Progress in International Law

EDITED BY

Russell A. Miller & Rebecca M. Bratspies

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Progress in International Law

Developments in International Law

VOLUME 60

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With a foreword from

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Dedication

For Carver & Elsa.
May their generation see greater progress towards peace than mine.

For Pax, Fortitudo & Prudentia.
They are the heart of International Law.

– Russell A. Miller

For Naomi Florence Schulz.

A small step towards תיקון עולם

– Rebecca M. Bratspies

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Introductory Materials

Foreword: Progress in International Law?

*By José E. Alvarez**

At the time I was invited to write this foreword, Columbia Law School was hosting a symposium, organized by our alumnus, Ambassador Eric M. Javits, the U.S. Permanent Representative to the Organization for the Prohibition of Chemical Weapons (OPCW), to commemorate the Tenth Anniversary of the Chemical Weapons Convention. As befits the theme of this collection of essays, the focus of that symposium was to celebrate *progress* achieved through "effective multilateralism." Panels of distinguished representatives to the OPCW, arms control experts, academics and even a member of the U.S. House of Representatives gathered to distill lessons from one of the few "successful" arms control treaties in existence.

Although his name was not invoked, the spirit of the individual who inspired the essays here – Manley O. Hudson – was very much alive during that gathering. Like Hudson, the international lawyers and diplomats gathered at Columbia shared a normative agenda. They believed that the world and its peoples would be better off – would be healthier, more peaceful, and more prosperous – if chemical weapons did not exist. They believed that they could better achieve their goal through the action of all nations – as opposed to unilateral remedies by a single state or bilateral negotiations among the most powerful states who possessed such weapons. They saw eradication of chemical weapons as a collective action problem that could be *managed* through, among other things, patient discourse, coupled with appropriate sticks and carrots. Like Hudson, they believed in multilateralism, in a rational "scientific" approach to international relations, and in the use of global institutions (including those built with real bricks and mortar). Like Hudson, they argued that the pursuit of international goals such as world peace needed to appeal to national self-interest but was not inconsistent with it. Like Hudson, they sought to convince others that the "sovereign" rights of the United States could be *enhanced* through our country's participation in

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Miller & Bratspies (Eds), Progress in International Law, pp. 3–8.

multilateral institutions. Like Hudson, they sought to make a problem in foreign relations less "foreign" – by making it clear to all that this issue has an immediate and local connection to how (and even to whether) people live.

For those gathered at Columbia, what made the chemical weapons regime a model of progress – the key to its success – were three elements that would have been very familiar to Hudson: universality, sovereign equality, and non-discrimination. At the core of the Chemical Weapons Convention, which now extends to all but a handful of states (North Korea, Syria, Israel, and Egypt being among them), is the conviction that creating and stockpiling these weapons was counterproductive in terms of enhancing the parties' individual or collective military security and presented potentially disastrous environmental consequences. Moreover, unlike the troubled nuclear non-proliferation regime, this arms control effort was a relative success because it did not privilege the position of those who had previously acquired the weapons sought to be banned. On the contrary, all parties to this treaty were obligated to eliminate their chemical weapons. Further, the Convention requires not only a promise not to develop such weapons but a binding commitment, enforced by periodic on-site inspections, to eliminate existing stockpiles. For those celebrating this example of "effective multilateralism," it was not incidental that the regime was built on the possibility of securing reliable information on member states' stockpiles and places of potential manufacture. The regime's effectiveness was based on constructing a viable central institution able to provide collective implementation, neutral verification, and technical assistance. The success of the chemical weapons regime, it was argued, was also premised on its dynamism. Its current and likely future success would turn on that regime's ability to adapt to changing technology, changing threats, and changing perceptions of its legitimacy over time.

Hudson would have recognized all the characteristic tools of compliance used by the chemical weapon regime: OPCW inspections of governments' destruction of their stockpiles; the threat of "challenge" inspections if demanded by any treaty party; criminal sanctions imposed under treaty parties' domestic laws; confidence-building measures such as regular information exchanges; and financial carrots supplied by members to one another to encourage mutual compliance. He would have been fascinated by this treaty regime's capacity to generate distinct and very tangible forms of cooperation among its state parties, including mutual exchanges of technical experts to enhance mutual compliance. Hudson would also have appreciated the emerging forms of cooperation connecting the chemical weapons regime to other forms of multilateralism, including the complementary roles performed by the Security Council and the Non-Proliferation Security Initiative, a coalition of the willing led by the United States. He would have been encouraged by how the OPCW has promoted forms of inter-state and

inter-organizational cooperation that suggest the tentative beginnings of global governance without world government.

Hudson, who struggled with securing United States participation in world institutions, also would have appreciated hearing about how the United States was persuaded to ratify the Chemical Weapons Convention treaty – despite scholarly arguments back in 1997 that the regime or its inspections would violate our Fourth Amendment guarantee against unlawful searches and seizures, constitute an unconstitutional delegation of law-making or enforcement power, or intrude on the residual Tenth Amendment rights of states of the United States. In all likelihood, Hudson would have been delighted to hear how treaty proponents shrewdly overcame such qualms by, among other things, including a national security exception (permitting the President to deny an inspection on such grounds, not as an illegal reservation to the treaty but presumably as a basis for legal termination of U.S. participation).

And Hudson would not have been terribly surprised by the remaining challenges identified for this example of multilateralism's progress: the prospect that parties to the Chemical Weapons Convention are not likely to achieve its goals by the "final" deadline of 2012, that certain states remain outside that treaty's strictures and are unlikely to join, that the regime remains a state-centric device ill-suited to the hazards of non-state terrorists, or that some parties to the regime suspect that others have not fully and honestly complied with its terms despite all the confidence-building measures in place.

The participants at the Chemical Weapons Symposium in late 2007 echoed most of the assumptions that have characterized international lawyers throughout the 20th century. Hudson's fellow travelers also believed in the value of universal participation. They also trusted in technocratic expertise and the promise of neutrality achieved through the work of international civil servants. They believed it was possible to establish institutional forms for governing the world without encountering predictable resistance to world government. They shared a faith that power-oriented diplomacy could be displaced by rule-oriented behavior and even, in some cases, by rule-oriented adjudication. Progress through law was possible, they thought, because lawyers acted on the basis of rational compromises, were attentive to fact over emotion, and relied on delimited, neutral forms of discourse. Progress through law, although not inevitable, was likely, they believed, because increasing conditions of interdependence made states turn to law out of functionalist necessity. They predicted and relied upon the emergence of virtuous circles. They contended that the turn to legal rules would require international institutions to implement them and that this inexorably would lead to forms of "constitutionalization" since the charters of these institutions needed to be interpreted flexibly and teleologically. For Hudson's colleagues, the normative values pursued through law were beneficial, interdependent, coherent. It was possible

to pursue peace *and* economic development, encourage respect for civil, political, *and* social and economic rights, dismantle colonialism *and* encourage free markets and trade. Achievement of all of these goals, after all, was dependent on the construction of the international *and* national rule of law – and there was nothing inconsistent about pursuing the rule of law at the global and the local level, especially with respect to democratic states.

As I have suggested elsewhere,[1] particularly as we have moved into this century and gained insights into the horrors of the former century, more of us have become quite skeptical of one, more, or even every one of these premises and assumptions. International lawyers no longer regard universal participation in law-making as an unalloyed virtue—not in an age where the proliferation of legal actors and subjects extends to Multi-National Corporations (MNCs) engaged in forms of self regulation, "unaccountable" Non-Governmental Organizations (NGOs) (often from the West) claiming to represent "international civil society," or foreign investors securing rights at the alleged expense of public values through international arbitration. Trust in technocratic experts and in international civil servants has been sorely tested by the repeated ineptitudes, frauds and even criminal acts committed by some of them. Confidence in the value of multilateral forms of legal discourse and its adjudicative fora has been undermined by questions about whether any of these venues, from the ILO to the WTO appellate Body, have really leveled the playing field between North and South – or merely "laundered" the interests of the former or enhanced the power of international bureaucrats at the expense of the interests of most of the peoples of the world. The once touted virtues of international organization – its vaunted capacity to secure the benefits of centralization and independence – are increasingly questioned, amidst robust post-modern doubts about the law's neutrality. The contemporary international lawyer's faith in Grotian progress has been displaced by occasionally severe existential doubts.

The essays in this collection are the product of Manley Hudson *and* of those who have since deconstructed the "progress narrative" that he embodied. Despite its title, this book is not a celebration through rose-colored glasses of international law's "progress" in achieving its ample normative aspirations for the betterment of humankind. It is, instead, an accounting of international law through the lens of the progress narrative that has, for better or worse, characterized much of modern international law and those who write about it. While some essays in this collection are indeed celebratory in tone, others are ambivalent about the

[1] José E. Alvarez, *International Organizations, Now and Then*, 100 American Journal of International Law 324 (2006).

institutions or norms described and still others downright dyspeptic in portraying the foibles of international lawyers and their work.

The rich and diverse contributions in this book reflect, as Russell Miller and Rebecca Bratspies suggest in their introduction, the singular uncertainties and contradictions that mark our times. We are no longer sure what "progress" in international law entails. We are no longer as sure, as were many in Hudson's day, whether we need or want *more* international law or institutions. We are no longer certain that "international" necessarily means supra-national in terms of effect or whether we can better achieve our goals through forms of "democratic experimentalism" in our regulatory frameworks or deploying "margins of appreciation" by our dispute settlers. We are no longer of one mind about when we ought to seek global harmonious rules over more contextually sensitive regulation, even at the expense of "fragmentation." We are sometimes confused about whom ought to participate in international law-making processes (NGOs? MNCs? Other IOs? Individuals? International civil servants?) and for what purpose. And we are increasingly aware of the frailties of our prescriptions; it is quite likely that remedying international law's "democratic deficits," for example, may only exacerbate inequalities among nations.

And yet, it is striking that international law remains one of the few legal fields where something as ambitious as this – a thorough mapping or cataloguing of current conditions, doctrines, and theoretical frameworks – is even attempted. That all the contributors to this book, despite the striking differences among them in their attitudes toward Manley Hudson's progress project, were enticed to participate in this effort suggests that at some level, all of them still believe that progress in international law is achievable—or at least worth pursuing.

This fine collection poses that challenge, and in its near-comprehensive breadth, provides the raw material for another generation's imagining the progress of international law.

Progress in International Law – An Explanation of the Project

By Russell A. Miller and Rebecca M. Bratspies

A. *Introduction*

This book aims to survey the state of the contemporary international legal order.

What better time than this unique juncture in history for such an effort? Three epochal developments have thrown the international legal order into a state of flux. First, even if we do not quite enjoy the promised "new world order," the world has clearly moved beyond the half century of Cold War stalemate between the Western and Eastern superpowers. Second, perhaps overshadowing the end of the Cold War, we already are confronted with what appears to be its paradigmatic successor: the era of global terrorism. Indeed, government leaders and commentators repeatedly warned that, after the September 11, 2001 terrorist attacks in the United States, "things would never be the same again."[1] Third, both of these developments have been facilitated and amplified by the rapid pace of technological change that has permitted instantaneous and ongoing transnational social, political and economic engagement. These three phenomena have called into question many of the assumptions about international law and institutions that prevailed in the post-World War II era. The ensuing upheaval is reflected in relatively contemporaneous proclamations about "the end of history,"[2] "the clash of civilizations"[3] and "the retreat of the state."[4] One consequence has been an erosion of the universal nature of foundational assumptions in international law. In 2000, the General Assembly directed the International

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[1] *See Night Fell on a Different World*, Economist, Sept. 5, 2002; *The Day the World Changed*, Economist, Sept. 13, 2001.

[2] Francis Fukuyama, The End of History and the Last Man (1992).

[3] Samuel P. Huntington, The Clash of Civilizations and the Remaking of the World Order (1996).

[4] Susan Strange, The Retreat of the State: The Diffusion of Power in the World Economy (1996). "A world dominated by nation-states is indeed in transition toward the post-national constellation of a global society." Jürgen Habermas, *Does the Constitutionalization of International Law Still Have a Chance, in* The Divided West 115 (2006).

Miller & Bratspies (Eds), Progress in International Law, pp. 9–30.

Law Commission (ILC) to address the "risks ensuing from fragmentation of international law."[5] Since the ILC is charged with the "progressive development of international law and its codification,"[6] this move suggests that concerns about fragmentation are perceived as the latest signal of a need for greater progress.[7]

We are confronted with a host of existential challenges. No book could hope to address them all. As editors, we were reluctant to pick and choose from among the myriad challenges facing international law. With the assistance of our contributors, we decided instead to focus our meditations broadly. In the process of taking account of the current state of international law, a series of tensions and contradictions repeatedly resurfaced. Among them are:

- The proliferation of legal norms and institutions, which raises concerns that international law is fragmenting into a multiplicity of normative islands.
- In a radically globalized world the relationship between markets and democratic processes has become ever more problematic.
- Non-state actors wield increasing power but most of international law focuses on the state as its presumed subject.
- Traditionalists, critics, realists and neo-conservatives demand that international law justify its existence in line with their disparate standards.
- Increased formal and informal intermingling of judicial and executive authority on a transnational plane continues to blur the line between domestic and international spheres of influence.
- The traditional sources of international law have retained their grip over us while they continue to fail to satisfy our expectations of efficacy and legitimacy.
- Transnational concerns, like climate change, dominate our attention while we add new members to the family of states at a remarkable pace.
- The law and infrastructure in place to maintain peace and security helped prevent global conflagration in the nuclear age, but may have facilitated the loss of millions of lives in "little," internal wars over the last 50 years.

Martti Koskenniemi argues that uncertainty and contradiction are the essence of international law, the "*condition of possibility* of there being something like a

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[5] *See* G.A. Res. 55/152, ¶8, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/152 (Jan. 19, 2001).

[6] Statute of the International Law Commission, Art. 1. intended to fulfill the General Assembly's obligations under Article 13.1(a) of the UN Charter.

[7] The European Society of International Law made fragmentation the focus of its second biennial meeting in 2006. *See* Alexandra Kemmerer, *Conference Report – Global Fragmentations: A Note on the Biennial Conference of the European Society of International Law (Paris, la Sorbonne, 18–20 May 2006)*, 7 German L.J. 729 (2006), *available at* http://www.germanlawjournal.com/pdf/Vol07No07/ PDF_Vol_07_No_07_729-734_Developments_Kemmerer.pdf.

distinct experience of international law in the first place."[8] And yet, amidst the uncertainty, practitioners and scholars of international law must practice and teach something. In this book, we challenged the contributors to begin cataloging this generation's tangled international legal order and to map the current conditions, theories, doctrine and trends. With nearly forty commentators from around the world, the book pursues this objective *via* a diverse spectrum of scholarly methods and perspectives, themselves representative of the contemporary, contending approaches to the field.

We will outline the book in Section C. But first, let us introduce the inspiration for this project.

B. *Manley Hudson and Progress in International Law*

Attempting to catalogue the state of contemporary international law is, admittedly, an ambitious project, but one for which there is an impressive precedent. Manley O. Hudson undertook a similar effort in an equally uncertain period in the history of international law. Besides providing an extraordinary glimpse into the state of international law in the tumultuous inter-war years, Hudson's effort also brought to the fore one of the most fundamental questions confronting international law, namely that international law practitioners' and scholars' "shared mythology presents international policy making as a grand story of … slow and unsteady progress …."[9] We hope the question of the relationship between the notion of progress and international law also colors this effort.

I. *The Genesis of Hudson's Survey*

In the fall of 1931, Hudson delivered a remarkable series of lectures at the University of Idaho – a succinct survey of the state of the international order that he entitled "Progress in International Organization." For Hudson, the Bemis Professor of International Law at Harvard Law School, the University of Idaho must have seemed removed by more than a week's train travel from the cosmopolitan and refined surroundings of Cambridge Yard. He was America's leading champion of progressive internationalism; but he had come to the frontier college town of Moscow, Idaho, to inaugurate the "William Edgar Borah Foundation for the Outlawry of War." Idaho Senator Borah, the ferocious, irreconcilable isolationist and architect of the Senate's defeat of the League of Nations Covenant

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[8] Martti Koskenniemi, From Apology to Utopia 565 (reissued with new epilogue 2005).
[9] David Kennedy, The Dark Sides of Virtue 141 (2004).

(which Hudson helped negotiate on behalf of President Wilson),[10] was perhaps Hudson's staunchest ideological rival. Surrounded by a standing-room-only crowd of his adoring constituents, Borah was in attendance when Hudson took the stage to begin his lectures. More than mere metaphor calls to mind the image of Hudson's descent into the lion's den: Borah had long been called the "Lion of Idaho."

In characteristic fashion, Hudson was unbowed. His was a battle-tested faith in the promise of international cooperation under law. "Of course," Hudson began his remarks, "it would not be the object of [the program inaugurating Borah's foundation merely] to confirm the conclusions at which Senator Borah has arrived – that would mean only stultification of the effort …."[11] The local press reported that "Dr. Hudson took the opportunity, … on several other occasions, to criticize Senator Borah …." Hudson had come to Idaho to cross swords with Borah, even in the context of the inauguration of a foundation dedicated to outlawing war. Borah, in his responsive remarks at the event, returned the favor. "The distinguished visitor who opens this course of lectures," Borah complained, "entertains views with which I am not in accord."[12]

The tension between Hudson and Borah was palpable and long-standing. For more than a decade the advocacy of their conflicting visions of America's role in the world had taken account of the other, sometimes in direct correspondence, other times in tit-for-tat lectures across the country.[13] The meeting of these great public figures for an open exchange of views was nothing short of an extraordinary clash of the era's foreign policy titans.

Hudson and Borah genuinely reveled in sincere intellectual give-and-take, of the kind that certainly occurred over those fall days in Idaho in 1931.[14] Despite firmly-held, nearly categorical differences, Hudson and Borah clearly admired each other. During his remarks, Hudson described Borah as having an "influence second to none in moulding both public opinion and governmental action on

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[10] "Perhaps it is not possible to say who kept the United States out of the League of Nations, but there is no question that a large share of the praise or blame belongs to Borah … Borah more than any other man, stirred up anti-League sentiment among the people." Claudius O. Johnson, Borah of Idaho 223 (1936).

[11] Manley O. Hudson, Progress in International Organization 3–4 (1932).

[12] Senator William E. Borah, Address at the Inauguration of the William Edgar Borah Foundation for the Outlawry of War (Sept. 24, 1931) (republished in this volume).

[13] *See, e.g., Prof. Manley O. Hudson Replies to Borah's Attack on World Court*, St. Louis Daily Globe-Democrat, May 30, 1923, at A1.

[14] "It was [Hudson's] greatest joy to cross intellectual swords with an antagonist in order that the sparks of creative thought could flash across the green baize table." Phillip C. Jessup, *Editorial Comment – Manley Hudson* (*1886–1960*) 54 Am. J. Int'l L. 603 (1960).

international issues."[15] Characterizing him as having "stood above all other Americans in the range of his persuasion" Hudson praised Borah for having pursued his beliefs with "such honesty of purpose, such intensity of zeal, and such probity of intelligence."[16] Perhaps more tellingly, their correspondence reveals that Hudson sought leave to send a copy of his 1925 book *The Permanent Court of International Justice and the Question of American Participation* to Borah for comments. Their public antagonism reached a fevered pitch over this very subject, but to this entreaty Borah replied: "I shall be glad to receive your book. We differ upon some matters but I can assure you have no more faithful reader than I."[17] While unflinchingly noting their differences, in his Idaho remarks Borah nonetheless characterized Hudson as the "ablest and most resourceful advocate of the views which he, and so many others, entertain whom it has been my privilege to know."[18]

II. *Hudson's Background and Legacy – A Window onto the Notion of Progress and International Law*

What were Hudson's views, to which Borah so stridently objected? Hudson had no equal among his generation of Americans in the practice of international law. He was also a celebrated scholar of international law and organizations. In both capacities Hudson was profoundly influential in establishing the international order we have inherited.[19] Among the many recognitions of Hudson's singular importance to international law, the American Society of International Law periodically awards the Manley O. Hudson medal for distinguished achievement in international law.[20]

At every turn Hudson was an advocate for a modernist-positivist internationalism. *Progress in International Organization*, the book Hudson published based

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[15] Hudson, *supra* note 11, at 3.

[16] *Id*.

[17] Letter from Senator William E. Borah to Prof. Manley O. Hudson (Nov. 15, 1924) (on file with the editors).

[18] Borah, *supra* note 13.

[19] Daniel Magraw, in his tribute to Louis B. Sohn, described Sohn as the "architect of the modern international legal system." That may be so, but Sohn was mentored at Harvard by Hudson, whose Bemis Chair he eventually assumed. Daniel Barstow Magraw, *Louis B. Sohn: Architect of the Modern International Legal System*, 48 Harv. Int'l L. J. 1 (2007).

[20] The recipients of the Manley O. Hudson Medal are themselves the most prominent internationalists of the post-war era: 1959 - Lord McNair; 1964 - Philip C. Jessup; 1966 - Charles De Visscher; 1970 - Paul Guggenheim; 1976 - Myres S. McDougal; 1978 - Eduardo Jiménez de Aréchaga; 1981 - Richard Reeve Baxter; 1981 - Oscar Schachter; 1982 - Hardy Cross Dillard; 1984 - Suzanne Bastid; 1985 - Marjorie M. Whiteman; 1986 - Leo Gross; 1993 - Robert Y. Jennings;

on his Idaho lectures, embodies this vision.[21] Three basic premises drove Hudson's thinking about international law: his conviction that the world was growing irreversibly more interconnected; his commitment to the need for international cooperation; and his belief that international law had a special capacity to secure such cooperation, and, thereby, move the world community progressively closer to peace.

These internationalist sympathies might not have been expected from a native of Missouri. Nonetheless, as Harvard Law School Dean Erwin Griswold noted in his memorial remarks upon Hudson's death, "Manley Hudson came out of the heart of America and made the world his stage."[22] It is clear that the trauma of the First World War, which overshadowed the early parts of Hudson's academic career, and which so brutally clashed with his youthful pacifism, shaped his approach to international law.[23] Interestingly, Harvard cannot be given as much credit for Hudson's cosmopolitan awakening. Dean Griswold noted that Hudson became a full-time member of Harvard's faculty in 1919,[24] at a time "when international law was hardly accepted as a fit subject for law schools."[25] Hudson is remembered for giving the field roots at Harvard, often in the face of "a certain snobbishness of attitude towards a subject … [that had an] uneasy place … in the curriculum of a law school whose faculty members prided themselves on 'tough' teaching of 'tough' straight-law subjects, …."[26] In many ways Hudson must be credited with Harvard's cosmopolitan awakening.

1995 - Louis Henkin; 1996 - Louis B. Sohn; 1997 - John R. Stevenson; 1998 - Rosalyn Higgins; 1999 - Shabtai Rosenne; 2000 - Stephen M. Schwebel; 2001 - Prosper Weil; 2002 - Thomas Buergenthal; 2003 - Thomas M. Franck; 2004 - W. Michael Reisman; 2005 - Sir Elihu Lauterpacht; 2006 - Theodor Meron; 2007 – Andreas Lowenfeld.

[21] Hudson, *supra* note 11.

[22] Erwin Griswold, *Manley Ottmer Hudson*, 74 Harv. L. Rev. 209 (1960).

[23] James Kenny noted that "[t]he values and principles of the scholar were shaped not only at Harvard but in the Midwest of the pre-World War I years. They were distinctly American and distinctly pacifist." James T. Kenny, The Contributions of Manley O. Hudson to Modern International Law and Organization 4 (1976) (unpublished dissertation, on file with the editors). Kenny further noted that Hudson "was strongly influenced" by the famed pacifists Jane Adams and Norman Angell. *Id.* at 12. Hudson, Kenny reported, went on to become a prominent peace activist in Missouri as well as at the national and international level. *Id.* at 16–38.

[24] While a member of the faculty at the University of Missouri, Hudson taught at the Cambridge Law School for Women in 1916–1917, along with Jens Iverson Westengard, whose Bemis chair in international law he later assumed at Harvard. *See* Milton Katz, *Manley Hudson and the Development of International Legal Studies at Harvard*, 74 Harv. L. Rev. 212, 214 (1961).

[25] Griswold, *supra* note 23, at 210 (1960).

[26] Julius Stone, *Manley Hudson: Campaigner and Teacher of International Law*, 74 Harv. L. Rev. 215, 222 (1961); Katz, *supra* note 25.

It was the war, and his first-hand experience with the diplomatic and legal responses to it, that galvanized Hudson's internationalism.[27] Just prior to his full-time appointment at Harvard, he served as a member of the International Law Division of the American Commission to Negotiate Peace at the Paris Peace Conference.[28] Shortly after joining the Harvard law faculty, Hudson was again called on temporary assignment to the U.S. government. In that capacity he served as a member of the Legal Section of the Secretariat for the League of Nations and took the lead in planning the Permanent Court of International Justice (PCIJ),[29] one of the international community's optimistic responses to the collapse of the legal order in the conflagration of World War I.[30] Hudson belonged to the Permanent Court of Arbitration from 1933–1945. He was also a Judge of the Permanent Court of International Justice (PCIJ), sitting in its first decade, from 1936–1946.

Hudson reported on the UN Conference on International Organization, which met in San Francisco in April 1945,[31] and which produced, *inter alia*, a draft statute for what would become the International Court of Justice. Hudson

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[27] Before the war Hudson's scholarly agenda focused largely on questions of Missouri property law, including "such matters as 'Transfer and Partition of Remainders,' 'Executory Limitations of Property,' 'Land Tenure and Conveyances,' 'Conditions Subsequent to Conveyances,' 'Estates Tail,' and 'The Rule Against Perpetuities.' " *See* Stone, *supra* note 27, at 215. In spite of his internationalism, Hudson maintained a parallel, life-long academic career in the domestic law of wills and trusts.

[28] Arthur E Sutherland, The Law at Harvard: a History of Ideas and Men, 1817–1967, 275 (1967). Woodrow Wilson established the Commission after the Nov. 11, 1918 Armistice. The Commission not only negotiated the peace treaties ending the war, but also drafted the Covenant for the League of Nations. Hudson served as a Technical Advisor in the Commission.

[29] A definite plan for an international tribunal could not be finalized at the 1919 Peace Conference, which "contented itself with drawing up article 14 of the Covenant of the League of Nations." Manley O. Hudson, *America and the Permanent Court of International Justice*, V (5) League of Nations 337, 359 (1923). Article 14 provides: "The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." The Statute of the P.C.I.J. was negotiated in 1920. Opened for signature in 1920, the Statute entered into force in September 1921. *See also*, Manley O. Hudson, *The Permanent Court of International Justice, II. The Current Development of International Law*, 2 Idaho L.J. 22 (1932).

[30] Martti Koskenniemi, The Gentle Civilizer of Nations 228 (2002) (suggesting that this optimism, as reflected by another PCIJ Judge, Max Huber, was ill-placed).

[31] Manley O. Hudson, *The Twenty-Fourth Year of the World Court*, 40 Am. J. Intl L. 1 (1946). In 1944 the Inter-Allied Committee, an informal consultative committee of distinguished jurists (not including Hudson and acting in their personal capacities), produced a non-binding report as a result of their meeting from May 20, 1943-Feb. 10, 1944. Hudson detailed this process and other deliberations regarding the future of the P.C.I.J. leading up to the establishment of the

also presided over the new International Law Commission at its first meeting in 1949 at Lake Success, New York, and remained a member until 1953. During the ILC's second session, Hudson served as Special Rapporteur for "Ways and means for making the evidence of Customary International Law more readily available,"[32] a topic of particular significance to judges on international tribunals. Hudson's hand is evident in "The Final Outcome" of the session, which included recommendations that the UN Secretariat be authorized to compile a Juridical Yearbook containing "significant legislative developments in various countries, arbitral awards by *ad hoc* international tribunals, and significant decisions of national courts relating to problems of international law."[33] Many of the session's other recommendations were implemented in forms that have since become familiar resources for public international lawyers.[34]

United Nations, including related discussions at Dunbarton Oaks. *See* Manley O. Hudson, *The Twenty-Third Year of the Permanent Court of International Justice and its Future*, 39 Am. J. Int'l L. 1, 2 (1945). He continued that discussion in "The Twenty-Fourth Year of the World Court."

[32] Hudson's Working Paper to the ILC on this topic appears at U.N. Doc. A/CN.4/16/Add. 1; U.N. Doc. A/1316 (A/5/12), *reprinted in* 2 Y.B. Int'l L. Comm'n (1950), pt. II, paras. 26–89. He also served as Special Rapporteur at the ILC'S Fourth Session (1952) for the topic "Nationality Including Statelessness," his report for which appears at U.N. Doc. A/CN.4/50, *reprinted in* 2 Y.B. Int'l L. Comm'n (1952); Report of the International Law Commission, U.N. GAOR, 8th Sess., Supp. No. 9, U.N. Doc. A/2163 (A/7/9), ch. III, paras. 29–31 (1952).

[33] The Session also recommended a Legislative Series on national treatment of international law issues, a collection of the constitutions of various states, index volumes to the United Nations Treaty Series, and similar aids. Report of the International Law Commission, U.N. GAOR, 5th Sess., Supp. No. 12, U.N. Doc. A/1316 (A/5/12), pt. II, paras. 90–94 (1950); *reprinted in* 2 Y.B. Int'l L. Comm'n 1950: "Final outcome: Recommended that the General Assembly should authorize the Secretariat to prepare the following publications: a) a Juridical Yearbook, … b) a Legislative Series containing the texts of current national legislation on matters of international interest, and particularly legislation implementing multilateral international agreements; c) a collection of the constitutions of all States; d) a list of the publications issued by Governments of all States containing the texts of treaties concluded by them, supplemented by a list of the principal collections of treaty texts published under private auspices; e) a consolidated index of the League of Nations Treaty Series; f) occasional index volumes of the United Nations Treaty Series; g) a repertoire of the practice of the United Nations with regard to questions of international law; h) additional series of the Reports of International Arbitral Awards" and that the ICJ Registry should publish digests of the Court Reports, and that governments should be encouraged to publish diplomatic correspondence and "other materials relating to international law.

[34] Not each of the publications recommended in the "Final Outcome" were actually produced. Those corresponding to the publications listed in note 33 are: a) UN Juridical Yearbook, b) UN Legislative Series; c) List of Treaty Collections (published in 1955); d) Cumulative Index of the UNTS; e) Repertoire of the Practice of the Security Council and Repertory of Practice of United Nations Organs; and f) Reports of the International Arbitral Awards. The Secretariat of the United Nations also issues Summary of Judgments, Advisory Opinions and Orders of the International Court of Justice.

Hudson not only served in these institutions; he wrote compendiously about them and about international law more generally. The first of his yearly installments on the work of the PCIJ appeared in the *American Journal of International Law* in 1923. It was titled, in his unadorned fashion, "The First Year of the Permanent Court of International Justice." When, in 1947, the PCIJ was dissolved and the International Court of Justice took its place,[35] Hudson chose to emphasize its continuity as a judicial body and unceremoniously changed the title of his yearly report to "The Twenty-Fourth Year of the International Court."[36] His annual articles about the Court for the *American Journal of International Law* provide a guide through the currents of 20th century international law. His belief in the need for international courts was palpable. Even as "war still raged and the Court was in a state of suspended animation,"[37] Hudson was busy publishing the second edition of his textbook on the PCIJ, and the book *International Tribunals – Past and Future* that was intended to "assess the role which tribunals may be expected to play when law and order are reestablished."[38] He convened and oversaw the publications associated with the Harvard Research in International Law in support of the ILC's progressive codification of international law. In a similar vein, he edited nine volumes of *International Legislation*. Throughout it all, for twenty-seven years, Hudson was a member of the Board of Editors of the *American Journal of International Law*. Julius Stone summed up Hudson's scholarly contribution in these terms: "by the time the American Society of International Law chose him, in 1956, to be the first recipient of the Hudson Medal struck in his honor, the list of [Hudson's] publications contained not much less than 170 titles, some being books, and some of these books of several volumes."[39]

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[35] Hudson's nomination to serve as a justice on the newly created International Court of Justice was defeated after the U.S. threw its support behind the nomination of Green H. Hackworth of the State Department. James Kenny explained:

> How did it come to be that one who had worked so conscientiously on behalf of the Court and who had been the favored candidate of other nations did not get the nomination? The only plausible reasons are political. Hackworth had been a faithful public servant … importantly, he was a friend of Cordell Hull's, and this counted for something.

Kenny, *supra* note 24, at 242–43.

[36] Hudson, *The Twenty-Fourth Year of the World Court, supra* note 32.

[37] Stone, *supra* note 27, at 218.

[38] Manley O. Hudson, International Tribunals – Past and Future vii (1944).

[39] Stone, *supra* note 27, at 224.

III. *The Book* Progress in International Organization

Despite Hudson's many and varied achievements, Phillip Jessup felt it necessary to defend his legacy as a scholar by explaining:

> It is, of course, true that Judge Hudson never wrote a comprehensive treatise on international law, but a mere glance at the analytical index of the *American Journal of International Law* and of the Proceedings of the Society covering the years 1921 to 1940 will show the breadth of his contributions to all subjects of international law, particularly through the editorials which he wrote and through his participation in the discussions at the annual meetings.[40]

Jessup's comments say a lot about the neglect into which Hudson's book *Progress in International Organization* had fallen.[41] It was, after all, not much shorter and not much less ambitious than Jessup's classic introduction to the field, entitled *A Modern Law of Nations*, in which Jessup acknowledged his debt to Hudson's vast body of work.[42]

Although not an exhaustive treatment of its subject, a number of contemporary reviewers recognized Hudson's *Progress in International Organization* to be a highly-readable and well-informed survey of international law. George W. Wickersham, writing in the *Harvard Law Review*, concluded:

> This little volume might well be adopted as a text-book in all schools and colleges as the first step in leading the minds of youth to a comprehension of the great practical progress made by the nations of the earth during the last decade in the creation and maintenance of institutions for the achievement of international peace and security – from which achievement, unhappily, the government of our own country markedly has stood aloof.[43]

Praising the book's quality as a survey of the field, Paul K. Walp wrote: "Law students will find the portions on the World Court and the current status of International Law stimulating and instructive."[44] Charles Martin of the University

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[40] Phillip C. Jessup, *Editorial Comment – Manley O. Hudson – 1886–1960*, 54 Am. J. Int'l L. 603 (1960).

[41] The book was also left out of Hudson's obituary in the *New York Times*. Obituary, *Manley Hudson, Law Scholar*, 73, N.Y. Times, Apr. 14, 1960.

[42] Phillip C. Jessup, A Modern Law of Nations viii (1949). In addition to Hudson's books and articles, which, Jessup characterized as "a constant source of reference," Jessup also praised "those remarkable co-operative enterprises which owe their inspiration and accomplishment to [Hudson]–the volumes of the Harvard Research in International Law and the International Law of the Future." *Id.*

[43] George W. Wickersham, *Manley O. Hudson's Progress in International Organization*, 46 Harv. L. Rev. 171, 173 (1932–1933) (book review).

[44] Paul K. Walp, *Manley O. Hudson's Progress in International Organiation*, 21 Ky. L.J. 503 (1932–1933) (book review).

of Washington agreed: "[t]here is no better brief introduction to the scientific study of international relations than this little book."[45]

Today, Hudson's *Progress* offers an exquisite snapshot of the state of international cooperation under law in 1931. To recreate that effort for today is, primarily, the challenge we have taken up in the present project. But Martin's review underscores the terminological evolution that has justified the slight adaptation to the title of our book: *Progress in International Law*. Hudson was writing at a time when the specialization of international law still lay on the distant horizon. In fact, he was pioneering the sub-discipline in international law and international relations we now call "international organizations."

As the wide range of topics covered in the book demonstrates, Hudson meant something more than just the theory, structure and function of "collections of sovereign states that have banded together as states to create, under a constitutive international agreement governed by international law …, an apparatus, more or less permanent, charged with the pursuit of certain defined common ends,"[46] though he was keenly interested in questions of institutional organization. Hudson meant something more like "order," what he called the "organized international effort"[47] or the "movement … to organize international co-operation" under law.[48] For Hudson, the term "organization," thus encompassed: (1) discrete institutions (our present-day field of international organizations); and (2) more generally, a cooperative world community governed by the rule of law.[49] From the language he used, it is clear that Hudson intended the second use of the word "organization" to be an action, a condition. Hudson's first, narrower use of the term "organization" in *Progress in International Organization* permitted him to survey a wide range of specific institutions, while his second, more generalized use of the term led him to engage with "The Current Development of International Law"[50] and "The World's Peace."[51]

Hudson summarized both the institutional and broad structural facets of his vision of "organization" in his article "International Law of the Future":

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[45] Charles E. Martin, *Manley O. Hudson's Progress in International Organization*, 3 Idaho L.J. 173 (1933) (book review).

[46] José E. Alvarez, International Organizations as Law-makers 1 (2005).

[47] Hudson, *supra* note 11, at 9.

[48] Hudson, *supra* note 11, at 12.

[49] Manley O. Hudson, *The International Law of the Future*, 30 A.B.A. J. 560, 561 (1944).

[50] Hudson, *supra* note 11, at 72–88.

[51] *Id.* at 89–102.

> What we can aim to do with some hope of success is to endow *agencies* of the whole community with competence to be exercised according to the wisdom of the time and to *build a law*, applicable to the great as well as the lesser great States, which will proscribe the use of force by any State acting merely in its own interest and without a legal mandate from the *organized Community of States*.[52]

In all, *Progress in International Organization* was a wide-ranging examination of the field during Hudson's generation. We adapted his title to *Progress in International Law* to better reflect the similarly broad scope of our effort for today.

First and foremost, Hudson's book attracted our attention as an artifact, which, when dusted off,[53] challenged us to consider producing an equivalent survey of international law for our era. But the book attracted our attention for another significant reason. In style, tone and method, *Progress in International Organization* is a spectacular example of the modernist–positivism that prevailed in Hudson's era and which persists today as one of the defining characteristics of international legal theory.

A true product of his time, Hudson believed that "men and nations could habituate themselves through laws and institutions to the avoidance of conflict inculcating a reverence for law and a disdain for war."[54] This is a distinctly modernist world view.[55] On one hand, Hudson's optimism, his rejection of "tradition, blind habit, and slavish obedience [to doctrine]," and his celebration of reason and logic reflect the hallmarks of modernism.[56] Jürgen Habermas has pursued a vigorous defense of the modernity that serves as a foundation for Hudson's work:

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[52] Hudson, *supra* note 50, at 590 (emphasis added).

[53] Regarding the discovery of Hudson's book as an artifact, see Kemmerer in this volume.

[54] Kenny, *supra* note 24, at 12.

[55] Legal modernism embraced objectivity, reason and universality as the crown jewels of Enlightenment thinking. Another hallmarks of the modern legal sensibility is the embrace of objective and reasoned bases for knowledge, truth and justice. Sigmund Freud's theories of the mind were a powerful influence on modernism. *See* Sigmund Freud, Totem and Taboo (1960); see also Walter Benjamin, Illuminations (1968). In literature, the period of high modernism was the twenty years from 1910 to 1930 and among the literary 'high priests' of the movement (writing in English) were T.S. Eliot, Virginia Woolf, James Joyce and Ezra Pound. Peter Barry, Beginning Theory 82 (2d ed. 2002). Appropriately, one of Hudson's favorite lines was from the third of T.S. Eliot's Four Quartets: "Fare forward, voyagers." Griswold, *supra* note 22, at 211.

[56] Barry, *supra* note 56, at 85. In the United States, legal modernism found an early advocate Oliver Wendell Holmes. In *The Path of the Law*, for example, he famously proclaimed that "it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1896). The sense of liberation from history captured in Holmes' remark reflects a modern belief in the human capacity to create meaning from the multitude of texts and ideas that get grouped together under the label of "law."

> [F]aith in reason and the possibility of *progress* survived into the twentieth century, and even survives the catalogue of disasters which makes up [the twentieth century's] history. The cultural movement known as modernism subscribed to this "project", in the sense that it constituted a lament for a lost sense of purpose, a lost coherence, a lost system of values.[57]

On the other hand, Hudson's emphasis on the role sources play in legitimizing law, and on the scientific and evidentiary nature of legal analysis was distinctly positivist.[58] Hudson, it seems, was equally committed to "facts" and "norms."[59]

The promise of "progress" lies at the center of his modernist-positivist epistemology.[60] Hudson never explicitly thematizes the relationship between "progress"

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[57] Barry, *supra* note 56, at 85. *See* Jürgen Habermas, The Philosophical Discourses of Modernity: Twelve Lectures (Frederick Lawrence trans., 1987); Jürgen Habermas, *Modernity: An Unfinished Project, in* Habermas and the Unfinished Project of Modernity 38 (Seyla Benhabib & Maurizio Passerin d'Entrèves eds., Nicholas Walker, trans., M.I.T. Press 1997).

[58] Stone, *supra* note 27, at 219 (characterizing those assumptions as "the most striking aspect of [Hudson's] work."). Legal positivism's most renowned torchbearers offered detailed explanations of the origins of law and the process of legal analysis–accounts that, although not undisputed, still resonate today in legal philosophy. *See e.g.*, H.L.A. Hart, The Concept of Law 250–54 (2nd ed. 1994); Joseph Raz, The Authority of Law (1979); Hans Kelsen, The General Theory of Law and State (1961); John Austin, The Province of Jurisprudence Determined 157 (1832); Jules Coleman, *Negative and Positive Positivism*, 11 J. Legal Stud. 139 (1982); H.L.A Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958). Of positivism's two central precepts: the separability thesis which draws a distinction between law and morality, and the rule of recognition which roughly posits that a rule is a law if a majority of society recognizes it as such, Hudson seemed far more concerned with the latter. Embracing the notion of source-based criteria of normative validity, Hudson dedicated his life to the project of documenting, codifying and formalizing international law in order to bring international law within the bounds of that which is recognized as law. For an explanation of how this works, *see* John Gardner, *Legal Positivism: 51/2 Myths*, Am. J. Juris. 199 (2001); Brian Leiter, *Review Essay: Positivism, Formalism, Realism: Legal Positivism in American Jurisprudence*, 99 Colum. L. Rev. 1138, 1154–55 (1999); Barry, *supra* note 56, at 85. Indeed, Hudson's overestimation of the value of codified law may stem directly from his embrace of this positivist precept. *See* Baker in this volume. For a critique of legal positivism, *see* Ronald Dworkin, Laws Empire 15–20, 33–44 (1987); Ronald Dworkin, Taking Rights Seriously (1978).

[59] Jürgen Habermas, Between Facts and Norms (William Rehg trans., 1998).

[60] *See* Stephen K. White, *Reason, Modernity, and Democracy, in* The Cambridge Companion to Habermas 3 (Stephen K. White ed., 1995) ("Hard questions have emerged about the predominant modern understandings of reason, subjectivity, nature, progress, and gender."); Giovanna Borradori, Philosophy in a Time of Terror 76 (2003) ("As Habermas developed his reflection of modernity in opposition to tradition, and in relation to the form in which rationality affirms itself in a democratic setting, the question arose as to whether modernity has the character of a historical experience or is simly a set of formal requirements applying to all ages and places. This is a crucial question if one wants, as Habermas does, to strictly universalize the agenda of modernity as the unique carrier of moral progress.").

and international law and cooperation—he assumes it.[61] For Hudson, as for generations of international lawyers that preceded and succeeded him, the notion that international law serves as the ordained mechanism for the achievement of "progress" was an accepted tenet of the faith,[62] confirmed by Kant, who argued:

> It is a duty to realize the condition of public right, even if only in approximation by unending progress, and if there is also a well-founded hope of this, then the perpetual peace that follows upon what have till now been falsely called peace treaties (strictly speaking, truces) is no empty idea but a task that, gradually solved, comes steadily closer to its goal (since the time during which equal progress takes place will, we hope, become always shorter).[63]

Thus, the first commentators on the field we now call international law, understood that it would serve the ends of spreading "civilization."[64] By the time Hudson was writing *Progress*, the term "civilization," associated as it was with Western colonialist paternalism, had begun to lose its appeal (even though it would survive long enough to find its way into the Statute of the International Court of Justice[65]). It had been replaced by Hudson's ubiquitous "progress." The yearning for steady movement forward, and the conviction that international law was the vehicle by which to achieve this movement, was ever-present in Hudson's work. Progress is, after all, an extremely powerful allegory for improving the human condition—it has been used throughout the ages to frame the complexities and complications of social interactions by suggesting that freedom from a morally ambiguous present can be rooted in history's inevitable march forward from a primitive, "brutish" past toward a shining future of transcendent peace.[66]

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[61] "This view rested on the unexamined assumption that morality equaled legality …." Kenny, *supra* note 23, at 12. Habermas said: "[M]odernity can't just be peeled off like a dirty shirt. It's our skin. We find ourselves in the condition of modern life: we didn't freely choose it; it is existentially unavoidable." Jürgen Habermas, *Europe's Second Chance, in* Jürgen Habermas – Interviewed by Michael Haller – The Past as Future 73, 94 (Max Pensky trans., ed., 1994).

[62] "[H]istory has put the international lawyer in a tradition that has thought of itself as the 'organ of the legal conscience of the civilized world.' " Koskenniemi, *supra* note 30, at 516.

[63] Immanuel Kant, Toward Perpetual Peace 8:386. Not surprisingly, Hudson showed interest in the "philosophy and epistemology of Immanuel Kant" during his undergraduate studies at William Jewell College. Kenny, *supra* note 24.

[64] Koskenniemi, *supra* note 30.

[65] Statute of the International Court of Justice, art. 38.1(c), June 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993.

[66] In contrast to Hudson's vision of law as a path of progress, *The Pilgrim's Progress*, portrayed law as a snare tempting one to turn aside from the true path toward salvation. John Bunyan, The Pilgrim's Progress: From This World To That Which Is To Come (1678).

Hudson was not alone in his belief that international law represented progress, nor in his confidence that it was possible to definitively mark that progress with regard to the existence and content of legal doctrines. A generation later, Jessup carried the torch forward. A "modern law of nations," he explained, "proceeds upon the assumption [of] progress …."[67] The defects in the existing international legal system he addresses in *A Modern Law of Nations*, are troublesome for being "obstacles to progress."[68] Louis B. Sohn (who began his United States legal career as Hudson's research assistant) reportedly characterized the progress of international law as an evolutionary process to be guided in the "right" direction by international lawyers.[69] Myres McDougal posited international law as a balance between progress and stability.[70] As used by these thinkers, the term "Progress" became a heuristic to legitimize transformation in international law. Wrapped in a directional vision that admitted one, or at best a few possible futures, linear and evolutionary notions of progress offered the possibility of an end-point for international law that could be known, and potentially reached.

This view that international law shares a special relationship with progress persists.[71] Koskenniemi reports that in 1963 "international lawyers could still think the civilizing project [of international law] valid as such, partly under way, partly obstructed by external causes."[72] At the dawn of the 21st century, David Kennedy, current holder of Harvard's Manley O. Hudson Professorship, lamented international law's reflexive vision of progress based on "a past of sovereign states and a future of international law. The discipline looks forward, confident that we will arrive in the future with history at our side."[73] Kennedy notes that for all its

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[67] Jessup, *supra* note 43, at 2.

[68] *Id*. at 8.

[69] Magraw, *supra* note 19.

[70] Myres S. McDougal, *Book Review: Problems of Stability and Progress in International Relations*, 48 Am. J. Int'l L. 682 (1954). Unlike many of his contemporaries, McDougal explicitly conceived of the law as a political instrument and rejected the idea that rules had meaning apart from the value-dependent policies that created them. With Harold Lasswell, he developed a jurisprudence of human dignity that represented a sharp break from Hudsonian positivism, while still managing to invoke similarly linear notions of progress. *See e.g.*, Harold D. Lasswell & Myres S. McDougal, Jurisprudence for a Free Society (1992); Myres S. McDougal & Florentino Feliciano, Law and Minimum World Public Order (1961) Koskenniemi, in turn, criticizes McDougal for replacing the myth of laws neutrality with the myth of the scholar's objectivity. Koskenniemi, *supra* note 8, at 201–09.

[71] Thomas Buergenthal, *Louis B. Sohn (1914–2006)* 100 Am. J. Int'l L. 623, 626 (2006).

[72] Koskenniemi, *supra* note 31, at 513.

[73] David Kennedy, *When Renewal Repeats: Thinking Against the Box*, N.Y.U. J. Int'l L. & Pol. 335, 347–72 (2000).

invocation of progress, international law offers very little articulation of "the direction progress takes and the terms with which it is marked."[74] Derrida reminded us that "no degree of progress allows one to ignore that never before, in absolute figures, have so many men, women and children been subjugated, starved or exterminated."[75] And yet, the very fact that Kennedy holds the Manley O. Hudson Professorship is in itself representative of a kind of progress—toward a more ambiguous and less directional vision about the development of international law.

Although many of the chapters straddle conceptual shifts in the meaning ascribed to both progress and international law, this project does not directly confront the indeterminacy at the heart of the progress narrative. Instead, questions of progress operate mostly as a backdrop to this book. This is, in part, a result of conscious editorial choice. With the entire normative universe of international law open for their contestation, we deliberately refrained from narrowing our contributors' gaze by challenging them to thematize notions of "progress" in their explorations of the current state of international law. That decision was not intended to diminish the fundamental critique that progress narratives are inherently slippery and value-laden. We take it as a given that "progress" is a term fraught with normative ambiguity, built on assumptions about context, perspective and directionality. We make no pretense that our exploration, no matter how exhaustive, will be anything more than an incomplete window into a "partial, multilayered and fragmented" international society.[76]

Some contributors critically explored the power dynamics inherent in the idea of progress, but most accepted and used the term much as Hudson might have done—to signify a collectively understood movement toward greater levels of integration, organization and cooperation. In offering different and sometimes competing perspectives on what might constitute progress in international law, the authors in this volume generally proceeded from an unspoken assumption that progress could be measured, debated and agreed upon. This, too, is indicative of the state of international law, where background assumptions often go unnamed, and there is a presumed sense of shared directionality. Manley

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[74] *Id*. at 347. Indeed, in *The Dark Sides of Virtue*, Kennedy elaborates on this point when he calls more broadly for the rejection of progress narratives in order to construct a new vision of humanitarian law. David Kennedy, The Dark Sides of Virtue: Reassessing International Humanitarianism 352–53 (2004).

[75] Jacques Derrida, Specters of Marx 85 (1994) (*cited in* Susan Marks, *The End of History? Reflections on Some International Theses*, 8 Eur. J. Int'l L. 449 (1997)).

[76] Anthony Carty, The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs 68 (1986).

O. Hudson, although many things, including scholar, judge, and political advisor to presidents, was no post-modernist. He knew very well what he meant by "progress" when he used the term for the title of his talks in 1931. Seventy-five years later, Hudson's modernist-positivism still has deep roots.

C. *An Accounting: Progress in International Law Today*

One incident of international law's progress narrative is that it gives rise to the necessity of periodic assessment. After all, one must know where one stands in order to mark how far she has come and what still remains to be accomplished. Hudson's *Progress in International Organization*, and much of the rest of his scholarship, serves this function, dutifully chronicling the current state of developments in international law. Aware that we were succumbing to this particular facet of international law's progress narrative we convened the conference that gave rise to this book in 2005 with the belief that an accounting of the state of contemporary international law would prove both challenging and enriching. At least we would have the outlines of the historical record in place to permit future generations to evaluate our progress, an exercise international law's preoccupation with progress would seem to make likely. And, in any event, the time for such an assessment seemed ripe. The new century has already brought tectonic upheavals in international law's status quo. Among them were: new challenges to the Geneva conventions disrupting the hithero undisputed center of international humanitarian law; global warming threatening the very existence of small island states; genocide rearing its ugly head in the Sudan; the Doha Round mired in controversy; and the sole remaining superpower announcing that the United Nations lacked relevance. The accepted grounds of international consensus and cooperation seem to be shifting under our feet. In such a situation, received wisdom about progress, as well as about the meaning and purpose of international law invariably came in for intense scrutiny.

We were fortunate to attract eminent thinkers in international law to the University of Idaho for two days of intense, and sometimes tense, intellectual exchanges. To structure our discussions, we drew on the blueprint of Hudson's 1931 survey, which, for Hudson, naturally confirmed the progress narrative.[77]

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[77] Hudson summed up his survey in these terms:

> [N]one of these perplexities has thwarted the movement of our time toward international organization. They may retard, and at times they may defeat advances; but they do not destroy the momentum which has been gained. Each of them must be approached by the student with appreciation of the general trend. In this brief period since the war, our generation

For us, given world events, the evidence only seemed to raise questions about the very idea of progress in international law.

Hudson might have been more critical in his own era.[78] He seemed oblivious to the dark clouds that fascism was already casting over his vision of international cooperation under law. It was a paradigmatic blindness; he was irretrievably immersed in the modernist-positivist progress narrative that was fueled by faith in human accomplishment. But it was also strategic positioning. As Stone remarked,

> As was natural, if not inevitable, in these circumstances, one who dedicated himself as Hudson did to the continuous study of the World Court tended to assume also the role of champion. In that role he showed a courage and a single-mindedness as great as the meticulous care with which he documented all the activities of the Court. When the United States participation in the League of Nations became a lost cause, he took up the burden of explaining to the American Government, to lawyers, and to the American people generally, the importance of participation in the work of the [International Court of Justice].[79]

Indeed, across more than three decades, Hudson was a stoutly loyal "campaigner and strategist" in the cultivation of public relations on behalf of international law.[80] If he was blind in 1931 to the fraying world order, it was a deliberate blindness. In a rare moment of (perhaps rhetorical) self-reflection in this regard,

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> has not been idle. It has suffered, as all generations suffer, from apathy, from ignorance, from opposition to its steady purpose. Yet it promises to leave something to show for its efforts. It has followed the method by which progress is achieved. It is building institutions which promise to serve the needs of future generations. It has made greater progress in organizing the world for co-operation and peace than was made in a hundred years before the war.

Hudson, *supra* note 11, at 122.

78 As Hudson was delivering his Idaho lectures the fissures in the international order he championed were beginning to show. He paused only briefly to note the worsening Manchurian crisis, but by the time Hudson published Progress in International Organization a year after the lectures, he could not ignore the League's failure to prevent Japanese aggression in Manchuria. However, he relegated the issue to a footnote in which he determinedly glossed over the League's failure. *See* Hudson, *supra* note 11, at 92, n. 1.

79 Stone, *supra* note 27, at 217.

80 The evangelical quality of this facet of Hudson's legacy is bolstered by Dean Griswold's characterization of Hudson. Early in his career, Griswold explained, Hudson "showed the *passion* that ruled his life." Griswold, *supra* note 22, at 209. Griswold credited Hudson with "a capacity which is rather rare among law teachers, the capacity to develop disciples." *Id*. at 210. Griswold concluded: "Central [to Hudson's career] was a moral, intellectual and spiritual force which gave meaning to everything he did, and left its imprint as one of the great individual contributions in the ineluctable struggle for a workable adjustment among the peoples of the world. He had a fire in his soul." *Id*. at 211.

Hudson pleaded at the close of *Progress in International Organization* that "I hope I have not been led to confuse my own enthusiasm and my judgment as to the processes of history. One does not need to be a historian to know that the lost causes of history include most of those which were for a time successful."[81] That caveat aside, Hudson was content to let his critics point out the practical failings of his vision. Including Borah, they were abundant and vocal.

In editing this volume, we deliberately sought out a wide variety of views, offered by proponents of different visions of international law. By that means, we hope to avoid the structural and strategic blindness to which Hudson fell prey. Yet, as we engaged with the topics Hudson had deemed central to international law in the inter-war period, we were struck by his ability to identify issues that continue to resonate in today's exploration of international organization (in both senses that he used the term).

Embedded in his short *Progress* volume were the early roots of today's questions about the role of non-state actors, the tensions between sovereignty and international organization, and the relationship between private and public international law. There were even hints, albeit faint ones, of the cross-cultural challenges that ensued when European colonial hegemony gave way to a multiplicity of nations. These challenges find their contemporary echo in the treatment the contributors to this project give to the broad range of topics they address. In particular, they are concerned with the consequences of American hegemony for the rule of law; the role that consent plays in international institutions; and the need for international cooperation to address a growing series of global problems that elude characterization in existing legal terms.

Hudson's topics resonated so well that, with only a bit of updating to reflect the burgeoning fields of international environmental and human rights law, we replicated them in the structure of this book—*plus ça change, plus c'est la même chose*. Thus, this volume is divided into six parts: The History and Theory of International Law; Sources of International Law and their Domestic Application in the United States; International Actors; International Jurisdiction and Jurisprudence; The Use of Force; and The Challenges of Protecting Human Rights and the Environment. Each section seeks to report on and theorize the notion of progress in relation to a topic that Hudson explored in his *Progress* narrative (with the caveat that the last section deals with issues that only became part of international law's core discourse well after Hudson's *Progress* was published). The contributors bring a wide variety of perspectives to bear on these issues while considering the central question of progress. Giving force to

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[81] Hudson, *supra* note 11, at 118.

Koskenniemi's critique of international law's indeterminacy, the contributors often use the same examples to reach vastly differing conclusions.

In organizing this book, we tried to roughly track the structure of many international law textbooks. Thus we begin with an overview in Part 1. Jordan Paust and Barry Carter both offer their general meditations on the status and role of international law. Paust skillfully draws parallels and distinctions between Hudson's era and today, while Carter provides a survey of the pressing issues currently challenging international law.

Part 2 explores the history and theory of international law. Alexandra Kemmerer offers a loving and metaphoric history of international law, while considering the burgeoning interest in the history of international law, and Sergio Dellavalle provides a spirited philosophical defense of the international law project. Ed Morgan questions its very existence. Christian Walter takes aim at the idea of constitutionalization in international law and Daniel Luker points out the wholly constructed nature of sovereign borders in his critique of *uti possidetis*.

Part 3 is a meditation on the sources of international law. Karin Ollers-Frohm provides an assessment of the role that treaties play in the progress of international law, and Alex Glashausser explores the domestication of treaty provisions. With regard to custom, Andrew Guzman and Timothy Meyer offer a perspective that contrasts sharply with that offered by Julian Ku in his assessment of U.S domestication of international custom.

Part 4 explores the evolving notion of what should be recognized and permitted to operate as a subject of international law. Florian Hoffmann begins with a vigorous examination of the state as an international actor. Andreas Paulus explores the role and status of the United Nations, and Karen Kaiser builds on that analysis by engaging with other intergovernmental organizations. Leila Sadat meditates on the status of the individual, particularly with regard to international criminal law. Monica Shurtman offers a description of how non-governmental organizations can become actors in international law, both on a formal basis and as norm entrepreneurs. In an iconoclastic foray, Russell Miller questions the contradictory treatment international law offers NGOs and transnational corporations. Jenia Iontcheva Turner concludes this section with a discussion of transnational networks—an modern development that Hudson predicted three-quarters of a century ago. In the next section of the book, Part 5, Melissa Waters picks up similar themes when she assesses the growing phenomenon of transnational judicial dialogue.

In addition to Waters contribution, Part 5 fleshes out current visions of jurisprudence and jurisdiction in international law. Cesare Romano eloquently depicts the current contours of international adjudication, and, along with Kelly Parker explores the growing role of regional and specialized tribunals. Betsy

Baker's fascinating assessment of Hudson's jurisprudence, with a focus on his pioneering use of equity grounds this section solidly in the history of international adjudication. Mary Bedekian provides an account of the many roles of international arbitration, both historically and in an era of economic globalization.

Part 6 confronts one of the most pressing questions facing international law today—the use of force and the world's peace. Global terrorism and the 2003 U.S invasion of Iraq provided a starting point for many of our contributors. Abraham Sofaer, Brian Foley, Margaret McGuinness, Petr Valek and Luke Davis confront questions of collective security, exploring facets of multilateralism, unilateralism and the legality of force under international law. Drawing on different theoretical traditions, these scholars bring vastly different interpretive horizons to bear on the question, and thus offer differing assessments of current conditions. Orde Kittrie explores the question of nuclear proliferation and rogue states and David Kaye offers an assessment of the law of war.

Finally, in Part 7, Stephen McCaffrey and Mayo Moran map out the international terrain of environmental protection and human rights respectively. Hari Osofsky brings the discipline of geography to bear on her assessment of environmental and human rights law. Amy Sinden, Rebecca Bratspies and Li Chen approach questions of trade, albeit from vastly different perspectives. Sinden offers a critique of liberal economics in her discussion of how trade impacts the environment, Rebecca Bratspies tests the concept of sustainable development against Hudson's progress narrative and Li Chen describes China's accession to the WTO. Pia Carazo explores how the European Court of Human Rights is advancing international human rights norms and Penny Andrews draws on the South African experience to discuss domestication of those norms.

Read together, these contributions offer a unique window into our turbulent, sometimes confusing era. The questions raised in this book are open-ended; the topics discussed are in a state of change. But they provide a map of the heart of international law as we know and imagine it today. In 1932, Hudson cautioned that it would take a half century to fully understand how the achievements he highlighted would transform international law.[82] So, too, the "progress" the chapters in this volume chronicle await the assessment that only time and perspective can bring. Future generations will offer their assessment of our generation and will, in turn, leave behind their own record of progress.

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[82] Hudson, *supra* note 11, at 5.

Part One

Progress in International Law – A Contemporary Assessment

Evidence and Promise of Progress: Increased Interdependence, Rights and Responsibilities, Arenas of Interaction, and the Need for More Cooperative Uses of Armed Force

By Jordan J. Paust

A. *Introduction*

When Harvard Professor Manley O. Hudson and Idaho Senator William Borah contemplated America's role in the international order in September 1931 and the need for either an internationally cooperative foreign policy or a relatively isolationist stance, Japan had invaded Manchuria just one week before Hudson's first Idaho lecture. At the time, Hudson praised the fact that "Chinese and Japanese representatives were explaining to the Council of the League of Nations … their views of what had happened,"[1] but in a footnote to his published lectures Hudson noted that his words had been spoken before Japan had used additional armed force during three "phase[s] of the Manchurian question."[2] Thus, it is evident that he had misjudged a new Japanese imperialism and its threat to the authority of the League of Nations and to world peace.

It is also doubtful that, in 1931, there was sufficient understanding as to why Japan's imperial ambitions posed a threat to U.S. interests in the Philippines. The United States was in the midst of the Great Depression and domestic needs were of greater immediate concern. More generally, it is unlikely that, in 1931, Hudson and Borah could have foreseen the dangers the coming decade would pose to humankind: Stalinist, Hitlerian, and Mussolinian ideology and oppression; the Holocaust; World War II, with active theaters in Asia, Africa, and Europe (although one could generally foresee the likely continuance of some forms of warfare and colonialist military oppression, such as the 1935 Italian invasion of Ethiopia); and the nuclear bomb. From our vantage point, Hudson's

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[1] *See* Manley O. Hudson, Progress in International Organization 91–92 (1932).

[2] *Id*. at 92, n. 1.

Miller & Bratspies (Eds), Progress in International Law, pp. 33–50.

enthusiasm for the international order at the beginning of the 1930s was not widely shared.

Hudson and Borah can be forgiven for not foreseeing these currents of history that would lead to the more hopeful shift from a League of Nations to the United Nations; the Korean War, with a U.N. Security Council authorization to use military force in Asia; the growth of regional international organizations; an integrating Europe; the phenomenal growth of special international committees, commissions, organizations, and tribunals with competence to address special matters under the authority conferred by subject-specific treaties, such as those involving trade, human rights, air traffic, and the law of the sea; among other catalytic events and developments. These now serve as established examples of the dramatic progress in international organization of the last half-century. He may have missed the mark by a generation or two, but Hudson was justified to conclude, in 1931, that:

> when the history of our times comes to be written with the perspective which only a half-century can bring, our generation will be distinguished, above all else in the field of social relations, for the progress which we have made in organizing the world for co-operation and peace.[3]

Threats continue to plague the international system today, but, based on the record of the last half-century, I must confess to sharing a cautious form of Hudsonian enthusiasm. It is difficult to know what conflicts and convulsions lie ahead, but the same trends of which Manley Hudson was so acutely aware in 1931, today also point to progress.

B. *Increased Human Interdependence*

During his visit to the University of Idaho in 1931, Professor Hudson recognized the existence of an interdependence among the American people and those of other nations. As he remarked:

> If any lesson stands out from our experience of the past quarter-century, it is that all of the people of the United States, in every section of the country and in every walk of life, are dependent in their daily lives on the ordering of the relations which we are forced to maintain with other peoples of the world.[4]

Since then, interdependence and international cooperation of a global and regional nature with respect to various transnational problems and activities has

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[3] *Id.* at 5.
[4] *Id.* at 1.

increased, and so have the types of human problems that would seem to require international cooperative effort. As I noted in a prior writing,

> We live in a time of increasing interdependence and transnational interaction with respect to all sectors of public life, including trade and investment, energy, organized crime, law enforcement, banking, politics, the world wide web and other forms of access to knowledge and communication, news media, intelligence gathering, education, culture, religion, entertainment, transportation, leisure, food and agriculture, the environment, health, employment, human invention, and exploration of space.[5]

Today, it is commonplace to recognize that domestic-based water and air pollution can have serious regional and global consequences.[6] For example, nuclear tests thousands of miles away in Asia can increase levels of radiation in the remote, Western U.S. state Idaho. Clean water and air, generally valued in Idaho, are becoming scarcer in most sectors of the globe.[7] Such scarcities might not have been imagined in 1931. Would Hudson and Borah have seriously believed that in our time large numbers of people would pay relatively high prices for bottled water? Our misuse of natural resources can affect our children, who are the owners of the present in the future – thus demonstrating the need for increased awareness of intergenerational interdependence and "cooperation." Global warming, ozone depletion, tsunamis, large solar flare-ups, and possible threats from space asteroids and debris are of increasing international concern.[8] Overpopulation, deforestation, and the increasing depletion of ocean fisheries are international problems requiring international cooperation.[9] The markedly increased extinction of various animals and plants can have human consequences for present and future generations with respect to food chains, health, and environmental degradation.[10] Greatly accelerated regional and global farming and food distribution processes raise common problems concerning general food quality, use of genetic engineering, pesticides, other contaminants, human health, and even terrorism.[11]

Perhaps in 1931 it would have been difficult to imagine a process of relatively inexpensive global air transportation requiring the cooperative routing, capacity,

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[5] Jordan J. Paust, *Tolerance in the Age of Increased Interdependence*, 56 Fla. L. Rev. 987, 995 (2004). *See* Lung-chu Chen, An Introduction to Contemporary International Law ix–x, 3–4, 23, 50–81 (2d ed. 2000).

[6] *See* Part VII of this volume, "Trade, Development and Environmental Protection."

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

and landing arrangements that are utilized by millions each year for business and leisure travel. Merely with respect to egress and ingress from and to the United States, each year tens of millions of U.S. nationals travel or work abroad and tens of millions of foreigners visit the United Sates. It might have been difficult to imagine that a civilian air transportation process involving flights of thousands of aircraft each day would create needs for new cooperation efforts to provide security from terrorist bombings in airports, hijackings, aircraft sabotage, and the use of civilian airliners like bombs to destroy skyscrapers in New York City. Ease of relatively fast international air transport of persons, other animals, and cargo have also created recognizable regional and global problems with respect to threats to human health, trade, and control of drugs and organized crime.[12] There are also related impacts on the growth of sexual exploitation and slavery of women and children, either with respect to the increased international transport of women and children who are victims, or those who engage in transnational processes of victimization.[13]

C. *Increased Recognition of Private and Public Individual Roles, Rights, and Duties*

I. *General Participation*

Since 1931, there has also been increased recognition of the various direct and indirect roles that private or nonstate individuals, groups, corporations, NGOs, and other actors play in power, wealth, and information processes as well as in the creation, shaping and termination of international legal norms.[14] The participation of these diverse actors in various sanction responses to perceived violations of international law is also more broadly recognized,[15] whether sanction strategies are utilized in political, diplomatic, economic, juridical, and/or power-oriented arenas or processes of human interaction.[16] Awareness of the fact and potential

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[12] *See* Bratspies, in this volume.

[13] *See generally* Susan W. Tiefenbrun, *The Saga of Susannah: A U.S. Remedy for Sex Trafficking in Women: The Victims of Tafficking and Violence Protection Act of 2000*, 2002 Utah L. Rev. 107 (2002); Susan W. Tiefenbrun, *Sex Slavery in the United States and Its Law to Stop It Here and Abroad*, 11 Wm. & Mary J. Women & L. 317 (2005).

[14] *See, e.g.*, Jordan J. Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process*, 25 Mich. J. Int'l L. 1229 (2004); Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 Vand. J. Transnat'l L. 801 (2002); Paust, *Tolerance in the Age of Increased Interdependence, supra* note 5. *See also* John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 Geo. L.J. 535, 539–41 (1993).

[15] *See* Part III of this volume, "International Actors."

[16] *Id.*

forms of participation in norm formation, modification, termination, and effectuation can facilitate realization of more effective and policy-serving roles for individuals and other actors in the international legal process.[17]

II. *International Crimes*

The growth of international criminal responsibility for both private and public actors has also been remarkable. From earlier attention to piracy, war crimes, breaches of neutrality and other crimes against peace, the slave trade, attacks on foreign dignitaries, and other international crimes under customary international law,[18] there has been a marked growth of international criminal law treaties and an expansion of customary international law reaching crimes such as genocide; other crimes against humanity; apartheid; race discrimination; hostage-taking; torture and cruel, inhuman or degrading treatment or punishment; forced disappearance of persons; terrorism; terrorist bombings; financing of terrorism; aircraft hijacking; aircraft sabotage and certain other acts against civil aviation; certain acts against the safety of maritime navigation, including boatjacking; murder, kidnapping, or other attacks on the person or liberty of internationally protected persons; trafficking in certain drugs; slavery; and mercenarism.[19]

During such growth, the world community has also witnessed a shift in the nature of several relatively new crimes, from offenses binding merely signatories to new treaties and their nationals to offenses mirrored in customary international law that are binding universally and without putative limiting reservations to treaties proffered by a few states. Of current interest in this regard is the failed attempt of the Administration of U.S. President George W. Bush to seek comfort from an attempted limiting reservation to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[20] designed to provide protections to human beings only to the extent that the U.S. Constitution would require similar protections.[21] The attempted reservation is necessarily

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[17] *Id.*

[18] *See, e.g.*, Jordan J. Paust, et al., International Criminal Law chs. 1, 6–8, 12 (3d ed. 2007); Jordan J. Paust, International Law as Law of the United States 12, 421–22 (2d ed. 2003).

[19] *See, e.g.*, Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process, supra* note 14, at 1237–40. *See also* Sadat, in this volume.

[20] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

[21] *See* Reservation No. 1, available at Cong. Rec. S17486–01 (daily ed., Oct. 27, 1990) ("the United States considers itself bound by the obligation under Article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment

incompatible with the object and purpose of the treaty (which seeks to end all forms of the proscribed conduct) and is, therefore, void *ab initio* as a matter of law.[22] In any event, because the prohibitions of torture and cruel, inhuman, or degrading treatment are customary international legal proscriptions, they are universally applicable without limitation.[23]

Along with the increased reach of customary and treaty-based international crimes, there has been the continued, but sometimes imperfect, recognition of universal jurisdictional competence[24] and responsibilities[25] to provide criminal and civil sanctions with respect to international crime.[26] For example, the duty of states to bring into custody and to either initiate prosecution of or to extradite those reasonably accused is often expressly set forth in relatively modern international criminal law treaties.[27] The same duty with respect to customary international crimes is expressed in the Latin phrase *aut dedere aut judicare*.[28] Universal responsibility also impacts on claims to immunity. Indeed, in no international criminal law instrument is there any form of immunity for any sort of actor and most instruments expressly reach any person who commits a covered crime.[29]

Although, in 1931, he could not foresee the Holocaust or the post-World War II International Military Tribunals at Nuremberg and at Tokyo, Professor

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prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."). Clearly, the attempted reservation is incompatible with the object and purpose of the Convention, since application of the reservation would preclude coverage of all forms of cruel, inhuman and degrading treatment as required under the Convention.

[22] *See, e.g.*, Vienna Convention on the Law of Treaties, art. 19(c), Jan. 27, 1980, 1155 U.N.T.S. 331.

[23] *See, e.g.*, Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 Colum. J. Transnat'l L. 811 (2005).

[24] *See, e.g.*, Paust, et al., *supra* note 18, at 157–68, 172–76; Paust, International Law as Law of the United States, *supra* note 18, at 420–23, 433–41 nn.47–80.

[25] *See, e.g.*, Paust, et al., *supra* note 18, at 132–46; Paust, International Law as Law of the United States, *supra* note 18, at 443–47.

[26] *See* Part IV of this volume, "International Jurisdiction and International Jurisprudence."

[27] *See, e.g.*, International Convention Against the Taking of Hostages, art. 8(1), Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205; Convention Against Torture, *supra* note 20, art. 7; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, art. 7, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177.

[28] *See, e.g.*, M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare*: The Duty to Prosecute or Extradite in International Law (1995); Paust, International Law as Law of the United States, *supra* note 18, at 421, 443.

[29] *See, e.g.*, International Convention Against the Taking of Hostages, *supra* note 27, art. 1(1) ("Any person who"); Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, art. 1(1), Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 ("Any person"); Convention Against Torture, *supra* note 20, art. 1(1) ("any act by which … when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"). *See also* Sadat, in this volume.

Hudson, in his book *International Tribunals Past and Future* from 1944, hesitantly recognized the potential for an expanded role of international criminal law.[30] This field now has its roots in the customary legal principles formally set forth by the U.N. General Assembly in the Principles of the Nuremberg Charter and Judgment formulated by the International Law Commission,[31] which include:

I. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.
II. The fact that internal law does not impose a penalty … does not relieve the person … from responsibility under international law.
III. The fact that a person who committed an act … acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Similarly, it might not have been foreseeable that, if an international criminal tribunal faces a claim that state sovereignty or domestic law provides a mantle of immunity for state actors accused of international crime, the tribunal might rightly respond:

> The principle of international law, which under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position.… He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.[32]

As the International Military Tribunal at Nuremberg affirmed in 1946, acts taken in violation of international law are beyond the lawful authority of any state, and thus are *ultra vires*, and cannot be covered by claims to immunity.[33] Non-immunity for human rights violations is also expressly set forth in the 1966 International Covenant on Civil and Political Rights.[34]

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[30] Manley O. Hudson, International Tribunals Past and Future 181, 186 (1944) ("If international law be conceived to govern the conduct of individuals, it becomes less difficult to project an international penal law … Current opinion may lead to the organization of international judicial agencies competent to deal with acts committed by individuals during the course of hostilities. …").

[31] U.N. G.A. Res. 177 (II)(a), 5 U.N. GAOR, Supp. No. 12, at 11–14, para. 99, U.N. Doc. A/1316.

[32] International Military Tribunal at Nuremberg, Opinion & Judgment (1946), *reprinted in* 41 Am. J. Int'l L. 172, 221 (1947).

[33] *See, e.g., id.*; Paust, *The Reality of Private* Rights, supra note 14, at 1235–36 & n.26.

[34] International Covenant on Civil and Political Rights, art. 2(3)(a), Dec. 19, 1966, S. Exec. Doc. E, 95–2 (1978), 999 U.N.T.S. 171 ("any person … shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity") [hereinafter ICCPR].

III. *Human Rights and Self-Determination*

In all sectors of the globe, but with varying degrees of effectuation, there have been increased demands for enjoyment of basic civil, political, economic, social, and cultural human rights.[35] We often see particular failures in the realization of human rights but lose sight of the significant advances that have occurred during a relatively recent span of human history (*i.e.*, within our lifetime and that of our parents). More generally, the advancement of humanity and international law can appear differently when viewed in 20, 40, or 60 year periods. Such a focus allows recognition of the fact that, despite the capacity and will of some to serve evil (even in response to evil and in the name of antiterrorism), the human spirit is generally virtuous and blessed with unending resilience. Humankind certainly can advance, if only we can survive.

Part of our shared humanity is reflected in the preamble to and the articulated purposes and principles of the United Nations Charter. Prominent among these are the Charter-based affirmations of "the dignity and worth of the human person"[36] and "equal rights"[37] and the Charter-based guarantees of human rights for all persons and self-determination of peoples. Under the Charter, U.N. entities and all member States have a duty to respect and observe human rights[38] and self-determination of peoples.[39]

These primary principles and duties can even limit the potentially predominant and growing power of the U.N. Security Council to identify "the existence of any threat to the peace, breach of the peace, or act of aggression"[40] and to decide on sanction measures[41] that U.N. members are generally bound to effectuate.[42] For example, Article 24(2) of the Charter expressly mandates that the Security Council "shall act in accordance with the Purposes and Principles of the

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[35] *See* Part VIII of this volume, "The Challenge of International Human Rights."

[36] U.N. Charter, pmbl. Concerning the nature of human dignity as a legal precept, *see, e.g.*, Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content*, 27 How. L.J. 145 (1983).

[37] See U.N. Charter, pmbl, arts. 1(3), 55(c).

[38] *See, e.g., id.*, pmbl, arts. 1(3), 55(c), 56; Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, U.N. G.A. Res. 2625, 25 U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 (1971).

[39] *See, e.g.*, U.N. Charter, arts. 1(2), 55, 56; 1970 Declaration on Principles of International Law, *supra* note 38.

[40] U.N. Charter, art. 39.

[41] *See id.*, arts. 41–42.

[42] *See id.*, arts. 24(2), 25, 48.

United Nations," and Article 25 requires that members "carry out the decisions of the Security Council in accordance with the present Charter" and, thus, not in violation of human dignity, human rights, self-determination of peoples, or other primary purposes and principles.[43]

Increased demands for enjoyment of human rights also led to a proliferation of global and regional human rights instruments and institutions that might have rarely been imagined in 1931, even by human rights activists, despite the fact that human rights have had a rich history for more than 250 years.[44] In addition to U.N. Charter-based guarantees set forth in 1945, the 1948 Universal Declaration of Human Rights,[45] and the two primary general human rights treaties adopted in 1966 (the International Covenant on Civil and Political Rights[46] and the International Covenant on Economic, Social, and Cultural Rights[47]), the world community has witnessed adoption of the 1951 Convention Relating to the Status of Refugees,[48] the 1966 International Convention on the Elimination of All Forms of Racial Discrimination,[49] the 1979 Convention on the Elimination of All Forms of Discrimination Against Women,[50] the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[51] the 1989 Convention on the Rights of the Child,[52] the 1994 Inter-American Convention on the Forced Disappearance of Persons,[53] the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms,[54] the 1969 American Convention on Human Rights,[55] and the 1981 African Charter on Human and Peoples' Rights,[56] among others. Many of these instruments also recognize private duties with respect to human rights expressly or by implication.[57]

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[43] *See id*. arts. 1, 55.
[44] *See, e.g.*, Paust, International Law as Law of the United States, *supra* note 18, at 193–223.
[45] U.N. G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810, at 71 (1948).
[46] *Supra* note 34.
[47] 993 U.N.T.S. 3 (1966).
[48] 189 U.N.T.S. 137 (1951).
[49] 660 U.N.T.S. 195 (1966).
[50] 1249 U.N.T.S. 13 (1979).
[51] *Supra* note 20.
[52] 1577 U.N.T.S. 3 (1989).
[53] Done in Belen, Brazil, June 9, 1994, *reprinted in* Jordan J. Paust, et al., 2005 Documents Supplement to International Law and Litigation in the U.S. 291 (2005).
[54] Nov. 4, 1950, 213 U.N.T.S. 221, revised by Protocol 11 thereto, Eur. T.S. No. 155.
[55] Nov. 22, 1969, 1144 U.N.T.S. 123.
[56] June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982).
[57] *See, e.g., supra* note 14; *see* Part IV in this volume.

Growth in the identification and clarification of human rights has occurred alongside increasing efforts at implementation through publicity, studies, reports, education, on-site investigations, advisory services, letter and email campaigns, demonstrations, diplomatic negotiation, lobbying, legislation and administrative measures, prosecution, and litigation.[58] However imperfectly, respect for human rights has conditioned domestic and international governmental foreign policy, investment processes, and trade. Nonetheless, humankind still suffers from inadequate food, housing, employment, protections from child labor, assurance of safe and healthy home and work environments, medical care, protections from private and state actor perpetrators, and domestic judicial and administrative remedies. Whether human dignity and tolerance have been furthered since 1931 (I believe that they have in general), it is evident that increased interdependence makes their effectuation concomitantly more necessary. I am optimistic that the Internet and other technologic advances will contribute to their increased realization and the spread of democracy, as will greater use of solar energy and the resources of our solar system. If it occurs, first contact with real aliens might contribute to a greater awareness of our common human heritage and dignity and the need for cooperation with other sentient beings.

Claims to political self-determination seem to have grown as increased human inter-determination makes such an outcome more relative. Out of the Holocaust, we have witnessed the birth of a Jewish state. The marked quest for freedom from colonialism and occupation led to a significant increase in the number of new states, especially in Africa. The break-up of Soviet colonialism led to increased freedom for East European peoples and, at the same time, a quest for a new integration within a new Europe. We are witness to the creation of a new Palestinian state and the need for Israel to end collective punishments[59] and further new forms of peaceful inter-determination with Arab neighbors. We are also witness to demands for an increased Kurdish autonomy, at least within a new Iraq; demands for a free Lebanon; and a significantly increased self-identification of the 23 million people of Taiwan as Taiwanese and the creation of a democratic governmental process in Taiwan despite lingering aspirations of an old elite in the Peoples' Republic of China to grow an empire through subjugation of a free

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[58] *See, e.g.*, Jordan J. Paust, *The Complex Nature, Sources and Evidences of Customary Human Rights*, 25 GA. J. Int'l & Comp. L. 147, 160–61 (1995–96).

[59] *See, e.g.*, U.S. Dep't of State, Country Reports on Human Rights Practices for 1998, The Occupied Territories, 13–14 (Feb. 1999); U.S. Dep't of State, Country Reports on Human Rights Practices for 1997, The Occupied Territories, 13 (Jan. 1998); ICRC, Annual Report 233–34 (Geneva 1996); Greg Myre, *Israel Halts Demolitions of Palestinians' Homes*, Int'l Herald Trib., Feb. 19, 2005, at 3.

Taiwanese people and continued oppression in Tibet west of China proper. Perhaps in the near future the process of relative political self-determination within states in Africa will shift toward newer forms of African integration to meet common needs and aspirations of African people. What Manley Hudson might not have foreseen in connection with increased demands and expectations concerning human rights and self-determination is the necessarily interrelated growth in democratic governmental processes.[60] Clearly, such growth has not been easy from the times when Hitler, Stalin, Mussolini, and various former emperors and generals wielded dictatorial powers, but the growth of democratic freedom has been a major part of recent human history. Ideological and religious forms of opposition to human dignity, tolerance, human rights, self-determination, and democratic values are not new and have not become unimportant, even within American society, but the purveyors of ideological and religious hatred and indignity are of markedly less influence.

Looking back and forward, especially as we contemplate current uses and threats of non-state and state actor terrorism, it is evident that human dignity, tolerance, human rights, and democratic values must be guiding precepts and achievements in our future. When human rights are furthered, terrorism is necessarily set back.[61] One of the failures of the Administration of U.S. President George W. Bush with respect to its policies and reaction to terrorism has involved attempts at radical destruction of human rights and restraints and

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[60] *See generally* U.N. Charter, arts. 1(2)–(3), 55, 76(b); Universal Declaration of Human Rights, *supra* note 45, art. 21; ICCPR, *supra* note 34, arts. 1, 25–26; Declaration on Principles of International Law, *supra* note 38; Promotion of a Democratic and Equitable International Order, U.N. G.A. Res. 55/107, U.N. GAOR, 55th Sess., 81st plen. mtg., Agenda Item 114(b), U.N. Doc. A/RES/55/107 (2001); Advisory Opinion on Western Sahara, 1975 I.C.J. 12, 31–33, 36; U.N. G.A. Res. 2, 39 U.N. GAOR, Supp. No. 51, at 14–5, U.N. Doc. A/39/51 (1984) (South African people are entitled to a "democratic society based on majority rule…with equal participation by all the people"); U.N. G.A. Res. 3297, U.N. Doc. A/RES/3297 (1974); U.N. G.A. Res. 2877, U.N. Doc. A/RES/2877 (1971) ("on the basis of one man one vote"); Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, July 29, 1990, *reprinted in* 29 I.L.M. 1305; Chen, *supra* note 5, at 30–33; American Society of International Law, *Democracy and Legitimacy – Is There an Emerging Duty to Ensure a Democratic Government in General and Regional Customary International Law?, in* Contemporary International Law Issues: Sharing Pan-European and American Perspectives 126–41 (1991); Morton H. Halperin & David J. Scheffer, Self-Determination in the New World Order (1992); Jordan J. Paust, *Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights*, 18 Case W. Res. J. Int'l L. 283 (1986) (*extract reprinted in* Paust, et al., *supra* note 18, at 795–801. *Cf* Russell A. Miller, *Self-Determination in International Law and the Demise of Democracy?*, 41 Colum. J. Transnat'l L. 601 (2003).

[61] *See, e.g.*, Jordan J. Paust, *The Link Between Human Rights and Terrorism and Its Implications for the Law of State Responsibility*, 11 Hastings Int'l & Comp. L Rev. 41 (1987).

rights mandated by the laws of war. Criminally sanctionable authorizations, orders, derelictions of duty, and complicity at the highest levels of the Administration have degraded the United States, its values, and its influence.[62] They have also served terrorist ambitions, aided their recruitment of others, and exacerbated the continual armed conflict in Iraq.

D. *Growth of Regional and International Institutions*

The growth of regional and international institutions since 1931 has been remarkable.[63] Several global and regional human rights treaties have created human rights committees or commissions with authority to provide normative clarification, to address state reports, and to address problems with respect to adherence and implementation. Some allow receipt of individual complaints. Some even provide judicial *fora* for state or individual remedial efforts and sanctions. Notable examples of the latter include the European Convention and the European Court of Human Rights[64] and the American Convention and the Inter-American Commission on Human Rights and Inter-American Court of Human Rights.[65] With respect to criminal sanctions against international crime, the world community has also witnessed the creation of the International Military Tribunal at Nuremberg, the International Military Tribunal for the Far East, the International Criminal Tribunal for Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Court (ICC), and certain other special tribunals.[66] The World Trade Organization (WTO) is

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[62] *See* Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 Notre Dame L. Rev. 1335 (2004); Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power,* 2007 utah l. rev. 345 (2007). *See also* Andreas Fischer-Lescano, *Torture in Abu Ghraib: The Complaint Against Donald Rumsfeld Under the German Code of Crimes Against International Law*, 6 German Law Journal 689 (2005), http://www.germanlawjournal.com/pdf/Vol06No03/PDF_Vol_06_No_03_689–724_Developments_Fischer-Lescano.pdf. *See also* jordan j. paust, beyond the law: the bush administration's unlawful responses in the "war" on terror (2007).

[63] *See, e.g.*, Frederic L. Kirgis, International Organizations (2d ed. 1993); Louis B. Sohn, Cases on United Nations Law (2d ed. 1967); Barton & Carter, *supra* note 14, at 536–38, 541–52, 555, 558–59.

[64] European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 222, sec. II. *See* Parker, in this volume; *see* Waters, in this volume.

[65] American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 143, pt. III. *See* Parker, in this volume; *see* Waters, in this volume.

[66] *See* Sadat, in this volume.

itself a creature of more modern times, as is its more recent Appellate Body.[67] Also of more recent vintage are the International Sea Bed Authority and the International Tribunal for the Law of the Sea created by the U.N. Convention on the Law of the Sea,[68] a treaty that the United States has yet to ratify.

Most prominent, of course, has been the creation of the United Nations in 1945, with its primary organs and specialized agencies. Hudson predicted that a Court, now termed the International Court of Justice, would be retained in such an organization,[69] and he advocated that its use for advisory opinions and state-to-state cases should grow,[70] and that its authoritative influence in domestic legal processes should generally expand.[71] He might have foreseen an increasing authority of an assembly and council, but we are well aware of the fact that the United Nations is not a world government and might never function fully in that regard. Nonetheless, effective power and authority of both the U.N. General Assembly and Security Council clearly have grown since their inception.[72] For example, although the General Assembly has no express power in Article 13 of the Charter to issue condemnatory resolutions or resolutions that identify or shape legal content, the General Assembly has issued condemnatory resolutions,[73] and when a resolution addresses legal norms and rests on vote patterns that are unanimous or nearly unanimous it is now understood that such resolutions can be authoritative or legally relevant for purposes of clarifying *opinio juris* with respect to the content of customary international law[74] or an evolved meaning of an international agreement.[75] Further, the General Assembly does not have

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[67] *See generally* John H. Jackson, *The Varied Policies of International Judicial Bodies: Reflections on Theory and Practice*, 25 Mich. J. Int'l L. 869 (2004). *See also* Carter, in this volume; *see* Kaiser, in this volume.

[68] 1833 U.N.T.S. 3, Part XI, §§ 4–5.

[69] See U.N. Charter, art. 92. *See also* Hudson, *supra* note 30, at 137 ("Hence the first preoccupation of the post-war period should be with the preservation and adaptation of existing institutions. The chief of these is the Permanent Court of International Justice, and the problem of equipping it for usefulness in the post-war world stands out as one of the principal problems to be considered in this connection.").

[70] Hudson, *supra* note 30, at 151, 153.

[71] *See also* Jordan J. Paust, *Domestic Influence of the International Court of Justice*, 26 Denv. J. Int'l L. & Pol. 787 (1998).

[72] *See* Paulus, in this volume.

[73] *See, e.g.*, Jordan J. Paust, et al., International Law and Litigation in the U.S. 49 (2 ed. 2005) (1949 Russian Wives "case").

[74] *See, e.g., id.* at 46–47, 49; Paust, International Law as Law of the United States, *supra* note 18, at 6, 34–36 nn.25–28.

[75] *See, e.g.*, Paust, et al., *supra* note 73, at 46–47, 49.

directly relevant express powers concerning the maintenance of peace and security, but subsequent practice has established its potential role in that regard.[76]

The Security Council is a remarkable institution with some historic achievements and a significant potential for cooperative responses to threats to the peace, breaches of the peace, and acts of aggression.[77] An initial goal was to enhance the ability of the Council to respond to such matters by making military forces available to the Council "on its call" in accordance with special agreements,[78] but no such agreements have occurred. The Council also has a limited power to order state members to engage in military enforcement action,[79] but, to date, the Council has chosen merely to authorize the use of military force. More frequently, the Council has decided to mandate economic and other non-military forms of sanction to address threats to the peace and promote international peace and security. Of recent interest are Security Council mandates with respect to various responses to and forms of impermissible support of terrorism.[80]

E. *Isolationist, Unilateralist Internationalism, or International Cooperation?*

Viewing its proclaimed policies and actions since 1931, the United States is clearly not isolationist in reaction to the growth and needs of a global economy and interdependencies with respect to greater effectuation of international peace and security. Yet, too often in recent years, the United States appears to be too unilateralist with respect to global environmental problems; utilization of earth resources on the seabed; a perceived need to secure open access to oil reserves outside U.S. territory and waters; a claimed need (in the so-called "Bush doctrine") to use armed force against perceived threats and "emerging" threats to U.S. domestic and international interests[81]; efforts by the international community to create an

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[76] *See, e.g.*, 1950 Uniting for Peace Resolution, U.N. G.A. Res. 377A, 5 U.N. GAOR, Supp. No. 20, at 10, U.N. Doc. A/1775 (1951); Certain Expenses of the United Nations, 1962 I.C.J. 151.

[77] *See* Foley, in this volume.

[78] *See* U.N. Charter, art. 43.

[79] *See id.* arts. 25, 42, 48.

[80] *See, e.g.*, U.N. S.C. Res. 1373, U.N. Doc. S/RES/1373 (2001).

[81] *See, e.g.*, National Security Strategy, pt. I (2002) (the "Bush Doctrine"), available at http://www.usinfo.state.gov. The Bush doctrine regarding his National Security Strategy claims a broad unilateral authority unsupportable under international law to use military force against "rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction," "to preempt emerging threats" or an "imminent threat," and "to counter a sufficient threat to our national security." Of course, an emerging or imminent threat is not even an actual threat. *See also* Valerie Epps, *The Failure of Unilateralism as the Phoenix of Collective Security*, 27 Suffolk Transnat'l L. Rev. 25 (2003).

effective International Criminal Court with jurisdiction over genocide, certain crimes against humanity, and various war crimes;[82] full efficacy of certain human rights treaties in view of attempted limiting reservations, understandings, and declarations[83]; and ICJ decisions recognizing individual rights under the Vienna Convention on Consular Relations.[84] Of more immediate concern with respect to cooperative peace and security are unilateralist claims to use armed force in preemptive self-defense.[85]

I. *Impermissible Preemptive Self-Defense*

With respect to the Bush Doctrine, does international law permit unilateral preemptive self-defense against perceived threats to a state's national security? I agree with most states and international law scholars that, absent the start of an actual "armed attack" triggering the right of self-defense under Article 51 of the United Nations Charter,[86] and absent an authorization to use armed force from the U.N. Security Council[87] or an appropriate regional organization,[88] no state can lawfully engage in what some term "preemptive" self-defense.[89] Furthermore, a change in international law to permit preemptive self-defense is not preferable

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[82] *See, e.g.*, Leila Nadya Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millennium (2002); *see also* Diana Marie Amann & Mortimer N.S. Sellers, *The United States of America and the International Criminal Court*, 50 Am. J. Comp. L. 381 (2002); Thomas M. Franck & Stephen H. Yuhan, *The United States and the International Criminal Court: Unilateralism Rampant*, 35 N.Y.U. J. Int'l L. & Pol. 519 (2003); Jordan J. Paust, *The Reach of ICC Jurisdiction Over Non-Signatory Nationals*, 33 Vand. J. Transnat'l L. 1 (2000); Leila Nadya Sadat & Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GT. L.J. 381 (2000). The Bush Administration withdrew a signature to the Statute of the ICC by former President Clinton.

[83] *See, e.g.*, Paust, International Law as Law of the United States, *supra* note 18, at 361–78.

[84] Having lost several cases addressing the failure to notify foreign accused of their right to communicate with their consulates, on Mar. 7, 2005, the Bush Administration withdrew U.S. acceptance of the Optional Protocol to the Vienna Convention on Consular Relations, which allows the ICJ to hear cases concerning application of the Convention. *See, e.g.*, Hugh Dellios, *Rice Defends U.S. Decision to Pull Out of Treaty on Death Penalty*, Chic. Trib., Mar. 11, 2005.

[85] *See* pt. 6 of this volume, "The Use of Force and the World's Peace."

[86] Art. 51 expressly limits "the inherent right of individual … self-defense" (whatever it had been) by the limiting phrase "if an armed attack occurs" and, thus, does not allow preemptive self-defense before the start of an attack. However, all that is required is that an attack or process of attack has begun.

[87] See U.N. Charter, art. 42.

[88] *See id*. arts. 52–53; Jordan J. Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond*, 35 Cornell Int'l L.J. 533, 546–47 (2002).

[89] *See* pt. 6 of this volume, "The Use of Force and the World's Peace."

from a policy-oriented standpoint.[90] Under the United Nations Charter, it is the Security Council that decides whether a "threat" to peace exists[91] and, if one exists, it decides whether to authorize or mandate the use of armed force[92] or economic or other sanctions not involving the use of armed force.[93]

Such a cooperative approach to the use of armed force lessens the chance for error evident in prior unilateralist determinations that a threat or emerging threat exists – for example, that France was about to launch an attack on Germany through Belgium in 1914[94] or that Iraq had weapons of mass destruction in 2003. It also provides a greater chance for peaceful resolution of disputes concerning alleged threats or emerging threats,[95] the serving of a cooperative peace and security,[96] and a greater assurance that "armed force will not be used, save in the common interest."[97] By adhering to the limitation of permissible unilateral self-defense expressly set forth in Article 51's phrase "if an armed attack occurs," unilateral self-defense will continue to be limited to an objective aspect of circumstance and an objective necessity (*i.e.*, the actual start of an armed attack) as opposed to more highly subjective and potentially erroneous unilateral determinations of "threats" or "emerging threats."

II. *Permissible Self-Determination Assistance*

One form of cooperative use of force independent of Security Council or regional authorization can involve self-determination assistance in response to

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[90] *See, e.g.*, Yoram Dinstein, War, Aggression and Self-Defence 183–85 (4th ed. 2005); Epps, *supra* note 81, at 30, 33–34; Paust, *supra* note 88, at 537–38 n.15, 557 n.125; Paust, *supra* note 62, at 1343–46 (especially concerning the 1837 *Caroline* incident); *but see* Abraham D. Sofaer, *On the Necessity of Preemption*, 14 Eur. J. Int'l L. 209 (2003).

[91] See U.N. Charter, art. 39.

[92] *Id.* art. 42.

[93] *Id.* art. 41.

[94] *See, e.g.*, Paust, et al., *supra* note 73, at 984–86 (also addressing claims of the German Chancellor that the treaty of neutrality with Belgium was just "a scrap of paper" and that Germany had violated "international law" but "[h]e who is menaced, as we are, … can only consider how he is to hack his way through.").

[95] *See also* U.N. Charter, arts. 1(1) ("to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace"), 2(3) ("All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered"), 33(1) ("The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by … or other peaceful means of their choice").

[96] *See also id.*, pmbl., art. 1(1).

[97] *See id.*, pmbl. *See also* Sofaer in this volume.

use of force by a state or government against a given people. In another writing, I noted that, in the 1970 Declaration on Principles of International Law, the U.N. General Assembly affirmed that self-determination assistance can be permissible under the Charter.[98] The Declaration recognizes that "[e]very State has the duty to refrain from any forcible action which deprives peoples … of their right to self-determination" and that "[i]n their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter."[99] In 1984, a resolution of the General Assembly concerning the illegal regime in South Africa also affirmed the permissibility of self-determination assistance while "recognizing the legitimacy of … [the] struggle [of the people of South Africa] to eliminate apartheid and establish a society based on majority rule with equal participation by all the people of South Africa" and urged "all Governments and organizations … to assist the oppressed people of South Africa in their legitimate struggle for national liberation," while also condemning "the South African racist regime for … persisting with the further entrenchment of apartheid, a system declared a crime against humanity and a threat to international peace and security."[100]

As the 1970 Declaration implicitly affirms, the territorial integrity of states can be disrupted and changed if they are not "conducting themselves in compliance with the principle of equal rights and self-determination of peoples."[101] Various other Security Council resolutions and international instruments and decisions indicate that use of force to overthrow a foreign government and to provide self-determination assistance to a people is not absolutely impermissible under the U.N. Charter.[102] However, permissibility must rest on a relatively free will of a given people seeking political self-determination and their request for assistance, unless there is an independent basis for support in an authoritative Security Council or regional authorization. One could also conceptualize such forms of self-determination assistance as collective self-defense of a given people.[103]

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[98] *See* Paust, *supra* note 88, at 547–48.

[99] 1970 Declaration on Principles of International Law, *supra* note 38. *See also* Advisory Opinion on Western Sahara, *supra* note 60.

[100] Advisory Opinion on Western Sahara, *supra* note 60.

[101] 1970 Declaration on Principles of International Law, *supra* note 38.

[102] *See, e.g.*, Paust, *supra* note 88, at 548 n.72.

[103] *See, e.g.*, Jordan J. Paust & Albert P. Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 Vand. J. Transnat'l L. 1, 11–12 n.39 (1978).

F. *Conclusion*

With increasing human interdependence in all sectors of public life, it is evident that human dignity, tolerance, human rights, democratic values, and the cooperative use of armed force and a retained impermissibility of unilateralist preemptive attacks must be guiding precepts for our future. Their effectuation also provides both an evidence and promise of progress in international organization.

Making Progress in International Institutions and Law

*By Barry E. Carter**

A. *Introduction*

The early 21st Century finds a world without military conflicts between major powers and benefiting from considerable, though unevenly distributed, economic growth. Promising recent trends toward democracy, market economics, and more widespread respect for human rights continue in some countries. But progress in these respects is slowing or even receding elsewhere.

Helping support and channel these developments is an underlying mixture of international institutions and international law, as well as regional and bilateral arrangements. These operate alongside the continuing role of national governments.

The international law and institutions that now exist have demonstrated a remarkable evolution in the 60 years since a burst of activity immediately after World War II created much of the international institutional system. Although remarkable, that evolution still gives rise to compelling concerns and rigorous questions as to whether the present institutions and international legal norms are adequate to deal constructively with major contemporary problems—e.g., the growing fiscal imbalances among major economies, global warming, the antagonisms of some Muslims toward so-called Western values, and continuing terrorist threats.

We might briefly recall the period about 100 years ago when Europe, the United States, and some other areas were experiencing a golden age in economic growth and increased international trade, partly as the result of technological developments such as the steam engine, telegraph, and telephone. This period was cut short by World War I and then the world's failure to develop strong political, trade, and financial arrangements to deal with international developments. The Great Depression, starting around 1929, resulted from collapsing national economies brought on in part by high tariff barriers and weak international financial

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* This chapter draws considerably upon an earlier article: John H. Barton and Barry E. Carter, *International Law and Institutions for a New Age*, 81 Geo. L. J. 535 (1992). In some parts it is an update of that article.

Miller & Bratspies (Eds), Progress in International Law, pp. 51–68.

mechanisms. Although Professor Manley O. Hudson was still optimistic in his series of lectures in 1931 at the University of Idaho on progress in international organizations, the gaps and weaknesses in the existing international system for peacekeeping were visible.[1] The United States and other key countries did not have the vision or will to make the necessary improvements to the international institutions, which contributed to worsening economic and political conditions, which, in turn, eventually led to World War II.

B. *The Creation and Evolution of International Institutions*

The vast destruction and searing experience of the Second World War led the victorious Allied leaders to try creatively to build the political and economic structures necessary to avoid further world wars and depressions. The central institution was to be the United Nations. Its primary purpose was to prevent military conflict among its members and to settle international disputes. As a supplement to the U.N., the International Court of Justice (ICJ or World Court) was established as the formal judicial body to resolve legal disputes among nations.

Other key international institutions were designed to deal with economic issues. The International Monetary Fund (IMF) was created to promote international monetary cooperation and stability in foreign exchange. The tremendous instability in the period before World War II had been triggered in part by rapid fluctuations in the value of individual nations' currencies and numerous currency restrictions. The International Bank for Reconstruction and Development (or World Bank) was established to help provide funds for the reconstruction of war-ravaged nations and to promote economic development.

An International Trade Organization (ITO) was planned as an institution to provide a structure and enforcement for rules that would regularize and encourage international trade. The worldwide economic problems of the 1930s had also been caused in part by the high tariff barriers adopted by the United States and other countries. Congressional opposition to the ITO, however, meant that the organization never came into existence. A subsidiary agreement, the General Agreement on Tariffs and Trade (GATT), was allowed instead to metamorphose into a skeletal institutional arrangement.

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[1] In spite of President Woodrow Wilson's efforts, the United States had not become a member of the League of Nations, which began to operate in 1920. And, although the League had some success in the 1920s, it was unable to check Japanese aggression in Manchuria in 1931, and then it failed to sanction Italy effectively after Italy's 1935 invasion of Ethiopia.

These post-World War II institutions continue to exist today, except for the GATT, which was subsumed into the new World Trade Organization in 1995. Although these institutions have failed to achieve some of their original objectives, they have grown and evolved. The United Nations was confronted with rivalries among the five veto-wielding powers on the Security Council (the United States, Soviet Union, China, England, and France) during the Cold War that developed in the late 1940s and lasted into the early 1990s. During that time, the U.N. shifted from collective security to a new peacekeeping pattern based on the consent of the nations involved.[2] The organization also became active in a number of other areas, such as economic development, human rights, and refugees. The end of the Cold War has seen occasional flashes of new energy in the Security Council, such as its response in 1990–91 to the Iraqi invasion of Kuwait. The organization, however, continues to be hobbled by financial crises, a sluggish bureaucracy, and opposition by some member states to an active peacekeeping role in maintaining peace and security. Although the ICJ caseload has increased in the past 10–15 years, the ICJ has been less busy and successful than its creators had hoped, partly because of its slow procedures, the requirement that only states could be parties, and the lack of enforcement powers.

The institutional evolution on the economic side has been much more far-reaching. The U.N. has undertaken various activities to promote economic development. Although the IMF was originally designed to support fixed exchange rates, since the 1970s when the United States went off the gold standard and most of the major industrial countries of the world moved toward flexible exchange rates, the IMF has worked to help countries maintain exchange rates within manageable bounds and to assist countries with high debt burdens. In the mid-1990s during the Asian financial crisis and later flare ups in Russia and Latin America, these IMF efforts ran into criticism from some experts that the Fund was being heavy-handed and inflexible in the conditions it demanded from struggling countries. The IMF has since more carefully targeted its activities and the conditions it places on loans.

The World Bank has switched its focus from reconstructing the war-torn countries of Europe to encouraging economic development. With an abundance of competing private capital available in the world for projects that have reasonable expectations of yielding an economic return, the World Bank has increasingly narrowed its efforts to countries that are among the poorest and that are in need of basic infrastructure and services. The IMF and the World Bank have also responded constructively to criticism of their environmental and human rights records.

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[2] *See* Thomas M. Franck, Recourse to Force: State Action Against Armed Threats and Armed Attacks 24–44 (2002).

Although the GATT continued to develop through the 1980s and early 1990s, it remained severely limited by the absence of an institutional structure, by its coverage of only trade in goods and not other important matters such as services and intellectual property, and by its weak dispute-settlement process. Recognizing that the GATT was becoming increasingly inadequate as international trade and investment steadily grew, most of the world's nations agreed to create a successor entity, the World Trade Organization (WTO). Coming into existence in 1995, the WTO has an institutional structure, though it still is based on a one-country, one-vote system that requires unanimity on important matters, a requirement that can often impede new initiatives or substantive changes. Reflecting the approximately 2,000 pages of related agreements, the WTO's scope is considerable—the agreements not only include more detailed provisions regarding trade in goods, but also cover trade in services and intellectual property, and have a few measures regulating trade-related investment.

The new WTO dispute resolution system is possibly the most influential international dispute-settlement arrangement in the world—the decisions of a WTO panel or, if appealed, of the Appellate Body are binding on the disputing parties, except in the highly unlikely situation that all the WTO members (including the winning party in the decision) vote not to accept the report of the panel or the Appellate Body.[3]

While these early international institutions were growing and evolving, a wide range of other international institutions developed. Entities were created to deal with new, often specialized issues, such as the International Atomic Energy Agency (IAEA)[4] in 1957 and the U.N. Environment Programme (UNEP)[5] in 1972. Countries with similar interests have combined in quasi-formal associations, such as the Group of Eight (the United States, Japan, Germany, France, United Kingdom, Italy, Canada, and Russia). The leaders of the Group of Eight countries might discuss a range of issues and immediate crises during one of their annual meetings. The group's record is mixed, with its best successes involving economic issues such as interest rates and exchange rates.

The emergence of regional entities has been at least as dramatic.[6] Starting in the mid-1950s as the European Economic Community, what is now the European Union (EU) has become a vital entity on the world stage, with 27 member states, a combined population of over 480 million, and a combined Gross Domestic Product (GDP) larger than that of the United States. The EU

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[3] *See* Chen, in this volume.

[4] *See* Kitre, in this volume.

[5] *See* Bratspies, in this volume.

[6] *See* Carazo, in this volume; Kaiser, in this volume; Parker, in this volume.

has achieved not only a high level of economic integration, but it has attained a considerable degree of cooperation on immigration and foreign policy.

Other regional arrangements, often focused on trade and sometimes investment, have sprung up or are coming online, including the North American Free Trade Agreement (NAFTA) among Canada, Mexico, and the United States; the Association of Southeast Asian Nations (ASEAN) with 10 member states; the Common Market of the South Cone (Mercosur) with four member states in South America; and Asia-Pacific Economic Cooperation (APEC) with many countries in a loose affiliation. Regional development banks, which substantially supplement the work of the World Bank, exist for Latin America, Asia, Africa, and Eastern Europe.

On the judicial front, the European Court of Justice, one of the EU institutions, and the separate European Court of Human Rights are both active and effective, and the Inter-American Court has recently shown new vigor. Besides regional courts, there has been a growth of specialized international courts. The Law of the Sea Convention led to the creation of the International Tribunal for the Law of the Sea in 1996. Specific conflicts led to several war crimes tribunals being established, such as the International Criminal Court for Yugoslavia. More recently, the International Criminal Court began operation in 2003.

Beyond such international and regional entities, there are a vast array of new bilateral and multilateral agreements that involve varying degrees of cooperation across a country's borders on a host of issues—ranging from protecting the ozone layer, to combating terrorism, safeguarding diplomatic personnel, establishing free-trade areas, and enforcing arbitral awards.

C. *The Changes in International Law*

The creation and evolution of various international and regional entities has been paralleled by substantial changes in international law. Most importantly, (1) the individual has become a recognized actor along with states and international organizations;[7] and (2) national, regional, and international tribunals—both judicial and arbitral—have become much more active and effective in enforcing international legal norms.

I. *The Individual's Role*

The traditional concept of international law was generally one of law between nation states. As late as 1963, a respected English treatise defined public international law

[7] *See* Sadat, in this volume.

as "the body of rules and principles of action which are binding upon civilized states in their relations with one another."[8]

After World War II, the scope of international law expanded from states to include the new international and regional institutions. For example, U.N. organs and agencies were allowed to seek advisory opinions from the ICJ, which was otherwise restricted to disputes among states.[9]

Individuals and, more broadly, persons (a term which also includes corporations and other organizations[10]) have become increasingly accepted as independent actors, subject to and benefiting from international law. This dramatic development had its origins in efforts by states to protect their nationals investing and engaged in business abroad. Under traditional international law, an investor's home country was considered injured by the host country's mistreatment and it was up to the home country to seek redress by using diplomatic pressure and sometimes resorting to arbitration. The investors, however, sought independent protection. Many host countries came to recognize the benefits of foreign investment and of resolving disputes with investors. A trend developed toward arbitration between the investor and the host government by a panel that might apply international legal norms.

This trend was part of a much larger development in which the traditional barriers between so-called "public" and "private" international law have eroded and often broken down. Besides the traditional public international law with rules for relations among states, there has long been private international law dealing with the activities of individuals, corporations, and other private entities when their activities crossed national borders. This was particularly true in the "lex mercatoria" or law merchant, which had its origins in the commercial renaissance in Europe in the eleventh and twelfth centuries, fueled in part by trade with the East. The law merchant developed further in the English common law, and became accepted in the United States for many years until the Supreme Court decision in *Erie v. Tompkins*.[11] The law merchant still exists as customary international law in, for instance, the often-followed rules for delivery terms (e.g., free-on-board or FOB) and letters of credit published by the International

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[8] James L. Brierly, The Law of Nations 1 (Humphrey Waldock ed., 6th ed. 1963).

[9] *See* Bratspies, in this volume.

[10] *See* Schurtman, in this volume; Miller, in this volume.

[11] 304 U.S. 64 (1938). In 1842, Justice Story, speaking for a unanimous Supreme Court, wrote: "The law respecting negotiable instruments may be truly declared … to be in a greater measure, not the law of a single country, but of the commercial world." Swift v. Tyson, 41 U.S. 1 (1842). *Erie* indicated that the law merchant, or commercial law, should be found in state (e.g., Illinois) law rather than a federal common law. However, even the resulting commercial laws of individual states, usually adopting with possible minor changes the Uniform Commercial Code, can often be traced historically to norms from private international law.

Chamber of Commerce. It has been codified, for example, by individual states in the Uniform Commercial Code, and accepted in a widely-ratified treaty, the U.N. Convention for Contracts on the International Sale of Goods.[12]

The distinctions between public and private international law have also become increasingly artificial because many states and their instrumentalities have entered the marketplace in a major way—either as traders themselves or to influence industrial policy—and because business and foreign policy have become increasingly intertwined. For example, Iraq's invasion of Kuwait in 1990 and the resulting U.N. economic sanctions involved such traditional issues of public international law as the use of force and sovereignty. However, the implementation of the sanctions significantly affected United States and European corporations that did business with Iraq or Kuwait. Other examples of public-private matters include foreign passenger jets crossing national borders and landing at government owned airports and long-term agreements for foreign oil companies to take oil from government-owned coastal areas. Courts, national governments, and international organizations struggle with such issues. Thus, when the European Court of Justice was being developed in the mid-1950s, the countries involved decided that persons, as well as member states, would be allowed standing to challenge Community actions.

The human rights area has occasioned probably the greatest expansion of individual rights and responsibilities under international law. A major step occurred with the response to Nazi Germany's treatment of Jews and other minorities before and during World War II. The Allies adopted the Nuremberg Charter and proceeded after the war with trials of many German Nazis for crimes against not only foreign individuals, but also against German citizens—thus recognizing that the citizens of a state should have some international law protection against even their own government.

Today, there are many widely-ratified treaties, as well as customary international law, that recognize a broad range of human rights, such as the right to be free from official torture.[13] As discussed below, these rights can sometimes even be enforced in a country's domestic courts. In Europe, they can also be enforced

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[12] Harold J. Berman, *The Law of International Commercial Transactions (Lex Mercatoria), in* A Lawyer's Guide to International Business Transactions 1, 5–7 (Walter Sterling Surrey & Don Wallace, Jr. eds., 1983); *see* Harold Hongju Koh, Dean, Yale Law School, Address at the Annual Meeting of the American Law Institute, "On Law and Globalization" (May 17, 2006) (transcript available at http://www.ali.org/doc/WedlunchKoh052606.pdf).

[13] *See, e.g.*, International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 (adopted by over 150 countries, including the United States); Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment, Dec. 10, 1984, 24 I.L.M. 535 (1985) (there are over 135 parties to the convention, including the United States); Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. There are over 190 parties to this and three other Geneva Conventions, including the United States.

before the European Court of Human Rights, which allows individuals to complain against a state that is party to the underlying European Convention for the Protection of Human Rights and Fundamental Freedoms, and the European Court of Justice can address human rights issues in some cases.

II. *The Role of International, Regional, and National Tribunals*

Of equal drama and import as the emergence of the individual in international law is the impressive change and proliferation of mechanisms available to enforce international law.

The traditional, and still important, international enforcement mechanism is reciprocity. For example, a country will often comply with the well-accepted international norms protecting embassies and diplomats because the country realizes that it wants its own embassies and diplomats to be protected by other countries.[14]

The best-known adjudicatory body for international law has been the International Court of Justice (ICJ). It will probably continue to be an important forum for resolving some legal issues between states, including boundary disputes. However, as noted above, the ICJ's caseload has not been heavy, in part because of its slow procedures, the requirement that only states could be parties, and the lack of useful enforcement powers. Although states have complied with the Court's judgments in many cases, there have been some notable exceptions. The U.N. Charter provides that the Security Council may "decide upon measures to be taken to give effect to the [Court's] judgment,"[15] but the Security Council has yet to do so.

Although the ICJ has taken steps in recent years to speed up its procedures and be more active, the real growth in formal dispute resolution is occurring in international arbitration, other international and regional courts, and national courts.

1. *Arbitration*

The rapid growth of cross-border trade and business after World War II led to increased acceptance of international arbitration to settle disputes between a state and a private party (e.g., a foreign investor) or between private parties caught up in, for example, an international trade or investment dispute.[16]

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[14] *See* Oellers-Frahm, in this volume.

[15] U.N. Charter art. 94.

[16] High hopes in the early 1900s that international arbitration would resolve state-to-state issues had been dashed by World War I and subsequent events. *See* Bedikian, in this volume.

Arbitration has the advantage of flexibility. Parties can choose the place of arbitration and the number, specialization, and even identity of the arbitrators; they can select the procedural rules (including those governing confidentiality and discovery); and they can specify the substantive rules (e.g., an individual country's laws, general principles of international law, and even specially-drafted provisions). This flexibility makes arbitration particularly useful in disputes between countries and investors or between people with economic interests in different nations. Arbitration also involves finality, with the decision of the arbitrator(s) usually not subject to any appellate procedure. Cutting against these advantages is the fact that arbitration, unless carefully managed, can be expensive because the parties compensate the arbitrators and provide the facilities. Also, an arbitrator generally does not have the legal authority to order discovery against persons not parties to the arbitral agreement.

Major impetus for international arbitration was provided by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (N.Y. Convention).[17] It has been ratified by over 135 countries, including the United States and all the other major industrialized countries. This treaty provides that, subject to very narrow exceptions, a decision by an international arbitral tribunal sitting in a contracting state will be enforced by the domestic courts of any other contracting country as if the decision were issued by that domestic court. As a result, a winning party in an international arbitration can usually be assured of collecting against a recalcitrant losing party if the loser has assets—bank accounts, real estate, goods—in any one of the N.Y. Convention countries. It is only necessary to take the arbitral award to the local court for authority to have the assets seized under local law. The U.S. Supreme Court and other nations' courts have generally been strongly supportive of international arbitration in recent years.[18]

Libya's Colonel Qaddafi learned first-hand of this Convention in the 1970s. After he led a military coup over a moderate government, Qaddafi nationalized valuable interests in foreign oil companies operating in Libya. These oil companies had entered into long-term agreements with the prior government, under which the companies were entitled to submit any dispute to arbitration and the principles of international law. Qaddafi claimed that the nationalization decree invalidated these contract provisions and that the companies had to see redress in Libya's domestic courts. The oil companies disagreed and sought arbitration.

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[17] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 19, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

[18] *See* Bedekian, in this volume.

The arbitration agreements for three different companies contained provisions that allowed the appointment of a sole arbitrator even if Libya refused to cooperate. Each of the arbitrators decided that he had jurisdiction over the particular company's dispute and each arbitrator ultimately entered awards against Libya. Qaddafi apparently refused to comply with the decisions, but he eventually agreed to pay tens of millions of dollars. Had Libya tried to resist paying, the successful companies could have moved to enforce their arbitral awards against Libya in, say, Italy, Germany, Switzerland, or any of the other N.Y. Convention countries where Libyan oil, bank accounts, airplanes, or other assets could be found and attached.

As a result of arbitration's flexibility, finality, and enforceability, it has been a growth industry in the last sixty years. For example, 521 requests for international arbitration were filed in 2005 with the International Chamber of Commerce (ICC). Although the ICC is designed to handle commercial disputes, in 13% of its cases at least one of the parties was a state or parastatal entity, such as government-owned utilities or airlines.[19] Similarly, the American Arbitration Association (AAA) has recently handled over 600 cases per year.[20]

The World Bank created the International Centre for the Settlement of Investment Disputes (ICSID) to resolve disputes between foreign investors and the host country through conciliation and arbitration. ICSID's own multilateral convention has enforcement provisions similar to those in the N.Y. Convention.[21] Although ICSID began slowly in 1965, its pace of activity has quickened, with 25 new cases in 2005.[22]

Contributing to the renewed acceptance of international arbitration by states has been the success of the Iran-U.S. Claims Tribunal. It was created by the Algiers Accords in January 1981 as part of the arrangement that freed the U.S. hostages seized by Iran and resolved a number of outstanding monetary claims by U.S. and Iranian citizens, as well as their governments, that had arisen from the events during that period. This arbitral tribunal was established in The Hague, Netherlands, with the United States appointing three arbitrators and the Iranians three, and then these six picked three more arbitrators. After initial delays and wrangling among the arbitrators, and against a background of continuing friction and even occasional hostilities between the two countries, the Claims Tribunal ruled on procedural matters, helped settle some claims, and has ruled on the merits on almost all the claims.

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[19] *See* the ICC website at http://www.iccwbo.org.

[20] *See* the AAA website at http://www.adr.org/index.asp.

[21] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159. As of October 2006, there were over 140 parties to the treaty.

[22] *See* the ICSID website at http://www.worldbank.org/icsid.

Another example of the preference for arbitration is the choice by Canada, the United States, and Mexico to provide creatively in the North American Free Trade Agreement (NAFTA) for arbitration, with variations, to resolve trade and investment disputes between any two of the countries or between one of the countries and a private party.

The World Trade Organization was similarly creative in adopting its binding dispute resolution system. Disagreements among contracting parties (which, with two exceptions, are countries) are initially addressed and decided by a panel usually composed of three individuals who are accepted by the parties or, if the parties disagree, selected by the WTO Director General. The panel's decision is effectively final unless a party appeals it to the "Appellate Body." The Appellate Body is composed of seven well-recognized trade experts, with three members sitting on an individual case. The Appellate Body's decision is effectively final.[23] This dispute system is essentially arbitration at the panel level, with the right to appeal to a judicial-like body.

The WTO dispute resolution system now has real teeth. If the losing party does not bring its laws or regulations into conformity with the WTO rules as determined by the panel or Appellate Body, the complaining party may be allowed to retaliate up to an amount equivalent to its injury, until the losing party does comply.[24]

2. *International and Regional Courts*

International law is not just the purview of the ICJ. Although it was essentially the sole international court in 1950, after the war crime trials in Nuremburg and Tokyo ended, the ICJ now has plenty of company. Specialized international

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[23] World Trade Organization, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 1225, 1225–47 (1994). As discussed above, the decision of the panel or, if appealed, the decision of the Appellate Body is effectively final because the WTO Dispute Settlement Body will not reverse it unless all the contracting parties agree. It is highly unlikely that a winning party will vote against the decision in its favor.

[24] Although the WTO dispute system has real teeth, it also has an important escape route for countries that believe their domestic interests are worth protecting in the face of an adverse WTO decision. The losing country can choose to continue to endure the equivalent tariffs against it by the winning country, rather than to change a domestic law or practice that has been found inconsistent with the WTO agreements. This has actually been happening in the case of the EU's prohibition upon the importation of beef that have been fed hormones. After the Appellate Body ruled against the EU's prohibition, the United States and Canada were allowed to raise tariffs by an amount equivalent to the estimated harm of over $100 million per year to their trade with the EU. Rather than dropping its prohibition, which has domestic political support because of health concerns, the EU has chosen to accept the continuing sanctions.

courts and regional courts have come into being, and international law is now more often addressed by domestic courts.

As noted before, the Law of the Sea Convention led to the creation of the International Tribunal for the Law of the Sea in 1996. This Tribunal stands as one of the alternatives, besides the ICJ or arbitration, for contracting parties to resolve disputes under the Convention. The International Criminal Court began operation in 2003, designed to exercise jurisdiction over the most serious crimes of international concern, as provided for in the Rome Statute of the International Criminal Court.[25]

However, the new regional courts, especially in Europe, represent the most dramatic increase in international jurisprudential activity. The European Court of Justice had over 470 cases brought to it 2005.[26] ECJ decisions can override the domestic law of a Member State; these decisions can be based on the Treaty of Rome that established the Community, and can look to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

That Convention, to which 46 European states are parties, is an extensive bill of rights—e.g., prohibiting capital punishment and official torture. The Convention also created the European Court of Human Rights, which saw a staggering 41,510 applications filed in 2005 and reached judgments on 1,105 applications.[27] All the contracting states have submitted to the compulsory jurisdiction of the court and have agreed to abide by its decisions, which have normally been accepted and implemented. These decisions have covered sensitive areas such as freedom of the press, sexual orientation, and restrictions on government wiretapping. In addition, some of the member states, like France and Italy, have incorporated the European Convention's bill of rights into domestic law.

The success of these European regional courts is, in large part, a result of Europe's overall political move toward greater integration. The European Union is obviously of vital interest to its member states. The European Court of Human Rights enjoys widespread popular support and prestige in Europe. The courts have focused jurisdiction and relatively easy access, unlike the ICJ. Judicial review, an American invention, has largely taken over in Europe, even in France, which had historically looked to a popularly-elected legislature as a defense against aristocratic judges.

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[25] *See* http://untreaty.un.org. As of July 2006, there were 100 parties to the Statute, but not the United States; *see also* Sadat in this volume.

[26] *See* 2005 Annual Report of the Court of Justice, *available at* http://curia.europa.eu/en/instit/presentationfr/index.htm. *See also* Carazo in this volume.

[27] *See* 2005 Survey of Activities of the European Court of Human Rights, *available at* http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+surveys+of+activity/.

3. *Domestic Courts*

As international trade, finance, investment, and travel have mushroomed, the domestic courts of most countries have naturally found themselves considering more and more cases that have international ramifications.[28] These courts have sometimes declined to hear such cases because of concerns about the extraterritorial impact of their decisions, and they have developed a variety of doctrines for that purpose, such as act of state doctrine, political question doctrine, international comity, exhaustion of local remedies, and *forum non conveniens*.

The overall and accelerating trend, however, is to hear more of these cases and effectively develop what amounts to an international common law, or what some call transnational law,[29] that lies between traditional domestic and traditional international law. This common law draws from a country's domestic statutes and court decisions that affect international matters, as well as from international treaties and the other international legal norms generally called customary international law. These doctrines of international common law, or transnational law, are often developed further by international and regional courts and by international arbitrations. Tribunals and scholars in different nations often look to one another's work to develop the harmony needed to make the system work.

This international flow of legal ideas is especially important in international economic issues, in human rights issues, and in resolving jurisdictional conflicts. Thus, domestic courts will often entertain claims that foreign corporate conduct violated domestic antitrust law because of the conduct's effects, or that a foreign government violated the rights of a domestic business that contracted with it.

The role of domestic courts in this development has been highlighted recently in the United States in the human rights area. In *Sosa v. Alvarez-Machain*,[30] the Supreme Court addressed the scope of the Alien Tort Statute, which allows suits by an alien for a tort in violation of the "law of nations or a treaty of the United States."[31] Although the Court did not find a violation in the particular facts of the alleged arbitrary arrest, the six Justices in the majority opinion concluded that federal courts could recognize private claims under federal common law for a limited group of violations of international law norms—i.e., ones that had the "definite content and acceptance among civilized nations" that was comparable

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[28] *See* Waters, in this volume.

[29] *See, e.g.*, Koh, *supra* note 12; Philip C. Jessup, Transnational Law 2 (1956) (employing a broad definition that includes international law as well as all other law "which regulates actions or events that transcend national frontiers.").

[30] 542 U.S. 692 (2004). *See* Ku, in this volume.

[31] 28 U.S.C. § 1350 (1948), originally enacted in slightly different form in the Judiciary Act of 1789.

to the three "historical paradigms familiar when §1350 was enacted" in 1789.[32] One such violation would appear to be official torture.[33]

Also, in *Hamdan v. Rumsfeld*,[34] the five-Justice majority opinion by Justice Stevens held that the military commissions created by President Bush to try al Qaeda detainees did not satisfy the requirements of so-called Common Article 3 of the 1949 Geneva Conventions. Although not deciding whether these Conventions gave rise to judicially enforceable rights for individuals in U.S. courts, the majority struck down these commissions because the Uniform Code of Military Justice, the statutory authority for the President to establish military commissions, is conditioned upon compliance with the laws of war, including the Geneva Conventions. Significantly, the majority found that Common Article 3 of the Geneva Conventions, which the United States had ratified, applied to the conflict against al Qaeda and, thus, was binding upon the U.S. Government in its treatment of al Qaeda detainees. In a memorandum issued shortly after the *Hamdan* decision, the Deputy Secretary of Defense acknowledged the decision and instructed other Defense Department officials to ensure that the military and other Defense employees abide by Common Article 3 in their treatment of detainees. Congress then passed the Military Commissions Act of 2006 in an effort to constitute the military commissions in a manner consistent with the *Hamdan* decision.

Judgments by domestic courts are, of course, enforceable within their own country. As for foreign enforcement, such judgments are usually given considerable respect in other countries, but practices differ among nations and even among the fifty states and District of Columbia.[35]

Domestic courts also have an influence beyond their specific judgments—their decisions are sometimes cited in other nations' courts and in the regional courts discussed above. This leads to the further development of an international common law or transnational law. It should be noted, though, that foreign courts consider United States court decisions far more often than U.S. courts consider foreign decisions. Recent years, however, have witnessed with some controversy

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[32] *Sosa*, 542 U.S. at 732. The three historical paradigms the opinion referred to were: violations of safe conduct for ambassadors, infringement of the rights of ambassadors, and piracy. *Id*. at 715, 724.

[33] The *Sosa* majority opinion appeared to cite with approval *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (finding that official torture was actionable under the ATS). *Sosa*, 542 U.S. at 731–32.

[34] 126 S. Ct. 2749, 2793–97 (2006).

[35] *See* American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (2006); Gary B. Born & Peter B. Rutledge, International Civil Litigation in United States Courts 935–86 (4th ed. 2006).

a trend toward more reference to foreign decisions and laws by U.S. courts, including the Supreme Court.[36]

D. *Lessons for the Future*

International institutions and law are very different from that which existed, or even may have been envisioned, after World War II. There is now a complex network of international and domestic law, administered and enforced by a variety of entities and often invoked by individuals. This new legal network builds on a variety of shared interests, well beyond traditional international reciprocity. It complements other networks and developments—communications, economic, and family—that are increasingly integrating the world.

Although the legal network is far too weak to guarantee security and stability,[37] it can contribute to those ends and it can help immensely in achieving such other important goals as economic growth,[38] individual freedom and human rights, and sustainable development. The ideas underlying the legal network are, in many cases, American ideas. The United States has been a leader in international arbitration; it invented judicial review; it was the key sponsor of the post-World War II international institutions. More recently, however, the United States has a mixed record toward international institutions and the law. For example, it has, on occasion, been dismissive of the United Nations. The United States has also hindered progress toward implementing a system to prosecute the most serious international crimes in the ICC and slowed international efforts to deal with global climate change.

I believe the United States can usefully play a much greater role in improving international institutions and law. It has much more to gain than to lose by constructively participating. Because the specific opportunities for reform and strengthening fluctuate with changing circumstances, let me recommend some more general principles for action.

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[36] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 575–78 (2005) (the majority opinion by Justice Kennedy noted international law and the domestic law and practice of other countries as one confirmation for its ruling against the death penalty for offenders under 18); *Id.* at 623–28 (Scalia, J., dissenting for three Justices) (arguing that foreign sources should not be given any weight in interpreting the cruel and unusual punishment clause of the Eighth Amendment).

[37] *See* Sofaer, in this volume.

[38] Economic growth is a vital factor in lifting people out of poverty and giving them opportunities. For example, the ten percent growth rate in China in the past decade lifted tens of millions of people out of poverty, a result that dwarfs any reasonable foreign assistance program.

I. *Invoke Self-Interest As Much As Possible*

Highlighting domestic interests makes it easier to galvanize domestic support for existing institutions and for new initiatives with other countries to deal with the problems of the 21st century. U.S. support for the creation of the World Trade Organization in the early 1990s and more recent efforts to enter into many bilateral free trade agreements stemmed in large part from perceived American economic self-interest. Similarly, the relatively rapid response through an international treaty and related actions to the problem of ozone depletion in the upper atmosphere reflected the countries' self-interest in dealing with an emerging threat to health and the environment.[39]

Invoking self-interest is not meant in the sense of a narrow, short-term interest, but in a more enlightened, progressive way.[40] A bit of background might be helpful.

There is a major debate in academic circles about the role of international law in state behavior. Briefly, one group of scholars argues for an interest-based approach—i.e., that states pursue their self-interest. Another group of scholars acknowledge that state behavior is often motivated by self-interest, but they also note that it is often occasioned by principled ideas or norms. For example, states enter into human rights and environmental treaties that might involve a substantial loss of sovereignty for little direct benefit to that state.[41]

While both the interest-based and norm-based approaches provide insights, charting a course of action might look more usefully at recent work on "progressive realism." As one scholar describes it: "Progressive realism begins with the cardinal doctrine of traditional realism: the purpose of American foreign policy is to serve American interest."[42] However, as the world has become more interdependent

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[39] The Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 26 I.L.M. 1516 (1987), recognized the ozone depletion problem and provided a legal framework for dealing with the problem, but did not place any restrictions on the production or use of the substances that caused the problem. However, the Montreal Protocol on Substances that Deplete the Ozone Layer soon followed in 1987. That Protocol, and then a rapid series of amendments to it in 1990, 1992, 1995, 1997, and 1999, progressively limited the production, consumption, and trading of these substances. *See* Barry E. Carter, International Law: Selected Documents 706–741 (2007–2008).

[40] *See* Dellavalle, in this volume.

[41] *See* Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. Chi. L. Rev. 469, 478–86 (2005). More recently, another group of scholars sees some convergence between the interest-based and norm-based approaches. Rather than trying to explain state behavior "as simply resulting from power-maximizing behavior or strategic calculation by a unitary actor," the approach recognizes that "state behavior is the result of complex interactions between political players at the domestic level." *Id*. at 484–85.

[42] Robert Wright, *An American Foreign Policy That Both Realists and Idealists Should Fall in Love With*, N.Y. Times, July 16, 2006, at 12.

because of advances in communications, transportation, weaponry, and other technology, the interests of the United States as well as other countries are becoming more interconnected. As that scholar notes:

> A correlation of fortunes—being in the same boat with other nations in matters of economics, environment, security—is what makes international governance serve national interest. It is also what makes enlightened self-interest *de facto* humanitarian. Progressive realists see that America can best flourish if others flourish— … if the world's Muslims feel they benefit from the world order, if personal and environmental health are nurtured, if economic inequities abroad are muted so that young democracies can be stable and strong.[43]

Disruptions in other parts of the world will increasingly influence the lives of Americans, just as Manley Hudson noted in 1931.[44] The economic crises of the mid-1990s, terrorist attacks, the AIDS virus and bird flu are examples of problems that originate a world away and yet can seriously affect Americans. By invoking enlightened self-interest, or progressive realism, in such areas as security, the global economy, and health care and by coordinating U.S. interests with those of other nations, the United States will be able to build greater domestic and international support for international institutions, legal norms, and new initiatives.

II. *Get Commitments To Institutions and Treaties Gradually*

We are not now in a period, like that after World War II, where major institutional reforms are possible. The world faces tensions between the West and many Muslims, generally weak leadership in Europe, and hesitance by many decision-makers to engage in bold action, as exemplified by the recent stalled WTO negotiations and the tepid efforts to reform the United Nations.

Those seeking progress in international institutions and law would be wise to focus on incremental change as the best long-term approach to pressing problems. This change should be encouraged by enlightened national self-interest. It should be designed to help norms develop so that various actors within a participating state will grow accustomed to the norms and accept gradual strengthening.

Areas for possible action include a revived international effort to deal with global climate change that includes the United States as well as China and other developing countries. The United States should also cooperate more constructively in

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[43] *Id.*

[44] "If any lesson stands out from our experience of the past quarter-century, it is that all of the people of the United States, in every section of the country and in every walk of life, are dependent in their daily lives on the ordering of the relations which we are forced to maintain with the other peoples of the world." Manley O. Hudson, Progress in International Organization 1 (1932).

trying to reform the U.N. And, after the present Bush administration leaves office, a new administration might find ways to participate in the International Criminal Court.

III. *Take Advantage of Externalities*

Progress in one area can often be leveraged by tying that progress to other activities. Countries could be encouraged to join and comply with, say, human rights agreements by promises of foreign aid or by giving them a greater role in international institutions. Membership in the European Union, for example, has effectively required that a country also be a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

A recent example of this leveraging, or use of externalities, was that the European Union apparently informed Russia that the EU would not support its accession to the World Trade Organization, which Russia is seeking, unless Russia ratified the Kyoto Protocol dealing with global climate change. Because the present U.S. government has opposed the treaty, Russia's ratification was actually indispensable for the Kyoto Protocol to go into effect, which it did in 2005.

IV. *Strengthen the Domestic Rule of Law*

Domestic courts are increasingly incorporating international legal norms into national law, as noted above. Hence, efforts to strengthen the domestic rule of law will help reduce the leeway for national leaders and agencies not to comply with international norms. The U.S. Supreme Court's recent decision in *Hamdan* vividly illustrates this. By holding that Common Article 3 of the Geneva Conventions applies to the U.S. government in its treatment of detainees, the Court not only blocked the military commissions as they had been established, but helped set standards for future behavior by the U.S. government.

E. *Conclusion*

It is in the enlightened self-interest of the United States to draw upon the principles described above and to participate in a major and constructive way in making progress in international institutions and international law. The United States would benefit, as would the rest of the world. The alternatives are much less attractive.

Part Two
History and Theory of International Law

The Turning Aside. On International Law and Its History

By Alexandra Kemmerer

A. *Introduction*

L'histoire n'est jamais sûre.[1]

The copy of Manley O. Hudson's Borah Foundation Lectures that I used to prepare this chapter was borrowed from the *Staats- und Universitätsbibliothek Göttingen*, the University of Göttingen's library.[2] The book carries various signs and traces of history. There was a sticker of the "International Mind Alcove," a support program for libraries sponsored by the Carnegie Endowment for International Peace that was established in the interwar era "to encourage a wider knowledge of international relations." After the Second World War, the book became a *"Leihgabe des Information Center HICOG für die Niedersächsische Staats- und Universitätsbibliothek in Göttingen,"* a book on loan from the High Commissioner for Germany, given to the library of the State of Lower Saxony and the University at Göttingen. There was also a rubber stamp placed inside the book by the *Amerikahaus Hannover*, which closed its doors in 1995, at the dawn of a New World Order, which, itself, has since been long forgotten. But when exactly did the slender volume come to Göttingen? Who owned it before 1945? And where? The book is in marvellous condition, and I wonder who its previous readers were. Were there any at all? Or was *Progress in International Organization* merely in use as a *decorum*, carefully placed on an educational institution's bookshelves?

The book's history is suggestive of this chapter's purpose, which is to take a closer look at the current phenomenon of a growing and still expanding interest

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[1] Michel de Certeau, La possession de Loudun: Édition revue par Luce Giard 13 (2005). The first edition of 1970, published in the collection "Archives," was edited by Pierre Nora and Jacques Revel; in English as Michel de Certeau, The Possession at Loudun (2000). *See also*, Michel de Certeau, L'Écriture de l'Histoire (1975) [in English as Michel de Certeau, The Writing of History (1988)].

[2] Signature 8 J GENT 1359/B.

Miller & Bratspies (Eds), Progress in International Law, pp. 71–94.

in the history of international law. International lawyers, but also historians, are turning to the history of the discipline, to the past itself as well as to its study and knowledge. Throughout the new and renewed discourse, history is closely intertwined with theory, and even with political theology. Often, it seems, the past is understood as providing traces of a path (or at least a pathfinder) into the complex future of a fragmented and differentiated international community.

I will argue that the study of international law's history requires not only careful contextualization of law and history, but also thoughtful distinctions. If history is to sharpen and enlighten our understanding of the present, intradisciplinary boundaries must be respected. History is neither theory nor political theology. Each discipline is, respectively, in need of reflection upon its potential, risks and limits.

The chapter will proceed in three steps: Following a short, but spirited *praeludium* in section B, it will start by sketching the current debate about the history of international law, section C. Needless to say, it would be an impossible task to provide here a comprehensive survey. The observations made below will merely be an extended promenade, introducing the reader to a variety of voices and melodies along the way.

The text, in section D, will then turn to the interrelatedness of history and theory, stressing the need to make the study of history a synchronic movement of distance and immersion, thereby recognizing our complex relationship to history and time. By finding their way between past and future, international lawyers can draw on experiences from other times and disciplines. This proposal is advanced in section E. After all, "Uses and Disadvantages of History for Life"[3] have been discussed before, and not only by Nietzsche.

In conclusion, I will return to library shelves, in section F, with another bibliophile impression, alluding to an indeterminacy that is common to both the history and theory of international law. What remains are the choices that are ours to make.

B. *A Grand Entrance*

"The history of international law is the Cinderella of the doctrine of international law," Georg Schwarzenberger wrote in 1952.[4] The German émigré lawyer, taking a sociological and realist approach to international law, saw the discipline

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[3] Friedrich Nietzsche, *On the Uses and Disadvantages of History for Life, in* Untimely Meditations (Daniel Breazeale ed., R.J. Hollingdale trans., 1997).

[4] Georg Schwarzenberger, *The Frontiers of International Law*, 6 Y.B. World Aff. 251 (Georg Schwarzenberger ed., 1952). As to many other insights, I was led to this reference by Stephanie Steinle, Völkerrecht und Machtpolitik: Georg Schwarzenberger (1908–1991) 192–93 (2002); for a shorter biographical note in English *see* Stephanie Steinle, *Georg Schwarzenberger (1908–1991), in* Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain 663 (Jack Betson & Reinhard Zimmermann eds., 2004).

as determined by *Machtpolitik* (power politics). The study of international law's history, he argued, would disenchant any idea of "progress,"[5] an idea championed by Hudson in his lectures at the University of Idaho in 1931:

> I believe that when the history of our times comes to be written with the perspective which only a half-century can bring, our generation will be distinguished, above all else in the field of social relations, for the progress which we have made in organizing the world for co-operation and peace.[6]

Half a century after Hudson's lectures, interest in the history of international law was still as dim as at the time when Schwarzenberger deplored the profound neglect of history among his colleagues.[7] Apart from a revised second edition of Arthur Nussbaum's *A Concise History of the Law of Nations*,[8] nothing much with regard to the history of international law happened for the next half century, at least not in the global *lingua franca*.[9]

Now, fifty-four years after Schwarzenberger made his Cinderella comparison, and seventy-five years after Hudson's Idaho lectures, Cinderella has been transformed into the much admired princess, ready to enter the brightly lit ballroom

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[5] Steinle, *supra* note 4, at 192. In her thesis, Steinle masterfully depicts the tensions and controversies between the pessimist, realistic Schwarzenberger – a steadfast positivist - and the optimist, idealistic "Cambridge Group" centred around Arnold McNair, with Hersch Lauterpacht, firmly rooted in the Grotian natural law tradition, as Schwarzenberger's lifelong antagonist. *See*, in particular, *id*. at 165, 199–211, 216–18. Whilst Schwarzenberger was only in 1963 appointed to a chair, Lauterpacht held since 1938 the prestigious Whewell Chair of International Law in Cambridge. On Lauterpacht, who frequently characterized himself as a "progressive", *see* Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960, at 353–412 (2001).

[6] Manley O. Hudson, Progress in International Organization 5 (1932). As probably any "progressive" protagonist of modern international law would have done, Hudson focussed in his Borah Foundation lectures on institution-building. In this chapter, his understanding of "progress" will be taken as a synonym for an optimistic outlook on a progressive development of international law in general. For the historian, that might well be a transgression of deontological limits, for the international lawyer, however, it seems necessary to avoid an oversimplification of the complex interrelatedness of law and politics, a "poisoned chalice" indeed, *see* Martti Koskenniemi, *Epilogue, in* From Apology to Utopia: The Structure of International Legal Argument 603 (Cambridge U. Press 2005) (1989).

[7] Steinle, *supra* note 4, at 192–93. *See also*, for another lament about the deplorable state of the history of international law, Wolfgang Preiser, Die Völkerrechtsgeschichte, ihre Aufgaben und Methoden 5 (1964).

[8] Arthur Nussbaum, A Concise History of the Law of Nations (2d ed. 1954).

[9] On literature on the history of international law published in Germany after 1945, *see* Steinle, *supra* note 4, at 193 n.71. Surprisingly, no mention is made of Carl Schmitt, Der Nomos der Erde im Jus Publicum Europaeum (1950) [Carl Schmitt, The Nomos of the Earth in the International Law of the Jus Publicum Europaeum (G. L. Ulmen trans., 2003)].

of the discipline. When the European Society of International Law (ESIL), founded in the spring of 2004 in Florence, met for its second biennial conference in Paris in May 2006,[10] the festive dinner tables in the *Grand Salon de la Sorbonne* were named after eminent jurists having left their mark in the rise and fall of modern international law: Louis Le Fur and Lassa Oppenheim, Georg Friedrich von Martens and Hersch Lauterpacht, to name just a few, had their grand entrance. And with them, history's moment.

Georg Schwarzenberger, however, was not given a table. He remains an outsider. But his impeccable scepticism, his deeply rooted suspicion towards any narrative of progress was present nonetheless during the conference proceedings, provocatively titled with a question leading to the very heart of the discipline: "International Law: Do We Need It?" Examining, as the official program put it, the question "what international law really contributes to contemporary international society, a society still marked by strong inequalities and injustice," the debate centred on a dispute as to whether conflicts of norms, legal regimes and jurisdictions could and/or should be resolved by constitutionalization and formalization – or whether the contradictions and conflicts arising from interdependencies and parallelisms of jurisdictions and legal regimes on a global level could only be dealt with by a new "international law of conflicts."[11]

Behind the discussions on various aspects of the fragmentation of international law, which I will briefly revisit below, the old question of power was lurking, and that of power's relation to normativity. Is power no more than cold Machiavellian tactics? Or can power be seen more brightly, as through Hannah Arendt's lenses,[12] as an enabling system of interrelated political options and possibilities? In the conference's closing plenary session, David Kennedy, the Manley O. Hudson Professor of International Law at Harvard Law School, bluntly declared the failure of modern international law's humanitarian project.[13] At the centre of the Sorbonne's *Amphithéâtre Richelieu*, Hudson's present-day faculty legacy made power his starting point, both as a tool and a challenge. Power politics, *Machtpolitik*, that has, as has the humanitarian, many faces: naïve, technocratic,

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[10] Alexandra Kemmerer, *Global Fragmentations: A Note on the Biennial Conference of the European Society of International Law (Paris, la Sorbonne, May 18–20, 2006)*, 7 GERMAN L.J. 729 (2006).

[11] *Id.* at 730.

[12] Hannah Arendt, The Human Condition (1958).

[13] *See* David Kennedy, The Dark Sides of Virtue: Reassessing International Humanitarianism (2004) [hereinafter Dark Side of Virtue]. On law having become a political and ethical vocabulary used by humanitarians and military planners alike, *see also* David Kennedy, Of War and Law (2006) [hereinafter Of War and Law].

revolutionary. But is law not more than a language of power? What happened to "progress," an idea so dear to Hudson and his contemporaries?

One need not have travelled to Paris for the ESIL meeting to have wondered about failure and about success. And about progress. Concepts are never simply to be put in a bag and taken on a plane. They travel. But they have their own schedules and itineraries. One could have been warned by a historian.[14] And one could have listened to another lawyer's voice, more subtle, albeit probably no less critical than Kennedy's: "Indeed it does not seem possible to believe that international law is automatically or necessarily an instrument of progress. It provides resources for defending good and bad causes, enlightened and regressive policies."[15]

C. *International Law and Its History*

As the story goes, it was Martti Koskenniemi's determined voice that spoke the first word in a renewed debate about the history of international law. His *Gentle Civilizer of Nations*,[16] "an intellectual history of the profession in the years of its prime,"[17] has, since its publication in 2001, encouraged a fresh interest in the discipline's past and instilled new approaches to style and methodology in the historiography of international law. Legal analysis, historical and political critique and semi-biographical studies of key figures, including Hersch Lauterpacht, Carl Schmitt and Hans Morgenthau, are combined with theoretical reflection. The book's appearance met with a certain *ambiance*, with an atmosphere of indeterminacy and open-endedness, side by side with disenchantment and fragmentation after the *caesura* of 9/11. "At this time of uncertainty about the role, place and function of international law in the international community, it asks the right questions and indicates possible answers,"[18] a reviewer of *Gentle Civilizer* noted.

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[14] On the concept of "progress" (*Fortschritt)* as *Reflexionsbegriff* (reflexive notion) *see* Reinhard Koselleck, *Die Verzeitlichung der Begriffe*, lecture delivered at the EHESS Paris in 1975, first published in English as *The Temporalisation of Concepts*, 1 Finnish Y.B. Pol. Thought 16 (1997), now also published in German *in* Reinhard Koselleck, Begriffsgeschichten: Studien zur Semantik und Pragmatik der Politischen und Sozialen Sprache 77 (2006).

[15] Koskenniemi, *supra* note 6, at 613.

[16] Koskenniemi, *supra* note 5. From the host of reviews discussing Koskenniemi's seminal work, at least two examples shall be mentioned here: Rein Müllerson, *Martti Koskenniemi's The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, 13 Eur. J. Int'l L. 727 (2002) (book review); Michael Stolleis, *Martti Koskenniemi's The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, 73 Nordic J. Int'l L. 265 (2004) (book review).

[17] Koskenniemi, *supra* note 6, at 617.

[18] Christian Tams, 46 German Y.B. Int'l L. 787, 787 (2003).

Although Koskenniemi's wide-ranging study opened new avenues to international law's past, he had not been alone on his path. Throughout the profession, a host of new developments concerned with the old could be observed.[19] In Germany, the International Legal History Project at the Max Planck Institute for European Legal History (*Max Planck Institut für Europäische Rechtsgeschichte*) in Frankfurt, under the direction of Michael Stolleis, provided the basis and structure for a number of remarkable research projects, mostly biographical or semi-biographical studies.[20] And the growing network of scholarship on the history of international law has inspired not only international lawyers, but also legal historians, encouraging distinct transnational perspectives.[21]

From the Critical Legal Studies camp, Nathaniel Berman and David Kennedy also started "to experiment with historical and doctrinal studies of various kinds"[22] when Koskenniemi left his diplomatic bag behind to enter academia in the mid-80s. In fact, his bag was always there, and still is. Bags, even unpacked, can be a powerful presence. But I will come back to this.

Similarly an offspring of CLS, Antony Anghie re-narrates the history of international law along the lines of the colonial encounter, illuminating the discipline's focus on the concept of sovereignty and its enduring imperial character.[23] Taking

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[19] Ingo Hueck, *The Discipline of the History of International Law – New Trends and Methods on the History of International Law*, 3 J. Hist. Int'l L. 200 (2001); Randall Lesaffer, *Introduction, in* Peace Treaties and International Law in European History: From the Late Middle Ages to World War One 1 (Randall Lesaffer ed., 2004).

[20] Special mention should be made, apart from the biographical study on Georg Schwarzenberger by Stephanie Steinle, *cf. supra* note 1, of Jochen von Bernstorff, Der Glaube an das universale Recht: Zur Völkerrechtslehre Hans Kelsens und seiner Schüler (2001); Betsy Röben, Johann Caspar Bluntschli, Francis Lieber und das moderne Völkerrecht 1861–1881 (2003).

[21] Miloš Vec, Recht und Normierung in der Industriellen Revolution. Neue Strukturen der Normsetzung in Völkerrecht, Staatlicher Gesetzgebung und Gesellschaftlicher Selbstnormierung (2006). On Transnationalism, *see* Peer Zumbansen, *Transnational Law, in* Encyclopedia of Comparative Law 738 (J. Smits ed., 2006); *see also* Philip Jessup's strikingly timeless observations in Philip C. Jessup, Transnational Law (1956).

[22] David Kennedy, *The Last Treatise: Project and Person (Reflections on Martti Koskenniemi's* From Apology to Utopia*)*, 7 German L.J. 982, 990–91 (2006). This was a special issue to mark the re-issue of Martti Koskenniemi's "From Apology to Utopia," (Morag Goodwin & Alexandra Kemmerer eds., 2006) [hereinafter Special Issue Marking Re-issue of Koskenniemi's From Apology to Utopia]. On Kennedy's historical studies, *see also* Of War and Law, *supra* note 13, at IX–XI, 46–98 (2006).

[23] Antony Anghie, Imperialism, Sovereignty and the Making of International Law (2005). *See also* my review, Alexandra Kemmerer, *Im Paragraphendschungel regiert das Gesetz des Dschungels: Antony Anghie sondiert mit heißem Herzen die kolonialen Unterströmungen des Völkerrechts*, Frankfurter Allgemeine Zeitung, July 15, 2005, No. 162, 35 (2005).

up Europe as a counterpoint from another angle, Mark Janis' *The American Tradition of International Law*[24] sets out to portray a non-European tradition which is, in fact, not only rooted in European traditions but also closely interconnected with those. Therefore, it comes as no surprise that, through the medium of some articles from the Heidelberg Max Planck Institute's *Encyclopedia of Public International Law*,[25] to which he refers, even Janis' work is (possibly without the author being aware of it) connected with the still and, on a global scale, ever more influential strand of a European Tradition of International Law shaped by Carl Schmitt and Wilhelm Grewe.

Wilhelm G. Grewe's *Epochen der Völkerrechtsgeschichte*,[26] published in English as *The Epochs of International Law* in 2000,[27] was the first comprehensive history of modern international law published in 50 years (in any language) when it first appeared in German in 1984. Due to its singularity and to the author's reputation as a legal scholar and leading diplomat, Grewe's book gained immediately an exceptional importance and influence. The first manuscript of the *Epochen* had been completed in November 1944, but never went into print during the last months of the war.[28] After his retirement from diplomatic service in 1976, Grewe prepared his manuscript finally for publication. Whilst he added literature and a new chapter dealing with postwar developments, he did not change the book's overall structure. "Grewe depicted the modern history of international law as a history of hegemony, a potentially eternal fight for supremacy, a sequence of alternating 'Great Powers' organizing and re-organizing the state system, usually after a war won by one power and lost by the other power."[29] His periodization was adopted by the editors of the *Encyclopedia of Public International Law* and hence universally disseminated. Grewes "hegemonic" perspective was also taken up by Karl-Heinz Ziegler in his 1994 *Völkerrechtsgeschichte*.[30] As Fassbender and Koskenniemi highlight in their reviews, Grewe's work was profoundly influenced

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[24] Mark Weston Janis, The American Tradition of International Law: Great Expectations 1789–1914 (2004); *see also* Martti Koskenniemi, *Mark Weston Janis' The American Tradition of International Law. Vol. 1: Great Expectations, 1789–1914*, 100 Am. J. Int'l L. 266 (2006) (book review).

[25] Encyclopedia of Public International Law (Rudolf Bernhardt ed., 2nd ed. 1992–2003).

[26] Wilhelm G. Grewe, Epochen der Völkerrechtsgeschichte (1984).

[27] Wilhelm G. Grewe, The Epochs of International Law (Michael Byers trans., 2000); *see* Bardo Fassbender, *Stories of War and Peace: On Writing the History of International Law in the 'Third Reich' and After*, 13 Eur. J. Int'l L. 479 (2002) (exploring the larger contexts of the book's writing, publishing and reception); Martti Koskenniemi, *Review of Grewe, Epochs of International Law*, 35 Kritische Justiz 277 (2002).

[28] Fassbender, *supra* note 27, at 482.

[29] *Id.* at 510.

[30] Karl-Heinz Ziegler, Völkerrechtsgeschichte (1994).

by Carl Schmitt, albeit his periodization follows the historian Wolfgang Windelband.[31]

It is only recently that Carl Schmitt's 1950 *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*[32] has gained immediate influence on international law and international relations discourse. An English translation appeared only in 2003, triggering an ever-increasing host of symposia and debates. As the transatlantic drift is still widening, with Europeans associated with a *cliché* of Venus-like idealism and Americans as realist children of Mars,[33] it is only on its surface that Schmitt's *Nomos* "appears to be a history of international law and international relations,"[34] and the "mixture of *Ideengeschichte*, mythical speculation and sharp insight into international politics" may well be read "as fragments from a political theology that is not explicitly articulated therein."[35] As interpretations proliferate and comments abound,[36] it might be worth engaging with the *Nomos* as well as with Schmitt's other writings on international law and international relations,[37] and not only in the frame of an American-European encounter:

> Schmitt's analysis and critique of modern international law in the last 100 pages of *Nomos* is both suggestive and incomplete. It is a strikingly sharp and original discussion that sheds light not only on the situation of international law in 1950, but also on what international lawyers today analyze in terms of the contradictory tendencies of the uniformization of the law under a single superpower and its functional and regional

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[31] Fassbender, *supra* note 27, at 505–10.

[32] Schmitt, *supra* note 9.

[33] Robert Kagan, Of Paradise and Power: America and Europe in the New World Order (2003); *see also* Special Issue: The New Transatlantic Tensions and the Kagan Phenomenon, 4 German L.J. 863 (2003); Robert Cooper, The Breaking of Nations: Order and Chaos in the Twenty-First Century (2003).

[34] Martti Koskenniemi, *International Law as Political Theology: How to Read* Nomos der Erde? 11 Constellations 492, 494 (2004).

[35] *Id.* at 494.

[36] *See, e.g.*, the recent special issue on "The International Theory of Carl Schmitt", 19 Leiden J. Int'l L. 1 (2006), with an editorial by Oddysseos und Petito and contributions by Burchard, Zarmanian, Friedrichs and Howse; William E. Scheuerman, *Carl Schmitt and the Road to Abu Ghraib*, 13 Constellations 108 (2006); Special Issue "World Orders: Confronting Carl Schmitt's The Nomos of the Earth," 104 S. Atlantic Q. No. 2 (2005); Ilse Staff, *Der Nomos Europas: Anmerkungen zu Carl Schmitts Konzept einer Weltpolitik, in* Europa und seine Verfassung: Festschrift für Manfred Zuleeg zum siebzigsten Geburtstag 35 (Charlotte Gaitanides et al. eds., 2005). *See also* Dan Diner, Weltordnungen: Über Geschichte und Wirkung von Recht und Macht (1993).

[37] Many of these have now been re-published in a richly annotated edition: Carl Schmitt, Frieden oder Pazifismus? Arbeiten zum Völkerrecht und zur internationalen Politik 1924–1978: Hrsg., mit einem Vorwort und mit Anmerkungen versehen von Günter Maschke (2005) [hereafter Frieden oder Pazifismus].

> fragmentation into specialized technical regimes in fields such as trade, human rights, and environment. The replacement of a single, Eurocentric, public-law-governed system of sovereignties by private law relations governing a global free market and the establishment of a morally-based imperial order that knows war only as a relation between the police and the criminal have rarely been analyzed with a sharper eye.[38]

Behind the surface history, there is theory. Fragments of analysis and speculation overlap. If we read Schmitt's *Nomos*, are we at the same time to be historians, theoreticians and philosophers? Or can we draw a line, can we differentiate properly? Is the future veiled in past and present?

Transcending boundaries is a challenge. And a temptation. It becomes obvious when scholars of medieval and early modern history set out to explore the history of pre-modern international law. Interdisciplinarity, however, is not always an easy challenge to live up to, and sometimes it is tempting to draw all-too-generalizing parallels between past and present. Or was the Holy Roman Empire truly a multilevel-system of governance? Are yesterday's pirates tomorrow's terrorists?[39]

And, one might ask historians exploring the archives of international law and organization, are yesterday's ideas tomorrow's values?

"To trace the economic and social ideas that have been launched or nurtured by the UN system," the "United Nations Intellectual History Project" was recently established.[40]

> There are extraordinary resources available for this new history: in the forty-one archives within the UN itself and the other organizations (see www.unesco.org/archives/guide); in virtually all national archives; in the correspondence and oral histories of individuals who have been engaged with or worked for the UN (from the tape recordings of soldiers who participated in international peacekeeping missions, preserved by the Nigerian Legion in Enugu, to the diaries of English officials working on public health in Cambodia in the 1950s, in the Bodleian Library in Oxford); in the records and memoirs of UN staff associations, in the cyclostyled records of committees and conferences, somewhat dispiritingly called 'grey literature'; in the art and architecture of the great UN sites themselves, the Palais des Nations in Geneva, and the UN headquarters on the East River.[41]

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[38] Koskenniemi, *supra* note 34, at 494 (footnotes omitted).

[39] Conference, "Rechtsformen internationaler Politik. Theorie, Norm und Praxis vom 12. bis 18. Jahrhundert", Münster, September 11–13, 2006, Conference Report *available at* http://hsozkult.geschichte.hu-berlin.de/tagungsberichte/id=1340&count=208&recno=13&sort=datum&order=down&geschichte=109; *see also* Alexandra Kemmerer, *Ich hätte Pirat werden sollen*, Frankfurter Allgemeine Zeitung, September 26, 2006, No. 224, 38.

[40] Thomas G. Weiss, Tatiana Carayannis, Louis Emmerij & Richard Jolly, Un Voices: The Struggle for Development and Social Justice 1 (2005); *see also* the other Volumes of the United Nations Intellectual History Project Series, published and forthcoming with Indiana University Press.

[41] *Id.* at IX.

Work on these resources has only begun, and much remains to be done for historians and political scientists, to gain a better understanding of the progresses and pitfalls of international organization.

Historians have also turned farther back to the earlier days of international organization, towards the history of the League of Nations. Susan Pedersen of Columbia University, who is currently writing a one-volume history of the League, studied in detail the Mandates System of the League of Nations. At a presentation of her ongoing research on the very League in which Manley Hudson invested so much hope[42] at the *Wissenschaftskolleg zu Berlin* she stressed that "it was not a new system of governance. It was, rather, a new mechanism for generating talk."[43] Pedersen discovered, while rooting in the Archives at Berlin and Geneva, what Jan Klabbers aptly defines as "a second concept of international organization. This is the concept of the international organization as a classical *agora*: a public realm in which international issues can be debated and, perhaps, decided."[44]

Hudson, for one, was also not so much after a functional "managerial concept," as Klabbers puts his alternative to the *agora* concept.[45] Writing about the League of Nation's Assembly, Hudson argues that "Even if nothing else were accomplished by these gatherings, they would be amply worth while because of the value of such personal contacts and of the increased understanding which results from them. One of the valuable by-products of all these meetings in Geneva is the personal acquaintance established between officials of different governments."[46] Does this not sound as if Anne-Marie Slaughter would have felt quite comfortable among the various networks of government officials[47] gathering at the *Palais des Nations*? Certainly, Hudson was not blind to the shortcomings of the League and its Council. "But the important thing is that it affords opportunity for discussion, that it continues to meet regularly, and that through its various sessions the threads of our current problems are not dropped."[48]

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[42] Hudson, *supra* note 6, at 25–45.

[43] Susan Pedersen, *"Sacred Trust of Civilization": A New Look at the Mandates System of the League of Nations*, WiKo Lecture, Wissenschaftskolleg zu Berlin, April 26, 2006, at 10 (paper on file with the author); *see also* Alexandra Kemmerer, *Treuhänderisch. Mandate des Völkerbundes*, Frankfurter Allgemeine Zeitung, May 10, 2006, No. 108 N3 (Geisteswissenschaften).

[44] Jan Klabbers, *Two Concepts of International Organization*, 2 Int'l Orgs. L. Rev. 277, 282 (2005).

[45] Klabbers, *supra* note 44, at 281–282.

[46] Hudson, *supra* note 6, at 32–33.

[47] On those, *see* Anne-Marie Slaughter, A New World Order (2004).

[48] Hudson, *supra* note 6, at 37.

Besides a strong ethos of discourse,[49] besides its weaknesses and failures, the "progressive period" of international organization left us a treasure of concepts and notions, such as the "sacred trust of civilization,"[50] invoked by the International Court of Justice (ICJ) in its recent advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[51] Here, the ICJ reminds us that Palestine – "certain communities, formerly belonging to the Turkish Empire" – was once a class "A" mandate entrusted to Great Britain by the League of Nations.[52] The Court also reminds us that the Pact of the League once described "the well-being and development of […] peoples (under mandates) as forming a 'sacred trust of civilization.' "[53] The expression may be obviously dated, but it still

> encapsulates many of the contradictory facets of the problem that the Court was asked to weigh upon: colonization, then and now; moving out of colonization; international institutions; the depth of history; the international community's old and ongoing interest in the area; the special responsibilities that may arise as a result; the idea of *a* trust, but also the larger problem *of* trust; the sacredness of trust, that of civilization, of whatever passes for the civilizing mission; not to mention the sacredness of the many holy sites that dot the area and, perhaps, the sacredness of human life and rights.[54]

The history of international law, and the history of concepts coined by it, can be a burden. But it may, at times, also provide us with a language to discuss the conflicts and fragmentations of our day. And it may provide us with a backdrop to debate questions of values and principles shaping the international community and its law.[55]

If things are so close and connections so tightly knit, is there really a need to make distinctions? To identify international law's historians and theoreticians? After all, the story of change is always a story of ideas.

"To understand law's contemporary function as vernacular of political judgement, we need to pay particular attention to changes in ideas about law,"[56] stresses

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[49] Not unfamiliar to today's international lawyer, reflecting once and again on discourse and deliberation, often inspired by Jürgen Habermas, The Theory of Communicative Action (1985).

[50] Pedersen, *supra* note 43.

[51] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 131 (July 9).

[52] *Id*. at para 70.

[53] *Id*. with reference to paragraph 4 of article 22 of the League Convenant.

[54] Frédéric Mégret, *A Sacred Trust of Civilization*, 1 J. Int'l L. & Int'l Rel. 305, 305 (2005).

[55] *See* Leiden University's new research project, *The United Nations and the Evolution of Global Values*, http://www.law.leidenuniv.nl/org/publiekrecht/ipr/nieuw_onderzoeksproject.jsp.

[56] Of War and Law, *supra* note 13, at 46 (2006).

David Kennedy in his recent book about "war today," in which he argues that war is "both a fact and an argument."[57] Kennedy's historical outline is merely intended as a firm grounding to prepare his contemporaries, be they humanitarians or military professionals, for the common "language game" of war, where "the point is no longer the validity of distinctions, but the persuasiveness of arguments."[58] Persuasive as this may sound, in a universe where our window to the world is framed by CNN, Google and YouTube, I disagree. The very point of persuasion is, still, a question of validity.

If law and force, history and theory indeed flow into one another, we must again, and ever more forcefully, make that Kelsenian effort to redefine "the lawyer's role and identity in a highly politicised environment."[59] "It's about politics, stupid!," the Crits tell us.[60] But, as Jochen von Bernstorff argues in an intellectual *double portrait* of Kelsen and Koskenniemi: "With its relentless focus on the politics of international law, the critical project will continue to be at risk of ultimately playing into the hands of those who are in power and want to eliminate any structure that can limit their freedom of action."[61] Politics may be our fate, but law remains our responsibility.

And the law questions us. The fragmentation and differentiation of the international social world[62] has been accompanied by a fragmentation of international law, by an emergence of specialised and (relatively) autonomous rule-complexes, legal institutions and spheres of legal practice.[63] Jurisdictions proliferate, courts and tribunals, truth commissions, panels and the International Criminal Court. Specialist systems such as "trade law," "human rights law," "environmental law," "law of the sea," "European law" and even such exotic and highly specialised fields as "investment law" or "international refugee law" abound, possessing their own principles, rules and institutions. "The result is conflicts between

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[57] *Id*. at 5.

[58] *Id*. at 96.

[59] Jochen von Bernstorff, *Sisyphus was an international lawyer: On Martti Koskenniemi's "From Apology to Utopia" and the place of law in international politics*, 7 German L.J. 1015, 1017 (2006) (Special Issue Marking Re-issue of Koskenniemi's From Apology to Utopia, *supra* note 22).

[60] *See, e.g.*, Roberto M. Unger, The Critical Legal Studies Movement (1983).

[61] *Id*. at 1034–35.

[62] Niklas Luhmann, Law as a Social System (Fatima Kastner et al. eds., Klaus A. Ziegert trans., 2004).

[63] *See* International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group on the Fragmentation of International Law, finalized by Martti Koskenniemi, 4 April 2006, U.N. Doc. A/CN.4/L.682, with further references.

rules and rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law."[64] But how are we to deal with the obvious phenomenon of fragmentation? Is there a way back to unity (if there ever was such a thing)? Can we still insist on formal unity? Or should we better strive towards a concept of *pluralisme ordonné*?[65] Or to a fragmented diversity where differences can be dealt with by an "international law of conflicts," inspired by the Vienna Convention on the Law of Treaties as well as by private international law?[66]

Here, again, history comes into play. In a careful analysis of the intersecting histories of public and private international law, Alex Mills demonstrates that private international law is and has ever been part of international law – and could again be a "tool for international lawyers, which might again be applied to the regulation of the international system."[67] He argues that the postmodern metamorphosis of international norms requires a reconceptualization of contemporary private international law; the international law of the past would suggest, he says, a model for the way this might be pursued. "A greater awareness of the achievements and failures of this old international law and its theorists might, it is hoped, pave the way for a greater understanding and development of 'new' international law by the new international lawyers who walk, too often unknowingly, in old footsteps."[68]

This "old international law" can, as Mills aptly indicates, be an inspiration. But it will not lead the way for us. Walking in old footsteps, the path is still ever new. And "no man can cross the same river twice."[69]

D. *Turning Aside*

The past is present. After the disenchantment of all narratives of progress,[70] the study of international law's history is alive and well, probably more vital than ever. International lawyers review the history of their profession and "establish links between the past and the present situation of international norms, institutions and barriers."[71]

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[64] *Id*. at 9.

[65] Mireille Delmas-Marty, Le pluralisme ordonné. Les forces imaginantes du droit II (2006); Mireille Delmas-Marty, Le relatif et l'universel: Les forces imaginantes du droit (2004).

[66] As proposed in Koskenniemi, *supra* note 63.

[67] Alex Mills, *The Private History of International Law*, 55 Int'l & Comp. L.Q. 1, 4 (2006).

[68] *Id*. at 49.

[69] Heraklit, Fragment 91.

[70] For a sobering critique, *see* Dark Sides of Virtue, *supra* note 13.

[71] George Rodrigo Bandeira Galindo, Review Essay, *Martti Koskenniemi and the Historiographical Turn in International Law*, 16 Eur. J. Int'l L. 539, 541 (2005).

But is this, as George Rodrigo Bandeira Galina argues so firmly, a *historiographical* turn?[72] It is, certainly, a turn *to history*, a firm re-consideration and re-confirmation of the history of a profession, of a discipline and a field of law. All along, there can also be observed a turn *à l'histoire meme*.[73] Certainly, the turn is taken by way of historiography, and sometimes historiography itself *turns* to historiography, to observe the observers.[74]

It all depends, however, on the *turn* itself, on *conversatio*, the very move we make to put past and present in their respective contextual settings,[75] thereby widening the scope of our enquiry. At the core, it is only the *turn* that matters, and in that movement of distance and immersion, history and theory are closely intertwined. "To invoke 'sovereignty' in 1873, 1919, 1965 or 2006 is completely different, it is the performance of an act which apart from its most insignificant aspect – namely its verbal surface – has a completely different meaning to the speaker and to the audience,"[76] writes Martti Koskenniemi in a response to readers of his seminal work *From Apology to Utopia*, a book which has been described by David Kennedy as "the last treatise."[77] "Historians involved in *Begriffsgeschichte* know very well that political and legal words are expressed in contexts and that their meaning depends on what claims are made by

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[72] *Id*. at 539–59. Bandeira Galindo may have been inspired by Duncan S. A. Bell, *International Relations: The Dawn of a Historiographical Turn?*, 3 British J. Pol. & Int'l Rel. 115 (2001). For more "turnology", *see* Doris Bachmann-Medick, Cultural Turns: Neuorientierungen in den Kulturwissenschaften (2006).

[73] Patrick Macklem, *Rybna 9, Praha 1: Restitution and Memory in International Human Rights Law*, 16 Eur. J. Int'l L. 1 (2005); *see also* Peer Zumbansen, *Transnational Law and Societal Memory, in* Law and the Politics of Reconciliation 129 (Emilious Christodoulidis & Scott Veitch eds., 2007). For an interdisciplinary introspective EU-Perspective, *see* "Schmerzliche Erfahrungen" der Vergangenheit und der Prozess der Konstitutionalisierung Europas (Christian Joerges et al. eds., 2008).

[74] *E.g*., Fassbender, *supra* note 27; Koskenniemi, *supra* note 27. If one, unlike Koskenniemi, would read Carl Schmitt's Nomos der Erde mainly as a history of international law and international relations, that could also be interpreted as turning to historiography. But Schmitt, usually characterizing himself as *Berufsjurist* (practicing lawyer), would never have accepted to be conceived exclusively as a legal historian, not even in regard to only one single work of his immense œuvre, and certainly not in the case of a major work such as the Nomos.

[75] Probably, as so often, poetry is more precise than scholarship: "Life is not hurrying on to a receding future, nor hankering after an imagined past. It is the turning aside …" R. S. Thomas, *The Bright Field, in* The Bright Field / Das Helle Feld 34–35 (Kevin Perryman ed. & trans. [to German], 1995).

[76] Martti Koskenniemi, *A Response*, 7 German L.J. 1103, 1106 (2006) (Special Issue Marking Re-issue of Koskenniemi's From Apology to Utopia, *supra* note 22).

[77] Kennedy, *supra* note 22.

them in respect to other claims. What are they intended to support or to oppose as they are uttered?"[78]

With theory and (intellectual) history being so interdependent, it does not come as a suprise that Koskenniemi's *Gentle Civilizer of Nations* should, according to its author, not be perceived as a repudiation of the structuralist "grammar" developed in *From Apology to Utopia*, but as intended to contextualize the law and its theory,

> to show how individual lawyers, both as academics and practitioners (this is a contentious distinction – after all, academics, too, practise the law, and it is only the context in which they do so that makes them special), have worked in and sometimes challenged the structure sketched there, how they have acted in a conceptual and professional world where every move they make is both law and politics simultaneously and demands both coolness and passion – a full mastery of the grammar and a sensitivity to the uses to which it is put.[79]

En détail, a compelling demonstration of the interrelatedness of history and theory is given by Koskenniemi in a semi-biographical study of the German public lawyer Georg Friedrich von Martens (1756–1821), whose reflections on principles of international law were adopted throughout the counter-revolutionary Europe of the "Holy Alliance" after 1815. Martens is sketched as a protagonist of positivism, the latter being "a project for the rule of law in international affairs, as poised against the rule of a moral universalism on the one hand, a pure *Realpolitik* on the other."[80] Thus, Koskenniemi argues, the way we theorise about international law has grown out of German public law, out of "the awareness of the gulf between what is and what ought to be and the feel of an imperative sense that to get to the latter one must first know, and master, the former."[81] German public law, however, has grown out of history.[82] The system emerged from an

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[78] Koskenniemi, *supra* note 76, at 1106. *See also* Peer Zumbansen, *Spiegelungen von Staat und Gesellschaft: Governance-Erfahrungen in der Globalisierungsdebatte*, 79 ARSP-Beiheft 13 (2001).

[79] Koskenniemi, *supra* note 6, at 617. That illuminating concluding paragraph could also be read as a response to the sometimes rather superficial critique of Galindo, *supra* note 71.

[80] Martti Koskenniemi, *Georg Friedrich von Martens (1756–1821) and the Origins of Modern International Law* (New York U. Sch. of Law Institute for Int'l Law and Justice Working Papers, History and Theory of International Law Series, Paper 2006/1), *available at* http://www.iilj.org/2006_1_HT_Koskenniemi.htm.

[81] *Id*. at 24.

[82] Notker Hammerstein, Jus und Historie 113 (1972) refers to Christian Thomasius, who wrote in 1700 that "without studying the history of the Empire, the study of public law would be taken up with dirty hands." (Translation by Alexandra Kemmerer). Hammerstein's *trouvaille* is also quoted in Michael Stolleis, Geschichte des Öffentlichen Rechts in Deutschland, Erster Band Reichspublizistik und Polizeywissenschaft 1600–1800, at 299 (1988); *see also id*. at 298–333. On the transfer of the new protestant *Reichspublizistik*, conceived at Jena and the new reform universities at Halle (1692) and Göttingen (1737), to the catholic territories of the

empire in demise, the discipline from the study of its history. "Then, like now, Europeans lived in an era where traditional truths about the grounding of legitimate political authority were being put into question."[83]

Not only Europeans, one may add. In the midst of Philip Allott's "international unsociety,"[84] in a world of fragmentation, we are confronted with the challenges and discontents of a new political (dis)order on a global level. "I knew that the problem had two aspects – philosophy and history,"[85] Philip Allott confides to his readers. He may or may not be "today's Pufendorf,"[86] but Allott's determination to wrestle with the monstrosities of our times in the sombre serenity of his fellow's rooms at Trinity College may be a starting point for a re-imagination of the world, as indeed "the global revolution is three-dimensional – real, legal and ideal."[87]

When turning to the past, it is not so revolutionary to express an interest in contexts, in mentalities and "sensibilities" as George Rodrigo Bandeira Galindo tries to make us believe. Long before Martti Koskenniemi, Wilhelm Grewe paid attention to the changing *ambiance* in which rules of international law are brought into existence.[88] Now, there is a new interest in places[89] taking root in international law,[90] and even in the history of international law.[91] There is an

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Empire, starting out from Würzburg, *see* Alexandra Kemmerer, *Die Juristische Fakultät der Universität Würzburg im Zeitalter der Aufklärung unter Fürstbischof Friedrich Carl von Schönborn 1729–1746* (1996) (unpublished, manuscript on file with the author).

[83] Koskenniemi, *supra* note 80.

[84] Philip Allott, Eunomia: A New Order for a New World 244 (1990).

[85] *Id*. at XVI.

[86] Nico Krisch, *Europe's Constitutional Monstrosity*, 25 Oxford J. Legal Stud. 321 (2005).

[87] Review Essay Symposion, *Philip Allott's* Eunomia *and The* Health of Nations – *Thinking Another World: "This Cannot Be How the World Was Meant to Be"*, Philip Allott, *The Globalization of Philosophy and the Philosophy of Globalization: Seven Theses*, 16 Eur. J. Int'l L. 256 (2005).

[88] Fassbender, *supra* note 27. Grewe used the term with reference to Dietrich Schindler, Verfassungsrecht und Soziale Struktur 92 (1932).

[89] Kartenwelten: Der Raum und seine Repräsentation in der Neuzeit (Christoph Dipper & Ute Schneider eds., 2005); *see also* Europas Weltbild in alten Karten: Globalisierung im Zeitalter der Entdeckungen (Christian Heitzmann ed., 2006). *See also* Karl Schlögel, im Raume lesen wir die Zeit: Über Zivilisationsgeschichte und Geopolitik (2003). Geopolitics is back again [and has maybe never been truly away, *see* Dan Diner, Weltordnungen: Über Geschichte und Wirkung von Recht und Macht (1993)]. Yet, Carl Schmitt, the author of the Nomos, would not have been surprised.

[90] Patrick Macklem, *Rybna 9, Praha 1: Restitution and Memory in International Human Rights Law*, 16 Eur. J. Int'l L. 1 (2005). Macklem draws from Pierre Nora's concept of *lieux de mémoire, see* Pierre Nora, Les Lieux de Mémoire (1984–1992) [abridged translation: Realms of Memory (1984–1992) is the translation of *Les Lieux de Mémoire*].

[91] Thomas G. Weiss, Tatiana Carayannis, Louis Emmerij & Richard Jolly, Un Voices: The Struggle for Development and Social Justice 1 (2005).

inquiry in texts and pictures as media of communication.[92] And there is a new, albeit intensely disputed turn to unorthodox methodological approaches, interrogating the neurosciences[93] on the evolution, individually as well as collectively, of historical narratives.[94]

In the net of contexts, however, we need to keep the strings apart. While boundaries blur, perspectives can still be distinguished and different approaches be taken.

E. *Advantages and Disadvantages*

Now and then it might be worthwile to take up a copy of Nietzsche's *Unzeitgemäße Betrachtungen (Untimely Observations)*[95] and have a closer look at the second essay, *Vom Nutzen und Nachtheil der Historie für das Leben (On the Use and Disadvantage of History for Life)*, of 1874.

Examining our complex relationship to history and to time, Nietzsche fervently rejects the progressive consequences that are drawn from the basic thesis of the neo-Hegelian philosophy of history, namely that every aspect of human life is conditioned by history.

Nietzsche points to the limitations of our historical sense and knowledge,[96] thereby relativizing the relation between history and life, tuning down too great an expectation brought forward by the protagonists of "historicism." And thereby also arguing against a historical sense that "reigns without restraint," that "uproots the future because it destroys illusions and robs the things that exist of the atmosphere in which alone they can live."[97] By describing "three species of history," he adds to the, in his day, fashionable "monumental" and "antiquarian" mode of regarding the past a "critical" mode, allowing for a scrupulous and merciless examination of

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[92] *See* Fabian Steinhauer, *Die Szene ist in Rom, in* Römisch, 30 Tumult. Schriften zur Verkehrswissenschaft 121 (Walter Seitter & Cornelia Vismann eds., 2006); Michael Stolleis, Das Auge des Gesetzes. Geschichte einer Metapher (2004).

[93] Johannes Fried, Der Schleier der Erinnerung: Grundzüge einer historischen Memorik (2005).

[94] On narratives, *see* Hayden White, Metahistory: Historical Imagination in Nineteenth-Century Europe (1973).

[95] Friedrich Nietzsche, *Unzeitgemäße Betrachtungen, in* Werke in drei Bänden 135–434 (Karl Schlechta ed., 1994) [Friedrich Nietzsche, Untimely Meditations (Daniel Breazeale ed., R.J. Hollingdale trans., 1997)].

[96] Friedrich Nietzsche, *On the Uses and Disadvantages of History for Life, in* Untimely Meditations, *supra* note 95, at 63.

[97] *Id.* at 95.

the past.[98] Yet, his critical approach is a constructive one, firmly rooted in a present open to transformation: "If you are to venture to interpret the past you can do so only out of the fullest exertion of the vigour of the present: only when you put forward your noblest qualities in all their strength will you divine what is worth knowing and preserving in the past."[99]

If we turn from the English translation to the original German, we might see Nietzsche's fervent pleading for a *vital interest* in history twice. Whereas the heading's first, classic translation (*On the Use and Abuse of History for Life)* alludes to the manipulative instrumentalization of history so harshly criticized by the author, the more recent and precise Cambridge translation by R. J. Hollingdale weighs the positive and negative impacts history might have on life *(On the Use and Disadvantages of History for Life)*. If we turn from the bookshelves towards the virtual library with its dozens of more-or-less accurate translations of Nietzsche (whose heirs' copyright expired many years ago), even more meanings proliferate. Here, we find meanings to weigh as carefully as history itself.

"Quite suddenly, as one must say when he looks at it in perspective, the world had become a smaller place in which to live."[100] No doubt. But under the roofs of our global village meanings abound. And it is the law that guides us along the rough coastlines of our "flat world,"[101] over the edges of culture and religion, through the turmoil of a fragmented world society,[102] where networks, regimes and social systems create new points of cooperation, collision and coordination.[103]

Translations are re-inventions, re-creations.[104] "Each human language maps the world differently. … Each tongue – and there are no 'small' or lesser languages – construes a set of possible worlds and geographies of remembrance. It is the past tenses, in their bewildering variousness, which constitute history."[105] In the language(s) of the law, this is no different. It is, indeed, "worth noting that there is an inherently reflexive element involved in the process of translation"[106] – whether concepts are translated over space or over time.

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[98] *Id.* 75–77.

[99] *Id.* at 94.

[100] Hudson, *supra* note 6, at 17.

[101] Arguably, it takes some thick neoliberal glasses to see the world as flattened. Thomas L. Friedman, The World is Flat: A Brief History of the Twenty-First Century (2005).

[102] Luhmann, *supra* note 62.

[103] *See, e.g.*, Netzwerke: Assistententagung Öffentliches Recht 2007 (Sigrid Boysen et al. eds., 2007).

[104] George Steiner, After Babel: Aspects of Language & Translation (3d ed. 1998).

[105] *Id.* at XIV.

[106] Neil Walker, *Postnational Constitutionalism and the Problem of Translation, in* European Constitutionalism Beyond the State 27, 53 (J.H.H. Weiler & Marlene Wind eds., 2003).

> In its original sense of *linguistic* translation – or indeed in the rather closer sense of the translatability of legal concepts between different state jurisdictions in comparative law, the very idea of good translation involves three things. First, it involves a 'thick' conception of what is to be translated, in the sense of a detailed hermeneutic understanding both of the context in which it was originally embedded and of the new context for which it is destined. Secondly, it involves some non-linguistic or meta-linguistic way of comparing these 'thick' contexts – of working out what is commonly or equivalently signified by these local signifiers. Thirdly, the translation must be plausible to those who are competent in both languages.[107]

History provides no short-cut to resolve the questions and knots of today's international law. In the ongoing process of legal and political, social, cultural and economic transnationalisation, the discipline of international law transcends continuously long-established inter- and intradisciplinary borders. Traditional differentiations between public and private, national and international are blurring, and a host of new questions are emerging.[108] Answers are often sought in international law's history. Yet, sometimes they are posed from an all-too-present perspective, which, at times, also leads into the temptation to idealize the past.[109] At the European Society of International Law's Paris conference, a speaker was obviously delighted to have discovered the idea of "good governance" already in early modernity, in Italian city states as well as in the Holy Roman Empire of the German Nation. Another panelist set out to trace back the core elements of the European Union's political architecture to earlier eras and the Holy Roman Empire.

In his critical narrative of sovereignty, even Antony Anghie has, at some point,[110] fallen prey to the temptation of "transforming the past into a mere reflection of the present."[111] But History and Memory can never be simple tools of a political *education sentimentale*, nor of societal "progress."[112] And they should never be taken at their apparent (or supposedly "hidden") face value, as seemingly straight-structured frames for developments in political theory, or political theology.[113]

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[107] *Id*. at 36–37.

[108] *See* Zumbansen, *supra* note 21 (with further references).

[109] Kemmerer, *supra* note 10.

[110] Anghie, *supra* note 23.

[111] Galindo, *supra* note 71, at 551.

[112] But *see* Karl Kaiser, *European History 101 for Japan and China*, 7 Internationale Politik (Transatlantic Edition) 90 (Summer 2006).

[113] The temptation, however, is a strong one, *see* Ulrich Haltern, *Tomuschats Traum: Zur Bedeutung von Souveränität im Völkerrecht, in* Völkerrecht als Wertordnung/Common Values in International Law: Festschrift Für/Essays in honour of Christian Tomuschat 867 (Pierre-Marie Dupuy et al. eds., 2006); Ulrich Haltern, Was Bedeudet Souveränität? (2007).

Positionen und Begriffe (positions and concepts) need to be carefully re-contextualized.[114] The *past future* of international law was never our own.[115]

Time goes by.

> A typical international law work is still animated by the idea of the great transformation (perhaps understood as "constitutionalization" of the international system, even federalism) in favour of human rights and environmentalism, indigenous causes, self-determination, economic redistribution and solidarity – often against Great Powers. But something happened to international law during those long years. The effort to streamline it with the utopias of political, economic and technological modernity failed to advance in the expected way. Periods of enthusiasm and reform were followed by periods of disillusionment and retreat.[116]

Time goes by.

> Yet none of these perplexities has thwarted the movement of our time toward international organization. They may retard, and at times they may defeat advances; but they do not destroy the momentum which has been gained. Each of them must be approached by the student with appreciation of the general trend.[117]

Time goes by.

> The Western legal tradition can contribute to world society a unique time sense, a sense of the normative significance of gradual, ongoing institutional evolution over generations and centuries. In the West this was once linked with the concept that the God of history challenges mankind to seek salvation through reformation of the world. Indeed, each of the Great Revolutions that have periodically punctuated the evolution of law in the West has been based on a belief in a violent apocalyptic transformation of society that would inaugurate a new era of human brotherhood; and each has eventually shed its apocalyptic program and reconciled its new vision with the pre-revolutionary past. If the Western legal tradition is now to make a positive contribution to the development of a multicultural world law, it will be not through an apocalyptic vision hat leads to violent revolution but through a post-revolutionary belief in the capacity of law to evolve, that is, to maintain continuity while adapting itself to changing social needs and values.[118]

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[114] Heinhard Steiger, *Probleme der Völkerrechtsgeschichte*, 26 Der Staat 103, 108–09 (1987); *see also id.*, *From the International Law of Christianity to the International Law of the World Citizen – Reflections on the Formation of the Epochs of the History of International Law*, 3 J. History Int'l L. 180 (2001) (partly a review essay on Grewe's *Epochs*).

[115] *See* Reinhart Koselleck, Vergangene Zukunft: Zur Semantik geschichtlicher Zeiten (1979). For a translation of Reinhart Koselleck's concept of the "past future" (*Vergangene Zukunft*) into the language of international law, *see* Peer Zumbansen, *Die Vergangene Zukunft des Völkerrechts*, 34 Kritische Justiz 46 (2001).

[116] Koskenniemi, *supra* note 6, at 611.

[117] Hudson, *supra* note 6, at 122.

[118] Harold J. Berman, Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition XI (2003).

Does this not sound, once again, like a paternalistic agenda of benevolent imperialism? But Berman opened the paragraph cited above with a gentle reminder: "In a new era of global integration, world law must draw on the material and spiritual resources not only of the West but also of other cultures, and not only of Christianity but also of other world religious and nonreligious belief systems. It is from the perspective of a new era of world law that the memory of the historical sources of the Western legal tradition must be revived."[119] In a multifaceted, pluralist context, all reflection must, at the outset, be self-reflexive.[120]

History is as fragmented as the world we live in. So many memories, so many hidden meanings.

F. *Black Letters*

There was another book, on another shelf. Searching for Hans Morgenthau's dissertation in the Würzburg law library, on a warm summer's evening some years ago, I discovered a small grey paperback volume.[121] Tidily stored in a hidden corner of the old Europe, far apart from the fragmentations and ruptures of its author's life and thought, the first book of the great theoretician of international politics was still standing amongst all the other small grey volumes of the *"Frankfurter Abhandlungen zum Kriegsverhütungsrecht"*. Volume No. 12, *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen (The International Judicial Function. Its Nature and Limits)* looked and felt as bright as coming straight from the publisher. And there was, on the upper right of the cover, the author's dedication, written with black ink in his characteristically small and accurate handwriting: "Ergebenst überreicht vom Verfasser." Had Hans Morgenthau, on a sunny day in summer 1929, taken the train from Frankfurt to Würzburg, to present a copy of his dissertation to the neighbouring university? Had he been travelling along the river Main, passing woods and vineyards, to fulfill that customary obligation of a successful PhD candidate in person?

Hans Morgenthau's book inspired the Schmittian idea of politics as an intensity concept which had not been present in the first edition of Schmitt's *Der Begriff des Politischen (1927)*.[122] By making reference to that very work of Carl

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[119] *Id.*

[120] *See also* Jürgen Habermas, *Intolerance and Discrimination*, 1 Int'l J. Const. L. 2 (2003).

[121] On that encounter, *see also* Alexandra Kemmerer, *Der harte Kern: Hans Morgenthau und der neue transatlantische Streit um die Folter*, Internationale Politik 68 (January 2006).

[122] *See* Koskenniemi, *supra* note 5, 436–37. *See also* Günter Maschke's annotation [4] on Carl Schmitt, *Der Begriff des Politischen, in* Schmitt, Frieden oder Pazifismus, *supra* note 37, 220–21.

Schmitt, Morgenthau had developed his own notion of the political as a quality and not a substance. In the second edition of his *Der Begriff des Politischen*, Schmitt included the new definition of the political as an intensity concept – without including a proper reference to Morgenthau.

After emigration to the United States in 1937, Morgenthau left his European baggage behind. Or, more precisely, he set it aside,[123] the law as well as the lawyers. And Nietzsche, whom he read so avidly during all of his life.[124] But his German and European influences were only rarely mentioned after Morgenthau started his remarkable career in international relations.

The European bags and suitcases, trunks and boxes were still there, neatly packed and carefully stored.[125] Although their contents were never openly laid out in articles and footnotes, they were ever-present in Morgenthaus's writings. They were there. They are there. As ever, it was only on the very surface of history that things seemed crystal clear. There the émigré, having left behind his passion for the law. Here his first book, neatly signed and left on the shelves of an old German university library where it rarely had been touched in 75 years.

On that mild summer evening when I read Morgenthau's dissertation, the windows were opened towards the Old University's renaissance courtyard. From across the yard, out of the windows of the university church, long waves of an organ prelude floated into the sunlit library hall. Time was but an imagination.

Later, I learned that the Würzburg law library and its entire collection had not only in part, but completely been burned during the night of 16 March 1945, when almost 90 percent of the historic town centre, once warmly described even by such cold-eyed a writer as Kurt Tucholsky,[126] were destroyed in the firestorm following a bombing raid by the British Royal Air Force.[127]

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[123] Koskenniemi, *supra* note 5, at 437.

[124] Christoph Frei, Hans J. Morgenthau: Eine intellektuelle Biographie 100–17 (1993) [Christoph Frei, Hans J. Morgenthau: An Intellectual Biographie (2001)]. *See* on Morgenthau *also* Christoph Rohde, Hans J. Morgenthau und der weltpolitische Realismus (2004).

[125] In April 1989, in New York, Morgenthau's biographer Christoph Frei was the first one to reopen many of those, including the parcels containing Morgenthau's "Spanish papers," the manuscripts, letters and notes of his first ten years as a scholar in Europe, *see* Christoph Frei, Hans J. Morgenthau: Eine intellektuelle Biographie 3–9 (1993).

[126] Kurt Tucholsky, *Das Wirtshaus im Spessart, in* 5 Gesammelte Werke [1927], 374–79 (1975); Kurt Tucholsky, *Wer kennt Odenwald und Spessart?, in* 6 Gesammelte Werke [1928], 117–19 (1975).

[127] Christopher Benkert, Die Juristische Fakultät der Universität Würzburg 1914 bis 1960, at 8 (2005) (with further reference).

Habent sua fata libelli. Books have their fates, and so have disciplines and ideas, scholars and practitioners. Historiography is, as is international law, undetermined, open to choice. There is idealism and disillusion, the particular and the universal. There is formalism, there is methodology. And, finally, there is a voice, and a signature. In international law, history must never be an argument, but an inspiration. A gentle reminder and a firm admonition. A provocation. A backdrop and a horizon.

The Necessity of International Law Against the A-normativity of Neo-Conservative Thought

By Sergio Dellavalle

> *It might be an advance toward reality if we began to think of the problems of our international relations as domestic problems, in the sense that they have to do with our immediate and local well-being.*[1]

A. *Introduction*

Three-quarters of century ago, Harvard Professor Manley O. Hudson, in his lectures given at the University of Idaho on the 24th and 25th of September 1931, had already articulated a critique of the habit of thinking of relations between nations as remote matters of foreign policy. Opposed to this well-established, but archaic approach to the world of politics and world politics, Hudson presented a more modern perspective claiming that the organization of the international order has a direct impact on the security and quality of our lives.[2] In his view, the project of overcoming the rigid division between the domestic and the international domain must be seen as an important cognitive progress, the measure of which is the development of international organization aiming at "organizing the world for co-operation and peace."[3] The legal instrument of this process, making the purpose effective, is international law.

In the decades that have passed since Hudson's lectures, many scholars have shared his opinion. Many, including politicians, lawyers, and simple citizens from all over the world, have been committed to realizing this vision. However, many others have expressed criticism, going sometimes as far as to deny the very normative meaning of international law. One of the most devastating attacks has been launched by that stream of political thought usually known as neo-conservatism.

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[1] Manley O. Hudson, Progress in International Organization 2 (1932).

[2] *Id.*

[3] *Id.* at 122.

Miller & Bratspies (Eds), Progress in International Law, pp. 95–118.

In this chapter I will try to address the social, political and conceptual relevance of international law from a *negative* point of view, *i.e.* moving from the negation (or limitation) of its normativity as claimed by the neo-conservatives. The analysis will, thus, start in Part B by presenting some influential critiques of international law asserted by authors situated in that school.

Usually, theorists and philosophers of law and politics, as well as international lawyers, view the neo-conservative approach sceptically, as nothing more than an ideology that serves the interests of the most powerful while lacking a solid theoretical structure. To the contrary, I believe it is possible to show that neo-conservative theory is the coherent continuation and innovative modernization of the most ancient paradigm of social, political and legal order which, first formulated in Ancient Greece and prosecuted until the present time, has always refused and still refuses to acknowledge the mere possibility of a global system of peace and security. This ancient thinking, which I propose to call "holistic particularism," prefers the firm and apodictic defence of the national interests or, more generally, of the interests of particular communities. It is precisely *against* this view that international law has developed with the function of guaranteeing at least the coexistence and, within the most ambitious theories and practices, also the cooperation among international actors. The second move of the chapter in Part C, thus, will consist in presenting the main characteristics of this, so-called, "archaic" paradigm of order as well as the variants it has developed over the centuries: realism, nationalism, and hegemonism.

Although neo-conservatism contains the core features of the paradigm, which it has in common with each of the versions of holistic particularism, its direct descent comes from the most recent of them, namely from hegemonism. In fact, neo-conservatism shares with all variants of holistic particularism the assumption that order is only possible *within* largely homogeneous societies, while outside of them, *i.e.* in the relations *between* them, merely a partial limitation of disorder would be feasible.[4] However, among the variants of the particularistic-holistic paradigm, only hegemonism meets the challenges of globalization: extending the borders of political communities beyond the nation and re-defining them as civilisations or polities acting globally and defending their interests or even values on a worldwide scale. In this way hegemonic politics can gather enough resources to guarantee its survival and success in times of increasing competition. This is precisely the same goal at which neo-conservative authors also are aiming with their cultural campaigning. Continuing the hegemonic project, they are committed to making the twofold idea, which combines the unbroken belief in the internal order of homogeneous communities with a deeply sceptical view of the

[4] For more details, *see infra*, Part C.

unavoidable international disorder, fit for a globalized competition.[5] Nevertheless, while the more "classic" supporters of hegemonism have limited the hegemonic claim by proposing to expand political control only until the borders of the territories populated by (presumably) homogeneous *ethnoi* or civilizations, the neo-conservative authors refuse any similar (or any other) constraint insofar as they pretend to pursue universal values (human rights, freedom, etc.). For this reason, the neo-conservative approach will be presented in Part D as the most radical interpretation, not only of the particularistic-holistic paradigm in general, but even of the hegemonism as its more extreme historically established version.

In a last step, Part E, I outline a critique of the neo-conservative approach with particular regard to its rejection of the normativity of international law. Its theoretical framework is characterized, as mentioned above, by an overlap of the definition of the interests of a single political community and universal values. If we accept the claim that these two elements are, in fact, identical, then we do not need international law, at least if we understand it as a normative system of obligations and a legal instrument guaranteeing the formal composition of diverging interests. Within an approach dominated by unilateral and nevertheless universal values, no international law would be necessary. On the contrary, if we realize that national interests cannot be seen as identical with universal aims for the global order, at least in the absence of a deliberative process safeguarding the right of every actor to express its interests, then we will see how indispensable international law is in today's globalized world. What Manley Hudson knew in the 1930s is even truer today.

B. *The Neo-Conservative Attack on International Law*

The critique of international law has become a staple of neo-conservative thought. In order to illustrate this significant aspect of the neo-conservative view of law and politics, I will consider three approaches. Although different in shape, theoretical background and scientific ambition, they are similar in working out clearly the two main facets of neo-conservatism. The first central characteristic consists of the continuity with a traditional understanding of law and politics. The second central characteristic consists of the novelty and originality of this stream of political thought.

I. *Rabkin's National Interest*

The most aggressive critique of international law can be probably found in the works of Jeremy A. Rabkin. In Rabkin's view, international law is nothing but an instrument

[5] *See infra*, Part C.

for restraining the well-motivated and legitimate national interests of the United States, as the paladin of the free world, and of all other liberal and democratic nation-states. As it was still called "law of nations" – Rabkin argues – international law was largely about war and commerce, and therefore limited in reach and range.[6] Moreover, it was based on reciprocal restraints, thus pre-existed and stood independent from establishing international institutions as well as, *a fortiori*, from the aim to enforce decisions taken by a nebulous international community. However, in the last decades international law developed into a much more ambitious and invasive enterprise, thought to give effect to the alleged will of nothing less than humankind itself, with its interests and values. This change of meaning of international law coincided with the transition to the United Nations, seemingly realizing Hudson's hopes and ambitions:

> When the United Nations was organized in 1945 as successor to the League of Nations, it gave itself a still wider mandate – reaching into human rights, economic and social welfare, and other matters.[7]

To some extent, this evolution can be compared to a similar change in domestic law. Just as domestic law moved from a framework designed to guarantee the interaction of free subjects to an instrument for boosting a certain idea of collective values, international law also left the firm domain of state interaction in order to support a vague concept of the common interests of humankind.[8]

The consequence has been not only a loss of efficiency, but also a shift in the political meaning of international law. This has been the main question for Rabkin. By building institutions, which pretend to be binding on sovereign nation-states, contemporary international law is becoming "a sheer monument to collectivist ideology."[9] That change, Rabkin claims, should pose in itself a problem for liberalism. Yet an even more serious challenge arises from it: in a world which is characterized by a large number of non-democratic states, binding international institutions can represent a handicap for liberal states and for their actions taken in defense of liberty. From this perspective, arguably identifiable as a problem even for those not beholden to a neo-conservative point of view, Rabkin infers a more far-reaching (and unnecessary) consequence, namely, the rejection of *any* idea of an ethical and political universalism. He adopts this position alongside a radical reaffirmation of the traditional doctrine of unilateral national sovereignty that is central to the archaic paradigm of holistic particularism.[10] We see

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[6] Jeremy A. Rabkin, Why Sovereignty Matters 24 (1998).

[7] *Id.* at 29.

[8] *Id.* at 28.

[9] *Id.* at 95.

[10] Jeremy A. Rabkin, *What We Can Learn about Human Dignity from International Law*, 27 Harv. J.L. & Pub. Pol'y 145 (2003).

what radical and, ultimately, absurd conclusion can be drawn from Rabkin's theory in his critique of the International Criminal Court (ICC). To his eyes the ICC serves only as an ingenious expedient for the Germans to "overcome the past, by licensing German judges to try Americans and Israelis for war crimes."[11]

II. *Kagan's Legitimacy Myths*

The most influential attack on international law coming from the neo-conservative camp, probably was launched by Robert Kagan. Albeit more cautious in tone, his arguments are not less caustic in their ultimate meaning than Rabkin's furious denouncement. In particular, the idea of a legalization of international relations is criticized as merely based on "legitimacy myths."[12] In order to properly legalize either the sphere of relations between states, or the ever closer worldwide interaction of individuals, private groups and non-governmental public actors, a legal framework of binding norms should be developed as well as institutions endowed with the competence to interpret and put into practice the legal norms of the international community. Exactly as Hudson understood those long years ago, this competence can only be implemented if nation-states transfer part of their sovereignty to the institutions of the international community, in particular to the United Nations. However, far from being "the place where international rules and legitimacy are founded,"[13] as the UN was described by French Foreign Minister Dominque de Villepin before the Security Council on the threshold of the Iraq war in March 2003, the United Nations and the Security Council, as its main organ, are rather flexible instruments serving the interests of the nation-states. Kagan points out that this judgment holds not only for the foreign policy of the super-power, as demonstrated in cases like the intervention in Haiti in 1994 or the Iraq bombing in 1998,[14] but also for the attitude of the main supporters of the supremacy of the Security Council before the Iraq war.[15] As an outstanding example, Kagan refers here to the Kosovo war in 1999, which, although waged while circumscribing or even flouting the will of the United Nations, had been considered as legitimate by France and Germany. Later, confronted with the prospect of an American-led invasion of Iraq in 2003, France and Germany would become the most decided opponents of unilateral actions.[16] This schizophrenia fuels Kagan's

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[11] Jeremy A. Rabkin, *Worlds Apart on International Justice*, 15 Leiden J. Int'l L. 835, 835 (2002).
[12] Robert Kagan, *America's Crisis of Legitimacy*, 83 Foreign Aff., Mar.-Apr. 2004, at 65, 73.
[13] *Id.* at 73.
[14] *Id.* at 74.
[15] Again, Kagan quotes Mr. de Villepin and his speech in March 2003 before the Security Council, during which he said that the Security Council "speaks in the name of peoples." *Id.* at 73.
[16] *Id.* at 74.

skepticism about the legalization of the international order based on multilateral consent concerning the deliberative rules that should result in legitimate decisions by the international community. He declared:

> Any "rules-based" international order must encompass … conflicts under a common framework. The failure to do so returns us to a world where some nations decide for themselves, guided by their own morality and sense of justice and order, when war is justified or not.[17]

Rejecting the idea of a legalized international order as proposed by the continental European nations because of its "formal and legalistic cast,"[18] Kagan argues that, faced as we are with an existential threat to liberal values, it is worth thinking of a new kind of legitimacy in international relations. The protection of fundamental human rights all over the world should be recognized as superior to the principle of the equal sovereignty of states, with the consequence that actions have to be considered legitimate if they coerce dictators and autocrats to show greater respect for civil and political rights.[19]

III. *Goldsmith and Posner's Rational Choice Theory*

Jack L. Goldsmith and Eric A. Posner have recently undertaken a more ambitious theoretical analysis of the normative limits of international law.[20] Using rational choice theory, they claim that international law has little normative influence on the behavior of states since states always follow their peculiar interests, irrespective of the law. Neither customary nor treaty law can build a framework assuring that compliance with international rules will bring individual states more benefits than defiance or even a breach can. With respect to customary international law, they argue that there is a lack of sufficient information and communication to make any single state actor confident that coordination or cooperation with another state actor will have positive effects on the pursuit of its interests. Regarding treaty law on the other hand, Goldsmith and Posner claim international law lacks control mechanisms and the force of sanctions. The consequence of both failures is the same: international law can only work when states identify an (actually causal) overlapping interest in a convergent behavior. No norm, from the point of view of Goldsmith and Posner, can ever enforce this result.

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[17] *Id*. at 77.
[18] *Id*. at 82.
[19] *Id*. at 78.
[20] Jack L. Goldsmith & Eric A. Posner, The Limits of International Law (2005).

As a presupposition of their research, Goldsmith and Posner assume some far-reaching axioms,[21] like the definition of the state as the unique, significant actor in the arena of international relations, as well as the assumption of a merely instrumental concept of rationality according to which the only rational behavior would consist in pursuing short-termed and particular payoffs. However, these assumptions are far from being self-evident. In fact, some questions arise from Goldsmith's and Posner's axioms. Is it correct, first, to treat collective actors (states) in the same way as single actors (individuals)? And, second, does not a purely instrumental understanding of rationality lead to a restricted view of human praxis? In fact, game theory was conceived to explain the actions of concrete individuals, not of complex social, political and administrative structures that are difficult to conceptualize as single players. Goldsmith and Posner assert that the assumption is nonetheless justified by the particular shape of the international arena, where states are normally perceived as acting as a unitary whole, and because the "billiard ball" approach, considering every single state as a unity, albeit "far from perfect," would be simply "parsimonious,"[22] in the sense that it would allow the reduction of the analyzed phenomena to a useful number and complexity in order to concentrate on the most significant among them. This argument, however, has little content in the face of one of the most relevant trends of our times: the de-structuring of state unity and the progressive development of private and public networks.[23] Ignoring these new developments would not provide for a healthy reductionism in scientific analysis, but, rather, for a misunderstanding of the present reality. Furthermore, either rationality should be understood in a more than purely instrumental sense[24] or, even if it is conceived as a mere instrument for the achievement of particular goals, it does not necessarily find its highest self-fulfillment in the *immediate* maximization of short-sighted payoffs. From a more far-reaching point of view, it also might be argued that the creation of norms, rules and solid international institutions to secure their compliance is, already in itself, a better achievement of instrumental reason insofar as it guarantees higher benefits in the long term.[25]

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[21] *Id*. at 4.

[22] *Id*. at 6.

[23] Anne-Marie Slaughter, A New World Order (2004).

[24] Jürgen Habermas, Theorie des Kommunikativen Handelns (1981); Andrew Linklater, The Transformation of Political Community (1998); Thomas Risse, *"Let's Argue!": Communicative Action in World Politics*, 54 Int'l Org. 1 (2000); Harald Müller, *Arguing, Bargaining and All That: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations*, 10 Eur. J. Int'l Rel. 395 (2004).

[25] The most famous example of a non-shortsighted use of strategic rationality has been delivered, at the very beginning of modern times, by Thomas Hobbes in his motivation for the transition

The analysis of the epistemological deficits of Goldsmith's and Posner's theory would go far beyond the purposes of the present contribution.[26] However, a few words still must be said about Goldsmith's and Posner's view of the relationship between democracy and international law. Although more moderate than Rabkin or Kagan in branding international law as a kind of undesirable tier that could (or, in the eyes of illiberal states, even should) bind the worldwide aspiration to liberty, they claim nevertheless that one of the most important reasons why democratic states do not submit themselves to international rules, thus transferring part of their sovereignty to supranational institutions, consists precisely in their specific form of domestic legitimacy, namely the power of the people. Insofar as governments are accountable to the citizens in democracies, and the citizens are not prone to prefer altruistic policies, liberal democracies would be precluded from pursuing cosmopolitan projects:

> To the extent that citizens do in fact have weak or nonexistent cosmopolitan sentiments, political institutions in liberal democracies cannot easily engage in cosmopolitan action. In a liberal democracy, foreign policy must be justified on terms acceptable to voters.[27]

In the view of Goldsmith and Posner, the more liberal and democratic the polity, the less willing it will be to submit itself to supranational rules. Yet, one could reply that there is some discrepancy in compliance with international law among liberal democracies. In most cases European states support ceding portions of erstwhile state sovereignty to supranational institutions. But others, most notably the United States, are much more reticent to do so. Goldsmith and Posner join Kagan in ascribing this difference to the differential of power: "Powerful states do not join institutions that do not serve their interests."[28] Following the interpretation of democracy and compliance with international rules as inversely

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from the state of nature to civil society. *See* Thomas Hobbes, Leviathan Ch. XIII et seq. (1651). For a different – and more recent – proposal in order to enlarge the horizon of instrumental rationality, *see* Robert O. Keohane, After Hegemony: Cooperation and Discord in the World Political Economy 65 (1984).

[26] *See, e.g.*, Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 Tex. L. Rev. 1265 (2006); Andrew T. Guzman, Book Review, *The Promise of International Law*, 92 Va. L. Rev. 533 (2006); Oona A. Hathaway & Ariel N. Lavinbuk, Book Review, *Rationalism and Revisionism in International Law*, 119 Harv. L. Rev. 1404 (2006); Detlev F. Vagts, *International Relations Looks at Customary International Law: A Traditionalist's Defense*, 15 Eur. J. Int'l. L. 1031 (2004); Anne van Aaken, *To Do Away with International Law? Some Limits to 'The Limits of International Law'*, 17 Eur. J. Int'l L. 289 (2006).

[27] Goldsmith & Posner, *supra* note 20, at 212.

[28] *Id*. at 223. This is precisely one of the most important arguments articulated by Kagan in his successful book *On Paradise and Power* in order to explain the differences in the foreign policy between the United States and Europe. Robert Kagan, On Paradise and Power (2003).

related, therefore, a democratic state will always prefer relying on its own resources and interests, unless it is not strong enough to take full responsibility for its actions.

In spite of the numerous differences, two core elements are present in each of these approaches:

1. They all share the conviction that social, political and juridical order can only be realized within a particular community, whereas outside of it, *i.e*. in the realm of the relations between the polities, mainly disorder or, in the best case, its precarious limitation can be found.
2. The idea that conflict reigns in the relations among states was traditionally softened by some kind of prudential restraint generating an unstable but nevertheless real limitation of the recourse to war. Admittedly, such a system of restraint depended on the most favorable conditions. But no such constraint can be found in the neo-conservative vision. The defense of national interests is not only the highest duty of every government; instead, it has become unparalleled by any other value, including peace. Moreover, this thoroughgoingness is now justified by the recourse to the democratic principle: the politics of privileging unilateral national will ought to prevail, from a normative point of view, because it is the only politics that is legitimized by the people.

As I noted earlier, the first of these two elements highlights the continuity of the neo-conservative thought to one of the most influential historical paradigms of social, political and legal order, while the second one demonstrates, on the contrary, that the neo-conservatives have brought important changes to that tradition.

I will continue the analysis by focusing on the first of these two elements.

C. *Neo-Conservative Thought in the Context of the Paradigms of International Order: The Continuity of a Legacy*

Without order, society is not possible. The concept of order describes the set of rules governing the socio-economic and political interactions among individuals within a more or less extended context, as well as the fact that these rules are, to a large extent, recognized as just and observed by those subject to them. Of course, during more than two-an-a-half thousand years of Western civilization[29] several

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For an analysis of content and background of Kagan's bestseller as well as for a critique of his approach *see* Special Issue: *The New Transatlantic Tensions and the Kagan Phenomenon*, 4 German L.J. 863–990 (September 2003), *available at* http://www.germanlawjournal.com/pdf/Vol04/pdf_vol_04_no_09.pdf.

[29] In fact, the analysis is here limited to materials conducing to patterns of Western civilization. However, the scholars specialized on the non-Western political and legal history will probably

visions of order have been developed, with each characterizing a period of political and legal history. I propose to define these different visions as "paradigms of social, political and legal order," treating each paradigm as a coherent set of concepts and theories aiming to interpret the social world and also to give us, as to the given situation, the best instrument for acting in it.[30] Every paradigm of order comprehends two dimensions, the first of which concerns the possible range of the order, the second its nature and structure. Accordingly, paradigms always contain a claim concerning the extension (first of all, but not only, in a territorial sense) of the well-ordered community of human beings. This dimension finds its expression in the question whether order is always particular, or can also be, at least potentially, universal. In the first case, we assume that it can only be realized within single communities, with the consequence that each community has its distinct order while disorder (or its fragile and temporary limitation) reigns between these closed systems. Or, if we opt for the second answer, order can eventually be extended to the whole of humankind. The second claim contained by every paradigm regards the foundations of order and how it can be implemented. Common questions in this dimension include whether order relies upon a quasi-natural source (the homogeneity of the nation, for example, in a particularistic view of the concept, as well as the unity of the whole of humankind in a universalistic one), or is order a product of human construction and will (such as in the case of the contractual theory of state). From the point of view of legal theory, paradigms of order always culminate in a peculiar conception of public law, sometimes corralling it within the boundaries of single polities and, thus, regarding international law merely as the precarious framework of coexistence originating from the non-curtailed sovereignty of nation-states, sometimes expanding international law to a genuinely universal law of cooperation, guaranteeing peace and the protection of fundamental rights for all humans.

As noted above, many paradigms of social, political and legal order have been developed during the centuries. Particularly interesting for my effort, however, is the first of them, to which also the neo-conservative thought belongs as its more recent and radical form. This most ancient of all paradigms of order moves from a

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recover the fundamental elements of the presented pattern of order as common also to their traditions. Yet, my little knowledge of non-Western political thought prevents me from claiming this with certainty. However, at least the hegemonic variant of the pattern, in which it finally culminates, can be likely seen as a genuine Western product – one of which we should not be proud.

[30] In this sense, the definition of paradigm is closely related, although not identical, to its understanding as proposed by Thomas Kuhn. *See* Thomas S. Kuhn, The Structure of Scientific Revolutions (1963).

simple and yet far-reaching assumption, namely, that order is only possible within a largely homogenous polity. The resulting communities appear to be necessarily concurring and conflicting parties with respect to their mutual relations. Two elements contour each other within this definition. First, the homogeneity of the single community involves the denial of common values and interests beyond any single community's borders, thus generating external conflicts. Second, the competition for the acquisition of scarce resources in a world without any universally shared and somehow stable mutual recognition has, as its necessary consequence, the strengthening of the community's internal ties. Being only a "particular" view of order, and based as it is on a "holistic" understanding of society (since it claims that the whole, and in particular the good consisting in its homogeneity, is always more than its parts), I propose to call this paradigm "holistic particularism."

Not surprisingly, holistic particularism has changed its shape during its two-and-a-half thousand years of history. In particular, three variants have emerged, mostly as a reaction to challenges growing from the social, political and economic world, *i.e*. influencing the scientific pattern from outside, as well as, to some extent, rearranging the scientific construct from the inside, namely as a consequence of the emergence of new paradigms or as an attempt to resolve the deficits of the already-achieved philosophical construction. The three outstanding variants of the particularistic holistic paradigm are realism, nationalism, and hegemonism.

I. *Realism*

Already formulated in its core assumptions in ancient Greece, *realism* is the oldest shape that has been given to the basic idea of holistic particularism. Reduced to a simple formula, its main assertion is that all politics, if correctly understood, is nothing but struggle for power in order to obtain access to resources, which, scarcely and inequitably distributed on earth, are nonetheless necessary to secure the achievement of individual or collective goals, such as survival (in the less favorable case) or success (in the most advantageous). After having been elaborated with laconic mastery by the Greek historian Thucydides in his report on the Peloponnesian War,[31] the "realistic" view of politics was re-proposed, substantially unchanged, by the Italian political writer Machiavelli in the early modern era.[32] However, neither Thucydides and Machiavelli, nor their numerous successors or *epigones*, could manage to overcome the most specific and serious deficit of realist thought, namely, its inability to explain the evident difference

[31] Thucydides, The Peloponnesian War V, at 86 (1959).

[32] Niccolò Machiavelli, Il Principe (1513); Discorsi Sopra la Prima Deca di Tito Livio (1513–1519).

between internal and external policies of the political community. In fact, whereas it seems to be provable – at least according to a shallow overview – that the foreign policy of states is guided by no constant rules but expediency, such a claim of lawlessness and instability is evidently counterfactual if applied to the framework of home affairs. In other words, the interactions *within* a political community, regardless of its presumed homogeneity, are manifestly ruled, at least partially, by law and organized up to a certain degree on solidarity, which means beyond mere self-interest. The failure to explain in a convincing way the *whole* (inside the polity and outside) realm of politics as a quest for power is one of the most important reasons, if not the most significant of all (at least on the conceptual level), why classical realism made way, roughly half a century ago, to the so-called "structural realism" or "neo-realism" of the new discipline of international relations.[33] Hans J. Morgenthau, as the founder of the new discipline,[34] still maintained the pretence of explaining all politics as a struggle in defense of self-interests.[35] But, he was forced to concede the inconsistency of the actually reliable mechanisms of home politics and the permanent confrontation abroad,[36] thus focusing his "realistic" analysis exclusively on the latter. The scholarship that grew under the umbrella of his "neo-realistic" approach eventually, and totally, gave up the examination of the foundations of the at least partial cohesion of domestic policies and came to focus exclusively on the way states, as the sole (or at least as the main) actors of international relations, organize their mostly hostile interactions.[37]

II. *Nationalism*

Trying to find an acceptable reason why domestic politics is shaped differently from international relations, Morgenthau eventually resorted to the concept of the *nation* as the consolidating factor within the single political community.[38] While abandoning the terrain of "classical" realism, he turned, in order to explain the cohesion of the polity, to the central theoretical tool of the second stream of the particularistic holistic paradigm, namely to the idea of the *nation*. Specific to nationalistic political thought is the conviction that outlining the cultural

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[33] Anne-Marie Slaughter, *International Law and International Relations*, 285 Collected Courses of The Hague Academy of International Law 9, 30 (2000).

[34] Hans J. Morgenthau, Politics Among Nations: The Struggle for Power and Peace (1948).

[35] *See* Kemmerer, in this volume.

[36] Morgenthau, *supra* note 34, at 31, 35.

[37] Within the very voluminous literature, as the historically maybe most eminent exponent, *see* Kenneth N. Waltz, Theory of International Politics (1979).

[38] Morgenthau, *supra* note 34, at 118, 244, 471.

identities that form the different nations can enlighten the divergent attitudes towards nationals and foreigners, also justifying solidarity and inclusion inside as well as collision and exclusion outside. Although less ancient than realism, nationalism also has a quite long history, dating from the time of political Romanticism, when conservative political writers, especially in Germany, borrowed the nation-concept from the progressive lexicon of the French Revolution and adapted it to the needs of a re-founded social and political conservatism.[39] Elites created a powerful idea by founding the cohesion of the political community on the identity of the nation. For the next century-and-a-half, this vision of the nation was able to boost the internal solidarity in a way that far exceeded the antiquated Aristotelian vision of the society as an enlarged family,[40] involving in the nationalist project broader social classes that no longer could be excluded from political process, and addressing their tensions towards an aggressive foreign policy. This, of course, finally led to the horrors of colonialism and imperialism. Nation-states at the apex of the nationalistic era, albeit always privileging their own interests, nonetheless also showed a disposition – somewhat surprising and, to some extent, even contradictory to their other tendencies – to recognize the need for coexistence and coordination, signing treaties which marked the acme of humanitarian international law and qualified the law of the peoples as the "gentle civilizer of nations."[41]

III. *Hegemonism*

Despite the unquestionable and long-lasting historical and political success of the nationalistic project, the ongoing transition to an ever-more-closely interlinked world manifested its weaknesses. In fact, an idea mainly concentrated on the protection of the national identity, no matter how small and marginal a nation might be, does not provide the best conceptual precondition for supporting adequately the sometimes fierce worldwide competition for scarce resources. Most nations – and maybe all of them – are actually too weak to compete while relying exclusively on their peculiar assets. It became necessary to find a broader basis for mobilizing human and material resources in order to tackle the demands of the new global game of survival and success. In other words, provided that a really universal perspective was beyond the horizon of the supporters of the particularistic holistic

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[39] Adam H. Müller, Die Elemente der Staatskunst (1809).

[40] Aristotle, The Politics I, at 2, 1252 et seq.; Jean Bodin, Six Livres de la République I, at I, 1 (1576); Robert Filmer, Patriarcha, Or the Natural Power of Kings (1680).

[41] Martti Koskenniemi, The Gentle Civilizer of Nation: The Rise and fall of International Law 1870–1960 (2001).

paradigm, the development of a more comprehensive definition of the political community that could gather more social and economic assets seemed necessary. The turn to *hegemonism* was the answer. Through hegemonism the particularistic holistic paradigm could incorporate a global perspective without going universal, that is, confirming the belief in the non-universality of order and nevertheless offering adequate conceptual tools in times of worldwide competition. The first answer in this direction was given by the German political philosopher – and "crown-jurist" of the Nazi regime – Carl Schmitt with his theory of "large-range-order" (*Großraumordnung*).[42] He was aware of the inadequacy of the traditional concept of the nation,[43] first because of the changes in warfare and second as a consequence of the "moralization" of international law introduced by the United States after World War I. To address this he urged his *Großraumordnung* as an idea of global (yet not universal) order based on a few great powers, thus allowing those powers to enlarge both the range and meaning of order as well as the resources needed to achieve it. The hegemons should guarantee the governance of their respective spheres of influence, which had to be largely homogeneous in ethnic composition and ideological orientation. Between the spheres of influence, which should not be disturbed by foreign intervention, competition and, if necessary, also armed conflict were accepted as the rule. In Schmitt's conception, the particular community assumes continental proportions due to a more inclusive definition of the reasons of the cohesion (not the language, for instance, but an homogeneous political system; not the national culture, but the race or, as we would say today, the ethnos). In this way, the hegemon is enabled to play the brutal game of survival and annihilation on a global scale, although remaining fully particular in its intents and values. Assertions of universal interests or values, in Schmitt's view, are no more than mere deceits. For some decades Schmitt's theory of *Großraumordnung* enjoyed little interest and even less appreciation. However, the influence of his thought remained quite strong, at least at a subliminal level, so that the features of his hegemonic reinterpretation of the particularistic holistic paradigm, in general, and of its idea of the international relations in particular, outlining the comprehensive definition of the political communities as the actors of international relations as well as the existentialistic dimension of conflicts, reappeared recently in Huntington's influential idea of the "clash of civilizations."[44]

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[42] Carl Schmitt, Völkerrechtliche Grossraumordnung mit Interventionsverbot für Raumfremde Mächte (1939). The concept has been later redefined, the theory being yet substantially restated. Carl Schmitt, Der Nomos der Erde im Völkerrecht des Jus Publicum Europeum (1950).

[43] Carl Schmitt, *Das Zeitalter der Neutralisierung und Entpolitisierung, in* Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corollarien 87 (1963).

[44] Samuel P. Huntington, The Clash of Civilizations (1996).

Two conclusions can be drawn at the end of this short presentation of the general contents and different versions of the particularistic holistic paradigm. First, neo-conservative thought shares with all variants of the paradigm its two main characteristics, namely the idea that social, political and legal order can only be possible within a compact community as well as the notion that this compactness relies on pre-critical homogeneity. This justifies the claim that the neo-conservatives belong to the outlined paradigm. The second conclusion regards, more specifically, the relation of the neo-conservatives to the variants of the paradigm. Two elements are decisive in this regard. Above all, we should keep in mind that realists and nationalists, albeit thoroughly skeptical about the possibility of world order, are nevertheless willing to admit the necessity of a certain constraint as regards the goals pursued by the single political community in its international actions as well as the means deployed to achieve them. Accordingly, Thucydides, Machiavelli and, more recently, even Morgenthau[45] admonished restraint in international relations, in order not to overstretch the particular community's capacities. This attitude traces back directly to the power-based idea of politics peculiar to the "realist" school, whose claim for self-limitation, albeit not a question of normative principles but only of prudential behavior, implies an honest effort against the dangerous merging of factual political interests and existentialist attitudes. Otherwise, nation-states have been able, just in the golden age of nationalism, to accelerate the development of international law. Certainly, the agreements signed in that "heroic" time, Manley Hudson's time, did not result in important, enduring supranational institutions that could prevent the drive to war, proving impotent in the face of the aggressive tendencies deeply rooted in nationalistic thought and politics. This notwithstanding, the presence of a certain openness to international agreements testifies to how nationalism could be able, under favorable circumstances, to recognize the fundamental importance of the normative element of law, though only in a transitional way.

Both elements – the outlining of the factual moment of politics against its colonization by identity claims and the respect for the normativity of law – are absent in the hegemonic variant of the paradigm as well as in neo-conservative thought. In both cases politics is the conveyer of existentialist aspirations carried on by post-rationalistic, ideologically-based communities, kept together not eminently by common interests, but rather by shared principles in order to mobilize all available material and spiritual resources. In front of a vital fight for survival or decline, of a battle for life or death, no normative or prudential constraint can be accepted anymore: the community's security requires imposition of the community's rules on a scale as large as possible.

Having established the continuity, in general, of neo-conservative thought to the particularistic holistic paradigm and located it within the hegemonic paradigmatic

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[45] Morgenthau, *supra* note 34, at 10.

variant, it is time now to move on to the question whether neo-conservatism can be seen, despite all these connections with the tradition, as a new approach in the history of political and legal thought.

D. *Neo-Conservatism as a Break in the Tradition: The Turn to Globalism and to Principles-oriented Politics on the Path of Holistic Particularism*

In order to outline the particularity of the neo-conservative contribution to the contemporary theory of law and politics, it is necessary to refer, first of all, to a double aspect of "classical" hegemonic approach from Schmitt to Huntington. First, "classical" hegemonism never bore really global aspirations: rather it extended the range of the homogeneous community, aiming to create a hegemonic system in distinct spheres of influence in order to gather more assets for global competition. It did not aspire to impose everywhere in the world a coherent set of values. Therefore, hegemony was always limited to a large but not worldwide scale, and, thus, there was no global order *per se*, but only competition among the enlarged hegemonic communities. Not surprisingly, we find both in Schmitt[46] and in Huntington[47] cautious warnings against the tendency to overestimate the community's values and the ambition to impose them universally. In this perspective – now moving on to the second aspect of "classical" hegemonic theory – values are fundamental in order to compact the society and make it fit for competition; yet they are always something relative, not universal. Both aspects are lost in neo-conservative thought.

I. *Neo-Conservative Hegemony*

The neo-conservatives acknowledge no limitation to hegemonic expansion. Not surprisingly, therefore, the concept of "empire," which seemed to belong to an old-fashioned political vocabulary, has re-emerged in the contemporary debate. The concept is used by the critics of hegemonism as to outline the features of a system which pretends to guarantee a global order, while oppressing, in reality, cultural pluralism and the just interests of the weak.[48] However, the idea of "empire" as a globalized political and legal regime is also re-vitalized, here with a positive connotation, by neo-conservatives like Deepak Lal. In Lal's view, empires

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[46] Carl Schmitt, Positionen und Begriffe 151, 309 (1994).

[47] Huntington, *supra* note 44, at Chapt. V, 12.

[48] Michael Hardt & Antonio Negri, Empire (2001); Detlev F. Vagts, *Hegemonic International Law*, 95 Am. J. Int'l L. 843 (2001); Nico Krisch, Imperial International Law (2004) (Global Law Working Papers 01/04).

can perform much better than nation-states in realizing the main goals of social life, namely maintaining peace and securing prosperity.[49] Furthermore, empires can achieve these goals on a significantly larger scale. The rehabilitation of the historic function of empires is then enlarged to comprehend also the role played at the present time by the United States. Tearing the "million strings" of international law which aim at tying down the super-power, impeding its free movement as the Lilliputians did with the overwhelming Gulliver, the United States should accept its imperial role along with the duties arising from that role. This consists, first, in securing global order, and second in expanding modernization. While global order guarantees peace on a large scale, modernization is the condition for prosperity.[50] Therefore, Lal's imperial conception globalizes hegemony in a way unknown to the tradition prior to the neo-conservative turn. Indeed, the regime imposed by the hegemonic U.S.-superpower is now extended throughout the world, in fact in a form that largely exceeds any other factual imperial attempt of the past as well as any historical ideology of hegemonism. But we find no reference to the universality of the values carried forth by the "empire." The sense of the empire's rule has to be found, Lal argues, in the security and wealth it can deliver all over the world, not in the questionable superiority of its moral and ethical principles.

II. *Justifying Neo-Conservative Hegemony*

But Robert Kagan claims precisely such a superiority of Western values, as defended in particular by the United States. Far from being analogous to the despotic superpowers of the past, the United States

> *is* a behemoth with a conscience. It is not Louis XIV's France or George III's England. Americans do not argue, even to themselves, that their actions may be justified by *raison d'état*. The United States is a liberal, progressive society through and through, and to the extent that Americans believe in power, they believe it must be a means of advancing the principles of a liberal civilization and a liberal world order.[51]

Liberty being a value shared, in principle, by all humans, the United States can reasonably claim to act globally. Furthermore, its intervention in the name of freedom is not a violation of the principle of equal sovereignty but a defense of a fundamental right. From the global validity of liberty Kagan ultimately draws the legitimacy of the worldwide American predominance:

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[49] Deepak Lal, In Defense of Empires 2 (2004).

[50] *Id.* at 35.

[51] Robert Kagan, *Power and Weakness*, 113 Pol'y Rev. 1 (2002).

> modern liberalism cherishes the rights and liberties of the individual and defines progress as the greater protection of these rights and liberties across the globe. In the absence of a sudden democratic and liberal transformation, that goal can be achieved only by compelling tyrannical or barbarous regimes to behave more humanely, sometimes through force.[52]

Hence, as a consequence of the neo-conservative turn, particularly in its more radical expression, hegemonism has reached an unprecedented worldwide extension and is based on an alleged superiority and universality of a particular community's values. Neo-conservatives – and in particular Kagan – seek to legitimize the global rule of the superpower and its right to intervention. At the same time, they insist that "the United States can neither appear to be acting, nor in fact act, as if only its self-interest mattered."[53] Such claims, however, do little to contradict the fact that the content of the hegemon's values do not reach beyond particularism. In fact, the hegemon's extension cannot properly be understood as the result of a really *universal* process because it does not arise from deliberative processes open, in principle, to all well-motivated arguments and contributions.[54] Rather, the assertion of the superiority of Western values is grounded on a unilateral claim, pretending to be self-evident but denying the challenge of a possible falsification. Neo-conservative thought refuses, in general, to engage with the "other" via a deliberative method, potentially involving all concerned subjects. But only such a discourse could lead to universally acceptable results and thus transcend particular interests. Consequently, it remains within the tradition of political theory that asserts that order can only be produced by homogeneous communities – with the difference, however, that a single community now pretends to extend its idea of order and values on a *global* level. Globalizing its rule and values, the superpower makes itself fit for new challenges. But shaping the rules in a properly inclusive and hence really universal way lies beyond the horizon of the limited neo-conservative outlook.

E. *Some Remarks on the Question Why Public International Law Should Not be Seen as Obsolete*

Law is the formal crystallization of the conditions of human interaction. As such, it sets the rules which make it possible for human interaction to unfold correctly, and guarantees the effectiveness of the norms, *i.e.* the compliance with them. Insofar as rules refer to matters or areas of common concern, including shared

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[52] Kagan, *supra* note 12, at 78.
[53] *Id.* at 85.
[54] Risse, *supra* note 24; Müller, *supra* note 24.

values or interests, and are enacted and imposed on individuals by compulsive authority and not formulated as a consequence of private agreements, law is defined as public law. Therefore, public international law comprehends the rules of global interaction, the norms that allow all human beings to meet on a field of mutual recognition.[55]

Having specified the terrain of public international law, its existence would become simply irrelevant or superfluous if at least one of the following two conditions were to occur: (1) no ordered interaction among human beings can develop on a global scale; or (2) globally valid principles are held in almost exclusive possession by a single political community, so that the only way to impose global rules would consist in widening as much as possible this community's sphere of influence. In the first case, since a stable order would only be possible within individual political communities, international law would become factually inapplicable and marginal. No higher normativity could be recognized, indeed, for norms which cannot bind in principle or in fact, neither as hard nor as soft law, sovereign states. The sovereignty of states would be everything, and any law operating between states would always be at the disposal of their sometimes benign

[55] This assertion should not be understood as a kind of naïve "wishful" or "positive thinking." Authors coming from the tradition of Critical Legal Studies have, in fact, convincingly demonstrated that international law has been conceived and implemented in many, if not in most, cases to justify the dominance of the mighty and the oppression of the weak. *See, e.g.*, David Kennedy, The Dark Sides of Virtue: Reassessing International Humanitarianism (2004); Antony Anghie, Imperialism, Sovereignty and the Making of International Law (2005). Similar criticism has been raised by scholars expressing a point of view external to the Western tradition. *See* Ram Prakash Anand, Studies in International Law and History (2004). Nevertheless, even an international lawyer as deeply influenced by Critical Legal Studies as Martti Koskenniemi has finally come to outline the relevance of the "legal formalism" of international law, as an instrument not only prone to articulate the interests of the mighty, but also able to express the universal claims of the oppressed. *See* Koskenniemi, *supra* note 41, at 494; Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 562 (2005). On Koskenniemi's influence on the recent development of the understanding of international law, see Special Issue: *Marking the Republication of 'From Apology to Utopia'*, 7 German L.J. 77–1176 (December 2006), *available at* http://www.germanlawjournal.com/past_issues_archive.php?show=12&volume=7. Koskenniemi's turn to "legal formalism" makes the difference clear between the critique of international law by the neo-conservatives and that formulated by the authors influenced by Critical Legal Studies. For the former, international law is too universal and aims at binding unduly the power of nation-states. For the latter, it is actually not universal enough tending to privilege the strongest. From a progressive point of view – that means, if we think that power can neither in domestic nor in international politics be accepted without imposing legitimate boundaries in order to protect the weak – international law, albeit far from being perfect, is the best tool we possess. This is simply the reason why we should use it, at least the best we can.

but always changeable free will. In the second case, international law would become useless if we presuppose that global rules do not arise from a worldwide discourse under condition of mutual recognition, but exclusively from the successful imposition of hegemony by the nation (or nations) standing for universal values. Fighting the battle between good and evil, the reasoning and values of the other side are nothing but deceit; compromise under these conditions is always a shady business.

Curiously, and for the first time in the history of political and legal thought, the neo-conservatives have managed to combine both the skepticism of the universality of order and the conviction of the global validity of principles. Surely, they do not go so far as to deny completely the sense of international law. Yet, their approach limits its reach and range to such an extent that very little remains of its normative content. Against what neo-conservatives believe to be "self-evident," there are many arguments that undermine both of the assumptions central to the neo-conservatives' marginalization of international law. First, the idea of the non-necessity or impossibility of order on a universal scale is already largely falsified – albeit, of course, indirectly – by some of the most important supporters of this idea themselves. In fact, even the realists, although cautiously, accept the hypothesis of some kind of diplomatic agreements aiming to constrain conflict,[56] which proves, at least, that in their opinion a certain degree of order is feasible and desirable. Furthermore, even if it is correct that diplomacy cannot resolve the prisoner's dilemma because every player, being unsure about the behavior of its opposing parties, may keep thinking that defiance can bring more payoffs than compliance, it is worth considering whether the creation of a solid and controllable legal framework would not introduce the guarantee that would be able to convince every player to comply. In fact, international law is nothing but such a framework, overcoming the simple face-to-face level of diplomacy and putting at disposal precisely those instruments *super partes* of shared normativity, formalized dispute-settlement, controlling procedures and inclusion. Finally, as mentioned above, politicians and diplomats managed, even in the era of the most successful development of nationalism, to lay the foundations of an important part of contemporary international law. The facts that the system they grounded largely collapsed along with the outbreak of World War I, or that Manley Hudson's beloved League of Nations was not able to prevent the carnage of World War II, can hardly be seen as proof of the non-necessity or even impossibility of a universal order. The archaic reaction to this history is to throw the baby out with the bath water and reject altogether the notion of an international order regulated by law. But there is an alternative response to the 20th century's

[56] Morgenthau, *supra* note 34, at 505.

failures. Provided that order is always fragile, and that the more complex and far-reaching interactions are, the more delicate the set of norms regulating them will be, the horrifying backstrokes of the 20th century demonstrate that an international law concerned merely with coexistence and coordination is too porous and unambitious to guarantee the stability of order, requiring instead a more ambitious and vigorous law of cooperation within a universally valid legal framework committed to peace and to the protection of the fundamental human rights.[57] In other words, the atrocities of the first half of the last century[58] do not prove, thus, that international law went too far, but rather that it did not go (yet) far enough.[59]

Second, claims of possessing the unique key to universally valid principles, no matter which nation may proclaim it, should be viewed very skeptically. It is, in fact, not by chance that the neo-conservative definition of the values that should be defended on a global scale reflects precisely a certain Western vision, largely identifiable with the interests of Western nations. They admit no doubt, for instance, on the centrality of exercise of free economic entrepreneurship. Even authors like Deepak Lal, who are moderate in arguing for forced democratic change outside of the Western world, are committed supporters of a global "modernization"[60] based on the free market economy as well as of a definition of peace directly linked to the maintenance of a free market global order. Then we have, coming in second, the rights of political freedom asserted by Kagan. No mention of the universal validity of social rights, however, can be found in neo-conservative writings – a meaningful silence significantly corresponding to a well-known bias of a certain Western tradition. The skepticism concerning how universal the neo-conservative principles really are should not lead us, however, to the platitudinous relativistic conclusion that no right or value should be seen as universal because values are nothing but the unexportable product of a particularistic culture. On the contrary, there are good reasons for the argument that political freedom must be understood as a fundamental right of every human being and

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[57] On the concepts of an international law of coexistence, coordination, or cooperation, *see* Armin von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization, and International Law*, 15 Eur. J. Int'l L. 885 (2004).

[58] This reference to the atrocities of the first half of the 20th century does not mean, obviously, that in the second half we did not have shocking events of violation of human rights determined by armed conflicts. However, what we see, in this second case, is less the consequence of wars between organized political entities (states) and more the output of irregular conflicts hardly checked by international law. The re-positioning of the challenges to human rights protection can, therefore, also be interpreted as pleading for a further deepening of international law, up to the areas traditionally covered by national sovereignty.

[59] Hudson, *supra* note 1, at 16.

[60] Lal, *supra* note 49, at 35.

that a certain degree of economic freedom constitutes an essential part of individual liberty. Not less good reasons stand, however, for the importance of social rights as a guarantee for the actual exercise of individual and political freedoms.[61] Universality of rights and values can thus be achieved only by inclusive procedures extending to all individuals and groups involved the opportunity to express their well-motivated preferences.

Having established that the denial of the universality of rights and values is, from a normative and conceptual point of view, simply untenable, it also must be pointed out that such a universality is neither an inherent feature of a metaphysical assumption on human nature and society, in the sense that fundamental rights and values would be part of a pre-critical and non-reflexive definition of the "essence" of mankind, nor a quality possessed by a somehow privileged political community, the duty of which would then be to expand the truth. Rather, the universality of rights and values is much more a result than a precondition, insofar as it should be understood as the product of a discursive process including all really and potentially interested individuals and groups. In this sense, universality is guaranteed by procedures, not by ontological contents. Furthermore, the importance of international law is located precisely in this context, namely, as the formal expression of the rules of an inclusive discourse and participation on a worldwide scale. Asserting the unilateral possession of higher values and curtailing, in this way, the inclusive discourse of all involved individuals and groups, the neo-conservative thought flows eventually into a radicalization of hegemonism: indeed, the interests and traditions of a single community are now re-defined in order to tackle the needs of globalization, yet without being opened to a sincere universalization. *Globalizing* a community's values, but not *universalizing* them, is thus the most recent answer of the particularistic holistic paradigm of social, political and legal order to the challenges arising from a more closely interconnected world.

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[61] Amartya Sen, Choice, Welfare and Measurement (1982); Amartya Sen, Resources, Values, and Development (1984); Amartya Sen, Commodities and Capabilities (1985); Amartya Sen, Inequality Reexamined (1992); Henry Shue, Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy (1980); Norberto Bobbio, Il Terzo Assente (1989); Jürgen Habermas, Faktizität und Geltung 156 (1992); Ernst Tugendhat, Vorlesungen über Ethik (1993); The Quality of Life (Martha Nussbaum & Amartya Sen eds., 1993); World Hunger and Morality (William Aiken & Hugh La Follette eds., 1995); Philosophie der Menschenrechte (Stefan Gosepath & Georg Lohmann eds., 1998); Recht auf Menschenrechte. Menschenrechte, Demokratie und Internationale Politik (Hauke Brunkhorst, Wolfgang R. Köhler & Matthias Lutz-Bachmann eds., 1999).

In conclusion, the results of my enquiry can be summarized as follows:

- Beyond the borders of nation-states, forms of global interaction potentially connect human beings all over the world. Though not as thick as within single political communities, this interaction comprehends basic elements of potential and actual communication, including a certain degree of empathy as well as social, economic and political interchange.
- In order to be effective, *i.e.* to become more than merely abstract claims, the normative conditions for the participation in human interaction are to be expressed in legal frameworks. International law lays down these conditions with regard to the worldwide communication among humans.
- Insofar as the worldwide communication among humans is an undeniable fact that requires order and, thus, must be subjected to a legal framework, international law is an essential instrument the function of which cannot be denied or substituted by the globalization of unilateral claims.
- International law derives its universality from its inclusive procedures. That means that every concerned subject should have the opportunity to participate in determining the norms it will have to observe. Through the principle of equal sovereignty, international law traditionally extended this chance only to states. Such a limitation – as neo-conservatives have correctly pointed out – may eventually generate oppression against individuals, particularly in a world still characterized by a minority of liberal democracies. However, the consequence they draw is short-sighted and biased by particular interests. The rejection of the normative potential of international law is not the solution, but rather its extension and redefinition. For instance, the principle of the equal sovereignty of states can be amended (not substituted, however, at least at the present time) by the idea of the *equal sovereignty of peoples*, as well as the legitimacy of international organizations could be improved by well-balanced reforms. Surely these claims should be seen, for the time being, as regulative ideas helping us to interpret and enhance international law. Nevertheless, they are not chimerical. They are based upon real political and legal processes; otherwise they promise to address the problems of a globalized world with a greater sense of justice and sustainability than the neo-conservative retreat to the national community's fortress, refusing to listen to arguments clearly resounding from outside.

Yom Kippur in Hell: The Empty Life of International Law

By Ed Morgan

A. *Literature and Law in Relief*

Despite its reputation for progress in resolving conflict,[1] international law has much to atone for. Armed with a potent mandate for implementing peace and security,[2] international legal actors have faltered in their attempts to act collectively in the cause of world order,[3] or to curb the actions of those who would ignore the collective enterprise. The law's dictates, even in areas crucial to international relations such as the law of war[4] or the rules governing national territory,[5] are at once voluminous and vacuous,[6] with regimes of interstate cooperation

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[1] *See, e.g.*, *Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding* (Medford, MA: Tufts University, 2004); Report of the Secretary-General pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 January 1992, *An Agenda for Peace, Preventative Diplomacy, Peacemaking and Peacekeeping*, June 17, 1992, U.N. Doc. A/47/277; Anne Orford, *The Politics of Collective Security*, 17 Mich. J. Int'l L. 373 (1996); John G. Collier & Vaughan Lowe, The Settlement of Disputes in International Law: Institutions and Procedures (1999).

[2] U.N. Charter art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.").

[3] For a survey of relevant developments on collective action and the Security Council, *see* Danesh Sarooshi, The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers (2000).

[4] Legal pronouncements of the prohibition on armed force, *e.g.*, Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 14, are easily met by declarations of the right to self-defense, *e.g.*, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (Advisory Opinion).

[5] *Compare* the rule of *utti possidetis*, or territorial integrity of existing states, Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, *with* the right of self-determination for those oppressed by existing states, Legal Consequences of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16 (June 12) (Advisory Opinion).

[6] H.E. Judge Gilbert Guillaume, President of the International Court of Justice, Address to the United Nations General Assembly, Oct. 26, 2000, *available at* http://www.icj-cij.org/presscom/

Miller & Bratspies (Eds), Progress in International Law, pp. 119–132.

handily dispatched by notions of the sovereign independence of states.[7] Having created a universe replete with empty promises, it is little wonder that international lawyers periodically flog themselves with guilt and declare a need to release their bonds and start anew.[8]

This chapter explores the idea, or rather the mirage, of Harvard Professor Manley O. Hudson's progress in international law.[9] It does so by examining a specific case study from the Cold War era: the conflict resolution efforts of the Security Council in the aftermath of the 1973 Arab-Israeli war. It is my contention that the paralysis that characterized the central peacemaking institution at this point in its history is not unique to the specific moment in time. Rather, the historic case study demonstrates that instances of international law's "progress," as scholars are prone to think of such significant institutional and doctrinal events,[10] are more akin to markers along the meandering route of an empty vessel. Hudson's claims of progress in 1931 were blind to the imminent conflagration that would soon consume the world and, in the process, confirm international law's impotence. Claims of progress in international law in view of the affairs of the last half-century are equally empty.

In terms of its methodology, this chapter traces the apparent identity,[11] or at least the strong family resemblance,[12] between the themes of international law

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index.php?pr=84&p1=6&p2=1&search=%22Guillaume%22 ("the case files [of the International Court of Justice] remain disturbingly voluminous").

[7] *Compare* Nuclear Test Cases (Australia v. France; New Zealand v. France), 1974 I.C.J. 253 (Dec. 20) (today's international relations are governed by laws of good faith and cooperation), *with* The S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10 (criminal jurisdiction is for each state to determine for itself, regardless of the impact on another state).

[8] Anne-Marie Slaughter, *The Future of International Law: Ending the U.S. – Europe Divide*, Crimes of War Project, September 2002, http://www.crimesofwar.org/sept-mag/sept-slaughter.html ("As in 1945, or perhaps in 1943 with the adoption of the Atlantic Declaration spelling out the goals of the war, the EU and the U.S. should be working with all like-minded nations to strengthen existing international rules and institutions and to develop new ones to address new threats. … We get there by appreciating the many ways in which international law itself has changed and by being much more flexible about how it develops in the future. When I say 'we' here, I intend to address my fellow international lawyers …"). *See also* Foley, in this volume.

[9] Ted Galen Carpenter, *The Mirage of Global Collective Security, in* Delusions of Grandeur: The United Nations and Global Intervention 13–29 (1997).

[10] Manley O. Hudson, Progress in International Organization (1932).

[11] The identity between literature and law is more of an aesthetic one. *See* Terry Eagleton, The Ideology of the Aesthetic 281 (1991) (describing the aesthetic sense as "a community of subjects now linked by impulse and fellow-feeling rather than by heteronomous law, each safeguarded in its unique particularity while bound at the same time into social harmony …").

[12] Ludwig Wittgenstein, Philosophical Investigations 31 (G.E.M. Anscombe trans., 1953) (thematic unities in games and other matters elude real definition, but are susceptible to arrangement in accordance with "family resemblances").

and the short stories of Yiddish writer I.L. Peretz.[13] In the piece for which the chapter is named, "Yom Kippur in Hell,"[14] Peretz relates the poignant tale of a cantor who has an extraordinarily beautiful voice and who leads his entire town in enchanting prayer. Although the cantor himself lacks personal piety, his voice so inspires the townsfolk that they pray constantly and are all treated as devoutly religious souls upon their deaths – so much so that the name of their town is unknown to the occupants of hell.[15] Upon hearing of this from a peddler who died by accident while passing through the town, Satan steals the cantor's voice, prompting the cantor, in turn, to seek his revenge. He takes counsel from a famous rabbi who explains that the voice will only return when the cantor is on his deathbed during his last moments of life. In a desperate act of vengeance for his lost voice, the cantor kills himself by drowning so that the water fills his lungs and blocks the emission of the final burst of sound.

Since, under traditional Jewish law, one who commits suicide has indulged in such a dire sin that he cannot be buried inside a graveyard, the cantor was assured a posthumous audience with his nemesis. Upon entering the fiery underworld and encountering Satan's domain, the cantor burst forth with the voice that had been blocked by the water, emitting a beautiful rendition of the *Kaddish* – the prayer of mourning – sung in the special Yom Kippur melody. As the exquisite sounds drifted through the air, the tortured inmates of hell all began to sing along in atonement for their sins. One by one the sinners "flew out of the jaws of hell and through the open door of paradise,"[16] leaving behind only Satan's devils and the cantor himself. Tragically, it would seem that the cantor had only a coincidental talent, and was unable to fulfill his own promise. "As in his lifetime," the reader is told, "all repented through him but he himself could not repent. A suicide."[17]

The futility of salvation through empty prayer, as illustrated in Peretz' story, neatly parallels the futility of progress through empty doctrine, as exhibited by international law. As indicated at the outset, this legal vacuum will be

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[13] Itzhok Leibush Peretz (1851–1915) is one of the three widely acknowledged masters of Yiddish literature (along with Mendele Mokher Seforim and Sholom Aleichem), and is generally considered the more literary and the greater realist of the trio. Whereas Mendele and Sholom Aleichem wrote about *shtetl* life and were loved as folk heroes, Peretz appealed to the urbanized Polish Jews of his era. *See* Sylvia Rothchild, Keys to a Magic Door: The Life and Times of I.L. Peretz (1959).

[14] The I.L. Peretz Reader 258 (Ruth Wisse ed., 2002) (all Peretz references are to this edition).

[15] The town's name is Lahadam, a Hebrew acronym for the phrase *lo haya ha-davar meolam* ("there never was such a thing"). *Id.* at 259, n.1.

[16] *Id.* at 262.

[17] *Id.*

demonstrated by means of a case study of the Yom Kippur War of October 1973 and its aftermath. In this way, the hollow sound of the law's voice can be heard echoing through the corridors of the United Nations and across the battlefields of inter-state conflict. While literary analysis of legal themes is most often used to underscore the richness of the normative content,[18] it is the theory of this chapter that, in the international arena, a literary parallel can most usefully be deployed to illustrate the broad and general emptiness of the law, and its accompanying lack of progress.

B. *The Security Council's Yom Kippur Resolution*

During the fall of 1973, the Security Council engaged in intense deliberations over the armed confrontation even before the fighting between Israel and Egypt, and Israel and Syria had ended.[19] The result was a unanimous,[20] if vacuous cease-fire resolution,[21] whose substantive thrust was entirely self-referential.[22] In effect, the best the Security Council, as the figure of international law, could come up with in the wake of the 1973 war was a circular admonishment that the parties adhere to the hotly debated wording of Resolution 242 passed in the wake of the

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[18] *See, e.g.*, Martha Nussbaum, Poetic Justice 78 (1995) ("Sympathetic emotion that is tethered to the evidence, institutionally constrained in appropriate ways, and free from reference to one's own situation appears to be not only acceptable but actually essential to public judgment. But it is this sort of emotion, the emotion of the judicious spectator, that literary works construct in their own readers, who learn what it is to have emotion, not for a 'faceless undifferentiated man,' but for the 'uniquely individual human being' ").

[19] *See* Meir Rosenne, *Legal Interpretations of UNSC 242, in* UN Security Council Resolution 242: The Building Black of Peacemaking 29–34 (1993).

[20] Security Council Resolution 338, adopted October 22, 1973, at the 1747th meeting, 14 votes to none, with one member (China) not participating in the vote.

[21] Paragraphs 1 and 3 of S.C. Res. 338 (1973) provides:

> The Security Council
> 1. *Calls upon* all parties to the present fighting to cease all firing and terminate all military activity immediately, no later than 12 hours after the moment of the adoption of this decision, in the positions they now occupy…
> 3. *Decides* that, immediately and concurrently with the cease-fire, negotiations shall start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East.

[22] *Id*. Paragraph 2 provides:

> The Security Council …
> 2. *Calls upon* the parties concerned to start immediately after the cease-fire the implementation of Security Council resolution 242 (1967) in all of its parts.

previous Arab-Israeli war.[23] If the existentialist conflagration involves interchange for its own sake with no exit,[24] international law's post-Yom Kippur ruling fits the infernal bill.

Since the faithless chant of Resolution 338 reflects the normative void of its predecessor, it is instructive to examine the interpretive debates surrounding the Security Council's most famous pronouncement of 1967.[25] In Resolution 242, the Council expressed its usual level of concern over the then-recently terminated military campaign, affirmed in the usual way its commitment to the principles of the U.N. Charter, and emphasized in standard phraseology the need to work toward a "just and lasting peace" in the region.[26] Its two operative paragraphs then addressed, in reverse chronological order, the beginning and the outcome of the June 1967 war:

(i) Withdrawal of Israel's armed forces from territories occupied in the recent conflict;
(ii) Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.[27]

Any reading of the resolution made it clear that, at end of the conflict – when all came to rest on the seventh day – the occupation of territories that had resulted from Israel's victory in the Six Day War would terminate, and the belligerency

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[23] Security Council Resolution 242, adopted November 22, 1967, at the 1382d meeting, adopted unanimously.

[24] Jean-Paul Sartre, *No Exit, in* No Exit and Three Other Plays 47 (S. Gilbert trans., 1955) ("Hell is – other people.").

[25] The Security Council adopted twelve resolutions in 1967, seven of which dealt with the situation in the Middle East, two with the Cyprus question, two with the conflict in the Democratic Republic of Congo, and one affirming the admission of the People's Republic of Southern Yemen as a new member of the United Nations. *See* Security Council Resolutions, 1967, *available at* http://www.un.org/documents/sc/res/1967/scres67.htm.

[26] Resolution 242/67, *supra* note 23, Preamble ("Expressing … emphasizing … affirms … affirms further …").

[27] *Id*. The second part of Resolution 242 went on to further affirm the necessity

(a) For guaranteeing freedom of navigation through international waterways in the area;
(b) For achieving a just settlement of the refugee problem;
(c) For guaranteeing the territorial inviolability and political independence of every State in the area, through measures including the establishment of demilitarized zones.

that resulted in the Arab states' perpetual state of war against Israel would cease.[28] Both sides of the bargain were, in the words of Lord Caradon, the British representative at the United Nations in 1967, "of equal validity and equal necessity."[29] The question on which the parties ultimately joined issue, however, was whether one of these moves was predicated on the prior accomplishment of the other.

The legalities of each position were thrashed out in the pages of the *American Journal of International Law* in the mid-1970s, with the Arab position coming out first with a pre-emptive defense by Kuwaiti international lawyer Ibrahim Shahita,[30] and the Israeli view set out in response by Yale law professor and former State Department official Eugene Rostow.[31] While the former maintained that the Yom Kippur surprise attack by Egypt and Syria was itself a defense against the aggressive 1967 occupation,[32] the latter asserted that absent peace treaties Israel was entitled to occupy the 1967 territories by virtue of its own defensive needs.[33] Both positions, in other words, were founded on attenuated theories of self-defense; at the same time, both acknowledged the complexity of the matter.[34]

The most interesting part of the debate between these legal scholars is that it came almost directly on the heels of, and seemed engulfed by, another much more famous debate in the pages of the same renowned journal: the Franck-Henkin debate over the use of armed force generally in international law. Writing in 1970,[35] at the height of the Cold War-era stalemates that paralyzed the United Nations,[36] New York University law professor Thomas Franck pronounced the

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[28] Rosalyn Higgins, *The June War, the U.N. and Legal Background*, 3 J. Cont. Hist. 271 (1968). *See also* Report of the Secretary-General presented pursuant to Security Council Resolution 331 (1973), Apr. 20, 1973, U.N. Doc. S/10929, May 10, 1973.

[29] Speech of Lord Caradon, 22 SCOR, 1377th meeting 4–5 (1967).

[30] Ibrahim F.I. Shahita, *Destination Embargo of Arab Oil: Its Legality Under International Law*, 68 Am. J. Int'l L. 591 (1974).

[31] Eugene V. Rostow, *The Illegality of the Arab Attack on Israel of October 6, 1973*, 69 Am. J. Int'l L. 272 (1975).

[32] Shahita, *supra* note 30, at 607 ("Egypt and Syria as the states vested with sovereignty, but illegally deprived of actual control, over territories occupied by Israel were thus entitled to seek redress for the protection of their territorial integrity.").

[33] Rostow, *supra* note 31, at 276 ("Israel is legally entitled to remain on the cease-fire lines of 1967 as the occupying power until the parties themselves reach an agreement of peace in conformity with the principles and provisions of Resolution 242.").

[34] Shahita, *supra* note 30, at 598 ("The legal complexities of the Arab-Israeli conflict are many."). Rostow, *supra* note 31, p. 281 ("The Security Council fully recognized the difficulties of the undertaking, against the background of the tragic history of the problem.").

[35] Thomas Franck, *Who Killed Article 2(4)?*, 64 Am. J. Int'l L. 809 (1970).

[36] For general political history, *see* Thomas J. McCormick, America's Half-Century: U.S. Foreign Policy in the Cold War (1989); Joseph L. Nogee & Robert H. Donaldson, Soviet Foreign Policy since World War II (1998).

death of article 2(4) of the U.N. Charter.[37] His prognosis was that "changing notions of international relations…have combined to take advantage of these latent ambiguities [in the meaning of article 2(4)], enlarging the exceptions to the point of virtually repealing the rule itself."[38] The famously pessimistic assessment illustrates the extent to which the centerpiece of the U.N. Charter's substantive reform of international law[39] – the article 2(4) prohibition on the use of force – was hollow at the core.

The cynical eulogy for a pacifistic world order was followed, not by any attempt to resurrect the post-war optimism of the United Nations' founders,[40] nor by any normative alternative, but rather by the view that, although "[t]he occasions and the causes of war remain… the sense [if not the fact] that war is not done has taken hold."[41] Writing from the other end of the city, as it were, Columbia law professor Louis Henkin responded to Franck with the theory that, contrary to the many skirmishes and superpower nuclear standoffs that characterized the early 1970s, the "ills of the international body politic" were not terminal.[42] What had replaced pacifism as a norm governing state conduct, he opined, was the notion that states could not engage in warfare without a legally cognizable justification.[43] Regulatory innovation – progress by another name – came in the form of a dialogic approach to foreign relations in which a rootless, but legalized discourse was an acceptable substitute for substantive law.

In a mere twenty-five years, Henkin's thesis suggested, the use of aggressive force had gone from being "the supreme international crime"[44] to a technical

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[37] U.N. Charter art. 2, provides:

> The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles…
>
> (4) 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.

[38] Franck, *supra* note 35, at 822.

[39] *Id*. at 809 (describing the Charter of the United Nations as "a solemn treaty giving effect to [the original signers'] determination 'to save successive generations from the scourge of war … ' ").

[40] For a discussion of the political environment of the 1945 San Francisco conference at which he U.N. Charter was drafted. *See* Clark Mell Eichelberger, The United Nations Charter: What was Done at San Francisco (1945).

[41] Louis Henkin, *The Reports of the Death of Article 2(4) are Greatly Exaggerated*, 65 Am. J. Int'l L. 544, 545 (1971).

[42] *Id*. at 544.

[43] *Id*. ("What has become obsolete is the notion that nations are free to indulge in [warfare] as ever, and the death of that notion is accepted in the Charter.").

[44] Judgment of the International Military Tribunal, Nuremberg, September 30, 1946, 22 Trial of the Major War Criminals 411, 427 (1948).

discussion about formal legal categories.[45] Although an attack by one U.N. member state on another could still be labeled a "serious breach of an international obligation of essential importance for maintenance of international peace and security,"[46] the first use of force did not necessarily amount to a legally recognizable act of aggression if the circumstances did not otherwise justify this characterization.[47] Likewise, economic coercion and other endangerment could amount to a form of impermissible aggression,[48] or could be a considered a non-aggressive form of coercive state conduct.[49] By the time the October 1973 war in the Middle East rolled around, international law had all but exhausted its categories; it could, accordingly, provide doctrinal support for such disparate acts as the Soviet Union's 1968 invasion of Czechoslovakia[50] and the United States' 1960 blockade of Cuba.[51]

Turning back to the "Question of Palestine," as the General Assembly had delicately put it in 1947,[52] it is little wonder that legal scholars faced off so squarely. The resolutions that had come with the termination of the 1967 war were subjected by states and by the U.N. itself to diametrically opposed interpretations: they had either so disadvantaged Israel that it had to withdraw and re-expose itself to further war,[53] or they had so disadvantaged the Arab states that any Israeli withdrawal would only take place under "conditions amounting

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[45] For a prominent example, *see* Record of the Security Council, 12 S.C.O.R. (783d meeting), U.N. Doc. S/PV. 783 at 7, Aug. 20, 1957 (debating whether article 2(4) applies to U.K. military intervention in the non-sovereign Imamate of Oman).

[46] Draft Articles on State Responsibility, *in* Report of the International Law Commission, 32 G.A.O.R. Supp. 10 U.N. Doc. A/32/10 at 1 (1977).

[47] Resolution on Definition of Aggression, G.A. Res. 3314, 29 G.A.O.R., Supp. 31 U.N. Doc. A/9631 at 142 (1974), annex article 2 ("a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances …"). Does this statement have resonance in the context of the current Iraq war?

[48] Report of the Secretary General on the Question of Defining Agression, U.N. Doc. A/2211, Oct. 3, 1952, section VII, 55 (defining "indirect aggression").

[49] Declaration of the Principles of International Law concerning Friendly Co-operation among States, G.A. Res. 2625, 25 G.A.O.R., Supp. 28 U.N. Doc. A/8028 at 121 (1970).

[50] *See Sovereignty and International Duties of Socialist Countries*, Pravda, Sept. 25, 1968, *reprinted in* 7 ILM 1323 (1968) (trans. N.Y. Times, Sept. 27, 1968) (called the Brezhnev Doctrine).

[51] Proclamation No. 3504, 47 Dep't State Bull. 717(1962), 27 Fed. Reg. 10401 (1962) (proclaiming naval blockade in wake of Cuban missile crisis).

[52] G.A. Res. 104 (S-1), U.N. Doc. A/310, 6–7 (1947) (establishing special committee on the question of Palestine). *See* Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 Denv. J. Int'l L. & Pol'y 27 (1997) ("Palestine first appeared on the United Nations agenda as a question."). *See also* Edward Said, The Question of Palestine 3–9 (1979).

[53] G.A. Res. 2628 (XXV), Nov. 4, 1970, G.A.O.R. 25th Session, Supp. No. 28 U.N. Doc. A/8028 at 5; G.A. Res. 2799 (XXVI), Dec. 13, 1971, G.A.O.R. 26th Session, Supp. No. 29 U.N. Doc.

to the liquidation of the whole Palestine question."[54] In tangent with the legal documentation, two different perspectives were expressed on the conduct of the parties: either Israeli actions were entirely duplicitous, "prompting Arab governments to adopt in subsequent years a negative position towards further negotiations on the subject,"[55] or Arab positions were entirely belligerent, insisting on "[n]o peace with Israel, no recognition of Israel, no negotiations with it…"[56]

In reiterating for 1973 the indeterminate resolutions of 1967,[57] the Security Council did more than simply miss one more chance to bring legal closure to the Israeli-Arab conflict – to make progress toward a regional politics that could concretize the outcomes of a technocratic law.[58] It effectively repressed any creative desire to escape, or do anything more than to chant by rote and to thereby recreate, the intellectual box into which it had placed itself.[59] In stifling its natural urges toward progress, the law may have seen the competing themes of its prior pronouncements as reflecting irreducible positions; and, though internally antagonistic, such a perception would kindle no attempt at legal reconciliation. Alternatively, in quenching any thirst for reform, the law may have seen the multiple themes of its own resolutions as reflecting a passionless harmony; and, though bland and ineffectual, such a perception would light no fires of doctrinal change.

C. *The Empty Life of International Law*

These two alternative impediments to progress – antagonism and banality – are perhaps best illustrated in I.L. Peretz's story, "Uncle Shakhne and Aunt Yakhne."[60] The narrator of the tale relates the melancholy story of his own

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A/8429 at 82; G.A. Res. 2949 (XXVII), Dec. 8, 1972, G.A.O.R. 27th session U.N. Doc. A/4548, Part I, 24 ("[T]he acquisition of territories by force is inadmissible and…consequently territories thus occupied must be restored.").

[54] Syrian Ambassador Tomeh, Speech to Security Council, 22 S.C.O.R., 1382d meeting, Nov. 22, 1967, at 2.

[55] Shihata, *supra* note 30, at 603.

[56] Rostow, *supra* note 31, at 69 (quoting the Arab League's Khartoum Resolution of Sept. 1, 1967, reprinted *in* Y. Alexander & N. Kittrie, Crescent and Star 427–29 (1973).

[57] S.C. Res. 338 (1973), para. 2, *supra* note 18 ("Calls upon the parties concerned to start … implementation of Security Council resolution 242 (1967)").

[58] *See* David Kennedy, *Introduction for the Participants*, 16 Leiden J. Int'l Law 839 (2003) ("If the work for the last century was to build a law which might constrain politics – our work now may be to build a global politics which can contest the outcomes of a technocratic law.").

[59] Makau Mutua, *Human Rights International NGOs, A Critical Evaluation, in* NGOs and Human Rights 151–63 (Claude E. Welch ed., 2000) (international human rights movement replicates the same power structure it seeks to counter).

[60] The I.L. Peretz Reader, *supra* note 14, at 171–78.

arranged marriage and that of his aunt and uncle, in the process detouring into numerous side comments that lead seemingly nowhere, but that fill the fabric of the narrative with a tangle of dangling threads. This technique is introspective in the extreme, although it is, by the way, something that more or less should never be done in a piece of academic writing, unless it is getting close to *Tisha B'Av* and the idea of the Temple's destruction and the fall of the Israelite kingdom is too much for a sound mind to bear, but I digress and really should be getting back to the matter at hand.[61] The point of the narrative is that a story woven together with nothing but loose ends is a form of discourse whose competing parts are more prominent than its narrative whole, or, more accurately, its narrative hole. The parallels to international law hardly need to be remarked.

The interesting thing about the strained relationship between Peretz's first person narrator and his newly-wed wife,[62] is that it is precisely as loveless as the otherwise affectionate relationship between his Aunt Yakhne and Uncle Shakhne. While the former depicts incompatible partners that have been forced together by community pressure, the latter reflects the passionless compatibility of sibling-like twins.[63] They represent, in other words, the combined themes of antagonism and banality, both undermining the sexual energy of the marital bed.[64]

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[61] Peretz' asides contain social commentary that appears otherwise gratuitous to the story's plot. Thus, the morning after his unfortunate wedding, he relates:

> And I was very anxious to see what my wife Chavele looked like, even though last night at the wedding feast I hadn't thought to glance her way; the big parade was on my mind then. Now I didn't know what to say to her: 'Chave' is too familiar. 'Wife' sounds vulgar. Does everybody have to know that she's my wife?
> The truth is that to this day I don't like the 'liberal' custom of husbands and wives walking everywhere together, and arm in arm, so that no one will, God forbid, mistake it, everyone must know what happened – who and with whom! There's no sense in it! And these same liberal Germans make fun of the washbasin in the study house because we rinse our hands in public.

Id. at 173.

[62] Little in the way of biographical data is known of Peretz' own involvements with women, although it appears that the marriage arranged for him by his father to the daughter of a known intellectual resulted in more of a bond between Peretz and his father-in-law than between Peretz and his wife. Ruth R. Wisse, *Introduction, in* The I.L. Peretz Reader, *supra* note 14, at xxiv. *See also* Paul Kreingold, *I.L. Peretz, Father of the Yiddish Renaissance*, 12 Fidelio, No. 2 (2003) ("The failure of Peretz's first marriage demonstrates the conflicts Jewish society experienced because of changes brought on by the *Haskalah* [enlightenment].").

[63] On Peretz' views of community and family, *see* S. Niger, Cedars of Lebanon*: An Appreciation of I.L. Peretz*, 27 Commentary, No. 6 (1959).

[64] For Peretz' views on sexuality, *see* Seth L. Wolitz, *Venus or Shulames? I.L. Peretz's Conundrum*, 6 Slavic Almanach (South Africa) 223–33 (2000).

Furthermore, scholars have noted that for Peretz, "the sexual and creative urges were closely linked,"[65] so that one cannot help but see a self-contemplative edge to the tale. Given that the narrator identifies himself as a twist on Peretz as author, the story of empty marriage becomes an allegory for the empty life of the writer within the community and the family.[66]

The void at the center of the Security Council's deliberations likewise arises from a combination of the antagonistic and the banal. On one hand, Resolution 242 characterizes the Israeli hold on territories as both defensive and aggressive while the Arab states' posture is both passive and belligerent.[67] The antagonism of the world community's norms – with every use of force being both illegal and justifiable – has stifled every creative urge in the U.N.'s deliberative body. On the other hand, Resolution 338's mundane repetition of prior holdings was eminently compatible with the fraternal order of Security Council members. The banality of the binding decisions made within the U.N. family – with every resolution having something for everyone and nothing to dispute – has soothed even the most creative edge in the Security Council's chamber. Like Peretz's narrator and his wife, the norms of international law are harsh to the point of head-on collision; and like Aunt Yakhne and Uncle Shakhne, the norms of international law are harmonious to the point of being facile.

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[65] Wisse, *supra* note 62, at xxiv.

[66] The writer/narrator of "Uncle Shakhne and Aunt Yakhne" takes a deconstructive turn:

> My uncle's name was Shakhne and my aunt's name was Yakhne.
>
> Whether this was purposely arranged by a special providence to spare me the trouble of thinking up rhymes for their names if I should decide to write a poem about them, or whether it was purely accidental, I don't know! The truth is that if a special providence had dedicated itself to providing me continuously with rhymes, I would never write prose at all – only bad rhymes. And then there would be nothing for a literary annual. Readers want only prose, and ordinary prose at that, nothing complicated – 'like a man speaking to his friend.' True, they like to read, it's an inherited trait, but they see no point in learning anything. Still, one wants the honor.
>
> But let's get back to Uncle Shakhne and Aunt Yakhne.

The I.L. Peretz Reader, *supra* note 14, at 171.

[67] For a statement of Israel's aggression and its neighbors' corresponding defensiveness over the years preceding October 1973, *see* Report of the Secretary-General presented pursuant to Security Council Resolution 331 (1973) of Apr. 20, 1973, U.N. Doc. S/10929, May 10, 1973. For a statement of Israel's defensive posture and its neighbors' corresponding belligerency over the years preceding October 1973, *see* S.C. Resolution 95 (1951), Sept. 1, 1951, 10 S.C.O.R., 688th meeting, paras. 98–102, at 20; and S.C. Resolution 118 (1956), October 13, 1956, 11 S.C.O.R., 743d meeting, 18.

All of this not only reverberates back in time, but has traveled forward as well. Thus, contemporary international law holds that, generally speaking, the right of self-defense exists where a party is responding to an attack on its territory from across a frontier,[68] while it also holds that Israel cannot defend against attacks from the territories it occupies beyond its frontiers.[69] Likewise, international pronouncements hold that the right of self-determination can be vindicated only by methods which conform to the non-violent norms of the U.N. Charter,[70] while they authorize violent resistance for those denied political independence by Israel's occupation.[71] On the other side of the coin, the law provides generally that acquisition of territory by force of arms is illegal,[72] while it has provided grounds for recognizing Israeli title to specific territories, which came under its control only by force of arms.[73] The law may be a qualitatively empty vessel, but it is also a cauldron that is boiling over with random content.

D. *No Relief for the Law*

All of this brings us back to the gates of hell. There is, of course, no true exit from this particular inferno – neither in legal doctrine nor in literature. Nevertheless, the literary depiction provides a graphic, stripped-down portrayal of the dearth

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[68] Nicaragua Case, *supra* note 3, para. 195 ("[A]n armed attack must be understood as including not merely an action by regular armed forces across an international border, but also the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State …").

[69] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. No. 131, para. 139 (Advisory Opinion) [hereinafter Legal Consequences Case] (concluding that since sovereignty is in abeyance across Israel's frontier, "Article 51 of the Charter [together with the customary right of self-defense] has no relevance in this case.").

[70] General Assembly Resolution Defining Aggression, U.N. Doc. A/Res 3314 (XXIX), Dec. 14, 1974, arts. 3(f) & (g), 7.

[71] Resolution on Occupied Territories, G.A. Res 37/43, Dec. 3, 1982, *available at* http://domino.un.org/UNISPAL.NSF/0/bac85a78081380fb852560d90050dc5f?OpenDocument("Reaffirms the legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial and foreign domination and foreign occupation by all available means, including armed struggle.").

[72] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, October 24, 1970, G.A. Resolution 2625 (XXV) ("No territorial acquisition resulting from the threat or use of force shall be recognized as legal.").

[73] The International Court of Justice has identified Israeli illegality in and around Jerusalem as being limited to the occupation of East Jerusalem, with a corresponding implication that title over West Jerusalem is legally recognized. Legal Consequences Case, *supra* note 69, para. 151 ("Israel's violations of its international obligations stem from the construction of the wall and from its associated régime, cessation of those violations entails the dismantling forthwith of those parts of

of meaning.[74] Legal texts, by contrast, render this paucity of substance in a more abstract mode, covered in complexity.[75] International law thus manages to hide for its participants the very thing that I.L. Peretz has been credited with exposing in his own Yiddish-speaking society: "the will for self-emancipation."[76]

As the cantor in the Peretz story wailed his soulful song in the face of Satan and his workers, a momentary mirage appeared on the horizon that would make a short-sighted observer think that salvation from the tiresome labor was about to be achieved. But, as the Security Council aptly demonstrated in the wake of history's most militarized Yom Kippur, any semblance of meaningful doctrine – of international legal progress – was a superficial one. The tortuous interpretations of Resolution 242 (1967) were enforced as law by Resolution 383 (1973),[77] allowing the ghosts of prior debates about enforceability to rise to legal paradise. But the debates soon became crowded with the same conflicting positions as had preceded the Council's pronouncement and had led to the war.

As narrated by Peretz, "when [the cantor] reached the prayer in the Shimenesre that praises God the Resurrector, the dead came back to life and answered 'Amen' in one voice."[78] However, the glimmer of progress was a fleeting image seen only by the short-sighted. The souls indeed escaped their torment at the sound of the cantor's voice and ascended to heaven, but no doctrinal reform can last forever. "After a while hell filled up again," writes Peretz. "New quarters were added, but still the crowding was great."[79]

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that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem."). Under the terms on which the League of Nations Mandate for Palestine was terminated, the entire city was to be a *corpus separatum*. Palestine Partition Resolution, G.A. Res. 181(II), Nov. 29, 1947. *See also* Statute for the City of Jerusalem, Trusteeship Council, 6th Session, Doc. T/592, Apr. 4, 1950, art. 1 ("The present Statute defines the Special International Regime for the City of Jerusalem and constitutes it as a *corpus separatum* under the administration of the United Nations.").

[74] Dana Gioia, *Why Literature Matters*, Boston Globe, Apr. 10, 2005 ("[M]ore ancient Greeks learned about moral and political conduct from the epics of Homer than from the dialogues of Plato").

[75] It is Tom Franck who has most prominently identified the sheer complexity of contemporary international law as one of the signs of its maturation. Thomas M. Franck, Fairness in International Law and Institutions 11 (1995) ("These economic, social, and political conditions have eventuated at the same time as the international legal system has reached a high level of maturity and complexity.").

[76] Sol A. Liptzin, A History of Yiddish Literature 56 (1972).

[77] Scholars on both sides of the Middle East divide seem to agree on the elevated stature that S.C. Res, 338 gave to S.C. Res. 242. *See* Shahita, *supra* note 30, at 603 ("Doubts on the binding character of that resolution (242) have probably been erased, however, by the text of Security Council Resolution 338 (1973)"); and Rostow, *supra* note 31, at 275 ("Resolution 242…was confirmed and made mandatory under Article 25 as a 'decision' by Security Council Resolution 338 of October 22, 1973.").

[78] The I.L. Peretz Reader, *supra* note 14, at 262.

[79] *Id.*

Progress in International Organization: A Constitutionalist Reading

By Christian Walter

A. *Introduction*

Harvard Professor Manley O. Hudson's book *Progress in International Organization* was, in many ways, an audacious and visionary. His idea of an "international government"[1] comes pretty close to the concept of "international governance" popular in today's scholarly discourse.[2] The book's overall structure – on the one hand a strong argument in favour of international co-operation,[3] and on the other hand a critical assessment of the position of the United States in the international arena[4] - operates as an excellent mirror for reflection on the current hopes and concerns of many international lawyers. Hudson's analysis of the impact of accelerated communication on the political organization of the world also bears striking similarities to current developments in the so-called "digital age." Writing in 1932, Hudson was referring to the changes provoked by postal and telegraphic communication as well as steamship transportation in the 19th century.[5] But the current transformations are working along similar lines, when the increased speed with which information may be distributed is qualified as an important contribution to societal change.[6]

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[1] Manley O. Hudson, Progress in International Organization 6 (1932).

[2] *See* Karl-Heinz Ladeur, Public Governance in the Age of Globalization (2004); *see also* Governance-Forschung: Vergewisserung über Stand und Entwicklungslinien (Gunnar Folke Schuppert ed., 2005).

[3] Hudson, *supra* note 1, at chs. IV–VIII.

[4] *Id*. at ch. IX.

[5] *Id*. at 7.

[6] Christoph Engel, *The Internet and the Nation State, in* Understanding the Impact of Global Networks on Local Social, Political and Cultural Values 201, 202 (Christoph Engel & Kenneth H. Keller eds., 2000); Klaus Dicke, *Erscheinungsformen und Wirkungen von Globalisierung in Struktur und Recht des internationalen Systems auf universeller und regionaler Ebene sowie gegenläufige Renationalisierungstendenzen, in* Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internationalen System 15 n.13 (2000).

Miller & Bratspies (Eds), Progress in International Law, pp. 133–150.

History has proven other aspects of Hudson's vision to be too optimistic,[7] or to have fallen short of our debates, which have gone beyond that which he could have predicted and analyzed in 1932.[8] Nevertheless, the general ideas in his book provides useful guidance in looking at the current state of international affairs from a constitutionalist perspective. The following chapter takes up some of the ideas that may be found in Hudson's book and relates them to the current debates on the constitutionalization of international law on the one hand (Parts B. and C.), and hegemony and unilateralism on the other hand (Part D.).

B. *Is There An "International Constitution"?*

Without expressly comparing the organization of the international order to national constitutional structures, Hudson refers to several aspects of international relations in his era that bear similarities to our own era. I want to discuss two important constitutional characteristics that are mentioned in Hudson's book (the idea of a "constitutional moment" and the requirement of democratic legitimacy) in order to highlight important differences between the concept of a constitution in national law and the constitutionalization of international law.

I. *"Constitutional Moment"*

It is often said in constitutional theory that the adoption of constitutions requires a so-called "constitutional moment." Constitutional moments are specific historical situations in which conditions are favourable for fundamental changes in the organizational structures of a given society.[9] Such conditions often exist after a successful revolution (a situation for which the United States or France in the late 18th century may be taken as examples) or in situations of complete defeat and devastation (exemplified by post-World War II Germany, when the Basic Law was created). It is, however, unclear whether a "constitutional moment" really is a necessary condition for the creation of new constitutional structures.[10]

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[7] This relates notably to the Chapter on "World Peace." Hudson, *supra* note 1, at 89.

[8] One may mention in that context the parts devoted to "international legislation" that basically refer to either customary law or treaty law (including the idea of codification) without focusing on law-making by international organizations such as the EU. Hudson, *supra* note 1, at 76.

[9] *See* Bruce Ackerman, *Revolution on a Human Scale*, 108 Yale L.J. 2279, 2298 (1999); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 489 (1989).

[10] Dieter Grimm, *Integration durch Verfassung*, Walter Hallsten-Institut für Europäisches Verfassungsrcht, FCE 6/04, (July 12, 2004), *available at* http://www.rewi.hu-berlin.de/WHI/english/fce/2004/06/grimm.pdf.

While it is true that many countries have adopted thoroughly revised or even completely new constitutions without being in situations of either complete triumph or complete defeat,[11] it must be noted that, from an historical perspective, such "quiet" changes (like the various French constitutions in the 20th Century or the "totally revised" Swiss constitution of 2000[12]) lack the fundamental importance that is ascribed to "constitutional moments." Such "quiet" constitutional changes may be characterized as "constitutional development" or "constitutional evolution" rather than as rupture and structural change.[13]

The question of whether constitutions can spring into existence without a "constitutional moment" does not really matter here, because Hudson's point is that there was such a "constitutional moment" in the international order in 1919. He expressly compares the era immediately following the end of World War I to the conditions that existed in 1789 for the adoption of the U.S. constitution.[14] He concludes that neither the 1919 Versailles Peace Treaty, including the League of Nations Covenant, nor the 1789 U.S. constitution, could have been adopted at another time in history.[15] Although comparisons to hypothetical historical situations cannot be proven right or wrong, they may help to evaluate the significance of developments. This is certainly the case with the comparison suggested by Hudson. Even from today's perspective, the "constitutional" importance of the League of Nations Covenant lies in the fact that it: (1) constituted the first document in which an international organization with universal aspirations was created that was not restricted to the regulation of purely technical matters; and (2) followed a comprehensive approach.[16] Discussing problems of international law's fragmentation and sectoralization,[17]

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[11] *Id.*

[12] For an overview *see* Martin Kayser & Dagmar Richter, *Die neue schweizerische Bundesverfassung*, 59 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht [hereafter ZaöRV] 985 (1999).

[13] Grimm, *supra* note 10.

[14] Hudson, *supra* note 1, 23.

[15] *Id.* at 23, 45.

[16] *Id.* at 42.

[17] Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law: Postmodern Anxieties*, 15 Leiden J. Int'l L. 553 (2002); the ILC has created a special "Study Group on Fragmentation of International Law," para. 729, GAOR, 55th Session, Supplement No. 10, U.N. Doc. A/55/10; Roman A. Kolodkin, *Fragmentation of International Law? A View from Russia, in* Towards World Constitutionalism: Issues in the Legal Ordering of the World Community 223 (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005) [hereinafter Towards World Constitutionalism]; *see also* the Report of the study group, Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.663/Rev.1 (July 28, 2004); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain*

hegemony,[18] and inclusiveness,[19] we are well aware today of existing deficiencies in the international legal order. Nevertheless, it remains true that the adoption of the League of Nations Covenant marks a fundamental change in the organization of international relations and may thus be rightly described as a "constitutional moment."[20]

II. *Democratic Legitimacy*

There is a second point of constitutional relevance in Hudson's analysis of international organization. When discussing issues of participation in the League of Nations, Hudson expressly uses the term "democratization."[21] He addresses problems of equal representation of states in the organs of the League of Nations and of unanimity in the voting procedures.[22] He explains reasons for sticking to the "one state, one vote" principle and, at the same time, highlights the democratic problem that is inherent in this principle if one compares the different member states as far as their population or size is concerned.[23]

The problem of how to establish democratic structure for a system of international governance is certainly the most difficult issue in the current debate on the constitutionalization of the international order.[24] In his era, Professor Hudson could stop with the conclusion that no change in the requirement of unanimity

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Search for Legal Unity in the Fragmentation of Global Law, 25 Mich. J. Int'l Law 999 (2004); G. Anders, *Lawyers and Anthropologists, A Legal Pluralist Approach to Global Governance, in* Governance and International Legal Theory 37 (Ige F. Dekker & Wouter G. Werner eds., 2004).

[18] *See* the contributions in United States Hegemony and the Foundations of international Law (Michael Byers & Georg Nolte eds., 2003); Nico Krisch, *International Law in times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 Eur. J. Int'l L. 369 (2005); Nico Krisch, *Amerikanische Hegemonie oder liberale Revolution im Völkerrecht*, 43 Der Staat 257 (2004); Christian Tomuschat, *Multilateralism in the Age of US Hegemony, in* Towards World Constitutionalism 31, *supra* note 17.

[19] Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 Eur. J. Int'l L. 113 (2005).

[20] For a similar argument with respect to the United Nations Charter *see* Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 Colum. J. Transnat'l L. 529, 573 (1998).

[21] Hudson, *supra* note 1, at 35.

[22] *Id*.

[23] *Id*. at 35.

[24] See the overview on different positions given by Armin von Bogdandy, Demokratie, Globalisierung, Zukunft des Völkerrechts – eine Bestandsaufnahme, 63 ZaöRV 853 (2003); Mattias Kumm, The Legitimacy of International Law: A Constitutionalist Framework of Analysis, 15 Eur. J. Int'l L. 907 (2004).

was to be expected in the near future.[25] Today, developments have gone beyond that point in many areas. For example, the WTO acts in its dispute settlement area with the so-called "negative consensus," which means that reports by a panel or the Appellate Body will be adopted, unless there is a unanimous decision against the adoption.[26] Decisions by the Security Council may affect states, and individuals within states, which have not participated in the deliberation or decision-making process and the Council does not have to decide unanimously.[27] However, these developments have only increased the democratic problem that Hudson so marvellously described in 1932. On a theoretical level, various competing propositions have been made in order to solve the democratic deficit.[28] The "superstate" mentioned by Hudson[29] remains as unrealistic an option today as in Hudson's time.[30] However, some elements of these propositions have been discussed as proposals for a structural reform of the United Nations. This is notably true for the creation of a United Nations Parliamentary Assembly as a subsidiary organ of the General Assembly.[31] While such a body could certainly add to the legitimacy of the organization on a general level, it cannot be neglected that – if constructed as a subsidiary organ of the General Assembly – the proposed Parliamentary Assembly's powers may not exceed the notoriously limited competencies granted to the Assembly by the U.N. Charter.[32] Significantly, the decisions

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[25] Hudson, *supra* note 1, at 36.

[26] Article 16, para. 4; Article 17, para. 14 DU; *see generally* Peter-Tobias Stoll & Frank Schorkopf, WTO: World Economic Order, World Trade Law 219 (2006).

[27] U.N. Charter art. 27, para. 3.

[28] *See* the reference in note 24.

[29] Hudson, *supra* note 1, at 35.

[30] For proposals concerning a "World Republic," *see*, notably Otfried Höffe, Demokratie im Zeitalter der Globalisierung 295, 296 (1999); *see also* R. Falk & A. Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Public Sovereignty*, 36 Stan. J. Int'l L. 191 (2000).

[31] See notably Jeffrey J. Segall, *A U.N. Second Assembly, in* Building a More Democratic U.N. 93 (Frank Barnaby ed., 1991); *see also* the propositions made in We The Peoples: Civil Society, the United Nations and Global Governance Report of the Panel of Eminent Persons on United Nations – Civil Society Relations, U.N. Doc. A/58/817, Proposals 13–18 (June 11, 2004). The matter has been debated also in the German Parliament. *See* BT-Drs. 15/5690 vom 15. Juni 2005; BT-Drs. 15/3711 vom 22. September 2004; siehe bereits BT-Drs. 14/5855 vom 6. April 2001, 5 und 14/1567 vom 9. September 1999; on the whole issue *see* Christian Walter, Vereinte Nationen und Weltgesellschaft: Zur Forderung nach Einrichtung einer Parlamentarischen Versammlung (UNPA), Zeitschrift für Politik (2006).

[32] While the competence of the General Assembly to deal with certain subject matters is considerably broad, its possibilities for binding action are limited to purely internal issues. *See* Jan Klabbers, An Introduction to International Institutional Law 188, 206 (2002). Further

creating the democratic deficit do not primarily emanate from the General Assembly, but from the Security Council, which has started to act as a quasi-legislator in recent years, notably with the anti-terrorist action programme.[33] Hence, even the most concrete proposals in the current debate would not solve the democratic deficit.[34]

III. *Constitutionalization of International Law*

What can be learned from the brief analysis just presented? Does it mean that there is nothing to the debate on "constitutionalization" international law? The main lesson is that distinctions are necessary and differences between the notion of "constitutionalism" in the national context and in international law must be made. There are two necessary distinctions. The first is the issue of membership in the community to be *constituted*. The second is the sectoralization of international law into different subject matters with the ensuing fragmentation of international law into several "partial-constitutions." The sectoralizaiton dynamic is made even more confounding by the necessity of ascribing the different functions that are bundled by national constitutions in the state to different actors on the international scene.

1. *Membership*

The most important difference between national constitutions and the claimed constitutionalization of international law lies in the structure of the object that is to be constituted. In national constitutional law this object has several characteristics, the most important of which is that the state purports to exercise public power within territorial limits but without restrictions as to possible subject matters of regulation.[35] Relying on the notion of internal sovereignty, the state, in the traditional concept, may take up any given subject matter and adopt a

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limitations are due to the predominance of the Security Council as far as international peace and security are concerned. U.N. Charter art. 12, para. 1; on the issue of the United for Peace-resolution of the General Assembly *see* Kay Hailbronner & Eckart Klein, *Article 12, in* The Charter of the United Nations: A Commentary 12 (Bruno Simma ed., 2002) [hereinafter The Charter of the United Nations: A Commentary].

[33] Nico Krisch, The Rise and Fall of Collective Security: Terrorism, U.S. Hegenomy, and the Plight of the Security Council, in Terrorism as a Challenge for National and International Law: Security versus Liberty? 879, 883 (Christian Walter et al. eds., 2004) (addressing the legal issues emanating notably from resolution 1373 (2001)).

[34] *See supra* note 30 and the proposals for reform referred to therein.

[35] On this point see Christian Walter, Constitutionalizing (Inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law, 44 German Y.B. Int'l L. 170, 192 (2001).

regulation for it.[36] Furthermore, the nation state "facilitated the political activation of its citizens. It was the national community that generated a new kind of connection between persons who had been strangers to one another."[37] In sum, the nation state and its constitution provided a "homology of territory, community and political capacity,"[38] thereby achieving a bundling of constitutional functions in one political unit by way of a single legal document.[39]

The first important difference with respect to a document like the UN Charter concerns the members of the community that is constituted. There can be no doubt that the UN Charter is the constitutive document of a community of states.[40] In this sense it forms part of the traditional fabric of international law as a law between states. However, if the UN Charter is seen as the "Constitution of the International Community"[41] it is necessary to determine who the members of the international community are. Is it still a "community of states" as formulated in Article 53 of the Vienna Convention on the Law of Treaties in the late 1960s?[42] By now, the notion of an international community seems to have moved beyond a community of states.[43] In its commentary on the 2001

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[36] *See* in this respect remarks of Hermann Mosler, The International Society as a Legal Community (1980). "It has become common to speak of international organisations as constitutions. They have indeed essential features of a constitution. *Their object is, however, restricted compared with the traditional meaning of a constitution as the supreme law capable of regulating everything and binding everybody within its territorial jurisdiction." Id.* at 16 (emphasis added).

[37] Jürgen Habermas, *The European Nation State – its Achievements and its Limitations*, 9 Ratio Juris 125, 133 (1996).

[38] Neil Walker, *The Idea of Constitutional Pluralism*, 65 Mod. L. Rev. 317, 320 (2002).

[39] Walter, *supra* note 35, at 192; the British exception of a democratic constitution without a written document does not contradict the general rule that modern democracies usually operate on the basis of a written text. For a discussion of the advantages of a "political normativity" which is created by written constitutions, *see* Christian Möllers, *Verfassunggebende Gewalt - Verfassung – Konstitutionalisierung, in* Europäisches Verfassungsrecht 1, 7, 13 (Armin von Bogdandy ed., 2003).

[40] U.N. Charter arts. 3, 4.

[41] See the title by Fassbender, *supra* note 20.

[42] Article 53 of the Vienna Convention on the Law of Treaties reads:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

[43] The Draft Articles on State Responsibility Adopted by the International Law Commission in 2001 speak of the "international community as a whole" without mentioning states as constituent elements. *See* Articles 25 (1) lit b); 33 (1), 42 lit b); 48 (1) lit b).

Draft Articles on State Responsibility the International Law Commission (ILC) defines the "international community as a whole"[44] as the "totality of other subjects" to which a state owes an obligation.[45] The ILC includes among those subjects all other states[46] but also, implicitly, non-state actors.[47] Also, the Rome Statute for an International Criminal Court refers in its preamble and in its Article 5, para. 1 to the "international community as a whole" without adding that it is a "community of states."[48] This leads to the conclusion that, if the UN Charter is to be the constitution of the international community, then the provisions concerning membership in the Charter do not adequately reflect the current state of international law.

2. *Sectoralization and the Unbundling of Constitutional Functions*

We are witnesses to the emergence of a sectorally organized, or fragmented, international order. International Criminal Law, International Trade Law, International Environmental Law, each of these sectorally confined regimes develops rules that address states as subjects of international law. Individuals are also granted specific rights or made subject to certain obligations by these regimes. They are increasingly being institutionalised. Often they even set up sectorally limited organs for dispute settlement, a development that has nourished the debate on the fragmentation of international law.[49] This highlights the important difference between the concept of "constitutionalism" in the context of the

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[44] This is also the term used by the International Court of Justice in the Barcelona Traction Case. Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Rep. 1970, para. 33.

[45] Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session, 72 (2002), *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf; *see also* the commentary and the reference to numerous treaties and other international documents in which the words "of states" are omitted in James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries 184, n.431 (2002).

[46] Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 45, at 322.

[47] Id. at 234.

[48] *See* on these developments comprehensively Andreas Paulus, Die internationale Gemeinschaft im Völkerrecht (2001); Christian Tomuschat, *Die internationale Gemeinschaft*, 33 Archiv des Völkerechts 1 (1995). *See* Sadat, in this volume.

[49] Notably the *Swordfish-Case* between the European Community and Chile has contributed to that debate; see in that respect Jan Neumann, *Die Materielle und Prozessuale Koordination Völkerrechtlicher Ordnungen – Die Problematik paralleler Streitbeilegungsverfahren am Beispiel des Schwertfisch-Falls*, 61 ZaöRV 529 (2001); *see generally* on the subject Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 Recuiel des Cours 101

state and attempts to apply the concept to the international order. While the state exercises competencies that are territorially limited but potentially unlimited as to the subject matters to be regulated, the new international legal order has produced actors that are functionally limited but – depending on the range of membership – may offer the possibility of global or almost global regulation with few territorial restrictions.

The sectoralization or functional differentiation leads to the conclusion that conceiving of the UN Charter as a constitution of the international community neglects important structural differences between the concept of "constitutionalism" in the national context and the structure of the international order. The idea that the UN Charter might be the constitution of the international community does not sufficiently take into account the functional differentiation of the international legal system. The model of the UN Charter as a constitution of the international community does not answer how the international order should react to functional differentiation. It suggests a hierarchy of norms only with respect to the relationship between the UN Charter and other norms of national or international law. But it does not take into account that the UN Charter is in itself functionally limited and that other important international organizations must be taken into account.

The disaggregation of the state, on one hand,[50] and the process of sectoralization that international law is undergoing, on the other hand, make it very unlikely that – in the foreseeable future – we will have "*the* constitution" for "*the* international community."[51] Instead, we are confronted with an order consisting of "partial constitutions" (on the international level as well as in the national

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(1998); Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is it Good or is it Bad?*, 14 Leiden J. Int'l L. 267 (2001); K. Oellers-Frahm, *Multiplication of International Courts and Tribunals and Conflicting Jurisdictions – Problems and Solutions*, 5 Max Planck Y.B. on U.N. L. 67 (2001).

[50] Among the various contributions in that regard see notably Jan Habermas, *Beyond the Nation-State? On some Consequences of Economic Globalization, in* Democracy in the European Union: Integration through Deliberation? 29 (Erik Oddvar Eriksen & John Erik Fossum eds., 2000); Anne-Marie Slaughter, A New World Order 12 (2004); Oscar Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 Colum. J. Transnat'l L. 7 (1997); Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?*, 4 Eur. J. Int'l L. 447, 453 (1993); Peter Saladin, Wozu noch Staaten? Zu den Funktionen des Modernen Demokratischen Rechtsstaats in einer Zunehmend Überstaatlichen Welt 19 (1995).

[51] For a focus on the U.N. Charter, *see* Fassbender, *supra* note 20; *see also* B. Fassbender, *The Meaning of International Constitutional Law, in* Towards World Constitutionalism 837, 848, *supra* note 17.

context; since the emergence of a system of "international governance" also reduces the national constitutions to partial constitutions[52]) and of "constitutional elements" that may be found in various contexts. Viewed as a whole, the emerging international order lacks a comprehensive constitution.

3. *Constitutionalization of International Law as a Process*

There can be no doubt that the term "constitutionalization" is highly ambiguous.[53] But given the current conditions in international law, this ambiguity seems to be its main virtue. It has several descriptive and analytical advantages. The most important advantage is that it expresses the character of an open-ended process.[54] An analytical value may be seen in the fact that the term expresses the fact that the functions of national constitutions are today complemented and in part substituted by developments on the international level: public power that affects the legal position of individuals is organised and exercised beyond national boundaries, human rights limitations with institutionalised mechanisms of protection have been instituted there. It would simply be insufficient to ignore the constitutional relevance of these developments. Again Hudson provides great insight into how to view fundamental legal developments like the ones just described. "[T]he League of Nations," he explained, "is more a process than an institution, [a] process [which] is devised not merely for 1920 or 1931 but for unfolding years to come."[55]

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[52] Peter Häberle, *Das Grundgesetz als Teilverfassung im Kontext der EU/EG – eine Problemskizze, in* Festschrift für Hartmut Schiedermair 81 (2001).

[53] Christian Joerges, *Constitutionalism and Transnational Governance: Exploring a Magic Triangle, in* Transnational Governance and Constitutionalism 339, 373 (Christian Joerges et al. eds., 2004) [hereinafter Transnational Governance and Constitutionalism] (speaking of "a trendy concept filled up with a plethora of meanings and messages"); in a similar direction, *see* Rainer Wahl, *Konstitutionalisierung – Leitbegriff oder Allerweltsbegriff?, in* Der Wandel des Staates vor den Herausforderungen der Gegenwart- Festschrift für Winfried Brohm 191 (Carl-Eugen Eberle ed., 2002).

[54] At least as far as the character of a "process" is concerned there is large consent. Christian Möllers, *Transnational Governance without a Public Law?, in* Transnational Governance and Constitutionalism, supra note 53, at 329, 334; Thomas Cottier & Maya Hertig, *The Prospects of 21st Century Constitutionalism, 7* Max Planck Y.B. on U.N. L. 261, 283, 296 (2003); Andreas Fischer-Lescano, *Globalverfassung: Verfassung der Weltgesellschaft*, 88 Archiv für Rechts- und Sozialphilosophie 349, 351 (2002); Markus Kotzur, *Weltrecht ohne Weltstaat – die nationale (Verfassungs-)Gerichtsbarkeit als Motor völkerrechtlicher Konstitutionalisierungsprozesse?*, DÖV 195, 200 (2002).

[55] Hudson, *supra* note 1, at 44.

C. *International Legislation*

It is one of the essential functions of constitutions that they provide for the legitimate exercise of public power in that they create binding procedures for the enactment of laws.[56] Thus, the notion of "international legislation" referred to by Hudson[57] is intrinsically linked to the constitutionalization of international law. Although Hudson's notion of "legislation" requires some additional comment based on the experience since 1932, the general line of argument presented by Professor Hudson is as valid today as when it was written. Hudson basically describes the development of international law as a process in which the "changed state of international society" requires transformations of national law that affect the concept of sovereignty, the independence of states and the treatment of aliens.[58] Hudson was referring to the 19th century, but the development has been prolonged throughout the 20th century. The proliferation of international organizations has dramatically continued to change the concept of sovereignty as a basis of international law.[59] Similarly, the profound changes that are due to the new position of the individual in international law[60] may be seen as a prolongation of the development, which, for Hudson, was basically confined to strengthening the position of aliens.

Hudson was also right in characterizing the potential of international legislation as "phenomenal" with an "unlimited promise for the future."[61] When Hudson wrote, the development was, indeed, a matter for rejoicing for international lawyers who properly emphasized the promises of international legislation. It is in this perspective that Hudson takes note of an increasing body of conventional law and sees a great potential in the possible codification of certain areas of law.[62]

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[56] Möllers, *supra* note 39, at 5.

[57] Hudson, supra note 1, at 76.

[58] *Id*. at 72.

[59] *See* Kaiser, in this volume; Paulus, in this volume. *See, e.g.*, Dan Sarooshi, *The Essentially Contested Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government*, 25 Mich. J. Int'l L. 1107, 1110 (2004); Schachter, *supra* note 50; Gernot Biehler, *Souveränität im Wandel: Rückzug des Staates aus der Internationalen Verantwortung? Aufgabenzuwachs Internationaler Organisationen als Maßstab äußerer Souveränität*, 35 Der Staat 99, 103 (1996); *but see also* Christian Hillgruber, *Souveränität – Verteidigung eines Rechtsbegriffs*, 57 Juristenzeitung 1072, 1076 (2002).

[60] See Sadat, in this volume. Among the various contributions see most recently Bernd Grzeszick, *Rechte des Einzelnen im Völkerrecht – Chancen und Gefahren Völkerrechtlicher Entwicklungstrends am Beispiel der Individualrechte im Allgemeinen Völkerrecht*, 43 Archiv des Völkerrechts 312 (2005); Oliver Dörr, *Privatisierung des Völkerrechts*, 60 Juristenzeitung 905 (2005).

[61] Hudson, *supra* note 1, at 77.

[62] *Id*. at 83.

These developments, especially with respect to the Hague Conference on Private International Law, were of great importance and worth being highlighted in 1932. It should be noted, however, that these international legislative developments basically remained within the traditional fabric of international law, since they were based on treaty negotiations and, in the end, required the national procedures for the adoption of such treaties would be respected. Hence, the national legislature always had the final say. But even under these traditional conditions it is striking to see how little interest Hudson has in the political dimension of such codifications. He pinpoints the problem when distinguishing between the "mere" codification of existing rules and their clarification and "true" legislation, but does not consider it necessary to draw a line between the two distinct phenomena.[63] Modern developments, especially in the law of international trade, have shown clearly how close the lines are between mere technical regulation, on the one hand, and substantive issues of an eminent political character, on the other hand. What today seems to be a technical issue concerning standards of food production, may tomorrow stand at the centre of a large-scale transatlantic "trade war."[64] In that sense, the awareness of the political dimension of international legislation has grown tremendously as compared to the euphoric and optimistic view presented by Hudson.

A similar concern must be raised with respect to other limits on international legislation. Problems of democratic legitimacy have already been discussed above.[65] Another aspect which is intrinsically linked to the notion of "constitutionalism" is the limitation on the exercise of public power - notably limitations based on human rights. As the French "Déclaration des droits de l'homme et du citoyen" pointed out in its famous Article XVI: "Toute société, dans laquelle la garantie des droits de l'homme n'est pas assurée ni la separation des pouvoirs determinée, n'a pas de constitution." This implies that constitutionalising international governance requires human rights protection.

However, the issue of protecting human rights and the respect for the rule of law in the process of international legislation is really tricky, as has been highlighted in recent months by the protection of individuals against measures

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[63] *Id*. at 84.

[64] This is notably true for the Hormones dispute between the U.S. and the European Community, *see* instead of others George H. Rountree, *Raging Hormones: A Discussion of the World Trade Organization's Decision in the European Union-United States Beef Dispute*, 27 Ga. J. Int'l & Comp. L. 607 (1999).

[65] *See supra* notes 21–30 and accompanying text.

adopted by the Security Council.[66] In fact, the Security Council has extended its legislative activities far beyond the forms of international legislation that Hudson contemplated. While the wording of the provisions in Chapter VII of the UN Charter does not expressly confer the power upon the Security Council to adopt legislative measures, the result has nevertheless been achieved in practice by an innovative and expansive interpretation of the condition of "threat to the peace" in Article 39 UN Charter. For example, in Resolution 1373 (2001) the Council qualified "international terrorism" as a "threat to the peace" and thus, not a specific situation but rather an abstract danger.[67] This opens the door for concrete and binding measures, which – in view of the abstract threat – must also be formulated in abstract terms.[68] This approach was repeated in 2004 concerning weapons of mass destruction.[69] Thus, Resolution 1373 (2001) very well may mark the beginning of a new practice of the Council.[70] The result is "international legislation" in a much more specific sense than the examples taken into account by Hudson, because the sole "legislator" is an organ of an international organization. This implies that, in contrast to traditional international treaty procedures, national legislatures may only intervene in areas where the measures adopted by the Security Council leave room for different solutions. As far as their content is clear and leaves no options in its application, the national legislatures are bound to transform the resolutions into directly applicable national law without changing their content.[71]

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[66] Notably resolutions 1267 (1999), 1333 (2000), 1390 (2002); *see* the critical remarks by Silke Albin, *Rechtsschutzlücken bei der Terrorbekämpfung im Völkerrecht*, 37 Zeitschrift für Rechts 71 (2004); Thomas Schilling, *Der Schutz der Menschenrechte gegen Beschlüsse des Sicherheitsrats*, 64 ZaöRV 343 (2004); Christian Tomuschat, *Internationale Terrorismusbekämpfung als Herausforderung für das Völkerrecht*, DÖV 357 (2006); P. Weckel & G. Areou, RGDIP 957, 961 (2005); *see also* the respective EC Regulation Nr. 881/2002 of May 27, 2002, OJ 2002, L 139, 9 and the Decision by the Court of First Instance in T-306/01, EuGRZ 2005, 592.

[67] "Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts, Reaffirming further that such acts, *like any act of international terrorism*, constitute a threat to international peace and security" S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001)(emphasis added).

[68] *See* the analysis by Paul Szasz, *The Security Council Starts Legislating*, 96 Am. J. Int'l L. 901, 902 (2002); Jurij Daniel Aston, *Die Bekämpfung abstrakter Gefahren für den Weltfrieden durch legislative Maßnahmen des Sicherheitsrats*, 62 ZaöRV 257 (2002).

[69] Resolution 1540 (2004).

[70] This is the assessment by Axel Marschik, *Legislative Powers of the Security Council, in* Towards World Constitutionalism 480, *supra* note *17*.

[71] Jochen A. Frowein & Nico Krisch, *Article 41, in* The Charter of the United Nations: A Commentary 8, *supra* note 32.

This type of a double-layered legislation (formulation of aims which have to be attained at the level of the United Nations, implementation on the European or national level) has important repercussions for the protection of individual rights. What if an individual wants to argue that a violation of human rights has its origins in a decision of the Security Council? On one hand, courts in the member states have the difficulty that applying their national human rights standards may result in a violation of the obligation to respect and apply the relevant Security Council resolutions. On the other hand, respecting and applying the resolutions may result in a violation of national human rights standards. It may be argued that, in view of Article 103, UN Charter Security Council resolutions must be given priority over national standards of protection, and, thus, that national courts may not interfere with their strict application. This solution is obviously highly problematic if there is no individual recourse at the level of the United Nations in which the original measure (*i.e.* the Security Council decision) could be challenged. The issue has already reached the Court of First Instance of the European Union, which has decided that its control of Security Council resolutions is limited to human rights standards that have achieved the status of *jus cogens*.[72] It is, however, very unclear which human rights may be qualified as *ius cogens*[73] and the decision thus implies an important element of legal uncertainty. The issue is currently pending at the European Court of Justice for review.

The problem of human rights protection against action taken by international organizations that directly affect the position of the individual is genuinely constitutional and should not be taken for granted.[74] The occasions on which problems similar to the one just described concerning resolutions by the Security Council arise have multiplied in recent years and the development is very likely to continue in that direction. The European Court of Human Rights has recently decided a case with respect to the exercise of its control towards the European Community, which may very well be read as a decision on principle that applies

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[72] There are by now several decisions: T-306/01 – Ahmed Ali Yusuf and Al Barakaat International Foundation (EuGRZ 2005, 592); T-315/01 – Yassin Abdullah Kadi, ILM 45 (2006), 81; T-253/02 – Ayadi; T-49/04 – Hassan (available at http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en). For discussion *see* Christian Tomuschat, 43 CMLR 537 (2006); M. Payandeh, *Rechtskontrolle des UN-Sicherheitsrates durch staatliche und überstaatliche Gerichte*, ZaöRV 41 (2006); S. Steinbarth, *Individualrechtsschutz gegen Maßnahmen der EG zur Bekämpfung des internationalen Terrorismus*, ZEuS 269 (2006); C. Tietje & S. Hamelmann, *Gezielte Finanzsanktionen der Vereinten Nationen im Spannungsverhältnis zum Gemeinschaftsrecht und zu Menschenrechten*, JuS 299 (2006).

[73] Payandeh, *supra* note 72, at 55.

[74] Christian Walter, *Grundrechtsschutz gegen Hoheitsakte internationaler Organisationen*, 129 AöR 39 (2004).

in a similar fashion to any other international organization.[75] According to this decision, the necessity of institutionalised international cooperation may serve as a legitimate aim for restricting the human rights protection that member states of the European Convention of Human Rights owe towards individuals under their jurisdiction. However, the European Court of Human Rights does not completely free the member states from their obligations. It requires them to ensure that, at the level of the international organization, a standard of human rights protection must exist that is – substantially and procedurally – equivalent to the standard guaranteed by the Convention. Under such circumstances, the European Court of Human Rights settled on a presumption that the organization respects human rights, a presumption which may, however, be rebutted by an applicant in his or her individual case. If one looks at the standards mentioned, especially the procedural requirements, there can be little doubt, that the freezing of individual property according to the procedure established by Security Council resolutions 1267 (1999), 1333 (2000) and 1390 (2002), and as they have been applied and handled by the respective Security Council committee, does not pass the test.[76]

D. *Unilateralism and the Role of the United States*

A third, and final, issue to be addressed concerns Hudson's treatment of the role of the United States in the international legal system.[77] After the end of the Cold War the political reproach of American unilateralism has been voiced frequently.[78] In international legal writing the consequences and dynamics of "hegemony" have received renewed interest.[79] It seems that dominant states always follow

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[75] Application Nr. 45036/98 Bosphorus v. Ireland; for a first analysis *see* C. Heer-Reismann, *Straßburg oder Luxemburg? Der EGMR zum Grundsrechtsschutz bei Verordnungen der EG in der Rechtssache Bosphorus*, NJW 192 (2006); N. Lavranos, Das So-Lange-Prinzip im Verhältnis von EGMR und EuGH, Anmerkung zum Urteil des EGMR v. 30.06.2005, Rs. 45036/98, EuR 2006, 79.

[76] *See* again the critical contributions quoted, *supra* note 66.

[77] Hudson, *supra* note 1, at 103.

[78] See the description in Jan Habermas, *Hat die Konstitutionalisierung des Völkerrechts noch eine Chance, in* Der Gespaltene Westen 113, 178 (2004).

[79] For writings contemporaneous to Hudson, *see* notably Heinrich Triepel, Die Hegemonie: Ein Buch von führenden Staaten, Stuttgart (1938); for the current debate *see* the references, *supra* note 18. *See also* the contributions in U.S. Hegemony and International Organizations: The United States and Multilateral Institutions (Rosemary Foot et al. eds., 2003); Unilateralism and U.S. Foreign Policy: International Perspectives (David Malone & Yuen Foong Khong eds., 2003). *See* Dellavalle, in this volume.

more or less similar patterns of behaviour. Hegemons tend to instrumentalize international law, they try to withdraw from its constraints and they want to reshape its substance.[80] As the contribution to this debate by Nico Krisch shows, all these strategies may be found in current American action: the strong focus on issues of international trade may be quoted as an example of instrumentalization,[81] the reluctance towards the creation of an International Criminal Court as an example of withdrawal,[82] and the revitalizing of the Security Council including its use in the "war on terrorism" can be viewed as an attempt to reshape this area of international law.[83]

Although writing in a completely different historical situation, Hudson also was concerned with American unilateralism. Being an international lawyer, he criticised America for failing to view itself as part of an international community.[84] According to Hudson, a major reason for this may be seen in the fact that "the public opinion of America has not been trained to see our place in an organized international society."[85]

Of course, traditions may play an important role, but there may be reasons deeper than a mere lack of "training." Some contemporary commentators have tried to understand U.S. international action from the perspective of national constitutional traditions. P.W. Kahn explained:

> [America] remain[s] a deeply nationalist country. Perhaps no other country is as deeply committed to its myth of popular sovereignty. We have a sacred text – the Constitution – which we understand as a revelatory expression of the popular sovereign. We believe that unless an assertion of governmental authority can be traced to an act of popular sovereignty, it is illegitimate.[86]

The statement may be illustrated by the reluctance of certain U.S. Supreme Court justices to take foreign and international legal developments into consideration when interpreting the U.S. constitution. Dissenting from the majority's decision to find criminal sodomy laws unconstitutional, a decision in which the majority considered foreign and international law on the issue when interpreting the relevant provisions of the U.S. Constitution, Justice Antonin Scalia voiced

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[80] Krisch, *supra* note 18, at 381.
[81] *Id.* at 384.
[82] *Id.* at 388.
[83] *Id.* at 398.
[84] Hudson, *supra* note 1, at 115.
[85] *Id.*
[86] Paul W. Kahn, *American Hegemony and International Law Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 Chi. J. Int'l L. 1 (2000).

the problem for the concept of popular sovereignty that may arise in this context:

> Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct. The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since "this Court … should not impose foreign moods, fads, or fashions on Americans."[87]

One may conclude from this dissent by Justice Scalia, and from the analysis presented above, that there is most probably more to the issue of American unilateralism than a "lack of education in international cooperation."[88] The quotations from Justice Scalia and Professor Kahn indicate that this reluctance has a lot do with different constitutional traditions and a strong understanding of democracy.[89] Both are reasons that are rooted in values common to many other countries, albeit without impacting the importance those countries attribute to the standing of international law and international cooperation in their domestic legal systems. The open question, therefore, remains why Americans find it so difficult to reconcile their strong democratic traditions with international cooperation. In that respect, it may help to re-read Hudson's argument on the benefits of international cooperation,[90] which today is as persuasive as it was in 1932.

E. *Conclusion*

At the beginning of the 21st century, international law seems to be torn between the challenges that go along with the process of constitutionalization described in the first two sections of this chapter, and hegemonic behaviour addressed in the second. It is fascinating to see that this tension, which can be felt so strongly

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[87] Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (*quoting* Foster v. Florida, 537 U. S. 990 (2002) (Thomas, J., concurring in denial of certiorari)).

[88] Hudson, *supra* note 1, at 115.

[89] *See also* the historical and ideological explanations offered by Robert F. Turner, *American Unilateralism and the Rule of Law, in* Towards World Constitutionalism 77, *supra* note 17.

[90] Hudson, *supra* note 1, at 115.

these days, was already present in 1932. Hudson was, of course, also aware of possible relapses and he offers consolation for those who feel uneasy about the possible directions that international law may take in the future:

> Yet not one of these perplexities has thwarted the movement of our time toward international organization. They may retard, and at times they may defeat advances; but they do not destroy the momentum which has been gained. Each of them must be approached by the student with appreciation of the general trend.[91]

[91] Hudson, *supra* note 1, at 122.

On the Borders of Justice: An Examination and Possible Solution to the Doctrine of *Uti Possidetis*

By Daniel Luker

A. *Introduction*

In Progress in International Organization, Professor Manley O. Hudson sought to determine the state of the international order, especially how it had progressed since the First World War.[1] He did this both to counter Senator William Borah's position of isolationism and state centrism on international affairs, and to emphasize the need to avoid the mistakes of the past, such as the First World War.[2] In examining the international order, Professor Hudson sought to identify the effect of the tools and institutions that had developed, specifically whether those tools and institutions "serve the needs of future generations."[3] It is this same question, whether the tools we employ in the international order "serve the needs of future generations," that frames this book. One such tool, the doctrine *uti possidetis juris*, is the subject of this chapter.[4]

One of the tensions between Senator Borah and Professor Hudson was how far the international order would encroach on the sovereignty of a state, and whether this limiting of sovereignty was progress.[5] It is this same tension, between the absolute sovereignty of states and the encroachment of the international order into a state to create order that underlies the problem with *uti possidetis*. The complicated interaction between the right to self-determination and the doctrine of *uti possidetis* exemplify these tensions.

In the debate over U.S. membership in the League of Nations, President Woodrow Wilson advanced his fourteen points as steps the international community

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[1] Manley O. Hudson, Progress in International Organization 5 (1932)

[2] *Id*. at 2–4.

[3] *Id*. at 122.

[4] U*ti possidetis juris* is a doctrine lifting internal administrative boundaries to the level of international boundaries during the processes of decolonization and nation building. Enver Hasani, *Uti Possidetis Juris: From Rome to Kosovo*, 27 Fall Fletcher F. World Aff. 85, 91 (2003); Case Concerning the Frontier Dispute (Burk. Faso/Mali), 1986 I.C.J. 554, 568 (Dec. 22).

[5] Hudson, *supra* note 1, at 105–7, 115.

Miller & Bratspies (Eds), Progress in International Law, pp. 151–170.

should take to avoid war and conflict.[6] The Fourteen Points were to be a starting place for the settlement of World War I, and a broad pronouncement of principles to govern nation states, and their peoples.[7] President Wilson stated that "every people [should] have the right to choose the sovereignty under which they shall live. …"[8] The fourteen points continue with statements of territorial adjustments that should be made in order to create a lasting peace.[9] With these statements, President Wilson brought the conflict between the right of self-determination and the claim to territory, the application of *uti possidetis*, into the modern international order.[10]

Questions of definition pose the primary challenge to the co-existence of these two principles, specifically: what exactly does the right of self-determination actually entail; and to what extent is a state's right of sovereignty absolute.[11] While these two issues certainly affected the history of the last century, it may be that finding compromises between these two principles will be the defining issue of international law for the 21st century.[12] The ability to reach those compromises is inhibited by the doctrine of *uti possidetis. Uti possidetis* is a tool that no longer serves the needs of the current generation, let alone future ones. While the doctrine has developed, it has not developed so as to be useful in solving the problems of the current international order. Because of the functional limitations of the doctrine, *uti possidetis* undermines the very goals it seeks to achieve. However, *uti possidetis's* historical development also contains the seeds to achieve those goals.

In section B this chapter will briefly examine the conflict between the right of self-determination and sovereignty. The history, the successes and failures of *uti*

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[6] Woodrow Wilson, *The Fourteen Point Speech (Jan. 8, 1918), in* 3 The Public Papers of Woodrow Wilson: War and Peace 155, 155–62 (Ray Stannard Baker & William E. Dodd eds., 1927). George Creel, War, the World, and Wilson 125 (1920).

[7] Creel, *supra* note 6 at 25, 301.

[8] President Woodrow Wilson, Address Before the League of Nations to Enforce Peace (May 27, 1916), *in* 53 Cong. Rec. 9954 (May 29, 1916).

[9] Wilson, *supra* note 6, at 155, 155–62.

[10] Thomas M. Franck, Fairness in International Law and Institutions, 149–53 (1995). Franck posits that *uti possidetis* and Wilson's concept of self-determination are diametrically opposed.

[11] *See* Michla Pomerance, Self Determination in Law and Practice 71 (1982) (Self-determination is not a *jus cogens*); Heather Wilson, International Law and the Use of Force by National Liberation Movements 78 (1988) (Self-determination has reached the status of right); Antonio Cassesse, Self-Determination of Peoples (1995), for a discussion on this point.

[12] Lorie M. Graham, *Self-Determination for Indigenous People After Kosovo: Translating Self-Determination "Into Practice" and "Into Peace,"* 6 ILSA J.Int'l & Comp. L. 455, 465 (2000). *See also* Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 Denv. J. Int'l L. & Pol'y 373 (2003).

possidetis in governing the borders of emerging states is analyzed in section C. And Section D will provide possible solutions to the shortcomings described in section C. These solutions are the means to develop *uti possidetis* into the legal tool it should be.

B. *The Rights of Self-Determination and Sovereignty*

While some discussion continues about whether self-determination is a right or simply a principle,[13] the right of self-determination has become ingrained in the concept of decolonization,[14] and codified by treaties such as the Universal Declaration on Human Rights,[15] the International Covenant on Civil and Political Rights,[16] and the International Covenant on Economic, Social, and Cultural Rights.[17] "[T]ogether [these last two International Covenants] are considered to constitute the international 'Bill of Rights,'" and are binding treaty law for a vast majority of the world.[18] The right to self-determination has struggled to coalesce, with an ongoing discussion regarding what actions self-determination justifies.[19]

The basic requirement for self-determination is that a "people" must exist to exercise it.[20] Generally a "people" is defined by a two-part test. The first part is an objective one that examines common racial backgrounds, ethnicity, language, religion, history and cultural heritage.[21] The second part, the "subjective prong," examines the extent to which the group self-consciously perceives itself collectively as a distinct "people." This requires that the group members express common values and goals.[22] Once these two prongs are satisfied, a "people" may be

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[13] Michla Pomernace argues that the concept of self-determination did not rise to the level of a principle of *jus cogens*. Pomerance, *supra* note 11, at 71. Compare this with Wilson's arguments that the principle of self-determination has risen to the status of a human right. Wilson, *supra* note 6, at 78.

[14] Hurst Hannum, *Rethinking Self-Determination* 34 Va. J. Int'l L. 1, 11 (1993).

[15] Universal Declaration of Human Rights, Dec. 10, 1948, art. 22.

[16] International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 1, 999 U.N.T.S. 171, 173.

[17] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1, 993 U.N.T.S. 3, 5.

[18] Scharf *supra* note 12, at 378.

[19] Franck, *supra* note 10, at 154.

[20] Scharf *supra* note 12, at 378.

[21] Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 Case W. Res. J. Int'l L. 257, 276 (1981).

[22] *Id.*

said to have a right to self-determination. However, in a Westphalian system built on nation-states, this Wilsonian right to self-determination immediately runs head-long into the sovereignty of the state.

At its most basic, sovereignty is a state's "ticket of general admission to the international arena."[23] It is a state's right to political independence, territorial integrity, and to exercise virtually exclusive control and jurisdiction with that territory.[24] Sovereignty was originally characterized as an absolute, either it existed or it did not, but with the development of the right of self-determination and other modern international law, the concept of sovereignty has lost this absolutism.[25]

The conflict between self-determination and sovereignty rests on the question, what is the extent to which the right of self-determination grants a "people" the ability to control territory in a fashion that may conflict with a pre-existing state's sovereignty over that same territory?[26] This question is usually phrased in terms of whether the right of self-determination grants a people the right to secede. There are generally three different answers to that question: yes, no, and sometimes.

The first answer, that self-determination contains within it a right of succession, draws strength from the way self-determination was applied during the period of decolonization.[27] After World War II, self-determination was cited as one of the reasons for recognizing the independence of the European nation's African colonies as individual states.[28] The United Nations mandated that the

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[23] Michael Ross Fowler & Julie Marie Bunk, Law, Power, and the Sovereign State 12 (1995).

[24] Scharf *supra* note 12, at 378. The Montevideo Treaty outlined four criteria for statehood: (1) a populace; (2) a government; (3) a defined territory; (4) and the capacity to enter into international treaties. Convention on the Rights and Duties of States (Montevideo Convention) Dec. 26, 1933, 165 League of Nations Treaties Series (LNTS) 19; 28 AJIL (Supp.) 53 (1934) (reprinting text of Montevideo Convention). While the requirement for a defined territory is not stringent, it must exist. This means that a state can have some disputes about exactly where a border lies, but not a dispute in whether there is a border. *See also* Stephen D. Krasner, Sovereignty: Organized Hypocrisy 14–15 (1999).

[25] International Law: Cases and Materials 18 (Louis Henkin et. al., eds., 3d ed. 1993); Hideaki Shinoda, Re-Examining Sovereignty: From Classical Theory to the Global Age 151–162 (2000). (Shinoda argues that sovereignty can be bifurcated into two concepts, constitutional sovereignty and national sovereignty, and that sovereignty is limited through this bifurcation); Neil MacCormick, Questioning Sovereignty: Law, State, and Nation in the European Commonwealth 128–36 (1999) (Sovereignty can be divided into internal and external sovereignty, and as international institutions grow sovereignty is changed, diminished making way stronger democracies and international institutions).

[26] Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 Yale J. Int'l L. 177, 177–8 (1991).

[27] Hannum, *supra* note 14, at 11–12.

[28] Pius L. Okoronkwo, *Self-Determination and the Legality of Biafra's Secession Under International Law*, 25 Loy. L.A. Int'l & Comp. L. Rev. 63, 76 (2002).

practice of colonialism was to end and that the colonies had the right to self-rule. Sometimes this right was exercised through secession from the colonial state and formation of an independent state.[29] However, as mandated by the United Nations, this right of secession was limited to those peoples who had been ruled under what has been termed "salt water" colonialism, or colonialism requiring a geographic separation between the state and its colony.[30] As a result, the right of succession did not encompass all of those who might be characterized as "peoples" under the two criteria mentioned above.[31] The idea that secession is only legitimate in overseas colonies runs into the problem with the fact that the right to secede is most often granted after the fact, when a secession movement has been successful.[32] As a result, some have cynically suggested that the right of self-determination grants a right to secession, only when it is successful.

The second answer, that self-determination does not include the right of secession, is based on a more restrictive vision of self-determination as a right to participate within the national political structure.[33] Thomas Franck concluded that the right of self-determination was really a right to democratic governance.[34] This reading of self-determination upholds the Westphalian principle of territorial integrity while at the same time providing a "people" the possibility of governing itself, or being represented in its governance.[35] Under this interpretation, the right of self-determination is an internal right, which is not to be exercised in a way that would threaten the state's sovereign claim to its territorial integrity.

The last answer, that self-determination sometimes includes a right to succession, grows from the question, "what happens when a state does not respect a "people's" right of internal self-determination?" Michael Scharf argues that when a "people" is denied the right to internal self-determination, and is subject to human rights abuses, under international law that "people" acquires a right to secede.[36]

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[29] Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, P 2, U.N. Doc. A/4684 (1960); Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, art. 1, P 2, U.N. Doc. a 4684 (1961); *see* Okoronkwo, *supra* note 28, at 76–95, for a discussion on the development of the United Nations mandate to decolonize Africa and the portions of the U.N. Charter and the various U.N. resolutions supporting decolonization.

[30] Brilmayer, *supra* note 26, at 182; James Anaya, Indigenous Peoples in International Law, 43–44 (2000).

[31] Brilmayer, *supra* note 26, at 182; Anaya, *supra* note 30, at 43–44.

[32] Lee Buchheit, Succession: The Legitimacy of Self-Determination 2–10 (1978).

[33] Hannum, *supra* note 14, at 34–5.

[34] Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 Am. J. Int'l L. 46, 58–59.

[35] Hannum, *supra* note 14, at 32–36.

[36] Scharf, *supra* note 12, at 384–5.

Thus, for Scharf, the state's sovereign right to territorial integrity is a "rebuttable presumption" rather than an absolute.[37]

In all three of the self-determination paradigms described above the underlying claim of self-determination includes a presumptive claim to territory. The claim to govern territory is an integral, but distinct, part of the right to self-determination.[38] "At issue is not a relationship between people and states, but a relationship between people, states, and territory."[39] By exercising a right to self-determination, a people make the claim they have a right to influence how a territory is governed. The doctrine of *uti possidetis* shapes how that people makes that claim. In all three paradigms of self-determination, the doctrine of *uti possidetis juris* inhibits the success of the peoples' self-determination claims.

C. *The Doctrine of* Uti Possidetis Juris

At its simplest, the doctrine of *uti possidetis juris* governs how emerging states draw their borders.[40] Application of the doctrine changes a state's internal administrative borders to the international borders of the emergent states.[41] This is easiest to understand by looking at the current borders in Africa. The International Court of Justice's *Case Concerning the Frontier Dispute (Burkina Faso/Mali)*[42] provides an example of how the doctrine is applied. The I.C.J. set out a two-step process to apply the doctrine. The first step is to determine the dates of independence for the new states. In the case of Burkina Faso and the Republic of Mali those dates were 1959–1960.[43] The second step is to then determine the boundary of the states or administrative units at the date of independence.[44] These boundaries then become the international borders. "The principle of *uti possidetis* freezes the territorial title, it stops the clock" at the time of independence.[45] Burkina Faso and the Republic of Mali were once individual

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[37] *Id.* at 385. Scharf explains that this "rebuttable presumption" was a sliding scale, granting a stronger right to secession as human rights abuses mounted.

[38] Brilmayer, *supra* note 26, at 179.

[39] *Id.*

[40] Case Concerning the Frontier Dispute (Burk. Faso/Mali) 1986 I.C.J. 554, 565 (Dec. 22). Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 Am. J. Int'l L. 590, 590 (1996).

[41] Case Concerning the Frontier Dispute (Burk. Faso/Mali), *supra* note 40, at 565.

[42] *Id.*

[43] *Id.* at 568.

[44] *Id.*

[45] *Id.*

subunits of French Africa, Burkina Faso was known as the colony of Upper Volta, and the Republic of Mali was the colony of Sudan.[46] In order to determine the colony boundaries at the time of independence, the I.C.J. traced the history of the colonial borders from 1919 up until the dates of independence, reconstructing the claims to territory each colony made until independence, through maps, legislation, administrative records, and other documents.[47] The boundaries at independence were then held to be the current international boundaries of Burkina Faso and the Republic of Mali.[48]

The current application of the doctrine is tied to its historical development: its origin in Roman property law,[49] its emergence in international law during decolonization in Latin America,[50] its use during the post-World War II decolonization of Africa,[51] and its application in Eastern Europe as new states emerged after the collapse of the Soviet Union.[52] To understand the doctrine's limitations, as well as how those limitations can be remedied it is necessary to understand how the doctrine developed and changed over time.

1. *A Brief History of* Uti Possidetis

The history of *uti possidetis* began in Roman property law.[53] It was used where the ownership of the property was in dispute. During the legal dispute the *praetor*, or administrator of justice, would grant temporary possession of the property to the person in actual possession of the property, unless that possession was gained through force or fraud.[54] The phrase *uti possidetis, ita possideatis*, or "as you possess, so you may possess," grew to summarize the edict.[55] This possession continued until the *preator* determined who the rightful owner of the property was. At that time the property was then returned to lawful owner.[56]

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[46] Pierre Englebert, Burkina Faso: Unsteady Statehood in West Africa 18–20 (1996). Case Concerning the Frontier Dispute (Burk. Faso/Mali) *supra* note 40.

[47] Case Concerning the Frontier Dispute (Burk. Faso/Mali) *supra* note 40, at 570–648.

[48] *Id*. at 649–651.

[49] Ratner, *supra* note 40, at 592.

[50] *Id*. at 593; Case Concerning the Frontier Dispute (Burk. Faso/Mali) *supra* note 40, at 565.

[51] Joshua Castellino & Steve Allen, Title to Territory in International Law 96–115 (2003).

[52] Franck, *supra* note 10, at 147.

[53] Peter Radan, Breakup of Yugoslavia and International Law 69 (2001).

[54] *Id*. at 69–70.

[55] Ratner, *supra* note 40, at 592–3.

[56] *Id*.

Uti possidetis emerged in international law during the decolonization of Latin America.[57] The leaders of the emerging nations applied the doctrine to their national borders to create stability but "the Latin states accepted the possibility that their final border might differ from the *uti possidetis* line."[58] This created a flexibility that allowed the Latin American nations to provide solutions for many border disputes.[59]

In Africa, the doctrine was applied differently. Each colonizing power had its own unique way of administering its colonies, and as a result, while some nations experienced violent popular uprisings during decolonization, such as France experienced in Algeria, others experienced a more orderly process.[60] In order to prevent challenges to the emerging nations' borders, from both inside and outside the new states, the new national leaders applied *uti possidetis* with a more literal and strict interpretation.[61] As discussed above, it is in Africa where many of *uti possidetis'* most obvious problems have arisen. *Uti possidetis'* effects are seen where ever ethnic groups have been bottled together against their will,[62] such as Rwanda, or the Sudan, and where borders have been drawn without any consideration to the realities on the ground, such as Ethiopia, DR Congo, or Angola.[63] Applying *uti possidetis* inflexibly does not allow the African nations to compensate for the doctrine's inherent problems.

When the Soviet Union collapsed, most of the individual republics accepted the internal Soviet borders as their international borders, even to the extent of codifying

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[57] The European powers were pre-occupied by the Napoleonic Wars allowing the Creole, the descendents of the European Colonists, to assert their claims of self-determination. In order to prevent re-colonization by the European powers and to create certainty in the borders between the new states *uti possidetis* was applied as a justification for using the administrative boundaries as international boundaries. Castellino & Allen, *supra* note 51, at 42–64.

[58] Ratner, *supra* note 40, at 594.

[59] Castellino & Allen, *supra* note 51, at 61. It should be noted that while the doctrine was applied flexibly in Latin America, it was applied by the descendents of Europeans for the benefit of those same peoples. The indigenous inhabitants of the continent generally did not receive the benefit of this flexibility.

[60] Yilma Makonnen, International Law and the New States of Africa 15–6 (1983). A good depiction of the Alegerian struggle is depicted in the film, Battle of Algiers (1965).

[61] Castellino & Allen, *supra* note 51, at 101–114. Just as in Latin America, the doctrine was applied by the political elites who were in power at the time of decolonization. In many cases these elites where the same groups the European Colonizers had "deputized" to administer the colonial state. This had the effect of perpetuating many of the problems decolonization sought to solve. Makonnen, *supra* note 60 at 439–453.

[62] Makau Wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 Mich. J. Int'l L. 1113, 1149 (1995).

[63] Nsongurua J. Udombana, *Unfinished Business: Conflicts, the African Union and the New Partnership for Africa's Development* 35 Geo. Wash. Int'l L. Rev. 55, 94 (2003).

those borders in the 1993 Charter of the Commonwealth of Independent States.[64] When Yugoslavia descended into violence[65] the European Community's response, affirmed by the United States and the USSR, was the organization of the Badinter Commission. The Commission was to examine the claims of the warring parties and to make recommendations to the European Community how the situation should be handled.[66] The Commission first made the determination that the Republic of Yugoslavia was in the process of dissolution,[67] and then noted that the emerging states had the responsibility to work together and within the international law to preserve the rights of people and minorities and settle the problems arising from state succession.[68] In opinion No. 3, of the Commission applied the doctrine of *uti possidetis* to the internal administrative borders of the Republic of Yugoslavia.[69] Both the Badinter Commission and the Soviet Union applied *uti possidetis* beyond traditional "salt-water" colonies. With this new development the doctrine would now be applied in all cases of state creation, not just decolonization, and all the short comings of the doctrine would now effect emerging states.

2. *The Success and Failure of* Uti Possidetis

The goal of *uti possidetis* was to provide stability for new states by giving certainty to their borders.[70] In theory, such certainty would reduce inter-state squabbling about who exercises sovereignty over what territory. If one only examines the level of the state actor (as much of international law is prone to do) one might conclude that the doctrine has been successful in preventing warfare on continent-wide scales.[71] Indeed, even critics of the doctrine concede that this has been largely successful, even in Africa, at least in preventing large-scale inter-state conflicts.[72]

The reality is that the regions of the world where *uti possidetis* has been applied regularly are not stable.[73] The damage caused by the application of *uti possidetis* is

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[64] Charter of the Commonwealth of Independent States, June 22, 1993, art. 3, 34 I.L.M. 1279, 1283 (1995).

[65] Radan, *supra* note 53, at 164.

[66] *Id*. at 166.

[67] Opinion No. 1 of the Arbitration Commission of the Peace Conference on Yugoslavia, 31 I.L.M. 1494 (1992).

[68] *Id*.

[69] Opinion No. 3 of the Arbitration Commission of the Peace Conference on Yugoslavia, 31 I.L.M. 1499 (1992).

[70] Case Concerning the Frontier Dispute (Burk. Faso/Mali), *supra* note 40, at 565.

[71] Makonnen, *supra* note 60, at 458–9.

[72] *Id*.

[73] Hasani, *supra* note 4, at 85–90, 94. *Uti Possidetis Juris* has been most frequently applied in Latin America, Africa, and Eastern Europe, all regions which have developed weak states.

most easily pointed out in Africa. Since 1970, over thirty wars have rocked the continent of Africa, "the vast majority of them originating intrastate."[74] These conflicts have varying sources, but many can be traced to perceived ethnic cleavages and inequality between domestic groups,[75] which, at their roots, are claims or denials of the right of self-determination, both external and internal.[76] This problem is exacerbated in states, such as the sub-Saharan states, that contain many distinct peoples within a single state.[77] With an increasing number of ethnicities and sub-nationalist groups, the nation is fractured, and has less of a cohesive national identity. This lack of identity can challenge a nation's existence because each of the sub-national groups seeks to assert its will individually instead of collectively.[78]

An example of the instability caused by *uti possidetis* can be found outside of Africa in the former Yugoslavia. Yugoslavia, like many African nations, was a state encompassing a number of different ethnic and political bodies. During the communist era these individual political bodies were formed into a federal state, and the individual ethnicities began to spread throughout the nation. With the collapse of the Soviet Union, the individual political units that had formerly been united as the Republic of Yugoslavia began to jockey for power and Yugoslavia dissolved into chaos.[79] The European Union responded by applying the doctrine of *uti possidetis* to the former state to provide an orderly separation of the sub-national groups.[80] However, the new states that emerged were in accordance with the Yugoslavian administrative boundaries.[81] This had the effect

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Uti possidetis has prevented the nations it has been applied to from overcoming internal problems and becoming a strong sustaining nation.

[74] Udombana, *supra* note 63, at 55, 59. Udombana cites conflicts in Rwanda, Sudan, Somalia, Eritrea, the Democractic Republic of Congo as examples of Africa's instability.

[75] *Id*. at 87–88.

[76] Mutua, *supra* note 62, at 1150. Dr. Mutua argues that the denying the right to self-determination perpetuates the damage of colonialism, resulting in the loss of legitimacy of the African State, which results in increased violence to control the state, which in turn results in a further cyclical loss of legitimacy, more violence, and instability. "The denial of the right to self determination is one of the fundamental reasons for the failure of the state to develop into a cohesive, effective, and functional entity."

[77] *Id*. at 1150.

[78] *Id*. at 1145–6.

[79] *See* Sabrin Petra Ramet, Balkan Babel: The Disintegration of Yugoslavia from the Death of Tito to the War for Kosovo (1999) for a complete description and analysis of the events.

[80] Castellino & Allen, *supra* note 51, at 158–161; and Opinion No. 3 of the Arbitration Commission of the Peace Conference on Yugoslavia, 31 I.L.M. 1499 (1992).

[81] Castellino & Allen, *supra* note 51, at 158–161.

of leaving the Kosovar Albanians within the new Republic of Serbia. The violence prompted by the claims of sovereignty and territorial integrity within Serbia is well known.[82] Part of what drove the violence were conflicting claims of self-determination over territory by Croats, Slovenes, Bosnian Muslims, Macedonians, Serbs and Albanians.[83] Those claims continued after the international community stepped in to keep the peace.[84]

While the causes of intrastate warfare and genocide are complex, many of the conditions that lead to those horrors are fostered by the application of *uti possidetis*: of the wholesale acceptance of administrative boundaries as international boundaries.

It must be pointed out that *uti possidetis's* application is more prominent in regions where colonialism and decolonization have been attempted.[85] It is important to note that it is difficult to separate what the actual root causes are for the instability in these post-colonial regions,[86] and *uti possidetis* should not bear the blame for all the ills in those nations. But, as will be discussed below, it is certainly a contributing factor, creating conditions that make conflict more likely, especially if combined with other factors.

I. *The Functional Difficulties of* Uti Possidetis

The roots of *uti possidetis's* affect on a "peoples" right of self-determination, with the attendant consequences for state stability, lie in what the doctrine actually does: changing administrative boundaries into international boundaries. Examining these changes reveals functional problems with using administrative boundaries as international boundaries.[87] First, international boundaries are created to separate states. States are concerned with what crosses their borders and the extent of jurisdiction their borders give them. International borders are also

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[82] *See* Peter Beaumont & Patrick Wintour, *Kosovo: The Untold Story*, Observer, July 19, 1999, *available at* http://observer. guardian.co.uk/milosevic/story/0,,520170,00.html; *see also* Ramet, *supra* note 79; *see* Miranda Vickers, Between Serb and Albanian: A history of Kosovo 241–288 (1998).

[83] Radan, *supra* note 53, at 157–8.

[84] *Pyrrhic Victory: Kosovo's election brings a peace settlement no closer*, Economist, Oct. 30, 2004, at 57–8.

[85] Castellino & Allen's discussion of *uti posseditis, see* Castellino & Allen *supra* note 51, centers on Latin America and Africa, to areas where Colonialism was prominent. While South East Asia also experienced colonialism for a number of reasons the effect was not the same. *See* Hasani, *supra* note 4, at 89.

[86] *See* Jared Diamond, Guns Germs and Steel (1999); Frantz Fanon, Wretched of the Earth (1963).

[87] Ratner, *supra* note 40, at 591.

lines of national defense, and for this reason they have often followed physical barriers such as mountains or rivers.[88]

Internal administrative boundaries, by contrast, serve two very different goals: to unify the nation, and to allow it to be governed more effectively.[89] Sometimes internal boundaries are inherited (like the original thirteen colonies in the United States). Other times, as in the case of national expansion (such as in Australia, Canada or the Western United States), provisional boundaries are drawn up in much the same manner as the straight-line colonial boundaries in Africa, giving very little consideration to the geographic and political reality on the ground.[90]

Internal boundaries are often drawn to facilitate the forging of a national identity.[91] One example is the boundaries of the Canadian province of Quebec. The borders of the province were adjusted, sometimes adding territory, at other times taking it away, to facilitate the identity of a Canadian people. The Soviet Unions' organization also used the boundaries of its republic in order to break up ethnic identity and redirect that identity to a greater Soviet Identity.[92] Internal boundaries can be used to foster a national identity at the expense of the sub-national units.

Administrative lines also divide national responsibilities in an organized way. These internal boundaries provide boundaries of economic and social responsibility, but still allow regulated sharing of those responsibilities. They provide jurisdiction for tax collection, school systems and other divisions that affect the daily life of the regular citizen of the state. Importantly, movement across these administrative borders is much looser than across international borders.[93] This can result in economic zones straddling internal administrative borders. The New York/New Jersey/Connecticut metropolitan area is one example of this. The metropolitan area stretches across three states and functions as one unit. To raise those specific administrative borders to the level of international borders would have dire consequences for the economic viability of the region because the new borders would cut up the area and impose restrictions on movement that would prohibit the movement of labor and goods.[94]

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[88] *Id*. at 602.
[89] *Id*. at 603.
[90] *Id*.
[91] *Id*.
[92] *Id*.
[93] *Id*. at 602. There are examples of this in the U.S. Constitution's privileges and immunities clause which preserve the right to travel between states. U.S. Const. amend. XIV § 1; Saenz v. Roe, 526 U.S. 489 (1999).
[94] Ratner, *supra* note 40, at 604. *See* The Federalist No. 42 (James Madison), for a discussion on the need for regulation of interstate trade and also a need for the freedom to conduct trade within a nation.

Ultimately, the problem is that internal borders are established for different reasons than international borders. To raise internal borders to the level of international borders is to ignore the purpose those internal borders served. When converted into international borders, these formerly-internal borders are too often unsuccessful in dividing states, and that lack of success is attributable to the very thing that made them successful internal borders.

II. Uti Posseditis, *Self-Determination and State Stability*

The functional realities of borders, both administrative and international, affect how "peoples" attempt to exercise their right of self-determination, and whether those attempts are legitimized by the international community.[95]

A federal state is one method to allow a "people" to exercise its right of internal self-determination.[96] But the functional reality of *uti possidetis* creates incentives for leaders of states that are struggling with questions of legitimacy to use administrative boundaries as a tool to weaken a "people's" political efficacy.[97] Under a regime employing the doctrine of *uti possidetis*, administrative regions are potential new nations, and when an administrative region is populated by a cohesive ethnic group that might satisfy the definition of a "people," it is easier for those in power to perceive that group as a threat to its control of the state.[98] As a result, those in power have an incentive to gerrymander the administrative boundaries in order to reduce the influence of possible internal rivals.[99] The effect is a further loss of political efficacy that can lead to a further loss of state legitimacy, and increased tension, which in turn too often results in violence.[100]

Uti possidetis also affects a "people's" claim to external self-determination. The current theory of external self-determination, or the claim to a right of succession, requires that the resultant states follow the doctrine of *uti possidetis*.[101] This has dramatic social and political consequences for a new state. When a minority

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[95] Castellino & Allen, *supra* note 51, at 114.

[96] Mutua, *supra* note 62, at 152–3.

[97] Ratner, *supra* note 40, at 603–4 (1996).

[98] Margaret Moore, *The Territorial Dimension of Self-Determination, in* National Self-Determination and Secession 140–1 (Margaret Moore ed., 1998). *See also*, Mutua, *supra* note 62, explaining that in multi-ethnic nations, especially in Africa, the two peoples understand the struggle for control of the state as a zero-sum-game, the victor having complete power over the loser.

[99] Moore, *supra* note 98, at 140–1.

[100] *Id.* at 140.

[101] Opinion No. 3 of the Arbitration Commission of the Peace Conference on Yugoslavia, 31 I.L.M. 1499 (1992). Franck, *supra* note 10, at 151. "What seemed to be needed was neither the *uti possidetis* of Latin America nor the self-determination of Europe, but some new normative

successfully asserts its right of external self-determination and gains state status for itself the minority is required to draw its new borders in accordance with the former state's previous administrative boundaries.[102] This can result in all the difficulties of raising administrative boundaries to international boundaries, such as economic impediments.[103] These difficulties are additional challenges for a new state and can sometimes overwhelm the ability of the new state to succeed.[104]

Another effect can also be that political majorities in the old state become politically weak minorities in the new state. This is what happened in the former Yugoslavia.[105] By applying *uti possidetis* to the former Yugoslavia, the Kosovar Albanians were placed in a position where they could be victimized by the newly-created Republic of Serbia.[106]

In Africa, and other post-colonial regions, *uti possidetis* has the effect of perpetuating the problems that the right of self-determination should be solving, such as creating stability for the emerging nation.[107] Because the right of external self-determination may only be exercised in accordance with *uti possidetis*, claims of secession are only recognized when they can be fit within an administrative region's borders.[108] Where a minority group who seeks to exercise its right of self-determination straddles a border, that group has twice the challenge: 1) to successfully assert its right of self-determination; and 2) tie that assertion to a claim to territory. This claim to territory has added difficulty because it is not within any existing borders– the claim crosses borders. Such a claim is in direct opposition to the idea of territorial integrity.[109]

In addition to claims of external-determination, *uti possidetis* leads to conflicts over national borders.[110] In Africa, many nations such as Ethiopia, Sudan, Libya and Chad, are unsure of their borders because the colonial administrative boundaries

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concept combining aspects of both. Thus the emerging nationalist leaders of Africa persuaded the UN General Assembly (and the International Court of Justice in its Namibia Advisory Opinion) that there must be a right of self-determination, but that it would be exercised only within existing colonial frontiers."

[102] Franck, *supra* note 10, at 153.

[103] *Id*.

[104] Ratner, *supra* note 40, at 602–7.

[105] Hannum, *supra* note 14, at 55–56.

[106] Ratner, *supra* note 40, at 591.

[107] *See* Makonnen, *supra* note 60, specifically at 460–463, but also in general.

[108] Franck, *supra* note 10, at 153.

[109] *Id*.

[110] Ratner, *supra* note 40, at 607.

were not delineated very well, or there is conflicting evidence of those delineations.[111] This uncertainty leads to a differing of opinions about where a border lies, and all too often states resort to violence to enforce their opinions.[112] *Uti possidetis* creates the condition for these border conflicts because it gives a sense of legitimacy to the conflict for the parties. The nations are not fighting to extend their control beyond their borders, but rather to enforce their control over what they see as their historical border.[113]

III. Uti Possidetis' *Status as International Law*

Any critique of the doctrine of *uti possidetis* must determine what status the doctrine has in international law. Has it reached the status of an international general principle as the Badinter Opinion No. 3 claims? Is it applicable to all nations, even those outside the doctrine's roots of decolonization? Or is the doctrine more limited? There is a voluminous body of literature on this subject,[114] and the recent focus in the debate centers on the wording in the I.C.J.'s *Burkina Faso* decision.[115]

The two parties to the case, Burkina Faso and the Republic of Mali, had agreed that *uti possidetis* governed the proceeding; neither contested its status as a controlling principle for their adjudication.[116] While international tribunals are not precedent setting, their rulings do have influence in other similar adjudications,[117] and the International Court of Justice has become the chief forum for territorial disputes.[118]

The language immediately before and after the Court's statement that *uti possidetis* is a general principle of international law, specifically discusses its application

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[111] *Id*. at 594, 607.

[112] *Id*. at 607.

[113] *Id*. at 607–8.

[114] *See* Castellino & Allen, *supra* note 51; Hasani, *supra* note 4; Peter Radan, *Post Succession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission*, 24 Melb. U. L. Rev. 50 (2000); Ratner, *supra* note 40, at 36.

[115] Case Concerning the Frontier Dispute (Burk. Faso/Mali), *supra* note 40.

[116] *Id*. at 564–5.

[117] Malcolm N. Shaw, International Law 86 (4th ed. 1997).

[118] Case Concerning Sovereignty Over Certain Frontier Land, 1959 I.C.J. (20 June) (Belgium and the Netherlands brought a case over the ownership of territory north of the village Turnhout); Territorial Dispute (Libyan Arab Jamahiriya/Chad) 1994 I.C.J. (Feb. 13) *See* Brian Taylor Sumner, *Territorial Disputes at the International Court of Justice*, 53 Duke L.J. 1779 (2004). Sumner outlines the International Court of Justice's jurisdiction over Territorial Disputes, and explains the legal justifications states cite to bring territorial cases before the court: treaties, geography, economy, culture, effective control, history, *uti possidetis*, elitism, and ideology.

during decolonization.[119] This contextual point is then underscored by the I.C.J.'s statement of the doctrine's purpose, namely "to prevent the independence and stability of new states being endangered by fratricidal struggles provoked by the challenging of frontiers *following the withdrawal of the administering power*."[120] This statement makes it clear that the doctrine is applicable specifically where a nation has been subjected to colonial, or colonial-like rule and should not be imposed in other situations.[121]

While I.C.J. decisions are not binding on anyone other than the parties of the dispute, the similar treatments of the doctrine have been codified in many of the areas where it has been applied. In South America the doctrine can be found in national constitutions,[122] in Africa the OAU adopted the doctrine as one of its early tenets,[123] and in Eastern Europe it was codified in the 1993 Charter of the Commonwealth of Independent States.[124] This leaves the doctrine's status in international law dependent on where it is being applied[125] and any solution seeking to solve the harms *uti possidetis* creates must be tailored to fit within the doctrine's status in the particular region. As the doctrine is currently applied rigidly to existing administrative boundaries[126] there is no flexibility to customize the application to each nation it is applied to.

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[119] Case Concerning the Frontier Dispute (Burk. Faso/Mali), *supra* note 40, at 564–5.

[120] *Id*. at 565 [emphasis added].

[121] Radan, *supra* note 114, at 63.

[122] *See, e.g.*, Const. Art. V (Venz. 1830), 18 Brit. & Foreign State Papers 1119 (1833); CONST. Art. IV (Hond. 1848); 36 Brit. & Foreign State Papers 1086 (1861).

[123] Organization of African Unity, *O.A.U. Resolution on Border Disputes, 1964, in* Basic Documents on African Affairs 360–361 (Ian Brownlie ed., 1971). The resolution may also referred to by its OAU document number, AGH/RES.16(I). *See also* Crawford Young, *Self-Determination, Territorial Integrity, and the African State System, in* Conflict Resolution in Africa 327 (Francis Deng & William Zartman eds., 1991).

[124] Charter of the Commonwealth of Independent States, June 22, 1993, art. 3, 34 I.L.M. 1279, 1283 (1995).

[125] The Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, regulates the formation and dissolution of treaties. And Article 38(1) of the Statute of the International Court of Justice creates a hierarchy of sources of international law. Article 38(1) places international treaties as the highest form of international law. Any other forms of international law are inferior and subservient to treaties. Shaw, *supra* note 117, at 55. This means that where *uti possidetis* has been codified by treaty, it is a binding rule, unless changed by treaty.

[126] As example of the rigid application refer to Opinion No. 2 of the Arbitration Commission of the Peace Conference on Yugoslavia 31 I.L.M. 1497 (1992) and Opinion No. 3 of the Arbitration Commission of the Peace Conference on Yugoslavia 31 I.L.M. 1499 (1992).

D. *What Can be Done About* Uti Possidetis

It seems unlikely that the doctrine of *uti possidetis* will be revoked in its entirety.[127] Thus, any solution will likely entail attempting to negate the functional problems the doctrine creates without disturbing the existing international order. Part of the answer lies in the doctrine's origins: the temporary nature of the doctrine during Roman property disputes,[128] and the flexibility of the doctrines application in South America.[129]

I. *The Principle of Equity in Border Disputes*

So how can dynamism be reintroduced? The I.C.J. may have an answer. In cases contesting ownership of maritime areas, specifically regions of the continental shelf, the court has relied on concepts of equity to determine ownership. In examining two such cases, *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*,[130] and *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*,[131] the I.C.J. focused on achieving "equitable results." Additionally the court's jurisprudence required that any delimitation of continental shelves be done "in accordance with equitable principles, and taking account of all the relevant circumstances."[132] In the particular cases, "relevant circumstances" include geography, the ownership of the economic development of the particular regions, as well as historical claims and uses. Equity has the potential to be the means to adjust boundaries to solve the inequities history has created. "Equity as a legal concept is a direct emanation of the idea of justice."[133] And it is certain that the world could use more justice, especially where minorities and self-determination are concerned.

Additionally the court recognized the "legal concept of equity [as] a general principle directly applicable *as* law."[134] The court specified that one of the effects of equity on international law was to allow the court to choose among several

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[127] Revoking *uti possidetis* totally would easily send Africa, if not other areas into wholesale bloodshed. Udombana, *supra* note 63, at 94.

[128] Radan, *supra* note 53, at 69.

[129] Castellino & Allen, *supra* note 51, at 61.

[130] Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) 1982 I.C.J. 18 (Feb. 24).

[131] Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta) 1982 I.C.J. 13 (June 3).

[132] Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), *supra* note 130, at 37.

[133] *Id*. at 60. *See also* Baker in this volume.

[134] *Id* [emphasis added].

different interpretations of the law and choose the one, in the particular circumstance before the court, with the result "closest to the requirements of justice."[135] Such jurisprudence has only been applied in the context of ownership of continental shelves, but could have profound application on the questions of land-based territorial claims. By recognizing that the time for strict application of *uti possedetis* has passed and that concepts of equity should be weighed in determining territorial boundaries, a mechanism providing for change short of warfare would be introduced. That said, three major concerns about applying principles of equity in territorial disputes must be mentioned.

The first is that only states have standing to bring a case to the I.C.J. and it may be too grandiose to expect a change allowing sub-state actors the same.[136] Without standing to directly bring a case before the I.C.J. any subs-state actors who have grievances about how territory is delineated are limited to bringing the issue up through the internal mechanisms of the state they belong to. This is fine if the state is reactive to such domestic influences, but when the sub-state actors' claim is against the state they inhabit the likelihood that state will bring the issue before the I.C.J. is unlikely.

Again, the I.C.J.'s continental shelf jurisprudence offers some solutions based on concepts of equity, and an examination of "relevant circumstances."[137] This approach might provide the flexibility to examine circumstances otherwise out of the purview of the court.[138] Such circumstances could very well include the ethnic composition of border regions, how those groups are being treated by the disputing nations, and what might the effect be of allowing that group and the related territory to be united under one of the disputing nations. The I.C.J. has examined the relationship and status of ethnic groups when it was required to reach a decision.[139] The obstacle of applying equity to sub-state actors in border disputes can potentially be remedied by simply appealing to the I.C.J.'s jurisprudence.

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[135] *Id.*

[136] Statute of the International Court of Justice, June 26, 1945, art. 34, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179. The jurisdiction of the I.C.J. is also seen as voluntary on the part of participating states. Barry E. Carter, et. al., International Law, 289–290 (2003). Any alteration of the court's jurisdiction to include sub-state actors could lead to less participation by states.

[137] Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *supra* note 130, at 55.

[138] *Id.*

[139] Western Sahara, 1975 I.C.J. 12 (Oct. 16), the *Western Sahara* case is an advisory opinion examining the claims of ownership of territory between Morocco and Mauritania. During its examination of Spain's colonial rule the court examined the individual tribal and ethnic groups and who there were legally obligated to as well as those that held themselves out to be independent entities entirely free from other national claims.

The second obstacle presents a greater deviation from the status quo. Even in cases concerning claims of ownership of continental shelves, a place where equity has a history of application, equity has never been applied without the request of the parties.[140] Applying equity to every border dispute, regardless of the parties' agreement, would require a total reworking of the court's use of equity.

Finally, the court has foresworn the use of equitable principles to alter geography, compensate for the inequality of nature, or allow one party to encroach upon another.[141] This is understandable in light of the relationship that territory has with sovereignty.[142] But such a limitation on the application of equity would render it useless in land-based territorial disputes, so it must be either discarded, or the status quo accepted.

Applying the concept of equity as interpreted by the I.C.J. in Continental Shelf Cases may provide the flexibility needed to compensate for *uti possidetis*' functional problems. However the sweeping changes required to allow its application to the doctrine are unlikely to come about. The changes in jurisprudence would be drastic, and might result in fewer claims being brought to the I.C.J. due to states' fears of an adjudication resulting in a loss of territory and may also dredge up internal disputes (such as those relating to the treatment of ethnic minorities in those border regions). For this reason a more conservative solution is needed if a viable solution is to be found.

II. *The Opportunity of the Failed State*

The Badinter Commission's actions offer a more conservative solution to the functional harms of *uti possidetis*. While the Commission's use of *uti possidetis* to determine boundaries within the former Yugoslavia was deeply flawed,[143] the Commission had the correct desires—to provide stability and certainty of borders in order to foster the peaceful creation of new states out of a failed state.[144]

It is in this venue of the failed state that the possibilities for change are rife. Part of the concern with a wholesale revocation of *uti possidetis* is that it might result in more bloodshed, because without the doctrine to legitimize current boundaries, states would then seek to enlarge their control by taking territory from their neighbors.[145] By discarding *uti possidetis* in the case of failed states the external boundaries

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[140] Case Concerning the Continental Shelf (Libya Arab Jamahiriya/Malta) *supra* note 131, at 39.

[141] *Id.* at 39–40.

[142] The idea of territory and control over that territory is tied to the idea of what a sovereign state is. Bruce Bueno de Mesquita, Principles of International Politics 188–9 (2nd ed., 1997).

[143] Radan, *supra* note 53, at 236–41.

[144] Castellino & Allen, *supra* note 51, at 159–163.

[145] Udombana, *supra* note 63, at 94.

of the former state would be preserved. Generally these external boundaries are delineated through treaties.[146] The Vienna Convention on the Law of Treaties specifies that successor states must abide by the treaties of the prior states.[147] The Badinter Commission recognized this and required that the external boundaries of the former Yugoslavia be preserved.[148] By preserving the external borders of the failed state, and integrating these borders into the borders of the successor state or states, the instability of upsetting standing treaties can be avoided.

The internal boundaries of the failed state, which have been traditionally elevated to the status of international borders could be altered using the concepts of equity as outlined in the I.C.J.'s continental shelf jurisprudence. These borders could also be altered through popular referendums and plebiscites.[149] This creates flexibility in a people's right to exercise self-determination while avoiding many of the conflicts between self-determination and the principle of territorial integrity. Neighboring states' integrity is protected, but the peoples who are asserting their right of self-determination can assert a claim to territory free from the requirement to delineate that territory by the failed state's former political subdivisions.

E. *Conclusion*

The doctrine of *uti possidetis juris* has a noble purpose: to create certainty and stability during state succession and dissolution.[150] But the inherent problems in its application undermine the doctrine's purpose.[151] By reclaiming flexibility of application, the doctrine again resembles its Roman origins: a temporary solution to a problem until a more just solution can be determined.[152] *Uti possidetis* should not be disregarded entirely, only applied judiciously, and always with an eye on what other policy options may provide a more just solution to questions of territory. The doctrine will then have progressed on its way to becoming an effective tool of the international order.

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[146] Henry G. Schermers, *Constituent Treaties of International Organizations Conflicting with Anterior Treaties, in* Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag 21 (Klabbers & Lefeber eds., 1998).

[147] Shabtai Rosenne, *Automatic Treaty Succession, in* Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag 100–2 (Klabbers & Lefeber eds., 1998).

[148] Opinion No. 3 of the Arbitration Commission of the Peace on Yugoslavia, 31 I.L.M. 1499 (1992).

[149] Hannum, *supra* note 14, at 56.

[150] Case Concerning the Frontier Dispute (Burk. Faso/Mali), *supra* note 40, at 565.

[151] *See* Ratner, *supra* note 40, at 607–8.

[152] Hasani, *supra* note 4, at 85–86.

Part Three

The Sources of International Law and their Application in the United States

The Evolving Role of Treaties in International Law

By Karin Oellers-Frahm

A. *Introduction*

The state of international organization is in permanent progression and development. This dynamism is particularly reflected in the body of international treaty law. When, in the nineteenth century, the era of cooperation between states was replacing the competitive approach that had prevailed in the eighteenth century, the international normative order expanded into fields that had traditionally been considered domestic affairs.[1] This process of adapting the legal order to a changed state of the international society, which is still ongoing, was primarily realized by treaty-making. When Harvard Professor Manley O. Hudson commented on the role of treaties in international law in his classic book *Progress in International Organization*, he was particularly enthusiastic about the "legislative" role played in this context first by international conferences and then the Committee of Experts for the Progressive Codification of International Law of the League of Nations.[2] Hudson welcomed this development of treaty-making by international bodies as the "most fruitful process by which international law is now being developed,"[3] and added that this process, which he labelled "international legislation," "holds unlimited promise for the future; it can easily be shaped to meet the changing emphasis of a shifting scene; and it can never be said to be finished. I believe that it has had, and is having, a greater influence on the growth of international law than any other movement."[4]

This chapter will explore whether Hudson's enthusiasm has any basis today. I will consider the problems, both new and old, this process of codification faces and whether there are other sources of international law more appropriate for the needs of the international community.

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[1] Wolfgang G. Friedmann, The Changing Structure of International Law (1964); Martti Koskenniemi, The Gentle Civilizer of Nations (2001).

[2] Manley O. Hudson, Progress in International Organization 72, 73 (1932).

[3] *Id*. at 74.

[4] *Id*. at 77.

Miller & Bratspies (Eds), Progress in International Law, pp. 173–196.

B. *Treaty-law as a Source of International Law*

As a preliminary remark it must be emphasized that Hudson was primarily concerned with *traités-lois* as distinguished from *traités-contrats*. While *traités-contrats* address the regulation of a particular legal situation, *traités-lois* articulate general rules corresponding to a common interest. As such, Hudson was of the opinion that *traités-lois* contributed to the progress of the international organization[5] in a more efficient way than could customary law. Although this distinction has not found expression in the modern rules on treaty law, *i.e.* the 1969 Vienna Convention on the Law of Treaties,[6] it remains of interest insofar as it distinguishes treaties that are regarded as establishing norms for the international community as a whole from those that are only of particular interest, mostly on a bilateral or restricted multi-lateral basis. *Traités-lois* are best represented through what we now call "codification" conventions—treaties intended to regulate new subjects rather than merely to fix in written form the pre-existing rules of customary international law, although the dividing line between law-making and the fixing of pre-existing rules is not always easily drawn.

There is no doubt that treaty-law of general application best serves the interests of the international society. Indeed, this kind of "legislation" becomes ever more desirable as the era of cooperation in international order fades before a growing trend towards "constitutionalization,"[7] which requires universally binding international law. There is also no doubt that, since Hudson's era, numerous *traités-lois* have been adopted, some of which have reached nearly universal adoption. The most significant examples of *traités-lois* in this category include: the 1948 Convention on the Prevention and Punishment of Genocide;[8] the four 1949 Geneva Red Cross Conventions;[9] the 1961 Vienna Convention on Diplomatic Relations;[10] the 1963 Convention on Consular Relations;[11] the 1966 International Covenant on Civil and Political Rights;[12] the 1966 International

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[5] The term "international organization" is used in the sense of Professor Hudson's understanding, that is the broader concepts and structures of the international legal order.

[6] May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention].

[7] Jochen A. *Frowein, Konstitutionalisierung des Völkerrechts*, 39 Berichte der Deutschen Gesellschaft für Völkerrecht 427 (2000) (F.R.G.); Christian Walter, *Constitutionalizing (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law*, 44 German Y.B. Int'l L. 170 (2001). *See* Walter, in this volume.

[8] Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

[9] Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

[10] Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

[11] Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; *see* 57 Am. J. Int'l L. 995 (1963).

[12] Dec. 16, 1966, 1966 U.S.T. 521, 999 U.N.T.S. 171.

Covenant on Economic, Social and Cultural Rights;[13] the 1969 Vienna Convention on the Law of Treaties;[14] and the 1982 Law of the Sea Convention.[15] Just as Hudson predicted in 1932, these many covenants address fields of international concern that require world-wide solutions.[16]

However, the mere fact that *traités-lois* are best fitted to contribute to the development of international law and to respond to the necessities of the international community does not change the underlying prerequisites of treaty-making. Treaties, like all international law, cannot be imposed on sovereign states because today, as in Professor Hudson's day, there is no international legislator. Treaties, like all international law, require the consent of states to be applicable, and in order to become generally applicable a treaty needs, in principle, the consent of all states. Thus, the role of treaties in today's international law depends on whether they can respond better than other sources of law, in particular customary law, to the necessities of the international community.[17] In this context it is not only the legislative process of treaty-making itself that is important, a process that Hudson considered to be "even more significant than the substance" of the conventional law,[18] but also and increasingly issues such as universality, flexibility or quick reaction to new situations.

C. *Pros and Cons of Treaty-Law*

There is general agreement concerning the advantages of treaty law as compared to customary law, namely that a written agreement provides for more certainty and reliability than an unwritten rule. Furthermore, a treaty has identifiable parties that have voluntarily subscribed to it, thus giving a treaty a contractual character that makes it not only a source of law but also a source of obligation.[19] Law-making by treaties can contribute to dispute prevention in that it can settle controversies that have not yet arisen between states, an impact beyond the scope of customary law. The increasing number of treaties and the multitude of subject-matters regulated by treaties confirm, if this were necessary, the important role of

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[13] Dec. 16, 1966, 993 U.N.T.S. 3.

[14] Vienna Convention, *supra* note 6.

[15] U.N. Doc. A/CONF. 62/122, *reprinted in* 21 I.L.M. 1261 (Dec. 20, 1982) [hereinafter Sea Convention].

[16] Hudson, *supra* note 2, at 78.

[17] *See* Guzman & Meyer, in this volume.

[18] Hudson, *supra* note 2, at 78.

[19] Robert Y. Jennings, What Is International Law and How Do We Well It When We See It? (1983), *reprinted in* Collected Writings of Sir Robert Jennings 730, 732 (1998).

treaties as a means of law-making. As a view of the current topics before the International Law Commission reveals, there are still a series of subjects requiring regulation, confirming that law-making by treaties will remain an appropriate and primary tool for enhancing international law.[20]

On the other hand, treaties are governed by extremely rigid rules laid down in the 1969 Vienna Convention on the Law of Treaties, a convention that is generally regarded as codifying customary international law. The inflexibility of these rules raise, however, critical questions with regard to the role that treaties can play in meeting the needs of an increasingly interdependent and changing world,[21] a world, moreover, marked by the globalization of challenges and problems in diverse areas such as international and internal security, economic issues, health, and ecology. Continued progress in international organization requires an effective and general legal regime that is not only universal but also quick to respond to new challenges; a regime marked by clarity and uniformity, as well as by flexibility and adaptability. It remains to be seen whether treaty law corresponds to these parameters or whether better alternatives exist.

I. *Consent*

Consent is the central aspect of treaty law. State parties must reach agreement on the text of the treaty and then each state must signify its consent by ratifying the treaty.[22] Only when the required number of states has consented through ratification will the treaty enter into force. Consent similarly governs all other aspects such as universality, flexibility and clarity. As to the first issue, the *elaboration of the text of the treaty*, there is no doubt that the time needed to develop an agreed-upon text of a treaty poses a serious obstacle to quick reaction to new developments in the international community as well as to the clarity of the treaty. This is not the place to go into details of the treaty-making process.[23] On this point it suffices to refer to the fact that, in particular with regard to multilateral treaties, the elaboration of the text generally takes a lot of time due to the different interests that have to be balanced and finally articulated in a single text. As is becoming

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[20] Among the topics on the agenda of the ILC there are: reservations to treaties, privileges and immunities of international organizations, right of asylum, obligations to extradite, shared cultural resources, diplomatic protection, unilateral acts of states, responsibility of international organizations, and expulsion of aliens. For more details refer to the home page of the ILC, http://untreaty.un.org/ilc/guide/gfra.htm.

[21] *See* Developments of International Law in Treaty Making 13 (Rüdiger Wolfrum & Volker Röben eds., 2005).

[22] Vienna Convention, *supra* note 6, arts. 9–18.

[23] For details *see* Malgosia A. Fitzmaurice & Olufemi Elias, Contemporary Issues in the Law of Treaties 53 (2005).

increasingly true in all aspects of modern international law, not only states are involved in treaty making, but also other actors, such as inter-governmental organizations, non-governmental organizations, or other interest groups and individuals.[24]

As such, the drafting process proceeds in different stages, a process that can be extremely time consuming. One has only to look at the International Law Commission where drafts on various subject-matters typically need more than a decade for adoption.[25] And, adoption is not the last step in the process of state consent, but has to be followed by state ratification, a process that again takes quite a bit of time. In order to react to the rapid pace of change in the international community, an acceleration of treaty-elaboration was necessary. States responded by introducing increased flexibility in the role that consent plays in the formation of a treaty, a development that was necessary in order to expedite the formation of international law. A variety of technical innovations with respect to the preparation and approval of treaties have been adopted.[26] First, there has been a redefinition of consensus, which has been decoupled from unanimity in the sense that where no strong or formal objection is made by the reluctant state(s) the text of a treaty will be deemed to have been adopted.[27] Further innovations concern the aspect of reservations, as well as the structural diversity of treaties such as framework agreements and the use of protocols or annexes to the basic treaty. These last two points will be discussed more fully in subsequent sections of this chapter.

While consent in the treaty-formation process has benefited from some increased flexibility, the entry into force of treaties through ratification or adoption by states, still requires explicit consent. This same principle of explicit consent also applies to the amendment of treaties. Even where a treaty contains simplified amendment procedures that may result in amendments to the treaty without the formal consent of all parties, these procedures have been accepted

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[24] *See* Schurtman, in this volume; Miller, in this volume.

[25] As examples reference may be made *inter alia* to the Law of the Sea Convention; the Draft on State Responsibility, the Conventions on State Succession. *Cf.* Laurence Boisson de Chazournes, *Treaty Law-Making and Non-Treaty Law-Making: The Evolving Structure of the International Legal Order, in* Developments of International Law in Treaty Making, *supra* note 21, at 563.

[26] For more in detail in this context see Francisco Orrego-Vicuna, *Law Making in a Global Society: Does Consent Still Matter?, in* Internationale Gemeinschaft und Menschenrechte: Festschrift für Georg Ress zum 70 Geburtstag 191–206 (Jürgen Bröhmer, et al., eds., 2005) (F.R.G.).

[27] *Cf.* Myron H. Nordquist, United Nations Conference on the Law of the Sea, 1982, at 99–103 (1985) (describing procedural innovations). *See also* Fitzmaurice & Elias, *supra* note 23, at 254.

beforehand by the parties themselves.[28] Thus, consent remains the very guarantor of the legitimacy of the rule of law.

II. *Clarity and Uniformity*

Like customary law, treaty-law is sometimes problematic with regard to *clarity and uniformity*. Clarity is often lacking due to the compromises necessary to obtain general agreement among states on the specific language of a treaty's text. Accordingly, the wording of the text may be so ambiguous that the lack of agreement in elaborating the treaty text is shifted from the negotiation to the implementation phase.[29] This shortcoming is, however, not peculiar to treaty law, but is of even more relevance in customary law. In both cases the concretization of an otherwise ambiguous rule is ultimately the province of international and national courts, with international courts today playing a much more important role than during Hudson's time.[30] This increasingly important role for international tribunals is considered later in this chapter, as well as elsewhere in this volume.[31]

The existence of numerous, sometimes conflicting international courts and tribunals, may become an additional factor in challenging the uniformity of treaty law. The issue of collision of court decisions in international law is a growing phenomenon,[32] and remedies for such conflicts are less easily found at the international level than in national law. This is due to the structure of international jurisdiction, in particular to the lack of a hierarchical judicial system so that, in general, no higher court or tribunal exists that is empowered to review decisions. However, this concern is valid for all international legal norms, not only treaty law, and may even be more pressing in the context of customary law, where the

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[28] Examples in this context are in particular to be found in economic and environmental law, where special organs are created which may even take binding decisions, however, mostly not on issues of substance; as a special case the Conference of the Parties of the Kyoto Protocol on Climate Change Convention may be mentioned. For more detail, *see* Christian Tietje, *The Changing Legal Structure of International Treaties as an Aspect of an Emerging Global Governance Architecture*, 42 German Y.B. Int'l L. 26 (1999).

[29] *See* Hanspeter Neuhold, *The Inadequacy of Law-Making by International Treaties: "Soft Law" as an Alternative?, in* Developments of International Law in Treaty Making, *supra* note 21, at 42.

[30] Professor Hudson would ultimately serve as a judge at the Permanent Court of International Justice and was unmatched in his expertise on and enthusiasm for the role of international tribunals in international organization. *See* Manley O. Hudson, International Tribunals, Past and Future (1944). *See* Waters, in this volume.

[31] *See* Baker, Waters, Romano and Parker in this volume.

[32] Karin Oellers-Frahm, *Multiplication of International Courts and Tribunals and Conflicting Jurisdiction: Problems and Possible Solutions*, 5 Max Planck Y.B. United Nations L. 67 (2001).

very existence of a legal rule may be subject to dispute. In these cases, the concretization of a legal norm is shifted to judicial bodies, which, in principle, have to discern the agreed-upon obligations embodied in the treaty or the customary law rule. Under such circumstances, interpreting the law cannot always be easily distinguished from exercising law-making power.[33] However, court decisions are, at least *de jure*, only binding upon the parties to the case,[34] so that they may even contribute to preventing uniformity of law.[35]

With regard to treaty-law, such problems could theoretically be limited by carefully wording the treaty-text and preventing, as far as possible, compromises that only serve to bridge differences of opinion. In any case, clarity of international law, treaty-law as well as customary law, would be best served if there were something like a "Supreme Court" as a last instance for the interpretation of international rules in order to avoid or remedy conflicting court decisions.[36]

III. *Reservations*

An even more dangerous shortcoming of treaty-law concerns the *uniformity of the substance of the treaty*, which may, in particular, be eroded by *reservations*. Under the 1969 Vienna Convention, reservations are admissible, with the exception of those prohibited explicitly by the treaty,[37] and those that are incompatible with the object and purpose of the treaty.[38] In particular, this last category of reservations increasingly leads to controversies, particularly with regard to human

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[33] Variations of this argument are, of course, at the root of criticisms of judicial review within domestic legal regimes. For prominent manifestations of the criticism as regards the U.S. Supreme Court's review of legislation, *see* Alexander Bickell, The Least Dangerous Branch (1962); Mark Tushnet, Taking the Constitution Away from the Courts (1999).

[34] See art. 59 of the International Court of Justice Statute, June 26, 1945, 59 Stat. 1055, T.S. No. 993 as an example of identical provisions in other court statutes.

[35] Tullio Treves, *Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice*, 31 N.Y.U. J. Int'l L. & Pol. 809 (1999); Hugh Thirlway, *The Proliferation of International Judicial Organs and the Formation of International Law, in* International Law and the Hague's 750th Anniversary 433 (Wybo P. Heere, ed., 1999).

[36] See the relative proposals of the President of the ICJ, Stephen M. Schwebel, 54 I.C.J. Yearbook 282–88 (1999–2000), and President Gilbert Guillaume, 55 I.C.J. Yearbook 319–326 (2000–2001); for a discussion of this item, *see supra* note 32.

[37] *See* art. 19(a), (b) which read, "[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation 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.…"

[38] *See* art. 19(c) according to which a State may formulate a reservation unless "(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty."

rights treaties.[39] The fact that the treaty obligations between different parties to a treaty may diverge on the basis of reservations, and additionally on the basis of whether the reservation was objected to by one or more of the parties,[40] undermines the aim of uniformity of international rights and obligations and makes it a puzzle to find out which party owes which obligations to which other state party.[41] This is particularly regrettable with regard to human rights treaties, which are not "reciprocal" in the traditional sense but create obligations *erga omnes*.[42] Only if there is a competent international court or monitoring body instituted by the treaty itself can a decision on the compatibility of a reservation with the object and purpose of a treaty or on the severability of the reservation be reached.[43]

The alternative to permitting only strictly confining reservations in the treaty text would, however, probably lead to even more complicated treaty negotiations, which would prolong the treaty-making process and endanger universal or quasi-universal adherence to the treaty, a solution that also is not satisfactory. Thus, with regard to the uniformity of international law, reservations remain problematic; it seems that they are the necessary price for obtaining maximum participation. Nevertheless, there are reservations that should be considered unacceptable *ab initio*, namely those that result in emptying the substance of the treaty. An example of this type of reservation is the exemption often secured by Muslim states to human rights treaties that establishes the primacy of *sharia* law,

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[39] *See* Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. 126 (Feb. 3), where the compatibility of a reservation to art. IX of the Genocide Convention concerning the submission of disputes to the ICJ was at stake; see in particular paras. 10–128 of the judgment and the joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma.

[40] *See* arts. 20 and 21 of the Vienna Convention, *supra* note 6, which provide for acceptance and objection to reservations. If a reservation made by a state party to the treaty is not accepted by all other parties to the treaty the obligations under the treaty vary what is not a satisfactory rule in particular with regard to human rights treaties. *See* Rudolf Bindschedler & Thomas Giegerich, *Treaties: Reservations, in* 4 Encyclopedia of Public International Law 496, bibliographical references (Rudolf Bernhardt, ed., 2000).

[41] Francesco Parisi & Catherine Sevcenko, *Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention*, 21 Berkeley J. Int'l L. 1 (2003); *see* Bindschedler & Giegerich, *supra* note 40.

[42] Liesbeth Lijnzaad, Reservations to U.N.-Human Rights Treaties (1995); compare to the work of the International Law Commission on the Law and Practice Relating to Reservations to Treaties which is still under consideration, on the website of the ILC, http://untreaty.un.org/ilc/guide/gfra.htm.

[43] Monika Heymann, *Unity and Diversity with Regard to International Treaty Law, in* Unity and Diversity in International Law 217, 220, and comment thereto by Alain Pellet 247, 248 (Andreas Zimmermann & Rainer Hofmann, eds., 2006).

even though this reservation erodes the treaty rights and obligations.[44] The whole topic of reservations is currently under consideration at the International Law Commission because the rules laid down in the 1969 Vienna Convention are no longer adequate today.[45]

IV. *Universality*

As indicated above, *universality* of treaty regimes is highly desirable in order to ensure the effectiveness of international law. However, because the sovereign freedom of states includes the power to decide on the usefulness of treaty adherence, universal validity of treaties is difficult to achieve in comparison to international customary law. Treaty law thus traditionally suffers from what one author aptly called "*lacunae ratione personae*."[46] Two developments in international law seek to respond to this weakness.

First, there is a growing recognition that certain treaties protect basic interests of the international community, the so-called "world order treaties."[47] These treaties are considered to contain obligations *erga omnes*, respectively obligations *omnium*,[48] and, as such, bind all states, not only states parties, with regard to obligations owed to and by the whole international community.[49] With regard to such treaties the passive and active subjects of an international norm are no longer clearly identifiable and the relative effect of treaty law is diluted, because the obligation is considered to exist also with regard to states not parties to the treaty. This is, however, true only insofar as these treaties do not generate new legal rights and duties, but instead give expression to legal relationships that already exist under customary law, general principles or possibly even natural law, albeit without being clearly defined.[50] Through the treaty-making process, these pre-existing principles can be refined with the advantage that every state

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[44] Lilly R. Sucharipa-Behrmann, *The Legal Effects of Reservations to Multilateral Treaties*, 1 Austrian Rev. Int'l Eur. L. 67 (1996).

[45] Compare to the website of the ILC, http://untreaty.un.or/ilc/guide/gfra.htm, where the different reports can be downloaded.

[46] Christian Tomuschat, Comment *in* Developments of International Law in Treaty Making, *supra* note 21, at 403.

[47] Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 Recueil des Cours 194, 268 (1993).

[48] *See* Prosper Weil, *Towards Relative Normativity in International Law?*, 77 Am J. Int'l L. 413, 422 (1983).

[49] For a first step in this direction *see* ILA, *Report of the Thirty-Ninth Conference, Paris*, 39 Int'l L. Ass'n Rep. Conf. [i] (Sept. 10–15, 1936); Anthony A. D'Amato, The Concept of Custom in International Law 121 (1971); Anthony A. D'Amato, International Law 123 (1987); Tomuschat, *supra* note 47, at 269.

[50] *See* Tomuschat, *supra* note 47, at 270.

has the opportunity to take part in the drafting process. However, states not party to the treaty are only legally bound by the underlying general principle or customary rule; the treaty itself will only acquire binding force through the acceptance by states.[51] The only new development in this context is the fact that it is not always clear what are the general obligations of states and what are the "new" ones created by the treaty.[52]

Second, universality is reached if a treaty may be regarded as having resulted in actually codifying or becoming customary law. Although the division between customary law and treaty law was never absolutely clear, the trend toward recognizing treaty clauses as being a definitive statement of customary law or as crystallizing customary norms that are in process of formation, or as attracting concordant practice is now of such frequent occurrence that it comes close to erasing the frontier between customary law and treaty law.[53] By declaring that a treaty norm simply codified customary law, the treaty norm comes to be imposed on all states, including those that never became parties to the treaty, thus, blurring the distinction between customary law and treaty law. However, although it is the treaty norm in its written and thus more precise form as compared to the customary rule that will be applied to states that are not party to the treaty, other provisions of the treaty, in particular those creating a machinery to make the rules effective, will only be applicable to states having become parties to the treaty.[54] Thus, universality of treaty rules can only be reached with the consent of all states; otherwise universality is only given if the treaty rule reflects customary law. Since consent is a promising prerequisite for the respect of treaty obligations, the respect of treaty obligations may contribute to their development into customary law and thus reach universality.

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[51] Compare with the Nicaragua judgment, 1986 I.C.J. 95, where the Court stated that a State may choose to adhere to a treaty restating a rule of customary law "because the treaty establishes what that State regards as desirable."

[52] See in this context the practice of the ICJ which is referred to in Alain Pellet, *Article 38, in* The Statute of the International Court of Justice: A Commentary 748 (Andreas Zimmermann, et al., eds., 2006).

[53] Oscar Schachter, International Law in Theory and Practice, ch. 5 (1991); Malgosia A. Fitzmaurice, *Third Parties and the Law of Treaties*, 6 Max Planck Y.B. United Nations L. 37 (2002); the most famous example is that of the Law of the Sea Convention, *supra* note 15, that updated ancient rules of customary law, but also introduced new rules in areas that had remained unregulated till then. The ICJ has stated in numerous decisions that the Vienna Convention, *supra* note 6, as well as the Law of the Sea Convention codified customary international law; particular mention shall be made of the statements of the ICJ concerning customary law in its Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 252 (July 8).

[54] Tomuschat, *supra* note 47, at 270.

V. *Adaptability of Treaties*

Once treaties have entered into force and once a state is bound by a treaty the legal landscape tends to remain relatively stable. The principle *pacta sunt servanda* requires compliance with the treaty commitments and states cannot freely renounce a treaty.[55] The rules on the law of treaties codified in the 1969 Vienna Convention govern the life of the treaty and the obligations of states having ratified a treaty. These rules improve the reliability of treaty law as compared to customary law. On the other hand, this stability also limits the *flexibility and adaptability* of treaty-based international order. Treaties can only be adjusted by consensual process, and agreement is often difficult to reach because it reopens the careful balance of mutual concessions upon which the treaty rests. A new negotiation process has to be instituted, with all its attendant difficulties. And, even when a treaty contains a clause on revision or amendment that does not require the consent of all contracting parties, such as Articles 108 and 109 of the UN Charter, the hurdles for revision or amendment are still generally very high. For the UN Charter the requirement is a two-thirds majority of the member states, including the five permanent members of the Security Council. The amendment procedures adopted in more recent treaties, such as amendment by protocols or annexes or the creation of special bodies, provide only technical relief because these mechanisms are part of the underlying treaty, which means that they need the consent of all parties to the treaty.[56] If, however, such a relief mechanism obtains that consent, it constitutes a welcome solution to realize treaty adaptation with relatively low transaction costs.

This idea has further developed with the creation of a new category of treaties, namely the so-called *framework conventions*. A framework convention only provides for general provisions, which then must be supplemented by further, more specific rules.[57] This kind of treaty is not appropriate for all subjects, but in the context of environmental standards, highly technical questions or minority rights, framework conventions have proven helpful because they are more susceptible to

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[55] Vienna Convention, *supra* note 6, art. 26; *cf.* Manfred Lachs, *Pacta Sunt Servanda, in* 3 Encylopedia of Public International Law 847, bibliographical references (Rudolf Bernhardt, ed., 1997).

[56] *Cf.* Orrego-Vicuna, *supra* note 26, at 197.

[57] Jutta Brunnée, *Reweaving the Fabric of International Law?: Patterns of Consent in Environmental Framework Agreements, in* Developments of International Law in Treaty Making, *supra* note 21, 101; Ellen Hey, *Exercising Delegated Public Powers, Multilateral Environmental Agreements and Multilateral Funds, in* Developments of International Law in Treaty Making, *supra* note 21 at 437.

supplementary law-making if changed needs so require.[58] Often, these framework conventions establish special bodies to conduct any needed supplementary law-making. These special bodies are more often empowered to act only in relation to technical aspects of the treaty and not in relation to its substance. Two such examples are the Legal and Technical Commission established under Art. 165 of the Law of the Sea Convention, which has to review plans for deep sea mining, and the Montreal Protocol of Substances that Deplete the Ozone Layer, which allows adjustment of controls by a qualified majority vote of the Meeting of the Parties.

VI. *Treaty Interpretation*

The obstacles posed by the formal adaptation or amendment of treaties may more easily be overcome by treaty *interpretation*, a process at the borderline between concretization and adaptation of law. In general, treaty interpretation is part of the task of international or national courts or tribunals which, by their very nature, are not treaty-making bodies. However, the line between interpretation and development of international law is not a clear one. For example, the International Criminal Tribunal for the Former Yugoslavia held that customary law rules concerning the methods and means of warfare applicable in international conflicts also apply to non-international conflicts,[59] a statement that comes closer to law-adaptation or law-development than to mere treaty interpretation. Courts may also use interpretation to prevent or slow the adaptation of treaties. The ICJ's decisions concerning self-defense under Article 51 of the Charter are a good example of this phenomenon. While the Security Council adopted an expansive definition of Article 51, and concluded that the right to self-defense can be exercised in cases where the attack does not come from a state but from terrorist groups,[60] the ICJ insisted in several decisions on the necessity of the attack emanating from or imputable to a state.[61]

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[58] *Cf., e.g.*, United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 164, 31 I.L.M. 849; Kyoto Protocol, Dec. 10, 1997, 37 I.L.M. 22; Convention on Biological Diversity, http://www.biodiv.org; International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 72; Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243; Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 10 (1987), 26 I.L.M. 1550.

[59] Prosecutor v. Tadic, 105 I.L.R. 429, 516, Case No. IT-94-1-AR72, Appeal on Jurisdiction (Appeals Chamber, Int'l Crim. Trib. Former Yugo., Oct 2, 1995).

[60] S.C. Res. 1368, U.N. SCOR, 56th Sess., U.N. Doc. S/RES/1368 (Sept. 12, 2001); and S.C. Res. 1373, U.N. SCOR, 56th Sess., U.N. Doc. S/RES/1373 (Sept. 28, 2001), which explicitly refers to the right of self-defense in the fourth preambular paragraph.

[61] Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J. 14, para. 195 (June 27); Oil Platforms (Iran v. U.S.), 2003 I.C.J. 192; Legal Consequences of the Construction of a Wall in

In the field of human rights, treaty interpretation is often entrusted to a special court or tribunal or to a specially created treaty body such as the Human Rights Committee of the Covenant on Civil and Political Rights or the Committee of the Convention on the Elimination of Racial Discrimination. By issuing "General Comments or Recommendations" of particular relevance to the further interpretation and application of the respective instrument, these bodies help concretize and effectively develop the treaty-system.[62]

While this process of treaty adaptation through the deliberations of special bodies provided for in the treaty may be regarded as supported by the consent of the parties to the treaty, adaptation by international courts may be more problematic. This holds true, in particular, for tribunals established by a binding resolution of the Security Council under Chapter VII instead of via a voluntary agreement of the parties concerned.[63] Treaty adaptation by international courts is, *de jure*, only binding upon the parties to the relevant case. This is a marked difference from treaty adaptation by treaty-created special bodies, which applies to all parties to the treaty. In practice, however, treaty interpretation by the ICJ has generally been recognised as applicable to all parties to the treaties.[64]

VII. *Security of Law*

The fact that treaties do not lend themselves to easy adaptation and flexible responses to new challenges also may be appreciated as an advantage rather than a disadvantage. Flexibility and adaptability must be balanced against the need for *security of law*, a need that is one of the main reasons that treaties are a cherished source of international law. In particular *traités-lois*, elaborated within international *fora*, actualize the common interests of the international community rather than the individual interests of the states participating in the negotiating process.

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the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, para. 139 (July 9); Armed Activities on the Territory of the Congo (Dem. Rep. of the Congo v. Uganda), 2005 I.C.J. 116, paras. 141–47, 304 (Dec. 19).

[62] For more details, *see* Gudmundur Alfredsson, *Human Rights Commissions and Treaty Bodies in the UN-System, in* Developments of International Law in Treaty Making, *supra* note 21, at 559; related comments by Eckart Klein, *Impact of Treaties Bodies on the International Legal Order, in* Developments of International Law in Treaty Making, *supra* note 21, at 571; and Bruno Simma, *Commissions and Treaty Bodies of the UN System, in* Developments of International Law in Treaty Making, *supra* note 21, at 581.

[63] The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda have been created by a resolution of the Security Council under Ch. VII, *available at* http://www.un.org/aboutun/charter /chapter7.htm.

[64] Christine Chinkin, *Article 63*, in Zimmermann, et al., *supra* note 52, at 1369, 1390.

As a result, flexibility and adaptability have to be kept within certain limits, namely that the underlying regulation of community interests will not be set aside in favour of particular interests. Viewed in this light, the lack of flexibility and adaptability of treaty-law may be regarded as a positive factor.

This holds true also under a further perspective. Although desirable, even *traités-lois* are generally not ratified by all states. The fact that states not party to the treaty are not bound by treaty law poses the problems described above for achieving uniformity in international law. However, once the majority of states accepts a treaty, it becomes difficult for non-party states not to follow the rules of the treaty. Over time, this non-party compliance may lead to the treaty law's evolution into customary law. This process would be interrupted by revisions or amendments to the treaty, and the revisions would have to obtain the same general acceptance as the treaty itself in order to become customary law. The rigidity and consistency of treaty law implies, therefore, a positive element for enhancing the universality of international law by creating customary international law.

D. *Alternative Means of Law-Setting*

From the above considerations it is clear that treaty law, although not without shortcomings, is a crucial means in the development of international law. Treaty law is generally preferable to customary law, which was the only relevant counterpart as a source of international law when Manley Hudson published *Progress in International Organisation*. General principles of law never played a significant role as source of law. This leads to the question whether today there are other means of international law creation that are apt to contribute to progress in international organization. In this context three topics seem to be of particular relevance: court decisions, resolutions of international bodies and soft law.

I. *The Role of International Courts and Tribunals*

Hudson wrote: "No system of law can depend solely on legislation for its development, however; the day-to-day application of the law must supply one of the elements of its growth, and it is in this way that courts make their contribution."[65] In this statement, Hudson referred explicitly to the Anglo-American legal system, and he expressed regret that an analogous development of international law was lacking because there was no comparable system of international courts. As already mentioned, international law still does not have a court system

[65] Hudson, *supra* note 2, at 80.

comparable to that found within national legal systems. That said, the last fifty years have seen an explosion of international judicial bodies,[66] with all the attendant problems of collision of international court decisions or problems of forum shopping.[67] But what exactly is the role of international courts, which clearly do not have a power to *create* law but rather play an important role in the concretizing law?

To raise this question is partly to answer it. There is no clear distinction between law concretization and law creation. With regard to customary law and also with regard to general principles of law, the task of courts having to apply these unwritten sources of international law is primarily to specify the contents of such rules. It is through the application of these principles to the particular case that the conditions and modalities, as well as the limits, of the relevant rules are concretized.[68] In later cases such concretization, in particular if it was made by the World Court, will play a decisive role. Even though technically not binding on third states, these decisions will constitute a welcome point of reference. The same is true with regard to treaty law. As already mentioned, because disagreement between states is often bridged by ambiguous terms, treaties often lack clarity. As a result, judicial bodies applying such treaties will have to define the contents of the rule or rules concerned. The clearest examples of this phenomenon come from the ICJ in the context of the Law of the Sea, concerning the drawing of the base lines, the continental shelf as natural prolongation of the land territory and the elements of equity in the delimitation of the continental shelf.[69] As the formulation or concretization of rules is always aimed at the realization of the scope of the rule, the judicial process must consider the actual needs of the treaty regime, and thus inevitably contributes to developing international law. In spite of the fact that international court decisions have no binding force except between the parties – a seeming rejection of the Anglo-American doctrine of *stare decisis* - the *de facto* role of precedent in international jurisprudence should not be underestimated, as Hudson rightly underlined.[70]

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[66] *See* Karin Oellers-Frahm & Andreas Zimmermann, Dispute Settlement in Public International Law (2001), which contains the statutes and rules of more than 150 international judicial bodies. *See* Romano, Baker, Waters and Parker in this volume.

[67] Oellers-Frahm, *supra* note 32. *See* Waters, in this volume; Parker, in this volume.

[68] Georges Abi-Saab, *Cours général de droit international public [General Course on Public International Law]*, 207 Recueil des Cours, 133 (1987).

[69] North Sea Continental Shelf (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3 (Feb. 20); Accord Continental Shelf (Tunisia v. Libya), 1982 I.C.J. 18, 38 (Feb. 24); Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 30 (June 3); Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 58 (June 14).

[70] Hudson, *supra* note 2, at 81.

While the role of international judicial bodies, in particular the ICJ, in the development of international law has gained considerable prominence, there are limits which must be mentioned. These limits concern primarily the fact that international courts cannot act *proprio motu* but have to wait to be seized with a question. Consequently their contribution to the development of international law is necessarily fragmented. Furthermore, as international jurisdiction depends on the consent of states, courts are forced to exercise judicial self-restraint in order not to deter states from submitting to their jurisdiction.[71] However, as the decision of the ICJ in the *Oil Platforms* case[72] shows, the Court is able, within the limits of its jurisdiction, to address relevant questions even if the solution of the dispute would not require it.[73] It is through this kind of judicial decision-making that the role of international courts, in particular the ICJ, has become a decisive factor in the development of international law. To consider the international judge, however, as "the most efficient, the most respected, and the most influential "legislator"[74] may be too far-fetched, even though through the influence of its judgments and advisory opinions the ICJ is in a unique position to adapt international law to the evolving needs of the international community by combining, prudently, the great variety of legal tools now existing with a certain amount of common sense and adroitness.[75]

Judicial decisions have thus gained significant importance in the progress of international law, much more, in fact, than intended originally. Among the sources of international law enumerated in Article 38 of the ICJ Statute, judicial

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[71] In this context the withdrawal of the United States from the dispute settlement protocol to the Consular Convention is of particular interest. The withdrawal effected on Mar. 7, 2005 by the United States has to be understood as a direct consequence of the judgments of the ICJ with regard to the obligations of the United States under the Consular Convention. *See* Karin Oellers-Frahm, *Der Rücktritt der USA vom Fakultativprotokoll der Konsularrechtskonvention, in* Völkerrecht als Wertordnung, Festschrift für Christian Tomuschat, 563–582 (Pierre-Marie Dupuy, et al., eds., 2006) (F.R.G.).

[72] 2003 I.C.J. 161 (Nov. 6).

[73] In the case at hand the ICJ had to decide on the violation of a commerce clause in a Treaty on Friendship, Commerce and Navigation between the United States and Iran. As a treaty violation could not be found, the Court would not have come to examine whether the justification for a treaty violation provided for in the treaty for the sake of national security or in case of use of force. However, the ICJ wanted to contribute to the question of what constitutes an armed attack and therefore reversed the questions to be decided upon by beginning with the justification before examining whether a treaty violation had occurred, a procedural step which met hard criticism in the separate votes.

[74] Alain Pellet, *The Complementarity of International Treaty Law, Customary Law, and Non-Contractual Lawmaking, in* Developments of International Law in Treaty Making, *supra* note 21, at 409–415, 414.

[75] *Id. See* Romano, in this volume.

decisions are only referred to as a *subsidiary* source of law, a fact that under formal aspects is undoubtedly true but not reflective of the actual place of court decisions in international law.

II. *The Role of International Organisations*

The development of the international society and the desire of implementing particular needs on the international level have led to the creation of numerous international organizations that also play a role in the development of international law[76] not foreseen by Hudson. Numerous international organizations reaching from a universal level to a regional or even local level have been created, the constitutional act being, of course, a treaty. This is not the place to examine in greater detail the law of international organizations.[77] It is enough for my purposes to mention that each international organization creates a particular legal system with proper organs and, sometimes, as in the case of international organizations like the European Union, even direct normative competence with regard to the citizens of the states parties. The peculiarity of these organizations is their partial status as international subjects.[78] The treaties, creating international organizations empowered to generate directly binding secondary law, may be compared, under the aspect of technical treaty systems, to framework conventions because they leave to the organization itself the detailed law-making within the framework of the institutional treaty. Thus, law-making in the framework of such organizations is based upon the consent of the states concerned and keeps within the parameters of treaty law. The contribution of law-making by international organizations is, in principle, valid only for the member states of the organization concerned. It may, however, be of model character for similar organizations and thus gain general acceptance. As an example, reference may be made to the numerous regional economic organizations that largely contribute to the creation of general international economic law.[79]

In the context of considering the role of international organizations in developing international law, it is, of course, of primary interest to have a look at the most important international organization, namely the UN.[80] Undoubtedly, the organ

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[76] *Cf.* Armin von Bogdandy, *Lawmaking by International Organizations, in* Developments of International Law in Treaty Making, *supra* note 21, at 171.

[77] *See* Kaiser, in this volume. *See also* Josè E. Alvarez, *International organizations: Then and Now*, 100 Am. J. Int'l L. 324 (2006); Chittharanjan Felix Amerasinghe, Principles of the International Law of International Organizations (2005).

[78] *See* Kaiser, in this volume.

[79] Josè E. Alvarez, International Organizations as Law-makers (2005).

[80] *See* Paulus, in this volume.

representing the member states, the UN General Assembly, is not a legislative body. Nevertheless, General Assembly Resolutions that have been adopted by the majority of states party to the UN, sometimes only by way of consensus, although not binding *de jure*, are not without any impact on international law.[81] Such resolutions reflect the *opinio juris* of the majority of the states and may be regarded as customary law *in fieri*.[82] In contrast to customary law, and more akin to treaty-law, such resolutions contain a written elaboration of the rules adopted and thus lend themselves to consideration and even interpretation by international courts. Non-binding resolutions may thus be considered as a source of law situated between customary law and treaty law. Although not binding, these resolutions, in fact, will be taken into account whenever necessary for lack of binding rules.[83] With a view to the fact that the elaboration of resolutions may take as much time as the elaboration of a treaty—reference may be made in particular to the resolutions containing the Friendly Relations Declaration of 1970[84] and the Definition of Aggression[85] the elaboration of which took seven years – it may be asked why they were not adopted as a treaty and thus as a traditional source of law. This question may be answered by referring to codification problems and the difference between stating customary law and creating new rules, which is irrelevant for the adoption of resolutions.

What has, however, become more important in the last decade is the role of the Security Council in law-making.[86] The most evident example is the reaction of the Security Council to the terror attacks of September 11, 2001. Since it was clear that the rules necessary for combating international terrorism would not easily and not speedily be adopted as a treaty, the Security Council itself claimed that under Chapter VII of the UN Charter, it had the power to adopt relevant law via resolutions.[87] Exercising this power, the Security Council adopted Resolution

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[81] *See* Hudson *supra* note 2, at 75 (underlining the role that the General Assembly of the League of Nations could play in the development of international law although it was not a legislative body). For the UN General Assembly see Abi-Saab, *supra* note 68, at 155.

[82] Weil, *supra* note 48, at 416.

[83] Tomuschat, *supra* note 47, at 332.

[84] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28 at 121, U.N. Doc. A/8028 (Oct. 24, 1970).

[85] Definition of Aggression, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (Dec. 14, 1974).

[86] *See* Walter, in this volume.

[87] *Cf.* Erika de Wet, *The Security Council as a Law Maker, in* Developments of International Law in Treaty Making, *supra* note 21, at 183 with comments by Michael C. Wood and Georg Nolte; Josiane Tercinet, *Le pouvoir normatif du Conseil de Sécurité: le Conseil de Sécurité peut-il légiférer?* 37 RBDI 528 (2004) (Fr.); Gilbert Guillaume, *Terrorism and International Law*, 53 Int'l & Comp. L. Q. 537 (2004); Paul C. Szasz, *The Security Council Starts Legislating*, 96 Am. J. Int'l L. 901 (2002).

1373, of 28 September 2001[88] concerning the threat to the international peace and security resulting from terrorist acts. Resolution 1373 imposed upon all states wide-ranging obligations to counter terrorism going well beyond existing international customary or conventional law.[89] The obligations resulting from this resolution were confirmed in a series of later resolutions.[90] Although this was not the first time that binding decisions of the Security Council had a normative character,[91] these resolutions were different because they were the first to establish an objective, general and impersonal legal regime binding upon all states. This precedent was followed by law-making resolutions in other fields where swift and comprehensive rule-making was required, for example in the non-proliferation of weapons of mass destruction.[92] Although this kind of law-making through the Security Council is a way to react speedily to actual needs of the international society, it raises the question of legitimacy, because the Security

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[88] Threats to international peace and security caused by terrorist acts, U.N. SCOR, 56th Sess. 4385th mtg., U.N. Doc., S/RES/1373 (2001).

[89] Carsten Stahn, *"Nicaragua is dead, long live Nicaragua" – the Right to Self-defence Under Art. 51 UN-Charter and International Terrorism*, 827–877 with bibliographical references, *in* Terrorism as a Challenge for National and International Law (Christian et al., eds., 2004); Jost Delbrück, *The Fight Against Global Terrorism: Self-Defense or Collective Security as International Police Action?*, 44 German Y.B. Int'l L. 9 (2001).

[90] *See, e.g.* S.C. Res. 1377, U.N. SCOR, 56th Sess., 4413 mtg., U.N. Doc. S/RES/1377 (Nov. 12, 2001); S.C. Res. 1390, U.N. SCOR, 57th Sess., 4452d mtg., U.N. Doc. S/RES/1390 (Jan. 16, 2002); S.C. Res. 1438, U.N. SCOR, 57th Sess., 4624th mtg., U.N. Doc. S/RES/1438 (Oct. 14, 2002); S.C. Res. 1440, U.N. SCOR, 57th Sess., 4632d mtg., U.N. Doc. S/RES/1440 (Oct. 24, 2002); S.C. Res. 1452, U.N. SCOR, 57th Sess., 4678th mtg., U.N. Doc. S/RES/1452 (Dec. 20, 2002); S.C. Res. 1465, U.N. SCOR, 58th Sess., 4706th mtg., U.N. Doc. S/RES/1465 (Feb. 13, 2003); S.C. Res. 1516, U.N. SCOR, 58th Sess., 4867th mtg., U.N. Doc. S/RES/1516 (Nov. 20, 2003); *cf.* Michael C. Wood, *The Security Council as a Law Maker: The Adoption of (Quasi)-Judicial Decisions, in* Developments of International Law in Treaty Making, *supra* note 21, 232 & 233.

[91] Reference may be made in this context to the creation of the international ad hoc criminal tribunals for the former Yugoslavia and for Rwanda as well as to the quasi-governmental structures for a specific territory as was the case for East Timor, Kosovo and also Iraq. For more details, *see* 9 Max Planck Y.B. United Nations L. 1 (2005) which is dedicated to the subject-matter *Restructuring Iraq, Possible Models based upon Experience gained under the Authority of the League of Nations*, in particular the contributions of: Jürgen Friedrich, *UNMIK in Kosovo: Struggling with Uncertainty*, 9 Max Planck Y.B. United Nations L. 225 Markus Benzing *Midwifing a New State: The United Nations in East Timor*, 9 Max Planck Y.B. United Nations L. 295, Rüdiger Wolfrum, *International Administration in Post-Conflict Situations by the United Nations and Other International Actors*, 9 Max Planck Y.B. United Nations L. 649. *See* to E. de Wet, *The Security Council as a Law Maker, in* Developments of International Law in Treaty Making, *supra* note 21, at 183; Tercinet, *supra* note 87, at 528; Guillaume, *supra* note 87, at 537.

[92] S.C. Res. 1540, U.N. SCOR, 59th Sess., 4956th mtg., U.N. Doc. S/RES/1540 (Apr. 28, 2004).

Council is not conceived as a legislative organ. The Security Council is a political organ in which the super powers, or, more accurately, the only remaining super power, play a far too dominant role. As such, Security Council law-making compromises the requirement of consent in international law-making. Even if it has to be admitted that resolutions of the Security Council under Chapter VII constitute a means of quick reaction to actual challenges, it must be recalled that such activity endangers not only the balance between the organs of the United Nations but also the necessity of far-reaching consent required for international rules. Unlike the international organizations discussed above, in which the states parties have agreed to transfer legislative power to the organization under the terms of the treaty, the United Nations Charter does not empower the Security Council to legislate.[93] Furthermore, legislation by the Security Council under Chapter VII may not be "in accordance with the principles of justice and international law" as required by Articles 1(1), 1(3) and 2(2) of the Charter, provisions that also apply to measures the Security Council takes in order to restore international peace and security.[94] Finally, such actions by the Security Council raise grave concern under the aspect of control. Although legislation through the Security Council may constitute progress in the elaboration of international law it can only be accepted in exceptional situations because it emanates from an organ not empowered to enact general rules of law and thus lacks the necessary consensual basis.

III. *Soft-law*

Finally, mention has to be made of what is called *soft law*, which certainly does not contain binding rules.[95] While the term soft law is a rather new one, not known in Hudson's time, soft law surely existed in his day. What is meant by soft law are the rules that are at the borderline of rules *de lege ferenda* and *lex lata*.[96] Thus, customary law *in fieri* may be considered soft law as well as resolutions by organs of international organizations. Soft law cannot be regarded as an alternative to treaty law because it does not create legally binding obligations. It is true that the frontier between the pre-legal and the legal is not always easy to discern, but the threshold does exist. A legal obligation can be relied on before a court

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[93] Tercinet, *supra* note 87, at 539.

[94] For a detailed analysis *see* de Wet, *supra* note 87, at 183.

[95] *See* Neuhold, *supra* note 29, at 47; Weil, *supra* note 48, at 415; Orrego-Vicuna, *supra* note 26, at 200.

[96] As the most prominent example of soft-law the "Helsinki Accords" concluded in the framework of the CSCE as well as later documents of the CSCE, i.e. the Report on National Minorities of 1991 and the Document of the Human Dimension, 1991, are generally cited.

and gives rise to international responsibility. Thus, finally, it will be courts or tribunals that decide on whether a rule of law exists or whether a mere political commitment is invoked.

This caveat does not mean that soft law does not have some "advantages" as compared to international treaties, such as expediency, avoidance of domestic legal procedures and even increased democratic accountability. As the effectiveness of international norms relates *inter alia* to common interests of the parties, these common interests are the most solid basis for the implementation of hard as well as soft law. Furthermore, the principle of reciprocity that plays an important role in treaty law is also applicable with regard to soft law. If one party does not honour soft law commitments the other is clearly not bound to do so. Although disregard of soft law does not lead to responsibility in legal terms, it may result in "countermeasures" in the form of political and economic consequences that might be even stronger.[97] Finally, aspects of prestige often come into play; public pressure is as relevant in the implementation of soft law as for treaty law. The most illustrative example is that of the development of "commitments" in the human rights arena within the framework of the CSCE/OSCE.[98] These commitments have proven even more effective than adherence to UN Covenants, because states, as the United States and the then-USSR, which were not parties to the UN Covenants, declared their intention to pay due regard and implementation to the provisions of CSCE documents, in particular the 1975 Helsinki Final Act, although declaring at the same time that they were not bound legally.[99] Thus, soft law may be as effective as treaty law, but only as long as it is voluntarily implemented. If compliance with soft law is lacking, implementation cannot be claimed before courts unless soft law has reached the level of (customary or treaty) law. Soft law may thus, in fact, have its place in international law. It is, however, no alternative to treaty law, but merely a possible step on the way to the formation of international law, which is based on the intent and consent of the parties to create binding law.

E. *Final Remarks*

It is as true today as it was in Hudson's time that there is no international legislator comparable to national parliaments. States are and remain the legislators. With regard to non-written, customary law, the law is constituted from the longstanding

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[97] *See* Weil, *supra* note 48, at 415.

[98] Orrego-Vicuna, *supra* note 26, at 200; Weil, *supra* note 48, at 414; Neuhold, *supra* note 29, at 48.

[99] *See* Peter H. Kooijmans, *Some Thoughts on the Relation between Extra-Legal Agreements and the Law-Creating Process, in* Theory of International Law at the Threshold of the 21st Century, Essays in Honour of K. Skubiszewski, 425, 425–6 (Jerzy Makarczyk, ed., 1996).

practice of states that is perceived as being required as of right.[100] With regard to written, treaty law, states still are the central players; it is by their agreement that treaty-law is enacted and enters into force. Although it is true that international relations may be and are in fact governed partly by non-binding commitments, soft law does not constitute a valuable alternative to treaty law because it lacks the binding character, the explicit consent and intent of states to be bound, and breaks down when it is not voluntarily honoured. A much more serious alternative means of law-making has, however, emerged with the legislative resolutions of the Security Council. If the Security Council increases its legislative activity there will, in fact, be a source of international law of universal application and capable of quick reaction to the actual needs of the international community. As, however, such rule-making suffers from a lack of legitimacy, restraint of the Security Council would be desirable.

Thus, treaties are and will remain the essential source of the development of international law with all the pros and cons that characterize treaty-making. The only really new development in the role of treaty law today, as compared to Hudson's era, is related to the so-called "codification conventions." As "predicted" by Hudson, the codification of large parts on international law by multilateral treaties, in particular by the work of the ILC, has been very successful and has largely contributed to progress in the international order. The fact, however, that there is no hard-and-fast distinction between strict codification and progressive development has resulted in blurring the frontier between customary law and treaty law. Where this line would be clear, the very fact of changing law from an unwritten source to a written source is itself inevitably a major change,[101] because the customary rule becomes, at least in large measure, the rule as expressed in the text. Thus, although *de jure* the codified rule is binding only upon the states parties to the treaty, *de facto* it will be applicable also to non-party states such that ratification of the treaty is no longer decisive. In case of a dispute about whether a treaty rule has achieved customary law status, the final decision will lie with a court or tribunal and, as the practice shows, the passage leading from mere treaty provisions to the statement of custom or the creation of new custom is straight and narrow, and the distinction between both is often one on which more than one opinion is possible. A treaty provision can thus easily become a general obligation if it is regarded as codifying customary law. As a result, the role of codification of international law in combination with the increasing means of judicial review on the international plane are the most remarkable factors in the evolving role not only of international treaties, but indirectly also of customary law.

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[100] *See* Guzman, in this volume.

[101] Jennings, *supra* note 19, at 70–759, 733.

In particular, codification treaties comprise both: a restatement of customary law and the enactment of new rules of law. Because the two often are not clearly distinguishable, courts have to decide upon the qualification of the treaty rules. As courts are inclined to be rather generous in qualifying provisions as customary law, the contribution of treaties to the progress of international organization is closely linked to that of customary law, although the treaty provision is the "starting point."

In the final analysis the most decisive players in contributing to the development of universally-binding international law are international courts and tribunals that have the last say as to the meaning of a treaty position. This role for international tribunals is only acceptable if judicial restraint is observed and if the decisions qualifying treaty law as customary law are supported by detailed reasoning. Thus, Manley Hudson's claim that codification of international law will have "a greater influence on the growth of international law than any other movement," has proven and remains as true as his statement that "the precise line between codification and legislation would be difficult to draw," which should not be a reason to worry because "all codification possesses a legislative character."[102]

[102] Hudson, *supra* note 2, at 84.

Customary International Law in the 21st Century

By Andrew T. Guzman and Timothy L. Meyer

A. *Introduction*

In 1932, in his seminal work, *Progress in International Organization*, Harvard Professor Manley O. Hudson declared that, "the customary part of international law is in an unsatisfactory condition."[1] Citing a host of concerns about customary international law (CIL) that are by now familiar to scholars, Hudson's misgivings about the state of CIL foreshadowed more modern critiques based on traditional legal scholarship,[2] as well as those grounded in international relations theory.[3] Yet developing a coherent theory of CIL remains crucial to advancing our understanding of international law.[4] This is not only because CIL is one of only two primary sources of international law, the primary source of universal law and the sole source of law governing certain issue areas.[5] In a very real sense, CIL and the customary process that gives rules of CIL their force undergird the entire system of international law, regardless of doctrinal category.

CIL is the most rudimentary of legal obligations. Unlike soft law and treaties, CIL does not emerge from a specific process that marks the creation of a legal obligation. This lack of a defining procedure creates considerable confusion as to the content of CIL and its relevance to state behavior. In part, this confusion stems from the fact that procedures marking the creation of legal obligations produce information about the nature and content of those obligations.[6] For example, the process of seeking and obtaining domestic ratification of a treaty

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[1] Manley O. Hudson, Progress in International Organization 83 (1932).

[2] Anthony D'Amato, The Concept of Custom in International Law (1971); Karol Wolfke, Custom in Present International Law (2d ed. 1993).

[3] Jack L. Goldsmith & Eric A. Posner, The Limits of International Law (2005).

[4] Andrew T. Guzman, *Saving Customary International Law*, 27 Mich. J. Int'l L. 115, 116 (2005).

[5] *Id.*

[6] *See, e.g.*, Richard H. McAdams, *An Attitudinal Model of Expressive Law*, 79 Or. L. Rev. 339 (2000) (noting that "law signals the existence of information held by the law-maker").

Miller & Bratspies (Eds), Progress in International Law, pp. 197–218.

reveals information about the seriousness, as well as the interpretations, the parties attach to their commitments.[7] Where such procedures are lacking, information about legal obligations will also be in short supply.

Nevertheless, it would be a mistake to think of the international legal landscape as being dotted with clear and rigid legal obligations against a backdrop of lawlessness. More accurate would be a view that recognized legal obligations with greater or lesser strength or credibility. Just as domestic laws vary in the strength of the state's commitment to a substantive behavioral standard, as measured by the penalties for violation, so too does the range of international legal obligations reflect a choice on the part of sovereign states to create legal obligations that vary in terms of their strength.[8]

This chapter argues that rules of CIL support "harder" legal agreements by reducing the costs associated with such agreements. Beyond this supporting role for CIL, this chapter also argues that formal legal institutions provide ways in which states can create more credible rules of CIL. Under standard rational choice assumptions, states create legal obligations to maximize their cooperative gains, taking into account transaction costs. In an environment in which states exercise a veto over legal obligations flowing from explicit agreements, transaction costs can prevent the creation, by way of agreement, of an otherwise beneficial legal obligation. CIL can bridge this gap, allowing the creation of less credible but still valuable legal obligations. As is argued below, states have found ways to use formal legal institutions to increase the credibility of particularly valuable rules of CIL in situations in which transaction costs might prevent the creation of a treaty-based regime.

This chapter proceeds in five parts. Section B reviews traditional definitions of CIL, as well as criticisms of traditional approaches. Section C develops a model of CIL based on rational states. This model provides a functional theory of CIL. Section D considers several ways in which CIL remains relevant to a world in which the predominant legal instrument of international relations is the treaty. This Section demonstrates that the rise of more formal legal institutions in the last century has reinforced and complemented the way in which CIL impacts state behavior, rather than rendering CIL irrelevant to international relations. We conclude our remarks in Section E.

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[7] *See, e.g.*, Lisa L. Martin, *The President and International Agreements: Treaties as Signaling Devices*, 35 Presidential Stud. Q. 440 (2005).

[8] Kal Raustiala, *Form and Substance in International Agreements*, 99 Am. J. Int'l L. 581 (2005) (describing the "wide range of variation" in the extent to which legal agreements may bind).

B. *Traditional Definitions and Critiques*

Article 38 of the International Court of Justice, which provides the most commonly cited definition of CIL, states that "international custom, as evidence of a general practice accepted as law, is one of the sources of international law."[9] The Restatement (Third) of Foreign Relations Law of the United States defines CIL as "result[ing] from a general and consistent practice of States followed by them from a sense of legal obligation."[10] Thus, CIL, as traditionally defined, has two elements: state practice and *opinio juris*. State practice is an objective requirement that focuses on the behavior of states. In contrast, the *opinio juris* requirement focuses on the subjective belief of the state in question. Specifically, the *opinio juris* requirement requires that a state believe itself to be bound by the customary rule in question.

This conception of CIL has long been under attack from a variety of directions. Traditional critics of CIL have pointed out that the definition of CIL is circular,[11] that rules of CIL are vague and thus difficult to apply,[12] and that we lack standards by which we can judge whether the two requirements for a rule of CIL have been met.[13] D'Amato, for example, has pointed out that traditionally, in order for a rule of CIL to exist, states must have the requisite *opinio juris*; in other words, they must follow the rule from a sense of legal obligation.[14] But how can a state follow the rule from a sense of legal obligation unless it already has the requisite *opinio juris*?

The state practice requirement is no less problematic. The amount of practice required is a central question for which there is no single answer. While it is clear that universal state practice is not required, opinions as to the degree of state practice that is required diverge considerably.[15]

Furthermore, both the *opinio juris* requirement and the state practice requirement suffer from enormous evidentiary problems. With respect to *opinio juris*,

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[9] Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055; Ian Brownlie, Principles of Public International Law 3 (4th ed. 1990).

[10] Restatement (Third) of the Foreign Relations Law of the United States §102(2) (1987).

[11] D'Amato, *supra* note 2, at 58; Michael Byers, Custom, Power and the Power of Rules 136 (1999); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. Rev. 665, 710 (1986).

[12] Wolfke, *supra* note 2, at xiii.

[13] D'Amato, *supra* note 2, at 58; Guzman, *supra* note 4, at 124.

[14] D'Amato, *supra* note 2, at 53, 66.

[15] *See* Guzman, *supra* note 4, at 124 (describing the different views of commentators on the state practice requirement).

it is extraordinarily difficult to determine whether a state has taken a given action because it believes itself to be bound by a rule of CIL, or if it would have taken the same action in the absence of such a rule. State practice is even more complicated. Before one can evaluate "state practice," one must first determine what actions count in assessing whether or not a "state practice" exists. Some commentators have urged that everything including the actual actions of states, treaties concluded, domestic laws, diplomatic correspondence, and even public statements by heads of state be considered evidence of state practice.[16] Others have urged a more restrictive view, suggesting that only physical acts should count.[17] Of course, views between these extremes abound.[18]

Even if consensus as to what counts as state practice could be achieved, practical problems relating to canvassing the enormous amount of evidence would still exist. Decision-makers on international tribunals face severe resource constraints in their efforts to assemble a record of state practice.[19] They are limited both in terms of time, personnel, and language. This necessarily has the effect of biasing international tribunals in favor of large states that are able to produce a wealth of evidence as to their practices in languages easily understood by the tribunal.

More recently, a new sort critique has arisen, based on rational choice theory. Using the conventional assumptions of rational choice theory, some scholars have argued that, as a theoretical matter, CIL has no, or at least extremely limited, impact on state behavior.[20] This theoretical claim, however, cannot withstand scrutiny. States interact with each other over an extended period of time, and, thus, a failure to comply with rules today will have consequences tomorrow. For CIL, or any other type of law, to have an impact on state behavior, it is a necessary but not sufficient condition that states place some value on the future. In other words, as long as states are concerned with their ability to cooperate in the future, rules of CIL can have some effect on a state's decision as to whether or not to comply with prevailing norms. The extent to which states value this future cooperation will in part explain the variation in compliance.

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[16] Michael Akehurst, *Custom as a Source of International Law*, 47 Brit. Y.B. Int'l L. 1 (1977).

[17] D'Amato, *supra* note 2, at 88.

[18] *See* Guzman, *supra* note 4, at 126 (offering a detailed list of possibilities).

[19] For example, in the famous *Paquete Habana*, 175 U.S. 677 (1900), the U.S. Supreme Court found a rule of CIL to exist based on the practice of fewer than a dozen states. The Permanent Court of International Justice found a rule of CIL to exist on similarly scant evidence in *S.S. Wimbledon*, 1923 P.C.I.J. (ser A.) No. 1 (Jan. 16).

[20] Goldsmith & Posner, *supra* note 5, at 43; Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. Int'l L. 639, 640 (2000) ("The faulty premise is that CIL … influences national behavior.").

Pointing out that states interact with each other in long-term relationships rather than one-off prisoner's dilemmas does not necessarily mean that CIL can generate cooperation. International law skeptics have grasped onto the decentralized nature of enforcement in the international environment to claim that, even when states expect to interact with each other in the future, they will often violate their present commitments because there likely will be no future repercussions for such violations.[21]

This view suffers from a narrow conception of what constitutes future sanctions. It is, of course, true that in many cases violations of international law will not result in multilateral sanctions, military reprisals, or anything else that is analogous to an "enforcement action." However, this does not mean that there is no sanction for violation of international commitments. Because states interact with each other over a long period of time, a reputation for abiding by cooperative arrangements is valuable to states. It permits them to extract concessions from other states in the future, and it allows other states to rely on their behavior, thus inducing welfare-enhancing behavioral regularities. It follows that, to the extent states value future cooperation with other states, they may be induced to comply with rules of international law when they otherwise would not. In other words, reputational sanctions can support a cooperative system of norms, be those norms rules of CIL or treaty-based rules.

C. *Rational States and CIL*

Besides explaining why states comply with rules of CIL, a functional theory of CIL also must explain why states violate such rules. This Section begins by laying out the ways in which international law can influence states' compliance decisions.[22] The second part of this Section applies the framework developed in the first part to further elaborate the theory of CIL.[23]

This theory uses basic rational choice assumptions to show how CIL, properly conceived, can affect state behavior. In this chapter, we treat the state as a unitary actor. Such a choice is increasingly common in international legal scholarship,[24]

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[21] *See, e.g.*, Goldsmith & Posner, *supra* note 5; Hans Morgenthau, Politics Among Nations: The Struggle for Peace and Power (1966).

[22] In discussing the role of CIL in the development of international law, and CIL's connection with other forms of international law, this chapter will draw on a theory of CIL developed by Guzman, *supra* note 4.

[23] For a normative critique of rules of CIL, *see* Eugene Kontorovich, *Inefficient Customs in International Law*, 48 Wm. & Mary L. Rev. 859 (2006).

[24] *See, e.g.*, Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 Cal. L. Rev. 1823 (2002); Edward T. Swaine, *Rational Custom*, 52 Duke L.J. 559, 563 (2002).

and reflects the fact that theories that peer into the internal dynamics of the state, most notably liberal theory and public choice theory, have difficulty generating predictions about how rules of international law will affect state behavior. The complexity that is present in domestic politics makes it nearly impossible to isolate the effect that international law has on states' decision-making processes. Thus, treating the state as a unitary actor allows us to think about CIL in a way that focuses on the impact of international law alone on states' decisions.

I. *CIL and Reputation*

As noted above, for international law to affect states' decisions, states must care about the future, and there must be future consequences for present compliance decisions. States have three methods for sanctioning behavior that is noncompliant with international law: reciprocity, retaliation, and reputational sanctions. The imposition of all three requires action by other states.[25] Such action will necessarily depend on how these other states perceive the action taken by the violating state and how they understand the content of the legal obligation. Thus, every state individually is an arbiter of the legal obligations of other states.

Reciprocity and retaliation both involve direct action by the offended state. In the case of reciprocity, a state withdraws its compliance with the legal rule in reaction to another state's withdrawal of compliance.[26] Such a withdrawal ensures that the violating state does not continue to receive the benefits of cooperation without having to pay the costs. Retaliation involves a state taking action specifically to punish a violating state. Retaliation is used as a means to ensure that the violating state will comply with legal rules in the future and can also enable the retaliating state to establish a reputation as a state willing to punish violators.[27] Retaliatory action need not be related to the same issue area as the violation prompting the retaliation.

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[25] Such action may be directly observable, as in the case of reciprocity or retaliation, or not, as in the case of a state updating its beliefs about state's likelihood to comply with international law in the future.

[26] Some scholars use reciprocity to refer to action taken in a situation involving only two states that has the effect of punishing one state for a violation. *See* James D. Morrow, *The Institutional Features of the Prisoners of War Treaties*, 55 Int'l Org. 971, 973 (2001). Here, however, reciprocity is distinguished from retaliation by the motivation of the state. Reciprocal action is thus not designed to punish the violating state, although it will often have that effect. Instead, reciprocal action is taken to maximize the non-violating state's payoffs, given the violation of the other state.

[27] This is a reputation of a different sort than the one being discussed here. The reputation that supports international law is a reputation for compliance with international law, as opposed to a reputation for being willing to punish those who violate international law, or who refuse to capitulate to a state's wishes.

Reciprocity and retaliation both suffer from severe limitations. Because reciprocity, as understood here, is limited to reciprocal withdrawals of compliance, reciprocity will support only a limited number of legal obligations, most of which will be bilateral.[28] In contrast, retaliation has the potential to significantly deter violations of international law by imposing large costs on violators. However, retaliatory sanctions are costly for the state imposing them. Furthermore, because the compliance generated by retaliatory sanctions has the features of a public good, meaning that many states benefit from the violating (and thus punished) state's future compliance, all states have an incentive to free ride on the retaliatory sanctions imposed by other states. The result is that sanctions are rare, and generally provided only in situations in which the punishing state captures most of the gains flowing from the punishment.[29]

A reputation for compliance with international law is the third important method for influencing states' compliance decisions. States rarely find themselves in a one-off prisoner's dilemma with other states. Instead, states are usually locked into relationships with each other that span decades and even centuries. Thus, action taken by a state today can be used by other states to assess the likelihood that a given state will abide by its legal commitments in the future. A state's reputation for compliance can thus be defined as the expectations of other states as to the circumstances in which compliance will be forthcoming.[30] Reputational sanctions can be thought of as the marginal decrease in states' expectations of the violating state's future compliance as a result of a violation. This marginal decrease in expected compliance reduces the ability of the violating state to cooperate in the future with other states, or to extract concessions in a bargaining context.

Of course, for reputation to matter for compliance, states must value their reputations, but it does not seem very far-fetched to assume that they do. Because states seek to enter into agreements with other states all the time, as well as to benefit from existing cooperative arrangements, a reputation for compliance with one's international legal commitments is valuable. In dealing with a state with a good reputation for compliance, other states can predict with higher certainty, and thus more accurately rely on, the "good" state's behavior, and, thus, will be willing to grant greater concessions in a bargaining context. In other words, a

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[28] Thus, reciprocity might support certain types of special custom, rules of CIL that are binding on only a few parties, as opposed to most rules of CIL, which are universally applicable.

[29] In other words, sanctions will be less likely in the multilateral context than the bilateral context. *See* Guzman, *supra* note 24, at 1869 (noting that bilateral sanctions are more effective than multilateral sanctions due to the collective action problem with the latter).

[30] *See* Andrew T. Guzman, The Theory of International Law: A Rational Choice Approach (forthcoming 2007).

commitment from a state with a good reputation is worth more than a commitment from a state with a worse reputation, and, thus, the possessors of good reputations will be able to extract more from cooperative partners.[31]

Reputation has an additional feature that increases its effectiveness over retaliation and reciprocity: it does not depend on collective action. Reputational sanctions are created when each state updates its estimation of a violating state's future compliance with international law. This updating does not require states to coordinate with each other. Each state has its own perceptions of legal obligations and will determine for itself whether a given action violates the perceived obligation.

Further, reputational sanctions are not costly for states to impose. Reputational sanctions result from individual states' self-interested collection and assessment of information regarding the likelihood of future compliance. Because states update their beliefs out of self-interest, reputational sanctions will be present even in situations in which cost-benefit concerns or attempts to free-ride on the actions of others prevents direct sanctions. Thus, reputational sanctions will be by far the most common type of sanctions for noncompliance.

Finally, in deciding on a particular course of action, states face a number of incentives that are not related to legal obligations. For example, the economic benefits from whaling in certain waters may outweigh the costs from violation of a legal commitment to refrain, particularly if whaling is a significant part of the nation's economy.[32] Likewise, the decision to build an extensive navy may be justified in terms of the gains in security, even if a legal obligation forbids such actions.[33] Such economic or security-related incentives will, in large part, determine the actions that a state takes when faced with a given decision. The legal ramifications of its decision are another factor that a state must consider when making a decision in which a rule of international law is implicated. Thus, to the extent that international law can sanction non-compliant

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[31] The workings of reputation are considerably more complex than this short description indicates. *See id. See also* Anne E. Sartori, Deterrence by Diplomacy (2005).

[32] Iceland in particular has struggled with the legal commitment to refrain from whaling. After failing to enter an objection to the International Whaling Commission's moratorium on whaling, as other whaling nations such as Japan and Norway did, Iceland resigned from the IWC in 1992, only to seek reentry in 2001. Following reentry, Iceland recommenced whaling under the cover of the moratorium's "scientific exception." *See* Ramsey Henderson, Note, *The Future of Whaling: Should the International Whaling Commission Create a Broadened Cultural Exemption to the Whaling Moratorium for Iceland?*, 33 Ga. J. Int'l. & Comp. L. 655 (2005).

[33] Multilateral Limitation of Naval Armament (Five-Power Treaty or Washington Treaty), art. 4, Feb. 6, 1922, TS No. 671, 2 Bevans 351 (entered into force Aug. 17, 1923). Both Japan and Italy failed to comply with the Washington Treaty in the build-up to World War II.

behavior (or reward compliant behavior), international law can affect states' decision-making calculus.

II. *A Functional Theory of CIL*

With this understanding of the legal underpinnings of compliance with international law, we can now develop a functional theory of CIL. Traditionally, scholars have considered consent to be the hallmark of international law.[34] States that did not consent to a certain rule of international law could not be bound by that rule. The significance of consent is most clearly demonstrated in the case of treaties. States are only bound by a treaty if they consent to be so bound (although if the rules embodied in the treaty are also rules of CIL, nonparties may still be bound by the rules of CIL). Thus, treaty law is universally understood to come about through a bargaining process in which states exercise a veto. States, in other words, always have the last say as to what treaty commitments will bind them.

Perhaps reasoning by analogy, legal scholars have long thought that the process governing the development of CIL must be based, even if somewhat loosely, on consent. The *opinio juris* requirement, as traditionally understood, is, thus, little more than the requirement that states consent to legal rules that bind them.

In contrast, a theory that focuses on why states comply with rules of international law has little room for state consent as a basis for determining which rules are binding.[35] Instead, states comply with international law when it is in their interest to do so. This understanding of international law explains why states comply with CIL rules even when they have not meaningfully consented. This approach also has the advantage of allowing us to understand the circumstances in which states will violate commitments to which they have consented.

From this functional standpoint, consent is valuable only to the extent that it is a reliable signal about future behavior. The existence of a legal obligation is based on the views of other states as to whether or not a legal obligation is binding on a given state. In the case of explicit agreements, these expectations are largely shaped by consent. *But it is these expectations, and not consent, that create legal obligations*.

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[34] *See, e.g.*, S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) ("The rules of law binding upon States therefore emanate from their own free will …"); Louis Henkin, *International Law: Politics, Values and Functions*, 216 Recueil Des Cours D'Academies de Droit Int'l 9, 27 (1989) ("[A] state is not subject to any external authority unless it has voluntarily consented to such authority.").

[35] Guzman, *supra* note 24, at 1833.

Under this approach, the only rules that count as rules of CIL are those rules that actually affect state behavior by virtue of their status as legal rules. Given this definition, it is necessary to reinterpret the traditional doctrinal elements of CIL. *Opinio juris*, as traditionally interpreted, was intended to protect the integrity of state sovereignty by requiring state consent to be bound. However, under a functional analysis, the *opinio juris* requirement can be understood as referring to the beliefs of other states as to the legal obligations binding a given state. This notion of *opinio juris* comports with the reputational mechanism mentioned above, which generally serves to enforce legal obligations. The views of states generally will determine the existence and magnitude of the reputational sanction, and, thus, will determine whether a legal obligation that will influence the decision-making processes of a given state exists.

Furthermore, the existence of a legal obligation does not depend at all on state practice, the second traditional element of CIL. The existence of a legal obligation is determined exclusively by the beliefs of states as to the existence of such an obligation. State practice remains relevant only insofar as it provides evidence of what states believe to be legal obligations. It should be noted that the familiar problem with drawing inferences as to state beliefs about legal obligations from state practice remains. States may strategically claim an obligation exists that they do not, in fact, believe exists. Furthermore, because a functional account of international law expects violations of law to occur, the fact that states sometimes fail to comply with a purported rule of CIL does not mean that the state does not consider the rule to be binding.

Significantly, the value of a reputation for compliance with CIL is not exactly the same as the value of a reputation for compliance with more explicit agreements, where the credibility of a state's explicit commitments to be bound is at stake. Because states have not explicitly contracted for obligations that arise under CIL, a state's ability to extract concessions in a bargaining context based on its reputation for compliance will only be affected by violation of rules of CIL to the extent that states interpret violations of rules of CIL as indicating a willingness to violate other legal commitments. In other words, violations of CIL can affect the bargaining value of a reputation for compliance to the extent that reputations for compliance generalize across legal obligations, rather than being compartmentalized so that states have separate reputations for compliance with treaties, soft law and CIL. However, even if reputations are completely compartmentalized, a reputation for compliance with CIL is still valuable because it allows other states to rely on a state's cooperative behavior. This reliance is, in turn, valuable, because it permits welfare-enhancing behavior regularities without the transaction costs involved in bargaining.

Practically speaking, reputational sanctions will vary with a number of factors. Because each state individually updates its beliefs, the magnitude of the sanction for a given violation will depend on the number of states that observe the viola-

tion, as well as the clarity of the obligation.[36] Thus, greater information about violations and greater clarity and consensus as to the nature and content of obligations promote compliance by increasing the reputational sanction for violation.[37] A lack of clarity as to the content of rules of CIL is likely to be a major factor in weakening the impact of CIL. To the extent that states diverge in their interpretations of what rules of CIL require, or even the existence of a rule of CIL, reputational sanctions can shrink to the point that they have no significant impact on state behavior. Thus, mechanisms for promoting consensus as to the content of legal rules are valuable to states because they increase the compliance pull of the obligations.

These concerns create problems when states, or tribunals, are trying to determine the existence of a rule of CIL, but they do not make such an inquiry impossible. Certain state actions will be more costly than others, and, thus, may more reliably indicate a state's belief that a legal obligation exists. One such example, which will be dealt with at greater length in the next section, is the creation of a treaty that incorporates or expounds on rules of CIL. Thus, looking to treaties as evidence of CIL can remain a valuable practice under a functional theory of CIL because treaties can send credible signals as to what rules states believe to be binding on non-parties. Delegation to an adjudicatory body to decide questions based on CIL can be another costly signal. Because the decisions of adjudicatory bodies can be costly to states, both in terms of providing information about violations of rules of CIL and by clarifying and creating consensus as to the specific content of rules, permitting such bodies to rule on the basis of CIL may be an indication that states believe a rule of CIL to exist.

D. *CIL in the 21st Century*

The functional model of CIL described here, with rational states as its core assumption, demonstrates that it is theoretically possible for CIL to have an impact on state behavior in the same way that any legal commitment does.

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[36] Other factors will also affect the magnitude of the reputational sanction. Specifically, states may have diverging estimates of a state's likelihood to comply with future obligations. Those states that already believe the likelihood of future compliance to be low may not have to update their expectations in response to a violation, thus reducing the overall sanction. *See* Guzman, *supra* note 24.

[37] An increase in sanctions for violation is not costless. As noted earlier, in an international context sanctions are negative sum, making them collectively costly to the parties in the event of violation. This explains why states do not as a matter of course create mechanisms to increase transparency or clarify obligations. They only do so to the extent that the value from increased compliance as a

Because states value their reputation for compliance with legal agreements, rules of CIL are one consideration among many that states take into account when deciding on their best course of action. However, unlike treaties and soft law, where states have explicitly bargained over their legal commitments, CIL presents an informational problem. States can only respond to legal commitments to the extent that they are aware that a legal commitment exists. Thus, although this model of CIL allows us to understand how CIL can affect state behavior, understanding the depth of cooperation that CIL can support requires an account of how states indicate to each other the rules that have legal status, and thus the violation of which will result in a reputational sanction.

At the outset, we note that the most common tool that states use to signal to each other their understanding of each other's commitments is an explicit agreement (either a treaty or a soft law agreement). Signature or ratification of an agreement, thus, not only signals intent to be bound by a state's own commitments, but also signals an understanding of the other side's commitments. In other words, consent to an explicit agreement reveals information to a given state about how other states view the legal commitments binding the original state.

However, as most states have not actually consented to rules of CIL, scholars have invented doctrines of constructive consent, or consent to secondary rules of CIL, to explain how states are bound by CIL.[38] This dilemma was most clearly presented by new states, which never had a chance to become persistent objectors to a rule while it was forming, but were nonetheless deemed to be bound by all of the rules in existence at the time the state formed.[39] Eventually, most commentators came to accept that the consent, or *opinio juris*, required for a rule of CIL applied to states generally, and not to a violating state specifically.[40] Thus, although traditional theories had a place for consent, the tenuous connection to deliberate, explicit consent meant that states revealed little information as to which obligations they felt had the status of legal rules, and little information as to the content of those obligations.

This lack of information about the existence and content of rules of CIL necessarily weakens the compliance pull of those rules. If there is uncertainty about

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result of greater clarity and information is greater than the marginally greater expected loss in the event of violation. *See* Andrew T. Guzman, *The Design of International Agreements*, 16 Eur. J. Int'l L. 579 (2005).

[38] Mark Villiger, Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources 18–22 (1985); Vaughan Lowe, *Do General Rules of International Law Exist?*, 9 Rev. Int'l Stud. 207, 208–10 (1983).

[39] Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 Brit. Y.B. Int'l L. 1, 16 (1985).

[40] *Id.*

the content of a legal rule, states will be unsure how to interpret action they consider to be a violation. For example, if State A observes State B take an action that State A considers to be a violation of a rule of CIL, State A may interpret the action as a willingness to violate the rule under the prevailing conditions. Alternatively, State A may believe that State B is acting in compliance with its own understanding of the rule. In the latter case, State A would not update its beliefs about State B's willingness to comply with its legal obligations. Furthermore, State A's beliefs about State B's motivations will often fall in between these two poles. States rarely admit to being in violation of their agreements, and it can be difficult to tell whether their statements to this effect reflect a sincere belief, or are merely strategic.

It follows from this that states have an interest in clarifying the perceptions of legal obligations and the situations in which those obligations will be binding. To do so, states have created a series of devices designed to clarify customary norms. These devices allow states to capture the benefits of greater clarity by revealing information about what rules states view as legally binding.

I. *Codifying Custom*

The most obvious method for clarifying customary obligations is by codifying them in treaty form. A number of major multilateral treaties purport to do just this. For example, the Vienna Convention on the Law of Treaties is widely viewed as codifying much of the customary law of treaties.[41] Similarly, the Vienna Convention on Diplomatic Relations codifies much of the customary international law relating to the protection and treatment of diplomats.[42] Indeed, in the last century many areas of international law that were exclusively governed by CIL have been addressed with treaties, such as human rights and the laws of war, a trend noted by Manley Hudson in the early 1930s.[43]

The basic trade-off in codifying customary international law is between the benefit of greater clarity in the rules, and the costs associated with the treaty-making process, as well as the costs that accompany the greater credibility of the commitment.[44] Indeed, the latter is likely to be significant. By increasing certainty as to the specific contours of an obligation, states are able to more accurately assess whether actions by another state that it deems violative were taken in good faith. Because reputational sanctions are often negative sum, this greater

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[41] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

[42] Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95.

[43] Hudson, *supra* note 1, at 83.

[44] Guzman, *supra* note 24.

certainty results in a larger net loss to the parties in the event of violation.[45] Thus, rules of CIL should only be codified when this loss is outweighed by the benefits of greater compliance and the ability to more accurately rely on this compliance.

The conditions in the modern world that create the need for greater reliance are fairly evident. As states interact with each other in more issue areas, with greater frequency, and with higher stakes, the costs incurred through codification sometimes come to seem small relative to the benefits. Thus, for example, the proliferation of treaties in the twentieth century made the law of treaties an ideal issue area in which to codify custom. An increase in the density of transactions increases the net benefits from greater certainty and, therefore, greater cooperation. Similarly, decolonization in the mid-twentieth century saw the emergence of many new states. Previously, what might be termed the law of diplomatic relations was governed by CIL. This was appropriate because it served primarily to govern the conduct of European nations towards each other. Decolonization not only led to the birth of many new states, it created states that were typically quite different from their former colonial masters. The increase in the heterogeneity of states made customary norms a less effective device for the management of cooperation. It became important to stipulate expressly the terms that would govern those relationships.[46] Like the Vienna Convention on the Law of Treaties, the Vienna Convention on Diplomatic Relations can be seen in part as a reaction to this need by codifying an aspect of states' relationships with each other.

It may be objected that the codification of custom in the most important areas of law indicates that CIL has no future relevance, regardless of its historic significance. This view is mistaken for several reasons. First, CIL, with the exception of special custom, is thought to bind states universally. Thus, despite the fact that the United States has not ratified the Vienna Convention on the Law of Treaties, other states view the United States as being bound by the customary law of treaties. Insofar as the Vienna Convention is the most authoritative statement of what the customary law of treaties is, the United States is bound by the terms of the treaty.

Significant for this conclusion is the fact that the Vienna Convention purportedly codifies custom, and that it has so many members. Under traditional definitions of CIL, treaties are often said to provide evidence that rules of CIL exist. This evidentiary device can be problematic, however, because treaties may

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[45] *Id.*

[46] Berdal Aral, *An Inquiry into the Turkish 'School' of International Law*, 16 Eur. J. Int'l. L. 769, 774–75 (2005) ("In the aftermath of decolonization, for example, some newly independent states asserted that they should not be bound by customary law as they had played no part in its development.").

be created either to capture the increased gains from cooperation, or to alter the default rules as between the parties to the treaty. Thus, it may be argued that treaties really indicate that any existing rules of CIL were inadequate to govern the relationship of the parties to the treaty, without indicating whether the inadequacy stemmed from lack of clarity and credibility, or from the substantive rules themselves. Given this uncertainty, it is difficult to infer whether or not a universal obligation exists.

From a rational choice perspective, however, the explicit codification of custom has an additional function. Rather than being evidentiary, the codification of custom can play a signaling role. Where a treaty is purported to embody customary norms, the treaty sends a signal to non-parties that the parties to the treaty consider the terms to be binding on all states. Because, under a rational choice model of CIL, the beliefs of other states determine a given state's legal obligations, this signal reveals information to all states about the content of the rules of CIL in question. In the extreme, even where treaty rules arguably deviate from conventional rules of CIL, a treaty can, in situations in which the parties assert that the treaty codifies custom, still signal information about how interpretations of the relevant rules may be changing.

Furthermore, the signal being sent is more credible than a simple joint statement by the parties to the treaty because sending the signal in treaty form is costly. By binding themselves to each other in treaty form, the parties increase the credibility of their commitment to abide by the customary rules, at least with respect to other parties. The resulting signal is more credible because a breaching party must bear a larger cost. The more costly the signal, the less likely it is that the parties to the treaty are strategically trying to manipulate the information other states possess. Conversely, where the treaty imposes few costs on the parties, the signal sent about the parties' beliefs about custom are quite weak. Thus, a larger number of parties should increase the significance of the signal sent to non-parties.

It follows from this analysis that the codification of custom, far from being the demise of CIL, can actually increase the significance of the customary process. Codifying custom gives states a way to signal information to each other about their beliefs about the prevailing norms, and, thus, gives them a way to "bind" states that remain outside of a given treaty. The examples of the aforementioned Vienna Conventions, governing the relationships of states with each other, provide an illustrative example of this proposition. When the number of relevant states was small, states felt comfortable allowing the terms of their interactions to be governed by customary norms. When there was a sharp rise in the number of states, as occurred in the middle of the twentieth century, existing states likely found it valuable to signal to new states what laws the former believed governed the interaction of states.

The second reason that CIL as a form of law retains vitality is that CIL is interstitial, filling in the gaps in more explicit legal instruments such as treaties and soft law, and provides a basis for the operation of those legal instruments.[47] The Vienna Convention on the Law of Treaties, for example, provides in its preamble that "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention."[48] The Convention thus contemplated that existing rules of CIL would complement the Convention in establishing states' expectations about the law of treaties.

Furthermore, these expectations drive all international law, regardless of its form. Simple cost/benefit analysis prevents states from committing to paper all of their legal expectations. Just as a contract will remain silent on issues to be governed by default or background rules, international agreements will be rationally incomplete. Customary norms will fill in many of the rational holes in treaties and soft law agreements. Without these background and default rules and expectations, the cost of creating commitments would be exorbitantly high. States would have to explicitly negotiate over the allocation of certain rights each time they entered into an agreement. As with contracts, however, default rules reduce transaction costs, thus creating a greater cooperative surplus and more possible agreements. Thus, even where CIL by itself may not deter violations of international law, it supports the creation of harder, more credible forms of law.

Third, the customary process permits the reinterpretation of more formal legal obligations, such as those arising from treaties, without resorting to a formal amendment process. Because a given state's legal obligations are defined by the beliefs of states generally about those obligations, a shift in beliefs results in a shift in the underlying legal obligations. If, for example, a treaty is initially understood to require X but over time states come to believe, perhaps through informal discussions or perhaps through changed political or economic circumstances, that instead of X the provision requires the state to do Y, the legal obligation effectively is Y.

Withdrawal or denunciation clauses in certain international treaties are an example that illustrates both the interstitial nature of the customary process as well as its ability to change the meaning of provisions of international agree-

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[47] While traditional theories of international law have considered treaties and CIL to be the primary types of international law, a reputational theory of international law leads to a different conclusion. Soft law agreements, to which states have explicitly consented, generally yield clearer expectations, and thus larger reputational sanctions in the event of violation, than unclear CIL obligations. Thus, in many cases, soft law agreements will be more "binding" on the parties, in the sense of having larger reputational costs associated with violation, than rules of CIL. *See* Guzman, *supra* note 30.

[48] Vienna Convention on the Law of Treaties, *supra* note 41, Preamble.

ments. Withdrawal clauses are often vague, stating only that states may withdraw, and sometimes stipulating that the withdrawal must be for reasons of "supreme interest."[49] Given the vague formulation of such clauses, one might think that states frequently invoke withdrawal clauses to escape legal obligations that have become onerous. The opposite appears to be true. States rarely invoke withdrawal clauses, despite their frequent inclusion in agreements.[50] Such reluctance to use a seemingly open-ended right that has been negotiated in the treaty-making process is best explained through a process that results in a narrowing of the substantive right despite its wording. The customary process allows us to understand how such legal obligations can be reinterpreted and elaborated without resorting to costly amendment processes requiring universal acceptance among parties.

Consider, for example, North Korea's withdrawal from the Nuclear Nonproliferation Treaty. North Korea withdrew from the NPT pursuant to Article X in January of 2003, citing the nation's "supreme interests" in protecting itself from American aggression.[51] At the same time, North Korea declared itself no longer bound by the safeguards agreements that it had signed with the International Atomic Energy Agency pursuant to Article III of the NPT.[52] As such, North Korea became legally free to use the technology other nations had shared with it during its membership in the NPT to pursue a nuclear bomb, despite the fact that any technology transfers under the NPT and IAEA safeguards are made in reliance on the receiving nation's compliance with its nonproliferation obligations. In other words, nothing in the text of the NPT prevents a state from receiving technology transfers under the premise that it is in compliance with its nonproliferation norms, and subsequently withdrawing from the NPT and using the technology to pursue a nuclear capability.

Nevertheless, such a course of action is clearly at odds with the spirit of the NPT. In transferring sensitive nuclear technology to non-nuclear weapons states (NNWS), transferring states assume that the NNWS intend to comply with their legal obligations during the time that they remain NNWS. Thus, following North Korea's withdrawal, France argued that states such as North Korea that withdrew from the NPT in superficial compliance with the plain text should remain

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[49] *See, e.g.*, Treaty on the Nonproliferation of Nuclear Weapons art. X, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161; Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., art. XV, May 26, 1972, 23 U.S.T. 3435, 944 U.N.T.S. 13.

[50] Barbara Koremenos, *Contracting Around Uncertainty*, 99 Am. Pol. Sci. Rev. 549, 561 (2005).

[51] Center for Nonproliferation Studies, *Text of North Korea's Statement on NPT Withdrawal*, January 10, 2003 (translated to English by North Korean new agency KCNA), *available at* http://cns.miis.edu/research/korea/nptstate.htm.

[52] *Id.*

responsible for violations committed while a member.[53] Germany sought to generate support for an amendment to the nonproliferation regime that would explicitly forbid states from using benefits received under the NPT to develop a nuclear weapon.[54] Under the theory developed in this chapter, however, such an amendment is unnecessary. The fact that states believe that the NPT has an implicit prohibition on actions such as those taken by North Korea, despite the lack of explicit language to that effect in the text, means that the obligation exists. Thus, North Korea's actions likely resulted in a loss of reputation. Indeed, in the case of the North Korea and specifically in light of North Korea's history of disregarding its nonproliferation obligations, this willingness to violate both implicit and explicit obligations has likely contributed to the inability of the Six Party talks to reach a negotiated settlement to the North Korean nuclear issue.[55]

This analysis suggests that the customary process operates to create implicit legal obligations that go beyond the open-ended wording of legal texts, both hard and soft. Just as there are rules prohibiting a state from undermining a treaty that it has signed,[56] it may be that states understand withdrawal clauses to limit the ability of states to profit from membership in a treaty regime after they have withdrawn from the regime, or more generally to escape from an obligation, no matter how informal, on which other states have relied. This certainly seems be the understanding of states with respect to the NPT, and to the extent that this hypothesis generalizes, it explains why states fail to take advantage of seemingly liberal withdrawal provisions in treaties. Implicit obligations based on state beliefs can trump the plain meaning of explicit legal texts.

II. *Tribunals*

Delegating dispute resolution to tribunals, a term used here to encompass at the international level not only courts but also investigative bodies, such as the U.N. Human Rights Committee and the Inter-American Commission on Human Rights, to which disputes can be submitted, can also increase compliance with

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[53] *See* Claire Applegarth & Rhianna Tyson, Arms Control Association and Women's International League for Peace and Freedom, *Major Proposals to Strengthen the Nuclear NPT: A Resource Guide*, April 2005, at 31, http://www.armscontrol.org/pdf/NPTRevConf2005_MajorProposals.pdf.

[54] Preparatory Committee for the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Strengthening the NPT Against Withdrawal and Non-Compliance: Suggestions for the Establishment of Procedures and Mechanisms*, NPT/CONF.2005/PC.III/WP.15, April 29, 2004, *available at* http://www.reachingcriticalwill.org/legal/npt/prepcom04/papers/GermanyWP15.pdf.

[55] *See* Kittrie, in this volume.

[56] Vienna Convention on the Law of Treaties art. 18, *supra* note 41.

CIL by increasing information, clarity of obligations, and commitment to observing rules of CIL. Not all of these tasks can be accomplished by international tribunals and,[57] thus, domestic tribunals, primarily courts, have begun to play an increasing role in the development of CIL.[58]

As noted above, any legal system that is supported largely by reputational sanctions requires that there be information about violations. Often, this information will be publicly available. States can observe the behavior of other states, and, thus, can assess whether or not other states' behavior comports with their legal obligations. However, in many other instances, state action will not be observable to any but an affected state, and even an affected state may not be entirely sure whether the alleged violation actually violated the norm as it is understood by the putatively breaching state or by states more generally. Tribunals and international organizations can aid compliance in these situations by increasing the amount of information available. When individuals or other states file an action against a state in an international court, or when an international organization investigates a state's compliance with a rule, observing states are given information about violations that might have been previously unavailable.

Furthermore, the reputational sanction from a negative verdict encourages states to reveal information about the circumstances surrounding an alleged violation and the states' interpretation of the relevant rules of CIL. Where states refuse to produce such information, observing states can infer that the cost of disclosing the information exceeds the expected gains in the proceedings. In many cases, but not all, this will be because the state is actually in violation, and revealing information cannot help their case. Of course, where information is produced about circumstances and particularly about interpretations, states must remain wary that other states are strategically trying to manipulate their information set.

Second, tribunals can play an agenda-setting role in clarifying the content of international norms. Proceedings before a tribunal give the tribunal the ability to elaborate on the content of particular rules of CIL.[59] States' expectations as to

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[57] *See* Romano, in this volume; Parker, in this volume.

[58] *See* Waters, in this volume.

[59] In the context of foreign investment, *see, e.g.*, Surya P. Subedi, *The Challenge of Reconciling the Competing Principles within the Law of Foreign Investment with Special Reference to the Recent Trend in the Interpretation of the Term "Expropriation,"* 40 Int'l Law. 121 (2006) (discussing how international tribunals have interpreted the customary international law of foreign investment). In the human rights context, the Inter-American Commission on Human Rights found the execution of juveniles to be customary international law, and possible a jus cogens norm. *See* Michael Domingues (United States), Case 12.285, Inter-Am. C.H.R., Report No. 62/02, OEA/Ser.L/V/II.177, para. 84–85 (2002).

what counts as a rule of CIL can shift with decisions or reports of tribunals, either coalescing around a decision or recommendation, or forming in opposition to the same. In some cases the mere act of establishing a tribunal to pass on certain questions sends a signal that the states establishing the tribunal believe that a rule of international law exists. Such is arguably the case with the Nuremberg trials and the establishment of crimes against humanity.[60] Furthermore, the compliance of a government with CIL-based tribunal (either international or domestic) decisions that are adverse to its interests can send a costly, and therefore credible, signal to other states as to what that state considers the relevant rules of CIL to require.

Lastly, the delegation to domestic tribunals of enforcement of CIL rules can create more *fora* to perform the informational and agenda setting functions discussed above, particularly for *jus cogens* norms and other human rights norms. This is important because standing and jurisdictional requirements are typically lower in domestic courts than in international tribunals. Indeed, domestic courts have become increasingly important to the development of CIL in recent decades. In the United States, for example, this trend began with the historic *Filartiga* decision, which interpreted the Alien Tort Statute as conferring jurisdiction on federal courts for claims based on violations of CIL.[61] The Supreme Court recently reaffirmed this in *Sosa v. Alvarez-Machain*, although the Court declined in that case to find a violation of a rule of CIL.[62] Notably, Congress has the power to overturn these judicial interpretations of the Alien Tort Statute, but has not done so. As the U.S. courts become more confident that Congress' silence represents acquiescence, they may become bolder in interpreting CIL as imposing domestic requirements.[63]

A particularly salient example of the role of domestic courts in the development of CIL is the decision of the U.S. Supreme Court regarding the illegality of military tribunals used to try foreign detainees from the war on terror held at Guantánamo Bay. In its decision, the Court interpreted provisions of the Geneva Conventions governing the military tribunals by reference to "those trial protections that have been recognized by customary international law," and found the government's procedures failed to comply with the Geneva Conventions and the applicable rules of CIL.[64] Because the United States is engaged in widespread

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[60] Sheri P. Rosenberg, *The Nuremberg Trials: A Reappraisal and Their Legacy*, 27 Cardozo L. Rev. 1549, 1550 (2006).

[61] Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

[62] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[63] *See* Ku, in this volume.

[64] Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2797 (2006).

activities that fall under the purview of the laws of war, both customary and as codified, any action taken by the United States in response to an adverse decision by its highest court is costly, and thus sends a costly signal to other nations as to the content of the relevant legal rules.

E. *Conclusion*

Given the increasing use of treaties and soft law agreements in the conduct of international relations, and the fierce criticism of traditional notions of CIL, one might very well wonder if CIL has a place in international legal relations in the 21st Century. Yet to dismiss CIL, either because of the prominence of the treaty in modern international relations or because of the theoretical shortcomings of traditional CIL doctrine, would be an error. States are not forced into an artificial choice between creating law through treaties or having no law at all. Instead, a variety of different legal modes are available to states when crafting their legal environment. While CIL may be the weakest type of international law from a compliance standpoint, the fact that it is capable of altering state incentives makes it an important tool for adding to the value of the international legal order.

More importantly, international law is a holistic system, in which different legal modes complement each other. To emphasize only explicit agreements at the expense of customary norms causes one to miss the effects of the significant interactions between custom and international agreements. By focusing attention on expectations as the source of legal commitments, CIL can inform our study of international law and the myriad ways in which states craft their legal environment. Only by understanding how and why states use the different legal tools available to them can we truly understand the role of international law generally in shaping state conduct.

Treaties as Domestic Law in the United States

By Alex Glashausser

A. *Introduction*

Writing his prescient *Progress in International Organization* in the sobering aftermath of World War I, when Americans had reason to wonder whether "The Great War" had produced long-term peace, Harvard Professor Manley O. Hudson seemed to view other nations as impediments rather than opportunities: "[A]ll the people of the United States … are dependent in their daily lives on the ordering of the relations which we are *forced* to maintain with other peoples of the world."[1] Writing in the sobering aftermath of the September 11 terrorist attacks in the United States, with Americans facing the possibility of a perpetual "War on Terror," one can just as easily rue the drawbacks of international relations.

And yet, Hudson's ultimate message was one of hope and confidence. His optimism was tempered by recognition of the hard-headed reality that the success or failure of the world order would depend on the shape of international organization. If nations could only structure their relations sensibly, they could simultaneously serve their own interests and those of the whole earth. While his vision had a touch of utopianism, it was hardly naïve: he realized that for the global venture to succeed, tools such as international courts and international agreements must be wielded with skill.

Treaties[2] serve an important role in this process of international organization. By binding nations to mutual promises, they help maintain international harmony.[3] Of course, international law can bind a nation—and thus, in a sense,

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[1] Manley O. Hudson, Progress in International Organization 1 (1932).

[2] Words such as "convention" and "international agreement" are roughly synonymous with "treaty." *See, e.g.*, Malcolm N. Shaw, International Law 73 (4th ed. 1997). This chapter avoids the subject of treaties between the United States and Indian tribes because they are a specialized type of treaty warranting their own distinct analysis. *See* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1263 (1995).

[3] *See* Oellers-Frahm, in this volume.

Miller & Bratspies (Eds), Progress in International Law, pp. 219–242.

strip away a bit of its sovereignty—only to the extent of the nation's consent.[4] The impact of treaties multiplies when nations allow them to penetrate their own legal systems and become internal law. This chapter explores the extent to which treaties constitute domestic law in the United States.

B. *The Constitutional Status of Treaties*

All treaties into which the United States enters stem from the Constitution's treaty clause, which gives the President the power to make treaties with the advice and consent of the Senate.[5] To help ensure a uniform national foreign policy, the Constitution's drafters specifically denied that power to the states.[6] Those constitutional provisions determine how the United States makes international law. But it is another provision that outlines the role of treaties as domestic law: the supremacy clause. That clause proclaims treaties, along with federal statutes and the Constitution itself, to be "the supreme Law of the Land."[7]

In a 1900 case involving customary international law, the U.S. Supreme Court wrote sweeping words that seemed to confirm the lofty station of treaties: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[8] In practice, though, the Court's treatment of treaties has not always lived up to that billing.

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[4] Justice Breyer has described the vast potential power of treaties: "The answer to Lord Ellenborough's famous rhetorical question, 'Can the Island of Tobago pass a law to bind the rights of the whole world?' may well be yes, where the world has conferred such binding authority through treaty." Torres v. Mullin, 540 U.S. 1035, 1041 (2003) (denying petition for writ of *certiorari*) (Breyer, J., dissenting) (citing Buchanan v. Rucker, 103 Eng. Rep. 546 (K. B. 1808)).

[5] U.S. Const. art. II, § 2, cl. 2 ("[The President] shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur ….").

[6] *Id.* art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation …."); *see* The Federalist No. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961).

[7] U.S. Const. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). This tripartite summary of federal laws also appears in Article III, which extends the federal judicial power to cases arising under federal statutes, the Constitution, and treaties.

[8] The Paquete Habana, 175 U.S. 677, 700 (1900) (citing treaties as examples of international law).

A major hurdle to full recognition of treaties as part of domestic law has been the judicial doctrine that downgrades certain treaties as "non-self-executing." Such treaties, according to the Supreme Court, have no effect in domestic courts until Congress (acting through both chambers) enacts legislation to implement them[9]—this despite the Supremacy Clause's reference to "*all* Treaties made […] under the Authority of the United States."[10] This doctrine of dualism—in the sense of distinguishing between international and domestic effects, as opposed to the monism advocated by some theorists[11]—arose in an early opinion by Chief Justice Marshall:

> [W]hen the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.[12]

The current contours of the self-execution doctrine are far from clear;[13] courts consider factors such as "the immediate and long-range social consequences of self- or non-self-execution."[14] What is clear is that treaties judged to be non-self-executing are now widespread, much to the chagrin of many scholars.[15]

Separate from the question of whether a treaty is self-executing is whether it grants individuals (as opposed to nations) the right to enforce it.[16] Some courts,

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[9] *See* Louis Henkin, Foreign Affairs and the United States Constitution 198–204 (2d ed. 1996).

[10] U.S. Const. art. VI, § 2 (emphasis added).

[11] Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 Vand. L. Rev. 1103, 1106 (1990) (noting Supreme Court's balance of monism and dualism).

[12] Foster v. Neilson, 27 U.S. 253, 314 (1829) (refusing to give effect to treaty without implementing legislation).

[13] George Slyz, *International Law in National Courts*, *in* International Law Decisions in National Courts 71, 81 (Thomas M. Franck & Gregory H. Fox eds., 1996).

[14] *E.g.*, Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 1283 (9th Cir. 1985).

[15] *E.g.*, Henkin, *supra* note 9, at 201–02; David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. Davis L. Rev. 1, 3–6 (2002). One has cited the doctrine as perhaps "the most glaring of attempts to deviate from the specific text of the Constitution." Jordan J. Paust, *Self-Executing Treaties*, 82 Am. J. Int'l L. 760, 760 (1988). *But cf.* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Colum. L. Rev. 1955, 1979–81, 2092–93 (1999) (arguing that treaties should be presumed to be non-self-executing).

[16] Restatement (Third) of the Foreign Relations Law of the United States § 111 cmt. h (1986); Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695, 719–22 (1995) (explaining the distinction).

however, have muddied the water by conflating those issues.[17] In *Hamdi v. Rumsfeld*,[18] in which a U.S. citizen who had been labeled an "enemy combatant" challenged his indefinite detention, the Supreme Court missed an opportunity to clarify that distinction. The plaintiff had asserted a right to habeas corpus because his detention violated not only the U.S. Constitution but also one of the Geneva Conventions.[19] The court of appeals had rejected the treaty argument on the questionable basis that, because it did not create a private right of action, the treaty was not self-executing.[20] Presented with an opportunity to resolve that confusion, the Supreme Court instead relied only on the U.S. Constitution—not on the treaty—in ruling for the petitioner; the chance to clarify the distinction between the self-execution doctrine and the question of private rights of action was lost.[21]

An earlier source of confusion clarified by the Supreme Court long ago was the extent of Congress's power to implement legislation necessary to execute treaties. The doctrine of non-self-executing treaties, coupled with the constitutional limits on the subject matter of federal statutes, once threatened to doom many treaties' prospects as domestic law. In *Missouri v. Holland*,[22] Missouri challenged the enforcement of a non-self-executing treaty protecting migratory birds. As the state pointed out, the federal statute giving effect to the treaty, if considered purely as domestic law, would have overstepped Congress's enumerated powers—indeed, before the signing of the treaty, a federal court had struck down very similar legislation.[23] Yet, because the treaty was valid, the Supreme Court upheld the statute implementing it, citing the "necessary and proper" clause of the Constitution.[24]

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[17] *E.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring in per curiam opinion) ("Absent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty is self-executing, that is, when it expressly or impliedly provides a private right of action.").

[18] 542 U.S. 507 (2004).

[19] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316.

[20] Hamdi v. Rumsfeld, 316 F.3d 450, 468–69 (4th Cir. 2003), *vacated on other grounds*, 542 U.S. 507 (2004).

[21] *Hamdi*, 542 U.S. at 533–34, 534 n.2. A later opinion did clarify the distinction, but only in dissent. *See* Medellín v. Dretke, 544 U.S. 660, 687 (2005) (O'Connor, J., dissenting).

[22] 252 U.S. 416, 432–34 (1920).

[23] *See id*. at 432 (citing United States v. Shauver, 214 F. 154 (E.D. Ark. 1914)).

[24] *Id*. (citing U.S. Const. art. I, § 8). *Holland* spawned a backlash by anti-internationalists who worried that treaties might expand federal power at the expense of states' rights. Such critics backed the "Bricker Amendment," which would have eviscerated *Holland* by providing that "[a] treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty." Henkin, *supra* note 9, at 192. After much debate, the proposed amendment failed.

Treaties do have limits, though. Soon after *Holland*, the Supreme Court announced that treaties must concern "proper subjects of negotiation between our government and other nations."[25] Thus, it may be that a President cannot circumvent the legislative process by entering into a treaty for the purpose of implementing it as domestic law.[26] But a larger question about limits on the treaty power was still open many years after *Holland*: were self-executing treaties, in their domestic law role, constrained by the Constitution?[27]

Of the three sources of federal law anointed by the supremacy clause, one seems explicitly subordinate to another: it is only federal statutes "made in Pursuance [of]" the Constitution that are the law of the land.[28] In contrast, the clause covers "*all* Treaties made … under the Authority of the United States," without any other restriction.[29] In *Reid v. Covert*, the Supreme Court addressed whether validly made treaties were free of review for constitutionality.[30] The U.S. government had sought to use military courts-marshal to try civilians accused of murdering their spouses, who were members of the armed forces stationed in Great Britain and Japan. According to the government, international agreements mandated that procedure.[31] The accused protested that such trials would not provide them with the procedural protections guaranteed by the Constitution.[32]

The Court thus directly confronted the question of whether treaties had to be consistent with constitutional guarantees in order to be considered "the supreme Law of the Land," despite the lack of explicit language in the Supremacy Clause to that effect. The Court accounted for the absence of the "made in Pursuance [of the Constitution]" qualification for treaties by resolving that the phrase "made in Pursuance [of]" did not mean "consistent with"; instead it meant "made after." That phrase did not attach to treaties, the Court elaborated, simply because the Framers wanted to include within the Supremacy Clause treaties entered into

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[25] Asakura v. City of Seattle, 265 U.S. 332, 341 (1924); *see* Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) ("The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations ….").

[26] *See* David Golove, *Human Rights Treaties and the U.S. Constitution*, 52 DePaul L. Rev. 579, 595, 598 (2002) (arguing that if "sole purpose" of treaty were to effect domestic policy, treaty would be unconstitutional).

[27] 252 U.S. at 433 (leaving this issue "open to question").

[28] U.S. Const. art. VI, cl. 2.

[29] *Id.* (emphasis added).

[30] 354 U.S. 1 (1957).

[31] *Id.* at 15–16, nn.29–30 (citing Executive Agreement of July 27, 1942, 57 Stat. 1193 (Great Britain); Administrative Agreement, 3 U.S. Treaties and Other International Agreements 3341, T. I. A. S. 2492 (Japan)).

[32] *Id.* at 16.

before the ratification of the Constitution.[33] Emphasizing "the supremacy of the Constitution over a treaty," the Court held that the defendants were entitled to trials in civilian courts.[34]

One basis for the *Covert* holding was the anomaly that would have resulted from finding treaties not to be bound by constitutional limits when established doctrine held that they could be abrogated by later federal statutes, which of course would themselves be so bound.[35] Like *Covert*, that doctrine about the interplay of treaties and statutes arose from imprecision in the supremacy clause. Though the clause expressly establishes the superiority of treaties to state laws, it does not resolve conflicts between treaties and federal laws. In *Dred Scott v. Sandford*, the case usually cited for its infamous holding that blacks were not U.S. citizens and thus could not invoke diversity jurisdiction, Justice Curtis, in dissent, doubted whether a treaty could apply domestically in the face of subsequent federal law to the contrary.[36] Fourteen years later, the Supreme Court confirmed that doubt and formally fashioned the doctrine of *lex posterior*,[37] under which the later law prevails, regardless of whether it is a treaty[38] or a statute.[39]

Or so the theory goes. In fact, courts often read treaties and statutes in ways that avoid inconsistencies.[40] They are more likely to stretch a treaty's meaning to fit with an earlier statute than vice-versa; when *lex posterior* is applied, it is most often the treaty that loses.[41] Some have argued that if anything, the reverse ought to be the case[42]—and indeed, in several other countries, it is.[43] In the United

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[33] *See id*. at 16–17.

[34] *Id*. at 17.

[35] *Id*. at 18.

[36] 60 U.S. (19 How.) 393, 629 (1856) (Curtis, J., dissenting).

[37] The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1870).

[38] Of course, the *lex posterior* doctrine applies only to self-executing treaties. Cameron Septic Tank Co. v. City of Knoxville, 227 U.S. 39, 44, 50 (1913).

[39] Whitney v. Robertson, 124 U.S. 190, 194 (1888).

[40] *E.g*., Moser v. United States, 341 U.S. 41, 45 (1951) (reading treaty to avoid conflict with later statute); *see Whitney*, 124 U.S. at 194 ("[C]ourts will always endeavor to construe [treaties and statutes] so as to give effect to both, if that can be done without violating the language of either ….").

[41] For an example of abrogation of a statute by a treaty, *see Cook v. United States*, 288 U.S. 102 (1933) (holding that 1924 treaty superseded 1922 statute authorizing seizure of foreign ships). Examples of the reverse are plentiful. *E.g*., Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581, 599–600 (1889) (affirming exclusion of individual from entry into United States pursuant to statute despite its inconsistency with earlier treaty); *Whitney*, 124 U.S. at 193–95 (upholding statute imposing duties on sugar despite conflict with earlier treaty).

[42] *E.g*., Henkin, *supra* note 9, at 210 (noting that based on Supremacy Clause, "one might well argue … that a treaty should prevail as law even in the face of a subsequent statute").

[43] For example, Japan's Constitution makes treaties superior to domestic laws. Kenpo, art. 98, para. 2.

States, the Constitution may exalt treaties as the law of the land, but the road from signing an international agreement to enforcing it domestically can be treacherous.

C. *Interpretation of Treaties by the Supreme Court*

Hudson recognized that high-minded treaties could change the world only if they were enforced:

> A moral declaration such as the condemnation and renunciation of war as an instrument of national policy … is not without value. … It furnishes a useful peg on which insistence may be hung, it serves as a *point de depart* in discussion. … But a merely formulated principle may not motivate men's conduct for long.[44]

Today, while the doctrine of *pacta sunt servanda*—"promises will be kept"—is axiomatic,[45] nations enter treaties with little realistic threat (or hope) of direct enforcement.[46] As a result, some observers say, compliance is lax.[47] Most, however, have noted that by and large, nations tend to keep their treaty promises.[48] After all, even if formal international enforcement mechanisms are lacking, diplomacy is its own reason to obey the law, as a federal court of appeals has noted: "[I]nfraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end

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[44] Hudson, *supra* note 1, at 95.

[45] *See* Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Law of Treaties Convention].

[46] Though the U.N. Charter allows the Security Council to authorize force in support of judgments of the International Court of Justice, U.N. Charter art. 94, it has never actually done so. *See* Richard Morrison, *Efficient Breach of International Agreements*, 23 Denv. J. Int'l L. & Pol'y 183, 193 (1994).

[47] *E.g.*, R. Anand, Studies in International Adjudication 274–75 (1969) (opining that lack of enforcement is "not [a] negligible problem" because of "several cases, if not of open defiance, at least of disregard of the decisions of an international court"); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference*?, 111 Yale L.J. 1935, 1989–93 (2002) ("Countries that ratify human rights treaties often appear less likely, rather than more likely, to conform to the requirements of the treaties than countries that do not ratify these treaties."); Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 Mich. J. Int'l L. 345, 346–47 (1998) (questioning whether notion that international law is largely complied with has adequate empirical support). *See* Dellavalle, in this volume.

[48] *E.g.*, Louis Henkin, How Nations Behave 47 (2d ed. 1979) (stressing that while violations garner much attention, nations obey their international obligations "almost all of the time").

be enforced by actual war."[49] In any event, in the domestic sphere, the U.S. Supreme Court deems self-executing treaties to be binding, having assumed the "duty … to enforce the … treaties of the United States, whatever they might be."[50]

In *The Federalist*, Alexander Hamilton wrote that the "true import" of treaties, in their capacity as domestic law, "must, like all other laws, be ascertained by judicial determinations."[51] When determining the import of treaties, the Supreme Court sometimes cites the Vienna Convention on the Law of Treaties, which articulates basic interpretive principles.[52] The U.S. Department of State has gone as far as to characterize the convention as "the authoritative guide to current treaty law and practice."[53] The United States has not ratified the convention, though, and the Court has largely forged its own treaty interpretation jurisprudence, borrowing copiously from the domestic fields of contract construction[54] and statutory interpretation.[55] But treaties are a unique type of law, and their interpretation is often a particularly delicate task.[56]

Illustrative was the Supreme Court's reliance on text, context, and extratextual sources when interpreting the Geneva Conventions in *Hamdan v. Rumsfeld*.[57] In *Hamdan*, the Court barred a military commission arranged by the Bush administration from trying a Yemeni citizen who had been captured in Afghanistan during hostilities with al Qaeda and was later detained at the Guantánamo Bay Naval Base; the commission, the Court held, violated international law. At issue

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[49] United States v. Emuegbunam, 268 F.3d 377, 389 (6th Cir. 2001) (quoting Head Money Cases, 112 U.S. 580, 598 (1884)). In a recent book, Jack Goldsmith and Eric Posner argue that when a nation complies with a treaty, it is not because of "noninstrumental" reasons such as values or legal doctrines; instead, it is simply because compliance maximizes the nation's self-interest. Jack L. Goldsmith & Eric A. Posner, The Limits of International Law 7, 15, 100–03 (2005).

[50] Air France v. Saks, 470 U.S. 392, 406 (1985) (quoting Reed v. Wiser, 555 F.2d 1079, 1093 (2d Cir. 1977)).

[51] The Federalist No. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[52] *See supra* section IV.

[53] S. Exec. Doc. L., 92d Cong., 1st Sess., at 1 (1971), *quoted in* United States v. Yousef, 327 F.3d 56, 57 (2d Cir. 2003).

[54] *E.g.*, *Air France*, 470 U.S. at 399 ("It is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.").

[55] *See, e.g.*, United States v. Alvarez-Machain, 504 U.S. 655, 663 (1992) ("In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning.").

[56] Many of the interpretive issues raised here are discussed in greater detail in Alex Glashausser, *What We Must Never Forget When It Is* a Treaty *We Are Expounding*, 73 U. Cin. L. Rev. 1243 (2005). In that article, I argue that in light of the singular nature of treaties, wholesale adoption of doctrines from statutory or contract interpretation is inappropriate.

[57] Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

was language found in all four Geneva Conventions (often referred to as "Common Article III") providing that certain persons arrested in connection with a "conflict not of an international character" could be sentenced only by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[58]

The government argued that Common Article III did not apply to the detainee because the conflict with al Qaeda was "international in scope." In rejecting that contention, the Court noted that other provisions of the Geneva Conventions offered more protection during clashes between nations; in that "context," the Court held, the "literal meaning" of "international"—namely, between nations—must apply.[59] Thus, because al Qaeda is not a nation, the detainee was protected by Common Article III.[60]

To discern the meaning of "regularly constituted court," the Court considered extratextual sources such as treatises, from which it concluded that, because the military commission was a special tribunal not formed for standard courts-martial, it did not qualify.[61] The Court also looked to customary international law to divine the indispensable judicial guarantees a proper tribunal would have, including the right of an accused to be present at his trial and to receive the evidence against him.[62] Because the military commission deprived the detainee of those rights, the Court held, it had no authority to try him.[63]

Sensitive issues of interpretation often arise from the use of multiple languages in treaties. A modern example is *Sale v. Haitian Centers Council, Inc*.[64] Pursuant to an executive order,[65] the U.S. Coast Guard had a policy of intercepting boats of refugees traveling from Haiti to the United States. The refugees were routinely returned to Haiti, without any consideration of their potential qualification for political asylum. Interdicted Haitians argued that the Coast Guard's practice violated a treaty, the authoritative text of which was in English but included a parenthetical French term: "No Contracting State shall … return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened …."[66]

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[58] *E.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3318.

[59] *Hamdan*, 126 S. Ct. at 2796.

[60] *Id.*

[61] *Id.* at 2796–97. The Court allowed that a practical need for the deviation might have justified it, but the Court found no such need to exist. *Id.* at 2797.

[62] *Id.* at 2797.

[63] *Id.* at 2797–98.

[64] 509 U.S. 155 (1993).

[65] Exec. Order No. 12324, 3 C.F.R. 181 (1981–1983), 46 Fed. Reg. 48,109 (Sept. 29, 1981).

[66] Protocol Relating to the Status of Refugees, art. 33, para. 1, Jan. 31, 1967, 19 U.S.T. 6223, 6276.

Considering whether the treaty provision applied to refugees intercepted outside the United States, the Supreme Court consulted two English-French dictionaries. The English translations of "*refouler*" did not include "return" but listed phrases such as "[t]o drive back" and "to repel."[67] The Court deduced that "return ('*refouler*')" must refer to something more narrow than the transportation of someone back to a certain place; it read the term to denote "a defensive act of resistance or exclusion at a border."[68] Thus, the Court concluded, because the plaintiffs had been apprehended at sea rather than at the U.S. border, the treaty offered them no protection.[69]

The Court acknowledged that its result "may not have been contemplated" by the treaty drafters and "may even violate the spirit of [the treaty]."[70] Yet it concluded that it had no choice because the treaty's text "affirmatively indicate[d]" that the provision did not apply extraterritorially.[71] This approach hewed to the Court's textualism that has of late been a hallmark of its treaty interpretation. The purpose of the treaty seemed to be to give aliens a safe haven rather than forcing them to return to home countries where they would face danger—and the Court understood that—yet it refused to go beyond what it perceived to be the literal mandate of the text.[72]

Justice Brennan once referred to the Court's unwillingness to look beyond the text of a treaty as a "blindfold."[73] The case yielding that comment, *Chan v. Korean Air Lines, Ltd.*, turned on whether an airline's failure to notify passengers of the Warsaw Convention's limits on liability estopped the airline from relying on those limits. The crucial provision of the treaty outlined the airline's duty: "[T]he carrier must deliver a passenger ticket which shall contain … [a] statement that the transportation is subject to the rules relating to liability established by this convention."[74] The plaintiffs admitted that the airline had delivered a ticket with a statement but argued that the font of the statement made it ineffective as a method of notice and that thus the limitation of liability did not apply.[75]

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[67] 509 U.S. at 180–81, n. 38.

[68] *Id.* at 182.

[69] *Id.*

[70] *Id.* at 183.

[71] *Id.* at 178–79.

[72] *See* Harold Hongju Koh, *Reflections on* Refoulement *and* Haitian Centers Council, 35 Harv. Int'l L.J. 1, 16–17 (1994) (lamenting Court's refusal to abide by convention's purpose).

[73] Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 136 (1989) (Brennan, J., concurring).

[74] Convention for the Unification of Certain Rules Relating to International Transportation by Air, art. 3, paras. 1–2, Oct. 12, 1929, 49 Stat. 3000, 3015, T.S. No. 876.

[75] *Chan*, 490 U.S. at 125–26.

The Court found no need to decide whether the notice was effective because under the language of the treaty, the limitation of liability applied whenever the carrier delivered a ticket that contained a statement about it.[76] Three federal appellate courts had held to the contrary that under the treaty, delivering a ticket with inadequate notice of the limitation barred an airline from relying on it.[77] In rejecting that position, the Court refused to examine any of the preparatory work (often referred to as "*travaux préparatoires*") of the treaty that the plaintiffs had marshaled in support of their position.[78] According to the majority, the text of the treaty was "clear," and thus consideration of the preparatory work would be "inappropriate."[79]

On occasion, the Court has rejected precise textual arguments. In *Eastern Airlines, Inc. v. Floyd*,[80] it again interpreted the Warsaw Convention, whose only official language is French. Under the convention, air carriers are liable for "*blessure*" and "*lésion corporelle*."[81] The plaintiffs alleged that they had suffered mental distress during an emergency landing. They argued that the defendant airline was liable because their distress constituted a "*lésion corporelle*" (which, in the English translation of the convention, is written as "bodily injury"[82]). Because "*blessure*" refers to a physical wound, they argued, "*lésion corporelle*" must, to avoid being mere surplusage, include non-physical injuries. The Court rejected that argument, holding that because the purpose of the convention was to limit air carriers' liability as a way of fostering industry growth, a narrower reading—one excluding liability for mental distress—was appropriate.[83]

The Court has untied the blindfold in other circumstances as well, considering not only preparatory work[84] but also legislative history from the domestic ratification process.[85] It has often cited intent, rather than text, as the touchstone of interpretation.[86] In fact, strictly textualistic interpretation of treaties is often

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[76] *Id.* at 127–29.

[77] *Id.* at 127–28 (citing cases from three circuits).

[78] *Id.* at 130, 133.

[79] *Id.* at 134 & n.5.

[80] 499 U.S. 530 (1991).

[81] Convention for the Unification of Certain Rules Relating to International Transportation by Air, art. 17, Oct. 12, 1929, 49 Stat. 3000, 3005.

[82] *Id.* at 3018 (English translation).

[83] *Eastern Airlines, Inc.*, 499 U.S. at 542, 546.

[84] *E.g.*, Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700–02 (1988) (using negotiating history to bolster holding that because Illinois law allowed service on foreign corporation via its American subsidiary, Hague Service Convention did not apply).

[85] *E.g.*, Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct., 482 U.S. 522, 529–32 (1986).

[86] *See, e.g.*, United States v. Stuart, 489 U.S. 353, 365 (1989).

problematic because treaties are documents of diplomacy.[87] Their text may thus pull in opposite directions, to give each signatory nation something that will enable it to proclaim a victory.[88]

For example, in *Rasul v. Bush*, the Court considered whether foreign detainees seized abroad and held at the Guantánamo Bay Naval Base could petition federal courts for writs of habeas corpus.[89] That issue turned on the interpretation of a 1903 treaty in which Cuba granted the United States a perpetual lease of the base.[90] A relevant precedent had refused to recognize federal jurisdiction over similar petitions, in part because the detainees (in Germany in that case) were "outside the United States."[91] The treaty with Cuba provided that "on the one hand," Cuba would keep its "ultimate sovereignty" over the territory, whereas "on the other hand," the United States would have "complete jurisdiction and control" over the base.[92]

The United States focused on the first clause, arguing that if Cuba had "sovereignty," then the detainees must be "outside the United States" and thus federal jurisdiction was absent.[93] Of course, the second clause undercut that argument somewhat. Ruling in favor of the detainees, the Supreme Court found a third way out. Whether the detainees were "outside the United States" did not matter, it held, because the base was subject to more control by the United States than Germany was in the precedent.[94]

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[87] Tucker v. Alexandroff, 183 U.S. 424, 437 (1902) (noting that one purpose of treaties is "to promote a friendly feeling between the people of the two countries").

[88] Charles Cheney Hyde, *The Interpretation of Treaties by the Supreme Court of the United States*, 23 Am. J. Int'l L. 824, 826 n.5 (1929) (noting that treaties often omit "the full scope of sacrifices" a party intends to make); *see also* Hans J. Morgenthau, Politics Among Nations 269 (4th ed. 1967) (noting that vague treaties often are in national interest); Shabtai Rosenne, Developments in the Law of Treaties 1945–1986, at 59 (1989) (noting deliberate ambiguity of many treaties' texts).

[89] Rasul v. Bush, 542 U.S. 466 (2004).

[90] Agreement for the Lease of Lands for Coaling and Naval Stations, art. III, U.S.-Cuba, Feb. 23, 1903, T.S. 418 [hereinafter Lease of Lands Agreement].

[91] Johnson v. Eisentrager, 339 U.S. 763, 777 (1950).

[92] Lease of Lands Agreements, supra note 90, art. III. The parties later agreed not to modify or abrogate the lease "so long as the United States … shall not abandon the [naval base]." Treaty Defining Relations with Cuba, art. III, U.S.-Cuba, May 29, 1934, 48 Stat. 1683, T.S. No. 866.

[93] *Rasul*, 542 U.S. at 475.

[94] *Id*. at 476–77. The lease with Cuba shows how flexible treaties can be. In a different context, the federal government's position was better served by focusing not on Cuba's sovereignty but on the "complete jurisdiction and control" language. That context was the Department of Defense memorandum that has become infamous for its cramped definition of torture. Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations 7–8 (Mar. 6, 2003), *available at* http://www.npr.org/documents/2004/dodmemo030306.pdf [hereinafter Defense Memorandum]. One

Over the several decades before *Rasul*, the Supreme Court had given such weight to interpretations of the executive branch[95] that deference to the executive was called "the single best predictor of interpretive outcomes in American treaty cases."[96] The Court justified such deference on the ground that international issues "uniquely demand [a] single-voiced statement of the Government's views."[97] That view dates to the birth of the Constitution, when James Madison wrote: "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations."[98] Though much of the Framers' concern about uniformity centered on the potentially unruly states,[99] this same theme has resonated with the Court in its efforts to ensure that the judiciary not undermine the executive's foreign policy.

Other federal courts have followed the lead of the Supreme Court.[100] For instance, in the prosecution of John Phillip Walker Lindh, the so-called American Taliban, for conspiring to murder American military personnel,[101] the defendant

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question the memorandum addressed was whether the federal statute prohibiting torture applied to interrogations at Guantánamo Bay. The statute applies only "outside the United States," 18 U.S.C. § 2340A (2006); thus, according to the memorandum, it had no bearing on the government's conduct at Guantánamo Bay. Defense Memorandum, *supra*, at 7.

[95] *E.g.*, El Al Israel Airlines v. Tseng, 525 U.S. 155, 168–69 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); United States v. Stuart, 489 U.S. 353, 369 (1989) (opining that executive views are "entitled to great weight").

[96] David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. Rev. 953, 1015 (1994); *see also* Koh, *supra* note 72, at 2, 17 (accusing Supreme Court of ignoring plain meaning of several treaties in deference to the executive). Some scholars have argued that deference is warranted. Under one conception, for example, the Constitution makes the treaty power fundamentally executive, and thus the President's interpretation should control. John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 Cal. L. Rev. 1305, 1315 (2002). Eric Posner and Cass Sunstein have more broadly advocated deference to the executive in matters involving international relations even if the executive's interpretation is one that would violate traditional notions of comity. Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 Yale L. J. 1170, 1177–78 (2007).

[97] Baker v. Carr, 369 U.S. 186, 211 (1962).

[98] The Federalist No. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961) (explaining why treaty power should reside with federal government).

[99] *See* The Federalist No. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961) ("[Under the Constitution,] treaties … will always be expounded in one sense and executed in the same manner—whereas adjudications on the same points and questions in thirteen States [absent the Constitution] will not always accord or be consistent.").

[100] *But cf.* Tachiona v. Mugabe, 186 F. Supp. 2d 383, 393 (S.D.N.Y. 2002) (asserting "judicial independence" and rejecting government's interpretation of Vienna Convention on Diplomatic Relations).

[101] United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002).

claimed immunity as a lawful combatant under the relevant Geneva Convention.[102] President Bush, however, had determined that Lindh was an unlawful combatant and thus ineligible for immunity.[103] The district court stated a representative view about the impact of an executive pronouncement:

> It is important to recognize that the deference here is appropriately accorded not only to the President's interpretation of any ambiguity in the treaty, but also to the President's application of the treaty to the facts in issue. … [T]he appropriate deference is to accord substantial or great weight to the President's decision regarding the interpretation and application of the [treaty] to Lindh, provided the interpretation and application of the treaty to Lindh may be said to be reasonable and not contradicted by the terms of the treaty or the facts.[104]

For its part, the Supreme Court has continued to espouse deference to the executive even when disagreeing with it.[105] What remains to be seen is whether the results in post-September 11 cases such as *Rasul* and *Hamdan* signal a lessening of the impact of that deference.

D. *The Impact of the International Court of Justice*

The most intriguing modern treaty interpretation issue with which the U.S. Supreme Court has been wrestling is the extent to which it should consider rulings of the International Court of Justice.[106] The United States has consented to the International Court's jurisdiction to adjudicate disputes arising under several dozen treaties.[107] The International Court generally follows the Vienna Convention on the Law of Treaties, which provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[108] On occasion, the Supreme Court has parroted the convention's interpretive

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[102] Geneva Convention Relative to the Treatment of Prisoners of War, arts. 87, 99, Aug. 12, 1949, 6 U.S.T. 3316.

[103] *See Lindh*, 212 F. Supp. 2d at 554–55.

[104] *Id.* at 556–57 (agreeing with President both on interpretation of treaty and on application to facts of case).

[105] *E.g.*, Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2684 (Breyer, J., dissenting) (2006).

[106] That question is explored in depth in Alex Glashausser, *Difference and Deference in Treaty Interpretation*, 50 Vill. L. Rev. 25 (2005). In that article, I take the position that although U.S. courts should retain their independence, they should pay more attention than they have historically to the interpretations and judgments of the International Court.

[107] Henkin, *supra* note 9, at 267.

[108] Law of Treaties Convention, *supra* note 45, art. 31, para. 1.

standard.[109] But it did so recently to arrive at a result at odds with the International Court on a subject that has caused a major rift.[110]

The flashpoint for that rift has been the Vienna Convention on Consular Relations. Under Article 36 of that self-executing treaty, when a citizen of one country is arrested in another, authorities "shall inform the person concerned without delay of his rights" to inform his consulate of the arrest.[111] In several cases that have worked their way to the Supreme Court and to the International Court of Justice, foreigners arrested in the United States have not been timely notified of their consular rights and, having later learned of those rights, have sought to defend themselves or to win post-conviction relief based on the treaty violation.[112]

Two interpretive issues have recurred. One is whether individuals, as opposed to nations, may enforce the Consular Convention. Some courts in the United States have held that they may not, on the basis of the preamble, which states the treaty's purpose as "not to benefit individuals but to ensure the efficient performance of functions by consular posts."[113] Others have ruled in favor of individuals on the ground that the treaty refers to informing the arrested person of "his rights."[114]

The other major issue is whether domestic procedural default rules that bar habeas corpus petitioners from raising new arguments trump whatever rights individuals may have. The language in Article 36 about remedies is quintessentially equivocal: "The rights … shall be exercised in *conformity with the laws and regulations of the receiving State*, subject to the proviso, however, that the said laws and regulations must enable *full effect* to be given to the purposes for which the rights … are intended."[115] Focusing on the "conformity" clause, many courts have allowed domestic rules to override treaty rights;[116] others have held that such abrogation would violate the "full effect" clause.[117]

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[109] *Sanchez-Llamas*, 126 S. Ct. at 2679 (quoting Restatement (Third) of the Foreign Relations Law of the United States § 325(1) (1986), which in turn adopts standard of convention).

[110] *See id.*

[111] Vienna Convention on Consular Relations, art. 36, para. 1(b), Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 [hereinafter Consular Convention].

[112] The cases are discussed in depth later in this section.

[113] *E.g.*, State v. Martinez-Rodriguez, 131 N.M. 47, 53 (2001) (quoting preamble). The U.S. Department of State has interpreted the treaty as creating rights only for nations. *See* United States v. Li, 206 F.3d 56, 63–64 (1st Cir. 2000) (en banc) (deferring to State Department's interpretation).

[114] *E.g.*, United States v. Hongla-Yamche, 55 F. Supp. 2d 74, 77–78 (D. Mass. 1999).

[115] Consular Convention, *supra* note 111, art. 36, para. 2 (emphasis added).

[116] *E.g.*, Vasquez v. State, 793 A.2d 1249 (Del. 2001).

[117] *E.g.*, Valdez v. State, 46 P.3d 703, 708 (Okla. Crim. App. 2002).

In the background of both narrow issues looms an overarching question: to what extent should interpretive decisions of the International Court inform decisions of the U.S. Supreme Court? The stark difference between the two high courts' interpretations of Article 36 has, several times, been a matter of life and death.

I. Breard *and* Paraguay v. United States

The first thrust and parry came in 1998, after a Virginia court had sentenced Angel Francisco Breard, a citizen of Paraguay, to death.[118] Breard petitioned the U.S. Supreme Court for a writ of *certiorari*, arguing that the federal courts adjudicating his habeas corpus petition had wrongly barred his argument based on the violation of his Consular Convention rights due to his failure to raise the argument in state court.[119] A week and a half before Breard's execution date, with his petition to the Supreme Court still pending, Paraguay initiated a case in the International Court against the United States. The International Court of Justice responded with a provisional order: "The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order."[120]

Breard then petitioned the Supreme Court to stay his execution pending the final International Court of Justice decision. In *Breard v. Greene*, on the day Breard's execution was scheduled, the Supreme Court acknowledged the "respectful consideration" due the International Court's order but essentially ignored it, denying both the *certiorari* and the stay petitions.[121] Regardless of whether the treaty conferred rights on individuals, the Supreme Court held, Breard's procedural default meant that, under the "conformity" clause of the treaty, no right of his could be enforced.[122] Moreover, even absent that clause, the procedural default rule would control under the doctrine of *lex posterior* because it stemmed from a federal statute enacted after the ratification of the treaty.[123] Hours after the Supreme Court's decision, Breard was executed.[124]

II. LaGrand *and* Germany v. United States

A final judgment of the International Court of Justice came three years later, in a case brought against the United States by Germany. The *LaGrand* case reached the

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[118] Breard v. Commonwealth, 248 Va. 68, 88–89 (1994).
[119] *See* Breard v. Pruett, 134 F.3d 615, 618, 621 (4th Cir. 1998).
[120] Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 258 (Apr. 9).
[121] 523 U.S. 371, 375 (1998).
[122] *Id*. at 376.
[123] *Id*. at 375–77.
[124] David Stout, *Clemency Denied, Paraguayan Is Executed*, N.Y. Times, Apr. 19, 1998, at A18.

International Court of Justice after two German brothers had been sentenced to death by an Arizona court.[125] As with Breard, their federal habeas corpus petitions asserting violations of their consular rights had been denied for procedural default.[126] On the day of the scheduled execution of one brother, the International Court of Justice issued another provisional order to stay the execution.[127] Again the U.S. Supreme Court denied a stay petition,[128] and again the execution went forward.[129]

Unlike in the case brought by Paraguay, in *LaGrand* the International Court of Justice proceeded to issue a final judgment in spite of the execution, holding that the United States had violated the Consular Convention by applying its procedural default rule to bar consideration of the treaty argument.[130] Moreover, the Court held, the Consular Convention created individual rights, and, thus, the United States had breached an obligation not only to Germany but also to the LaGrand brothers.[131]

III. Torres *and* Avena (Mexico v. United States)

In a later case brought by Osbaldo Torres, a Mexican on death row in Oklahoma, the U.S. Supreme Court for the first time addressed the Consular Convention issue in light of a final judgment by the International Court of Justice. In fact, when the Supreme Court considered *Torres v. Mullin*, not only was the *LaGrand* precedent in place, but the International Court of Justice had also issued a provisional order in a new case, *Avena*, brought by Mexico against the United States on behalf of Torres and dozens of similarly situated Mexicans. The provisional order directed the United States to ensure that the prisoners not be executed before a final judgment.[132] The Supreme Court, however, denied Torres's petition for a writ of *certiorari*—over two rare written dissents.[133]

In its final judgment in *Avena*, the International Court of Justice reaffirmed both its holdings from *LaGrand*.[134] It ordered the United States to reconsider the convictions and sentences of the affected Mexicans to determine whether the

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[125] State v. LaGrand, 734 P.2d 563, 565 (Ariz. 1987).
[126] LaGrand v. Stewart, 133 F.3d 1253, 1261 (9th Cir. 1998).
[127] LaGrand Case (F.R.G. v. U.S.), 1999 I.C.J. 9, 16 (Mar. 3).
[128] LaGrand v. Arizona, 526 U.S. 1001 (1999).
[129] LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 479–80 (June 27).
[130] *Id.* at 497–98.
[131] *Id.* at 494.
[132] Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2003 I.C.J. ¶ 59 (Feb. 5).
[133] Torres v. Mullin, 540 U.S. 1035 (2003).
[134] Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128, ¶¶ 40, 112–114 (Mar. 31).

violations of the convention had caused them "actual prejudice."[135] Unlike the Supreme Court petitioners in *Breard* and *LaGrand*, Torres lived to hear the International Court's final judgment—and he benefited from it, as the Oklahoma governor decided to commute his sentence to life without parole.[136]

IV. Medellín *and* Avena (Mexico v. United States)

One of the Mexican defendants covered by the International Court's judgment in *Avena* was José Medellín, on death row in Texas. For this petitioner, the U.S. Supreme Court granted a writ of *certiorari* to consider whether federal courts were bound by the International Court's order and alternatively whether federal courts should comply with the order as a matter of comity.[137] Before the Supreme Court heard oral argument, however, President Bush intervened, announcing that the United States would respond to the International Court of Justice by "having State courts give effect to the decision in accordance with general principles of comity."[138]

In light of the administration's previous disregard for international institutions, that announcement came as a surprise.[139] But the President's intent was not to defer to the International Court of Justice in any broad sense. A week later, he withdrew the United States from the optional protocol of the Consular Convention that gave the Court jurisdiction over disputes arising out of it.[140] A State Department spokesperson explained the administration's rationale: "We are protecting against future International Court of Justice judgments that might similarly interfere in ways we did not anticipate when we joined the optional protocol."[141]

Reasoning that, in light of the President's directive respecting *Avena*, Texas state courts might grant Medellín the reconsideration of his claim that he desired, the Supreme Court dismissed Medellín's writ of *certiorari* as improvidently granted.[142]

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[135] *Id.* ¶¶ 121–122, 153.

[136] The governor did not mention the International Court specifically but did take into account the fact that the U.S. signed the 1963 Vienna Convention on Consular Relations and is part of that treaty.

[137] Medellín v. Dretke, 543 U.S. 1032 (2004).

[138] *See* Medellín v. Dretke, 544 U.S. 660, 663 (2005).

[139] Adam Liptak, *U.S. Says It Has Withdrawn from World Judicial Body*, N.Y. Times, Mar. 10, 2005, at A14.

[140] *Id.*

[141] *Id.* (statement of Darla Jordan).

[142] *Medellín*, 544 U.S. at 664–67. Medellín had moved the Court to stay its proceedings pending the outcome in state court, but a majority of the Court voted instead to dismiss the writ. *Id.* at 668 (Ginsburg, J., concurring).

V. Sanchez-Llamas *and* Bustillo

Four Justices in *Medellín*, instead of dismissing the writ, would have remanded to the federal court of appeals for further consideration because the issues raised by the case would "inevitably recur."[143] And indeed they did, in 2006, in the consolidated cases of *Sanchez-Llamas v. Oregon* and *Bustillo v. Johnson*, in which the U.S. Supreme Court considered the Consular Convention claims of Moises Sanchez-Llamas, a Mexican convicted in Oregon, and Mario Bustillo, a Honduran convicted in Virginia.

Sanchez-Llamas argued unsuccessfully at his Oregon trial that statements he had made to the police should be suppressed because he had not yet been notified of his consular rights. The Oregon Supreme Court affirmed his conviction on the ground that individuals may not enforce Article 36 of the treaty.[144] Bustillo, like most defendants in this series of cases, did not raise his consular right until after his conviction (though his attorney had been aware of that right at trial).[145] In support of his state habeas corpus petition, he argued that had he been notified of his right, the Honduran Consulate could have helped him locate another Honduran he had fingered at trial as the true perpetrator. The habeas court dismissed his petition as barred by his failure to raise that argument earlier, and the Virginia Supreme Court let that holding stand.[146]

In splintered opinions, the Justices of the U.S. Supreme Court strived for international diplomacy. One did not address the issue, but the other eight agreed (or strongly suggested that they agreed) that the International Court's interpretation of the Consular Convention warranted "respectful consideration."[147]

For four Justices, that respect translated into agreement that the convention created rights enforceable by individuals.[148] Writing for this bloc, Justice Breyer soft-pedaled the point by distinguishing (without answering) the question of whether an individual could sue for injuctive relief or damages based on a violation of the convention, but he stressed that under the supremacy clause, the convention must be considered law applicable both to the direct appeal of Sanchez-Llamas and to Bustillo's state habeas proceeding.[149] The government's argument to the

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[143] *Id.* at 675 (O'Connor, J., dissenting).

[144] State v. Sanchez-Llamas, 108 P.3d 573, 578 (Or. 2005) (en banc).

[145] Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2688–89 (2006) (Ginsburg, J., concurring).

[146] *See id.* at 2677 (summarizing Virginia proceedings).

[147] *Id.* at 2697 (quoting *Breard v. Greene*, 523 U.S. 371, 375 (1998)); *id.* at 2700 (Breyer, J., dissenting) (quoting majority opinion) ("assum[ing]" that Supreme Court was not bound and citing authority to support that assumption). Justice Ginsburg's concurring opinion did not address this topic.

[148] *Id.* at 2692 (Breyer, J., dissenting).

[149] *Id.* at 2695 (Breyer, J., dissenting).

contrary had relied on a purported "long-established presumption" that treaties do not create private rights. Justice Breyer dealt with that notion bluntly: "The problem with that argument is that no such presumption exists."[150]

The majority opinion avoided the question of individual rights, just as the Court had done in previous cases.[151] That crucial issue, which has split the courts in this country, thus remains undecided.[152] What tore the Court apart was not the question of the rights but that of the remedy.

Sanchez-Llamas had argued that suppression was necessary to give "full effect" to his rights. The majority disagreed, focusing on the clause in the treaty requiring "conformity" with domestic law. Under U.S. law, wrote Chief Justice Roberts, the exclusionary rule is largely limited to violations of constitutional rights, and moreover, its policy of deterring the authorities is largely absent as to consular rights because the "police win little, if any, practical advantage from violating Article 36."[153] The dissent voted for remand to have an Oregon court consider whether any remedy short of suppression might cure whatever prejudice stemmed from the treaty violation.[154]

The other divisive remedial issue was that of Bustillo's procedural default. Resting on its precedent in *Breard*, the majority opinion held that under the treaty's "conformity" clause, the Virginia habeas courts had properly barred Bustillo's Consular Convention argument based on his failure to raise it earlier.[155] Recognizing that the International Court had, since *Breard*, twice rendered final judgments disagreeing with the Supreme Court's interpretation, Chief Justice Roberts proceeded carefully—he noted that those judgments could not be "easily dismissed"[156]—but firmly. He emphasized that the federal judicial power resides with the Supreme Court and that International Court opinions purport to have no binding force other than on the international plane, and even then only in the single case at hand.[157] Relying on textualism, the majority insisted that the International Court's interpretation was simply wrong: "the plain import" of Article 36 was that a domestic rule of procedural default could trump whatever consular rights an individual might have.[158]

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[150] Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2692 (2006) (Breyer, J., dissenting).
[151] *Id.* at 2671.
[152] *See id.* at 2690–91 (Breyer, J., dissenting) (summarizing split of authority).
[153] *Id.* at 2693.
[154] *Id.* at 2691, 2705, 2709 (Breyer, J., dissenting).
[155] *Id.* at 2677.
[156] *Id.* at 2683.
[157] *Id.* at 2675.
[158] *Id.* at 2685.

The majority opinion even offered an explanation for the International Court's putative mistake. Whereas, in an inquisitorial system, the failure to raise an issue may be partially the fault of the government, in an adversarial system, the litigants are responsible for raising issues, and waiver rules encourage them to do so promptly. Thus, the Chief Justice concluded, the International Court of Justice—steeped in the workings of non-adversarial systems—had failed to recognize the importance of waiver rules in the United States.[159] The "full effect" clause, he insisted, could not be read to bar the use of those rules, because such an interpretation would logically sweep away other procedural rules (such as statutes of limitation) that are an essential part of the very legal system with whose laws the exercise of consular rights is, according to the treaty, supposed to conform.[160]

Writing for three dissenters, Justice Breyer scoffed at the majority's purported respect for the International Court.[161] He emphasized the extent to which the Supreme Court and other federal courts had looked to the International Court for guidance in treaty interpretation over the years and called the majority's straying from that deference "unprecedented."[162] Moreover, in terms of analysis of the treaty text, he pronounced the majority not to have "rise[n] to the interpretive challenge."[163]

Justice Breyer appeared to relish that challenge himself, offering a thorough account of the negotiation of Article 36. That account showed that the drafters had adopted the "full effect" clause only after rejecting other language that in their view would have allowed for too much impairment of treaty rights by domestic laws.[164] Drawing on that history as well as on deference to the International Court's decisions in *LaGrand* and *Avena*, the dissent recommended remanding Bustillo's case to Virginia for a determination of whether Bustillo's failure to raise his consular rights at trial stemmed from the violation of the treaty and, if so, whether state law lacked an effective mechanism for remedying the violation (such as a claim of ineffective assistance of counsel).[165]

Even though the United States has withdrawn from the International Court's jurisdiction over Consular Convention disputes, it still consents to the Court's jurisdiction under many other treaties.[166] Thus, questions about that Court's influence on

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[159] *Id*. at 2684–86.
[160] *Id*.
[161] *Id*. at 2691 (Breyer, J., dissenting).
[162] *Id.* at 2702 (Breyer, J., dissenting).
[163] *Id*. at 2709 (Breyer, J., dissenting).
[164] *Id*. at 2691–92 (Breyer, J., dissenting).
[165] *Id*. at 2693, 2699, 2703 (Breyer, J., dissenting).
[166] Henkin, *supra* note 9, at 267; Liptak, *supra* note 139.

U.S. domestic law, via its interpretation of treaties to which the U.S. is a party, are sure to reappear.

E. *Conclusion*

The treaty cases decided most recently by the U.S. Supreme Court raised a host of questions about the domestic status of treaties, only some of which have been answered. In *Hamdan v. Rumsfeld*, the case rebuffing the reach of presidential power to establish a military commission to try detainees, the Court managed to avoid—as it had done in the past—the issue of when a treaty confers on individuals the right to enforce it.[167] Even a basic tenet of the supremacy clause has come into question. Concurring in *Sanchez-Llamas v. Oregon*, Justice Ginsburg noted that the *lex posterior* doctrine allows federal laws to nullify the domestic effect of treaties. Because the consolidated cases at hand both turned on the intersection of a treaty with state laws rather than federal laws, that doctrine had no apparent relevance, but Justice Ginsburg called it "unseemly" to treat state laws any differently from federal laws *vis-à-vis* treaties.[168] That posture would seem to elevate some state laws over treaties, in violation of the Supremacy Clause.[169] In short, the cases before the Court may have been resolved, but little has been settled. And much is at stake.

Amid the details of interpretive stances, a global point stands out: the way the United States treats treaties domestically is not an insular issue. Dissenting

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[167] A federal court of appeals had held that the petitioner had no right to judicial enforcement of the relevant Geneva Convention provision. Hamdan v. Rumsfeld, 415 F.3d 33, 40 (D.C. Cir. 2005). Though the Supreme Court reversed, it did so on the ground that regardless of whetherthe convention itself was enforceable, the detainee had a right to judicial enforcement of the same principles under the law of war. Because a prerequisite for the jurisdiction of the military commission was compliance with the law of war, he thus had the right to challenge the commission's structure and procedure in court. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2772 (2006).

[168] Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2689 (2006) (Ginsburg, J., concurring).

[169] Justice Breyer found Justice Ginsburg's point surprising as well. *See id.* at 2704 (Breyer, J., dissenting) (noting that requiring state to set aside its procedural default rule would not be inconsistent with *Breard*'s holding that a later-enacted federal procedural default rule trumped the Consular Convention).

in *Sanchez-Llamas*, Justice Breyer twice noted the reciprocal nature of treaty interpretation, warning that domestic disrespect for International Court of Justice judgments might translate into unfair treatment of U.S. citizens arrested abroad.[170] Moreover, decisions by the U.S. Supreme Court have often helped create international law,[171] and one wonders whether the influence of the Court abroad might wane as a result of its own reluctance to be influenced. These practical considerations surely would have resonated with Hudson.

Hudson likely would have recommended more deference to the judgments of the International Court than the Supreme Court has extended to date.[172] He served on the Court's predecessor, the Permanent International Court of Justice. More importantly, he recognized that interested parties can always concoct a favorable "weasel interpretation"[173]—and when it comes to interpreting treaties, a domestic court of a treaty party is hardly a disinterested party, no matter how much judicial independence it enjoys. To alleviate that problem, Hudson stressed the need for "collective judgment" on matters of treaty interpretation—namely, judgments by international bodies.[174]

He noted the Supreme Court's struggle for relevance and legitimacy and paralleled it with that of the Permanent International Court.[175] More deference by the Supreme Court today might well help burnish the International Court's image in this country as a tribunal worthy of respect. The Supreme Court has been the focus of much debate these days about the significance of international law, based on its occasional references to decisions of foreign domestic courts

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[170] *Id*. at 2692, 2700 (Breyer, J., dissenting).

[171] *E.g.*, Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. 1045, 1066 (Dec. 13) (citing discussion about how to measure the width of a river in *Vermont v. New Hampshire*, 289 U.S. 593 (1933)).

[172] Other countries' domestic courts defer more to International Court decisions than does the U.S. Supreme Court. Thomas M. Franck & Gregory H. Fox, *Transnational Judicial Synergy*, *in* International Law Decisions in National Courts, *supra* note 13, at 5. Many scholars in the United States have advocated for more deference. *E.g.*, Anne-Marie Slaughter, *Court to Court*, 92 Am. J. Int'l L. 708 (1998) (arguing that Supreme Court in *Breard v. Greene* should have stayed execution out of comity or civility).

[173] Hudson, *supra* note 1, at 97.

[174] *Id*.

[175] *Id*. at 116.

in cases construing the U.S. Constitution.[176] Seventy-five years from now, when people reflect on this era as we do now on Hudson's, it is hard to say whether they will view it as one in which we progressed toward international organization by integrating internationalism into the legal system of the United States.

[176] *E.g.*, Roper v. Simmons, 543 U.S. 551, 575–78 (2005) (citing foreign law as evidence of international norms against execution of juveniles); Lawrence v. Texas, 539 U.S. 558, 576–77 (2003) ("The right the petitioners seek in this case [to private sexual acts between consenting adults] has been accepted as an integral part of human freedom in many other countries."); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) ("[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."); *see also* Michael J. Shultz, Comment, *Finding Consensus While Footnoting the "Opinions of Mankind":* Roper v. Simmons *and the Proper Role of International Consensus in United States Eighth Amendment Jurisprudence*, 45 Washburn L.J. 233, 234 (2005) (noting that *Roper* caused "tremendous backlash" that galvanized many to seek to gag federal courts). For a scholarly symposium on this issue, see Janet Koven Levit, *Symposium: 2002–03 Supreme Court Review: Going Public with Transnational Law*, 39 Tulsa L. Rev. 155 (2003). In a study quantifying the use of foreign decisions by federal courts over the past sixty years, David Zaring was underwhelmed: "American courts rarely cite to foreign courts, they do so no more now than they did in the past, and on those few occasions where they do cite to foreign courts, it's usually not to help them interpret domestic law." David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. Empirical Legal Stud. 297 (2006).

The "Unsatisfactory Condition" of Customary International Law in the United States

By Julian G. Ku

A. *Introduction*

At the time that Harvard Professor Manley O. Hudson delivered his lectures compiled in the volume *Progress in International Organization*,[1] the domestic status of customary international law (CIL)[2] in the United States was not considered an important doctrinal question. In his lecture on the "Current Development of International Law," Hudson does discuss the role of custom in the formation of international law.[3] But his discussion largely expresses a general dissatisfaction with the condition of this type of international law, especially the lack of consensus and certainty about many important and basic rules of customary international law.[4] Indeed, the bulk of his lecture on this subject is devoted to the promise of a "legislative" movement to codify international law through treaties and international agreements.[5]

Indeed, from a contemporary perspective, it is striking that Hudson, perhaps the leading U.S. international law advocate of his generation, appears to dismiss the utility or importance of asking national courts to interpret, apply, and develop rules of CIL. In contrast, the invocation and application of CIL by U.S. federal and state courts has been a central and primary topic of debate among international legal scholars in the United States as well as advocates for the development of international legal norms.[6] In recent years, this debate has reached the U.S.

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[1] Manley O. Hudson, Progress in International Organization (1932).

[2] According to scholars, customary international law is defined as those customary rules followed by states out of a sense of legal obligation. *See* Mark W. Janis, An Introduction to International Law 41–43(4th ed. 2003).

[3] Hudson, *supra* note 1, at 82–83.

[4] *See* Guzman & Meyer, in this volume.

[5] Hudson, *supra* note 1, at 72–88.

[6] The literature is voluminous. The following provides a sample. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997); Richard Lillich, *The Proper Role of Domestic Courts in*

Miller & Bratspies (Eds), Progress in International Law, pp. 243–260.

Supreme Court resulting in two of the most important decisions on CIL ever delivered by that court: *Sosa v. Alvarez Machain*[7] and *Hamdan v. Rumsfeld*.[8]

This chapter reviews the contemporary debate over the proper status of CIL in the U.S. legal system. Scholars and judges today disagree sharply over whether CIL is part of federal or state law, its relationship with federal statutory law, and its impact on the duties and powers of the U.S. President. While the U.S. Supreme Court has intervened, it has generally failed to directly resolve most of these disagreements over the proper domestic status of CIL. The Court's unwillingness to do so leaves the domestic status of CIL deeply uncertain and hotly contested in the United States.

B. *The Domestic Status of Customary International Law*

Courts in the United States have a long history of using CIL as a rule of decision, although such cases were neither frequent nor significant.[9] Still, CIL's long historical pedigree as a rule of decision in the United States seems at odds with continuing uncertainty over its precise legal status in the domestic legal system.[10] This part reviews understandings of the legal relationship of CIL with each branch of the federal government. Despite a recent decision by the Supreme Court announcing that CIL can be invoked in the context of lawsuits by foreign nationals[11] substantial uncertainty over the domestic legal status of CIL remains.

I. *CIL and the Constitution's Text*

The text of the U.S. Constitution provides little guidance for determining the domestic status of CIL. The Constitution explicitly mentions CIL only once – allocating to Congress the power to "Define and Punish offences against the Law of Nations."[12] Few scholars dispute that this provision grants Congress the right

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the International Legal Order, 11 Va. J. Int'l L. 9 (1970); Richard Falk, *The Role of Domestic Courts in the International Legal Order* (Syracuse 1964). Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. Rev. 665, 669–70 (1986); Arthur M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 Yale J. Int'l L. 1, 38–44 (1995).

[7] 542 U.S. 692 (2004).

[8] 126 S.Ct. 2749 (2006).

[9] For a review of the practice of federal and state courts in the U.S. applying CIL in the late 18th and 19th Century, *see* Julian G. Ku, *Customary International Law in State Courts*, 42 Va. J. Int'l L. 265, 286–332 (2001).

[10] *See, e.g.*, Bradley & Goldsmith, *supra* note 6; Harold H. Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824, 1832 (1997).

[11] Sosa v. Alvarez Machain, 542 U.S. 692.

[12] U.S. Const. art. I, § 8.

to pass legislation codifying rules of CIL as federal statutes.[13] Congress has exercised this power sparingly, however, and few statutes have been enacted pursuant to this power.

A strict textualist reading might require congressional action prior to the recognition of CIL in the U.S. legal system. But the rarity of congressional legislation codifying rules of CIL has not prevented courts from recognizing, interpreting, and applying CIL within the domestic legal system. But this simply begs the question. What is the basis for applying CIL in the U.S. system when Congress fails to act?

II. *CIL and the Common Law*

Both federal and state courts in the United States have long applied CIL as a rule of decision in certain cases involving questions such as diplomatic immunity and the law of war.[14] The basis for this practice is the longstanding doctrine recognizing the law of nations as part of the common law.[15] This doctrine, which was recognized by British courts, was embraced by American courts even prior to the establishment of the U.S. Constitution in 1789.[16]

Leading intellectual figures of the young republic also viewed CIL as integral to the law of the United States. Alexander Hamilton's description of the Law of Nations embraces this theory.[17] In defending President Washington's legal authority to proclaim neutrality in European wars during the 1790s, Hamilton explained that:

> The common law of England which was [and] is in force in each of these states adopts the law of Nations, the positive equally with the natural, as a part of itself … Ever since we have been an Independent nation we have appealed to and acted upon the modern law of Nations as understood in Europe … The President's Proclamation of Neutrality refers expressly to the modern law of Nations … 'Tis

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[13] The lone recent study of the clause can be found in Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish … Offenses Against the Law of Nations*," 42 Wm. & Mary L. Rev. 447 (2000) (concluding that the provision suggests the national or federal concern with developing rules of customary international law.).

[14] For a discussion of the types of CIL cases historically handled by state and federal courts, *see* Ku, *supra* note 9, at 286–332.

[15] *See* Huntington v. Attrill, 146 U.S. 657, 683 (1892) (stating that question of international law "is one of those questions of general jurisprudence.…").

[16] For further background, *see* Restatement (Third) of U.S. Foreign Relations Law, pt. I, ch. 2, introductory note at 41.

[17] The Law Practice of Alexander Hamilton: Documents and Commentary (Julius Goebel Jr., ed., 1964).

> indubitable that the customary law of European Nations is as a part of the common law and by adoption that of the U[nited] States.[18]

Other contemporaneous sources embraced the theory that the law of nations could be treated as general common law. For instance, James Wilson, an influential figure of the Founding era, traced the law of nations' entry into American jurisprudence through the common law. If a question arises under the common law, which requires resolution by the law of nations, "[by] that law she will decide the question. For that law in its full extent is adopted by her."[19]

Leading judicial decisions applying CIL similarly looked to the common law as the basis for applying CIL rules. For instance, in 1839, a New York state court applied a rule of CIL to grant a foreign diplomat immunity from New York courts' jurisdiction even though the court found that no federal or state statute required such immunity.[20] The court relied on CIL, as part of the general common law, to resolve the case. But CIL did not hold any status independent of the common law and its relationship with other forms of domestic law was not developed. The Supreme Court generally refused to treat CIL as a form of federal law for the purposes of establishing federal court jurisdiction.[21] The Court also hinted that, like other forms of the general common law, CIL's domestic effect was limited by any inconsistent "treaty or controlling legislative or executive act or judicial decision."[22] Courts in the United States continued this approach of applying CIL as a general common law rule throughout the 19th and early 20th century.[23]

III. *The Unsettled Questions: CIL, the States and the President*

Although CIL was well established as a rule of general common law, the continued application of CIL by domestic federal and state courts did not resolve two larger structural questions. First, did CIL form part of a national or federal common law rather than simply existing as part of the various states' common law? Second, did CIL bind the President and if so, how?

The first question became particularly urgent with the Supreme Court's seminal decision in *Erie v. Tompkins*.[24] The *Erie* Court's elimination of the general federal common law system meant that, for the most part, federal courts could

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[18] Alexander Hamilton, *To Defence No. XX* (Oct. 23–24, 1795), *in* 19 Papers of Alexander Hamilton, at 341–42 (Harold Syrett ed., 1973) (emphasis added).

[19] Henfield's Case, 11 F. Cas. 1099, 1107 (1793).

[20] *See* Holbrook v. Henderson, 6 N.Y. Super. Ct. 619, 4 Sandf. 619 (N.Y. Sup. Ct. 1839).

[21] *See* Ker v. Illinois, 119 U.S. 436, 444 (1886); New York Life Ins. v. Hendren, 92 U.S. 286 (1875).

[22] The Paquete Habana, 175 U.S. 677 (1900).

[23] *See* Ku, *supra* note 9.

[24] 304 U.S. 64 (1938).

not create or apply rules of federal common law.[25] Instead, to the extent federal courts applied common law, they usually applied the common law of the applicable state. But this seemed to leave CIL as part of the common law of the individual states, as Judge Learned Hand suggested in one of the first post-*Erie* decisions applying CIL.[26] Alternatively, CIL might be a special kind of common law, one that even forms part of the "Law of the United States" as used in the supremacy clause of the Constitution and therefore preempting all inconsistent state law.[27]

The second question became intertwined with the first. Assuming CIL had not been incorporated by Congress in a statute, did CIL nonetheless "bind" the President? After all, the President has a duty under Article II of the Constitution to "Take Care" that all the "Laws" are faithfully executed, which may include a duty to take care that CIL is executed as well. Moreover, if CIL constitutes part of the phrase "Law of the United States," the President's duty to obey such law is strengthened even more.

Such questions about the domestic status of CIL rarely troubled courts during the 19th century, probably because CIL was rarely invoked as a rule of decision in U.S. courts, and when it was, it was not interpreted to conflict with either state law or presidential policies.[28] At the time of Hudson's prominence in the early 20th century, however, CIL and international law in general began to enjoy a renaissance of interest that accelerated after the Second World War. CIL rules began to expand beyond traditional areas such as diplomatic relations and border disputes and into areas affecting private individuals such as human rights. The growth and expansion of CIL as a set of legal rules affecting private individuals increasingly created conflicts with areas of regulation traditionally controlled by the governments of the several states. For instance, CIL rules began to reflect individual human rights claimed against nations in areas as diverse as criminal justice and family law.[29]

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[25] Although Erie declared that most types of common law were questions of state law, some federal common law remained in areas such as admiralty jurisdiction. *See, e.g.*, Caleb Nelson, *The Persistence of General Law*, 106 Colum. L. Rev. 503 (2006); Henry J. Friendly, *In Praise of Erie–and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405–07 (1964).

[26] *See* Bergman v. De Sieyes, 170 F.2d 360 (2d Cir. 1948).

[27] *See* Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 Am. J. Int'l L. 740 (1939).

[28] For a survey of state court practice involving CIL, *see* Ku, *supra* note 9, at 291–332.

[29] For a deeper discussion of the change in the nature and type of subject matter covered by international law generally, *see* Paul B. Stephan, *The* New International Law–*Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. Colo. L. Rev. 1555, 1556 (1999) (describing a new international law regulating relations between nation states and their own citizens).

Moreover, the growth in CIL norms governing private rights created a greater potential for conflicts with policies pursued by the U.S. executive branch.[30]

C. *The Contemporary Debate over the Domestic Status of CIL*

During the last three decades, the domestic status of CIL has drawn more and more attention from courts and scholars. This attention eventually intensified into a rather contentious and unresolved academic debate over the domestic status of CIL. Although this debate did not directly call into question the overall utility or legitimacy of CIL as part of the broader international system – a debate that Hudson was more familiar with – the contemporary debate has raised broad questions about the significance of CIL on the allocation of legal authority within the U.S. political and legal system.

I. *The Traditional View*

Prior to the contemporary era, the leading source of authority on the status of customary international law in the United States was the U.S. Supreme Court's 1900 decision in *The Paquete Habana*.[31] That case, which involved a challenge to the legality under CIL of a naval captain's seizure of fishing vessels as prize during the Spanish-American War, presented the Court with one of its rare opportunities to opine broadly on the nature of CIL. Speaking through Justice Gray, the Court explained that:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations. …[32]

The Court's discussion of the domestic status of CIL is more noteworthy for its brevity than its clarity. Still, a number of broad understandings can be drawn from Justice Gray's statement.

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[30] For example, aliens detained by the U.S. in the war on terrorism have invoked customary international law as a basis to challenge the conditions and circumstances of their detention. *See, e.g.*, Julian G. Ku, Ali v. Rumsfeld: Challenging the President's Interpretation of Customary International Law, 38 Case W. Res. J. Int'l L. 371 (2006); Julian G. Ku, The Third Wave: The Alien Tort Statute and the War on Terrorism, 19 Emory Int'l L. Rev. 105 (2005).

[31] 175 U.S. 677 (1900).

[32] 175 U.S. at 700.

- Customary international law is cognizable in U.S. courts even absent codification by Congress through specific legislation.
- A court's authority to recognize CIL depends on whether it has the "appropriate jurisdiction" suggesting that CIL alone did not support the assertion of jurisdiction in that case.
- A court's application of CIL can only occur in the absence of a conflict with a "statute, treaty, or controlling executive act."[33]

It is worth noting that the *Paquete Habana* court did not assert appellate jurisdiction on the basis of the federal status of CIL. Rather, the Court's appellate jurisdiction in that case arose under congressional statutes authorizing review of lower court decisions in prize cases. Moreover, in a number of prior cases, the Supreme Court repeatedly refused to assert appellate jurisdiction over lower federal court or state decisions that applied and interpreted rules of CIL.[34] This approach was completely consistent with the Supreme Court's treatment of other kinds of "general common law" that were independently applied by federal and state courts alike without either system asserting the power to review the decisions of the other.[35]

The Court's decision in *Erie v. Tompkins* upset this approach to the application of "general common law" by federal courts. After *Erie*, the status of CIL remained uncertain. One prominent judge, Learned Hand, treated CIL as a rule governed by the common law of the states and applied "New York's" rule of CIL to resolve a case involving the customary law of diplomatic immunity.[36] On the other hand, one of Hudson's academic contemporaries, Phillip Jessup, opined that the *Erie* decision did not mean that CIL should be treated as part of the common law of the states.[37] Rather, Jessup argued that CIL, as a quintessentially national concern, should remain a question of federal law for the federal courts.

The question of CIL's domestic status garnered barely one paragraph in the 1965 *Restatement of the Law (Second) of the Foreign Relations Law of the United States*, which simply noted that international law has been treated "as part of the

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[33] This last claim has been contested by scholars. For the most persuasive critique of this part of the holding, *see* William Dodge, *The Story of* The Paquete Habana: *Customary International Law as Part of Our Law, available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=847847.

[34] *See, e.g.*, New York Life v. Hendren, 92 U.S. 286 (1875); Wulfsohn v. Russian Socialist Federated Soviet Republic, 266 U.S. 580 (1924) (per curiam); Ker v. Illinois, 110 Ill. 627 (1884).

[35] For a fuller discussion of the approach of the general common law regime, *see* William Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513 (1984).

[36] Bergman v. DeSieyes, 170 F.2d 360, 361 (2d Cir. 1948).

[37] Philip C. Jessup, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 Am. J. Int'l L. 740 (1939).

general nonstatutory, or "common" law from the "earliest times in the United States." The Restatement went on to note that:

> it is not settled whether the application or non-application of all questions of international law by a state court is reviewable by the Supreme Court of the United States, and whether federal courts sitting in diversity of citizenship cases are free, despite the doctrine of Erie, to disregard state precedents declaratory of international law.[38]

Thus, in the traditional view, CIL could be applied by courts as part of the common law. The broader status of CIL as federal law remained unsettled. Moreover, despite early consideration of this question by luminaries such as Hand and Jessup, neither courts nor commentators were deeply troubled by the domestic status of CIL. This was probably because Congress codified those few traditional areas of CIL regularly raised in domestic court proceedings, such as foreign sovereign immunity and diplomatic immunity, by enacting statutes or entering into treaties.[39]

II. *The Third Restatement and the Modern Position*

Fifteen years after the Second Restatement, the American Law Institute began the Third Restatement project, which devoted substantially more attention to the domestic status of CIL. Published in 1980, the Third Restatement articulated a more aggressive view of the domestic status of CIL, especially its status as federal law. Brushing aside the tentative tone of the Second Restatement, the Third Restatement flatly declared that:

> Customary international law is part of the common law in the United States, but it is federal common law and its determination by the Supreme Court is binding on the states and state courts.[40]

Further, the Third Restatement explained that customary international law is part of the "laws of the United States" for the purposes of the federal court subject matter jurisdiction under Article III, section 2 of the Constitution. In other words, cases involving the application of CIL could sustain a federal court's exercise of subject-matter jurisdiction. Thus, when Congress authorized federal courts to assert jurisdiction over cases arising under "federal law," it also authorized courts to assert jurisdiction over any cases involving CIL.

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[38] Restatement (Second) of the Foreign Relations Law of the United States (1965).

[39] *See, e.g.*, Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330 *et seq.*; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

[40] Restatement (Third) of the Foreign Relations Law of the United States § 111, cmt. d n.2 (1987).

Finally, the Third Restatement declared that CIL, like international agreements, is "supreme over the law of the several states."[41] Although the Third Restatement could cite no judicial decision in support of this position, it explained that prior Supreme Court decisions allocating an extra-constitutional federal power over foreign affairs[42] or a broad interpretation of the phrase "Laws of the United States" in Article VI of the Constitution supported treating CIL as preemptive federal law.[43]

The more aggressive tone of the Third Restatement may have reflected an intellectual shift by progressive legal elites in favor of using international law to pursue domestic goals.[44] The Third Restatement was also partially supported in its determinations by the seminal decision of *Filartiga v. Pena-Irala*, decided by the U.S. Court of Appeals for the Second Circuit in 1980.[45] In that decision, the federal court upheld federal court jurisdiction under the Alien Tort Statute (ATS) in a lawsuit brought by one alien against another alien for violations of CIL. The ATS provides for federal court jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations. …"[46] The *Filartiga* Court decided that, at least for the purposes of Article III's grant of limited subject matter jurisdiction to the federal courts, CIL was a form of federal common law. Such a determination was necessary to the holding of the case because the federal court could not otherwise have properly asserted jurisdiction in that case over a dispute between two aliens.[47]

Taken together, the *Filartiga* decision and the *Third Restatement* represent a shift from the traditional view of CIL as originally articulated by the *Paquete Habana* and the Second Restatement. Rather than existing "as part of our law" applied by courts of "appropriate jurisdiction," CIL now served as an independent source of federal common law controlled by the federal courts and preemptive of inconsistent state law.

III. *The Revisionist Critique*

The acceptance of the Third Restatement's view was reflected in a wave of Alien Tort Statute lawsuits in federal courts alleging violations of the law of nations.

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[41] *Id.*

[42] *See, e.g.*, United States v. Belmont, 301 U.S. 324, 331 (1937); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[43] *Id.*

[44] *See* Paul B. Stephan, *Courts, the Constitution, and Customary International Law: The Intellectual Origins of the Restatement (Third) of the Foreign Relations Law of the United States*, 44 Va. J. Int'l L. 33, 47 (2003).

[45] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[46] 28 U.S.C. § 1350.

[47] For an argument as to the inconsistency between ATS litigation and Erie, *see* Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 Fordham L. Rev. 319, 311 (1997).

This first wave of lawsuits typically followed the pattern set down by *Filartiga*, involving foreign plaintiffs suing other foreigners for violations of the customary international law of human rights.[48] These decisions reaffirmed, at least in the context of the Alien Tort Statute, that CIL could serve as a rule of decision for federal courts and that it could sustain federal court subject matter jurisdiction as a form of federal law.

In the mid-1990s, however, a number of scholars began to question the propriety of the Third Restatement position. Most prominently, Professors Curtis Bradley and Jack Goldsmith launched a full-scale critique on what they called the "modern position" embodied in the Third Restatement's declaration that CIL is a form of federal common law.[49] Joined by a number of other scholars, they offered a "revisionist" view of the proper status of CIL after the Supreme Court's decision in *Erie*.[50]

First, the revisionist critique took issue with the Third Restatement's broadest claim: that CIL was understood by the Founders to form part of the "Law of the United States" in either Article III or Article VI of the Constitution. In its most extreme form, a number of scholars actually rejected the view (embraced by both Restatements) that uncodified CIL was always understood as a form of common law prior to *Erie*.[51] But even the Third Restatement's narrower conception of CIL as a form of federal common law, revisionist scholars argued, had little historical or precedential support.[52]

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[48] *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995). Trajano v. Marcos, 878 F.2d 1439 (9th Cir. 1989); Forti v. Suarez-Mason, 694 F. Supp. 707 (N.D. Cal. 1988); Guinto v. Marcos, 654 F. Supp. 276 (S.D. Cal. 1986).

[49] Bradley & Goldsmith, *supra* note 6; Arthur M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 Yale J. Int'l L. 1, 38–44 (1995).

[50] Which is not to say their critique has gone unrebutted. For critical responses, *see* Koh, *supra* note 10; Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley & Goldsmith*, 66 Fordham L. Rev. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law after* Erie, 66 Fordham L. Rev. 393 (1997). The Bradley-Goldsmith critique of customary international law in domestic courts is separate from a broader critique offered by Professors Eric Posner and Jack Goldsmith of international law in general. *See* Eric Posner & Jack Goldsmith, The Limits of International Law (2004). For some critical commentary, *see* Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 Tex. L. Rev. 1265 (2006); Andrew T. Guzman, *The Promise of International Law*, 92 Va. L. Rev. 533 (2006); Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 Harv. L. Rev. 1404 (2006); Detlev F. Vagts, *International Relations Looks at Customary International Law: A Traditionalist's Defense*, 15 Eur. J. Int'l. L. 1031 (2004); Anne van Aaken, *To Do Away with International Law? Some Limits to the "Limits of International Law"*, 17 Eur. J. Int'l L. 289 (2006).

[51] *See, e.g.*, Jordan J. Paust, International Law as Law in the United States § 30 n.34 (1996) (arguing that viewing CIL as "mere" common law is simplistic and citing cases implying that the law of nations and the common law are different).

[52] For arguments to this effect, *see* Bradley & Goldsmith, *supra* note 6, at 849–52.

Second, revisionist scholars highlighted one of the unappreciated structural consequences of treating CIL as federal common law. Such a view threatened to give federal courts what they viewed as an unprecedented power to preempt inconsistent state law absent any congressional supervision or authorization.[53] As federal common law, federal courts were free to develop and interpret the evolving CIL of human rights, for instance, to challenge state practices like the death penalty.[54]

The revisionist critique, therefore, would leave CIL after *Erie* as a form of state common law as Judge Learned Hand suggested in his first consideration of the issue.[55] Although this result has been criticized as impractical because it would leave states with the power to issue divergent interpretations of CIL, others have argued that the federal government could always, if it chooses, override inconsistent state interpretations of CIL.[56] Indeed, as John Yoo and I have argued, recent Supreme Court precedent might authorize the President (in the absence of congressional action) to independently preempt state law on the basis of his general executive power to interpret CIL.[57]

Some scholars have offered a compromise view suggesting that CIL be treated as a special form of federal common law that cannot preempt inconsistent state statutory and common law.[58] This "federal non-preemptive view" agrees with the Third Restatement view that CIL is federal law for purposes of federal court jurisdiction in Article III. On the other hand, scholars adhering to this position agree with the revisionist view that CIL cannot preempt inconsistent state law because customary international law is not part of the phrase "Law of the United States" as it is used in the supremacy clause.

D. *The Supreme Court's Indecisive Foray*

The first wave of ATS lawsuits invoking customary international law had generally been limited to cases brought by aliens against other aliens for actions occurring overseas. While such lawsuits were not uncontroversial, they did not spark a

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[53] *See, e.g.*, Bradley & Goldsmith, *supra* note 6, at 860–61.

[54] For an argument to this effect, *see* Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 Sup. Ct. Rev. 295.

[55] Bergman v. De Sieyes, 170 F.2d 360 (2d Cir. 1948).

[56] The leading proponent of this critique is Dean Harold Koh. *See* Koh, *supra* note 10, at 1832.

[57] *See* Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 Sup. Ct. Rev. 153.

[58] Another group holds that CIL is not federal law under *either* Article III or Article VI. *See, e.g.*, Michael D. Ramsey, *International Law as Non-Preemptive Federal Law*, 42 Va. J. Int'l L. 555 (2002).

broader concern within the U.S. because they did not involve U.S. defendants. When a second wave of ATS lawsuits against foreign and U.S. corporations for alleged violations of international human rights law was launched in the mid-1990s, however, U.S. corporate defendants began to raise some of the same objections developed by revisionist scholars. Moreover, while the U.S. executive branch had sometimes endorsed the use of ATS lawsuits, it changed course as a third wave of such lawsuits began to be directed at various U.S. government actors.[59] Although the United States Supreme Court has had the opportunity to resolve lingering questions about the domestic status of CIL, its decisions have left many of these same questions unanswered.

I. *The Alien Tort Statute: Sosa v. Alvarez Machain*

The Supreme Court's first foray into the CIL debate came in its 2004 decision in *Sosa v. Alvarez Machain*.[60] The case involved a lawsuit by Alvarez-Machain, a Mexican citizen who had alleged he was kidnapped in Mexico and brought to the United States at the behest of U.S. government officials. Alvarez Machain alleged that his kidnapping violated customary international law and filed his claim in federal court pursuant to the Alien Tort Statute.

Defendants Sosa, a Mexican national alleged to have acted as an agent of U.S. government officials, and the U.S. government raised a number of objections to the lawsuit drawing upon the revisionist critique. They put forward two major objections:

1. The Alien Tort Statute was merely a jurisdictional statute that did not create a private cause of action for individual plaintiffs;[61]
2. Even if private rights of action could be brought under the Alien Tort Statute for violations of CIL, the kind of arbitrary detention alleged by Alvarez Machain was not recognized as a violation of CIL.[62]

After disposing of Alvarez-Machain's lawsuit against the U.S. government on immunity grounds, the Court considered Sosa's two objections to the ATS.

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[59] *See, e.g.*, Memorandum for the United States as Amicus Curiae *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79–6090) (arguing in favor of allowing recognition of CIL violations under the Alien Tort Statute). *But see* Brief for United States as Respondent in Support of Petitioner, 11–21, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[60] 542 U.S. 692 (2004).

[61] *See* Brief for Petitioner, 20–34, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Brief for United States as Respondent in Support of Petitioner, 11–21, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004). *See also* Tel Oren v. Libyan Arab Republic, 726 F.2d 774, 779 (Bork, J., concurring).

[62] *See* Brief for Petitioner, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Brief for United States as Respondent in Support of Petitioner, 20–46, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

While it agreed with Sosa that the ATS was a jurisdictional statute only and did not by itself create a private cause of action, the Court found that federal courts retained a limited common lawmaking power to recognize well-settled violations of CIL.[63] After reviewing the history of the ATS' enactment, it suggested that CIL was always understood to form part of the common law applied by federal and state courts alike. Although the Court acknowledged that *Erie* changed this prior practice, the Court decided that it would permit federal courts to continue to apply CIL as common law unless and until Congress repealed or amended the ATS.

The Court thus accepted Sosa's first argument about the jurisdictional character of the ATS, but still ruled against him on the question of whether federal courts could themselves recognize private causes of action under CIL. The Court then went ahead and accepted Sosa's second argument on the substance of the claim against him and ruled in his favor. After emphasizing that, when applying CIL in the context of the ATS, federal courts must be careful to recognize only the most well-settled principles of CIL, the Court found that Alvarez – Machain's allegations that he was arbitrarily detained for a short period of time simply did not qualify as a well-recognized violation of CIL.[64] For this reason, it ordered the lawsuit against Sosa dismissed.

Interestingly, neither the U.S. government nor Sosa raised a third objection, which flowed most directly from the revisionist critique. Neither Sosa nor the U.S. fully embraced the revisionist claim, which would have argued that federal courts could not properly exercise jurisdiction over the lawsuit against Sosa because a lawsuit charging violations of CIL did not "arise under" the "Laws of the United States" as used in Article III of the U.S. Constitution.[65] The Court therefore was not directly presented with this argument. It did indirectly acknowledge, however, that, at least in the context of cases brought under the ATS, that CIL was a form of the "Law of the United States" for the purposes of Article III.[66] But it pointedly refused to decide whether CIL was part of the "Law of the United States" for any other purpose.[67]

In this way, *Sosa* left open at least two of the most important questions about the domestic status of CIL. Even if CIL could sustain the exercise of federal court

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[63] 542 U.S. at 712–14.

[64] *Id*. at 731–32.

[65] The Article III argument was not mentioned by the United States at all and briefly mentioned only in the Reply Brief for Petitioner, at 17 n.14, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004). This argument was discussed and endorsed by Judge Randolph of the D.C. Circuit in a concurrence to U.S. v. Al-Odah, 321 F.3d 1134, 1145–50 (D.C. Cir. 2003).

[66] *Sosa*, 542 U.S. at 731 n.19.

[67] *Id*. ("Our position does not, as Justice Scalia suggests, imply that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law.").

jurisdiction under Article III, did it also preempt inconsistent state law under Article VI? In other words, the Court did not provide an answer to one of the most aggressive claims of the Third Restatement: that CIL was federal law supreme over the law of the states. The Court also largely avoided the similarly difficult question of whether such federal court interpretations of CIL bound the executive branch, although it did suggest that a court should consider the executive branch's views of a CIL interpretation on foreign policy.[68]

II. *The President and CIL:* Hamdan v. Rumsfeld

The Supreme Court had another opportunity to consider the proper role of CIL in its 2006 decision *Hamdan v. Rumsfeld*.[69] This case involved a challenge by Hamdan, a detainee held as an illegal enemy combatant in Guantanamo Bay, Cuba, and in 2004 charged by the U.S. government with conspiring in the September 11, 2001 attacks.[70] Hamdan brought a number of challenges to the legitimacy of his trial by military commission, including a challenge that customary international law did not recognize the charge of conspiracy. Hamdan's CIL arguments therefore presented the Court with arguments about the relationship between CIL and the President.

Salim Hamdan was alleged to have served as Osama Bin Laden's driver in the years before the September 11, 2001 attacks. After being detained at Guantánamo Bay, Hamdan became one of the first individuals to be charged and tried under military commissions established by President Bush. In an executive order issued in the fall of 2001, President Bush cited his general constitutional power as Commander in Chief during wartime, Congress' general authorization for the use of military force against individuals connected to the September 11, 2001 attacks, as well as a number of other statutory provisions in the Uniform Code of Military Justice as authority for his use of military commissions.[71]

Hamdan offered an array of statutory and constitutional challenges to his trial before the commissions. In particular, he argued that the military commissions violated the "law of war" as codified in the Geneva Conventions[72] but also as recognized under customary international law. According to Hamdan, the commissions violated the law of war's guarantee of a regularly constituted court as defined in

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[68] *Id*. at 733 n.20.

[69] 126 S.Ct. 2749 (2006).

[70] *Id*. at 2760.

[71] *See* Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

[72] Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, T.I.A.S. No. 3364 (Third Geneva Convention).

Common Article III of the Geneva Conventions.[73] Additionally, the commissions' procedures violated guarantees of the right to be present at a trial and to have access to all evidence used against him.[74] Finally, Hamdan alleged that the commissions could not try him for conspiracy because conspiracy was not recognized as a crime under the laws of war.[75]

In order for any of these challenges to succeed, however, the President would have to be bound by the customary international law of war. In other words, Hamdan needed to present a theory of incorporation of CIL so that it could bind the President in a federal court proceeding. Fortunately for Hamdan, the Uniform Code of Military Justice (UCMJ), a federal statute, appeared to limit the jurisdiction of military commissions to violations of the "law of war."[76] Hamdan could then base his argument largely on a statutory incorporation theory, which, as discussed earlier, is the least controversial theory for the incorporation of CIL into the U.S. legal system.

Although Hamdan relied on the statutory theory of incorporation, the government argued that the phrase "law of war" in the UCMJ did not incorporate customary international law in a way that granted individual rights.[77] For this reason, Hamdan argued in the alternative that customary laws of war applied to his situation and limited the President even without statutory incorporation.[78] In response, the government argued that Hamdan had wrongly characterized the law of war's treatment of conspiracy arguing that such charges had a long history within U.S. practice.[79] More importantly for our discussion, the government also asserted that it had the power to reject the binding force of CIL if it prohibited a charge of conspiracy.[80] Citing the *Paquete Habana*, the government argued that the President could and did have the power to abrogate a particular rule of customary international law.[81] The government argued, for instance, that even if Common Article III of the Geneva Conventions applied as customary international law, it no longer bound the President because the President's executive order establishing the military commissions was a "controlling executive act" as that phrase was understood in the *Paquete Habana*.[82] In other words, the government

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[73] Brief for Petitioner at 27–36, Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006).
[74] *Id*. at 27–36 (citing customary law of war).
[75] *Id*.
[76] 10 U.S.C. § 821.
[77] Brief for Respondent at 35–36, Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006).
[78] *Id*. at 27–36.
[79] *Id*.
[80] *Id*. at 35–36.
[81] *Id*. at 35–36.
[82] *Id*.

read the *Paquete Habana* as Supreme Court authority for the power of the executive branch to override the domestic application of a rule of CIL.

The *Hamdan* court did not even refer to the President's claim of the authority to reject or override a rule of customary international law *via* a "controlling executive act." Instead, the Court's majority simply assumed that Congress had incorporated the Geneva Conventions by statute.[83] The Court found that, whether or not the Geneva Conventions were "self-executing" or applied as independent force, the treaty obligations had been incorporated by the phrase "law of war" in the Uniform Code of Military Justice.[84] The treaty obligations would therefore apply whether or not the President had issued a controlling executive act.

But four members of the Court did seek to interpret and bind the President with obligations that were not found in the Geneva Conventions. In an opinion which Justice Kennedy refused to join, four members of the Court found that conspiracy is not recognized as a crime in violation of the customary law of war.[85] Thus, these members of the Court obviously believed that the CIL obligations also bound the executive branch, although they also appeared to rely on a theory of statutory incorporation by emphasizing Congress' use of the phrase "laws of war" in its recognition of the jurisdiction of military commissions. Neither these four members nor the Court as a whole directly considered with CIL could apply against the President outside of the context of statutory incorporation.

Thus, although the Court was presented with arguments seeking to bind the President with rules of CIL that were not incorporated by congressional statute, the members of the Court avoided squarely facing this question. By relying heavily on a theory of statutory incorporation of the law of war, the members were able to find that the President had violated a federal statute rather than that he had violated uncodified CIL. But by doing so, the Court also avoided the lurking debate over how and whether unincorporated CIL can be interpreted to bind the executive branch.

E. *Conclusion: An "Unsatisfactory Condition"*

In his lectures, Hudson complained that "the customary part of international law is in an unsatisfactory condition."[86] Hudson appeared frustrated by the lack of consensus and certainty about many important and basic rules of customary

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[83] Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2796 (2006).

[84] *Id.*

[85] *Id.* at 2777–86.

[86] Hudson, *supra* note 1, at 82–83.

international law. He also recognized that CIL seemed inadequately developed for contemporary problems.

In many ways, Hudson's despair about the condition of customary international law in general could apply to the condition of customary international law in the U.S. system. After the groundbreaking decision of *Erie*, the traditional view of CIL as a form of general common law independently applied by state and federal courts could no longer be maintained. But few courts have been willing to endorse the aggressive efforts by the Third Restatement to establish CIL as a form of supreme federal law preemptive of state law and binding on the executive branch. In two recent cases, the U.S. Supreme Court managed to avoid reaching either of those questions.

The Court has only reaffirmed one basic point: CIL is part of the American legal system. It is still part of "our law," even when Congress has not explicitly codified it by statute. CIL can be, and continues to be, invoked by alien plaintiffs bringing claims under the Alien Tort Statute. But whether CIL has any other domestic significance remains highly doubtful and hotly contested. Perhaps the U.S. Supreme Court will have another opportunity to consider the domestic status of CIL. Until then, the status of CIL in the United States will remain, as Hudson might say, "in an unsatisfactory condition."

Part Four
International Actors

In Quite a State: The Trials and Tribulations of an Old Concept in New Times

By Florian Hoffmann

A. *Introduction – Finding the State*

> I believe that when the history of our times comes to be written with the perspective which only a half-century can bring, our generation will be distinguished, above all else in the field of social relations, for the progress which we have made in organizing the world for co-operation and peace.[1]

Seventy-five years after Professor Manley O. Hudson dared write these prophetic words, their content strikes one as, on one hand, evidently anachronistic and, in light of the great suffering dawning over the old and new worlds at that very moment, cruelly misjudged. On the other hand, juxtaposed with the contemporary world, these words can be read to contain more than just a grain of truth. *Prima facie*, of course, the world today can hardly be considered to be any more pacific or collaborative than the world of the 1920s and early 1930s. While the sort of international organizations to which Hudson dedicates his book may have come a long way since his time of writing,[2] examples abound of the deliberate lack of cooperation in contemporary international relations. And, while war in the classical sense may no longer be formally considered an option, its continuing *de facto* occurrence in many places, as well as its general shift to a wider, if hazier, object in the form of terrorism, also seems to belie Hudson's optimism. However, in a different and perhaps unintentional sense, Hudson's vision points to the emergence of a host of processes that, in the aggregate, can be said to stimulate cooperation and to privilege peace over war in the traditional sense. The rise of new types of international organizations such as the European Union or the World Trade Organization, which are endowed with partial sovereignty and hard sanctions for non-compliance with their norms, would appear to point to "progress" in international cooperation. As does many a government's realization that some form of multilateralism is needed even in that most uncooperative of

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[1] Manley O. Hudson, Progress in International Organization 5 (1932).

[2] *See* Kaiser, in this volume.

Miller & Bratspies (Eds), Progress in International Law, pp. 263–288.

international activities, armed conflict – a realization from which even the hegemony of then and now, the United States, arguably, is not exempt.[3] Likewise, states' use of the power to wage war has, today, generally become a liability rather than an asset, as the kind of instability created by armed conflict is severely punished by the highly sensitive transnational capital streams that can financially make or break countries, regions, or entire continents. Hence, while the world may not be all that much more peaceful now, the stakes of waging war have increased immensely.[4] In this sense, Hudson's words have indeed proven to be visionary, though, arguably, in a rather different way than he may have imagined in 1932. For him, it was self-evident that "progress" in cooperation and peace would be the outcome of deliberate and, at least to some extent, rational agency by what even to his liberal internationalist mind would always count as the original and primary actors of international relations: (nation) states. Yet, as shall be explored in this chapter, while the formal qualities of the state may not have changed much since Hudson's day, the environment within which the state operates has altered profoundly – so profoundly, indeed, that the idea of its exclusive, *sovereign* agency has to be revised. Hence, to a considerable extent, the "progress" in Hudson's vision is the result of processes in which the classical sovereign state is, at best, one among several actors. More radically, the state is itself profoundly redefined by processes it originally may have helped to bring about, processes over which it no longer exercises control. Nonetheless, then as now, the concept

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[3] While general attention is, of course, currently focused on the United States's unilateralism in relation to its decision to invade and occupy Iraq, it should not be forgotten that at all stages of its campaign, President George W. Bush's administration has sought the assistance, whether symbolic or material, of other governments. After effecting regime change, the United States availed itself of the humanitarian and other services provided by the United Nations and its auxiliary organizations. The old realist argument that the United States acted this way entirely of its own volition and could have acted differently is unpersuasive, as the "real" empirical facts tell a different story.

[4] The contention that the world has not become fundamentally more peaceful is, however, contestable. For example, the *Human Security Report 2005*, authored by the University of British Columbia's Human Security Center, purports to show that there has been a forty percent decrease in the number of wars waged around the world since 1990, and an eighty percent decrease of genocides and similar mass atrocities. The United Nations Development Program's *Human Development Report*, however, suggests that, while the number of armed conflicts may have decreased, their death tolls have increased, especially if indirect deaths resulting from armed conflict are counted. The point made here, however, does not hinge on statistics, but on the widely-held impression that today's world is still marred by bloody conflicts, a sentiment that may have been aggravated by the dimension terrorism and the fight against it has reached. *See* Human Security Centre, Human Security Report 2005: War and Peace in the 21st Century; United Nations Development Program, Human Development Report 2005, at 149 (2005), *available at* http://hdr.undp.org/reports/global/2005/.

of the state still figures as the centerpiece of virtually all international analyses, whether as a reincarnated Renaissance Leviathan, a spiraling star system continuously losing mass and energy, or simply an empty rhetorical shell. Therefore, an appreciation of Hudson's vision of "progress" cannot bypass this old bedfellow of modernity, but must attempt to locate it in the universe of contemporary social relations.

Where can that search begin? Where to look for the state? Initially, it is, as usual, a question of language, namely of what kind of phenomena are denominated by what kind of concept. Here, the state, like few other concepts, abounds with different definitions and points of origin. To account for the concept of the state one has to move along an, at its most abstract level, two-dimensional matrix with one axis denoting the historical phenomenon of that entity now called the state, and the other denoting the different theoretical paradigms through which that phenomenon has been conceived. The only fixed point within this matrix is the specific historical period during which the very term *state* comes into usage for the phenomenon in question, notably the period between the late Middle-Ages and the early modern period, when initially the generic Latin *status*, denoting a condition or position, acquires the added meaning of estate, or seat of rule, seat of power.[5] It thus becomes Machiavelli's *stato* which, however, then only denotes a particular and potentially changing condition or status of power-holding.[6] It is Bodin who, in his concept of *état*, sees power as permanently institutionalized through the person of the monarch ruling over a specific territory and, thus, establishes the sovereign state as a formal (legal) category.[7] Yet, it is only with the French and American Revolutions at the end of the eighteenth century that the state acquires its modern and contemporary connotation, namely as an abstract (legal) persona and organizational system differentiated from the person of the monarch and endowed with sovereignty by its people.[8]

However, neither on the phenomenological nor on the theoretical axes have reflections on the state been confined to this particular historical period. With regard to the former, the term *state* quickly became the generic term for all public organizational units above the family, be it the imperial "state," the city "state," the church "state," or the feudal "state."[9] Hence, as a phenomenon, this generic

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[5] *See* Martin van Creveld, The Rise and Decline of the State (1999); Wolfgang Mager, Zur Entstehung des modernen Staatsbegriffs (1968).

[6] *See* Niccolò Machiavelli, *The Prince & The Discourses, in* The Portable Machiavelli (Peter Bondella & Mark Musa trans., 1979).

[7] Jean Bodin, Bodin: On Sovereignty (Julian H. Franklin ed. & trans., 1992).

[8] *See* Alexis de Toqueville, Democracy in America (Gerald Bevan trans., Penguin Books 2003). *See also* Edmund Burke, Refelections on the Revolution in France (J.C.D. Clark ed., 2001).

[9] Van Creveld, *supra* note 5.

state has been traced back to the origins of human civilization as such, even if there is a strong point for limiting reference to the state to only those entities that conceptually and empirically correspond to the clearly defined, historically-evolved paradigm alluded to above. On the theoretical axis, the concept of the state is so closely tied to the emergence of many of today's distinct social science disciplines that it would be an understatement to say that sizeable bodies of literature on the state have evolved in each of these – in truth, they are, in their very essence, conceptually premised on the state. As Hedley Bull pointedly put it: "[…] one reason for the vitality of the state system is the tyranny of the concepts and normative principles associated with it."[10] In other words, the difficulty with accounting for the state and for changes in the nature of the state across time is not only due to the fact the state as a phenomenon has changed, but also to the partial inability of traditional disciplinary paradigms to conceptualize these changes, as is amply evidenced, for example, in international law's perennial difficulty of dealing with non-state actors in light of the classical conception of state sovereignty inherent to the discipline.[11] Thinking about the state of the state requires, hence, a reflection across the boxes[12] of disciplinary horizons that aims to shed light on the position of the state on either of the aforementioned axes, notably as an organizational phenomenon and as a theoretical construct.

That said, the very omnipresence of the state both as a phenomenon and as a theory makes the quest to locate it all the more difficult, for there seems to be no way, at least within reasonable limits of time and space, to determine where to start, where to end, and which particular story of the state to tell. As hinted above, most of today's academic social science and some of the humanities disciplines are premised on it, most notably law, both in its domestic (constitutional) and international variant; political science with its political theory and comparative politics branches and its now mostly independent offspring of international relations; sociology and general social theory; (macro-) economics; and, of course, general history. It thus becomes almost impossible to localize *it* within this analytical cacophony; though, to some extent, it is precisely this omnipresence that makes the state rather ephemeral, deeply implicating the (social scientific) observer's perspective in the phenomenon to be observed, with all the limitations as to objectivity this implies.

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[10] Hedley Bull, The Anarchical Society: A Study of Order in World Politics 275 (1977).

[11] *See* Shurtman, in this volume; Miller, in this volume.

[12] On thinking inside and outside of boxes, *see* David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. Int'l L. & Pol. 335 (Winter 2000).

For this reason, the following reflection will merely attempt to survey some of the changes that have occurred with the state as a theoretical concept during the last roughly seventy years of "progress in international organization."

B. *The State in Theory*

The contemporary reflection on the state has essentially concentrated on identifying the causes and assessing the consequences of changes impacting on the classical conception of statehood. That classical conception, as mentioned in the introduction, sees the state as a form of political organization based on a fixed geographical territory and a culturally defined nationality.[13] It is characterized by sovereignty, that is, internally, the monopolization of the use of force by an abstractly defined government and the (regular) exercise of power by law,[14] and, externally, by the mutual recognition of the equality of that (internal) sovereignty, and, hence, of all states.[15] In its modern version, sovereignty is additionally taken to be based on popular consent.[16] This classical conception is, in turn, challenged by the host of processes commonly subsumed under the term globalization. In a very broad sense, the main symptom of that challenge with regard to the state can be said to be the gradual shift from inter-state, *i.e*. international, to transnational relations, a movement driven by actors both above and below the level of the state and increasingly outside of its *de facto* control.[17] The potential consequences of this shift are manifold, though two stand out as particularly relevant: (1) globalization's impact on the concept of (state) sovereignty; and (2) globalization's effect on the conceptual marriage between the state as a form of political organization and the nation as a culturally-rooted political community. The following survey will attempt to sketch, in the first place, how globalization processes prompt changes in the classical conception of statehood, and, in the second place, how these changes specifically impact in sovereignty and the state-nation relationship.

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[13] *See generally*, Jens Bartelson, A Genealogy of Sovereignty (1995); Janice E. Thomson, *State Sovereignty in International Relations: Bridging the Gap Between Theory and Empirical Research*, 39 Int'l Stud. Q. 213, 214 (1995).

[14] *See, e.g.*, John H. Jackson, *Sovereignty Modern: A New Approach to an Outdated Concept*, 97 Am. J. Int'l L. 782 (2003); Jenik Radon, *Sovereignty: A Political Emotion, Not a Concept*, 40 Stan. J. Int'l L. 195 (2004).

[15] *See, e.g.*, Dan Sarooshi, *Sovereignty, Economic Autonomy, the United States, and the International Trading System: Representations of a Relationship*, 15 Eur. J. Int'l L. 651, 652 (2004).

[16] *Id*. at 654.

[17] *See, e.g.*, Andrew Clapham, Human Rights Obligations of Non-State Actors (2006). *See also* Rebecca M. Bratspies, "*Organs of Society": A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities*, 13 Mich. St. J. Int'l L. 9 (2005). *See* Schurtman, in this volume; Miller, in this volume; Kaiser, in this volume; Paulus, in this volume.

I. *The State of the World: Globalization Abounds*

In a tribute to Louis Henkin in the *Columbia Journal of Transnational Law*, Oscar Schachter identified three different processes that apparently contribute to the erosion of state sovereignty, namely what he terms (global) capitalism, the new civil and uncivil society, and latter day national particularisms.[18] This echoes many other accounts of the contemporary state, all of which attribute pressures on the old Westphalian idea of statehood to any or all of these processes. The common label they are almost always given is "globalization." The sound bite version of the latter is, perhaps, well summed up in Thomas Friedman's popular description, notably that globalization is:

> the inexorable integration of markets, nation-states and technologies to a degree never witnessed before – in a way that is enabling individuals, corporations and nation-states to reach around the world farther, faster, deeper and cheaper than ever before, and in a way that is enabling the world to reach into individuals, corporations and nation states farther, faster, deeper, cheaper than ever before.[19]

It is, put in more abstract terms, a "process with spatial co-ordinates that links and relates particular places through flows of people, information, capital, goods and services."[20] It is invariably described as a process, implying constant movement. It affects the conception of space and time. It alters relationships between people. And it is more or less all-encompassing. Zygmund Bauman speaks of a global figuration in which

> the network of dependencies spreads to absorb and embrace the furthest corners of the globe [so that] nothing that happens anywhere can be safely left out of account in calculations of causes and effects of actions: nothing is indifferent, or of no consequence, to the conditions of life anywhere else.[21]

More specifically, globalization processes have been associated with a number of quite clearly bounded "domains of activity and interaction,"[22] including the

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[18] Oscar Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 Colum. J. Transnat'l L. 7 (1997).

[19] Thomas L. Friedman, The Lexus and the Olive Tree: Understanding Globalization (2000).

[20] Rosemary J. Coombe, *Culture: Anthropology's Old Vice or International Law's New Virtue?*, 93 Am. Soc'y Int'l L. Proc. 261 (1999).

[21] Zygmund Bauman, Wars in the Globalisation Era (unpublished conference paper prepared for War and Social Theory: Reflections After Kosovo conference held at European University Institute and organized by Gerard Delanty, Heidrun Friese, & Peter Wagner, Mar. 10–11, 2000, on file with author).

[22] *See* Culture, Globalization and the World-System: Contemporary Conditions for the Representation of Identity (Anthony D. King ed., 1997); Many Globalizations: Cultural Diversity in the Contemporary World (Peter L. Berger & Samuel P. Huntington eds., 2003); James N. Rosenau, Distant Proximities: Dynamics Beyond Globalization (2003); The Cultures of Globalization (Fredric Jameson & Masao Miyoshi eds., 1998).

economic, political, technological, military, legal, cultural, and the environmental.[23] Of these, three have received particular attention, namely economic, socio-cultural, and political globalization.[24] Indeed, a large number of globalization stories consist of intermingled references to ongoing processes in these three discursive fields.

In essence, economic globalization denotes the gradual global interconnection of economic activities, both through the numerical increase of international and interregional business transactions, and through the gradual emergence of a global and transnational, as opposed to national or inter-national, frameworks of reference. However, the main aspect of economic globalization is not the replacement of national and regional markets with a plurality of segmented but genuinely global market spaces, but the global interconnection of, *inter alia*, local markets, production facilities, consumption habits, and legal framework.[25] Socio-cultural globalization, in turn, emerges from the "shambles" of an all-encompassing modernization process characterised by the "disembedding" of social relations out of their local-historical contexts, of a general process of "de-traditionalization," and of "de-territorialisation," the "interlacing of social events and social practice 'at distance' with local contextualities."[26] Here, the picture is one of fragmentation and individualization, which, however, allows the cosmopolitanized actor to construct and reconstruct, seemingly at will, a plurality of segmental identities from an ever increasing socio-cultural repertoire.[27] Yet, new constraints also emerge, such as global consumption and fashion patterns, professional codes and ethics, homogenized merchandise, "hyper-" and "hyperreal" spaces,[28] or stereotypical

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[23] David Held, *The Changing Contours of Political Community: Rethinking Democracy in the Context of Globalization, in* Global Democracy: Key Debates 20 (Barry Holden ed., Routledge 2000).

[24] For this tri-partite distinction, *see, e.g.*, Helmut Wiesenthal, *Globalisierung: soziologische und politikwissenschaftliche Koordinaten im neuartigen Terrain, in* Globalisierung und Demokratie 21 (Hauke Brunkhorst & Matthias Kettner eds., 2000).

[25] *See, e.g.*, Peer Zumbansen, *Quod Omnes Tangit: Globalization, Welfare Regimes and Entitlements, in* The Welfare State, Globalization, and International Law (Eyal Benvenisti & Georg Nolte eds., 2003).

[26] Michael Kearney, *The Local and the Global: The Anthropology of Transnationalism*, 24 Ann. Rev. Anthropology 549 (1995); Anthony Giddens, Modernity and Self-Identity 22 (1991).

[27] Though not even Giddens would describe the consequences of modernity in such overenthusiastic and unproblematized terms, his work has, arguably, contributed to rendering this rough image, especially outside social theory circles.

[28] A "hyperspace" denotes, according to Kearny, "environments such as airports, franchise restaurants, and production sites that, detached from local reference, have monotonous qualities." Kearney, *supra* note 26, at 535. Hyperreal spaces, in turn, refer to amusement parks and, increasingly virtual reality spaces where simulacra replace the "real" reality. *See* Umberto Eco, Travels in Hyperreality (1986).

multiculturalism. The "new" consciousness that globalization configures is, therefore, neither concrete nor unified,[29] but is, as Mike Featherstone has put it, like "a heap, a congeries, or an aggregate … of cultural particularities juxtaposed together on the same field, the same bounded space […]."[30]

Lastly, economic and social-cultural globalization drive political and legal globalization. On one hand, increased economic and social-cultural interdependence fosters the institutionalization of inter-state relations through an ever tighter net of international organizations. On the other hand, ever more relevant economic and social-cultural decisions are taken by non-state actors within a transnational, rather than international frame of reference. Under such conditions, the classical conception of the state as the primary global actor comes under immense pressure. This is also reflected in the way politics is conceived: the theory of cosmopolitan democracy, for instance, is premised on the decentralized democratization of those aspects of globalization that fall outside of the ambit of the nation-state. As one of its proponents, David Held, puts it: "in essence, the cosmopolitan project attempts to specify the principles and institutional arrangements which seek to render accountable those places and forms of power which are currently transcending the space of democratic [nation-state] control."[31] The vision that emerges here is remarkably present in Hudson's account of international organization. He speaks, for example, of the extra-legal international standard-setting generated by some of the League of Nations' and the International Labour Organization's activities.[32]

All of these processes and tendencies exert immense pressure on the classical concept of the state, and the first cracks may be appearing in its supporting columns.[33] However, despite the mounting pressure, these columns are still held together by two mighty concepts, sovereignty and nationality, which, for better or worse, keep the classical concept of the nation-state in the game as formally

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[29] John Tagg, *Globalization, Totalization, and the Discursive Field, in* Culture, Globalization, and the World System, *supra* note 22, at 155.

[30] Mike Featherstone, *Localism, Globalism, and Cultural Identity, in* Global/Local: Cultural Production and the Transnational Imaginary 70 (Rob Wilson & Wimal Dissanayake eds., 1996). Another phenomenon that contributes to socio-cultural globalization is, of course, the massive increase in cross-border migration, which leads to large-scale cultural *mesclage* in both the migrants', the "recipients," and also in the "left behind" culturespheres. *See* Stephen Castles & Alastair Davidson, Citizenship and Migration: Globalization and the Politics of Belonging (2000); Aihwa Ong, Flexible Citizenship: The Cultural Logics of Transnationality (1999).

[31] Governing Globalization: Power, Authority, and Global Governance 115 (David Held & Anthony McGrew eds., 2002).

[32] Hudson, *supra* note 1, at 25, 46.

[33] *See* Peer Zumbasen, *Die Vergangene Zukunft de Völkerrechts*, 34 Kritische Justiz 46 (2001).

still the most senior player. Only what Thomas Kuhn would term a revolutionary paradigm shift could unfasten these conceptual anchors and result in the state slowly drifting out of sight. Is such a revolution really in the offing? Are sovereignty and nationality about to be undermined?

II. *Beyond the Holy Grail: Sovereignty-old and Sovereignty-new*

Sovereignty has, of course, traditionally been considered as the "gold standard"[34] of international relations. As with many such defining concepts, it has always been averse to precise definition,[35] even though categorizations abound. Probably the best known contemporary definition comes from neo-realist international relations scholar Stephen Krasner, who distinguishes four types of references to the term (state) sovereignty: (1) interdependence sovereignty; (2) domestic sovereignty; (3) Vattelian sovereignty; and (4) international legal sovereignty.[36] Each implies a different dimension of sovereignty. The first refers to the state's power to effectively control its (territorial) borders and regulate transborder movements. The second refers to the state's authority over its internal affairs, most notably through the monopoly on the legitimate use of force within its borders as well as the rule of law. The third refers to the state's right to exclusivity of such (internal) rule, implying the right not to have any outside actors interfere with domestic affairs in law and in practice. The fourth refers to the principle that these features are bestowed upon political communities through recognition by other states, implying, in turn, the fundamental equality of actors so endowed. Krasner's fourfold distinction coincides with a number of other classifications, including the conception of two spheres of sovereignty: (1) internal (domestic) sovereignty as thematized in political and sociological theories of the state; and (2) external (interdependence, Vattelian and international legal) sovereignty, which is the main conceptual pillar of international law and one of the primary objects of study of international relations.[37] In addition, sovereignty has been likened to the concept of personal liberty in political theory, with its dual nature of the negative protection against (outside) intrusion, and the positive

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[34] Michael Milde, *Contemporary State Sovereignty Under the Microscope*, 52 U. Toronto L.J. (2001).

[35] Radon, *supra* note 14, at 195.

[36] *See* Stephen Krasner, Sovereignty: organized hypocrisy (1999). Interestingly, in this monograph Krasner originally uses the term "Westphalian" instead of "Vattelian" sovereignty, though in a later article he switches to the latter term – this being, of course, evidence of his changed interpretation of the historiography of the concept of sovereignty. *See* Stephen Krasner, *Rethinking the Sovereign State Model*, 27 Rev. Int'l Stud. 17 (2001).

[37] *See* Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 240–385 (2d ed. 2005).

affirmation of a particular identity.[38] In the case of sovereignty, this duality is manifested through the principle of territorial integrity and non-intervention, in the coupling of the state to a nation, and in the legitimating of the state's exercise of power by that latter component. Another distinction differentiates between formal and operational sovereignty, the former denoting the formal attributes of sovereignty possessed by the state, as outlined above, and the latter the *de facto* exercise of these attributes by any actor capable of doing so, whether state or non-state.[39] This distinction already points towards a possible dissociation of the concept of sovereignty from the concept of the state, which is one of the globalization-induced changes discussed below.

Yet, despite these attempts to structure the debate through classification, sovereignty has remained an "essentially contestable concept."[40] At the base point of that contestability lie the two basic positions that characterize stances on sovereignty across the disciplinary boundaries of international relations and international law. On the one hand, liberal interdependence theorists in international relations, and positivists in international law see as the essence of sovereignty the ability to control actors and activities within and across territorial borders, by means of institutional structures that operate through legal norms.[41] For realists in both international relations and international law, on the other hand, sovereignty is the state's *de facto* ability to make authoritative decisions, including those either surrendering sovereignty to other entities, as well as those fundamentally negating the sovereignty of other states, as occurs in war.[42] Martti Koskenniemi has analyzed these two approaches by stylizing them into what he terms the "legal" and the "pure fact" approaches, epitomized by Hans Kelsen and Carl Schmitt respectively.[43] To the former, sovereignty essentially denotes the competences of the primary subjects of international law (states) as determined by a legal order (international law) presumed to precede it.[44] From this normative,

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[38] Paul W. Kahn, *The Question of Sovereignty*, 40 Stan. J. Int'l L. 259, 262 (2004).

[39] Robert O. Keohane, *Hobbes's Dilemma and Institutional Change in World Politics: Sovereignty in International Society, in* Whose World Order: Uneven Globalization and the End of the Cold War 165 (Hans-Henrik Holm & Georg Sorenson eds., 1995).

[40] *See* Sarooshi, *supra* note 15, at 652. Sarooshi, in turn, refers to Samantha Besson. *See* Samantha Besson, *Sovereignty in Conflict: Post-sovereignty or Mere Change of Paradigms, in* Towards an International Legal Community?: The Sovereignty of states and the Sovereignty of International Law 131 (Stephen Tierney & Colin Warbrick eds., 2006). *See also* Costas Douzinas, *Speaking Law: On Bare Theological and Cosmopolitan Sovereignty, in* International Law and Its Others 35 (Anne Orford ed., 2006).

[41] Koskenniemi, *supra* note 37, at 228.

[42] *Id*. at 228.

[43] *Id*. at 226.

[44] *Id*. at 228.

i.e. "ought-based" perspective, sovereignty is not external to (legal) normativity, but a function of it. It cannot, by definition, be invoked against (international) law to describe or justify unilateral state action. Instead, it delimits the scope of action of an entity called the state the identity of which can only be understood from within the legal system or paradigm.

The "pure fact" approach sees sovereignty as outside of and, indeed, beyond the reach of the law. This perspective emphasizes the factual power or authority of historically grown political communities called states, with (international) law being, at best, a reflection of that "reality." Here, sovereignty is an analytical category for which law is merely an epiphenomenon, as articulated in Schmitt's idea that sovereignty does not primarily manifest itself when law is regularly complied with, but rather when it is deliberately broken in the instance of exception.[45] Sovereignty is, therefore, inherently external to the law, and yet its necessary foundation. Koskenniemi further points out how the "legal" approach is often associated with a restrictive, the "pure facts" approach with an expansive view of sovereignty, even if there is no necessary link between either approach and these respective positions.[46] More relevant, in the present context, than the scope each approach assigns to sovereignty, is the question of how each perspective conceives of the linkage between sovereignty and the nation-state, or, in other words, how changes in that linkage can be accounted for on either side of the dichotomy. Is it possible to conceive of sovereignty as divested from the state, as a free floating attribute that can be attached to all sorts of new actors? Or, conversely, can the concept of the state be meaningful without the attribute of sovereignty? Importantly, the response to these questions hinges not only on how the effect of globalization is interpreted by either theoretical horizon, but also by the way sovereignty is conceptualized in the first place.

On the "pure facts" side, which is today mostly associated with realist and neo-realist international relations scholarship, as well as with both critical and hyperrealist approaches – such as the "economic analysis of law" – in international law, two positions can be distinguished. On one side, there is what could be termed the "zero-sum" view of sovereignty,[47] which views sovereignty as a clearly identifiable set of features that are disposed of by international actors in an either/or way. Hence, any loss of all or part of these sovereignty-defining features by the state implies a correlative sovereignty gain by other actors, such as international organizations or sub-state actors such as private corporations, and

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[45] *Id*. at 226.

[46] *Id*. at 234.

[47] *See* Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. Int'l Econ. L. 841 (2003).

vice versa. From this perspective, the status of full-sovereignty-bearing classical statehood can be assessed by measuring the degree to which it still possesses the features constituting sovereignty. Although definitions of these features abound, most seem to include the following core elements:[48] effective control over territory and the people in it, including the monopoly on the use of force; and the recognition of that effective control by other states and the *de facto* lack of intervention by these states. In addition, there is what Janice Thomson has described as "meta-political authority," *i.e.* the ability to exclusively define the limits of the political sphere, and, hence, the area within which the sovereignty-holder can legitimately coerce.[49] From the "zero-sum" perspective, a further feature of sovereignty is, of course, its mutual exclusivity: any transfer of sovereignty-features to another entity, whether state or non-state, amounts to a loss of sovereignty on part of the original holder. Or, in other words, sovereignty cannot be shared; different features of sovereignty may be held by different entities, but no two such entities can hold the exact same features. This, in turn, implies a view of sovereignty as an essentially monolithic category that may change places, but that does not fundamentally change itself.

A slightly different take of this "zero sum" view has been elaborated by John Jackson, who sees sovereignty as a denominator for power allocation.[50] Power, in Jackson's view, is essentially decision-making power by actors with governing responsibilities, with these actors not being limited to the nation-state. Indeed, "sovereignty-modern," as he terms it, should no longer be considered a formal attribute hermetically tied to the state, but as an analytical expression of which actor exercises which degree of decision-making power on which level. Jackson thereby expands the semantic field occupied by sovereignty, but his conception of it still leaves its constitutive element, decision-making power, untouched. Sovereignty-modern nonetheless goes a considerable way towards merging the concept of sovereignty into the concept of governance, where the latter, on the most abstract level, represents the idea of political organization based on universally comprehensible principles of rationality and efficiency, as opposed to historically-contingent, state-based government. Yet, unlike the perspective explored below, sovereignty-modern does not incorporate a fundamentally different conception of the state, nor is its main ingredient, decision-making power, more than an extension-by-analogy of the way states have traditionally exercised their internal and external sovereignty. Sovereignty-modern remains within the "zero-sum"

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[48] *See, e.g.*, Helen Thompson, *The Modern State and its Adversaries*, 41 Gov't & Opposition 23 (Winter 2006); Thomson, *supra* note 13.

[49] Thomson, *supra* note 13, at 222.

[50] Jackson, *supra* note 14, at 789.

perspective, in which a finite and clearly delimited quantum of power is spread across different actors, the fundamental nature of which is, however, not affected by variations in their share of that power.

On the other side of the "pure facts" approach lies what could be termed the "sovereignty-revealed" perspective, which can be most closely associated with Stephen Krasner's neo-realist attempt to unmask classical state sovereignty as an "organized hypocrisy."[51] The part of the argument relevant here is Krasner's assertion that globalization does not so much challenge the state as that it reveals its true nature. By seemingly cutting into classical sovereignty, it merely brings to the fore what has, in his view, always been true about the Westphalian model, namely, that real state practice and the main components of classical sovereignty – the principles of non-intervention and of mutual recognition – simply do not match. The real-existing asymmetries of power among states, different levels of domestic legitimacy, and, generally, the absence of any higher authority capable of centrally determining valid norms and resolving disputes[52] relegate formal state sovereignty to the level of "organized hypocrisy," while implicitly acknowledging that such hypocrisy is inherent in a complex and potentially anarchical international society. Behind the smokescreen of formal sovereignty, however, states have, in Krasner's view, always tended to act on the basis of an assessment of the consequences of their actions in light of some pre-defined "national interest," rather than according to the appropriateness of their actions in relation to any supervening norm system.[53] What distinguishes the "sovereignty-revealed" perspective from the "zero-sum" perspective is that, while for the latter, sovereignty is a real expression of power or authority, the locus of which may shift in between actors, for the former, it is an epiphenomenon of the "real" functioning of international environments on the level of a productive myth. It is productive, because, in Krasner's view, the recurring rhetorical reference to formal sovereignty and the norms associated with it allows actors to, *prima facie*, satisfy the expectations of a multiplicity of domestic and international constituencies, while *de facto* acting according to a logic of consequences. From this perspective, the particular organizational form of the nation-state has never been more than one actor among several actors – such as empires, tributary state systems, city states, feudal oligarchies – even if it may have been the most successful one by evolutionary standards from the mid-seventeenth century up to today. Globalization, by challenging that organizational hegemony, may speed up the demise of the idea of state sovereignty, but not of the state itself, which has, in this view, always acted outside the conceptual straightjacket of sovereignty.

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[51] *See* Krasner, *supra* note 36.

[52] *Id.* at 21.

[53] *Id.* at 42.

Diametrically opposed to this strand, of course, are the perspectives associated with the "legal" approach for which the norms associated with sovereignty are definitive of the identity of the state and of international society. The traditional "legal" approach, still held by many positivist international lawyers, sees sovereignty as the normative force that keeps the elements of international society, most notably states, in a stable orbit. To these "classicists," divergence from that orbit, *i.e.* non-compliance with international norms, by individual (state) actors threatens not only the stability of what they consider to be an international system, but, indeed, the very system itself, and with it, the identity of each of its elements. While non-compliance on the part of states simply represents the traditional realist "pure facts" challenge to the "legal" approach's concept of formal sovereignty, the "hemorrhaging" of sovereignty to supra- and sub-state entities as a result of globalization processes falls outside of that dichotomy. This, in turn, has been perceived as profoundly threatening to the "legal" approach, because it undermines its contractarian foundations, which are premised on the exercise of hierarchically-conceived *government* by clearly defined individual sovereign entities. It replaces this approach with diffuse and a-hierarchical *governance* that emerges from the norm-oriented interaction of a diversity of actors.

There have been, however, a host of attempts to mount a defense of the "legal" approach in the face of these challenges. The main argument of that defense has been twofold. On the one hand, it has consisted of proposals to re-conceive the international norm structure, so as to better reflect current realities without surrendering the presumption of the norm-based character of the latter. Hence, in a move not dissimilar from Jackson's power-allocation analysis, Christoph Schreuer, among others, has argued that the traditional canon of international law has to be significantly revised to reflect the increasing verticalization of international relations.[54] Shadowing some of the discussions in European law on the nature of the European Union and its relationship with its member states, he suggests that international law itself should open itself up to other actors that increasingly assume governmental functions. This implies, in particular, a revision of the sources doctrine, including: (1) the (equalization) of international organizations with regard to treaty-making competences, and their recognition as a source for and not merely evidence of international custom; (2) a different conception of the relationship between domestic and international law – beyond the dualism-monism dichotomy and towards a more functionalist doctrine that takes into account the de facto vertical division of powers between sub-state actors, states, and international organizations; (3) a new stance towards participation in international

[54] Christopher Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law*, 4 Eur. J. Int'l L. 447 (1993).

relations – the granting of full legal personality to international organizations, the rationalization of state recognition criteria, the opening up of international conferences to international organizations and, perhaps, even other non-state actors such as NGOs; and (4) the granting of standing to these latter actors in international adjudicatory bodies such as the International Court of Justice. Besides, existing evolutionary trends in international law, notably the ever wider and deeper international protection of human rights, the internationalization and humanitarianization of the use of force, as well as its applicability to non-state actors such as terrorists, and the occasional internationalization of the central element of sovereignty, namely the control over territory and people, would all need to be consolidated and further expanded. However, Schreuer, like many reform-minded "legalists," leaves open the question *how* an international legal order based on classical state sovereignty is supposed to transform itself into a system of norm-based multilevel governance. Is it likely that states, already fearful of their waning role, will readily agree to their own conceptual marginalization?

Proponents of this approach point to the highly innovative nature of the European Union, as well as to some intra-state neo-federalist arrangements, such as those resulting from devolution in the British context. Neill McCormick, for one, the eternally brilliant enfant-terrible of British jurisprudence, derives from his analysis of the legal relationship between the European Union and its member states, as well as from his ruminations about the nature of devolution in the United Kingdom, the notion of "post-sovereignty" – essentially positing that international law does not need old-style state sovereignty in order to maintain stability, and that the latter has, indeed, been a hindrance towards the realization of democracy and subsidiarity as conceived from what he terms a "liberal nationalist" point of view. This notion will be discussed briefly in the following section.[55]

While these "legal" approaches essentially attempt to trade off the centrality of the state in favor of the preservation of sovereignty within a re-defined international legal framework, another line of thought takes an almost inverse direction by seeking to preserve the centrality of the state through a radical re-definition of sovereignty. For liberal internationalists such as Abram and Antonia Chayes or Anne-Marie Slaughter, this "new sovereignty" is based on the assertion that "states can only govern effectively by actively cooperating with other states and by collectively reserving the power to intervene in other states' affairs."[56] New

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[55] Neil Maccormick, Questionning Sovereignty: Law, State, and Nation in the European Commonwealth (1999); Milde, *supra* note 34.

[56] Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 Stan. J. Int'l L. 283, 285 (2004).

sovereignty is, in other words, a relational concept that expresses "[a state's] capacity to engage, rather than to resist."[57] Sovereignty is reconceived as the right to participate in international cooperation, with such cooperation considered not just one among several options, but the new paradigm of international reality. To these authors, globalization is not like some meteorite from outer space smashing into an inelastic structure of sovereign states, but rather like a light beam that is reflected by everything it falls upon. They take pains to accrue evidence that state actors are already, and quite voluntarily, interacting in "government networks" involving different governmental branches and levels of administration. In their view, such collaboration now forms the epistemic horizon that shapes the way states see themselves, as a result of a real transformation of the nature of sovereignty, rather than merely an assumed interest calculus. International organizations, like the United Nations, but even more so such institutions as the World Trade Organization, play a preeminent role in this "new world order,"[58] and they are seen as actually "sovereignty-strengthening" because they preserve effective (global) governance in the face of ever weaker individual state governments. This, then, could be called the "reflection" perspective of state sovereignty, since the latter's colors are taken to be profoundly changed by the lights of globalization. One interesting implication of this reconceptualization is that the state is not seen as the passive object of globalization processes slowly eating it up, but as a proactive subject, alongside other actors, and within ever tighter government-governance networks moving according to a common normative script.

Ultimately, both the "pure facts," and the "legal" approach attempt, in one way or other, to reconceive sovereignty, whether: (1) in the somewhat cynical form of Krasner's "sovereignty-revealed"; (2) as multi-level power-allocation in "sovereignty-modern"; (3) as participation in global governance processes in the "new sovereignty"; or (4) as the ultimate disentanglement of state and nation in "post-sovereignty."

III. *Heading Towards Divorce: Nation and State*

As was hinted above, globalization does not only impact on the nature of sovereignty and its relation to the state, but also on the second central premise of classical statehood, namely the "marriage" between state and nation, or, as Ernest Gellner would have it, between organization and culture.[59] As was already seen, statehood is the particular, historically contingent way to organize a political community – a

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[57] *Id*. at 325.

[58] *See* Anne-Marie Slaughter, A New World Order (2004).

[59] Ernest Gellner, Nations and Nationalism (1983).

res publica – that emerged from the centralized territorial dominion by a monarch, and that, within the European context, turned out to predominate over other organizational forms such as empire, feudal oligarchy, or cities. That predominance is, arguably, the result of a particular turn the state's territory-based form of organization took from the late eighteenth century onwards, or, more specifically, through the French and American revolutions. The important conceptual turn here was the re-definition of the political power, *i.e*. sovereignty, exercised over state territory away from the person of the monarch and towards the people inhabiting the territory, namely the nation. Importantly, however, the concept of nation is not, therefore, seen as simply derivative of the state, but is conceived of as a distinct entity parallel to and, indeed, preceding the state. The term comes, of course, from the Roman *natio*, denoting originally birth and origin, and then used as a generic reference to peoples with archaic, pre-political forms of organization. Indeed, the glue that integrates the nation is a shared culture based on common descent, rather than political organization, in the sense of *ethnos*, rather than *demos*. Even Kant, who, through his *Perpetual Peace*, became one of the matchmakers of the state's liaison with the nation, nonetheless still originally defines nation as "that group of people, which, on account of its members' common descent, comes to perceive itself as a civic community … "[60] Hence, *prima facie*, state and nation are far from an obvious match. On one hand lies the state with its rationality of administration. On the other hand lies the nation, rooted in an imagined community.[61] The state is bound together by political power. The nation is bound together by a broadly-understood idea of *Kultur* that includes, *inter alia*, shared language, ethnicity, habits, rituals and religion.[62] The crucial impulse for a union of the two comes only when the state's first spouse, namely the monarch, is revealed as a pathological adulterer and is thrown out. Instead, the nation, which through its linkage between people and territory, provides a ground for the state's political power much superior to the inherent cosmopolitanism of dynastically-organized monarchies, is chosen as the next and apparently definitive partner. The marriage is then celebrated in practice by the French and American Revolutions, and in theory by the social contractarians – Hobbes, Locke, and Rousseau – and by Kant. Both state and nation change through their union; the nation looses its

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[60] Immanuel Kant, *Anthropologie in pragmatischer Hinsicht abgefaßt - 2. Theil*, vol. 7 of ibidem., Kants Werke, Berlin: Königlich Preußische Akademie der Wissenschaften 311 (1968\69).; *see* Jürgen Habermas, *Staatsbürgerschaft und nationale Identität, in* Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des Demoikratischen Rechtsstaats 635 (4th ed. 1994).

[61] *See* Benedict Anderson, Imagined Communities: Reflections on the Origins and Spread of Nationalism (1991).

[62] Gellner, *supra* note 59, at 89.

primordial cultural authenticity and, instead, becomes the source and exclusively legitimate ground of sovereignty within the state which, in turn, functions as a mechanism for the realization of that sovereignty. Thus, state and nation merge into the nation-state, a form that, from then on, appears as an indissolvable unity. One consequence of this union, was, however, a gradual shift in emphasis away from the substance of a shared culture and common descent, and towards the form of the practice of national sovereignty through increasingly democratic decision-making. Culturally-defined nationality became, hence, secondary to formally-defined citizenship. It is the modern nation-state's citizenry which, in Kant's conception, is at once subject and object of political power. Even though it would take roughly another 150 years until this model of political organization became consolidated, the basic tenets of what would be known as the liberal democratic state with universal suffrage, separation of powers, rule of law, *etc*.—stem from this "age of revolutions."[63] The shift in emphasis from national to citizen had an important implication: it meant that membership in the political community was increasingly defined through abstract participation rights, rather than by common cultural descent. This led to an individualization and desubstantialization of nationhood, or, in other words, to a shift from the idea of an organic national whole to the idea of a community of citizens, as expressed in Ernest Renan's well-known phrase "l'existence d'une nation est … un plébiscite de tous les jours."[64] However, paradoxically, the very process that led to this transformation of nationality into citizenship also created the momentum for the subsequent re-appropriation of a culturally-defined national identity. Indeed, nationalism, the nation-state's monstrous offspring, is much more premised on the popular sovereignty brought about by the union of its parents, than it is on real common descent or shared culture. Nor is nationalism necessarily the nation-state's only or most dominant child. What is important is that, from the beginning, the liberal Kantian lighting of the stage of the state-nation wedding has not been able to reach some darker corners, and it is these which have continuously threatened the harmony of the union. Whenever irredentist aspirations to reaffirm national identity within and among states were able to dominate the expression of popular sovereignty, the state-nation relationship became instable, risking, and sometimes losing both territorial integrity and national sovereignty. The 20th Century "age of extremes" provides ample evidence for this self-destructive streak of the relationship.

Apart from the centrifugal potential that inheres in the very concept of the nation-state, the same globalizing processes that are so profoundly affecting classical

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[63] *See* Eric Hobsbawm, The Age of Revolutions: 1789–1848 (1996).

[64] Ernest Renan, *What is a Nation?, in* Nation and Narration, 8 (Martin Thom & Homi K. Bhabha eds., 1990) (translation of speech given at the Sourbonne on March 11, 1882).

state sovereignty, are also having an impact on the state-nation marriage. The most common consequence actually has to do with precisely the construction fault line that haunts the nation-state. For the pressures of globalization on individual states or regions, including, prominently, economic adjustment processes, cultural de-rooting, and large-scale im(migration), have in some cases, re-awakened the nationalist beast, destabilizing existing states, threatening the peaceful co-existence of neighboring states, and subduing formal popular sovereignty to substantive national self-determination and aggrandizement. This trend to re-nationalize – *i.e.* culturally homogenize – territory, with the consequent impulse for either fragmentation or expansion, could lead, according to Thomas Franck, to an "unmanageable world of 2000 mutually hostile states, each based on what their leaders claim to be the ideal: a pure-blooded, homogenous nation born to redress and avenge its woeful past."[65] Hence, the potential fostering of nationalist tendencies, and the consequent instable disequilibrium between organization (state) and culture (nation) is a first consequence of globalizing processes.

A second, though inverse, consequence is the proliferation of group identities, whether explicitly called nations or merely following the logic of nationality, within the state. This phenomenon has, of course, been treated within the now vast body of literature on multiculturalism, as well as in communitarian conceptions of political society. Both discussions deal with the question of whether and how different collective identities can be integrated within the same organizational scheme, namely the state. The communitarian, argument, in particular, is based on a critique of the dominant liberal storyline, according to which culturally-defined nationality is taken to have been entirely absorbed into an individualized, functional citizenship.[66] Against this postulate, communitarians assert that the universalist principles of the (liberal) democratic state require some form of cultural rootedness, which in turn, represents one of the core challenges to multicultural states. How can different collective identities be assumed to share, or by what procedures can they be made to share the same substantive commitment to popular sovereignty within the particular territorial boundaries that characterize the state. One response to this challenge has been the reference to so-called constitutional patriotism, which assumes that, in a grown constitutional system such as in the United States, different communities can, nonetheless, come to substantively share a commitment to that constitutional order which enables their self-affirmation. Yet, the empirical evidence on functioning multiculturalism is

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[65] Thomas M. Franck, The Empowered Self: Law and Society in the Age of Individualism 23 (1999).

[66] *See* Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (1996); Michael Walzer, Politics and Passion: Toward a More Egalitarian Liberalism (2005).

mixed, and the question remains whether what was conceived, even if always artificially, as a monogamous relationship between one form of organization and one culture is amenable to being transformed into a polygamous one, with one state being married to a multiplicity of nations. The European Union's ongoing struggle to grow into such a multinational state is evidence of the difficulties that this divergence from the classical model still entail.[67]

Beside either the hypostazation or the proliferation of nationhood, a third consequence of globalization processes on the state-nation relationship has been taken to be the withering away of the concept of nation. With the classical liberal thesis of the absorption of collective nationality into individual citizenship as a starting point, Thomas Franck, for one, has gone to considerable length to argue that the union between state and nation has essentially been a mechanism to forcefully impose an imagined national identity onto individual identity, with state sovereignty being the enforcement mechanism of that imposition.[68] Globalization, in this liberal millenarian view, breaks open this oppressive structure, by diffusing state sovereignty, and, yet more importantly, by increasingly empowering individuals to freely define their identities, and, in line with these, their loyalties. Polypatrism and *intercitoyenneté* are, hence, likely to become the norm, for the state will, in Franck's vision, remain in existence for some time to come, if only as one among several co-equal actors. Indeed, to Franck, the world is "on the verge of a new stage of human evolution in which loyalty to the [S]tate is transformed into a higher loyalty to humanity, symbolized by global … institutions of government, commerce, education, and communication […]."[69] It is a world fundamentally shaped by individuals and their supposedly freely defined preferences, and in this sense Franck's brave new *Promethea*[70] can be seen as closely linked to the cosmopolitan democratic project referred to above. In this cosmopolis, substantial (collective) culture gives way to a meta-culture consisting of the shared experience of continuous individual identity creation. This (meta-) culture of self-fulfillment is protected by global governance mechanisms based on liberal premises. The nation becomes a redundant category, and the state merely lends aspects of its organizational form to a de-centered network of global institutions. Although yet clearly a utopian vision, liberal millenarians and cosmopolitans see the world's *de facto* functional evolution clearly pointing towards their vision, as evidenced in the daily lives of an ever increasing number of people.[71]

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[67] *See* Yael Tamir, Liberal Nationalism (1993); Geneviève Nootens, *Liberal Nationalism and the Sovereign Territorial Idea*, 12 Nations & Nationalism 35 (January 2006).

[68] Franck, *supra* note 65, at 1.

[69] *Id*. at 59.

[70] *See* Florian Hoffmann, *The Empowered Self: Law and Society in the Age of Individualism*, 15 Leiden J. Int'l L. 725 (2002).

[71] Again, Hudson already prefigured this to some extent. Hudson, *supra* note 1, at 1.

C. *Conclusion – Wither the State?*

Hence, what is, then, the current 'state of the (S)tate'? Having embarked on a fly over of contemporary theory of it, the challenge of any conclusion will be to resist the seduction of a "middle-of-the-road" perspective, one which sees the nature of statehood as profoundly affected both by globalization processes and by international relations in the post-Cold War world, but which equally recognizes the continuing relevance of the state despite and, increasingly, because of the very phenomena at the root of its transformation. Such a perspective would be as deeply plausible as it would be reductive and, ultimately, empty of explanatory value.

What else is there to say about the present and future of the state? One way out would be to attempt to evade the question by musing about the nature of the matter that surrounds the contemporary state, namely that institutional-normative gel that has allegedly replaced both purely legal and purely power-based inter-state relations, notably (global) governance. The term was coined in contradistinction to traditional state-based government.[72] It is, however, primarily an analytical concept denoting different forms of rule-based decision making processes. Although it may be defined negatively as the absence of anarchy and chaos,[73] *i.e.*, non-governance, it does not have any particular, positive content. Different regimes imply different forms of governance, and all the generic term denotes here is the presence of some form of regime. Likewise, governance occurs on all political levels, with "global governance," in particular, referring to sets of rules and institutions dispersed across the globe and directed towards global policy issues.[74]

To many theorists of political globalization, governance alone cannot substitute the gaps of political authority created by economic and socio-cultural globalization. It lacks what to this line of thought is the most advanced concept the old

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[72] *See* David Held, Democracy and the Global Order: From the Modern State to Cosmopolitan Governance (1995); Aseem Prakash, Globalization and Governance (2000).

[73] The term "chaos" being used here trivially, for its mathematical definition is, of course, precisely not as a totally irrational, a-logical, and non-directional state, but as, in fact, obeying certain underlying rules. *See, e.g.*, Stephen H. Kellert, In the Wake of Chaos: Unpredictable Order in Dynamical Systems (1994).

[74] *See, e.g.*, René Foqué, *Global Governance and the Rule of Law: Human Rights and General Principles of Good Global Governance, in* International Law: theory and practice 25 (Karel Wellens ed., 1998); David Kennedy, *Background Noise? – The Politics Beneath Global Governance*, 21 Harv. Int'l Rev. 3, 52 (1999); Basak Cali & Ayca Ergun, *Global Governance and Domestic Politics: Fragmented Visions, in* Reflecting Critically on Global Governance 161 (Philip Müller & Markus Lederer eds., 2005).

nation-state was potentially able to produce, namely political legitimacy.[75] The latter is, of course, epitomized by two specific forms of governance, namely democracy and (human) rights, the interdependence of which is achieved, in the best of cases, within the nation-state, but not yet on the global level.[76] In respect of these, the literature on political globalization has taken a twofold approach.[77] First, it has adopted a, *prima facie*, empiricist-historicist perspective and thematized the worldwide expansion of both democracy and human rights within nation-states as a simple fact of historical destiny; ranging from the social-theoretical account of expansive modernization, to the historical-philosophical affirmation of the ultimate triumph of liberal (capitalist) democracy.[78] This line of thought seeks to provide empirical evidence for the argument that democracy and human rights are essential aspects of the general globalization process. A second line of thought has endorsed an overtly normative stance. In essence, it charges economic and sociocultural globalization with creating significant legitimacy gaps by promoting the transfer of increasing amounts of political authority away from liberal democratic nation-states, and to unaccountable bodies or wholly decentralized processes.[79] As a consequence, globalization processes need to be democratized – which is generally taken to imply the parallel expansion of human rights regimes.[80] This includes calls for the democratization of international organizations,[81] the greater inclusion of civil society organizations in the international political process,[82] as well as the

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[75] *See* Governing Globalization, *supra* note 31.

[76] For what is likely to be the most theoretically elaborate reconstruction of the originally Kantian intertwinement of democracy and human rights within the nation-state, *see* Habermas, *supra* note 60. For the global dimension of democracy, *see* The Transformation of Democracy?: Globalization and Territorial Democracy (Anthony McGrew ed., 1997); Globalization and Human Rights (Alsion Brysk ed., 2002).

[77] *See* David Held et al., Globalization Theory: Approaches and Controversies (2007).

[78] Thomas Franck has made a laborious attempt to "prove" that there is now such a thing as a "right to democracy" or democratic governance in international law. *See* Thomas M. Franck: The Power of Legitimacy Among Nations (1990); Franck, *supra* note 65 (1999). For a critical analysis, *see* Susan Marks, *The End of History? Reflections on Some International Legal Theses*, 8 Eur. J. Int'l L. 449 (1997); Russell A. Miller, *Self-Determination in International Law and the Demise of Democracy?*, 41 Colum. J. Transnat'l L. 601 (2003).

[79] McGrew, *supra* note 76.

[80] *See* Carol C. Gould, Globalizing Democracy and Human Rights (2006); Transnational Democracy in Critical and Comparative Perspective: Democracy's Range Reconsidered (Bruce Morrison ed., 2004).

[81] *See* Ian Shapiro & Casiano Hacker-Cordón, Democracy's Edges (1999); Andrea Ribeiro Hoffmann & Anna van der Vleuten, Closing or Widening the Gap?: Legitimacy and Democracy of Regional International Organizations (2007).

[82] *See* Mary Kaldor, Global Civil Society: An Answer to War (2003); Richard Falk, *The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society, 7* Iowa J. Transnat'l L. 333 (1997).

idea of a cosmopolitan democracy.[83] The last of these demands represents the most far-reaching response to the perceived legitimacy gap; instead of subscribing to an evolutionary view of modernity in which a world society, and a corresponding world government, is ultimately bound to emerge in strict analogy to the development of the state, the cosmopolitan democracy project is premised on the decentralized democratization of those aspects of globalization which fall outside of the ambit of the state. As Held puts it, "in essence, the cosmopolitan project attempts to specify the principles and institutional arrangements which seek to render accountable those places and forms of power which are currently transcending the space of democratic [nation-state] control."[84] In cosmopolitan democracy, individuals will have multiple political identities, as citizens, stakeholders, and members of different types of communities.[85] The objective is both to subject all exercise of political authority – in its classical sense, but, potentially, also in the deeper sense of all forms of power exercised over people – to democratic control, and to, thereby, interlink the manifold processes, institutions, and constituencies that are currently dispersed and fragmented. The ideal is not a unified world-state, but a democratic cosmopolis constituted by complementary political fields across diverse levels all of which are subject, in the last instance, to the control of cosmopolitanized individuals.[86] This, then, would be one way to look at, or rather, *through* the contemporary state. In the multiple interlinkages of individual and collective (non-state) actors we would behold "progress in international organization."

Another way to look at the future of the state would be to divest the concept of statehood from that of the "real existing" nation-states and project it onto the global level. Thus, the global world towards which we are allegedly moving would be conceived of as an analogy to the nation-state, as if the same socio-historical processes that led to the development of the latter were to repeat themselves in different conceptual guises on the way to a world-state. Hence, "international organization" would be seen as having an inherent *telos*, notably the increasing integration of the world's states into ever larger units, be they a United States of Europe, a Mercosur or Andean State Community, or, eventually, a United States of the World. Although, *prima facie*, this vision seems to most closely correspond to Hudson's, it is doubtful whether he would hold it today were he to repeat his original survey. Ultimately, the classical statist perspective is bound either to a

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[83] A classic among the now extensive literature on cosmopolitan democracy is Daniele Archibugi & David Held, Cosmopolitan Democracy: An Agenda for a New World Order (1995).

[84] Held, *supra* note 23, at 115.

[85] Held, *supra* note 72, at 226.

[86] *Id*. This resounds, again, with Thomas Frank's millenarian vision. *See* Franck, *supra* note 65.

form of political-economic structuralism, or to a somewhat naïve progressivism,[87] both of which have today lost much of their credibility.

A third way would be to go down the neo-medievalist road and see contemporary statehood as embedded in overlapping neo-imperial structures that may be territorial, such as the European Union,[88] or topical, as, for example, the international trade regime within the ambit of the WTO. In a sense, this neo-medieval option can be seen as a combination of the previous two: relations within the empire or commonwealth would largely correspond to different forms of governance, rather than government, yet there would be enough of a centre, whether geographical or institutional, to hold together and constitute as a recognizable entity the diverse individuals, cultural and ethnic collectivities, political organizations, and territorial boundaries of which it is comprised. The classical state would not, at least initially, cease to exist, but its central attributes would be gradually transformed. Hence, sovereignty would become merely an expression of the existence of empire, an ontological attribute signaling that it was imbued with both power and law. Nationhood, in turn, would give way to a multiplicity of overlapping identities the common trait of which would be their recognition by and within the empire. Lastly, political organization would become more mobile, moving to the level on which particular demands would be most efficiently addressed, whether that be on the old nation-state level, or below or above it. The way to such neo-medieval empires could well be paved by states themselves, notably by the initially quite literally imperialist tendencies of some dominant states or groups of states. Hence the United States and the (Western) states within its orbit, or China and its East Asian allies, besides the European Union itself, may initially act as the power generators that create the gravitational forces necessary to bring and hold together new empires. These core states would not govern in the way states have traditionally governed their people and territory, and they themselves would be profoundly transformed in the process of empire formation, so that in time, they would be taking on a life of their own. In this scenario, the nation-state would not so much wither away, as it would gradually be woven into a larger fabric.

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[87] Habermas, for one, arguably needs to (counterfactually) project the functioning of the late-modern nation-state onto a global frame in order to maintain the feedback loop between democracy and fundamental rights. *See* Jürgen Habermas, *Zur Legitimation der Menschenrechte, in* Die Postnationale Konstellation 170 (4th ed. 1998). For a liberal progressivism seemingly untainted by the "war on terror," *see* Anne-Marie Slaughter & G. John Ikenberry, Forging a World of Liberty under Law: U.S. National Security in the 21st Century – Final Report of the Princeton Project on National Security (Princeton University 2006), *available at* http://www.wws.princeton.edu/ppns/report/FinalReport.pdf (last visited June 2, 2007).

[88] *See* Jan Zielonka, Europe as Empire 4 (Oxford University Press 2006).

Would this be progress? Would it be possible to show that "international organization" had made progress, or not, if states went "medieval"? Hudson, when reflecting on the vision he had of the times to come, was frank about the difficulty of distinguishing between judgment and enthusiasm. He felt that by discerning the general trends, it would be possible to evaluate the reality of international relations in their light. And this led him to be modestly optimistic. Even though we know that this optimism was, in the short term, not warranted, it may still be taken to represent a legitimate way to deal with the certainty of the coming of the unknown. Perhaps, then, it would be appropriate to end this reflection on the state with a note of optimism on what will become of the state: no matter in what form, where, and how, it has a future.

Between Incapacity and Indispensability: The United Nations and International Order in the 21st Century

By Andreas Paulus

A. *Introduction*

In *Progress in International Organization*, Harvard Professor Manley O. Hudson draws a trajectory of the rising contributions by international organizations, in particular the League of Nations, to progress in the maintenance of peace and security, coming to the conclusion that: "[t]he current development of international law has turned away from war. It is directed towards the maintenance of peace."[1] And further that none of the perplexities of his time: "had thwarted the movement of our time toward international organization."[2]

Of course, international law is, alas, still dealing with war as much as with peace. But in the days after the fall of the Berlin Wall and the liberation of Kuwait, U.S. President George W. Bush could announce, in the Hudsonian spirit, a "new world order" centered around the United States and an invigorated United Nations.[3]

Fifteen years later, however, in the wake of another war against Saddam Hussein's Iraq, led by another President Bush, these high hopes for a new international order have faded. Shunned by the only superpower for not backing the use of force against an Iraq allegedly in possession of weapons of mass destruction and harboring terrorists, the U.N. appeared powerless. In the words of Richard Perle, then-Chairman of the U.S. Department of Defense's Defense Policy Board Advisory Committee:

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[1] Manley O. Hudson, Progress in International Organization 88 (1932).

[2] *Id*. at 122, 23, 45, 89.

[3] Statements of September 11, 1990, *in* 2 Public Papers of the Presidents of the United States: George Bush 1219 (1990); Statements of January 29, 1991 & Statements of April 13, 1991; *in* 1 Public Papers of the Presidents of the United States: George Bush 79, 366 (1991); Address Before a Joint Session of the Congress on the Cessation of the Persian Gulf Conflict (March 3, 1991), 27 Weekly Compilation of Presidential Documents 259 (January-March 1991). For early skepticism in this regard *see* George Abi-Saab, *A "New World Order"? Some Preliminary Reflections*, 7 Hague Y.B. Int'l L. 87 (1994).

Miller & Bratspies (Eds), Progress in International Law, pp. 289–314.

> as we sift the debris of the war to liberate Iraq, it will be important to preserve, the better to understand, the intellectual wreckage of the liberal conceit of safety through international law administered by international institutions.[4]

Before, in his speech to the General Assembly in September 2002, President George W. Bush had challenged the United Nations to either support the United States in its policy against Saddam Hussein, or risk irrelevance:

> All the world now faces a test, and the United Nations a difficult and defining moment. Are Security Council resolutions to be honored and enforced, or cast aside without consequence? Will the United Nations serve the purpose of its founding, or will it be irrelevant?[5]

In other words: not only Saddam Hussein was to be tested, but also the United Nations. Oddly enough, President Bush did not consider independent decision-making in the common interest to be a signal of the U.N.'s vitality, but offered accession to U.S. demands as the only conclusive test of "relevance."[6]

And further:

> My nation will work with the U.N. Security Council to meet our common challenge. If Iraq's regime defies us again, the world must move deliberately, decisively to hold Iraq to account. We will work with the U.N. Security Council for the necessary resolutions. But the purposes of the United States should not be doubted. The Security Council resolutions will be enforced – the just demands of peace and security will be met – or action will be unavoidable.[7]

The referenced action, which was later carried out, was to enforce purported Council decisions, even against or without the clearly expressed will of the Council pursuant to the procedures of the Charter. This was not Hudson's vision of progress, who had pointed out, in 1932, that "[n]o nation, not even the United States, can maintain a claim to be the special guardian of the world's peace."[8] It was, instead, a vision of hegemonic order,[9] in which global institutions would play a secondary role, if any.

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[4] Richard Perle, *United They Fall*, Spectator, Mar. 22, 2003, at 22.

[5] Address by Mr. George W. Bush, President of the United States of America, UN GAOR, 2d plen. mtg. at 6, 8, U.N. Doc. A/57/PV.2 (Sept. 12, 2002).

[6] *See* Michael J. Glennon, *Why the Security Council Failed*, 82 Foreign Aff. 16 (May/June 2003).

[7] *Id*. at 9.

[8] Hudson, *supra* note 1, at 96.

[9] On hegemonic law, *see* José E. Alvarez, *Hegemonic International Law Revisited*, 97 Am. J. Int'l L. 873 (2003); Detlev F. Vagts, *Hegemonic International Law*, 95 Am. J. Int'l L. 843 (2001). *See also* United States Hegemony and the Foundations of International Law (Michael Byers & Georg Nolte eds., 2003); Andreas L. Paulus, *The War Against Iraq and the Future of International Law: Hegemony or Pluralism?*, 25 Mich. J. Int'l L. 691, 724–27 (2004) (with further references). *See* Dellavalle, in this volume.

Five years after the fact, the U.S.-led invasion of Iraq without the backing of the Security Council has produced a situation recently described as having the potential for "civil war" even by the U.S. military leadership.[10] The quasi-hegemonic order designed by President Bush seems as incapable of fulfilling the security promise as the Charter system of collective security. It is an open question whether a U.N. legitimation of the U.S. attack would have changed the picture in any relevant way. Nevertheless, the U.S., and especially the U.K., attempt to receive U.N. support testifies to the "relevance" they ascribe to the legitimizing role of the U.N.[11] But, the later U.N. involvement at the stage of the occupation itself points in the opposite direction; the U.N., while failing to endorse the Iraq war as such, was nevertheless targeted by Iraqi insurgents.[12]

In 2006, it was the United Nations that again was called upon to broker a cease fire in the war between Israel and the Lebanese militia Hezbollah, if only because the United States alone was too much associated with Israel to be able to act as a neutral arbiter. While it took four weeks from the beginning of the war for the Security Council to adopt Resolution 1701 (2006) calling for a cessation of hostilities,[13] the compromise struck between the U.S. and France, Israel and Lebanon erased the originally envisaged Chapter VII mandate of the new UNIFIL force.[14] Rather, the resolution required the consent of the parties as a condition for the adoption of the resolution, a return to the pre-1989, cold war standard for Security Council operations.[15] As it turned out, this compromise

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[10] *See* Dana Priest & Mary Jordan, *Iraq at Risk Of Civil War, Top Generals Tell Senators*, Wash. Post, Aug. 4, 2006, at A1. For a transcript, *see* U.S. Senate Armed Services Committee Hearing on Iraq and Afghanistan, CQ Transcripts Wire, August 3, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/08/03/AR2006080300802.html.

[11] *See* Paulus, *supra* note 9, at 693–701; James Rubin, *Stumbling into War*, 82 Foreign Aff. 46 (September/October 2003) (with further references). For the official justification of the resort to war, *see* Letter Dated 20 March 2003 from the Permanent Representative of the United States of America to the President of the Security Council, U.N. Doc. S/2003/351 (2003); William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 Am. J. Int'l L. 557 (2003).

[12] For the SC resolutions on the occupation of Iraq and its transition to democracy, *see* Res. 1483 (May 22, 2003) and 1511 (Oct.16, 2003). The latter Resolution also deplored the loss of lives by the destruction of the U.N. headquarters through a terrorist attack on August 19, 2003.

[13] SC Res.1701 (2006).

[14] *See* SC res. 1701, op. para. 12 (deployment of an international force upon request by the government of Lebanon) with the French-U.S. draft of August 5, 2006, which had foreseen a more robust mandate under Chapter VII of the Charter in addition to the consent of the government of Lebanon. Associated Press Worldstream, Aug. 5, 2006, 4:42 PM GMT, OP 10, available at LEXIS-NEXIS. On the need for clear mandates, *see* Report of the Panel on United Nations Peace Operations ("Brahimi Report"), U.N. Doc. A/55/305-S/2000/809, Aug. 21, 2000, 10, para. 56.

[15] *See* Michael Bothe, *Peace-keeping, in* The Charter of the United Nations: A Commentary 648 (Bruno Simma ed., 2d ed. 2002).

rendered solicitation of troops for the U.N. peace force referenced in the Resolution much more difficult, with even the French sponsor of that compromise hesitating to commit forces.[16]

Finally, not even the crimes against humanity, if not genocide, committed in the Darfur region of Sudan, have brought about the collective "humanitarian intervention"[17] called for not only by the historic origins of a Charter drafted in the wake of the slaughter of the European Jews,[18] but also by the much trumpeted "responsibility to protect" announced at the 60th U.N. anniversary summit of the Heads of State and Government.[19] Although the Security Council has finally established a peace force for the conflict, the Sudanese government, which bears

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[16] *See* Edith M. Lederer, *France Said to Want Only Symbolic Force*, Associated Press, Aug. 17, 2006, *available at* http://www.militaryphotos.net/forums/showthread.php?t=88940.

[17] *See, e.g.*, Independent International Commission on Kosovo, The Kosovo Report: Conflict, International Response, Lessons Learned (2000); Antonio Cassese, *A Follow-Up: Forcible Humanitarian Countermeasures and* Opinio Necessitatis, 10 Eur. J. Int'l L. 791 (1999); Antonio Cassese, Ex iniuria ius oritur: *Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 Eur. J. Int'l L. 23 (1999); Simon Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law (2001); Thomas Franck, Recourse to Force: State Action Against Threats and Armed Attack 135–91 (2004); Humanitarian Intervention and the United Nations (Richard B. Lillich ed., 1973); Humanitarian Intervention: Ethical, Legal, and Political Dilemmas (J.L. Holzgrefe & Robert O. Keohane eds., 2003); Georg Nolte, *Kosovo und Konstitutionalisierung: Zur humanitären Intervention der NATO-Staaten*, 59 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 941, 946–48 (1999); Bruno Simma, *NATO, the UN, and the Use of Force: Legal Aspects*, 10 Eur. J. Int'l L. 1, 5–6 (1999). In the Kosovo debate, most States have rejected a right of humanitarian intervention. *But see* Belgium's pleadings before the ICJ, Me. Ergec (Belgium), Legality of Use of Force (FRY v. Belgium), Uncorrected Verbatim Record, ICJ Doc. CR 99/15, May 10, 1999, *available at* http://www.u-paris2.fr/cij/icjwww/idocket/iybe/iybeframe.htm.

[18] The Preamble of the Charter already makes the connection between saving humankind "from the scourge of war" and the protection of human rights. U.N. Charter, Preamble, paras. 1, 2. *See, e.g.*, Rüdiger Wolfrum, *Preamble, in* The Charter of the United Nations: A Commentary, *supra* note 15. One of the first Security Council proceedings concerned an intervention in the Franco régime in Spain. *See* Report of the Sub-Committee on the Spanish Question, at 11–12, paras. 18–22, 27, 28, U.N. Doc. S/75 (May 31, 1946) (no case of Article 39); *see also* the Polish reservation, at 16–17; Torsten Stein, *Article 36, in* The Charter of the United Nations - A Commentary, *supra* note 15. The contemporary sanctions régime has its origins in the intervention in racist Rhodesia. *See* Vera Gowland-Debbas, Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia 423–86 (1990).

[19] World Summit Outcome, GA Res. 60/1, U.N. Doc. A/RES/60/1, para. 139 (Oct. 24, 2005). *See* Sofaer, in this volume.

heavy responsibility for the mass killings in the first place,[20] continues to hamper the transition from a weak African Union Force in every conceivable way.[21]

What, then, is the United Nations still for? What if Richard Perle was wrong about the Iraq war, but right on target regarding the potential of the United Nations to police the world? In this chapter I will look at the original idea behind the Charter system of collective security and compare it to the role of the United Nations in the early days of the 21st Century, a century that is marred by the uneasy relationship of the inter-State system as built after World War II with an emerging, "neo-medieval"[22] world of non-State actors, from the economic forces of globalization to the neo-Islamist enemies of modernity, and with the neo-hegemonic aspirations of the only superpower claiming superior values and special rights for itself.

And yet, the skeptics of the U.N.'s capacity to contribute to world peace and justice must also consider the alternatives. While it remains almost impossible to bridge the gap between the need for a strong global institution to maintain and build international peace and security, on the one hand, and the universality required for a world body, on the other hand, this tension is inherent in the concept of a world organization for peace and security – at least as long as that world organization is not meant to become a world State. The U.N. must square the circle of being both effective in securing human and group rights while being respectful of the sovereignty the U.N. Charter secures for its member States. In most cases, it cannot order and enforce, in the true sense of the term, but needs to balance and to persuade. As Immanuel Kant long ago demonstrated,[23] a true

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[20] On 2 May 2007, Pre-Trial Chamber 1 of the International Criminal Court issued Warrants of Arrest for the Sudanese Minister of State for Humanitarian Affairs and an alleged leader of the Janjaweed militia, see Prosecutor v. Ahmad Muhammad Hasan ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), Press Release, 2 May 2007, Doc. ICC-PIDS-PR-2007, 0502-214.

[21] *See* Report of the Secretary-General on the deployment of the African Union-United Nations Hybrid Operation in Darfur, Doc. S/2007/759 of 24 Dec. 2007; Jean-Marie Guéhenno, Security Council, 5817th mtg., 9 Jan. 2008, S/PV.5817, p.3.

[22] *See, e.g.*, Jörg Friedrichs, *The Meaning of New Medievalism*, 7 Eur. J. Int'l Rel. 475 (2001) (with further references). *See also* Hedley Bull, The Anarchical Society: A Study of Order in World Politics, 245–47, 254–66 (2d ed. 1995).

[23] Immanuel Kant, *Zum ewigen Frieden: Ein philosophischer Entwurf, in* Werke in sechs Bänden 194, 208–13 (Wilhelm Weischedel ed., 1983) (1795); Immanuel Kant, *Die Metaphysik der Sitten, in* Werke in sechs Bänden 309, 474–75. Even Realists support the idea of a world State, if only to deplore its absence. *See* Hans J. Morgenthau, Politics Among Nations: The Struggle for Power and Peace 492 (5th ed. 1972) ("[I]n no period of modern history was civilization more in need of permanent peace, and, hence, of a world state, … in no period of modern history were the moral, social, and political conditions of the world less favorable for the establishment of a world state.").

world State would both be dangerous to freedom and too over-extended to be effective. As long as we have different levels of governance, however, efficiency and effectiveness will invariably suffer as well.

Nevertheless, I will conclude by arguing, that, for all its shortcomings, the United Nations remains as indispensable for the taming and channeling of global conflicts as it is likely to continue to be impotent to "solve" them alone in the post-September 11 world. In this regard, Hudson may have been naïve in his belief in progress, but he was right in one central respect. While international organization is not the solution to all of the world's problems, a solution of these problems, in particular those involving matters of war and peace, can no longer be found without some measure of international institution building.

B. *The Concept of the Charter: Order vs. Law*

Contrary to Richard Perle's claim, the Charter was not designed to implement international law. To the contrary, the founders of the Charter were wary of the failures of the League to maintain peace and security based on the mere application of existing law without regard to the underlying power relationships.[24] On the one hand, the Charter is based on idealistic premises, as the Preamble suggests:

> We, the peoples of the United Nations, determined
>
> to save succeeding generations from the scourge of war, … and…to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained….[25]

But note that it is justice that comes before existing law, and it is the aim of the organization "to establish conditions" conducive to the respect for law, not simply to apply and implement the law as it is. The same ambiguity is to be found in the purposes of the organization as contained in Article 1. The maintenance of international peace and security comes before the respect for existing law, and the

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[24] The following are representative of the seminal debate on the role of law in the inter-war years. Arguing that law needs to be regarded as complete to strive to reach peace, *see* Hersch Lauterpacht, The Function of Law in the International Community, 85–135, 420–38 (1933); Hudson, *supra* note 1, at 63–71. Arguing against this position, *see* Edward Hallet Carr, The Twenty Years' Crisis 1919–1939: An Introduction to the Study of International Relations 170–201 (2nd ed. 1946). On this debate, *see* Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960, at 361–69 (2002).

[25] U.N. Charter, Preamble.

peaceful settlement of disputes is to conform to the "principles of justice and international law," and does not simply consist in the application of pre-determined rules. Thus, even the most idealistic and aspirational parts of the Charter recognize the role of "peaceful change"[26] rather than blind obedience to international law.

On the other hand, a more "realist" reading of the Charter can be based on the special role given to the victors of the Second World War who hold veto power on the Security Council. The sovereign equality of States[27] gives way to the prevalence of the great powers (especially those with nuclear weapons) to react to threats to international peace and security, breaches of the peace and aggression.[28] While the exact relationship between binding decisions of the Security Council under Chapter VII of the Charter and the observance of international law remains vague,[29] it is commonplace that the Council is not bound by international law in place when deciding on measures "to maintain or restore international peace and security." The Council must only act "in accordance with the Purposes and Principles of the United Nations,"[30] which are themselves sufficiently broad to leave the Council a large margin of appreciation. Even those who maintain, as I do,[31] that the Council's discretion is not unlimited, have difficulty to point to unequivocal *ultra vires* acts by the Council.[32]

The most important Charter mechanism for the maintenance of peace and security is the relationship between collective security administered by the Security Council in Chapters VI and VII of the Charter, on the one hand, and the

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[26] On the term and its meaning, *see* Jost Delbrück, *Peaceful Change, in* 2 United Nations: Law, Policies and Practice 970, § 102 n.13 (Rüdiger Wolfrum ed., 1995) (compromise character of the respective Art. 14 UNC); Otto Kimminich & Markus Zöckler, *Article 14, in* The Charter of the United Nations: A Commentary, *supra* note 15.

[27] U.N. Charter art. 2, para. 1.

[28] U.N. Charter arts. 39, 27.

[29] *See* Jochen A. Frowein & Nico Krisch, *Introduction to Chapter VII, in* The Charter of the United Nations: A Commentary, *supra* note 15 (with further references).

[30] U.N. Charter art. 24.

[31] On *jus cogens* and the Charter, *see* Frowein & Krisch, *supra* note 29; Andreas L. Paulus, Jus Cogens *in a Time of Hegemony and Fragmentation*, 74 Nordic J. Int'l L. 297, 317–19 (2005) (with further references). *See also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosn. & Herz. v. Yugo (Serb. & Mont.)), 1993 I.C.J. Rep. at 440, para. 100 (Apr. 8).

[32] However, the present author would also limit the competence of the Council to legislate beyond specific instances of threats to international peace and security. *See* Andreas Zimmermann & Björn Elberling, *Grenzen der Legislativbefugnisse des Sicherheitsrats*, 52 Vereinte Nationen 71 (2004). *But see* Stefan Talmon, *The Security Council as World Legislature*, 99 Am. J. Int'l L. 175 (2005) (arguing that those limitations do not derive from Article 39 UNC).

unilateral right of individual and collective self-defense as contained in Article 51, on the other hand. States thus maintain the "inherent right" (English text) or "droit naturel" (French text) to individual or collective self-defense, *e.g.* alone and with the help of others, if and to the extent that the Security Council, albeit informed of the action, does not take the required measures to repel an "armed attack." Note, however, the extremely limited nature of this right to self-defense. It is only available "if an armed attack occurs" – a qualified form of attack not including, according to the dominant doctrine, small border incidents and similar minor offensive actions,[33] and it ceases when the Security Council itself "has taken measures necessary to maintain international peace and security."[34] Nevertheless, by giving the five permanent members the individual right to veto any resolution against their interests, and by leaving the judgment as to self-defense to individual States, the Charter does collectivize security in a complete fashion.[35]

Thus, the Charter model was not based on "international law administered by international institutions," as Richard Perle suggests, but it was conceived of as a system of "collective security" to embody the policing of the international community by the "five policemen," or the permanent members of the Security Council. It thus protects members against violations of the peace by other members or from the outside through the solidarity of all members except the wrongdoer[36] – and does not constitute a system of strict law observance to the detriment of peace and security. Even loosed from the bonds of law, as some understandings suggest the Permanent Five are, the absence of agreement between them, whether on Iraq or on Darfur, nonetheless hampers the effectiveness of the Charter system to this day.

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[33] *See* Albrecht Randelzhofer, *Article 51, in* The Charter of the United Nations: A Commentary, *supra* note 15 (with further references). *But see* the endorsement of the right to self-defense by Israel against the kidnapping of two of its soldiers and killing of 8, albeit combined with the more or less regular firing of Katyusha rockets into Northern Lebanon, by both the G8 leaders, *e.g.*, the heads of State and government of the 7 industrialized nations and Russia, G8 statement at their summit in St. Petersburg, July 16, 2006, *available at* http://www.lloyds.com/dj/DowJonesArticle.aspx?id=184866#, as well as, implicitly, by Security Council Res. 1701 (Aug. 11, 2006), para. 1 (calling for the end of offensive operations by Israel).

[34] *See* Sofaer, in this volume; Foley, in this volume.

[35] Note Hudson's skepticism towards the right to self-defense. Hudson, *supra* note 1, at 97 (calling the permissive interpretation of the Pact of Paris "a weasel interpretation"). *But see* Sofaer, in this volume.

[36] *See* Karl Doehring, *Collective Security, in* 1 United Nations: Law, Policies and Practice 110–15 (Rüdiger Wolfrum ed., 1995).

C. *The U.N. in 21st Century Conflicts*

The United Nations has rarely lived up to the task of guaranteeing collective security. Whereas the Charter contemplated the establishment of U.N. forces by special agreements with member States,[37] their absence transforms a system of collective security to one of the collective legitimation of the individual use of force. During the Cold War, the antagonism of the Eastern and Western blocs prevented the Charter system from functioning, with the sole – and problematic – exception of the Korean war when the Soviet Union pursued a boycott policy of an "empty chair."[38] Instead, the U.N. developed "peace-keeping" by "blue helmets,"[39] who were acting not to *enforce* peace but to *keep* peace with the consent of the parties to a conflict. In spite of their military weakness, the blue helmets could point to some measure of success, for example in Cyprus, but also to failures, as in Lebanon.[40]

I. *After the Cold War: From Collective Security to Genocide Nightmares*

Only after the end of the Cold War could the U.N. hope for a new era of super-power consensus on the Council. Indeed, when Saddam Hussein invaded and annexed Kuwait, the promise appeared to live up to reality. The Security Council passed a series of resolutions not only condemning the Iraqi action,[41] but implementing sanctions against Iraq under Article 41,[42] and authorizing the use of "all necessary means," including the use of military force, to liberate Kuwait.[43] Finally, the Council determined the conditions for an end to hostility and a cease fire.[44]

However, a closer look shows how far already the liberation of Kuwait strayed from the "Charter model," laying the groundwork for later calamities. The U.S.-led

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[37] U.N. Charter art. 43. *See* Sofaer, in this volume (proposing to invigorate this provision).

[38] On the effects of the policy of an "empty chair," *see* Bothe, *supra* note 15. On the status of the Unified Command in Korea, *see* Andreas Paulus, *Article 29, in* The Charter of the United Nations: A Commentary, *supra* note 15; Rosalyn Higgins, 2 United Nations Peacekeeping 1946–1967: Documents and Commentary 153–312 (1969). On the "empty chair" and its implications, *see id*. at 173–75 (with further references).

[39] On Peace-keeping generally, *see* Bothe, *supra* note 15 (with a comprehensive bibliography and the early practice).

[40] *See id*. at margin number 24 (Cyprus); *id*. at margin number 28 (Lebanon). For the future of UNIFIL in Lebanon, *see* SC Res. 1701, *supra* note 13 and accompanying text.

[41] See SC Res. 660, para. 1 (1990).

[42] SC Res. 661 (1990); SC Res. 665 (1990); SC Res. 670 (1990).

[43] SC Res. 678 (1990).

[44] SC Res. 686 (1991); SC Res. 687 (1991).

coalition claimed that it acted in collective self-defense of Kuwait with the authorization of the Council, under Article 51, rather than engaging in collective action under U.N. authority.[45] In spite of the wording of the Cease-Fire Resolution 687 (1991), which implied the existence of a conflict between Iraq and the U.N. and not only the coalition,[46] the United States, the United Kingdom, and initially also France claimed to retain the right to, if necessary, unilaterally enforce the terms of the cease-fire, culminating in the establishment of "no-fly zones" and the raid on Baghdad of December 1998.[47] The profound irony of this situation was only revealed well after the U.S.-led war against Iraq in 2003. Apparently, Saddam hoped to deter the U.S. and its allies by pretending to possess Weapons of Mass Destruction, but the U.S. used allegations that he possessed such weaponry as justification for intervention.[48]

It is not the place here to review the application of Chapter VII since the end of the first Iraq war and into the new century.[49] Suffice it to say that the wars of succession to the former Yugoslavia and the Rwanda genocide showed that, in the absence of soldiers to deploy on short notice – as contemplated by the original Charter model under Article 43 – the UN could not live up to its promise, neither to the preservation of inter-State peace nor to the protection of the most basic human rights. The confusion in the command structure of UNPROFOR contributed to the Srebrenica massacre,[50] just as much as the lack of support for the

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[45] *See* Frowein & Krisch, *supra* note 29, at margin note 22 (arguing that the Resolution fell under Article 42); Yoram Dinstein, War, Aggression and Self-Defense, 272–75 (5th ed. 2005) (arguing that the resolution was based on Article 51, with further references). The most fitting description, however, regards the Resolution as falling under a combination of the two. *See, e.g.*, Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 Am. J. Int'l L. 452, 457–63 (1991).

[46] See SC Res. 687, para. 34 (1991).

[47] For the frustration of international lawyers in view of the silence of the international community on this and similar attacks, *see* Luigi Condorelli, *A Propos de l'Attaque Américaine Contre l'Irak du 26 Juin 1993: Lettre d'un Professeur Désemparé aux Lecteurs du JEDI*, 5 Eur. J. Int'l L. 134 (1994). *But see* W. Michael Reisman, *The Raid on Baghdad: Some Reflections on its Lawfulness and Implications*, 5 Eur. J. Int'l L. 120 (1994).

[48] *See* Paulus, *supra* note 9, at 701–06, with further references.

[49] *See, e.g.*, Jochen A. Frowein & Nico Krisch, *Article 42, in* The Charter of the United Nations: A Commentary, *supra* note 15.

[50] The U.N. has tried to draw the lessons of this horrible incident. *See* Report of the Secretary-General Pursuant to General Assembly Resolution 53/35 (1998), Srebrenica Report, U.N. Doc. A/54/549 (Nov. 15, 1999). *See also* reports from France and the Netherlands regarding the involvement of the peace-keeping forces in the massacre: Assemblée générale (France), 11th legislature, Rapport d'information sur les évenements de Srebrenica (Nov. 22, 2001); Netherlands Institute for War Documentation, Srebrenica: A 'Safe' Area, (Apr. 10, 2002), *available at* http://www.srebrenica.nl/en/a_index.htm. For an account of the US position, *see* Samantha Power, A Problem From Hell: America and the Age of Genocide 391–441 (2002).

Belgium and Canadian peace-keepers in Rwanda contributed to the death of up to one million people in a couple of months, probably the greatest loss of civilian lives in such a short period since World War II. The *nostra culpa* half a decade later of U.N. Secretary General Kofi Annan,[51] at the time the man responsible for peace-keeping at the U.N., cannot console the victims and their relatives. It also fails to remedy the structural reasons for this disaster of unspeakable proportions.

But the post-Cold War conflicts do not follow the Charter model in literal terms. Inter-State wars, the scourge of the early 20th century, are on the wane, and when they occur, international intervention remains precarious – from the Iraq/Iran war to the Eritrea/Ethiopia conflict. The "new" conflicts mostly have an inter-State component, but result from more complicated interactions between States and non-State actors, not all of them external, but certainly with external support. Whereas, during the Cold War, most of these conflicts had, or would include at some point, a component of inter-block confrontation, after the fall of the Berlin wall, it is mostly armed groups and States fighting each other, at times in the context of failed or failing State structures. While a traditional reading of international law may tend to regard the relationship between State sovereignty and international order as a zero sum game, less sovereignty would lead to more international authority and *vice versa*, the "new" system demonstrated how international order depends on the functioning of sovereign States. Enabling States to be sovereign on their territory – and to accept democratic processes and mechanisms of regional autonomy to give the formerly suppressed a stake in the new community – becomes a new challenge at least equal to the need of taming sovereignty by getting States to accept a minimum of world order rules.[52]

In the absence of global military or police forces, however, the United Nations must rely on States. In this alternative – Thomas Franck speaks of a "franchise system"[53] – the United Nations uses its unrivaled international legitimacy to

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[51] Secretary-General, In 'Mission of Healing' to Rwanda, Pledges Support of United Nations for Country's Search for Peace and Progress, Press Release SG/SM/6552 AFR/56, (May 6, 1998). "We must and we do acknowledge that the world failed Rwanda at that time of evil. The international community and the United Nations could not muster the political will to confront it." *Id. See also* Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, U.N. Doc. S/1999/1257, (Dec. 15, 1999). On the desperate situation of the peacekeepers on the ground, *see* the memoir of their chief officer, Roméo Dallaire, Shake Hands with the Devil: The Failure of Humanity in Rwanda (2003). On the role of the Clinton administration, still haunted by the Somalia debacle, *see* Power, *supra* note 50, at 329–89.

[52] *See* Hoffmann, in this volume.

[53] Thomas Franck, *The United Nations as Guarantor of International Peace and Security: Past, Present, Future, in* The United Nations at Age Fifty: A Legal Perspective 25, 31 (Christian Tomuschat ed., 1995).

authorize States to do its job. The problem with this system, however, consists in the mostly self-interested nature of the support offered by third States.[54] Either States simply wish to make money, but often lack the necessary well-trained forces and modern equipment, or they have their own political motives not always in harmony with those of the U.N. Therefore, international intervention may become lopsided and erratic rather than systematic. The outcome thus is not collective security for all, but for the happy few able to enlist the global media or powerful allies. Of course, one also should not underestimate the security successes of the United Nations. It is in the nature of armed conflict that it is difficult, if not impossible to "solve" a conflict, even less so from "above," or from far away, with the best of intentions and unlimited means. Thus, for all their shortcomings, the relative peace in places such as Cambodia, Bosnia and Kosovo, or the independence of East Timor, should be counted as successes, even if they are always in danger of degrading. But the relativity of those results demonstrates the limitations of "collective security." If this may well be regarded as progress, it is slow and cumbersome, and in permanent danger of derailing.

II. *The UN and the Maintenance of Peace after September 11, 2001*

Then came the terrorist attacks of September 11, 2001, the true and early turning point of the new century. Gone is the enthusiasm for a "new world order" of the first President Bush in the wake of the liberation of Kuwait.[55] His son, at first, appeared to rely on international solidarity after the worst terrorist attack in U.S. history, only to shun international institutions later. President George W. Bush did not ask for a Security Council resolution explicitly authorizing the use of force against al Quaeda and its Taliban protectors in Afghanistan, but was happy with an implicit endorsement of the right to self-defense against non-State actors of uncertain legal status.[56] The U.N. was welcomed, however, when it came to rebuilding Afghanistan after the successful U.S.-led uprooting of the Taliban regime. This rebuilding effort, in which the U.N. was urged to play a significant role, included both physical infrastructure and governing institutions with the aim of making Afghanistan a democratic State. It also rendered anti-terror measures binding on States, in spite of the dubious legality of law-making by the Council.[57] Nevertheless, the example shows that the U.N. was able to act

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[54] *See* Dellavalle, in this volume.

[55] *See supra* note 3.

[56] SC Res. 1368 and 1373 (2001), Preamble.

[57] *See supra* note 32. *See* Oellers-Frahm, in this volume; Walter, in this volume.

against the use of force by non-State actors, re-interpreting Article 51 in a way that allowed for unilateral self-defense not only against a terrorist group, but also its protector State.[58]

When the United States attacked Saddam Hussein's Iraq, another attack took place on the constitutional front of the U.N. Charter. The claim of a unilateral right to "pre-emptive" self-defense against individual groups or States suspected of possessing WMD in the U.S. National Security Strategies of 2002[59] and 2006[60] puts the whole Charter system of collective security in doubt. The Charter is premised on the assumption that self-defense would only be available in the face of Security Council inaction, and only to repel an existing armed attack.[61] Although the latter term may include the anticipatory use of force when an armed attack is imminent and no peaceful alternative exists, the so-called *Caroline* principle,[62] the right to self-defense is limited to instances of a "clear and present danger," and does not extend to long term threats. For these, the Charter provides for collective security mechanisms. The Security Council is authorized to react to mere "threats of the peace"[63] when direct aggression is not imminent or even likely, whereas Article 51 demands the previous occurrence of an actual "armed attack."[64]

It is impossible to say, however, whether U.N. authorization would have led to different results in Iraq. Indeed, the U.N. was involved during the occupation phase and in the run up to the first elections.[65] This involvement could not make up for the whole affair's glaring lack of legitimacy. Nevertheless, the U.N. came out of an occupation it had opposed almost as battered as the U.S. Having been targeted itself and lost some of its very best and brightest to a devastating terrorist

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[58] *But see* the (overly narrow) interpretation of the SC resolutions by the ICJ in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of Jul. 9, 2004, 43 I.L.M. 1009, para. 139 (2004).

[59] The National Security Strategy of the United States of America (Sept. 2002), *available at* http://www.whitehouse.gov/nsc/nss.pdf.

[60] National Security Strategy of the United States of America (March 2006), *available at* http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf.

[61] U.N. Charter art. 51. *See, e.g.*, Randelzhofer, *supra* note 33.

[62] Letter from Daniel Webster to Lord Ashburton, Aug. 6, 1842, 2 Dig. Int'l L. 412 (John Bassett Moore ed., 1906); *see also* Robert Y. Jennings, *The Caroline and McLeod Cases*, 32 Am. J. Int'l L. 82 (1938). The Nuremberg judgment regarded the *Caroline* Case as the ultimate limit of the anticipatory use of self-defense. *See* International Military Tribunal (Nuremberg), Judgment and Sentences, 41 Am. J. Int'l L. 172, 205 (1947). *See* Foley, in this volume; Valek, in this volume; Davis, in this volume.

[63] U.N. Charter art. 39.

[64] *See, e.g.*, Randelzhofer, *supra* note 33, at margin number 16–36 (with further references).

[65] *See, inter alia*, SC Res. 1511 (2003); *see also*, in particular, SC Res. 1546 (2004) on the end of the occupation phase.

attack, ultimately it could not deliver democratic stability to a country marred by internal divisions. Iraq, it appeared, sounded the death knell just as much for collective security as it did for U.S. unilateralism.

The effect has been a reluctance to deploy military force in the midst of an ongoing armed struggle. The "African world war" in Congo was tamed, certainly, by a U.N. force, the deployment of which was conditioned on a cease fire agreement, the Lusaka agreement, but also on its actual observance.[66] Again, as in Rwanda before, the U.N. operation proved unable to prevent the Bunia massacre against civilians in 2003. This time, however, the UN at least authorized a multinational force under EU auspices to quell the violence.[67] Only when MONUC took over again, did it receive a strong mandate under Chapter VII of the Charter.[68] The Bunia massacre was repeated in Bukavu only as a farce, but a deadly one at that.[69] It was not the cease fire that proved problematic, however, but the internecine fighting behind the cease fire line in Eastern Congo. Whether the force will be able to keep the country at peace remains to be seen, but a force of less than 20,000 is hardly able to get a country the size of Congo under anything resembling control. MONUC again shows the reluctance of the U.N. members to get involved in a complicated civil war in a country that, in spite of its natural riches, is seldom at the center of international attention. Nevertheless, the relative calm in Congo since 2004 shows that, at times, even modest efforts can be effective when a certain resolve exists to carry things through.

Such resolve seems to be lacking among some members of the Security Council in the case of the alleged genocide[70] and civil war in the Darfur region of Sudan.

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[66] *See, e.g.*, SC Res. 1341, paras. 20–22 (2001). MONUC was established by SC Res. 1291 (2000) to implement the Lusaka peace agreement between the parties.

[67] *See* SC Res. 1484 (2003) (Operation Artemis).

[68] SC Res. 1493 (2003).

[69] *See* Somini Sengupta, *2 U.N. Peacekeepers Killed in Eastern Congo*, N.Y. Times, June 7, 2004, at A3; Declan Walsh, *While His Soldiers Rape and Pillage, the Rebel General Insists: We Come in Peace*, Independent, June 4, 2004, at 30.

[70] In 2005, the U.N. Commission of Inquiry established by SC Res. 1564 (2004) was unable to conclude that genocide had occurred and left this determination to a future court or tribunal. In any case, it regarded the attacks against the civilian population as crimes against humanity and war crimes. *See* Report of the International Commission of Inquiry on Darfur 124 (Jan. 25, 2005), *available at* http://www.un.org/News/dh/sudan/com_inq_darfur.pdf. Whether the present situation in Darfur amounts to genocide or "only" to crimes against humanity at a massive scale is hotly debated, although the humanitarian imperative in both cases appears more or less identical. The Commission correctly stated that, depending on the circumstances, these crimes could be of no lesser gravity than genocide. *Id.* at 132. However, only in case of genocide, the Genocide Convention contains, in its Article I, an unambiguous obligation of third States to prevent its occurence – an obligation States seem disinclined to be seen

Again, the U.N. is only able to keep the peace in those regions in Southern Sudan in which a political compromise is already in place.[71] Although both the U.N. Secretary General and the United States were trying hard, the U.N. has proved to have great difficulty to convince the Sudanese government to accept U.N. forces on their territory instead of the hapless African Union forces. Again, a deployment without the consent of the parties, or at least the territorial State that is itself party to the conflict, would require resources and a political will absent at the U.N. and lacking in its member States. Iraq has certainly contributed to the increasing reluctance regarding outside intervention by force in situations of civil war and internal conflict. As in Rwanda, however, the Security Council has only recently mustered the determination to send peace-keeping forces,[72] but with an uncertain mandate as to whether its deployment was to depend on the consent of the Sudanese government.[73]

In spite of all the talk of "robust peace-keeping,"[74] the U.N. seems to have reverted, to a certain extent, to the *modus operandi* of the Cold War era, in that its activity is limited to instances where the parties to the conflict have adopted something akin to a cease fire agreement and consent to the multilateral deployment of U.N. troops. The 2006 conflict between Israel and Hezbollah in Southern Lebanon is a further case in point. On the insistence of one of the parties, Resolution 1701 (2006), which strengthens the existing UNIFIL observer force, requires the consent of Israel and Lebanon. Lebanon's government, of course, include representatives of Hezbollah. The Resolution, thus, reverts to the old days of peace-keeping exclusively based on the consent of the parties to a conflict.[75] However, it also demonstrates that a relatively strong mandate can be based on consent instead of a binding Chapter VII resolution. The point is not the legal basis upon which an operation rests, but the content

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violating. Again, however, crimes against humanity and war crimes also carry the obligation to extradite or punish. *See also* David Luban, *Calling Genocide by its Rightful Name: Lemkin's Word, Darfur, and the UN Report*, 7 Chi. J. Int'l L. 303 (2006) (arguing that the definition of genocide needs to be amended).

[71] *See* SC Res. 1547 (2004); SC Res. 1627 (2005) (establishing the UN(A)MIS mission in Southern Sudan).

[72] SC Res. 1706 (2006).

[73] *See infra* note 102 and accompanying text.

[74] *See* Report of the Panel on United Nations Peace Operations ("Brahimi Report"), paras. 48–64, U.N. Doc. A/55/305–S/2000/809, (Aug. 21, 2000). The report does not use the term as such, but emphasizes the need for robust doctrine and realistic mandates. *Id.* at ix, 10, para. 55. Others also speak of a "shift to robustness." *See* Ian Johnstone et al., *The Evolution of UN Peacekeeping: Unfinished Business*, 80 Friedens-Warte 245 (2005).

[75] SC Res. 1701 (2006).

of its mandate. Nevertheless, a stronger mandate will usually be easier to perform under some form of "obligation from above" rather than the free will of the parties concerned.

After September 11, 2001, the U.N. continues to prove useful for the legitimation of the use of force when necessary, but has failed to show that it can, by itself, fulfill the task given to it by its framers: "to save succeeding generations from the scourge of war."[76] But it is not enough to criticize the U.N. for its slowness, its reliance (and dependence) on non-democratic States and human rights violators or its mismanagement. The challenge consists in devising alternative institutional settings in which the organization can fulfill its tasks in spite of its shortcomings. In addition, the organization must learn to deal not only with inter-State wars, but increasingly with conflicts between States and non-State actors such as terrorist groups, and even among non-State actors, as in Darfur.[77] In the latter case, Security Council action cannot rest on consent as easily as in inter-State conflict.

If one reads the primary mandate of the U.N. Charter to be "collective security" in the full sense of the term, one must be disappointed by this U.N. record. Indeed, the story is a disappointing one if measured against Hudson's euphoria for "progress in international organization." But to downgrade the United Nations to a mere talking shop[78] underestimates its indispensable function in peace-making and in legitimizing the use of force in a world where the unilateral use of force is increasingly doomed to failure – and not only the unilateral use of force by the U.S. in Iraq. In addition, if one made the counter-attempt to analyze the successes and failures of unilateralism, one cannot but conclude that multilateralism has the better chance of success, at least in the long run.[79] In his contribution

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[76] U.N. Charter, Preamble, para. 1.

[77] For a beginning, *see* the recently adopted Global Counter-Terrorism Strategy, U.N. Doc. A/RES/60/288, Annex (Sept. 8, 2006). Still missing, however, is a comprehensive definition of terrorism.

[78] *See* Sofaer, in this volume.

[79] The examples of unilateral failures abound, from the Soviet invasions of Afghanistan to Iraq's aggressions against Iran and Kuwait, to the U.S. adventures from Vietnam to Iraq II, in particular if compared to the more successful operations in Korea and the former Yugoslavia, where the U.S. was backed by international institutions, if, at times, not by the U.N. Sofaer's list, in his contribution to this volume, of unilateral success neglects, for instance, Gorbachev's willingness to co-operate instead of resisting the end of the Cold War. Sofaer's mention of Nicaragua as a success of U.S. intervention seems to contradict the fact that it was peaceful accommodation rather than the Contra war which brought peace. It is ironic that, at the time of this writing, the Sandinista leader of the time, Daniel Ortega, has been re-elected president of Nicaragua. *See* Sofaer, in this volume.

to this volume, Sofaer concedes this much and suggests strengthening the Charter system by allowing a more effective collective or individual use of force.[80] This approach appears to rest on the belief that the use of force is the solution rather than the problem in inter-State relations. This is not only a most unlikely reading of the U.N. Charter as a system of collective security against the outbreak of violence. This approach also is not born out in practice, which demonstrates that the use of force is problematic even when appropriately justified.

It is difficult, if not impossible, to draw a single set of conclusions from the experience with the "progress" of international organization with regard to questions of peace and security. The U.N. has, at best, a mixed record, in particular when its mission is as broadly defined as in the Preamble and in Article 1 of the Charter. However, it has also become clear that unilateral action is even less promising than collective action under a U.N. mandate. The challenge, therefore, consists in strengthening collective mechanisms for conflict resolution. This is at the heart of the attempts at a U.N. reform undertaken in the second term of U.N. Secretary General Kofi Annan.[81]

D. *U.N. Reform: Towards an Institutional "Responsibility to Protect"?*

More than a year after the summit of the Heads of State and Government that started the implementation phase of the most recent round of U.N. reforms, the most ambitious plans have yet to materialize – from the reform of the composition of the Council to the effective implementation of the "Responsibility to Protect" populations from crimes against humanity and genocide. And yet, after the first disappointment at the feeble outcome document of the anniversary summit of Heads of State and Government,[82] the glass appears half-full rather than

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[80] *See* Sofaer, in this volume ("Unlike the League, the United Nations has developed a substantial capacity for voluntary peacekeeping and responding to humanitarian crises such as famines and earthquakes, and at times has effectively confronted evils like apartheid and aggression.").

[81] For the reform proposals of Kofi Annan, *see*, in particular, Renewing the United Nations: A Program for Reform, U.N. Doc. A/51/950 (July 14, 1997); In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General, U.N. Doc. A/59/2005 (Mar. 21, 2005).

[82] World Summit Outcome, GA Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005). On the disappointing aspects, *see* Christian Tomuschat, *Einführung*, 80 Friedens-Warte 223 (2005). A more ambitious draft had been thwarted not the least by a U.S. bid to re-negotiate the document at a very late stage. For the draft before the arrival of US Ambassador John Bolton, *see* Revised Draft Outcome Document of the High-Level Plenary Meeting of the General Assembly of September 2005 Submitted by the President of the General Assembly, U.N. Doc. A/59/HLPM/CRP.1/Rev.1 (July 22, 2005).

half-empty.[83] After all, in spite of a less-than-hospitable international climate, the Peace Building Commission[84] and the Human Rights Council[85] have been established – the latter in spite of U.S. opposition to the compromise reached.[86] The Responsibility to Protect also has been recognized in principle.[87] Both the administrative reforms of the General Assembly and the Security Council reforms are lagging behind, however. Ultimately, the true test of the reform lies in its eventual contribution to a more swift and effective reaction to threats to international peace and security.

With regard to U.N. action under Chapter VII, the necessary reforms would concentrate on enhancing the readiness of U.N. member States to provide troops and on allowing for the rapid, effective, and efficient reaction to new threats, both to inter-State peace and to the massive violation of human rights. Large-scale violation of human rights is often the harbinger for new conflicts, and the earlier the reaction, the better the chances of success. At the same time, the Security Council must see to it that the legitimacy of the Council is preserved and enhanced. If perceived as a superpower club with limited accountability, the legitimacy of the Council will wane – and this would profoundly affect the prospects of effective implementation. When U.N. operations become suicide missions, the readiness of States to contribute troops will further decrease. Thus, the decision-making procedures of the Council must become more transparent. In addition, the Council must justify its actions to the General Assembly, the member States, and the public at large. The following remarks focus on the "responsibility to protect" because that is the key advance in material international law involved in U.N. reform and is most relevant to the "peace and security" perspective from which I evaluated the state of the U.N. in the preceding section.

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[83] This was also the initial assessment by Kofi Annan, *see id., A Glass At Least Half Full*, Wall St. J., Sept. 19, 2005, at A 16.

[84] SC Res. 1645 (2005); GA Res. 60/180 (Dec. 30, 2005). On the Peace-Building Commission, *see* Detlev Wolter & Jörn Müller, *The United Nations at Sixty: Getting Serious with Conflict Prevention?*, 80 Friedens-Warte 333 (2005).

[85] *See* GA Res. 60/251 (Apr. 3, 2006).

[86] The U.S. was joined by only four States voting against the resolution establishing the Council, *see* Procès-Verbal, at 6 (170/4/3), U.N. Doc. A60/PV.72 (Mar. 15, 2006). *See also* the explanation of vote of the U.S. Ambassador John Bolton. *Id.* at 6–7. The tenure so far has certainly done little to abate this criticism, the Council dealing three times in Special Sessions with alleged Israeli war crimes (but not those of Hezbollah) in the Israeli-Lebanon war and the Occupied Territories, but only in one session with the crimes against humanity in Darfur, Sudan, with a very modest outcome. For details of its work, *see* its website http://www.ohchr.org/english/bodies/hrcouncil/.

[87] *See infra* note 94 and accompanying text.

I. *Responsibility to Protect: The Concept of Humanitarian Intervention and the UN*

So-called "humanitarian intervention" is one of the most common phrases bandied about in the debate on U.N. reform.[88] However, no agreement seems to exist as to who exactly is to intervene and under which circumstances. Indeed, according to the Charter, intervention in domestic affairs is prohibited, both in inter-State relations, as a consequence of the sovereign equality of the State parties,[89] and between the United Nations and its member States,[90] except for the Security Council acting under Chapter VII of the Charter.

The meaning of "intervention" depends, however, on the extent of States' freedom of action under international law. In other words, the enforcement of justified legal claims by permissible means does not constitute intervention. As to the means, in any event, Article 2 (4) of the Charter prohibits the use of force between States. Only the Security Council, when acting under Chapter VII of the Charter, may intervene by force into States' domestic realm. Pursuant to Article 51, States may, as a matter of course – the Charter speaks, in its French version, even of a "droit naturel," a natural right – defend themselves against "armed attacks," but only until such time as the Council has taken the necessary measures to repel the attack.[91]

It was never to be expected that the debate on whether international law permits – or should permit –intervention for truly humanitarian reasons, that is, for the sake not only of individual or collective self-defense of States, but also for the most basic rights of survival of individual human beings,[92] would be solved

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[88] For the debate in the framework of U.N. reform, *see infra* note 93. For humanitarian intervention generally, *see supra* note 17; *see also infra* note 92.

[89] U.N. Charter art. 2, para. 1. *See* Bardo Fassbender, *Article 2(1), in* The Charter of the United Nations: A Commentary, *supra* note 15.

[90] U.N. Charter art. 2, para. 7. *See* Georg Nolte, *Article 2 (7), in* The Charter of the United Nations: A Commentary, *supra* note 15.

[91] The debate centers on the question of whether the assessment for the effectiveness of the Council measures lies with the Council or with the State under threat. *See* Sofaer, in this volume. However, contrary to Sofaer's presentation, the question is not whether Council inaction in spite of debate counts as a "necessary" measure, but whether the individual State may act counter to or in addition to, an express measure taken by the Council. The wording of Article 51 suggests that, if and to the extent the Council acts, its views on the necessity prevail. *See* Randelzhofer, *supra* note 33, at margin number 41.

[92] For arguments in favor of humanitarian interventions by individual States for the protection of human rights, *see* Claus Kreß, Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater (1995); Fernando R. Tesón, Humanitarian Intervention: An Inquiry into Law and Morality (2d ed. 1997). For the conclusion that only a "thin red line" separates unilateral

within the debate on U.N. reform. However, what the reform set out to achieve was to provide criteria for collective intervention in reaction to gross violations of the most basic human rights or to the mass commission of war crimes, crimes against humanity, and genocide.[93]

The 2005 Outcome Document can be regarded as limited "progress" in this direction. It emphasizes both the responsibilities of each individual State, as well as the subsidiary obligation of the international community. The summit pointed out that

> [e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.[94]

But the Outcome Document also emphasized that

> [t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, [1] through the Security Council, [2] in accordance with the Charter, including Chapter VII, [3] on a case-by-case basis and [4] in cooperation with relevant regional organizations as appropriate, [5] should peaceful means be inadequate and [6] national authorities are manifestly failing to protect their populations [7] from genocide, war crimes, ethnic cleansing and crimes against humanity.[95]

While the convoluted nature of this text demonstrates, if demonstration were necessary, that States are extremely reluctant to unconditionally commit themselves to use force, the "international community" seems to accept an obligation to collectively act to counter mass violence, including measures involving the

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humanitarian interventions from international legality, *see* Bruno Simma, *NATO, the UN, and the Use of Force: Legal Aspects*, 10 Eur. J. Int'l L. 1, 22 (1999); Brad Roth, *Bending the Law, Breaking It, or Developing It? The United States and the Humanitarian Use of Force in the Post-Cold War Era, in* United States Hegemony and the Foundations of International Law 232 (Michael Byers & Georg Nolte eds., 2003); Marcelo G. Kohen, *The Use of Force by the United States After the End of the Cold War, and Its Impact on International Law, in* United States Hegemony and the Foundations of International Law 197. On the general literature of humanitarian intervention, *see supra* note 17.

[93] *See*, in particular, The International Commission on Intervention on State Sovereignty, which had "invented" the concept in its report on The Responsibility to Protect (2001), and the Report of the High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, paras. 29, 199–203, U.N. Doc. A/59/565 (Dec. 2, 2004).

[94] World Summit Outcome, para. 138, GA Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

[95] *Id.* at para. 139. The numbers in brackets are ours.

use of force against the will of the State concerned. Though codifying the responsibility to protect, the summit declaration includes important caveats. In particular, the text limits the responsibility to cases of war crimes, ethnic cleansing, crimes against humanity and genocide (7). It is the Security Council – eventually with the support of regional organizations (4) – that is called upon to act, not individual states (2), in each specific case (3) and only after the territorial state was "manifestly" unable to do so (6). Thus, the text avoids giving a blank check to States for unilateral intervention. The responsibility to protect rather attempts to bind the Security Council to take concrete action and to assuage concerns that, in case of inaction, gross violations of human rights can go on unhindered.[96] It also meets Hudson's concerns about individual action by being directed towards the Security Council, not individual States. Thus, the responsibility to protect does not authorize unilateral "humanitarian intervention."[97]

II. *The Challenge of Implementation*

Again, however, the main problem will be in the implementation, not in the words. In the face of the newly emerging responsibility to protect, let us examine a particularly horrific, but also typical example: the crisis in Darfur. Has the reaction of the international community there been demonstrably different from Rwanda, Congo, or the former Yugoslavia? Recall the following facts. In Rwanda, the United Nations removed the small (and, within its limited capabilities, courageous) peace-keeping force there when the genocide started, only to later authorize a French intervention to halt the military advance of the opponent Tutsi forces (and to protect Hutu civilians in the West). In Congo, the U.N. – and the world – stood by for a long time in what some observers have called "the African world war."[98] In the former Yugoslavia, the U.N. intervened to establish "safe areas"[99] while, in Srebrenica, failing to prevent what ICJ and ICTY later determined to be genocide.[100] Of course, as I have pointed out, each of these characterizations are not entirely fair. In each case the U.N. suffered from a lack

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[96] *See* Sofaer, in this volume.

[97] On "humanitarian intervention," *see supra* note 13 (and accompanying text).

[98] The Los Angeles Times, in 1998, cites Africa specialist Salih Booker from the Council on Foreign Relations for this terminology. *See* Richard Boudreaux, *Foreign Forces Battle with Rebels in Congo*, L.A. Times, Aug. 23, 1998, at A1. *See also Bringing Congo's Great War to an End*, N.Y. Times, Aug. 1, 2002, at A24.

[99] *See* SC Res. 824 (May 6, 1993), Establishment of Safe Areas in Bosnia and Herzegovina.

[100] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), para. 297 (Feb. 26, 2007), *available at* http://www.icj-cij.org; Prosecutor v. Krstić, 43 I.L.M. 1301, paras. 5 *et seq*. (2004).

of capabilities and experience, and the existing forces tried, in most cases, to do the best they could.

In Darfur, the situation is even more complex. Until 2006 it featured a relatively clear-cut conflict between Arab militias with the support of the government against rebel groups of another ethnic faction in the Western Sudanese province of Darfur. The main debate focused on whether the attacks by the Janjaweed and government forces could be called genocide[101] in the legal sense of the term. The conflict has now transformed into a multi-party conflict after the U.N. and the African Union garnered only a partial support from rebel groups for the Darfur Peace Agreement.[102] The African Union has forces on the ground – the African Union Mission in the Sudan (AMIS) – but they are understaffed (about 900 personnel for a territory of the size of France) and under- equipped. Its transformation into a AU/UN hybrid operation in Dafur (UNAMID) is currently underway but continues to meet operational opposition by the government of Sudan.[103]

The U.N. has not stood idly by or waited until it was too late. Besides brokering cease fires and peace accords, it has supported the A.U. mission in Sudan (AMIS) with logistics, but also investigated the abuses against civilians, leading to an unprecedented referral of the situation in Sudan to the International Criminal Court.[104] Thus, while the Security Council established the International Criminal Tribunal for the Former Yugoslavia as a *substitute* for forceful action and the International Criminal Tribunal for Rwanda was created only *after* a genocide had taken place, in Sudan, the U.N. combined support for the AMIS and the prosecution of legal action against the perpetrators. The main stumbling block for more forceful action is, on the one hand, the unwillingness of the Sudanese government to accept more robust U.N. troops, and, on the other hand, the failure of China and Russia to convincingly support action against the will of the government because of their strategic interests in the region.

Faced with this situation, and, according to the most conservative estimates, after at least 200,000 deaths (and counting), most of them civilians, the Security Council has finally agreed to establish a mission under Chapter VII of the Charter, but only with the consent of the Sudanese government.[105] However, it

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[101] See the Report of the International Commission of Inquiry on Darfur, *supra* note 70.

[102] For a brief description of the deteriorating situation and the history of the conflict as well as attempts of peace-making, *see* Report of the Secretary-General on Darfur, paras. 3-39, U.N. Doc. S/2006/591 (July 28, 2006).

[103] *See supra* note 20.

[104] SC Res. 1493 (2005). The U.S., although vigorously opposed to the ICC, abstained, so did China. *See* Verbatim Records, at 3, 5, U.N. Doc. S/PV.5158 (Mar. 31, 2005).

[105] SC Res. 1769 (2007), para. 15.

remains to be seen whether the Council can muster the required 18,000 troops.[106] Bearing in mind the considerable difficulty in finding 15,000 troops for Southern Lebanon, a decision taken in the same month in Resolution 1701 (2006), and with regard to the government opposition to the deployment, one may ask whether this endeavor has any chance of success. In a previous report, the Secretary General acknowledges as much:

> [T]he United Nations cannot take over full peacekeeping responsibilities in the region until it has the consent and cooperation of the Government of the Sudan and until it has been able to gather together sufficient contributing nations of goodwill to mount the large multidimensional peacekeeping operation described.[107]

Thus, the problem lies not so much in a lack of readiness of the United Nations "to do something" but, rather, in the lack of support by its member States. "Humanitarian intervention" involving the use of force against the Sudan régime cannot be contemplated in the absence of a fighting force. Although the extended UNMIS mandate contained in Resolution 1769 is relatively strong and based on Chapter VII, it only contains the authority "to use all necessary means" – since the Iraq resolution 678 (1990) the term for the use of military force – under limited conditions, for example "to protect United Nations personnel," and "to prevent disruption of the implementation of the Darfur Peace Agreement by armed groups". The use of force is more significantly limited by the condition that it be "without prejudice to the responsibility of the Government of Sudan." The Secretary General's report emphasized the necessity of working with the Sudanese government. Furthermore, the Council did not include any reference to its referral of the situation in Sudan to the International Criminal Court.[108] Nevertheless, instead of accepting the UN forces, the Sudanese government announced its rejection of Resolution 1706, declaring instead its intention to send government troops that have been complicit in the slaughter of innocents to substitute AMIS.

Thus, even when the U.N. is ready to act decisively, it does, at least, need the acquiescence of the local government. And even if it were considering the authorization of a fighting army, it would have to figure in the possibility that an all-out war of the United Nations against Sudan would make things worse – not the least for the suffering population of Darfur. As it turns out, the recognition of a "responsibility to protect" is the easiest part. The actual prevention of further genocides is something much more complex.

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[106] For the difficulties involved, see Jean–Marie Guéhenno, S/PV.5817, 9 Jan. 2008, at 3–5.

[107] Report of the Secretary-General on Darfur, para. 139, UN Doc. S/2006/591 (July 28, 2006).

[108] *See supra* note 103.

The U.N. reform, thus, may have fared much better than many observers expected after the disappointing Outcome Document. The establishment of the Peacebuilding Commission is a further contribution to improving the record of U.N. intervention.[109] But nothing can substitute for the willingness of member States to provide the U.N. with the required means to exercise the emerging responsibility to protect. The key consists in making States and their representatives – whether superpower or "failed State" – understand that paralyzing and scapegoating the U.N. will ultimately hurt everybody – the strong States, because they cannot do everything alone, as Iraq has shown afresh, and the weak States, because an incapacitated U.N. may well mean unilateral intervention, and therefore less involvement of smaller powers in actual decision-making.

E. *Conclusion*

Some claim that the regulation of the use of force by the Charter has failed.[110] But they do not provide any alternative mechanism to legally circumscribe the use of force. A legal order worthy of that name cannot, however, leave the use of armed force unregulated or unlimited. The post-war situation in Iraq seems to demonstrate that the consequences of war cannot be assessed beforehand, however easy the war may appear at first sight. This strengthens the insight of the drafters of the Charter that the use of force seldom solves problems, but rather, constitutes the problem itself. The test of relevance has turned against the challenger. When this is progress, it is the one step forward after two steps back.

The Iraq conflict was a momentous event, but it is not the first instance in which the biggest world power has allegedly disregarded the international rules on the use of force. International law could never be enforced on the territory of a superpower against its will. On the contrary, the effective implementation of international law largely depends on the support of the United States. But the project of an international rule of law has lost, in the Iraq war, nothing of its usefulness, even for a power with a global reach that cannot, in spite of all imperialist temptations, manage the world alone. In the words of Michael Walzer: "The U.S. administration will learn sooner or later that hegemony, unlike empire, rests on consent."[111]

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[109] The Peacebuilding Commission, U.N. GA Res. 180 (2005), U.N. Doc. A/RES/60/180 (Dec. 20, 2005). For an early assessment, *see* Wolter and Müller, *supra* note 84, at 345–46. Its first meetings (on Rwanda and Sierra Leone) were held in July 2006.

[110] *See* Glennon, *supra* note 6; Perle, *supra* note 4; Sofaer, in this volume.

[111] Michael Walzer, *Is There an American Empire?*, Dissent, Fall 2003, at 27, 29.

The use of force without the clear and unequivocal support of international law and institutions is costly in terms of so-called "political capital," *e.g.* the costs of maintaining fragile "coalitions of the willing,"[112] which can only be maintained as long as the common will persists. In other words, a permanent institution can withstand conflicts of interests of its members far better than a loose coalition held together by mere expediency.

Thus, the legitimacy bestowed on military action by international institutions is everything but negligible. For example, a Security Council resolution would have allowed not only for a larger anti-Saddam Hussein coalition including, among others, France, Turkey, and NATO as such, but also for a more inclusive and more acceptable post-war regulation. Fighting terror, in particular, requires broad international cooperation. The United States abandonment of multilateralism led to a much harder time in winning support for the implementation of anti-terrorism measures. As the post-war phase in Iraq has shown, if violence should eventually abate, any use of force has to give way to non-violent means of conflict-resolution, based on a minimum set of common values and institutions – the very values and institutions international law has helped to develop. Under these circumstances, the United Nations can, as representative of the international community, provide the legitimacy that eludes the United States as the occupying power in Iraq.[113] As the first Iraq war has shown: when the United States enlists the support of the U.N., the world power can act with much more authority and a greater chance of success.

On the other hand, the United Nations cannot serve as a world State. It does not possess its own forces. It depends entirely on the support of its membership. The very fact that the U.N. may play a decisive role in the legitimation of the use of force does not mean that it can guarantee the preservation of peace. Sudan is a warning; intervention by force seldom solves problems and, in any case, is not always an option, not in spite, but because of consideration for the civilian population.

The tragedies of Iraq and Sudan attest that neither big power leadership nor U.N. involvement can guarantee peace or prevent mass murder or genocide. The temptation to blame the U.N. for this unacceptable situation, rather than the parties to the conflict and their State and non-State supporters, is considerable. The U.N. can help the parties and the international community to find a common basis for a solution, and to channel the requisite means for this task. But it

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[112] *See* Coalitions of the Willing: Avantgarde or Threat? (Christian Calliess *et al.* eds., forthcoming 2007).

[113] Even Robert Kagan, who had formerly defended U.S. power by pointing out the reliance of the rest of the world on its leadership, now emphasizes the need for legitimation. *See* Robert Kagan, *America's Crisis of Legitimacy*, 83 Foreign Aff. 65 (March/April 2004).

cannot step in where willingness for compromise and for providing the requisite means of implementation is missing in the first place. In other words, "safety through international law administered by international institutions" may indeed constitute an illusion, as Richard Perle submits. But, at the same time, safety by superpower fiat fares no better.

In a 21st century in which States appear unable to monopolize the use of force in the same way as in the past, the concept of collective security cannot remain unchanged. But the need for collective action has never been as strong as in the globalized world of today, which faces mass criminality against civilians, and terror, not to mention global inequality, famine, environmental degradation, and religious hatred. The economic realm also needs a minimum of regulation to thrive. Maintaining and strengthening the universal international organization is cumbersome, but constitutes, ultimately, the only conceivable avenue for building and implementing shared responses to these challenges. Most of these problems will not be solved by military force. But when its use appears necessary, the unilateral defense of universal values against or without the legitimacy provided by the United Nations will further diminish the prospects of success. In the era of globalization, progress in international organization is not so much a question of grand institutional designs, but of using the existing institutions to achieve their objectives.

Coordination of International Organizations — Intellectual Property Law as an Example: Can There Be Safety in Numbers?

By Karen Kaiser

A. *Introduction*

In his lectures *Progress in International Organization*, given at the University of Idaho in 1931, Harvard Professor Manley O. Hudson argued that the establishment of international organizations and institutions was a sign of progress, in so far as these institutions outlive temporary associations of states. "Hav[ing] a strange way of keeping themselves alive," Hudson concluded that international organizations and institutions have the advantage that they can be handed on to future generations.[1] Since 1931, the number of international organizations has increased continuously. Following a gradual rise from 123 in 1951 to 365 in 1984,[2] it is guessed that there are between 500 and 700 international organizations today.[3] Next to states and other actors in international relations, such as transnational enterprises and non-governmental organizations,[4] international organizations have become familiar players on the international stage.

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[1] Manley O. Hudson, Progress in International Organization 120 (1932).

[2] *See* the table on international organizations by year and type (1909–1984) *in* Union of International Association, 1 Y.B. Int'l Orgs. 1984–1985, at 1627 (21st ed. 1984).

[3] Chittharanjan Felix Amerasinghe, Principles of the Institutional Law of International Organizations 6 n.10 (2d ed. 2005). The latest issue of the *Yearbook of International Organizations* records a total of 7,350 public or intergovernmental organizations, *see* the table on the number of international organizations in this edition by cluster (2005/2006) *in* Union of International Association, *Guide to Global Civil Society Networks*, 1B Y.B. Int'l Orgs. 2005–2006, at 2967 (42d ed. 2005). It is, however, unclear how many of these would fall under the definition of an international organization of a public or intergovernmental nature. *See* Amerasinghe, *supra*. National, dead, inactive and unconfirmed bodies which are also listed would certainly not.

[4] *See* Schurtman, in this volume; Miller, in this volume.

Miller & Bratspies (Eds), Progress in International Law, pp. 315–334.

Over the last few years, however, a certain reluctance towards creating new international organizations may be observed.[5] The fact that international organizations "have a strange way of keeping themselves alive" is no longer seen as the advantage Hudson supposed. Critics refer to a variety of problems confronting and arising from international organizations: (democratic) legitimacy,[6] accountability and responsibility,[7] management[8] and, last but not least, coordination.[9] Due to the growing number of international organizations, overlapping activities and conflicting competences occur frequently and the need for coordination becomes more and more evident.[10] Without coordination, international organizations risk hampering or even obstructing each other's activities.[11] One may raise the hypothetical question whether Hudson, were he to give his lectures today, would still speak of the rise or, rather, the fall of international organizations.

This chapter focuses on the coordination of international organizations in the field of intellectual property law, as it is one of the few fields of international law

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[5] Some legal scholars observe a "move away from institutions." *See, e.g.*, Jan Klabbers, *The Changing Image of International Organizations, in* The Legitimacy of International Organizations 221, 222 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001). Others speak of the "proliferation" of international organizations. *See, e.g.*, James Hawdon, Emerging Organizational Forms, The Proliferation of Regional Intergovernmental Organizations in the Modern World-System (1996). The term "proliferation" has a pejorative connotation and suggests a wish to reduce the number of international organizations. *See* Henry G. Schermers, *Final Remarks, in* Proliferation of International Organizations: Legal Issues 549 (Niels M. Blokker & Henry G. Schermers eds., 2001).

[6] Thomas D. Zweifel, International Organizations and Democracy, Accountability, Politics, and Power (2006); G. C. A. Junne, *International Organizations in a Period of Globalization: New (Problems of) Legitimacy, in* The Politics of Global Governance, International Organizations in an Independent World 189 (Paul F. Diehl ed., 3d ed. 2005).

[7] Zweifel, *supra* note 6; Gerhard Hafner, *Accountability of International Organizations*, 97 Am. Soc'y Int'l L. Proc. 236 (2003); William E. Holder, *International Organizations: Accountability and Responsibility*, 97 Am. Soc'y Int'l L. Proc. 231 (2003).

[8] Yves Beigbeder, Management Problems in United Nations Organizations: Reform or Decline? (1987).

[9] Only 19 years after Hudson's lectures, *see* Clarence Wilfred Jenks, *Coordination: A New Problem of International Organizations; A Preliminary Survey of the Law and Practice of Inter-Organizational Relationship*, 77 Recueil des Cours de l' Académie de droit International de La Haye 157 (1950).

[10] *See, e.g.*, Ibrahim F. I. Shihata, *Techniques to Avoid Proliferation of International Organizations, The Experience of the World Bank, in* Proliferation of International Organizations: Legal Issues, *supra* note 5, at 111; Paul C. Szasz, *The Proliferation of Arms Control Organizations, in* Proliferation of International Organizations: Legal Issues, *supra* note 5, at 135; Gerhard Loibl, *The Proliferation of International Institutions Dealing with International Environmental Matters, in* Proliferation of International Organizations: Legal Issues, *supra* note 5, at 151.

[11] *See* Walter, in this volume.

that is attended to by a large amount and variety of international organizations, be they on the universal or the regional level, be they technical or global organizations. At the beginning of his lectures, Hudson mentions the international unions for the protection of intellectual property, the Paris Union for the protection of industrial property of 1883 and the Berne Union for the protection of literary and artistic works of 1886, as two of the earliest attempts to deal with current problems by organized international effort.[12] Since then, new international organizations have been created in the field of intellectual property law, universal institutions such as the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO), as well as regional institutions such as the European Patent Organization (EPO) and the European Community (EC).[13] By comparing these two pairs of universal and regional organizations, this chapter will examine why new international organizations were created even though others already existed in the field of intellectual property law. Furthermore, it will deal with specific legal problems arising from their co-existence. Finally, this chapter will evaluate mechanisms or instruments for the coordination of their activities.

B. *Reasons for the Multiplication of International Organizations in the Field of Intellectual Property Law*

It is recognized that there are two general, interrelated reasons for the multiplication of international organizations, namely globalization and interdependence.[14] In Hudson's era, states might have been able to choose not to

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[12] Hudson, *supra* note 1, at 11.

[13] Convention Establishing the World Intellectual Property Organization, July 14, 1967, 828 U.N.T.S. 3 [hereinafter WIPO Convention]; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement]; Convention on the Grant of European Patents, Oct. 5, 1973, 1065 U.N.T.S. 199 [hereinafter European Patent Convention]; Treaty establishing the European Community, May 25, 1957, last revised Feb. 26, 2001, 2001 O.J. (C 80) 1 [hereinafter EC Treaty]. The WTO and the EC are treated as international organizations in the field of intellectual property law, as intellectual property protection forms part of their comprehensive mandates. In the case of the WTO, this can be derived from the existence of the Agreement on the Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]. In the case of the EC, this can be derived from its legislative powers in the field of intellectual property law. EC Treaty art. 95, para. 1; art. 133 para. 5.

[14] Niels M. Blokker, *Proliferation of International Organizations: An Explanatory Introduction, in* Proliferation of International Organizations: Legal Issues, *supra* note 5, at 1, 11.

cooperate, but, increasingly, this sovereign freedom to pursue self-sufficiency and isolation has been eroded by the facts and forces of interdependence.[15] Hudson alluded to this when he noted that neutrality law had become obsolete with the growth of economic and financial ties between neutral and belligerent states at the beginning of the 20th Century.[16] Today, not only the maintenance of peace and security, but also human rights, sustainable development and world trade, of which intellectual property is a part, have outgrown the national legal order and have become a matter of concern to all states. Behind these general reasons for the multiplication of international organizations, globalization and interdependence, one may find different particular explanations, in particular in the field of intellectual property law. This will be demonstrated by comparing the two pairs of universal and regional organizations mentioned earlier, the WIPO and the WTO on the one hand, the EPO and the EC on the other hand.

WIPO was established in 1967 in order to provide for an UN-affiliated organizational framework for the existing international system providing for the protection of intellectual property rights, which consisted of a number of unions, among them the Paris and Berne Unions mentioned by Hudson.[17] The central objectives of WIPO have been: to provide a forum for international cooperation in the development of substantive rules for the protection of intellectual property; to administer the rules agreed upon; and to provide technical assistance to developing countries.[18] In 1995, the TRIPS Agreement, administered by the WTO, entered into force. An important factor in its genesis was the perception among developed countries that the protection of intellectual property through WIPO was insufficient in terms of the establishment of substantive rules and the maintenance of mechanisms for the enforcement of these rules.[19] The Paris and Berne Conventions had not been revised since 1967 and 1971 respectively.[20] The

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[15] *See, e.g.*, Jürgen Habermas, *Beyond the Nation-State? On Some Consequences of Economic Globalization, in* Democracy in the European Union, Integration Through Deliberation? 29 (Erik Oddvar Eriksen & John Erik Fossum eds., 2000); Magdalena M. Martin Martinez, National Sovereignty and International Organizations 63–66 (1996).

[16] Hudson, *supra* note 1, at 92.

[17] *See, e.g.*, Peter-Tobias Stoll, *WIPO – World Intellectual Property Organization, in* United Nations: Law, Policies and Practice 1431 (Rüdiger Wolfrum ed., 1995).

[18] *See* WIPO Convention, *supra* note 13, arts. 3, 4.

[19] *See, e.g.*, Peter-Tobias Stoll, *Die WTO: Neue Welthandelsorganisation, neue Welthandelsordnung, Ergebnisse der Uruguay-Runde des GATT*, 54 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 241, 311–12 (1994).

[20] Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, last revised July 14, 1967, 828 U.N.T.S. 305 [hereinafter Paris Convention]; Berne Convention for the Protection of Literary and Artistic Works, Dec. 9, 1886, last revised July 24, 1971, 1161 U.N.T.S. 3 [hereinafter Berne Convention].

advocates for the implementation of the TRIPS Agreement argued that the previous regime's enforcement mechanism, namely reference of disputes to the ICJ,[21] had proven to be inadequate and was never used.[22]

In contrast to WIPO and the WTO, the co-existence of the EPO and the EC was intended from the beginning. In the 1950s, states wanted to have a two-pronged system of transnational patent protection in Europe, the European Patent system for the central grant of national patents, which is accessible to any European state, and a Community Patent system for the grant of a unitary patent for the entire territory of the EC, which would be limited to the member states of the nascent EC.[23] While the European Patent Convention entered into force, the Community Patent Convention was not ratified by all member states of the EC.[24] In 2000, the EC Commission made a new attempt and proposed the establishment of a Community Patent system by way of an EC regulation.[25]

C. *Specific Legal Problems Arising from the Co-Existence of Different Organizations in the Field of Intellectual Property Law*

The co-existence of international organizations leads to overlapping activities and conflicting competences. In the field of intellectual property law, these overlapping activities and conflicting competences concern rule-making, dispute settlement, technical assistance to developing countries, and administration, *e.g.* with regard to the central registration of intellectual property rights. In order to discover the specific legal problems in these areas the two pairs of universal and regional organizations, the WIPO and the WTO, on the one hand, and the EPO and the EC, on the other hand, shall again serve as examples.[26]

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[21] *See* Paris Convention, *supra* note 20, art. 28; Berne Convention, *supra* note 20, art. 33.

[22] *See* Stoll, *supra* note 19, at 312.

[23] Otto Bossung, *A Union Patent Instead of the Community Patent, Developing the European Patent into an EU Patent*, 34 Int'l Rev. Intell. Prop. & Competition L. 1, 5–6 (2003); Kurt Haertel, *The Draft Conventions for a European System for the Grant of Patents and for the European Patent for the Common Market*, 1 Int'l Rev. Intell. Prop. & Competition L. 289, 290–91 (1970).

[24] Convention for the European Patent for the Common Market, Dec. 15, 1975, 1976 O.J. (L 17) 1 [hereinafter Community Patent Convention]; Agreement Relating to Community Patents, Dec. 15, 1989, 1989 O.J. (L 401) 1. The Community Patent Convention was not ratified by Denmark, Ireland and Spain.

[25] Proposal for a Council Regulation on the Community Patent, COM(2000) 412 final.

[26] Problems arising from the co-existence of international organizations are, of course, not confined to these two pairs of international organizations. *See, e.g.*, Jacqueline Nancy Land, *Global Intellectual Property Protection as Viewed Through the European Community's Treatment of Geographical Indications: What Can TRIPS Learn*?, 11 Cardozo J. Int'l & Comp. L. 1007 (2004)

I. *Rule-making*

As far as rule-making is concerned, the tension between WIPO and the WTO, as well as between the EPO and the EC, is obvious. The TRIPS Agreement did not suspend the independent operation of WIPO-administered conventions. New conventions have been negotiated under the auspices of WIPO,[27] as have amendments and supplements to existing conventions.[28] The TRIPS Agreement requires the TRIPS Council to review the content of specific provisions[29] as well as the TRIPS Agreement in its entirety.[30] How can the coherence of two different sets of rules for the protection of intellectual property be maintained?

The fact that over 70 percent of the member states of the EPO are at the same time member states of the EC intensifies the tension between the EPO and the EC.[31] The European Patent Convention includes not only rules regarding procedures up to the grant of a patent, but also substantive rules, such as rules on patentability.[32] What happens if the EC starts to regulate patentability, as it has done in the case of biotechnological inventions[33] and as it is about to do with regard to Community Patents? Will the minority of EPO member states who are not, at the same time, member states of the EC, be forced to agree to the adaptation of the rules of the European Patent Convention to the EC standard?

(for the relationship between the WTO and the EC); Talia Einhorn, *The Impact of the WTO Agreement on TRIPs (Trade-Related Aspects of Intellectual Property Rights) on EC Law: A Challenge to Regionalism*, 35 Common Mkt. L. Rev. 1069 (1998) (for the relationship between the WTO and the EC). *See also infra* D. III. 1 (for the relationship between the WTO and the EPO).

[27] *See, e.g.*, Trademark Law Treaty, Oct. 27, 1994, 12 WIPO, Industrial Property Laws and Treaties, Multilateral Treaties, Text 3–010; WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203; Patent Law Treaty, June 1, 2000, 39 I.L.M. 1049 (2000).

[28] *See, e.g.*, Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs, WIPO-Doc. H/DC/40 (July 2, 1999).

[29] *See* TRIPS Agreement, *supra* note 13, art. 23, para. 4; art. 24, para. 1; art. 27, para. 3 lit. b; art. 64, para. 3.

[30] *See id.* art. 71, para. 1.

[31] The only member states of the EPO who are not at the same time member states of the EC are Switzerland, Iceland, Liechtenstein, Monaco and Turkey.

[32] *See, e.g.*, European Patent Convention, *supra* note 13, arts. 52–57. The European Patent Convention does not include rules regarding procedure after the grant of a patent, such as on infringement and revocation actions.

[33] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions, 1998 O.J. (L 213) 13. The proposal for a Directive of the European Parliament and of the Council on the Patentability of Computer-Implemented Inventions, COM(2002) 92 final, proved to be less successful. It was rejected by the European Parliament at second reading on July 6, 2005.

II. *Dispute Settlement*

With regard to dispute settlement activities, tensions between WIPO and the WTO have not yet arisen. In the 1990s, WIPO negotiated an alternative dispute settlement forum outside of the WTO Dispute Settlement Understanding. However, the Draft Treaty on the Settlement of Disputes Between States in the Field of Intellectual Property was never adopted.[34] Tensions may still arise due to the fact that the TRIPS Agreement incorporates provisions of the Paris and Berne Conventions.[35] Will WTO panels interpret these provisions autonomously or will they rely on advice provided by WIPO organs?

In contrast, tensions between the EPO and the EC depend on the accession of the EC to the EPO.[36] For several years now, the EPO has been discussing a Draft Agreement on the Establishment of a European Patent Litigation System,[37] which would centralize patent litigation in Europe. As the European Patent is nothing but a bundle of patents having the effect of a national patent in the states for which it was granted,[38] infringement and revocation actions still have to be dealt with by national courts and authorities.[39] Since these actions have to be initiated in all the states for which the European Patent was granted, multiple patent litigation[40] becomes inevitable. The European Patent Litigation Agreement, if adopted and ratified, would fill the gap and rationalize the patent litigation procedure by setting up a European Patent Judiciary, comprising a Court of First Instance as well as a Court of Appeal.

The proposal by the EC Commission to establish a separate Community Patent Court with exclusive jurisdiction on disputes relating to Community Patents,[41] however, interferes with the European Patent Litigation Agreement. If the European

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[34] Proposed Treaty on the Settlement of Disputes Between States in the Field of Intellectual Property, WIPO-Doc. WO/GA/XXI/2 (Apr. 30, 1997).

[35] *See* TRIPS Agreement, *supra* note 13, art. 2, para. 1; art. 9, para. 1.

[36] The EC Commission has suggested accession of the EC to EPO with a view to linking the proposed Community Patent regulation to the European Patent Convention. *See* 3d Recital of the Proposed Community Patent Regulation, *supra* note 24.

[37] Draft Agreement on the Establishment of a European Patent Litigation System (Feb. 14, 2004), *available at* http://www.european-patent-office.org/epo/epla/pdf/agreement_draft.pdf [hereinafter European Patent Litigation Agreement].

[38] *See* European Patent Convention, *supra* note 13, art. 2, para. 2.

[39] Jan J. Brinkhof, *Prozessieren aus Europäischen Patenten – Einige prozessuale Aspekte der Internationalisierung des Patentrechts*, 1993 GRUR Int. 177, 180–81.

[40] Multiple patent litigation has several disadvantages. It is, first of all, costly, gives rise to legal uncertainty as diverging decisions on the substance of the cases cannot be prevented and allows, last but not least, for forum shopping.

[41] Proposal for a Council Decision conferring jurisdiction on the Court of Justice in disputes relating to the Community patent, COM(2003) 827 final; Proposal for a Council Decision establishing the

Patent Office granted a Community Patent as a special type of European Patent,[42] both the European Patent Court and the Community Patent Court would be competent to decide on infringement and revocation actions relating to Community Patents. Is there a way to reconcile these two judicial systems or is one system condemned to extinction?

III. *Technical Assistance to Developing Countries and Administration*

As far as technical assistance and administration is concerned, the WTO Secretariat has to fulfill tasks similar to those undertaken by the International Bureau of WIPO. On the one hand, the TRIPS Agreement requires developed members to provide technical assistance to developing and least-developed members.[43] On the other hand, it requires all members to give notice of, *inter alia*, intellectual property laws and regulations, as well as emblems, flags and seals, to the TRIPS Council to avoid having them trademarked by private concerns.[44] The competent divisions of the WTO Secretariat are too small and often too inexperienced to work efficiently. To give an example, while the International Bureau of WIPO employs over 1,000 people, the Intellectual Property Division of the WTO Secretariat consisted, in 2005, of only 14.5(!) staff members.[45] Can a waste of resources be avoided?

As the EPO and the EC do not provide technical assistance to developing countries, tensions on the regional level arise only with regard to administration. The proposed Community Patent regulation raises questions regarding the registration of Community Patents, in particular: will the EC establish its own Community Patent Office as it has done for other Community industrial property rights[46] or will the European Patent Office, which already grants European Patents, grant Community patents as well?

Community Patent Court and concerning appeals before the Court of First Instance, COM(2003)828 final. The separate Community Patent Court would be a judicial panel attached to the Court of First Instance on the basis of art. 225a of the EC Treaty.

[42] *See* Proposed Community Patent Regulation, art. 1, *supra* note 24.

[43] *See* TRIPS Agreement, *supra* note 13, art. 67.

[44] *See id*. art. 63, para. 2; Paris Convention, *supra* note 20, art. 6.

[45] *See* Paul Salmon, *Cooperation Between the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO)*, 17 St. John's J. Legal Comment. 429, 432 (2003) (for the International Bureau of WIPO); WTO, Annual Report 2005, 105 (2005) (for the Intellectual Property Division of the WTO Secretariat).

[46] The EC has established the Office for the Harmonization in the Internal Market for the registration of Community Trademarks and Community Designs and the Community Plant Variety Office for the registration of Community Plant Variety Rights.

IV. *Conclusion*

From the foregoing, one can infer that the specific legal problems arising out of the co-existence of international organizations in the field of intellectual property law are related to the coordination of their overlapping activities. Duplication of existing international organizations should certainly be avoided, at least as long as existing institutions work efficiently. Moreover, a comparison of the different legal problems reveals that, even in the narrow field of intellectual property law, the mechanisms and instruments of coordination of international organizations cannot be conceptualized on a "one size fits all" basis, rather, they have to be chosen with respect to the specific relationship of the international organizations concerned and adjusted to the legal problem in question.

D. *Mechanisms and Instruments of Coordination of International Organizations in the Field of Intellectual Property Law*

The mechanisms and instruments of coordination that have been suggested in the field of intellectual property law or elsewhere can be summarized with three catchwords: consolidation, subordination, and cooperation.

I. *Consolidation*

It has been suggested that international organizations in the field of intellectual property law, in particular WIPO and the WTO, should be consolidated.[47] The underlying perception has been that, over the course of several decades, the WTO might evolve into the "United Nations of World Trade," a super-organization in which other international organizations only function in the manner of executive ministries operating under the policy direction of the center.[48] Under this theory, the WIPO would become one of these executive ministries of the WTO charged with administering the TRIPS Agreement as well as the Paris and Berne Conventions.[49] Considering the increasing dominance of EC member states in the EPO,[50] a consolidation of the EPO and the EC seems to be even more

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[47] Frederick M. Abbott, *The Future of the Multilateral Trading System in the Context of TRIPS*, 20 Hastings Int'l & Comp. L. Rev. 661, 681 (1997). The idea of consolidating international organizations is not confined to the field of intellectual property law, but has also been considered elsewhere. *See, e.g.*, Szasz, *supra* note 10, at 141 (in the area of arms control); Loibl, *supra* note 10, at 172 (in the area of environment).

[48] Abbott, *supra* note 47.

[49] *Id.*

[50] *See supra* note 30.

probable. If the influence of non-EC member states in the EPO diminished to such a degree that nothing else remained for them to do but to formally accept changes to patent law decided upon by the EC, not only these states, but also the European Patent system as such, would be marginalized.[51]

Consolidation of international organizations in the field of intellectual property law would decrease the number of international organizations and would thus have the advantage of going to the root of the problems associated with their multiplication. It would, moreover, lead to the creation of super-organizations, which would be able to perform the now no longer overlapping activities more effectively. With regard to rule-making, for example, a super-organization would be more qualified to develop a consistent system of international or regional intellectual property law than two or more smaller organizations necessarily interfering with each other.

However, consolidation of international organizations has several drawbacks. To begin with, no really strong super-organization can be accepted without some kind of democratic control.[52] One only needs to remember the calls for strengthening democratic control of WTO and EC decision-making[53] to easily imagine that the democracy problem would grow even more acute if these two large organizations gained in power and importance. What is more, consolidation of international organizations would not only end the specific problems that arise out of their co-existence, but would also end any kind of competition that has ever existed between them. A certain level of competition and rivalry among international organizations may be healthy, at least as long as the competition is fair and the rivalry is friendly and cooperative. In the case of the WIPO and the WTO, the adoption and entry into force of the TRIPS Agreement helped to break the deadlock within the WIPO and lead to the successful negotiation of new conventions.[54] Similarly, with respect to the EPO and the EC, the proposed Community Patent regulation spurred long expected reforms of the European Patent Convention, the Agreement on the Application of Article 65 of the

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[51] Hanns Ullrich, *Patent Protection in Europe: Integrating Europe into the Community or the Community into Europe*?, 8 Eur. L. J. 433, 489 (2002). Referring to the history of transnational patent protection in Europe, some authors look upon this development favorably. *See, e.g.*, Otto Bossung, *The Return of the European Patent Law to the European Union*, 27 Int'l Rev. Intell. Prop. & Competition L. 287, 291–302 (1996).

[52] Schermers, *supra* note 5, at 551.

[53] *See, e.g.*, Markus Krajewski, *Democratic Legitimacy and Constitutional Perspectives of WTO Law*, 35 J. World Trade 167 (2001) (for the democracy deficit in the WTO); Stephen C. Sieberson, *The Proposed European Union Constitution – Will it Eliminate the EU's Democratic Deficit*?, 10 Colum. J. Eur. L. 173 (2004) (for the democracy deficit in the EC).

[54] *See supra* note 26.

European Patent Convention,[55] and the not-yet-adopted European Patent Litigation Agreement. Eventually, super-organizations may have problems acquiring the distinct technical expertise they need to perform, political aims overruling or drawing away attention from their specific technical duties.[56] In the field of intellectual property law this has become apparent with regard to technical assistance to developing countries. In contrast to the WIPO, the WTO as the larger organization of the two has neither the staff nor the expertise to fulfill this task on its own.[57]

II. *Subordination*

Subordination presupposes a hierarchical structure of international organizations. In the field of intellectual property law, a hierarchical structure can be achieved either by the accession of international organizations to other international organizations or by the application of the principle of subsidiarity.

1. *Subordination by Accession*

Since the accession of international organizations to other international organizations is a rather new phenomenon,[58] only the constituent treaties of recently established international organizations contain corresponding provisions.[59] Usually, accession is reserved to regional economic integration organizations, such as the EC.[60] The EC is a member of the WTO, but it is not a member of the WIPO[61] or the EPO. The grant of a Community Patent by the European Patent Office would presuppose a revision of the European Patent Convention permitting international organizations to accede to the EPO. Subordination by way of accession

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[55] Agreement on the Application of Article 65 of the Agreement on the Grant of European Patents, Oct. 17, 2000, O.J. EPO 549 (2001).

[56] Schermers, *supra* note 5, at 550.

[57] *See infra* D. III. 2 (for the cooperation of the WIPO and the WTO in this respect).

[58] Rachel Frid, The Relations Between the EC and International Organizations, Legal Theory and Practice 173 (1995); Henry G. Schermers, *International Organizations as Members of Other International Organizations, in* Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte 823 (Rudolf Bernhardt et al. eds., 1983).

[59] *See, e.g.*, WTO Agreement, *supra* note 13, art. XI, para. 1 (for the WTO); United Nations Convention on the Law of the Sea, art. 156 in conjunction with art. 305, para. 1, lit. f, Dec. 10, 1982, 1832–1835 U.N.T.S. (for the International Sea-Bed Authority).

[60] Henry G. Schermers & Niels M. Blokker, International Institutional Law 65 (4th ed. 2003).

[61] The EC is, however, a contracting party of several WIPO-administered treaties, such as the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, June 28, 1989, 1997 U.K.T.S. No. 3 (Cmnd. 3505) [hereinafter Madrid Protocol], the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, *supra* note 13.

could be problematic for both organizations. From the perspective of the EC, the grant of Community Patents by the European Patent Office implies more than a simple management task. It raises problems of supra-EC governance of EC matters, a new concern for the EC in the field of intellectual property law.[62] From the perspective of the EPO, problems may arise out of the fact that the accession of the EC, an international organization grouping the majority of members of the EPO, alters the EPO's decision-making process.[63] Voting in groups may become institutionalized and the voting power of non-EC member states may evolve into a veto power.

The EC Commission has suggested accession of the EC to the EPO[64] and, in its staff working paper of 2001,[65] set out a possible approach to realizing the Community Patent within the framework of the European Patent Convention. As to the substance of a possible revision of the European Patent Convention, the EC Commission identified several key questions, among them consistent development of the EC *acquis*[66] and EPO law, compliance with the existing EC *acquis* by the EPO and the future role of the EC in the EPO. As far as consistent development of the EC *acquis* and EPO law is concerned, the EC Commission recommended supplementing the European Patent Convention with a mechanism that would ensure the insertion of any future EC rules that are applicable to the phase preceding the grant of a patent, *e.g.* regarding the patentability of software-related inventions.[67] On the subject of compliance with existing EC *acquis* by the EPO, the EC Commission discussed the incorporation of a provision

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[62] Ullrich, *supra* note 51, at 457. The EC has created several Community intellectual property rights. *E.g.*, The Community Trademark, Council Regulation 40/94, Dec. 20, 1993, 1994 O.J. (L 11) 1. However, unlike the European Patent Convention, the Madrid Protocol, *supra* note 61, to which the EC has acceded does not provide for the central registration of trademarks through a special treaty body. Trademark owners wanting to have their trademarks protected in more than one state file their applications directly with their own national or, in case of the EC, regional trademark office. The national or regional trademark office then presents the applications to the International Bureau of WIPO.

[63] Ullrich, *supra* note 51, at 460.

[64] *See supra* note 24.

[65] Commission Staff Working Paper, *A Community Policy for the Realization of the Community Patent in the Context of a Revision of the European Patent Convention*, SEC(2001) 744 [hereinafter Commission Staff Working Paper].

[66] The French term *acquis* or *acquis communautaire* refers to the entire body of legislation of the European Communities and the European Union (EU). Applicant countries must accept the *acquis* before they can join the EU. *See, e.g.*, Christine Delcourt, *The* acquis communautaire: *Has the Concept Had its Day?*, 38 Common Mkt. L. Rev. 829 (2001); Communication from the Commission to the European Parliament and the Council, Codification of the *acquis communautaire*, COM(2001) 645.

[67] Commission Staff Working Paper, *supra* note 65, at 5.

into the European Patent Convention stipulating that the EPO should take account of the case law of the European Court of Justice, including the case law on the European Patent Convention, which would become part of the EC *acquis* after accession.[68] As regards the future role of the EC in the EPO, the EC Commission suggested that the link between the European Patent Convention and the future Community Patent regulation be forged by way of a new part of the convention relating to the Community Patent. This change would assign specific responsibilities to a special committee, made up of representatives of the EC and its member states.[69]

The elaborateness of the working paper, which even contains the exact wording of the proposed amendments to the European Patent Convention,[70] is illustrative of the power the EC wants to exert over the EPO. It overemphasizes the EC's interest in its own patent policy and fails to take into account the interests of the EPO and its non-EC member states in, for example, clarifying the conflict between the Community Patent Court and the European Patent Judiciary. By dictating the way the revision of the European Patent Convention should be achieved, in particular by demanding automatic transformation of its law into EPO law, the EC is, in reality, asking for the EPO's subordination, although it should be the other way round. The EC should accept that it is about to join an international agreement on uniform law which harmonizes some aspects of patent law for a larger number of contracting parties, including itself.[71]

2. *Subordination by Application of the Principle of Subsidiarity*

The principle of subsidiarity, which is presently best known as a fundamental principle of EC law,[72] has been suggested as an instrument for the delimitation of conflicting competences of international organizations.[73] According to this principle, global organizations have a subsidiary function, performing only those tasks that cannot be performed effectively by more technical and, thus, more specialized organizations. This principle is, of course, no great help where international organizations of the same kind are concerned. The WIPO and the WTO are both technical organizations. However, because of the wide

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[68] *Id*.

[69] *Id*. at 6.

[70] *Id*. at 14–39.

[71] Ullrich, *supra* note 51, at 467.

[72] The principle of subsidiarity is laid down in art. 5 of the EC Treaty. *See, e.g.*, Paul P. Craig & Graínne de Búrca, EU Law, Text, Cases and Materials 135 (3d ed. 2003).

[73] Ignaz Seidl-Hohenveldern & Gerhard Loibl, Das Recht der Internationalen Organisationen einschliesslich der Supranationalen Gemeinschaften 98–99 (7th ed. 2000).

scope of the WTO, the authority of which extends well beyond intellectual property issues, it can be considered to be at least more global than the WIPO. Thus, one could deduce from the principle of subsidiarity that the WTO should only deal with intellectual property to the extent that the WIPO can no longer do so effectively.

III. *Cooperation*

Eventually, starting from the assumption that all international organizations are basically equal, cooperation between international organizations is guided by the principle of good neighborliness.[74] Contrary to the principle of good neighborliness of states, which is territory-based, its inter-organization equivalent is function-based.[75] In carrying out their tasks, international organizations should be aware of, and take into account, the tasks of other international organizations with competences in their field. The principle of good neighborliness has both positive and negative dimensions.

1. *Principle of Good Neighborliness: Negative Dimension*

According to the negative dimension, international organizations should not interfere in each other's domain without very good reasons.[76] There exist some examples proving that international organizations in the field of intellectual property law have taken care not to interfere. Leaving aside the fact that the TRIPS Agreement, as such, was an interference in the WIPO's domain, it did not establish a completely new set of rules, but incorporated provisions of existing intellectual property conventions administered by the WIPO and built upon them.[77]

Unfortunately, there also exist other examples. The EC's undue exertion of influence on the revision of the European Patent Convention has been discussed above, but what about the problems resulting from parallel harmonization of rules on patentability in the different international organizations in the field of intellectual property law? Does the EPO interfere in the WTO's and the EC's domains if the European Patent Office's Boards of Appeal refuse to apply the TRIPS Agreement and secondary EC law on intellectual property? As the EPO is neither a member of the WTO nor of the EC, it is neither bound by the TRIPS Agreement nor by secondary EC law. The rule in Article 34 of the Vienna

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[74] Blokker, *supra* note 14, at 25; Felice Morgenstern, Legal Problems of International Organizations 26 (1986); René-Jean Dupuy, *Le droit des relations entre les organisations internationals*, 100 Recueil des Cours de l' Académie de droit International de La Haye 457, 584 (1960 II).

[75] Blokker, *supra* note 14, at 30.

[76] *Id*. at 32.

[77] *See supra* note 20. Provisions of the TRIPS Agreement that go beyond the protection guaranteed in the Paris and Berne Conventions are therefore called the Paris- and Berne-plus-elements.

Convention on the Law of Treaties,[78] according to which a treaty[79] neither creates obligations nor rights for a third state without its consent, is part of customary international law and applies *mutatis mutandis* to international organizations.[80]

A possible justification for the EPO's application of the TRIPS Agreement and secondary EC law could be derived from the fact that the majority of member states of the EPO are at the same time member states of the WTO and of the EC.[81] The EPO could be obliged to interpret convention law so that it is consistent with the TRIPS Agreement and secondary EC law.[82] According to the Vienna Convention, any interpretation of treaties shall take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" and "any relevant rules of international law applicable in the relations between the parties."[83] The TRIPS Agreement and secondary EC law could be considered to be both "subsequent practice," at least for the majority of member states of the EPO, and "relevant rules of international law." Subsequent practice by a majority of member states may be sufficient, as it is not necessary that each member state has engaged in the practice.[84] However, in order to prevent minority non-WTO and non-EC member states of the EPO from becoming marginalized within the European Patent system, the practice may not be relied upon if a clear difference of opinion exists.

In addition, while it cannot be denied that the TRIPS Agreement and secondary EC law on intellectual property are "relevant rules of international law," the question has to be raised whether the European Patent Convention is to be interpreted in the light of the rules of international law in force at the time of its conclusion[85] or in force at the time of interpretation. The Vienna Convention does not speak

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[78] Vienna Convention on the Law of Treaties, May 23, 1969, 1151 U.N.T.S. 331 [hereinafter Vienna Convention].

[79] The same holds true *a fortiori* for treaty-derived law.

[80] Christine Chinkin, Third Parties in International Law 11–12 (1993); Dan Sarooshi, *Some Preliminary Remarks on the Conferral by States of Powers on International Organizations*, Jean Monnet Working Paper 4/03, at 10. The applicability of art. 34 to international organizations is, moreover, supported by the reproduction of the rule, *mutatis mutandis*. The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, art. 34, Mar. 21, 1986, XXV I.L.M. 543 (1986).

[81] Monaco is the only EPO member state that has not acceded to the WTO. For non-EC member states of EPO, *see supra* note 31.

[82] *See, e.g.*, Joseph Straus, *Völkerrechtliche Verträge und Gemeinschaftsrecht als Auslegungsfaktoren des Europäischen Patentübereinkommens*, 1998 GRUR Int. 1, 15 (with regard to art. 31, para. 3, lit. b).

[83] Vienna Convention art. 31, para. 3, lit. b & c.

[84] Anthony Aust & Arthur Watts, Modern Treaty Law and Practice 195 (2000).

[85] *See* Robert Jennings & Arthur Watts, Oppenheim's International Law: Peace 1281 (9th ed. 1992).

of "subsequent"[86] rules and an evolutionary interpretation of the European Patent Convention may only be permissible if it does not conflict with the intentions and expectations of the parties at the time of its conclusion.[87] In this context, it could be argued that a consistent interpretation of convention law with secondary EC law meets the expectations of the original parties of the European Patent Convention which, after all, intended to have a two-pronged system of transnational patent protection in Europe from the beginning.

The principle of consistent interpretation, however, has its limits. Convention law may only be construed in conformity with "subsequent practice" and "relevant rules of international law," if feasible.[88] If convention law is so clearly contradictory that the inconsistency cannot be removed, a consistent interpretation is not feasible. In the words of the European Patent Office's Enlarged Board of Appeal, the TRIPS Agreement may be used as a means of interpreting convention law, which admits of different interpretations; however, it "cannot justify ignoring express and unambiguous provisions" of the European Patent Convention.[89] In the opinion of the Enlarged Board of Appeal, it is, instead, up to the member states of the EPO to revise provisions of the European Patent Convention that are affected by the TRIPS Agreement[90] and, one could add, by secondary EC law. This view clearly minimizes the risk of non-WTO and non-EC member states of EPO being marginalized, as the revision of provisions of the European Patent Convention and its implementing regulations requires a three-quarters majority of member states.[91] It is, furthermore, confirmed by the fact that EPO revised art. 87 of the European Patent Convention to ensure conformity with the TRIPS Agreement in 2000[92] and changed its implementing regulations with regard to the EC directive on biotechnological inventions in 1999.[93]

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[86] Vienna Convention art. 31, para. 3, lit. c.

[87] Ian Sinclair, The Vienna Convention on the Law of Treaties 140 (2d ed. 1984). *But see* Carazo, in this volume (for a contrary paradigm in the human rights context).

[88] This view is supported by the wording of art. 31, para. 3 of the Vienna Convention ("*shall* be taken into account") (emphasis added).

[89] Decision of the Enlarged Board of Appeal, April 26, 2004, G 2/02 and G 3/02, Applicant: AstraZeneca AB, O.J. EPO 501, 483–503 (2004).

[90] *Id*. at 499 *et seq*.

[91] *See* art. 33, para. 1, lit. b; art. 35, para. 3 for the Administrative Council; art. 172 of the European Patent Convention, *supra* note 13, for an intergovernmental conference.

[92] Revised European Patent Convention and Implementing Regulations, O.J. EPO Special Edition No. 1 (2003). The amendment to art. 87 of the European Patent Convention provides for the recognition by EPO of first filings in a WTO member state as giving rise to a right of priority.

[93] Decision of the Administrative Council of 16 June 1999 amending the Implementing Regulations to the European Patent Convention, O.J. EPO 437–40 (1999). Pursuant to the general rule 23b, the Directive 98/44/EC, *supra* note 33, shall be used as a supplementary means of interpretation.

2. *Principle of Good Neighborliness: Positive Dimension*

The positive dimension of the principle of good neighborliness empowers international organizations to cooperate with other international organizations.[94] The constituent treaties of the international organizations under scrutiny here even expressly provide for a power to cooperate.[95] International organizations can grant observer status to other international organizations, conclude cooperation agreements with other international organizations and agree on further joint initiatives. It has even been suggested that cooperation between international organizations might be formalized by creating an inter-institutional body. For example, in the case of the WIPO and the WTO, an "Inter-Institutional Intellectual Property Rights and Trade Governing Council"[96] could be established. In the case of the EPO and the EC, a "Select Committee of the Administrative Council"[97] could be considered. Another possibility would be to take advantage of existing inter-institutional bodies, for example, the United Nations Chief Executives Board (CEB) for Coordination.[98] The WIPO and the WTO are both member organizations of the CEB. The CEB's work program, however, focuses on cross-cutting issues that lie in the interest of a majority of member organizations, such as security of staff, but does not appear to be the right forum for bilateral cooperation between two member organizations.

Cooperation agreements between international organizations exist.[99] Unfortunately, they are more often than not bare-bone texts that leave the details of implementation open. The cooperation agreement between the WIPO and the WTO[100] provides, at least, for a delimitation of competences in the fields of technical assistance and administration. First, the WIPO and the WTO will provide technical assistance to members of both organizations on the same basis as they provide assistance to their own members. Second, the WIPO makes available to the WTO

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[94] Blokker, *supra* note 14, at 32. Some constituent treaties of international organizations expressly provide for a power to cooperate.

[95] *See* WTO Agreement, *supra* note 13, art. V; WIPO Convention, *supra* note 13, art. 13; EC Treaty, *supra* note 13, art. 302; European Patent Convention, *supra* note 13, arts. 30, 33, para. 4.

[96] Abbott, *supra* note 47, at 680.

[97] *See* European Patent Convention, *supra* note 13, art. 145; Commission Staff Working Paper, *supra* note 65, at 6.

[98] The CEB brings together the executive heads of 28 member organizations to further coordination and cooperation on the whole range of substantive and management issues facing the United Nations system. For further information, *see* CEB homepage, http://ceb.unsystem.org/.

[99] *See, e.g.*, Schermers & Blokker, *supra* note 60, at 1130–39 (cooperation agreements generally); Karen Kaiser, *Article V WTO Agreement, in* WTO – Institutions and Dispute Settlement 64–65 (Rüdiger Wolfrum et al. eds., 2006) (cooperation agreements between the WTO and the EC in particular); Frid, *supra* note 58, at 126–29.

[100] Agreement Between the World Intellectual Property Organization and the World Trade Organization, Dec. 22, 1995, 35 I.L.M. 735 (1996).

and its members its collection of laws. Thirdly, the WIPO also processes the notifications of emblems, flags and seals. In sum, the WIPO does the tasks for which it is institutionally suited. It has personnel with specific expertise in intellectual property and the infrastructure to provide support for intellectual property administration.

Despite the silence of the cooperation agreement on the delimitation of powers in the fields of rule-making and dispute settlement, the WIPO and the WTO have found a way to share these responsibilities over the last ten years. While the negotiation of new intellectual property conventions has continued under the auspices of the WIPO, the function of the WTO is to serve as a forum of last resort in case cross-concessions become relevant.[101] The WIPO does not demand consensus and, unlike the WTO, does not threaten with trade sanctions. As such, it is better adapted to address intellectual property issues that are rapidly emerging in the highly technologically integrated global economy. The substantive rules of new WIPO-administered conventions, such as the so-called internet treaties,[102] may be incorporated into the TRIPS Agreement at a later date. While the WTO is the predominant power in the field of dispute settlement, the WIPO may contribute by giving advice to WTO panels, especially where the interpretation of the Paris and Berne Conventions are concerned. In the past, WTO panels were required to refer to practice under WIPO-administered conventions in order to interpret the TRIPS Agreement.[103]

In essence, responsibilities between the WIPO and the WTO are distributed to the international organization best adapted to the particular subject matter.[104] The capacities of each international organization are thereby enhanced. In contrast to the principle of subsidiarity, which leads to a primary responsibility of the WIPO for all overlapping activities, this model of cooperation does without a hierarchical structure and is, therefore, more flexible. It allows a differentiation between activities.

IV. *Conclusion*

One can observe that the presented mechanisms and instruments of coordination are not equally commendable for international organizations in the field of intellectual property law. Because of its negative impact on democratic control

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[101] Frederick M. Abbott, *Distributed Governance at the WTO-WIPO: An Evolving Model for Open-Architecture Integrated Governance*, 3 J. Int'l. Econ. L. 63, 70 (2000). Cross-concessions became relevant during the Uruguay Round as a means to strike a balance in the diversity of trade interests and to link such different sectors as agriculture and intellectual property rights.

[102] *See supra* note 27.

[103] *See* WTO Panel Report, EC – Trademarks and Geographical Indications, WTO-Doc. WT/DS174/R, Annexes D2 and D3 (Mar. 15, 2005).

[104] Abbott, *supra* note 101, at 70–71.

and inter-organization competition, consolidation of international organizations should only be considered when other means of coordination have failed. So far, this has not been the case, as both subordination and cooperation offer promising alternative means of coordination.

As far as the WIPO and the WTO are concerned, cooperation is to be preferred to subordination. Subordination by accession is excluded from the outset, as the WTO Agreement presupposes "full autonomy in the conduct of its external commercial relations,"[105] which international organizations, other than regional economic integration organizations, are unlikely ever to possess. Subordination by application of the principle of subsidiarity is, as has been pointed out, too rigid, as it leads to the primary responsibility of only one organization for all activities, but not necessarily of the organization that is institutionally best-suited for the activity in question. In the case of the WIPO and the WTO, too sharp a delimitation is hard to reconcile with the necessary dynamics that these international organizations need in a changing world. Informal coordination, therefore, seems to be more fruitful than superior organs imposing coordination or strict rules.

Because of their common historic roots, the situation with respect of the EC and the EPO is different. Cooperation, for example in terms of consistent interpretation of EC and convention law, is only good enough, as long as the EC has not adopted the Community Patent regulation. As soon as it has done so, cooperation between the two organizations must be formalized through subordination by accession. The systems interdependencies between the European Patent and the Community Patent can only be approached by a clear delimitation of powers. This implies, however, that the EC, as the acceding organization, will refrain from dominating the EPO.

E. *Final Remarks*

In order to turn the wheel full circle, one can conclude that Manley Hudson, were he to give his lectures today, would not need to speak of the fall of international organizations, provided that international organizations decide to coordinate their overlapping activities. In doing so, the profitable cooperation of the two most prominent international organizations in the field of intellectual property law, the WIPO and the WTO, and the thus far unsuccessful attempt of the EC to accede to the EPO, may serve as both positive and negative examples. There can be safety in numbers after all.

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[105] *See* WTO Agreement, *supra* note 13, art. XII, para. 1.

Individual Progress in International Law: Considering Amnesty

By Leila Nadya Sadat

A. *Introduction*

In his book *Progress in International Organization*, Harvard Professor Manley O. Hudson argued for a new world order. To his mind, isolationism and insularity had seen their day, with people everywhere "dependent in their daily lives on the ordering of relations which [they] are forced to maintain with other peoples of the world."[1] He was primarily concerned with the new global infrastructure that had sprung-up in the wake of WWI, which would serve to facilitate, manage and improve these new, global interdependencies. "I believe that when the history of our times comes to be written," he explained, "our generation will be distinguished, above all else in the field of social relations, for the progress which we have made in organizing the world for cooperation and peace."[2] Thus, Hudson devoted his attention to institutions like the League of Nations and the International Labor Organization.

As prescient as this globalizing vision has proven to be, it was a vision still deeply grounded in the state-centric, Westphalian vision of the international order and international law.[3] Hudson's work assumed that states were the exclusive subjects of international law, although he enthusiastically embraced a niche for the offspring of their cooperation. International organizations, and especially international tribunals,[4] have a prominent role in the progress he advocated. Hudson can hardly be faulted for failing to consider, in 1932, one of the most revolutionary developments in international relations of the last half-century: the emergence of the individual as an actor in international law. After all, the internationalization of states' affairs that he promoted was radical enough. As

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[1] Manley O. Hudson, Progress in International Organization 1 (1932).

[2] *Id.* at 5.

[3] "International law applies primarily to States in their relations inter se. It creates rights for States and imposes duties upon them *vis-à-vis* other States." Manley O. Hudson, International Tribunals 180 (1944).

[4] *Id.*

Miller & Bratspies (Eds), Progress in International Law, pp. 335–356.

U.S. Senator William E. Borah agonized when he and Hudson met for a series of joint lectures at the University of Idaho in 1931:[5]

> There are some things in this world more to be desired than peace, and one of them is the unhampered and untrammeled political independence of this Republic – the right and power to determine in every crisis, … the course which it is best for the people of this nation to pursue.[6]

The world would have to suffer the scourge of a second world war and the death of fifty million individuals before serious challenges would emerge to states' stewardship of their citizens under international law's paradigm of state sovereignty and state personality. But that is not to say that the first stirrings of a role for individuals in international law were not already a part of Hudson's vision. He recognized that changes in transport and communication meant that "national boundaries […] ceased to correspond with the limits within which most men had to live their daily lives."[7] Professor Hudson understood that individuals, at the expense of states' traditional sovereignty, were the actors in and the beneficiaries of this "new international society."[8] Indirectly, individual policymakers would forge personal relationships in the regular meetings hosted by institutions like the League of Nations.[9] But more directly, individuals were the growing focus of the progress Hudson described. He praised the work of the League's Advisory Committee on Traffic in Women and Children.[10] He was optimistic about the International Labor Organization's efforts regarding workers' health and safety.[11] He saw Sam Plimsoll's successful advocacy for an international agreement on overloaded merchant ships "to protect seamen" as exemplary.[12] He argued for the significance of the Hague Peace Conferences of 1899 and 1907, and various humanitarian law conferences in the 1920s, with all their implications for individuals at war.[13] In all of this, Hudson was describing more than a primitive form of the International Bill of Rights that would move individuals to the center of international law after WWII.[14]

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[5] Hudson's lectures at this event were published as the book *Progress in International Organization. See supra* note 1.

[6] *See* Sen. William E. Borah, Speech at the Inauguration of the William Edgar Borah Foundation for the Outlawry of War (Sept. 24, 1931), in this volume.

[7] Hudson, *supra* note 1, at 8.

[8] *Id.* at 9.

[9] *See* Turner and Waters in this volume.

[10] Hudson, *supra* note 1, at 42.

[11] *Id.* at 50.

[12] *Id.* at 87.

[13] *Id.* at 13, 87.

[14] *See* Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3.

A dramatic example of the emphasis international law has come to place on individuals is, of course, international criminal law. But even in 1944, a mere two years before the historic work of the Nuremberg Tribunal, Hudson could report that "no authoritative attempt has been made to extend international law to cover the condemned and forbidden conduct of individuals, …."[15] This led him to conclude that "recent history would seem to have opened little prospect for the establishment of a permanent international criminal court."[16]

In hindsight, we know now that Hudson was wrong, or at least that his vision of the future was incomplete. Indeed, the now extant system of international criminal justice, haltingly initiated in Nuremberg[17] and Tokyo,[18] and restarted by the international criminal tribunals for Rwanda (ICTR)[19] and the former Yugoslavia (ICTY),[20] the Special Court for Sierra Leone (SCSL),[21] and the International Criminal Court (ICC),[22] represents a remarkable example of the prominent role now played in international law by the individual. Debate centers upon whether individuals are now subjects of international law, as opposed to mere objects.[23] I believe that individuals have achieved more than a limited

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[15] Hudson, *supra* note 3, at 181.

[16] *Id*. at 186.

[17] Charter of the International Military Tribunal (Aug. 8, 1945), 82 U.N.T.S. 284 [hereinafter Nuremberg Charter].

[18] Charter of the International Military Tribunal for the Far East, 4 Bevans 21 (Jan. 19, 1946), *superseded by* 4 Bevans 27 (Apr. 26, 1946).

[19] Establishing the International Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

[20] Establishing the International Tribunal for Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

[21] Establishing the Special Court for Sierra Leone, S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

[22] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3.

[23] "There is no general rule that the individual cannot be a 'subject of international law,' and in particular contexts he appears as a legal person on the international plane. At the same time to classify the individual as a 'subject' of the law is unhelpful, since this may seem to imply the existence of capacities which do not exist and does not avoid the task of distinguishing between the individual and other types of subject." Ian Brownlie, Principles of Public International Law 65 (6th ed. 2003). "The object theory … maintains that individuals constitute only the subject-matter of intended legal regulation as such. Only states, and possibly international organizations, are subjects of international law. This has been a theory of limited value. The essence of international law has always been its ultimate concern for the human being and this was clearly manifest in the Natural Law origins of classical international law …. [M]odern practice does demonstrate that individuals have become increasingly recognized as participants and subjects of international law." Malcolm N. Shaw, International Law 232 (5th ed. 2003). Shaw specifically links the ascension of the individual to international criminal law's emergence. *Id*. at 235–41. *See, e.g.*, Carl A. Norgaard, The Position of the Individual in International Law (1962).

degree of personality in international law, as evidenced by international criminal law's increasingly unbounded application to individuals, without regard to states' traditional interests in geography and sovereignty. State sovereignty remains the organizing paradigm of the world's legal order. However, the essence of the deepening international criminal law regime is the understanding that the international community may assert jurisdiction over individuals if they affect a fundamental interest of *l'ordre public international*. In these admittedly rare circumstances, the accused individual engages with the international community alone, marked by his or her own rights and duties in international law.

An example of this paradigm shift is the application of universal jurisdiction by international tribunals (and national courts) to individuals who have been granted state-sanctioned amnesty for violations of *jus cogens* crimes. Increasingly, states and the international community are finding that where there appears to be clear evidence that a high ranking individual has committed a "core" international *(jus cogens)* crime, neither the passage of time nor the exercise of territorial sovereignty may shield the individual from either civil or criminal liability.

B. *Amnesty and the Culture of Impunity*

Although it would no doubt be preferable for the international community to prevent atrocities before they occur,[24] the world not demonstrated either the resources or the will to do so consistently. Instead, just as domestic legal systems attempt to constrain violent behavior by relying upon the internalization of norms by individuals rather than the continual threat of external sanctions, the international community has sought to engage in norm building as well, with the possibility of sanctions at the domestic level conceived of as the "stick" required. This approach is exemplified by the adoption of international legal instruments such as the Torture Convention,[25] the Genocide Convention,[26] the Apartheid Convention,[27]

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[24] W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 Law & Contemp. Probs. 75 (Autumn 1996). *But see* Payam Akhavan, *Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda* 7 Duke J. Comp. & Int'l L. 325, 328 (1997) (arguing that because cataclysmic violence requires extensive planning it is both foreseeable and preventable).

[25] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention].

[26] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

[27] International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243.

and the four Geneva Conventions of 1949.[28] These treaties required the parties to criminalize their breach, or at least certain breaches of the treaties' provisions. Where domestic criminalization of this sort might fail, accountability regimes on the international plane have also been established, including the ICC and the tribunals set up for Rwanda, Yugoslav and Sierra Leone.

In spite of these efforts, impunity for the commission of human rights atrocities has been the norm, rather than the exception. Even recently, amnesty has played a key role in promoting impunity. For example, before the U.S. invasion of Iraq in 2003, Saddam Hussein was offered the opportunity to leave Iraq to save his country.[29] Donald Rumsfeld, U.S. Secretary of Defense, suggested that the "senior leadership" in Iraq and their families should be afforded safe haven in some other country to avoid the prospect of war.[30] Later that year, Charles Taylor, President of Liberia, was convinced to accept exile in Nigeria.[31] Shortly thereafter,

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[28] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Convention Relative to the Treatment for Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

[29] On the evening of March 17, 2003, President Bush declared "Saddam Hussein and his sons must leave Iraq within 48 hours," or war would result. *Bush's Speech on Iraq: "Saddam Hussein and His Sons Must Leave*," N.Y. Times, Mar. 18, 2003, at A14.

[30] *Lateline: US Offers Exile to Saddam Hussein* (Australian Broadcasting Corporation television broadcast Feb. 20, 2003), *available at* http://www.abc.net.au/lateline/content/2003/s789392.htm. It is not clear where Saddam would have been able to go, although one commentator suggested (tongue in cheek) St. Helena, Napoleon's last demeure. William F. Buckley, Jr., *On the Right: A Future for Saddam*, Nat'l Rev., Feb. 24, 2003, at 58. Others suggested Egypt, Saudi Arabia and Belarus. *News Hour with Jim Lehrer: Saddam in Exile*? (PBS television broadcast Jan. 20, 2003), *available at* http://www.pbs.org/newshour/bb/middle_east/jan-june03/saddam_1–20.html.

[31] Taylor arrived in Calabar, Nigeria, with his wife, daughters and a large entourage in August 2003. Under the terms of his asylum, Mr. Taylor was apparently forbidden from communicating with anyone involved in political, illegal or government activities in Liberia. Anna Borzello, *Nigeria Warns Exiled Taylor*, BBC News, Sept. 17, 2003, http://news.bbc.co.uk/1/hi/world/africa/3115992.stm. According to news reports, the U.S. government supported Taylor's exile, believing that it would save lives, *US Denies Charles Taylor Bounty*, BBC News, Nov. 13, 2003, http://news.bbc.co.uk/1/hi/world/africa/3266075.stm, and opposed congressional efforts to offer a $2 million bounty for his capture, and to force Nigeria to extradite Taylor to the SCSL, pursuant to an indictment issued by that court, *Taylor: Fugitive, or Exile*?, CBS News, Nov. 14, 2003, http://www.cbsnews.com/stories/2003/11/14/world/main583572.shtml. According to news reports, Taylor's exile was also supported by U.N. envoy Jacques Klein, although the United Nations generally takes the position that amnesties for war crimes, genocide and crimes against humanity are incompatible with international law. *See, e.g.*, U.N. Econ. & Soc. Council [ECOSOC],

Haiti's President Jean Bertrand Aristide was deposed and took up residence in South Africa.[32]

There is evidence that the notion of accountability is, nonetheless, gaining the upper hand on amnesty. The SCSL Appeals Chamber ruled in 2004 that the Lomé Accord, which granted amnesty to the perpetrators of crimes committed during the conflict in Sierra Leone, could not deprive the SCSL of jurisdiction because the crimes within the SCSL's statute were crimes subject to universal jurisdiction.[33] Even governments initially advocating exile, such as the Bush administration's offer to Saddam Hussein, have subsequently sought accountability in the form of criminal trials or other redress.[34] Most recently, the Sudanese government, many of whose members have been accused of serious crimes under international law, has not argued that accountability is a poor idea; instead, the government has argued that it should be able to bring prosecutions itself, rather than having the Darfur situation referred to the International Criminal Court.

Comm'n on Human Rights, *Promotion and Protection of Human Rights*, paras. 20–24, U.N. Doc. E/CN.4/2005/L.93 (Apr. 15, 2005). Many have contended that Nigerian President Obasanjo offered the asylum as a means of deflecting attention away from potential charges against Obasanjo himself for atrocities committed against unarmed civilians by troops under his orders. *Liberia-Nigeria: Questions Raised over Taylor's Exile in Nigeria*, BiafraNigeriaWorld, Aug. 23, 2003, http://news.biafranigeriaworld.com/archive/2003/aug/23/0024.html. Taylor was ultimately turned over to the SCSL in 2006 and will be tried in the Hague in 2007.

[32] Gary Marx, *Haitians in a Vise of Nature, Politics: Weeks After Floods Killed at Least 1,900 in Gonaives, Relief Efforts Have Faltered in a Climate of Violence over Who Should Rule*, Chi. Trib., Nov. 25, 2004, § 1, at 1.

[33] It did not, however, find the amnesty invalid *per se*. Prosecutor v. Kallon & Kamara, Case Nos. SCSL–2004–15–AR72(E), SCSL–2004–16–AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, paras. 87–89 (Mar. 13, 2004). This decision followed to the same effect the opinion of the ICTY in Prosecutor v. Furundzija, Case No. IT–95–17/1–T, Judgment (Dec. 10, 1998), which was cited with approval by a recent U.N. report on impunity, ECOSOC, Comm'n on Human Rights, *Promotion and Protection of Human Rights, Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, para. 48, U.N. Doc. E/CN.4/2005/102 (Feb. 18, 2005) (*prepared by* Diane Orentlicher) [hereinafter Orentlicher Impunity Study]. The SCSL reaffirmed Kallon & Kamara a few months later in Prosecutor v. Kondewa, Case No. SCSL–2004–14–AR72(G), Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord (May 25, 2004). In Kondewa, Justice Robertson authored a special opinion arguing that the amnesty had become ineffective, not because of the international nature of the crimes, but because it had been forfeited by the resurgence of the conflict. *Id*. para. 28 (separate opinion of Judge Robertson).

[34] The United States supported the trial of Saddam Hussein and other former Baath party leaders in Iraq both financially and logistically. *See* Leila Nadya Sadat, *New Developments Regarding the Prosecution of Saddam Hussein by the Iraqi Special Tribunal*, ASIL Insight, Aug. 5, 2005, http://www.asil.org/insights/2005/08/insights050805.html.

In light of these new developments in international law and practice, I examine recent decisions from the ICTY, SCSL and the International Court of Justice (ICJ), and conclude that customary international law increasingly regards amnesties for the commission of *jus cogens* crimes to be illegal, particularly for the leaders who have organized and commanded the commission of atrocities. These decisions offer an extraordinary example of an international legal process in which the individual accused of committing atrocities is isolated from the international personality traditionally enjoyed exclusively by states.[35] I must note, however, that this chapter confines itself to addressing the problem of amnesties for the commission of *jus cogens* crimes – crimes covered by peremptory norms of international law[36] – which may not be set aside by conflicting municipal laws. This point forms an important part of my thesis because it highlights the fact that an adjudication of international crimes before an international court involves the *direct* exercise of universal international jurisdiction against an *individual*. It is not the same as a domestic court's exercise of universal inter-state jurisdiction. This distinction is most clearly present in the quasi-revolutionary jurisdictional referral mechanisms present in the ICC Statute, which allow the Security Council to apply, in a manner unbounded by geography and state sovereignty, the substantive criminal law in the Court's Statute. This is nothing less than the direct application of international law to an individual,[37] in contradiction to the express interest of a state. The same idea was recognized by the ICJ in the *Yerodia* case,[38] by the ICTY

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[35] *See, e.g.*, Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 Neb. L. Rev. 181 (1996); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 Yale L.J. 2347, 2398–402 (1991); Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 Geo. L.J. 1057, 1089, 1124–25 (2004); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 Geo. L.J. 487 (2005); *see also* Anne-Marie Slaughter, *Defining the Limits: Universal Jurisdiction and National Courts, in* Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law 168, 189 (Stephen Macedo ed., 2004) [hereinafter Universal Jurisdiction].

[36] This idea is codified in Article 53 of the Vienna Convention on the Law of Treaties, which provides that a "peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

[37] The terminology is my own. *See* Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 407 (2000).

[38] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 1 (Feb. 14), available at http://www.icj-cij.org/index.php?p1=3&code=cobe&case=121&k=36 [hereinafter Congo Arrest Warrant].

in the *Furundzija* case,[39] and most recently by the SCSL. All three courts recognized the impossibility of effectively invoking an immunity created by national law before an international tribunal. In so doing, the decisions elevate the individual to a status in international law that has only peripheral regard for states.

C. *Criminal Accountability for the Violation of* Jus Cogens *Norms Under International Law: Doctrinal Foundations*

I. Jus Cogens *Crimes Under International Law*

Many discussions of amnesties avoid the question of the legal status of the crimes in question. Yet one cannot discuss the matter without at least determining in advance which international crimes are so uniformly accepted by the international community that the exercise of universal jurisdiction by the international community as a whole is generally accepted. Although the theory of *jus cogens* has been the subject of much dispute and scholarly commentary,[40] the near-universal acceptance of the notion of peremptory or *jus cogens* norms,[41] as set out in the Vienna Convention on the Law of Treaties,[42] suggests that modern international criminal law, both explicitly and implicitly, embodies within its prescriptions certain non-derogable norms of peremptory application.[43] Although not all international criminal law scholars address the question of peremptory norms (indeed, the concept does not even figure in the otherwise excellent monograph of Antonio Cassese[44]), fundamental to the notion of a duty to prosecute international

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[39] Prosecutor v. Furundzija, Case No. IT–95–17/1–T, Judgment (Dec. 10, 1998).

[40] *See, e.g.*, Anthony D'Amato, *It's a Bird, It's a Plane, It's Jus Cogens*, 6 Conn. J. Intl L. 1 (1990); Gennady M. Danilenko, *International Jus Cogens: Issues of Law-Making*, 2 Eur. J. Intl L. 42 (1991).

[41] *See, e.g.*, Alain Pellet, *Internationalized Courts: Better Than Nothing…, in* Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia 437, 444 (Cesare P.R. Romano et al. eds., 2004) (stating that all States, "even … France," accept the notion of peremptory norms of international law).

[42] Vienna Convention, *supra* note 36.

[43] In its report on what became Article 53 of the Vienna Convention, the International Law Commission gave as examples of treaties that would violate a peremptory norm of international law a treaty contemplating an unlawful use of force, a treaty contemplating an act criminal under international law, and a treaty conniving or contemplating slave trading, piracy or genocide. The Commission also mentioned as possibilities treaties violating human rights, the equality of states and the principle of self-determination. Report of the International Law Commission to the General Assembly, U.N. GAOR, 21st Sess., Supp. No. 9, U.N. Doc. A/6309/Rev.1 (1966), *reprinted in* 2 Y.B. Int'l L. Comm'n 169, 248 (1966), U.N. Doc. A/CN.4/Ser.A/1966/Add.1.

[44] *See* Antonio Cassese, International Criminal Law (2003).

crimes, a duty incumbent upon all states, is the non-derogability of the norms at issue.[45] Indeed, the very reason amnesties are so deeply problematic is that they fly in the face of this fundamental tenet of international law and practice. This may be why not one jurisdiction has, to date, accepted the juridical validity of a foreign amnesty decree for the commission of human rights atrocities. As the International Criminal Tribunal for the Former Yugoslavia opined in *Prosecutor v. Furundzija*,[46] regarding the crime of torture,

> While the *erga omnes* nature [of the crime] appertains to the area of international enforcement (*lato sensu*), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules.[47]

Even if one agrees, however, on the status of *jus cogens* crimes in principle, determining which offenses are entitled to that status is problematic. The report issued by the Secretary General establishing the ICTY, although avoiding the term *jus cogens*, took the view that the most serious crimes against the international community as a whole included rules of international humanitarian law that are "beyond any doubt" part of customary international law.[48] Examples include war crimes, genocide, and crimes against humanity.[49] The Draft Chicago Principles

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[45] *Accord* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 Va. J. Int'l L. 81, 104 (2001); Kristin Henrard, *The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility in International Law*, 8 Mich. St. U. J. Int'l L. 595, 645 (1999); Natalino Ronzitti, *Use of Force, Jus Cogens and State Consent, in* The Current Legal Regulation of the Use of Force 147 (A. Cassese ed., 1986); *cf.* Claudia Annacker, *The Legal Régime of Erga Omnes Obligations in International Law*, 46 Austrian J. Pub. & Int'l L. 131, 135 (1994).

[46] Prosecutor v. Furundzija, Case No. IT–95–17/1–T, Judgment (Dec. 10, 1998).

[47] *Id.* para. 153. It is true that this holding is arguably dicta. *See* William Schabas, *Commentary on* Prosecutor v. Furundzija, *in* 3 Annotated Leading Cases of International Criminal Tribunals 753, 755 (André Klip & Göran Sluiter eds., 1999).

[48] The Secretary-General's report does not use the terminology "jus cogens," but instead refers to "rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise." The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution* 808, para. 34, U.N. Doc. S/25704 (May 3, 1993) [hereinafter Secretary-General's Report]. The Secretary-General concluded that these rules included the Geneva Conventions of Aug. 12, 1949 for the Protection of War Victims, *supra* note 28; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto, Oct. 18, 1907, 1 Bevans 631; the Genocide Convention, *supra* note 26; and the Nuremberg Charter, *supra* note 17.

[49] *Secretary-General's Report, supra* note 48, paras. 34–35.

on Post-Conflict Justice retain the same category of offenses.[50] The Princeton Principles categorize these as "serious" crimes under international law, adding to the list piracy, slavery, crimes against peace, and torture.[51] The International Law Commission, in its 1996 Draft Code of Crimes Against the Peace and Security of Mankind, included aggression, genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes.[52] Finally, the Restatement (Third) of the Foreign Relations Law of the United States, relying on several U.S. cases,[53] takes the position that universal jurisdiction crimes (e.g., *jus cogens* offenses) include piracy, the slave trade, attacks on or highjackings of aircraft, genocide, war crimes, and perhaps certain acts of terrorism.[54]

The Restatement's omission of aggression and torture is perhaps problematic given the relatively widespread acceptance of these crimes (and may simply be a function of the fact that it is more than twenty years old). Conversely, its addition of terrorism as a *jus cogens* offense may be appropriate, particularly after the Security Council Resolutions issued following the attacks of September 11, 2001, particularly Resolution 1373.[55] Among other things, the Resolution, adopted pursuant to Chapter VII of the U.N. Charter,[56] provides that all states have a duty to enact legislation criminalizing certain acts of terrorism,[57] suggesting that

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[50] Int'l Human Rights Law Inst., Chicago Principles on Post-Conflict Justice, princ. 10 (2005).

[51] Princeton Project on Universal Jurisdiction, The Princeton Principles on Universal Jurisdiction princ. 2(1) (2001), *available at* http://lapa.princeton.edu/hosteddocs/unive_jur.pdf [hereinafter Princeton Principles].

[52] Report of the International Law Commission to General Assembly, U.N. GAOR, 51st Sess., Supp. No. 10, arts. 16–20, U.N. Doc. A/51/10 (1996), *reprinted in* [1996] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/1996/Add.1, pt. 2.

[53] *See, e.g.*, Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714–19 (9th Cir. 1992) (holding that alleged acts of official torture, which were committed in Argentina before the adoption of the Torture Convention, violated international law under which the prohibition of official torture had acquired the status of jus cogens); United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991); *In re* Extradition of Demjanjuk, 603 F. Supp. 1468, 1473–79 (N.D. Ohio 1985) (holding that offenses that are *jus cogens* may be punished by any state because the offenders are the common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution).

[54] Restatement (Third) of the Foreign Relations Law of the United States § 404 (1986).

[55] S.C. Res. 1373, para. 1, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

[56] U.N. Charter ch. VII.

[57] S.C. Res. 1373, *supra* note 55, para. 2(e). According to the Princeton Principles, terrorism is not a crime of universal jurisdiction. *See* Princeton Principles, *supra* note 51, princ. 2(1). However, Resolution 1373 "decides" that every state must punish and prevent terrorism, suggesting that it is the Security Council's belief that this crime is now a crime for which universal jurisdiction exists and for which a duty to punish is present. S.C. Res. 1373, *supra* note 55, paras. 1–2. Therefore, in the Security Council's view, presumably any amnesties granted to terrorists would be illegal.

amnesties, either *de facto* or *de jure*, for such crimes would contravene international law. Indeed, Resolution 1373 suggests that these are crimes over which the exercise of universal jurisdiction would be appropriate, and even mandatory, as a matter of customary international law.[58]

II. *Distinguishing Universal Inter-State Jurisdiction from Universal International Jurisdiction*

Because this Chapter addresses the question of amnesties only as regards *jus cogens* crimes, and makes the further assumption, like the Princeton Principles and other authorities, that the set of *jus cogens* crimes is coterminous with the set of crimes over which states may exercise universal jurisdiction,[59] a discussion of amnesties and international law necessarily entails consideration of the exercise of universal jurisdiction by states and by the international community as a whole.

States exist in a horizontal relationship to one another. Their jurisdiction to prescribe norms of criminal law is territorially bounded, except insofar as some exception permitting the extraterritorial exercise of a state's prescriptive or adjudicative jurisdiction is present. As the *Lotus* case suggests,[60] both in the views of the majority[61] as well as the dissent,[62] under the Westphalian system, the prescriptive and adjudicative jurisdiction of sovereign states is a creation of international law. Moreover, states generally have jurisdiction only over their territories, with the caveat that international law has generally recognized four exceptions to territoriality: jurisdiction based on nationality, passive personality, the protective

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[58] *See* Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 Wash. U. Global Stud. L. Rev. 135, 150 (2004). Of course, given that the Security Council presumably has no power to create international law, the question remains whether Security Council Resolution 1373 is the codification of custom or a new form of Security Council "legislation." *See generally* Paul C. Szasz, Comment, *The Security Council Starts Legislating*, 96 Am. J. Int'l. L. 901 (2002).

[59] Obviously, there are contrary views that have been expressed about the set of "universal jurisdiction crimes." *See, e.g.*, the separate opinion of President Guillaume in the Yerodia case, where he stated categorically that "international law knows only one true case of universal jurisdiction: piracy." Congo Arrest Warrant, *supra* note 38 (separate opinion of President Guillaume), *available at* http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214_guillaume.PDF. Moreover, even in cases where universal jurisdiction is accepted in principle regarding certain crimes, a court may nevertheless refuse the exercise of universal jurisdiction in a particular case as a matter of comity or for lack of resources. *Cf.* Guatemala Genocide Case, STS, Feb. 25, 2003, (No. 327/2003) (Spain), *translated in* 42 I.L.M. 686, 702–03 (2003).

[60] S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), *available at* http://www.worldcourts.com/pcij/ eng/decisions/1927.09.07_lotus/.

[61] *Id.* at 18–19.

[62] *Id.* at 43–44 (dissenting opinion of Vice-President Weiss).

principle, and the principle of universality. Application of universal jurisdiction is predicated largely on the notion that some crimes are so heinous that they offend the interest of all humanity, and, indeed, imperil civilization itself.[63] States seeking to exercise universal jurisdiction over the perpetrator of a *jus cogens* crime are therefore employing their own legislative authority to prescribe as regards an international law norm. In this scenario, the issue of individual personality (*via* criminal responsibility) is muted by the fact that the state remains the subject, here drawn into functioning as an enforcement mechanism of the international law it has created.

The situation before an international court or tribunal, however, is quite different. The vertical relationship between the individual and *jus cogens* crimes, extant as a function of the basic principles of international law, is quite different from the horizontal perspective apparent in cases of universal inter-state jurisdiction. In this context, the individual's status in international law is no longer dependent on a state as the true subject of international law. As the International Military Tribunal at Nuremberg declared, "[I]ndividuals have international duties which transcend the national obligations of obedience imposed by the individual state."[64] Standing alone, of course, this statement neither created a rule or custom, nor, importantly, did it imply that international courts necessarily have primacy over national courts, although the Tribunal itself asserted that its adjudicative power was based upon the fact that the signatories to the London Charter were merely "do [ing] together what any one of them might have done singly."[65] Instead, what this statement suggests is that international law (as a matter of prescriptive content) may sometimes take precedence over national law, and that international courts may, in appropriate circumstances, exercise adjudicative jurisdiction in questions involving international legal obligations to the disregard of particular states' interests in the matter. It was many years before the notion, that international law took precedence over national law in certain circumstances, became firmly aligned with the idea that international courts should have primacy over national jurisdictions as well – at least under certain circumstances. Indeed, one of the fundamental contributions of the Rome Statute of the International Criminal Court was to help clarify and codify the status of

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[63] *See* Luc Reydams, Universal Jurisdiction 38–42 (2003); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 Tex. L. Rev. 785, 803 (1988); *see also* Orentlicher, *supra* note 35, at 1059–60, 1063.

[64] International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, *reprinted in* 41 Am. J. Int'l L. 172, 221 (1947).

[65] *Id.* at 216.

international, as opposed to national, jurisdictions exercising adjudicative jurisdiction over *jus cogens* crimes committed by individuals.

Some commentators have argued that international courts, whether created by the Security Council or by international treaty (or by amendment to the Charter) are courts exercising jurisdiction delegated to them by states. Thus, the argument goes, independent international jurisdiction over *jus cogens* crimes does not indicate independent status as subjects for individuals.[66] This argument is overstated. Indeed, to accept such a proposition would stand the nature of the international legal order on its head, given that states' jurisdictions, wrapped up as they are in the essence and definition of sovereignty, are in fact the authors of international law. At the very least, this claim fails to explain the establishment of the ICTY, ICTR, and ICC, and it does not seem consistent with their jurisdictional bases. As the Appeals Chamber of the ICTY held in *Prosecutor v. Blaskic*,[67] the grant of authority to the ICTY by the U.N. Security Council created a vertical relationship between the ICTY and individuals, not only as to the international law involved, but with regard to the "judicial and injunctory powers" of the ICTY.[68] The Appeals Chamber noted the continued dependence of international courts upon states and the Security Council in the realm of enforcement jurisdiction, a dependency continued and perhaps even exacerbated with the establishment of the International Criminal Court and the very "soft" enforcement regime built into the ICC's Statute.[69] Moreover, as the ICTY noted, state sovereignty is the principle organizing premise of the world's legal order. However, to the extent that national and international legal orders, each autonomous in their own right, operate in a mutually reinforcing relationship as regards the individual, it would seem deeply problematic to argue that states, to the exclusion of these international tribunals and the individuals over whom they exercise jurisdiction, are the ultimate repositories of the international community's prescriptive and adjudicative jurisdictional capacities. Rather, as European scholars suggested during the post-war period, the international community may assert jurisdiction over a problem if it affects a fundamental interest of the international community.[70]

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[66] Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 Cal. W. Int'l L.J. 241, 269–276 (2001); Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 L. & Contemp. Probs. 13, 18, 52–57 (Winter 2001).

[67] Prosecutor v. Blaskic, ICTY, Case No. IT–95–14, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Oct. 29, 1997).

[68] *Id*. para. 47.

[69] Sadat & Carden, *supra* note 37, at 415–17.

[70] *E.g*., Georges Levasseur, *Les crimes contre l'humanité et le problème de leur prescription*, 93 J. Droit International 259, 267 (1966) (Fr.).

D. *Recent International Decisions and Practice*

I. *International Decisions*

In addition to the practice of the U.N. Human Rights Committee, as well as regional human rights courts, particularly in the Americas, four international legal decisions were recently handed down on the question of amnesties and the related problem of immunities for *jus cogens* crimes. In the first, *Prosecutor v. Furundzija*,[71] the ICTY held that not only was the prohibition on torture *jus cogens*, but also that any amnesty therefore would be inconsistent with international law.[72] The discussion of amnesties was not necessary to the resolution of the case, as the problem of amnesties was not raised during the proceedings; however, the Trial Chamber cited with approval a Comment from the Human Rights Committee that "[a]mnesties are generally incompatible with the duty of States to investigate [torture]."[73] Moreover, the Trial Chamber noted that even in the light of an amnesty, a prosecution could be instituted either before a foreign court, an international tribunal, or in their own country under a subsequent regime.[74]

Although *Furundzija* only addressed the issue of amnesty in passing, the question was squarely presented to the Special Court for Sierra Leone. The SCSL was established on January 16, 2002, by agreement entered into between the United Nations and the Government of Sierra Leone.[75] The jurisdiction *ratione materiae* of the SCSL included, *inter alia*, crimes against humanity and war crimes. In an opinion on the question of amnesties for international crimes, dated March 14, 2004, the Special Court considered the appeals of two defendants who argued the amnesty granted under the Lomé Peace Agreement precluded their trial before the SCSL.[76]

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[71] Case No. IT–95–17/I–T, Judgment (Dec. 10, 1998).

[72] *Id*. paras. 153, 156.

[73] *Id*. para. 155, n.172 (citing Compilation of General Recommendations Adopted by Human Rights Treaty Bodies, para. 30, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994)).

[74] *Id*. para. 155.

[75] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, U.N. Doc. S/2002/246/Annex (Mar. 8, 2002). The negotiations were undertaken pursuant to Security Council Resolution 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

[76] Kallon & Kamara, *supra* note 33, para. 1. This provision was negotiated between the Government of Sierra Leone and the Revolutionary United Front (RUF) on July 7, 1999. Although a representative of the Secretary-General of the United Nations and outside governments signed as "Moral Guarantors" of the agreement, only two factions of Sierra Leonians were parties thereto: President Kabbah, who signed on behalf of the Sierra Leone government, and Corporal Sankoh on behalf of the RUF. It was ratified by the Parliament of Sierra Leone on July 15, 1999. After the RUF reneged on the agreement, the President of Sierra Leone wrote to the Security Council

The defendants argued that, notwithstanding the international nature of the crimes, the SCSL was bound to respect the amnesty granted by the Lomé Agreement because the Agreement was an international treaty, having been signed by six states and a number of international organizations, including the RUF.[77] The SCSL disagreed, holding that

> [t]he role of the UN as a mediator of peace, the presence of a peace-keeping force which generally is by consent of the State and the mediation efforts of the Secretary-General cannot add up to a source of obligation to the international community to perform an agreement to which the UN is not a party.[78]

Instead, the court found that the agreement could not be characterized as an international instrument.[79] Conversely, it held that Article 10 of the Special Court's Statute, forbidding the Special Court from taking into consideration "an amnesty granted to any person falling within the jurisdiction of the Special Court in respect of [international] crimes [within the Special Court's jurisdiction] shall not be a bar to prosecution," did apply.[80] Therefore, any amnesty granted to the accused had no effect. In the words of the Special Court:

> Where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction. A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.[81]

The Special Court concluded that the crimes within its jurisdiction – crimes against humanity and war crimes committed in internal armed conflict – are the subject of universal jurisdiction under international law.[82] Going beyond many national court decisions, which conclude that states were entitled to exercise jurisdiction over such crimes, the Special Court suggested that the prosecution of such crimes was perhaps required, given that "the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*."[83]

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requesting the establishment of a "court … to administer international justice and humanitarian law."Letter from the Permanent Representative, Sierra Leone, to the President of the Security Council, United Nations 3 (Aug. 9, 2000), U.N. Doc. S/2000/786/Annex (Aug. 10, 2000).

77 Kallon & Kamara, *supra* note 33, paras. 22, 30.

78 *Id*. para. 39.

79 *Id*. para. 49.

80 *Id*. paras. 53, 64 (quoting SCSL art. 10 (2000)).

81 *Id*. para. 67.

82 *Id*. para. 69.

83 *Id*. para. 71. Somewhat inconsistently, the court suggested that domestic amnesties for such crimes were lawful.

The third decision is the ICJ's opinion in the *Yerodia* case.[84] The separate and dissenting opinions filed in that case offer an interesting perspective on the question of universal jurisdiction and universal jurisdiction crimes under international law. The court held that Yerodia was immune from Belgium's criminal jurisdiction by virtue of his status as a sitting foreign minister of the Democratic Republic of the Congo.[85] However, perhaps to meet the critique that its decision could promote impunity for international crimes, the court stated that several *fora* would nonetheless be available for his prosecution – that is, his immunity before the courts of Belgium was not tantamount to impunity for the commission of crimes under international law.[86] In particular, an accused could be tried before the courts of his own state, in a foreign state if either his state waived its immunity or after his tenure in office ceased,[87] and finally, "an incumbent or former foreign minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction."[88] The ICJ referred specifically in this paragraph to the International Criminal Court, and the *ad hoc* Tribunals for Rwanda and the Former Yugoslavia, but did not foreclose other international courts from relying upon this holding in support of their own jurisdiction.[89] This holding has proven to be more than theoretical. On May 31, 2004, the Special Court faced the question of immunity for a sitting head of state, namely Charles Taylor. In a fascinating opinion, the Special Court opined that, because it was an international court, the immunity invoked by Taylor could not apply.[90] The Special Court, while admitting that it was not "immediately evident" why national and international courts could differ as to their treatment of immunities under international law,[91] suggested the following: first, the principle of the sovereignty of states was inapplicable, given the court's status as an international organ; and second, as a matter of policy, " 'states have considered the collective judgment of the international community to provide a vital safeguard against the potential destabilizing effect of unilateral judgment in this area.' "[92]

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[84] Congo Arrest Warrant, *supra* note 38.

[85] *Id.* para. 58.

[86] *Id.* para. 60.

[87] Here, however, the court has created significant confusion as to what acts may be chargeable, stating that he may be charged with acts subsequent to his period of office "as well as in respect of acts committed during that period of office in a private capacity." *Id.* para. 61.

[88] *Id.*

[89] *Id.*

[90] Prosecutor v. Taylor, Case No. SCSL–2003–01–I, Decision on Immunity from Jurisdiction, para. 51 (May 31, 2004), *available at* http://www.sc-sl.org/Documents/SCSL–03–01–I–059.pdf.

[91] *Id.*

[92] *Id.* (quoting Amicus Brief of Professor Diane Orentlicher at 15, Taylor, Case No. SCSL–2003–01–I).

Of course, as alluded to above, there is another explanation of the difference between the jurisdiction of national and international courts in this area, which is that they are not exercising the same form of universal jurisdiction at all.[93]

II. *International Practice*

Principle 7(1) of the Princeton Principles on Universal Jurisdiction provides that "[a]mnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law,"[94] suggesting the undesirability, but perhaps not a *per se* prohibition, on all domestic amnesties for *jus cogens* crimes under international law. The view taken by the drafters of the Principles in 2001 has been strengthened by recent state and international practice, and indeed, research to date has not uncovered any recent case in which a foreign or international court has respected a state amnesty with respect to a *jus cogens* crime. At the same time, even if courts are unwilling to consider amnesties for *jus cogens* crimes as having any extraterritorial effect (or any effect before international courts), they are still hesitant to declare them unlawful *per se*. For example, the amnesty opinion of the SCSL held (perhaps as dictum), that although the Lomé amnesty was inapplicable before it, there was "not yet any general obligation for States to refrain from amnesty laws on these [*jus cogens*] crimes. Consequently, if a State passes any such law, it does not breach a customary rule."[95]

This hesitancy is perhaps because the law in this area has been slow to evolve and is difficult to apprehend. As to war crimes, most authorities distinguish between amnesties that might be given for crimes committed in international and non-international armed conflict.[96] The grave breaches regime of the four Geneva Conventions of 1949 mandate the exercise of universal jurisdiction over those crimes.[97] While it is certainly possible that only the substantive provisions

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[93] *See supra* notes 35–39 and accompanying text.

[94] Princeton Principles, *supra* note 51, princ. 7(1).

[95] Kallon & Kamara, *supra* note 33, para. 71.

[96] Although amnesty clauses for war crimes committed in international armed conflict were generally incorporated in peace agreements prior to World War I, they were vigorously rejected thereafter. Fania Domb, *Treatment of War Crimes in Peace Settlements – Prosecution or Amnesty*?, 24 Isr. Y.B. on Hum. Rts. 253, 256–57 (1994).

[97] Geneva Convention I, *supra* note 28; Geneva Convention II, *supra* note 28; Geneva Convention III, *supra* note 28; Geneva Convention IV, *supra* note 28. This obligation was expanded upon in the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.; *see also* Michael Bothe, *War-Crimes in Non-International Armed Conflicts*, 24 Isr. Y.B. Hum. Rts. 241 (1994); Domb, *supra* note 96, at 261.

of the Conventions and not their procedural provisions have risen to the level of custom, most commentators have accepted that, at least with respect to war crimes committed in international armed conflict that fall within the grave breaches regime, a fair (but not watertight) case can be made not only for the existence of a customary international law duty to prosecute or extradite the offender, but, as a corollary,[98] for a rule prohibiting blanket amnesties.[99]

As regards non-international armed conflicts, at least some take the view that general amnesties are not only permitted, but are encouraged by existing law.[100] This view relies upon Article 6(5) of Protocol II relating to the Protection of Victims of Non-International Armed Conflict, which provides, "At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."[101]

This provision was cited by the South African Constitutional Court as supporting the validity, under international law, of the amnesties granted by the South African Truth and Reconciliation Commission.[102] The decision may be criticized for being insufficiently attentive to the international legal issues in

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[98] There are two related, yet distinct, issues raised by the question of amnesties. First, whether states have a duty to punish and prosecute (or extradite) those who commit crimes falling under universal jurisdiction. Second, even if no such duty to punish exists, whether international law recognizes the legality of amnesties for such offenses. The two questions are often conflated, but they are distinct. One can answer the first question in the negative, for example, but still recognize that the absence of an affirmative obligation to prosecute does not permit states carte blanche in their reaction to the commission of mass atrocities. On the other hand, an affirmative duty to prosecute or extradite would appear to rule out the legality of amnesties.

[99] Scholars are divided on this question. Professor Meron argues that every state has a duty to try or extradite those guilty of grave breaches, and has "the right, although probably not the duty, to prosecute [other] serious violations of the Geneva Conventions." Theodor Meron, *Is International Law Moving Towards Criminalization*?, 9 Eur. J. Int'l L. 18, 23 (1998). On the other hand, states have generally not complied with this obligation, thereby undermining its claim as custom. M. Cherif Bassiouni & Edward M. Wise, Aut Dedere Aut Judicare, The Duty to Extradite or Prosecute in International Law 44–46 (1995). Cassese, *supra* note 44, at 5.

[100] See Domb, *supra* note 96, at 266–67.

[101] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 6(5), June 8, 1977, 1125 U.N.T.S. 609, 614 [hereinafter Protocol II]. One author takes the position that this language was intended to apply to those combating the State, not those acting as its agents. Peter A. Schey, *Addressing Human Rights Abuses: Truth Commissions and the Value of Amnesty*, 19 Whittier L. Rev. 325, 340 (1997).

[102] Azanian Peoples Org. (AZAPO) v. President of the Republic 1996 (8) BCLR 1015 (CC) at 1033 (S. Afr.).

question, in particular, for failing to analyze the crimes committed as crimes against humanity (apartheid clearly constituting such a crime), and neglecting to establish whether there exists any customary international law duty to punish offenders of a prior regime for such crimes.[103] Moreover, both the ICTY and the SCSL have made it clear that crimes committed in internal armed conflict cannot benefit from amnesties, at least before those jurisdictions, and even more importantly, perhaps, the ICRC takes the position that Article 6(5) may not be "invoked in favour of impunity of war criminals, since it only applied to prosecution for the sole participation in hostilities."[104] Thus while soldiers may benefit from a general amnesty for combatants, the ICRC takes the position that they may not receive immunity for the commission of atrocities.[105]

With respect to crimes against humanity and genocide, some commentators have vigorously asserted the existence of a duty to investigate and punish human rights violations committed under a prior regime.[106] Certainly, the Genocide Convention and the Torture Convention suggest that a duty is assumed by states Parties to those conventions to pursue and punish (or extradite, in the case of the Torture Convention) those who violate the Conventions' prohibitions.[107] However, even those treaties are unclear as to the precise modalities of such punishment. They would thus appear to leave a certain degree of discretion to national legal systems in their implementation.

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[103] John Dugard, *Reconciliation and Justice: The South African Experience*, 8 Transnat'l L. & Contemp. Probs. 277, 302 (1998). This criticism is consistent with the notion that there may be an international legal obligation to punish at least the worst offenders after a civil war as a necessary corollary of the need to protect human rights. Bothe, *supra* note 97, at 248 (arguing that principles of state responsibility may require prosecution). Nonetheless, while the distinction between international and noninternational armed conflict may be disappearing, it has not done so yet. *See* Andrews, in this volume.

[104] 2 Int'l Comm. of the Red Cross, Customary International Law 4043 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

[105] *Id.*

[106] Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537, 2546–48 (1991).

[107] Article 1 of the Genocide Convention, provides that "genocide … is a crime under international law which they undertake to prevent and to punish." Genocide Convention, *supra* note 26, art. 1. The Convention is not based on a principle of universal jurisdiction, but of territorial jurisdiction; that is, pursuant to Article 6 of the Convention, those charged with genocide or similar acts "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by [an] international penal tribunal." *Id.* art. 6. Similarly, Article 4 of the Torture Convention requires States Parties to "ensure that all acts of torture are offences under [their] criminal law" and Article 7 requires them to either extradite or prosecute alleged torturers. Torture Convention, *supra* note 25, arts. 4, 7.

As to a generalized customary international law rule requiring punishment, the evidence of state practice is less forceful. At the same time, although the human rights instruments that guarantee a right to bodily integrity and freedom from torture and other abuses do not typically, by their terms, require states to investigate and prosecute abuses of rights,[108] regional human rights courts and international human rights monitoring bodies have been unanimous in imposing an affirmative obligation on states to investigate human rights abuses.[109] Additionally, in 2001, the Inter-American Court rendered its first judgment on the merits of an amnesty, finding Peru's amnesty laws incompatible with international law.[110]

E. *Conclusion*

The decisions discussed above are highly significant, particularly when viewed in light of emerging state practice. Without more, perhaps they do not establish that a duty to investigate and prosecute is imposed upon states as a matter of international

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[108] Naomi Roht-Arriaza, *Sources in International Treaties of an Obligation to Investigate, Prosecute and Provide Redress, in* Impunity and Human Rights in International Law and Practice (Naomi Roht-Arriaza ed., 1995).

[109] The leading case is Velásquez Rodríguez, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29). Velásquez has been followed by the Inter-American Commission on Human Rights to find that Chile's amnesty laws violated the right to judicial protection in the Convention, as well as the State's duty to "prevent, investigate and punish" any violations of the rights found in the Convention. Hermosilla v. Chile, Case 10.843, Inter-Am. C.H.R., Report No. 36/96, OEA/Ser.L./V/II.95, doc. 7 rev. para. 73 (1996); *see also* Espinoza v. Chile, Case 11.725, Inter-Am. C.H.R., Report No. 133/99, OEA/Ser.L./V/II.106, doc. 6 rev. paras. 102–07 (1999). The European Court of Human Rights has, similarly, suggested that states may have affirmative obligations to prevent and remedy breaches of the Convention in certain circumstances suggesting in one case that criminal prosecution could be required as part of that obligation. X & Y v. Netherlands, App. No. 8978/80, 8 Eur. H.R. Rep. 235, 241 (1985) (holding that the Netherlands was required to adopt criminal law provisions to remedy sexual abuse of a mentally handicapped individual living in a home for mentally handicapped children because "the protection afforded by the civil law in [this] case is … insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions."); *see also* Selçuk & Asker v. Turkey, App. Nos. 23184/94, 23185/94, 26 Eur. H.R. Rep. 477, 519–20 (1998). The Human Rights Committee has reached a similar conclusion, finding that criminal prosecutions may sometimes be required. Orentlicher Impunity Study, *supra* note 33, para. 37, at n.48 (cases cited). Finally, the African Commission on Human and Peoples' Rights has concluded that governments have not only negative obligations, but affirmative duties to protect their citizens. SERAC & CESR v. Nigeria, Comm. 155/96, 15th Annual Activity Report, Annex V, para. 57 (2001–2002), *available at* http://www.achpr.org/english/_doc_target/documentation.html?../activity_reports/activity15_en.pdf.

[110] Barrios Altos Case, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75, at 14 (Mar. 14); *see also* Orentlicher Impunity Study, *supra* note 33, para. 29.

law. However, they do suggest that a prohibition against the grant of blanket amnesties for the commission of *jus cogens* crimes may be crystallizing as a matter of customary international law.[111] Although some countries have granted amnesties to the perpetrators of atrocities under a prior regime, amnesties that in some instances have been sustained by higher courts,[112] this practice appears to be changing, certainly in countries where democratic institutions have come to replace dictatorships or military regimes, as the examples of Chile and Argentina seem to suggest. Indeed, it may be that amnesties are acceptable within a society only so long as they are needed to provide stability, after which time their beneficiaries need to "repay" the liberty they received under duress.

The International Criminal Court Statute is explicit on certain challenges to accountability such as superior orders,[113] head of state immunity,[114] and statute of limitations,[115] but is silent both as to any duty to prosecute and with regard to amnesties.[116] Although the issue was raised during the Rome Conference at which the Statute was adopted, no clear consensus developed among the delegates as to how the question should be resolved. This too suggests that customary international law had not crystallized on this point, at least not in 1998. According to the Chairman of the Committee of the Whole of the Diplomatic Conference, the question was purposely left open by the drafters: while the Statute does not condone the use of amnesties by its terms, presumably the Prosecutor has the power to accept them if doing so would be "in the interests of justice."[117]

Finally, in regard to the international practice of the United Nations, although prior to the establishment of the International Criminal Court in 1998, international negotiators participated in amnesty deals, consistent with recent jurisprudence on the subject, the United Nations now takes the position that a grant

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[111] Geoffrey Robertson, Crimes Against Humanity 248–53 (2000); Orentlicher, *supra* note 106, at 2568–81.

[112] *See, e.g.*, Hermosilla et al. v. Chile, Case 10.843, Inter-Am. C.H.R., Report No. 36/96, OEA/Ser.L./V/II.95, doc. 7 rev. para. 73 (1997) (describing decision of Supreme Court of Chile in 1990 to uphold a self amnesty).

[113] Rome Statute, *supra* note 22, art. 33.

[114] *Id.* art. 27.

[115] *Id.* art. 29.

[116] *See* Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 Cornell Int'l L. J. 507, 523–25 (1999) (discussing some of the issues raised by the Statute).

[117] Rome Statute, *supra* note 22, art. 53(2)(c). The delegates were largely unable to achieve consensus on the issues of pardons, commutations and amnesties. *See* John T. Holmes, *The Principle of Complementarity, in* The International Criminal Court: The Making of the Rome Statute 41 (Roy S. Lee ed., 1999).

of amnesty in the case of a *jus cogens* crime is inconsistent with international law. As stated by the U.N. Secretary-General in his 2000 report on the establishment of the SCSL:

> While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.[118]

Although it may be, as the Special Court for Sierra Leone has intimated, that amnesties, even for the commission of *jus cogens* crimes, are lawful in the territorial state, a proposition that appears increasingly tenuous, the cases to date have unanimously concluded that the amnesties cannot "travel" with efficacy to other jurisdictions, and, in particular, are without force before international courts and tribunals.

These holdings reinforce the jurisprudence of the Nuremburg Tribunal to the effect that crimes are "committed by men, not by abstract entities," and suggest that individuals have attained an independent status in international law that makes it increasingly difficult to characterize them as mere objects. Would these developments have surprised Hudson? Probably not, even though his vision of international law did not include them. Would he have approved of them? I believe so. For Hudson, as one of his biographers wrote at the time of his death, "came out of the heart of America and made the world his stage."[119] Born in a small Missouri town, Hudson understood intuitively that international law was not just about intercourse between the nations, but about achieving world peace under the rule of law – for all the world's citizens, especially the victims of war.

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[118] The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, para. 22, *delivered to the Security Council*, U.N. Doc. S/2000/915 (Oct. 4, 2000); *see also* The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, paras. 6, 7, 18, *delivered to the Security Council*, U.N. Doc. S/2004/616 (Aug. 23, 2004).

[119] Erwin N. Griswold, *Manley Ottmer Hudson*, 74 Harv. L. Rev. 209, 209 (1960).

The Challenges of Evaluating NGO "Success" in Cross-Border Rights Initiatives: The Examples of the International Campaign to Ban Landmines and the Autotrim/Customtrim Initiative under the NAFTA Labor Side Agreement

By Monica Schurtman

A. *The Growing Prominence of NGOs in Developing and Implementing International Norms and the Challenge of Establishing Realistic Measures by which to Assess their Work*

In his 1931 lectures "Progress in International Organizations," Professor Manley O. Hudson emphasized the expanding influence of international governmental organizations (IGOs) on legal regulation and policy in an increasingly interconnected world.[1] Hudson scarcely mentioned the potential role non-governmental organizations (NGOs) could play in shaping international law and relationships. At the time few cross-border NGOs existed—much less held significant sway—in international discourse, particularly with respect to the formation of policy or law. Today, by contrast, NGOs routinely act across international borders in major ways.[2] As Jose Alvarez comments, "[N]o one questions today the fact that international law—both its content and its impact – has been forever changed by the empowerment of NGOs."[3]

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[1] Manley O. Hudson, Progress in International Organization (1932).

[2] For discussions of the historical evolution of cross-border NGOs and the prominent roles they play today in developing, promoting, and monitoring compliance with international legal norms, *see generally*, Margaret E. Keck & Kathryn Sikkink, Activists Beyond Borders (1998); William Korey, NGOs and the Universal Declaration of Human Rights: "A Curious Grapevine" (2001).

[3] Jose E. Alvarez, International Organizations as Law-Makers 611 (2005).

Miller & Bratspies (Eds), Progress in International Law, pp. 357–380.

Despite the proliferation of NGOs during the last four decades, no single authoritative definition of "NGO" exists. In general terms, NGOs are "formal influence groups unattached to any state."[4] Yet as Menno T. Kamminga aptly observes: "NGOs are most easily defined by explaining what they are not."[5] Kamminga posits that NGOs share five basic characteristics. First, they are "private structures in the sense that they are not established, or controlled by, states." Second, they do not aim "to overthrow governments by force." Third, although NGOs often try to change government policies and practices, they do not seek state power. Fourth, while NGOs may fundraise to carry out their activities, "they do not seek financial profit for their own sake." Fifth, NGOs are typically law-abiding. In sum, NGOs are usually "private citizens' groups created to further specific common objectives of their members," such as the promotion of human rights, protection of the environment, or enhancing the rights of workers through advocacy, relief and assistance, or a combination thereof.[6]

One way to understand how NGOs interact with other players in cross-border rights advocacy is through what Harold Koh and others refer to as transnational legal process theory. According to Koh's model, transnational internalization and implementation of legal norms occurs in four overlapping phases: (1) subject-specific interactions transpire among transnational actors in a law-declaring forum which (2) prompt interpretation and enunciation of a relevant global norm and (3) compel other parties to internalize the new articulation of the norm and finally (4) "bind" parties to obey the norm.[7] This process relies on change agents. The first of these are "transnational norm entrepreneurs"—NGOs or private individuals who draw worldwide attention to a particular issue. Through education and publicity, they mobilize popular opinion and action domestically and abroad to support a particular norm or set of norms, so as to change the way governments act with respect to the specific issue. Second, "governmental norm sponsors" are officials who work proactively with non-governmental actors by operating inside governmental channels to advocate for the changes that non-governmental norm entrepreneurs urge. Governmental norm sponsors become "governmental norm entrepreneurs" when they use their official status to promote normative positions

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[4] Debora Spar & James Dail, *Of Measurement and Mission: Accounting for Performance in Nongovernmental Organizations*, 3 Chi. J. Int'l L. Rev. 171 (2002).

[5] Menno T. Kamminga, *The Evolving Status of NGOs under International Law: A Threat to the Inter-State System, in* State, Sovereignty, and International Government 390 (Gerard Kreijen, et. al., eds., 2002).

[6] *Id.*

[7] Harold Hongu Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 Hous. L. Rev. 623, 645 (1998).

externally. Third, public and private norm entrepreneurs may form "transnational issue networks" involving state and non-state entities that possess different kinds of expertise in broader cross-border discussion, information transmission, and problem-solving. Fourth, "interpretive communities" consist of transnational public and private actors who participate in a law-declaring forum to frame, debate, and further elaborate the meaning and content of particular norms so as to develop standards against which conduct can be measured.[8]

Commentators may quibble over how best to define NGOs and continue to refine models to explain the ways in which NGOs interact with other players in effecting normative change across borders. Still, most experts today agree that NGOs can exert considerable pressure on transnational legal, political, and regulatory matters.[9] Accordingly, just as Hudson began to recognize decades ago that the increasing impact of IGOs on world affairs required the development of tools to evaluate their efficacy,[10] the heightened importance of NGOs operating in the international arena today demands the creation of reliable accountability mechanisms and assessment measures.[11]

NGO accountability and NGO success, although related, have different foci. Accountability implies that NGOs are obligated to provide information about their activities and to face sanctions for conduct deemed unsatisfactory by agreed-upon "principals."[12] Scholars, advocates, and grantors are also trying to develop indicators to measure the "success" of NGOs in international rights initiatives.[13] Evaluating the success or effectiveness of a rights-oriented NGO focuses on the extent to which its work contributes to the process of producing the normative changes it seeks.

Constructing a viable framework by which to analyze NGO success is particularly difficult because different types of NGOs operate in diverse spheres. Few

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[8] *Id*. at 645–650.

[9] *See, e.g., supra* notes 2–8 and accompanying text.

[10] Hudson, *supra* note 1, at 118.

[11] *See generally* Alan F. Fowler, *Assessing NGO Performance: Difficulties, Dilemmas, and a Way Ahead, in* Beyond the Magic Bullet: NGO Performance and Accountability in the Post Cold War World 169 (Michael Edwards & David Hulme eds., 1996).

[12] Erik B. Bluemel, *Overcoming NGO Accountability Concerns in International Governance*, 31 Brook. J. Int'l J. 139, 143 (2005). *See also* Michael Edwards & David Hulme, *Assessing NGO Performance and Accountability, in* Beyond the Magic Bullet, *supra* note 11, at 8 (agreeing that NGO accountability typically refers to "the means by which individuals and organizations report to a recognized authority (or authorities) and are held responsible for their actions."). Bluemel emphasizes that because NGO roles vary widely, accountability measures must reflect functional differences.

[13] *See, e.g.*, Spar & Dail, *supra* note 4.

existing approaches seem useful in assessing the efficacy of transnational NGO rights campaigns launched under wildly varying political, economic, and social circumstances.[14] The purpose of this chapter is to generate further discussion about how to meaningfully evaluate cross-border NGO rights-oriented efforts, given such disparities.

I begin by describing two transnational NGO rights initiatives. Each undertook similar kinds of advocacy techniques, yet encountered vastly dissimilar challenges and responses, largely because of the particular contexts in which they worked. These case studies illustrate the need to elaborate evaluative frameworks capable of adequately taking into account the variations that inform the progress of cross-border NGO efforts.

The first case study is the International Campaign to Ban Landmines (ICBL).[15] The ICBL galvanized the creation and implementation of the Landmine Treaty.[16] The Treaty prohibits the use, manufacture, trade, and transfer of anti-personnel landmines; requires the destruction of stockpiles; prioritizes de-mining and delivery of medical and rehabilitative services to survivors of mine explosions; and outlines a system, comprised by governments, NGOs, and IGOs, to monitor treaty

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[14] *Id*. (supporting an evaluative approach of objective and subjective benchmarks to analyze NGO success that would incorporate identifying specific categories of NGOs, determining in which category an NGO belongs, and assessing NGOs according to their outputs, outcomes, and impacts); Gay J. McDougall, *Decade of NGO Struggle*, 11 No. 3 Hum. Rts. Brief 12 (2004) (stating that recognition of rights is one measure of success, but that NGO efficacy must also consider application and implementation over time—making rights real for people); Edwards & Hulme, *supra* note 11, at 257 (commenting on the "sheer complexity of NGO performance assessment and accountability in determining what to evaluate" and "the problems of identifying impact when individual NGOs and projects are such a small part of the overall picture, how to measure qualitative changes in the strength of institutions or the awareness of individuals"). There are few agreed upon standards for performance, and "no obvious bottom line against which progress can be measured." Edwards & Hulme, *NGO Performance and Accountability, in id*. at 9; Alan F. Fowler, *Assessing NGO Performance: Difficulties, Dilemmas, and a Way Ahead*," in *id*. at 169 (discussing the difficulties in developing effective evaluative tools, and attempts by NGOs to assess performance).

[15] Initiated in 1992 by a handful of NGOs, the ICBL's first steering committee included the Vietnam Veterans of America Foundation, the Human Rights Watch Arms Division, the Mine Action Group, Handicap International, Medico International, and Physicians for Human Rights. Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations, and the Idea of International Civil Society*, 11 EJIL 91, 105 (2000). Today the ICBL constitutes a network of more than 1400 NGOs operating in over 90 countries. International Campaign to Ban Landmines, Home Page, www.icbl.org.

[16] The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 36 I.L.M. 1507 (1997) (entered into force Mar. 1, 1999) [hereinafter Landmine Treaty].

compliance.[17] In 1997, the ICBL became one of the few NGO-driven rights campaigns to win the Nobel Peace Prize.[18]

The second case study is the NGO-run Autotrim/Customtrim campaign[19] which sought to use the NAFTA[20] Labor Side Agreement[21] to strengthen occupational health and safety norms, and thereby improve working conditions in Mexico's *maquiladora* industry[22] while indirectly influencing normative change related to broader labor issues in Mexico, the United States, and Canada. One of the Side Agreement's stated objectives is to increase compliance with legal standards governing work-related health and safety in the NAFTA countries.[23] A principal method is through the Agreement's submission process. The submission process can be used by NGOs and other private actors to challenge a NAFTA government's alleged violations of the Agreement—specifically, a persistent failure to enforce applicable labor laws.[24] The Autotrim/Customtrim campaign revolved around a submission of the same name.[25] While receiving modest acclaim, the Autotrim/Customtrim initiative failed to achieve concrete normative change.

Parts B and C of this chapter provide overviews of the ICBL and the Autotrim/Customtrim initiative. Part D draws on transnational legal process theory to

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[17] *Id.*

[18] The Nobel Committee explained that the award was intended to recognize the ICBL's leadership role in organizing hundreds of NGOs—as well as governments and IGOs—to craft and conclude the multilateral treaty, and to signal approval of cooperation among public and private actors. The Nobel Prizes, History of Organization, http://nobelprize.org/nobel_prizes/peace/laureates/1997/icbl-history.html.

[19] This campaign, spearheaded by two NGO associations, the Coalition for Justice in the Maquiladoras and the Maquiladora Health and Safety Support Network, comprised a loosely knit alliance of approximately 75 groups in Mexico, the United States, and Canada.

[20] North American Free Trade Agreement between the Government of the United States, the Government of Canada, and the Government of the United Mexican States, Dec. 17, 1992, 32 I.L.M. 296.

[21] North American Accord on Labor Cooperation Between the Government of the United States, the Government of Canada, and the Government of the United Mexican States, Sept. 13, 1993, 32 I.L.M. 1499 [hereinafter Side Agreement].

[22] Maquiladoras are factories that are part of directly-owned subsidiaries or subcontractors of foreign or multinational corporations. Raw materials are imported into Mexico, assembled into finished goods by Mexican workers in the maquiladoras, and then exported to the country from which the materials originated or to a third country. Gerard Morales, et al., An Overview of the Maquiladora Program (2004), www.dol.gov/ilab/media/reports/nao/maquila.htm.

[23] Side Agreement, *supra* note 21.

[24] The Agreement's submission process is described *infra* notes 57–61 and accompanying text.

[25] U.S. Dept. of Labor, Bureau of Int'l Labor Affairs, U.S. Nat'l Admin. Office, *available at* http://www.dol.gov/ilab/programs/nao/public_submissions.htm (follow "U.S. NAO Submission 2000–01" hyperlink) [hereinafter Autotrim/Customtrim Submission].

facilitate a comparative discussion of the efficacy of each undertaking, and to show that NGOs can lay important foundations for long-term normative change even when advancements in transnational process are interrupted. Part D also aims to underscore the point that the different contexts in which NGOs undertake rights-oriented campaigns necessarily informs outcomes. Although transnational legal process theory is useful in describing how NGOs can foster wide acceptance of international norms, it does not sufficiently consider how various external factors affect the degree to which NGOs succeed in doing so in practice.

In Part E, I sketch a general evaluative paradigm that begins to assess the effectiveness of NGO international rights-oriented efforts while taking into account the huge differences among such NGOs, the subject matter they engage, the dissimilar historical, political, and economic contexts in which they often operate, and the distinct obstacles they face. This framework envisions that NGO-driven international rights campaigns are influenced by at least six broad factors: (1) historical timing and political context; (2) economic interests at stake; (3) the political will of state actors and how they frame notions of national sovereignty in relation to the campaign's subject matter; (4) the extent to which the subject can be expressed in a sympathetic, clear, and simple message; (5) the campaign's financial viability; and (6) the organizational structure of the participating NGOs.

Part F concludes that the success of NGOs in carrying out particular international rights campaigns should be evaluated in light of the parameters in which they operate, and measured not only by obvious public victories but also by more modest gains toward achieving articulated goals and normative change. An important and related indicator of success should be the extent to which NGO initiatives create a foundation for continued progress toward fuller realization of their goals—especially given the challenges they face.

B. *The ICBL*

The ICBL is lauded as one of the most successful international movements in recent history. As Lloyd Axworthy, Canadian Minister of Foreign Affairs asserted:

> No other issue in recent times has mobilized such a broad and diverse coalition of countries, governments, and NGOS. Much of this momentum has been the result of the tremendous efforts made by NGOs to advance the cause to ban anti-personnel landmines. Their commitment and dedication have contributed to the emergence of a truly global partnership.[26]

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[26] Lloyd Axworthy, Minister of Foreign Affairs, Canada, *AP Mine Ban: Progress Report 1*, Canadian Dept. of Foreign Affairs and International Trade, Feb. 1997.

ICBL advocacy resulted in the negotiation, outside the usual United Nations channels, of the Landmines Treaty.[27] The Treaty forbids parties to use, develop, produce, acquire, stockpile and transfer antipersonnel mines. It further requires them to: destroy existing mines, take safeguards to protect civilians from mines not yet cleared, provide medical and rehabilitative services to survivors, submit to international transparency and compliance measures and adopt domestic implementation regimes.[28]

From the ICBL's inception its members undertook to re-frame previously accepted norms which allowed regulated use of mines and did not prohibit their production and transfer. ICBL members inserted themselves into the drafting and negotiation process of a multilateral treaty that would instead impose a flat ban on use, production or transfer of landmines.[29] The opportunity for such participation started in the early 1990s, when pressure mounted for the U.N. Committee on Conventional Weapons (CCW) to review and revise its 1980 Landmines Protocol.[30]

The stated goal of the 1980 Protocol was to reduce the devastation caused by mine warfare. Experts recognized that the Protocol, which purported to limit mine use, was wholly ineffective in curbing harm.[31] NGOs familiar with the failure of the 1980 Protocol documented and publicized the gruesome injuries and deaths caused by landmines and the high number of civilian mine casualties around the world. They also compiled and disseminated data about long-lasting socioeconomic and political effects of mine warfare, including the ways in which unexploded mines impede peace-keeping, economic investment and development, and post-war re-building. NGO efforts to record and expose the insidious and wide-ranging effects of antipersonnel mine use culminated in the 1993 publication, *Landmines: A Deadly Legacy*, a 500-page examination of the global production and trade in mines, and the devastating consequences of their use.[32] *Deadly Legacy* also presented legal analysis rooted in humanitarian, human rights, and disarmament

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[27] Jody Williams & Stephen Goose, *The International Campaign to Ban Landmines, in* To Walk Without Fear: The Global Movement to Ban Landmines (Maxwell A. Cameron et al., eds., 1998).

[28] Landmine Treaty, *supra* note 16.

[29] Don Hubert, *The Landmine Ban: A Case Study in Humanitarian Activism*, (2000) *available at* http://www.icbl.org/index/ text/Detailed/473.html (follow "view online" hyperlink).

[30] U.N. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Have Indiscriminate Effects, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and other Devices (Protocol II), 19 I.L.M. 1534 (1980).

[31] *See generally*, Human Rights Watch & Physicians for Human Rights, Landmines: A Deadly Legacy (1993).

[32] Deadly Legacy, *supra* note 31.

norms to show that mines violated existing principles of international law. *Deadly Legacy* concluded that only a total ban on mine use, production, stockpiling, and transfer, along with an emphasis on de-mining, could adequately address the severity of the landmine crisis, and bring about compliance with international legal principles proscribing inherently indiscriminate weapons and those that cause harm in excess of their military utility. The authors proposed re-conceptualizing mines as "weapons of mass destruction in slow motion" akin, over time, to biological and chemical weapons, and deserving of similar stigmatization and a total ban.[33]

The publication of *Deadly Legacy* corresponded with the formal establishment of the ICBL, and generated considerable international attention among governments and in the press. Its documentation, from multiple perspectives, of the widespread ruin created by mine warfare, its solid research on mine production and export, and its characterization of antipersonnel mines as illegitimate weapons of mass destruction formed the basis of the ICBL's advocacy for a new, comprehensive treaty to proscribe mine use, manufacture, and transfer, and prescribe affirmative requirements to diminish existing harm.

The research and writing of *Deadly Legacy* also coincided with the movement by several countries, including the United States and several European Union states, to enact unilateral bans on mine exports, out of concern for harm caused by landmines. Prompted by pressure from the ICBL and concerned governments, the U.N. CCW Committee agreed to convene a conference to review the 1980 Landmines Protocol.[34]

Between 1994 and 1996, the CCW Committee held several conferences (the "Geneva Process") that led to the completion of a revised Landmines Protocol. Although not permitted to participate directly in the Geneva Process, the ICBL significantly influenced it. ICBL members traveled to conference sites to engage and educate country delegates about landmines, proposed text to strengthen the 1980 Protocol, monitored negotiation developments, and organized regular meetings with media.[35]

When it became clear that the Geneva Process was not progressing toward a full ban, the ICBL invited states to join pro-ban NGOs to develop an alternative strategy. Governments began to dispatch delegates to meetings with ICBL members to chart a course toward achieving a ban treaty. When the Geneva Process resulted in a new Landmines Protocol in May 1996—one which fell far short of a ban—supporters of a flat-ban treaty inaugurated what became known as the "Ottawa Process."[36]

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[33] *Id.*
[34] Williams & Goose, *supra* note 27.
[35] *Id.*
[36] *Id.*

The Ottawa Process consisted of cooperative efforts among the ICBL, governments, and international agencies such as UNICEF to negotiate a total ban agreement. In October 1996 participants gathered at a meeting in Ottawa during which Canadian Foreign Minister Lloyd Axworthy proclaimed that Canada intended to hold a total-ban treaty signing conference in December 1997.[37]

Axworthy's proclamation spurred intensive public-private collaboration to formulate treaty language and amass political support. In subsequent months, proposals among governments and NGOs circulated in dozens of countries, and the treaty secured broad-based political and financial endorsement. On December 10, 1997, 122 governments agreed to and signed the Landmine Treaty. It entered into force less than one-and-a-half years later, on March 1, 1999—record time for a multilateral treaty.[38]

Today, the U.N. serves as the depository for the Landmine Treaty's compliance reports and helps resolve problems of interpretation and implementation.[39] Public-private working groups monitor transparency in reporting, national implementation measures, resource mobilization, and norm universalization. States party to the treaty, ICBL delegates and international organizations convene regular meetings to evaluate progress in fulfilling its provisions.[40] Concrete accomplishments attributed to this process include: a marked decrease in mine use; a major reduction in state-originated mine transfers; the significant destruction of mine stockpiles; and an increase in resources for de-mining and treatment of mine victims.[41]

The ICBL remains actively involved in efforts to increase compliance with treaty norms. It established and coordinates the Landmine Monitor, a global network of field researchers who gather information for an annual report, also called the Landmine Monitor, which assesses treaty compliance and tracks ratification developments.[42]

ICBL advocacy is a powerful illustration of NGO and government partnership to achieve the realization of transnational norms. Many factors have contributed to the ICBL's effectiveness. These include: (1) political will borne of historical timing, economic perceptions, and a sympathetic subject conducive to governmental support for the ICBL's goals; (2) the ICBL's skill in capitalizing on the subject matter by formulating simple messages and slogans that stigmatize mines, foster

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[37] *Id.*

[38] *Id.*

[39] ICBL, United Nations, http://www.icbl.org/treaty/un.

[40] Williams & Goose, *supra* note 27.

[41] *See generally*, ICBL, Landmine Monitor Report 2004, www.icbl.org/lm/2004 (follow "Executive Summary" hyperlink).

[42] ICBL, Landmine Monitor Report 2005, www.icbl.org/lm/2005 (follow "Executive Summary" hyperlink).

an anti-mine taboo, and facilitate public acceptance of a total ban; (3) enormous international media attention resulting from the ICBL's systematic engagement of the press; (4) meticulous, comprehensive, and inter-disciplinary documentation and analysis; (5) a huge infusion of private and public money based on the nature of the subject combined with concerted NGO and fundraising efforts; (6) the ICBL's structure which balances a fully-staffed steering committee authorized to make decisions, work by NGOs to develop agendas that reflect their own strengths and needs, and linking NGO efforts through diverse modes of cross-border communication and planning; and (7) the ICBL's pro-active emphasis on close collaboration with governments, a technique that NGOs sometimes eschew.[43]

The ICBL exemplifies an NGO rights-oriented coalition that has substantially met its articulated goals and demonstrates how transnational legal process theory can work in practice. This chapter posits, however, that the ICBL's success must also be measured against an evaluative framework which considers the different subjects that NGOs address; the dissimilar contexts in which they may function; and the distinct political and economic hurdles they face. When assessed within such a framework, the ICBL's work is in no way diminished; rather, such an analysis reveals that the existence of particular conditions shapes the extent to which NGOs can mobilize norm transformation.

C. *The Autotrim/Customtrim Campaign*

The Autotrim/Customtrim campaign, like the ICBL, relied on multidisciplinary collaboration of numerous NGOs across borders, careful documentation of harm, public dissemination of relevant information, and comprehensive legal analysis rooted in international (and domestic) laws. Yet the campaign was unable to rally the kind of broad-based public opinion or governmental support needed for normative transformation.

NGOs participating in the initiative used the NAFTA Labor Side Agreement's submission process to try to spur more effective enforcement of occupational health and safety laws in Mexico's maquiladora industry. The campaign focused on the Autotrim/Customtrim Case, a submission filed under the Side Agreement, which complained that the Mexican government persistently failed to enforce such laws at the Autotrim and Customtrim plants.[44] The submission was hailed as:

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[43] *See generally* Robert O. Muller, *New Partnership for a New World Order: NGOs, State Actors, and International Law in the Post-Cold War World*, 27 Hofstra L. Rev. 21 (1998); Hubert, *supra* note 29; Williams & Goose, *supra* note 27.

[44] *See, e.g.* Autotrim/Customtrim Submission *supra* note 25, at 5 for information about the Autotrim and Customtrim maquiladoras.

> [A] major new complaint [under the Labor Agreement] … for workers suffering egregious health and safety violations at two … manufacturing plants in [Mexico's] maquiladora region . … [The] complaint reflects a long and careful collaboration among the filing organizations, a high level of technical competency and legal argument, and a powerful indictment of the government's failure to enforce health and safety laws.[45]

Jonathan Graubert gave the Autotrim/Customtrim submission high marks for "dramatic framing" and "skillful integration of the legal argument" with the involvement of "multiple parties … connected to networks of advocates."[46] Despite such praise many of the NGO participants in the Autotrim/Customtrim effort concluded that the Side Agreement's submission process was a resource-intensive exercise in futility, at least in terms of effectuating visible change in the interpretation and enforcement of labor standards.[47]

In one sense, this disappointment stems from the inadequacy of the text and structure of the Side Agreement generally, and its submission provisions specifically.[48] To an extent, such flaws result from and reflect the eventual exclusion of NGOs by the NAFTA governments in Side Agreement discussions. A brief description of the history, politics, and limited scope of the Side Agreement follows. This background is necessary to grasp the kinds of challenges the Autotrim/Customtrim campaign faced. It also helps explain why some of the strategies used effectively by the ICBL were not as fruitful in the Autotrim/Custom initiative.

I. *Context*

A North American free trade accord was publicly proposed in 1990. In an approach akin to the ICBL's, NGOs sought to participate in the drafting and negotiation process, with the goal of helping shape norms that would promote positive conditions for workers. NGOs proposed that the free trade treaty contain

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[45] Lance Compa, *NAFTA's Labor Side Agreement and International Labor Solidarity* 3 Antipode 451 (2001).

[46] Jonathan Graubart, *Giving Teeth to NAFTA's Labour Side Agreement, in* Linking Trade, Environment, and Social Cohesion: NAFTA Experiences, Global Challenges 203, 215 & Table 13.5 (John J. Kirton & Virginia W. Maclaren eds., 2000).

[47] Linda Delp et al., *NAFTA's Labor Side Agreement: Fading into Oblivion*? 29–30 (2004), http://www.labor.ucla.edu/publications/nafta.pdf; Monica Schurtman, *"Los Jonkeados" and the NAALC: The Autotrim/Customtrim Case and Its Implication for Submissions under the NAFTA Labor Side Agreement*, 22 ariz. j. int'l & comp. l. 292 (2005).

[48] *See generally* Human Rights Watch, *Trading Away Rights: The Unfulfilled Promise of NAFTA's Labor Side Agreement* (Apr. 7, 2001), *available at* http://www.hrw.org/reports/2001/nafta.

strong safeguards for workers and solid enforcement mechanisms such as those guaranteed to corporations.[49] Early drafts of NAFTA accommodated some of these proposals, a fact that some members of the Mexican, United States and Canadian governments and influential business interests did not like.[50]

Ultimately, the NAFTA governments opted to disregard NGO concerns that the treaty would negatively affect labor conditions. Workers' rights issues were relegated to a "side" accord with very weak language and no enforcement procedure.[51] The Side Agreement includes no independent monitoring provisions or explicit opportunities for NGO involvement in interpretation or implementation.[52] The submission process is flawed by convoluted procedures, and a virtual guarantee that monetary sanctions, although theoretically possible, will never be imposed.[53] A Mexican representative who participated in the Side Agreement talks observed that:

> Mexican officials regarded the outcome of the side deal negotiations as a bit of a joke. … The system is not worth a damn. At the end of the day everyone says, 'Nice to talk with you, good luck. … Lots of public discourse, nothing more. This is the result we wanted.[54]

Robert Reich, U.S. Secretary of Labor during the negotiations, subsequently confirmed that the primary purpose of the Labor agreement was to ensure passage of NAFTA.[55]

The subordination of labor rights to free trade is evident throughout the text of the Side Agreement and in its interpretation and implementation.[56] The Side Agreement provides for a National Administrative Office (NAO) in each NAFTA country. NAOs are authorized to receive submissions from non-state actors alleging that a NAFTA government persistently fails to enforce or comply with its own labor laws.[57] A submission may also address related international norms especially if they

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[49] Jerome I. Levinson, *NAFTA's Labor Side Agreement: Lessons From the First Three Years*, Institute for Policy Studies and the International Labor Rights Fund (1996); Schurtman, *supra* note 47.

[50] Maxwell A. Cameron & Brian W. Tomlin, The Making of NAFTA 201 (2000).

[51] Levinson, *supra* note 49; Mark J. Russo, *NAALC: A Tex-Mex Requiem for Labor Protection*, 34 U. Miami Inter-Am. L. Rev. 51 (2002).

[52] Schurtman, *supra* note 47.

[53] *See, e.g.* Katherine Van Wenzel Stone, *Labor and Global Economy: Four Approaches to Transnational Labor Regulation*, 16 Mich. J. Int'l L. 987, 1009–11 (1995); Stephen F. Diamond, *Labour Rights in the Global Economy: A Case Study of the NAFTA, in* Human Rights, Labor Rights, and International Trade 217 (Lance Compa & Stephen F. Diamond, eds., 1996); John French et al., *NAFTA'S Labour Side Accord: A Textual Analysis, in* Labour and Nafta (1994).

[54] Cameron &. Tomlin, *supra* note 50, at 201.

[55] *Id.* at 200.

[56] Schurtman, *supra* note 47.

[57] Side Agreement, *supra* note 21, art. 16.

are incorporated or reflected in domestic law. The submission process is not intended to examine claimed inadequacies in a NAFTA country's labor laws. It does not provide for filing a case directly against a company. Damages cannot be awarded. The only remedy possible is that the offending state may be pressured into improving its enforcement of domestic laws intended to safeguard labor conditions.[58]

The NAO can investigate, hold public hearings, and issue a report on a submission. If the NAO determines that the submission's claims are valid, it can refer the case for resolution through Ministerial Consultations—high-level discussions among the NAFTA countries' federal labor departments.[59] In occupational health and safety cases, if Ministerial Consultations fail to achieve resolution, the NAFTA governments can convene an Evaluation Committee of Experts (ECE), a quasi-independent panel of experts recommended by the International Labor Organization (ILO).[60] If the ECE fails to resolve the case, an arbitral panel may assess fines against a non-compliant state.[61]

Despite more than twenty-five submissions and pressure from NGOs and members of the legislatures of the NAFTA countries, no ECE or arbitral panel has been established. Since only an arbitral panel can impose fines, the monetary sanctions provision remains entirely theoretical.[62] The Side Agreement's submission process is anemic not only as written but as interpreted and implemented. The Agreement does not affirmatively preclude NGO participation. Yet after the NAO phase NGOs are *de facto* excluded from the process; thus, those who file a submission which gives rise to additional action under the Agreement are effectively barred from further involvement.[63]

II. *The Case and the Campaign*

The Autotrim/Customtrim Case was the first Side Agreement submission to focus solely on the failure by a NAFTA country to enforce occupational health, safety, and related social security laws.[64] Although constrained by inadequate funding, NGO participants coordinated tri-national work on the case and the campaign surrounding it, undertaking advocacy methods similar to those the ICBL used.

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[58] Schurtman, *supra* note 47.
[59] Side Agreement, *supra* note 21, arts. 20–23.
[60] *Id.* arts. 23–26, 49.
[61] *Id.* arts. 27–32, Annex 39. A fine cannot exceed .007% of the cost of total trade in goods among the NAFTA countries in the most recent year such a figure is available.
[62] Schurtman, *supra* note 47.
[63] *See, e.g., id.* at 339–342.
[64] *Id.* at 293.

The initiative drew on several years of collaboration among NGOs and other private actors in Mexico, the United States and Canada: workers, lawyers, law students, community organizers, labor rights advocates, occupational health and safety experts, and religious groups.[65] They documented the widespread existence of work-related injuries and illnesses at Autotrim and Customtrim. Workers were exposed to toxic chemicals without proper protective equipment and to ergonomically unsafe production practices on a daily basis. They suffered adverse and often chronic health effects including: debilitating and sometimes permanent musculo-skeletal injuries; nervous system disorders; dizziness and fainting; respiratory illness; addiction to workplace glues and solvents; pregnancy and birth crises; skin and eye ailments; constant headaches, sore throats, bleeding coughs; nausea; and stomach pain.[66] With the assistance of occupational health and safety experts, toxicologists, and ergonomic specialists, NGOs demonstrated links between worker illnesses and injuries, workplace conditions that violated domestic and international laws, and the Mexican government's repeated failure to enforce those laws. The process of documentation and legal analysis, over the course of several years, was strengthened by regular cross-border NGO conferences and health and safety workshops, dissemination of data internationally, and tri-national public education and media campaigns. Like the ICBL, Autotrim/Customtrim NGOs developed short messages designed to telescope the significance of the campaign. NGOs also attempted to enlist the support of labor department officials and legislators in the NAFTA countries, but were mostly rebuffed.[67] Efforts by a handful of legislators and government officials to advance the Autotrim/Customtrim initiative failed to produce positive results.

Coordination among NGOs resulted in a 108-page Autotrim/Customtrim complaint, supported by hundreds of pages of additional documentation. NGOs filed the complaint with the NAO pursuant to the Side Agreement's submission provisions. The submission alleged that the Mexican government had violated the Agreement by repeatedly refusing to enforce Mexico's health and safety laws at Autotrim, Customtrim, and other maquiladoras. Relying on several years of NGO research, the submission demonstrated that the failure to enforce contributed to work-related injuries and illnesses caused or exacerbated by unlawful toxic exposure and ergonomic practices. Legal analysis showed that this pattern and practice of lack of enforcement violated the Side Agreement, domestic law, and international norms binding on Mexico.[68]

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[65] *Id*. at 311.

[66] Autotrim/Customtrim Submission, *supra* note 25.

[67] Schurtman, *supra* note 47. NGOs sought governmental support through personal meetings with members of each country's executive and legislature, and regular written and telephonic communication.

[68] Autotrim/Customtrim Submission, *supra* note 25.

The NAO accepted the Autotrim/Customtrim submission for review and held a public hearing on the allegations on December 12, 2000. The detailed, vivid testimony and legal arguments presented by workers and NGOs were generally well received. Representatives of Autotrim, Customtrim, and the Mexican government attended the hearing but declined to testify.

The NAO issued a report on the Autotrim/Customtrim case four months after the public hearing. It affirmed the submission's claim that the Mexican government violated the Side Agreement by persistently failing to enforce domestic and international occupational health and safety laws. The report acknowledged that this neglect likely contributed to unsafe levels of employee exposure to toxic chemicals, and to ergonomically unsafe work practices, which could cause injuries and health problems reported by the plants' workers. The NAO referred the case for Ministerial Consultations.

When the submission entered the Ministerial Consultations phase, worker and NGO Autotrim/Customtrim case participants provided detailed written recommendations toward resolution. The ministers ignored the recommendations, and excluded the Autotrim/Customtrim workers and the NGO complainants from participating in the resolution process; despite repeated efforts to become involved, the ministers refused even to keep them abreast of the status of the case.[69]

More than a year after the NAO's referral of the case for Ministerial Consultations—during an ILO meeting in Geneva—the ministers issued a joint declaration purporting to resolve the Autotrim/Customtrim submission.[70] The declaration established a taskforce of NAFTA government officials to consider matters already examined during the NAO phase of the submission process; it prescribed no guidelines, goals, or deadlines for the taskforce's agenda. Neither workers nor NGOs who had filed the Autotrim/Customtrim submission, or their legal counsel, were allowed input into the work of the taskforce. Members of the U.S. Congress recommended, in vain, that the taskforce be broadened to include the complainants and other stakeholders.[71] At least for those who filed the Autotrim/Customtrim case, taskforce outcomes still remain unclear.

Like the ICBL, the Autotrim/Customtrim campaign engaged in multifaceted activities to achieve its goals. Yet despite its painstaking work—in terms of NGO

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[69] Schurtman, *supra* note 47, at 294.

[70] Ministerial Consultations, Joint Declaration Between the Department of Labor of the United States of America and the Secretariat of Labor and Social Welfare of the United Mexican States Concerning U.S. NAO Public Communications 99–01 and 2000–01 and Mexican NAO Public Communication 98–04, June 11, 2002, *available at* http://www.dol.gov/ilab/media/reports/nao/jointdeclar061102.htm.

[71] Schurtman, *supra note* 47, at 332.

collaboration, presentation of compelling factual content and legal analysis, raising public awareness, and perseverance in attempting to press the NAFTA governments to make real changes—the initiative failed to yield any obvious, immediate improvements.

The Autotrim/Customtrim campaign's inability to achieve rapid, high profile results should not be equated with unsuccessful NGO advocacy. To the contrary, the campaign fulfilled at least three important goals: (1) cross-border documentation and exposure of occupational health and safety violations and the ineffectiveness of the Side Agreement to curb abuse; (2) increased cross-border organizing around workplace health and safety: and (3) elaboration of international normative analysis that can be applied to future health and safety initiatives.[72] Measuring the campaign's achievements against contextual evaluative criteria, as proposed in this chapter, demonstrates that largely external variables undercut attempts to galvanize normative change.

D. *Evaluating the Success of NGO Initiatives: Lessons from Transnational Legal Process Theory*

As summarized above, transnational legal process theory aims to explain how norms become accepted and obeyed across borders. The theory posits that transnational normative internalization depends on: (1) specific kinds of interactions (norm articulation, interpretation, and compliance efforts); (2) among private and public actors (transnational norm entrepreneurs and governmental norm sponsors and entrepreneurs) that can engender (3) transnational issue networks and (4) interpretive communities in particular settings (law declaring fora).[73]

Transnational legal process theory provides a structure for appreciating why NGO-initiated advocacy such as the ICBL and the Autotrim/Customtrim campaign, while employing similar types of approaches, yielded apparently divergent results. It also helps demonstrate that each initiative was shaped by the different contexts in which they operated, and that criteria for evaluating NGO success in transnational human rights-oriented initiatives must include consideration of such factors. When measured against criteria that take context into account, it becomes clearer that both the ICBL and the Autotrim/Customtrim campaign made valuable contributions to normative change.

In the ICBL, transnational norm entrepreneurs consisted of international, domestic and local NGOs operating in numerous countries. In the Autotrim/Customtrim

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[72] *See generally id.*; Delp, et. al., *supra* note 47, at 29–30.

[73] *See supra* notes 7–8 and accompanying text.

campaign, transnational norm entrepreneurs included cross-border, domestic, and local NGOs working primarily in the NAFTA countries. Although both campaigns utilized similar advocacy techniques, they differed significantly in the number and size of participating NGOs, and their geographical reach, prominence, and ability to attract funding. Distinct subject matter, economic interests, political timing and other factors helped the ICBL mobilize pro-active governmental norm sponsors and entrepreneurs in Canada, the European Union, and the United States, and impeded the capacity of the Autotrim/Customtrim to do the same anywhere.

Both the ICBL and the Autotrim/Customtrim campaign included NGOs with expertise in numerous disciplines, experience in cross-border dissemination of information and analysis, and skill in complex problem-solving. Transnational legal process theory holds that a cross-border normative campaign that integrates NGOs with these multiple proficiencies can facilitate the creation of transnational issue networks. Transnational issue networks comprise public and private actor alliances that focus on a particular issue and can facilitate the development and transmission of new data and analysis across borders. In the case of the ICBL, collaborations ripened into transnational issue networks that drew on public and private actor expertise. In Autotrim/Customtrim and similar initiatives, influential government officials usually refused to interact with labor and human rights NGOs; accordingly, while tri-national systems developed among NGOs, a full-blown public-private issue network was not possible.

In the case of the ICBL, the Geneva and Ottawa processes constituted law-declaring fora in which public and private actors interacted in interpretive communities.[74] With the Landmine Treaty in force public and private actors now comprise interpretive communities that collaborate in law-declaring for a such as regular review meetings and topical working groups.

In the Autotrim/Customtrim campaign and others seeking to engage the Side Agreement, interpretive communities did encompass NGOs involved in case submissions and could have included corporate representatives, the NAOs, and the Labor Departments of each NAFTA country. Interpretation and application of the Side Agreement and norm articulation also could have occurred in various law-declaring fora: during the submission process; in NAO hearings and reports; during Ministerial Consultations; or through establishment of Side Agreement expert and arbitral panels. Unfortunately, in the Autotrim/Customtrim context, collaboration in interpreting and developing norms did not progress beyond NGO actors.

The ICBL illustrates a more complete transnational legal process than the Autotrim/Customtrim campaign. Koh's theory of transnational legal process holds

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[74] Koh, *supra* note 7 at 656–59.

that a key component in progression toward transnational norm acceptance and internalization is interaction and cooperation among state and non-state actors. This view, when applied to the ICBL and Autotrim/Customtrim examples, helps explain why Autotrim/Customtrim and similar initiatives under the Side Agreement have been unable to achieve significant progress toward normative transformation. Simply put, even if offered grudgingly, government support and willingness to interact with non-state actors is a crucial predicate for genuine normative change. This predicate condition does not exist with respect to transnational occupational health and safety norms among the NAFTA countries.

Still, the Autotrim/Customtrim campaign made valuable contributions toward the normative change it sought. International human rights scholars and advocates have long recognized that three basic techniques help form the foundation for the eventual realization of rights across borders. These are: (1) documentation, legal analysis, and dissemination of knowledge; (2) education and organizing; and (3) framing and re-framing of norms so that they apply to specific situations.[75] NGOs in the Autotrim/Customtrim campaign successfully used these techniques.

The submission and the advocacy work surrounding it served to document and publicize wide-spread violations of occupational health and safety laws in the *maquiladora* industry and the repercussions for workers.[76] The campaign exposed lax labor law enforcement, and the severe and permanent illnesses and injuries linked to inadequate enforcement of occupational health and safety rules. The submission periodically attracted media attention in the three NAFTA countries and piqued the interest of several U.S. senators and representatives.[77] NGOs now use the submission in discussing NAFTA's shortcomings with leaders of countries contemplating free trade agreements with the United States. The campaign amassed knowledge and data, and developed legal analysis on which future transnational occupational health and safety initiatives can build.

The Autotrim/Customtrim effort and others like it galvanize cross-border labor organizing. Activists and scholars agree that creation of transnational connections among like-minded NGOs and increasingly coordinated advocacy across borders is one of the Side Agreement's biggest—albeit indirect—benefits.[78]

A third positive result of the Autotrim/Customtrim submission is its potential to spur re-articulation and application of existing international norms to the Side

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[75] *See, e.g.*, Douglas Cassel, *Does International Human Rights Law Make a Difference?*, 2 Chicago J. Int'l L. 121 (2001); Richard B. Bilder, *An Overview of International Human Rights Law, in* Guide to International Human Rights Practice (Hurst Hannum; ed.,1984).

[76] Delp, et. al., *supra* note 47.

[77] Schurtman, *supra* note 47, at 326–37.

[78] Compa, *supra* note 45.

Agreement's general constructs. Building on normative analysis in previous submissions, participants in the Autotrim/Customtrim case sought to interpret the Side Agreement by applying relevant portions of widely accepted international accords to which to which the NAFTA countries profess to adhere.[79] Future initiatives related to the Side Agreement can use the interpretive work of the Autotrim/Customtrim campaign as a basis for further elaborating and applying transnational norms to the Side Agreement.

This brief assessment of accomplishments affirms that the Autotrim/Customtrim campaign made progress in transnational legal process, although at a far slower pace and in a less complete manner than the ICBL. As outlined below, when the two initiatives are measured against an evaluative framework that considers the diverse contexts in which each campaign operated, the Autotrim/Customtrim achievements become even clearer.

E. *Evaluating the Success of NGO Initiatives: Additional Lessons from the ICBL and the NAALC*

Examining the performances of the ICBL and the Autotrim/Customtrim campaign underscores that proper evaluation of norm-based or rights-oriented efforts must account for the historical, political, and economic circumstances in which they work. Transnational legal process theory helps explain how NGOs can mobilize the creation, acceptance, and obedience to international norms. But the theory does not explain why some NGOs can participate in the process of norm internalization more fully than others, or why the development of certain normative regimes and adherence to them advances more rapidly than others. A comparison of the two campaigns suggests that at least six factors must be considered in addressing these questions. These include: (1) timing of the initiative; (2) economic interests at stake; (3) issues of political will and national sovereignty; (4) ability of the campaign's subject matter to evoke a clear, simple and sympathetic message; (5) financial capabilities of the NGOS involved; and (6) organizational structure.

1. *Historical and Political Timing*

Both the movement toward a landmines ban treaty and pressure for a tri-national labor rights agreement to accompany NAFTA began as the Cold War ended. For

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[79] These accords include International Labor Organization Conventions, the constitutive documents of the World Health Organization and the Pan-American Health Organization, and international human rights treaties such as the International Covenant on Economic, Social, and Cultural Rights, the International Covenant on Civil and Political Rights, and various regional agreements. Schurtman, *supra* note 47 at 358–382.

the ICBL, the timing was fortuitous. A spirit of relative optimism prevailed, and world leaders publicly embraced prospects for peace and "peace dividends." It was possible to imagine a world without landmines. For labor, the timing was not propitious. States and private corporations could characterize the conclusion of the Cold War era as signaling the triumph of capitalism and a mandate to expand free trade economies. The history of the Side Agreement suggests that during the early 1990s, as the emphasis on free markets become more pronounced, the NAFTA governments became increasingly disinclined to consider workers' rights concerns. This trend contributed to a trade agreement stripped of meaningful protection for labor. The treatment by NAFTA governments of Autotrim/Customtrim and similar submissions rendered hollow the Side Agreement's meager labor provisions.

2. *Economic Interests*

Cheap to produce, landmines are not big profit-makers for arms manufacturing companies. At the same time, NGOs demonstrated that mine use creates devastating effects for entire countries. Their inherently indiscriminate nature causes death long after wars end; their presence hinders reconstruction, development, and corporate investment; and de-mining is expensive. These economic considerations helped NGOs to advocate for a flat-ban treaty.[80]

In contrast, a Side Agreement with serious worker safeguards was seen as undercutting corporate profit margins, which in turn was viewed as potentially depriving states of economic benefits.[81] Cases such as Autotrim/Customtrim graphically illustrated that maquiladora workers often suffer seriously debilitating job-related injuries and illnesses. Such harm, however, is not readily susceptible to the perception that economic interests of an entire country are at stake. The widespread presence of landmines might discourage important economic investment in a country trying to recover from war. Yet, especially given Mexico's ample unemployed population, maquiladora workers are easily and cheaply replaced. Thus, Mexico's overall economic interests are not viewed as adversely affected by its failure to enforce labor laws; indeed, some observers argue that the government's lax enforcement of work-related rules attract corporate investment to Mexico.[82]

3. *Political Will and State Framing of Sovereignty Issues*

The ICBL and Autotrim/Customtrim case studies affirm the basic principle that if state actors fail to support normative change, transnational legal process

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[80] *See generally* Hubert, *supra* note 29.
[81] *See generally* Levinson, *supra* note 49.
[82] *Id.*

remains incomplete. Whether sufficient political will can be generated to support normative change depends on the interplay of factors such as historical and political timing, actual or perceived economic interests, and the subject matter involved. Skillful NGO advocacy alone is not sufficient if other conditions are not ripe for attracting committed government norm sponsors and entrepreneurs to join in a normative change process.

The manner in which states frame national sovereignty in relation to the subject matter of a proposed norm also affects the ability of NGOs to move forward in the transnational legal process. Prior to the ICBL, most countries lacked substantial legal regimes governing landmines;[83] perhaps for this reason many states did not perceive the call to eliminate mines as an impermissible intrusion on their sovereignty. At the time NAFTA was negotiated, the United States, Mexico, and Canada were eager to amend existing trade and investment laws to advance North American free trade; however, they had long-established domestic legal regimes to regulate labor. They refused to incorporate legal mechanisms into NAFTA or the Side Agreement that could enable workers to challenge corporate or government practices across borders—although NAFTA includes enforceable legal provisions to allow corporations and states to challenge policies and practices that purported to affect trade.[84] In short, whether or not governments choose to treat proposed normative changes as improper intrusions on their national sovereignty should also be considered when evaluating the progress of an NGO initiative.

4. *Ability to Evoke a Clear, Simple, and Sympathetic Message*

Advocating a flat ban on mines communicates an unequivocal message: the need to completely eliminate their production, transfer, sale, and use, and to support de-mining. NGOs buttressed this message with persuasive medical, social, and economic documentation that mine deployment causes decades of destruction, and a growing body of evidence that the military utility of mines ordinarily outweighs their harm.[85] Photographs of children whose limbs have been amputated because of mine explosions and testimony of mine victims conveyed a similarly clear message that further engaged public sympathy for a mine-ban treaty.

Advocating for workers' rights under the Side Agreement is less susceptible to simple messages that resonate easily with government officials and the general public. Convincing government leaders that the human costs generated by factors

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[83] Deadly Legacy, *supra* note 31.

[84] Schurtman, *supra* note 47.

[85] Deadly Legacy *supra* note 31.

such as unsafe working conditions should be balanced against increased corporate profit and cheaper goods is extremely difficult in today's political climate. Videotapes, photographs and testimony of victims of workplace injuries and illnesses usually depict adults who may have trouble moving their limbs, difficulty breathing, constant pain, frequent vertigo, and skin diseases; these images have not engaged public sympathy as powerfully as portrayals of mine survivors.

5. *Financial Capacity*

Human Rights Watch, Vietnam Veterans of America Foundation, and other NGOs at the forefront of the ICBL are much better funded than those involved with the Autotrim/Customtrim case and similar initiatives. Compared with NGOs that undertake occupational health and safety campaigns pursuant to the Side Agreement, the NGOs that founded and guide the ICBL have higher public profiles, well-established track records, and more experience in effective fundraising. Another likely reason for funding disparities is that landmine ban efforts are typically perceived as entirely humanitarian, while NGO collaborations to improve working conditions are often viewed as more "political" and orchestrated by labor unions trying to expand their power.

6. *Organizational structure*

The ICBL tends to be better organized than NGOs that launch campaigns under the Side Agreement. As noted above, NGOs advocating to achieve better working conditions in the NAFTA countries have been unable to attract the level of funding that the ICBL has obtained. Limited funding poses difficulties in creating stable organizing structures. Obstacles include insufficient resources to retain key personnel, sustain cooperation between NGOs, or systematically develop and realize coordinated strategy plans. Competition for scarce funds can lead to competing NGO agendas that can fracture advocacy efforts. Labor rights NGOs in the NAFTA countries seem relatively less adept at publicly subsuming differences and presenting a united front than those that comprise the ICBL. In the Autotrim/Customtrim campaign, no well-defined decision-making body existed, while the ICBL invested its steering committee with decision-making power when situations demanded a quick response. Finally, consistent with transnational legal process theory, the ICBL's creation of a strong organizational structure was probably bolstered by considerable state interest in its agenda. Meanwhile, the ability of the NGOs participating in Autotrim/Customtrim and similar campaigns to construct a solid organizational base was likely undermined by state hostility to their efforts.

F. *Conclusion*

A comparison of the ICBL and the Autotrim/Customtrim campaign shows that a meaningful evaluation of the success of international, rights-oriented private actor initiatives must consider the different conditions in which they undertake their work. It is neither helpful nor realistic to assess NGO efforts by the immediacy or tangible nature of the changes they achieve. The success of NGO-initiated normative change campaigns is perhaps better measured by the criteria outlined previously in this chapter.

These criteria include three inter-related considerations. First, the campaign should be assessed in terms of the extent to which it met previously articulated goals. Second, it should be reviewed for its ability to gather and mediate information across borders, strategically expand transnational organizing, and enhance normative constructs that can serve as the basis for future advocacy. These appraisals should be made in light of the third criterion: a contextual framework, as outlined in Part E, which considers diverse factors that can influence progress in effectuating normative change.

The fact that rights-based NGOs are being asked to develop indicators by which to analyze the success of their initiatives demonstrates that they have become critical actors in the international arena. The achievements of the ICBL and the Autotrim/Customtrim campaign, among other examples, provide reliable evidence that NGOs are here to stay, and are increasingly prominent in shaping change in diverse global contexts. Some NGO initiatives are dramatically powerful, as in the case of the ICBL. Others have less obvious or concrete impact, such as in the case of Autotrim/Customtrim. The success of NGO norm-based transnational campaigns should be gauged not only by the speed with which they generate change, but also in consideration of the difficulties they face, and their ability to create a foundation from which they can eventually meet such challenges.

Paradoxes of Personality: Transnational Corporations, Non-Governmental Organizations and Human Rights in International Law

By Russell A. Miller

A. *Introduction*

Verdi's romantic tragedy *La Traviata* tells the story of the doomed affair between Violetta Valéry and Alfredo Germont.[1] We know from the start that it is an ill- fated escapade; could anything but calamity await "a courtesan, dying of tuberculosis" and a "young poet." And, indeed, it all goes terribly wrong. Violetta forswears the lavish but indifferent conditions in which she is kept by the Baron Duophol, risking her secure position as the Baron's mistress on Alfredo's earnest expressions love. But Alfredo's father wrecks the young couple's bliss. In a clandestine visit to Violetta during which he demands that she end the affair because of the ruin it is bringing to the family's reputation, the senior Germont explains that "the youth whom my daughter loves dearly, and who loves her so much in return, was disgusted by all of this scandal, and has canceled the marriage." Desolate and powerless, Violetta obliges Alfredo's father and leaves Alfredo to return to the Barron.

I find myself reflecting on the plot of *La Traviata* because the tragedy is imposed on Alfredo and Violetta by unseen forces, by a character that never makes an appearance in the drama. Certainly Alfredo's father is to be condemned for giving voice to the prevailing mores of the day,[2] but ultimately it is the sharp edge of the social code of mid-19th century France, enforced by Alfredo's sister's

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[1] *See* Giuseppe Verdi, La Traviata (EMI Classics 1982).

[2] "How outrageous are Gorgio Germont's demands, really? Well, can there be any doubt that the marriage he is anxious to see take place between his daughter and the youth she 'loves dearly, and who lovers her so much in return'" is a marriage he has arranged for strictly financial reasons? I have no real evidence to support this theory, except to point out that in the 1840s love matches between children of upper-class families in France were virtually unknown." Paul Zweifel, *La Traviata*, by Giuseppe Verdi (Notes by Paul Zweifel), *at* http://pzweifel.com/music/traviata_notes.htm.

Miller & Bratspies (Eds), Progress in International Law, pp. 381–406.

fiancé, that dooms the affair.[3] The characters' assimilation of that social code is so thorough as to be beyond critical inquiry, so much so that it transcends even the power of love! Worse, like every paradigm, it is wholly spectral, inanimate and assumed; we are never given the chance to confront Alfredo's sister's fiancé on stage. What are these assumptions, these "routine blind spots and biases,"[4] heartlessly dictating the tragedy from beyond the stage?

I worry that a similar phenomenon is at work in international law. A powerful bias against business interests seems to have gained such currency in scholarly consideration of globalization that it has shaped international law's nexus with globalization.[5] Has international law been enlisted to the service of the following, constructed narrative: behind the scenes of political, social and economic globalization, while ever-diminishing states continue to "strut and fret their hours upon the stage,"[6] profit-mongering transnational corporations are dictating

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[3] As Paul Brians explains in a review of a Zeffirelli directed film of the opera:

> The story is a quintessential romantic attack on conventional bourgeois morality, arguing that a good heart is more important than propriety, that the social distinctions which split the beau monde (high society) form the demimonde (the world of illicit sex) are cruel and hypocritical, and that true love must triumph over all.
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> In mid-19th-century France, almost as much as in England, sexual hypocrisy was widespread. Prostitution and gambling were extremely popular and widespread even as they were being publicly condemned on every hand. Men were expected to have mistresses whom they supported financially; but they were expected to conceal that fact, and they were not to fall in love with them.
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> * * *
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> Any woman who slept with a man before marriage was thought to be "ruined" (i.e., rendered unfit to be wed), and should be shunned as a social leper.

Paul Brians, Study Guide for Giuseppi Verdi (1813–1901): *La Traviata*, *at* http://www.wsu.edu:8080/~brians/hum_303/traviata.html.

[4] David Kennedy, The Dark Sides of Virtue xviii (2004).

[5] "There has been strong resistance to including entities such as transnational corporations in a discussion about the subjects of international law, and, until recently, it was hardly ever suggested that corporations have international legal personality." Andrew Clapham, Human Rights Obligations of Non-State Actors 76 (2006). Clapham noted that D. A. Ijalaye made the following appeal as early as 1978: "Since the participation of private corporations at the level of international law would now seem to be a fait accompli, international lawyers should stop being negative in their approach to this obvious fact. They must realize that as a result of these new arrivals in the international scene, the commercial law of nations, more than ever before, now constitutes a formidable challenger to international and comparative lawyers alike." *Id.* at 76–77 fn. 69 (*quoting* D.A. Ijalaye, The Extension of Corporate Personality in International Law 245 (1978)).

[6] William Shakespeare, Macbeth, act 5. sc. 5, ln. 32. *See* Hoffmann in this volume.

the world's fate with the direst consequences for human rights and the environment.[7] Josselin and Wallace suggested that international lawyers across the spectrum of political and theoretical views are in the service of this narrative, explaining that "Realists and Idealists come together in their ambivalence about transnational economic actors – banks and multinational companies (MNCs)…"[8] Larry Backer also worried that international humanitarians had been ideologically captured. "[A]cademics and segments of global culture," he argued, "embraced 'Marxist' and other 'progressive' ideologies which were, at their heart, anti-capitalist/consumerist and which saw the [transnational corporation] as the latest stage in the march toward monopoly capitalism or as the vanguard of capitalist consumerism."[9] Backer concluded that this is not a perspective only advanced by the extreme-left, but also by "high status Western academics."[10]

I have only anecdotal evidence to add to these claims. I was struck, for example, by the pervasiveness of this perspective among international law scholars while driving in a van from the airport where I had collected a number of the participants in the symposium that gave rise to this book.[11] En route to the hotel where the symposium was held we passed through an overdeveloped, bleak, sprawling, exurban shopping district that was, as is so typical in the United States, crowned by the big box of a Wal-Mart. At the mere sight of the store a spontaneous chorus of disapproval arose from my colleagues, "international humanitarians" in outlook and profession.[12] I readily joined in: "economic hegemon," "corporate imperialism," "human rights violator." Had we become Alfredo's sister's fiancé? Were our unstated, yet thoroughly assimilated, normative biases shaping our vision of international law as much as our shopping habits?

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[7] "If we turn to another category of [non-state actor], that of business enterprises, then the picture is equally mixed. It is easy to write the history of contemporary international relations in terms of activities of business groups – you do not have to be a Marxist to do so. […] Thus, Susan Strange has argued, in the area not only of growth and investment, but of standard-setting and legal change, banks and other commercial enterprises are making the running." Fred Halliday, *The Romance of Non-State Actors, in* Non-State Actors in World Politics 21, 31 (Daphné Josselin and William Wallace eds., 2001) (citation omitted).

[8] Daphné Josselin and William Wallace, *Non-state Actors in World Politics: A Framework, in* Non-State Actors in World Politics 1 (Daphné Josselin and William Wallace eds., 2001).

[9] Larry Cata Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 Colum. Hum. Rts. L. Rev. 287, 315 (2006).

[10] *Id*.

[11] The symposium, "Progress in International Organization," was the third in the Annual Idaho International Law Symposium series. It was held March 3–5, 2005, at the Coeur d'Alene Resort in Coeur d'Alene, Idaho. *See* http://www.law.uidaho.edu/default.aspx?pid=78373.

[12] Kennedy, *supra* note 4, at xii.

The dark view widely shared among international humanitarians of the informal but insidious global influence of transnational corporations has its roots in two facts about the contemporary international order. The first fact is that "many multinational corporations have become as least as powerful as some of the states in which they function."[13] This has allowed them to evade or manipulate the regulatory authority of states in the relentless pursuit of profit. The second, confounding, fact is that "the principle subjects of international law are nation states. …"[14] Thus, multinational corporations often operate beyond the control of domestic and international law.[15] Do these facts mandate the marginalization and vilification of multinational corporations in international law? Is the present doctrinal landscape, which largely excludes transnational corporations from international legal personality, a consequence of international humanitarians' anti-business bias? As always, the task of answering these questions requires self-reflection and criticism; what David Kennedy termed "analytic vigilance and skepticism about the forms [our] purposes have come to take."[16]

In this chapter I consider the status of the non-state actors known variously as transnational corporations (TNCs) or multinational enterprises (MNEs) in international human rights law, adding in my modest way to the insightful consideration the other contributors to this part of the book have given to established and emerging actors in the international order. In doing so, I hope to expose a potential blind spot or bias in international law's approach to non-state actors. I argue that this bias has led to the paradoxical privileging of non-governmental organizations (NGOs) over TNCs in the field of international human rights. My question, urged on by Kennedy's work in *The Dark Sides of Virtue*, is: How much of the doctrine formally precluding TNCs from enjoying the same degree of personality as NGOs in international human rights law is a "deformation introduced by the training of an international lawyer,"[17] training that reflects international humanitarians' encoding that TNCs operate as a powerful and corrupting force in the international order, while NGOs do not?[18]

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[13] Fleur Johns, *The Invisibility of the Transnational Corporation: An Analysis of International Law & Theory*, 19 Melb. Univ. L. Rev. 893, 903-904 (1993–1994).

[14] Malcolm N. Shaw, International Law 1 (5th ed. 2003).

[15] "Social change advocates have a particularly difficult time addressing the transboundary problems created by multinational corporations, as these entities operate in a largely unregulated space at the international level." Julie Mertus, *Considering Nonstate Actors in the New Millenium: Toward Expanded Participation in Norm Generation and Norm Application*, 32 N.Y.U. J. Int'l L. & Pol. 537, 549 (2000).

[16] Kennedy, *supra* note 4, at xxi.

[17] Kennedy, *supra* note 4, at 112.

[18] Fleur Johns put it in these terms: "The transnational corporation ('TNC') does not have a concrete presence in international law. Rather it is an apparition, reappearing in many different

There is a model for resolving this paradox. Fortunately, it allows me briefly to consider the International Labor Organization's engagement with the issue of addressing TNCs' alleged violations of international human rights standards. I argue that the tripartite corporatism at the core of the ILO project more closely approximates Habermas's theory of discursive democracy, at least as adapted for application amongst collectives. Pursuit of the ILO model, reflecting Habermas's discourse theory as I argue it does, would greatly enhance the legitimacy of efforts to regulate the human rights impact of TNCs. As will be seen, however, this model requires an engagement with TNCs that moves beyond the bias against business interests that prevails among international humanitarians. Finally, I say it is "fortunate" that my thesis leads me to the ILO because it was an institution of special interest to Harvard Professor Manley O. Hudson, whose 1932 book *Progress in International Organization* served as the inspiration for the present project.[19]

II. *The Paradox of Non-State Actors' Status in International Human Rights*

1. *International Personality*

Brownlie summarized the classic definition of a subject of international law, and the classic criticism of that definition. "A subject of the law," Brownlie explained, "is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims. This definition, though conventional, is unfortunately circular since the *indicia* referred to depend on the existence of a legal person."[20] This looping definition has almost exclusively referred to states. "States have these capacities and immunities, and indeed the incidents of statehood as developed under the customary law have provided the *indicia* for, and instruments of personality in, other entities."[21] Thus, using the state-template for personality, the International Court of Justice (ICJ) recognized that some international organizations also may be subjects of international law.[22] But, Brownlie could only conclude that "[i]t is states and organizations (if appropriate conditions exist) which represent the normal types of legal person on the international plane. … [And] it is as well to remember the primacy of states as subjects of law."[23]

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forms and contexts – its actuality sifted through the grid of state sovereignty into an assortment of secondary rights and contingent liabilities." Johns, *supra* note 13, at 893.

[19] Manley O. Hudson, Progress in International Organizaiton (1932).

[20] Ian Brownlie, Principles of Public International Law 57 (6th ed. 2003).

[21] *Id*.

[22] Reparation for Injuries Case, 1949 I.C.J. 179 (April 11).

[23] Brownlie, *supra* note 20, at 58.

This state-centric model no longer matches our international reality.[24] International Relations scholars have proven better able to describe and theorize the pluralistic and transnational globalized landscape.[25] "We live in a messy world," James Rosenau said, further explaining that

> World affairs can be conceptualized as governed through a bifurcated system – what can be called the two worlds of world politics – one an interstate system of states and their national governments that has long dominated the course of events, and the other a multicentric system of diverse types of other collectivities that has lately emerged as a rival source of authority with actors that sometimes cooperate with, often compete with, and endlessly interact with the state-centric system.[26]

The state's emboldened rivals include "the apparent authority exercised by global market forces, by private market institutions engaged in setting of international standards, by human rights and environmental non-governmental organizations, by transnational religious movements, and even by mafias and mercenary armies in some instances."[27] Other contributions in this book consider these established and emerging international actors as well as international organizations, individuals and terrorist movements.

In recognition of this changed reality, international lawyers have raised normative challenges to international law's state-centric tradition. Christoph Schreuer was an early advocate for a "functionalist" approach to international legal personality. "[W]hat matters," Schreuer argued, "is not the formal status of a participant (province, state, international organization) but its actual or preferable exercise functions."[28] Schreuer's work stirred considerable attention to the rising influence of non-state actors after the end of the Cold War. An impressive conference was held on the subject in Kiel, Germany in 1998.[29] The American Society of

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[24] "Only the most determined 'Realist', however, would deny that the balance between states and non-state actors has shifted, over the past 30–40 years – at least within the community of advanced democracies." Josselin and Wallace, *supra* note 8.

[25] Peter J. Spiro, *Nonstate Actors in Global Politics*, 92 Am. J. Int'l L. 808, 811 (1998).

[26] James N. Rosenau, *Governance in a New Global Order, in* Governing Globalization 70, 72–73 (David Held and Anthony McGrew eds., 2002).

[27] Rodney Bruce Hall and Thomas J. Biersteker, *The Emergence of Private Authority in the International System, in* The Emergence of Private Authority in Global Governance 3, 4 (Rodney Bruce Hall and Thomas J. Biersteker eds., 2002).

[28] Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law*, 4 Eur. J. Int'l L. 447, 453 (1993).

[29] Non-State Actors as New Subjects of International Law: International Law – From the Traditional State Order Towards the Law of the Global Community (Rainer Hofmann and Nils Geissler eds., 1999). *See* Malcolm MacLaren, *Book Review – Like Blind Men Feeling an Elephant: Scholars' Ongoing Attempts to Ascertain the Role of Non-State Actors in International Law*, 3 German Law Journal (No. 10) (October 1, 2002), at http://www.germanlawjournal.com/article.php?id=201.

International Law convened a plenary panel at its 1998 Annual Meeting around the topic "The Challenge of Non-State Actors."[30] Both efforts, however, seemed able to do no more than conclude that "ritualized models of state-to-state interaction will no longer do. The new maps may still place non-state actors on the periphery, but if so, *hic cave dragones*!"[31] Among others, Philip Alston,[32] Andrew Clapham,[33] Jan Klabbers,[34] Jessica Mathews,[35] Julie Mertus[36] and Peter Spiro[37] have taken up the challenge. Building on this earlier work, Guido Acquaviva offered his "power-based analysis" of personality as a response to the "uncertainties … posed by those entities that do not fulfill the traditional criteria of 'states' but nevertheless act in the international arena with all the rights and duties they effectively possess."[38] Acquaviva's solution, with an obvious debt to Schreuer's functionalism, was to acknowledge that "the main feature of subjects of international law has been their ability to assert that they are not subordinates to other authorities. …"[39] Acquaviva argued that sovereignty and "effective authority," not legal formalisms, has always and now more explicitly should determine whether an entity is a subject of international law. This approach might free us to understand that "[t]he addition of new subjects to the international community …, even if true, would be only an 'environmental change,' not a 'systemic change.'"[40]

2. *The Paradox of Personality: The Norms*

While international law has been slow to adapt to the emerging multiplicity of actors in an increasingly privatized global order, this hesitance has been neither uniform nor unyielding. Particularly in the field of human rights, international law has begun to flirt with, if not fully embrace, discrete non-state actors as *subjects* or *quasi-subjects* of international law. Most prominently, NGOs play an ever-greater and more formalized role in the formation and enforcement of international human rights norms. Paradoxically, a parallel development in the field has been to

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[30] *Plenary Theme Panel: The Challenge of Non-State Actors*, 92 Am. Soc'y Int'l L. Proc. 20 (1998).

[31] *Id*. at 36. "[T]he participants were essentially unable to agree on how the legal norms governing the interaction between international actors, old and new, are being renegotiated in light of globalization." MacLaren, *supra* note 28, at para. 39.

[32] Non-State Actors and Human Rights (Philip Alston ed., 2005).

[33] Clapham, *supra* note 5.

[34] Jan Klabbers, *The Concept of Legal Personality*, 11 IUS Gentium 35 (2005).

[35] Jessica T. Mathews, *Power Shift*, Foreign Affairs 50 (Jan./Feb. 1997).

[36] Mertus, *supra* note 15.

[37] Spiro, *supra* note 25.

[38] Guido Acquaviva, *Subjects of International Law: A Power-Based Analysis*, 38 Vand. J. Transn'l L. 345, 386 (2005).

[39] *Id*. at 380–81.

[40] *Id*. at 387.

seek to bring international human rights norms to bear on the actions of TNCs as *objects* of international human rights law, while denying them the status of independent *subjects* or *quasi-subjects* enjoyed in some degree by NGOs.[41]

This paradox, at least partly a product of international humanitarians' bias against business interests, is at its plainest when international law enlists one non-state actor – NGOs – to the cause of forming and enforcing human rights norms against another non-state actor – TNCs. This is precisely the case with respect to the abandoned United Nations "Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights" (Norms). The Norms were promulgated with great fanfare by the United Nations Sub-Commission on the Promotion and Protection of Human Rights in the summer of 2003.[42] They were intended to bind TNCs within the framework of international human rights rules. Since 2003, however, the Office of the High Commissioner on Human Rights has significantly eroded and downgraded the status of the Norms to little more than another among the Commission's "existing initiatives and standards on business and human rights, with a view to their further consideration."[43] Still, I agree with Larry Backer that, "whatever the immediate fate of the Norms, it is unlikely that the ideas represented by the Norms, as originally submitted, will disappear."[44] For my purposes, it is most relevant that NGOs feature prominently, over and against TNCs, in the history of the formation of the Norms and in the Norms' enforcement provisions.

i. The Norms Introduced

The Norms are the most recent manifestation of a decades-long effort by states, international organizations and NGOs to regulate the power of TNCs. This effort grows from a concern that TNCs wield vast power, and often do so in a fashion that violates international human rights standards. Fleur Johns, in her survey of the question, concluded

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[41] The Third Restatement of Foreign Relations Law notes that the transnational corporation, while an established feature of international life, "has not yet achieved special status in international law." Restatement (Third) of Foreign Relations Law § 213(f) (1986).

[42] U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 13, 2003) [hereinafter "Norms"].

[43] U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion and Protection of Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises With Regards to Human Rights*, P 52(d), U.N. Doc. E/CN.4/2005/91 (Feb. 15, 2005).

[44] Backer, *supra* note 9, at 332.

> TNCs have shown themselves to be able and willing to violate individuals' … right to work (and to do so in just and favourable conditions); to form and join trade unions; to life and to enjoy the highest attainable standard of physical and mental health.[45]

Thus, there has been a steady roll-out of codes-of-conduct, guidelines, declarations and compacts since the 1970s.[46] This proliferation of international instruments produced little in the way of concrete results. Most spectacularly, the Norms were meant to succeed where these previous efforts failed because they sought to impose binding, as opposed to voluntary, duties on TNCs.[47]

Human rights NGOs played a not insignificant role in the formation of the Norms, and it should be no surprise that the Norms assign NGOs a not insignificant role in their enforcement scheme. This combination of competences—norm creation and enforcement—is central to any assertion of international legal personality and they are fundamental characteristics of a *subject* of international law.[48]

ii. NGOs and the Formation of the Norms

It has been asserted that the "process leading to the adoption of the Norms was inclusive and the consultation was broad."[49] David Weissbrodt served as a member of the Sub-Commission's working group tasked with considering "the working methods and activities of transnational corporations,"[50] and he prepared the

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[45] Johns, *supra* note 13, at 909.

[46] "Prior to the Sub-Commission's action in August 2003, several other prominent international bodies had considered these issues in either unsuccessful or voluntary initiatives. For example, the United Nations unsuccessfully attempted to draft an international code of conduct for businesses in the 1970s and 1980s. The Organisation for Economic Co-operation and Development (OECD) undertook a similar effort in 1976 when it established its first Guidelines for Multinational Enterprises to promote responsible business conduct consistent with applicable laws. In 1977 the International Labour Organization (ILO) adopted its Tripartite Declaration of Principles Concerning Multinational Enterprises, which calls upon business to follow the relevant ILO conventions and recommendations. Further, in January 1999, the United Nations Secretary-General Kofi Annan proposed a "Global Compact" of shared values and principles at the World Economic Forum … These various initiatives, however, failed to bind all businesses to follow minimum human rights standards." David Weissbrodt and Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 Am. J. Int'l L. 901, 902–903 (2003).

[47] *Id*. at 903 ("the Norms represent the "first nonvoluntary initiative accepted at the international level."); Carolin F. Hillemanns, *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 4 German Law Journal 1065, 1068 (2003) ("[T]he Norms overturn two paradigms that have to date dominated the discourse on corporate social responsibility: namely that all initiatives should be voluntary …"),

[48] Shaw, *supra* note 14, at 176, 245.

[49] Hillemanns, *supra* note 47, at 1069.

[50] Weissbrodt and Kruger, *supra* note 46, at 904.

initial draft of the Norms. In his report on the Norms (with Muria Kruger) in the *American Journal of International Law's* "Current Developments" from October 2003, Weissbrodt echoed this claim:

> [M]embers of the working group organized a seminar in March 2001 at the Office of the UN High Commissioner for Human Rights. The participants included members of the working group; representatives of NGOs interested in corporate responsibility, human rights, development, and the environment; representatives of companies and unions; and several scholars.[51]

However, as the working group's efforts advanced, the broad and balanced constituency in place in 2001 gave way to the paradoxical prioritization of NGOs over TNCs. Weissbrodt reported that, by March 2003, the process had come to be dominated, if not captured, by human rights NGOs. Ultimately, NGOs were afforded a unique opportunity to influence the final shape of the working group's draft:

> Several NGOs organized a seminar in which they provided the working group's members with detailed comments on the Norms. During that seminar, the working group received and responded to each issue raised by the NGOs in attendance. Immediately following the seminar, meeting in a private session, the working group considered all the comments received from the seminar … The working group then agreed on a draft of the Norms to present at the fifty-fifth session of the Sub-Commission in July-August 2003.[52]

The NGOs then brought their influence to bear on the Sub-Commission as it considered the adoption of the working group's proposal:

> At the 2003 meetings of both the working group and the Sub-Commission, many NGOs and others made public statements in support of the Norms, including Amnesty International; Christian Aid; Human Rights Advocates; Human Rights Watch; the Lawyers Committee for Human Rights; the Federation Internationale des Ligues des Droits de l' Hommer; Forum Menschenrechte (Human Rights Forum); Oxfam; the Prince of Wales International Business Leaders Forum; World Economy, Ecology and Development; and the World Organization Against Torture. Additionally, Amnesty International submitted a list of fifty-eight NGOs confirming their support for the Norms, and Forum Menschenrechte presented another list of twenty-six NGOs joining its statement of support.[53]

This quasi-formal involvement of NGOs in the formation of international law, whether as the suppliers of technical expertise or in the more blunt form of lobbyist or pressure group, is a hallmark of the increasing power of NGOs.[54] The role of NGOs

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[51] *Id.*

[52] *Id.* at 906.

[53] *Id.*

[54] Mathews, *supra* note 35 ("Increasingly, NGOs are able to push around even the largest governments.").

in the drafting of the Norms resembles the nearly determinative role NGOs played in the negotiation of the Framework Convention for Climate Change and the Convention Prohibiting Landmines.[55] As Jessica Mathews noted regarding the former effort:

> NGOs set the original goal of negotiating an agreement to control greenhouse gases long before government were ready to do so, proposed most of its structure and content, and lobbied and mobilized public pressure to force through a pact that virtually no one else thought possible when the talks began.[56]

iii. NGOs and Enforcement of the Norms

Where the involvement of NGOs in the formation of the Norms was substantial but informal, the Norms formally integrated NGOs in the process of enforcement. Besides requiring TNCs to adopt "internal rules of operation in compliance with the Norms,"[57] implementation of the Norms was to be achieved by

> periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created, regarding application of the Norms. This monitoring *shall* be transparent and independent and take into account input from stakeholders (*including non governmental organizations*) …[58]

This is a remarkable parenthetical. It formally incorporates NGOs in the enforcement of the Norms against TNCs, codifying the monitoring and reporting role NGOs have assumed in many international human rights regimes. The *Commentary on the Norms*, which was recognized in the *Preamble to the Norms* as a "useful interpretation and elaboration of the standards contained in the Norms,"[59] disposed of any qualification on the enforcement authority of NGOs that might be asserted because they are mentioned only in a parenthetical. To the contrary, the commentary to Paragraph 16 urged the Sub-Commission and its interested working group to rely upon information received from NGOs in their monitoring and development of best practices regarding the Norms.[60] Furthermore, the

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[55] As well as, *inter alia*: the African Charter on Human and Peoples' Rights; the European Convention for the Prevention of Torture; the UN Convention on the Rights of the Child; and the Statute of the International Criminal Court. *See* Menno T. Kamminga, *The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?, in* Non-State Actors and Human Rights, *supra* note 32, at 93, 101-104.

[56] Mathews, *supra* note 35.

[57] Norms, para. 15.

[58] Norms, para. 16. (emphasis added).

[59] Norms, Preamble.

[60] U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion and Protection of Human Rights, *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, ¶ 16, U.N. Doc E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 13, 2003) [hereinafter "Commentary"].

commentary to Paragraph 16 encouraged NGOs to "use the Norms as the basis for their expectations of the conduct of the transnational corporation or other business enterprise and monitoring compliance."[61] It is as if the parentheses were meant to underscore the important, rather than the marginal, role NGOs were expected to play, among the relevant "stakeholders," in the enforcement of the Norms.[62]

To facilitate, and further formalize the enforcement function that the Norms cede to NGOs, the Sub-Commission subsequently issued a Resolution "calling for the creation of a mechanism for NGOs and others to submit information about businesses that are not meeting the minimum standards of the Norms."[63] This is reflective of the enforcement capacity explicitly extended to NGOs by other human rights regimes,[64] some of which grant NGOs standing before interpretative and enforcement bodies, including both commissions and courts.[65]

The message was not lost on NGO advocates of human rights. David Weissbrodt reported that, "immediately upon adoption of the Norms, many … NGOs … issued a press release welcoming the Sub-Commission's action. A few NGOs have already indicated their intent to begin using the Norms as standards for reporting on the human rights activities of businesses."[66]

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[61] *Id.*

[62] Surya Deva, *UN's Human Rights Norms for Transnational Corporations and Other Transnational Business Enterprises: An Imperfect Step in the Right Direction?*, 10 ILSA J. Int'l & Comp. L. 493, 516 (2004).

[63] Weissbrodt and Kruger, *supra* note 46, at 906.

[64] "On the contrary, in an apparent acknowledgement of the importance of NGO input, the conventions often provide NGOs with a formal role in their implementation and follow-up." Menno T. Kamminga, *The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?, in* Non-State Actors and Human Rights, *supra* note 32, at 93, 105.

[65] *See, e.g.*, European Convention on Human Rights, art. 34, April 11, 1950, 213 U.N.T.S. 222 ("The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto."); American Convention on Human Rights, art. 44, DATE, 1144 U.N.T.S. 123 ("Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.")

[66] Weissbrodt and Kruger, *supra* note 46, at 906–907. *See, e.g.*, Human Rights Watch, Nongovernmental Organizations Welcome the New U.N. Norms on Transnational Business, http://hrw.org/press/2003/08/un-jointstatement.htm#ngos (last visited Aug. 26, 2007); Press Release, Human Rights Watch, The U.N. Norms: Towards Greater Corporate Accountability (Sept. 30, 2004), at http://hrw.org/english/docs/2004/09/30/global9446.htm; Amnesty International USA, UN Norms for Business: Taking Corporate Responsibility for Human Rights to the Next Level!, http://www.amnestyusa.org/Business_and_Human_Rights/Legal_accountability/page.do?id=1101637&n1=3&n2=26&n3=1243 (last visited Aug. 26, 2007).

3. *Critiquing the Paradox*

International humanitarians typically justify their preference of NGOs over TNCs,[67] and consequently the different status these non-state actors are accorded in international law, by arguing that TNCs are capable of violating human rights and, at the same time, unaccountable for the exercise of their power. The first point is beyond doubt. As for the second claim regarding the accountability of TNCs, two criticisms emerge. First, TNCs, although formally denied international personality, nonetheless use their great power informally and sometimes illegally in order to manipulate states in a fashion that advances TNCs' interests at the expense of the state. Of course, NGOs also exercise their influence in a similarly informal manner. This criticism, thus, may be a matter of degree rather than of form. Second, the more familiar refrain in the context of globalization commentary, is that, by their nature, TNCs transcend any single state and are able to evade the control of states and popular accountability by moving their management and production centers to more favorable locations. In this wholly undemocratic fashion, TNCs influence the normative landscape by shopping for preferred regulatory environments.[68]

Without exploring the complexities of these criticisms, but with a view more narrowly towards the paradoxical preferencing of NGOs over TNCs in human rights regimes, it is important to note that similar questions about an accountability deficit have been raised around NGOs' activities. Out of a generalized concern for the importance of accountability and transparency in international governance, Paul Wapner has raised fundamental questions about the increasing authority of NGOs. Wapner explained that "[c]ritics are right to point out the lack of legitimacy, undemocratic character, and weak responsiveness of NGOs. NGOs deserve such critical scrutiny and … will benefit from it … [as do] all institutions of political organization, including the state."[69] The central elements of this view are the simple facts that there are many NGOs that pursue abhorrent goals; that the basis on which NGOs purport to understand/embody global public interest is unclear; and that the constituencies to which NGOs are accountable are often narrow (issue-oriented), untransparent and self-selecting. Thus, Wapner concluded that "Global civil society [unlike states] has no formal, cross-cutting institutional checks on activity, nor do the internal dynamics of NGOs express clear democratic characteristics."[70]

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[67] Paul Wapner captured the generally positive view of NGOs among international humanitarians in these terms: "most people like most NGOs most of the time." Paul Wapner, *Introductory Essay: Paradise Lost? NGOs and Global Accountability*, 3 Chi. J. Int'l L 155, 156 (2002).

[68] *See* Sinden and Bratspies in this volume.

[69] Wapner, *supra* note 67, at 159.

[70] Wapner, *supra* note 64, at 157.

David Held endorsed Wapner's concern about democracy and accountability in describing a kind of market failure in civil society. NGOs' representative character can be questioned, he concluded, "when background conditions prevent access to such associations or when they are ordered internally in a manner which systematically distorts opportunities or outcomes in favour of particular sectional interests or groups."[71] In fact, most NGOs leaders are appointed, and, if elected, only by the narrow membership base of the organization. To the degree that checks, like advisory committees and boards exist, their authority is often subverted by the fact that these watchdog institutions regularly share the viewpoint of the respective NGOs they monitor. Held explained that organizations can "take on a 'life of their own' which may lead them to depart from the wishes and interests of their members. Such may be the case when they generate oligarchic tendencies…."[72] Finally, there are only weak international checks on NGOs. Consultative status at the U.N., for example, is conditioned on the soft requirements that NGOs support and respect the principles of the Charter of the United Nations and provide an audited annual financial statement.

The question of NGO accountability led to a charged exchange between Peter Spiro and Phillipe Sands at the 1998 ASIL plenary panel dedicated to "The Challenge of Non-State Actors"[73] Spiro questioned the accountability of Sands' NGO named FIELD,[74] particularly in its representation of small island states in standard setting institutions. Spiro concluded: "This leads to the question of whether that organization is fully accountable to the governments of the small island states or whether FIELD may have agendas of its own." Anne-Marie Slaughter, moderating the panel, followed up by asking: "Professor Sands, are you accountable?" To this, Sands exclaimed: "Absolutely I'm accountable!"[75] But how, and to whom or what, Sands did not explain. That silence on the part of NGOs advocates, and the reality that such silence suggests, led Kenneth Anderson to conclude that "[i]t is no exaggeration to regard … international NGOs … as not merely undemocratic, but as profoundly antidemocratic."[76]

It is not necessary for me to go so far. The point of a NGOs accountability deficit is made only to suggest that they may suffer, to some degree, from the same pathologies that international humanitarians regularly invoke when justifying the denial of international personality to TNCs.

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[71] David Held, Democracy and the Global Order 181 (1995).
[72] *Id*.
[73] *Plenary Theme Panel, supra* note 30, at 30.
[74] Foundation for International Environmental Law and Development.
[75] *Plenary Theme Panel, supra* note 30, at 30.
[76] Wapner, *supra* note 67, at 157–58.

Besides the accountability critique, one might also question NGOs' lack of independence from states, a concern that is embedded in the much more complicated challenge confronting the traditional notion of a public/private divide in the law.

At a superficial level, it is important to note that NGOs are closely linked to states, whose aid initiatives they increasingly facilitate and serve. *The Economist* reported in 2000 that "[a] growing share of development spending, emergency relief and aid transfers passes through [NGOs]. … [W]estern governments have long been shifting their aid towards NGOs."[77] The affinity that should develop from such synergies has been exacerbated by direct government subsidization of NGOs. "[T]he principle reason for the recent boom in NGOs," *The Economist* explained, "is that western governments finance them."[78] This trend had only deepened several years later when *The Economist* reported on the dependency that has emerged between the European Commission, EU member states and NGOs. "Many of the NGOs that Brussels likes to consult," the Economist explained, "are directly financed by the commission itself."[79] Involving large amounts of money, *The Economist* summarized the perversity of the situation in these terms:

> The spectacle of organizations that receive EU money using their money to campaign for more EU money is only one example of this looking-glass world. It is a world in which so-called NGOs are actually dependent on governments for cash; and one in which the European Commission, itself directly financed by Europe's national governments, finances "autonomous" organizations that campaign for more power and money to be handed to the commission itself.[80]

Delving more deeply than shared financing and expertise, David Held concluded that "there is a profound sense in which civil society and civic associations are never separate from the state; the latter, by providing the overall legal framework of a society, to a significant degree constitutes the former."[81]

At a more theoretically complex level, the dependency between states and NGOs is symptomatic of an epochal shift in our jurisprudence. Peer Zumbansen described the broader phenomenon of dependency as the "hybrid interaction of public and

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[77] *Sins of the Secular Missionaries*, The Economist, June 27, 2000, at http://www.economist.com/world/displaystory.cfm? story_id=E1_NSGJPT.

[78] *Id*.

[79] *A Rigged Dialogue with Society*, The Economist, Oct. 21, 2004, at http://www.economist.com/world/europe/ displaystory.cfm?story_id=E1_PPDRJRG.

[80] *Id*.

[81] Held, *supra* note 71, at 181.

private actors" or the "contractualization of public governance" in his insightful critique of the stubborn formalism of "public" and "private" legal spheres.[82] For him, the hybridization was occurring across the public boundary between states and non-profit *and* for-profit non-state actors in equal measure. The paradoxical international treatment of NGOs and TNCs, it seems, is justifiable only if the ever-less persuasive distinction between the two as non-profit and for-profit entities is sustained. In practical terms, as the reporting of *The Economist* makes clear, sustaining that distinction is difficult. On the one hand, "NGOs are … looking more and more like businesses themselves. … Now a whole class of them have, even if not directly backed by businesses, taken on corporate trappings. Known collectively as BINGOs, these groups manage funds and employ staff which a medium-sized company would envy."[83] On the other hand, "Corporations are governments. … They exercise power in a political sense [in that they have the] capacity to make or influence decisions that shape the values of others. … [T]he corporation has effective control over much of the routine affairs of human governance."[84] What if, as these circumstances suggest, the distinction between the public and the private itself is unsustainable? In describing Claire Cutler's work, Zumbansen concluded that, in the face of the increasing illogic of the traditional public/private distinction in law, "the dividing lines … between public and private," like the line which lies at the heart of my critique, "can only be drawn by an act of paradox."[85]

As early as 1971, Arthur Selwyn Miller agonized over the perpetuation of the public/private formalism in the face of the great power wielded by TNCs. Presciently, he wrote about the emerging global economy, fully recognizing the challenges it would pose for the state-centric tradition of international law and the public/private dogma on which it depended. At the center of these challenges to the accepted dogma, Miller explained, was the "age of international production, the instrument for which is the global corporation."[86] The challenge TNCs posed to states' traditional dominance, for Miller, was so thorough as to undermine tired distinctions of public and private law. "All law is public law" he declared.[87] He went on:

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[82] Peer Zumbansen, *Sustaining Paradox Boundaries: Perspectives on Internal Affairs in Domestic and International Law*, 15 Eur. J. Int'l L. 197, 201 (2004).

[83] *Sins of the Secular Missionaries, supra* note 77.

[84] Arthur Selwyn Miller, *The Global Corporation and American Constitutionalism: Some Political Consequences of Economic Power*, 6 J. Int'l L. & Econ. 235, 240 (1971–1972).

[85] Zumbansen, *supra* note 82, at 206.

[86] Miller, *supra* note 84, at 236–37.

[87] *Id.* at 243.

> Is GM private or public? How about IBM? Or Standard Oil of New Jersey? Or Olivetti? Or Unilever? Surely one is hard put to determine where the private character of Lockheed—the largest defense contractor—leaves off and the public character of the Department of Defense begins. … What is being suggested is that, when one views the giant corporations, it is becoming increasingly difficult to ascertain where the line between public and private is to be drawn.[88]

The foregoing points merely serve to cast light on the possibility that bias and ideological acculturation explain the paradoxical treatment these non-state actors are given in human rights regimes. Certainly, the reality of the role played by TNCs in international affairs and foresighted shifts in jurisprudence that are sensitive to that reality, make it difficult to justify the distinction.

III. *Discursive Democracy and an Inclusive Approach to Personality*

If TNCs are as powerful as is feared by international humanitarians, then the continued efficacy and relevance of international law depends on the exposure and correction of the paradox I have identified. As Jordan Paust explained:

> the efficacy, predictability and stability of international law ultimately rest upon real processes of power and authority in which all participate, however indirectly. When all the various voices are heard or represented, it is more likely that the law will be effective, predictable and more stable.[89]

Paust's argument for an inclusive approach to personality, with some adaptation, resonates with Habermas's discourse theory of law.

1. *Collective Discursive Democracy*

Habermas's discursive democracy typically characterizes the conditions for just relations between *individuals*; leading to the creation of governing institutions and the norms those institutions apply. But, with some adaptation that embraces the social identity theory,[90] it may be possible to extend Habermas's theory of discursive democracy to interactions between collectives like TNCs, NGOs and states. Thus, the interactions between collectives would be held to the standard of Habermas's discursive democracy, consisting of a complementary relationship between political actors – here TNCs and NGOs as collectives, on the one hand,

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[88] *Id*. at 244.

[89] Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process*, 25 Mich. J. Int'l L. 1229, 1246 (2004).

[90] *See, e.g.*, Will Kymlicka, Multicultural Citizenship (1995); Allen Buchanan, *The Role of Collective Rights in the Theory of Indigenous Peoples' Rights*, 3 Transnat'l L. & Contemp. Probs. 89 (1993); Robert N. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 Ariz. L. Rev. 739 (1990).

and the interested states, on the other. This would be a relationship characterized by discourse and guided by a consensual ideal of the common good that comes to define the norms of justice. This application of Habermas's discourse theory to collectives is an innovation I have urged elsewhere with regard to indigenous peoples' self-determination claims against states.[91]

Focused as he is on the primacy of individual autonomy, I suspect that Habermas would reject the transposition of his principles of discourse theory to the interactions between collectives such as TNCs.[92] In fact, Habermas wrote to challenge the moral and legal validity of group rights, focusing on their illiberal potential for limiting individual self-realization in the broader society.[93] Habermas disparagingly refers to institutions like states (and probably transnational corporations) as "systems,"[94] by which he means vacuous structures, remote and detached from the "life world" of the individual and the autonomous expression of her will in society.[95] Collectives, he argues, are artificial constructions, unable

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[91] Russell A. Miller, *Collective Discursive Democracy as the Indigenous Right to Self-Determination*, 31 Am. Ind. L. Rev. 341 (2007).

[92] Habermas builds his theories of communicative action and discursive democracy on assumptions of individual intersubjectivity: "If we construe the universalist claim of the moral principle intersubjectively, then we must relocate ideal role taking, which, according to Kant, each individual undertakes privately, to a public practice implemented by all persons in common." Jürgen Habermas, Between Facts and Norms 109–110 (William Rehg trans., 1996). The discourse principles are meant to be applied by *citizens* for *themselves. Id*. at 126. Habermas aligns himself with the "Classical liberalism, going back to Locke," which, he argues, sought to use "the mechanisms and concepts of modern law to tame political power and put it at the service of the pre-eminent goal of protecting the pre-political freedom of the individual member of society." Habermas concludes that "[t]he core of a liberal constitution is the guarantee of equal individual liberties for everyone." Jürgen Habermas, *Equal Treatment of Cultures and the Limits of Postmodern Liberalism*, 13 The Journal of Political Philosophy 1 (2005).

[93] Habermas begins by suggesting that "[…] collective rights are not suspicious per se. […] [T]he principle of equality is not violated as long as member are not barred from showing their dissent by exiting the group or mobilizing couter-forces within the organization itself." Habermas, *Equal Treatment of Cultures and the Limits of Postmodern Liberalism, supra* note 92, at 19. But, he goes on to explain that "[a] potential oppression internal to the group is sheltered by collective rights that strengthen a group, not only in the service of the cultural rights of its individual members, but also directly serving, over their heads, the continued existence of the cultural background of the collective." *Id*. at 21. Habermas particularly notes that collective rights particularly expose women and children to the risk of losing their individual liberties. *Id*. at 19.

[94] "The process that has brought the communicative rationalization Habermas identifies has, at the same time, produced a state and economy that operate on other principles—and in ways that may be dysfunctional for what Habermas calls the lifeworld." Hugh Baxter, *Habermas's Discourse Theory of Law and Democracy*, 50 Buff. L. Rev. 205, 234 (2002).

[95] "In interpreting their situations and pursuing their plans, [Habermas] says, communicative actors in 'lifeworld' situations proceed consensually. Their actions presuppose, or are directed toward

to justify an inherent interest in their own will.[96] For Habermas a collective entity is less than the sum of its parts.

In a variety of legal contexts, however, we accept that collectives are capable of expressing will and invoking rights.[97] Most prominently, in the United States corporations are credited as legal persons. Of equal relevance to this discussion is the fact that international lawyers generally accept that states, acting in the international legal order, address matters of their "will," "interest" and "rights," and are responsible for duties.[98] And, central to the paradox I have identified, there is the impulse from international humanitarians to attribute personality to another collective, namely, NGOs.

Habermas, in his writings on the federalist dynamic in the evolution of Europe, seems to concede that states might be will-forming collectives.[99] And Habermas has written to endorse the will-forming impact and potential of broad cultural movements, sometimes loosely referred to as "civil society." In this sense, he too may be susceptible to favoring "civil society" groups over others, like business interests. Indeed, Habermas may have recognized the relevance of

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establishing, 'common situation definitions.'" *Id.* at 224 (citing Jürgen Habermas, 2 Theory of Communicative Action: Lifeworld and System 121, 127 (Thomas McCarthy trans., 1987)).

[96] "A culture is not suited to be a legal subject as such, because it cannot meet the conditions for its reproduction with its own power; instead, it depends upon the constructive appropriation by autonomous interpreters who say 'yes' or 'no'." Habermas, *Equal Treatment of Cultures and the Limits of Postmodern Liberalism, supra* note 92, at 22.

[97] Martin Blanchard argues:

An implicit premise of [Habermas's argument against collective rights] stipulates that the soundness of holding a right is determined by the ability of its holder to justify its own interests. This premise is plainly false. For instance, business corporations hold rights, but no one would argue that they are able to justify their own interests. A "legal person" is a legal fiction that enables certain rights for business entities. This fiction is justified regarding its aims: it confers legal status to a collective actor for reasons that are (arguably) justified in our society; that is, in *our* interest. Another example of rights-holders that do not possess the ability to justify their own interests are infants and seriously handicapped persons; yet I do not believe Habermas would argue that they do not possess rights.

Martin Blanchard, *Recognition and the Case of Indigenous Reparation: A Habermasian Critique of Habermas* 4 (Centre de recherché en éthique de l'Université de Montréal (CREUM) – Working Paper), *available at* http://www.creum.umontreal.ca/IMG/pdf/Habermas_and_Recognition.pdf.

[98] *See* Jack L. Goldsmith and Eric A. Posner, The Limits of International Law 6 (2005) ("By state interest, we mean the state's preferences about outcomes. State interests are not always easy to determine, because the state subsumes many institutions and individuals that obviously do not share identical preferences about outcomes. Nonetheless, a state – especially one with well-ordered political institutions – can make coherent decisions base upon identifiable preferences, or interests, …").

[99] Jürgen Habermas, *Why Europe Needs a Constitution*, 11 New Left Review 5 (Sept./Oct. 2001).

his discourse theory for "intercultural" relations between collectives. Tensions between such groups, he explained, are the result of "distortion in communication, from misunderstanding and incomprehension, from insincerity and deception […] The spiral of violence [between cultures as between individuals] begins as a spiral of distorted communication that leads through the spiral of uncontrolled reciprocal mistrust, to the breakdown of communication."[100] The matter is undoubtedly more complicated when addressed to groups. Habermas noted that "cultures, ways of life, and nations are at a greater distance from and, thus, are more foreign to one another. They do not encounter each other like members of a society who might become alienated from each other through systematically distorted communication."[101] But, if the source of dissonance, whether between individuals or more remote cultures and groups, is the same erosion of genuine discourse, Habermas explained that "it is possible to know what has gone wrong and what needs to be repaired."[102] In that spirit, I propose that international humanitarians might hold collectives, like TNCs and NGOs, to the same standard of discourse that Habermas prescribes for individuals.

Nayef Samhat also urged the application of the principles of Habermasian discursive democracy to the interactions between collectives. In mapping the discursive democratic potential of regimes, Samhat noted that "international regimes are the means through which state and non-state actors regulate areas of global life …"[103] He regarded non-state actors operating in this capacity as "group oriented"[104] and refers specifically to "global civil society actors such as non-governmental organizations (NGOs) and social movements …"[105] In answering skepticism about the ability of NGOs and social movements to function as will-forming entities in Habermasian democratic discourse, Samhat explained that "NGOs and social movements can be representative agents … in world politics, implementing tasks and aggregating interests and voices for segments of the global polity …"[106] TNCs are an obvious parallel to the kinds of collectives that interest Samhat. They, too, are non-state groups, exercising a definable will in relationships with states as relevant social agents.[107]

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[100] Giovanna Borradori, Philosophy in a Time of Terror 35 (2003).

[101] *Id.*

[102] *Id.*

[103] Nayef H. Samhat, *International Regimes and the Prospects for Global Democracy*, 6 The Whitehead Journal of Diplomacy and International Relations 179, 180 (Winter/Spring 2005).

[104] *Id.*

[105] *Id.* at 182.

[106] *Id.* at 186.

[107] Jürgen Habermas, 2 Theory of Coummunicative Action: Lifeworld and System 95 (Thomas McCarthy trans., 1987).

2. *Discursive Democracy*

Applied as between states, TNCs and NGOs as the basis for ascribing international personality, Habermas's discourse theory of democracy conceives of

> an ideal procedure for deliberation and decision making. Democratic procedure, which establishes a network of pragmatic considerations, compromises, and discourses of self-understanding and of justice, grounds the presumption that reasonable or fair results are obtained insofar as the flow of relevant information and its proper handling have not been obstructed.[108]

The resulting system is one in which

> [T]he only regulations and ways of acting that can claim legitimacy are those to which all who are possibly affected could assent as participants in rational discourses. In light of this "discourse principle," citizens test which rights they should mutually accord one another. *As* legal subjects, they must anchor this practice of self-legislation in the medium of law itself; they must legally institutionalize those communicative presuppositions and procedures of a political opinion- and will-formation in which the discourse principle is applied. Thus the establishment of the legal code, which is undertaken with the help of the universal right to equal individual liberties, must be *completed* through communicative and participatory rights that guarantee equal opportunities for the public use of communicative liberties. In this way, the discourse principle acquires the legal shape of a democratic principle.[109]

The theory is dependent on Habermas's expansive claims for the normative potency of communicative action, which maximizes the effective force of reason by procedurally limiting the influence of the elements of strategic action, including wealth and power.[110] Simone Chambers has explained: "Discourse is an idealized and formalized version of communicative action. In communicative action participants search for mutual understanding by offering arguments that could command assent … in communicative action, participants are interested in bringing about a genuine understanding."[111] The success of the theory, indeed, of democracy itself, is measured by the discourse promoting quality of the institutionalized procedures and conditions of communication operating between the relevant subjects,[112] in this case between TNCs, NGOs and states

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[108] Habermas, *supra* note 92, at 296.

[109] *Id*. at 458.

[110] "Communicatively acting subjects commit themselves to coordinating their action plans on the basis of consensus that depends in turn on their reciprocally taking positions on, and intersubjectively recognizing, validity claims. From this it follows that only those reasons count that all the participating parties together find acceptable." *Id*. at 119.

[111] Simone Chambers, *Discourse and Democratic Practices, in* The Cambridge Companion to Habermas 233, 237 (Stephen K. White ed., 1995).

[112] Habermas, *supra* note 92, at 298.

as collectives. Thus, Habermas demands that legal subjects become the democratic authors of their legal order *via* "[b]asic rights to equal opportunities to participate in processes of opinion- and will-formation in which [subjects] exercise their political autonomy."[113] Habermas favorably invoked Robert Dahl's five postulates for an appropriate democratic procedure,[114] but insisted that, in its essence

> […] the principle of democracy should establish a procedure of legitimate lawmaking. Specifically, the democratic principle states that only those statutes may claim legitimacy that can meet with the assent (*Zustimmung*) of all citizens in a discursive process of legislation […][115]

Habermas's "more open and dynamic conception of democratic deliberation" could resolve even such latent and pervasive discursive dissonance as international humanitarian's anti-business bias. Extending personality to TNCs would, in this theory, strengthen the international normative regime. Valdez explained that Habermas

> maintains that the range of acceptable reasons [operating in the discourse] may be broadened by the inclusion of more diverse perspectives, and that the interpretive perspectives of the participants themselves will be enlarged by including more voices in the dialogue […] He thus emphasizes the changing, dynamic character of public deliberation in which participants achieve mutual respect and greater understanding as they reflexively interpret and accommodate different perspectives.[116]

For this approach to international personality to become discursive, however, it is necessary that we turn our attention to "the terms and dynamics of [the] relational aspects" between TNCs, NGOs and states. First and foremost in that effort is the need to invite TNCs in from the exile imposed by international humanitarians.

IV. *Conclusion: The ILO as a Model for a Discursive Approach to Personality*

Harvard Professor Manley O. Hudson outlined the uniquely inclusive character of the International Labor Organization (ILO) in his book *Progress in International Organization*. He explained:

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[113] *Id*. at 123.

[114] Including: "(a) the inclusion of all those affected; (b) equally distributed and effective opportunities to participate in the political process; (c) an equal right to vote on decisions; (e) an equal right to choose topics and, more generally, to control the agenda; and (e) a situation that allows all the participants to develop, in the light of sufficient information and good reasons, an articulate understanding of the contested interests and matter in need of regulation." *Id*. at 315 (*quoting* Robert A. Dahl, A Preface to Economic Democracy 59 (1985)).

[115] *Id*. at 110.

[116] *Id*. at 61.

> Each member … is entitled to be represented by four delegates, of whom two are so-called government delegates, freely chosen by the government, one is a so-called employers' delegate, chosen by the government in consultation with its most representative organization of employers, and one is a so-called workers' delegate, chosen by the government in consultation with its most representative organization of workers. Thus constituted, it does not cease to be an intergovernmental conference; but the delegates are not plenipotentiaries, and those named by a government do not necessarily vote en bloc nor work in unison. National lines are all but ignored at the sessions of the Conference, and divisions usually find the employers' delegates and the workers' delegates of all countries united in the respective groups.[117]

This tripartite structure seems particularly responsive to Habermas's demand that norms be enacted following rational discourse in which all who are possibly affected could assent as participants. Hudson acknowledged that the ILO's formal embrace of non-state actors was revolutionary for its time. "For the first time in history," he concluded, "international co-operation [was] organized with some reference to other than national interests …"[118] But, more than this innovation, the legitimacy, and now the longevity, of the ILO must be attributable to the balanced manner in which it reached beyond the state-centric tradition of international law to engage with NGOs and TNCs on equal terms. In this respect, Hudson credited the ILO with achieving "a unity among employers and employed which is not organized along state lines."[119] The ILO, at the very least, has not been a vehicle for the paradoxical treatment that international humanitarians are determined to give NGOs and TNCs today.

In this more representative landscape debate at ILO Conferences over proposed conventions (what Hudson insisted on calling "legislation") blossomed into an almost ideal Habermasian discourse. Labor issues, Hudson explained,

> are extensively debated … by the representatives … Silk gloves are not worn while that debate is in progress, and many a delegation in the Conference has heard the frankest criticism of its government's action; nor do the employer's and workers' delegates refrain from castigation of each other on positions taken in the Conference itself.[120]

The ILO's corporatism has been praised by others for both breaking down the state-centric model of international personality[121] and facilitating the legitimacy

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[117] Hudson, *supra* note 19, at 47–48.

[118] *Id*. at 48.

[119] *Id*. at 51-52. Menno T. Kamminga, in a more contemporary work, also singled-out the ILO's inclusive structure. *See* Menno T. Kamminga, *The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?, in* Non-State Actors and Human Rights, *supra* note 32, at 93, 100.

[120] Hudson, *supra* note 19, at 51.

[121] "In the matter of adoption of Conventions … the final decision rests with the Governments. However, any action on their part in this direction depends on the initiative of the Conference,

and success of its initiatives. Klaus Samson explained, in nearly Habermasian terms, that "the tripartite structure of the organization's deliberative bodies … enhances the authority of its decisions and their impact on policy discussions at the national level."[122] E.A. Landy especially noted the importance of the participation of non-state actors in the ILO's efforts to supervise the implementation of its standards. "It seems hardly surprising," he concluded, "that the tripartite system … should have exercised a profound influence in a sector of [the ILO's] work [supervision] where governmental action comes under scrutiny."[123] E. Osieke concluded that, without tripartism, "the ILO would certainly be less effective, …"[124]

Critics of the ILO cast its more recent record in less favorable light. Laurence Helfer reported

> A widely held perception that the organization is powerless to combat the workplace abuses that globalization can engender …. Numerous studies deride the ILO as a '90-pound weakling of UN agencies,' a 'toothless tiger,' whose only tools of influence are the sunshine of public scrutiny and the shame of public censure, and whose feeble enforcement mechanisms render all but nugatory its efforts to improve global labor conditions.

The ILO's structure, especially including its particular brand of tripartite corporatism, has come in for some of the blame. Undoubtedly, the ILO is a product of the unique political and economic forces operating at its founding.[125] The flaw, however, is not in the broader principles of corporatism and discourse. Instead, it is its too narrow application in the ILO. If the ILO is out of sync with the prevailing pluralistic political and economic reality, then a more inclusive governing structure is the solution offered by Helfer. Sean Cooney agreed. In terms that

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in which State representatives constitute only one-half of the total number of delegates. The Constitution of the Organisation thus signifies a limited but important departure from the principle generally obtaining in International Law, namely, that States only may take part in the process of creating new rules of International Law and that only the interests of States as such are entitled to direct representation in the International sphere." Lassa Oppenheim, International Law: A Treatise 731–732 (8th edn., H. Lauterpacht ed., volume I: *Peace*, 1955).

[122] Klaus Theodore Samson, *International Labour Organization, in* 2 Encyclopedia of Public International Law 1150, 1155 (Max Planck Institute for Comparative Public Law and International Law, Rudolf Bernhardt ed. 1995).

[123] E.A. Landy, The Effectiveness of International Supervision: Thirty Years of I.L.O. Experience 180 (1966).

[124] E. Osieke, Constitutional Law and Practice in the International Labour Organisation 54 (1985).

[125] Sean Cooney, *Testing Times for the ILO: Institutional Reform for the New International Political Economy*, 20 Comp. Lab. L & Pol'y J. 365, 369 (1999) ("The formative period of the ILO was distinguished not only by the dominance of particular states, but also by a particular economic form.").

would be regarded as irreverent in international humanitarians' discussions of corporate social responsibility and human rights, Cooney urged the expansion of employer-side participation at the ILO at the same time as he urged the expansion of employee-side participation. He explained:

> Similar issues of inclusion and exclusion arise on the employer side. What is the commonality between a small business-person, a transnational corporation, a medium-sized enterprise which is a member of a national employer federation, and a self-employed person? Which of these groups is deemed 'most representative' of employers? Is this any longer an appropriate criterion for determining who gets to vote in the ILO?[126]

The answers to his rhetorical question are obviously "no" and "let's conceive of a way for a broader cross-section of business interests to participate so that all interested parties have a place at the table." Held urged that "[c]ompanies … be conceived as real entities or 'legal persons' with legitimate purposes of their own. …" He explained that "a democratic legal order must, therefore, recognize enterprises as well as individual citizens as part of its constitutive domain."[127] Along with D.A. Ijalaye's early effort,[128] Kinley and Tadaki also argued for the investment of TNCs with "sufficient international legal personality to bear obligations, as much as to exercise rights."[129] Johns' call for extending international personality to TNCs was stronger still: "Ultimately it is submitted that if international law is to fulfill any or all [of its descriptive or prescriptive] roles and more importantly, if it is to have a continuing and positive impact upon daily human endeavour, its processes must be opened up to all groups (including, but by no means limited to TNCs) with direct involvement in any field of human affairs with which these legal processes purport to deal."[130] Only this way do we approach Habermas's promise of legitimacy resulting from broadly inclusive discourse.

Achieving a more inclusive discourse, however, will require international humanitarians to critically engage with the ideological biases and blind spots that prevent them from welcoming TNCs to the table. Presently, regulatory efforts like the UN Norms and the overwhelming weight of the literature favor increasing the international responsibility of TNCs as objects of a human rights regime that, at the same time, extends NGOs ever more international legal personality as subjects.

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[126] *Id.* at 372.

[127] Held, *supra* note 71, at 252.

[128] D.A. Ijalaye, The Extension of Corporate Personality in International Law (1978).

[129] Clapham, *supra* note 5, at 77 (*citing* D. Kinley and J. Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 Va. J. Int'l L. 931, 947 (2004)).

[130] Johns, *supra* note 13, at 894.

To return to *La Traviata*, it was only by critically engaging with and ultimately rejecting the moral paradigm enforced by Alfredo's Sister's fiancé, that redemption is achieved in the opera. Alfredo's father, ashamed of his own actions in wrecking the relationship and realizing Violetta's noble character and genuine love for Alfredo, is able to reconcile the young lovers just as Violetta dies with these words on her lips:

> Se una pudica vergine
> Degli anni suoi sul fiore,
> A te donasse il core –
> Sposa ti sia – lo vo'.
> Le porgi quest' effigie;
> Dille che dono ell'é
> Di chi nel ciel fragli angeli
> Prega per lei, per te.[131]

[131] "If some young girl – in the flower of life – Should give her heart to you – Marry her – I wish it. Then give her this portrait: – Tell her it is the gift – Of one who, in heaven among the angels, – Prays for her and for you." Giuseppe Verdi, *Prendi, quest'è l'immagine, on* La Traviata (EMI Classics 1982).

Transnational Networks and the International Public Order

By Jenia Iontcheva Turner

A. *Introduction*[1]

When Harvard Professor Manley O. Hudson delivered his lectures on "Progress in International Organization" in 1932, he recognized that a devastating world war and rapid technological changes had fundamentally transformed international relations. As the means of communication and transportation improved at the end of the nineteenth and early twentieth century, "contacts had grown much more frequent and intimate, commerce had expanded very rapidly, exchanges of all sorts had grown apace. Quite suddenly […] the world had become a smaller place in which to live."[2] The ruin of World War I shattered some illusions of growing international cooperation, but it also reinforced the belief that a stronger international organization was needed to promote peace and stability.[3]

In the United States, President Woodrow Wilson was a fervent advocate of the view that that the international community could be saved from another world war only by cooperating within the framework of a new international institution.[4] It was under his initiative that states participating in the Peace Conference at Versailles signed the Covenant establishing the League of Nations. Hudson himself supported the League's mission. In his view, the League ushered in a "new era in organized international life" and represented "the triumph of common interest over national and local prejudice."[5] He became personally involved in the League's work, advising Wilson at Versailles and later serving in the League's Secretariat and as a judge at the Permanent Court of International Justice.

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[1] Sections of this chapter are adapted from Jenia Iontcheva Turner, *Transgovernmental Networks in International Criminal Justice*, 105 Mich. L. Rev. 985 (2007).

[2] Manley O. Hudson, Progress in International Organization 14–15 (1932).

[3] *Id.* at 16.

[4] *Id.*

[5] *Id.* at 23.

Miller & Bratspies (Eds), Progress in International Law, pp. 407–430.

While Hudson's predictions about the League's triumph over national and local prejudice were proven tragically wrong by World War II, many of his broader insights concerning the value of international organizations remain worthy of attention. One example is his belief in the fundamental importance of the human element in promoting international cooperation. Hudson recognized that "[g]overnmental agencies do not operate themselves, and their character must change as men come and go."[6] He believed that the engine of international cooperation was not so much the charter or the mandate of the League, but rather the regularized interaction between state officials and civil servants that the League promoted. Even if nothing of substance were to be accomplished at the gatherings of the League's Assembly, Hudson thought these gatherings "would be amply worthwhile because of the value of such personal contacts and of the increased understanding which results from them."[7]

Today, interpersonal contacts among national representatives remain a significant factor in international cooperation. Until relatively recently, such contacts developed primarily through meetings, conversations and other personal exchanges among heads of state or their diplomatic representatives. Following World War II, the United Nations also became a venue for regular interactions among delegations of national diplomats.

Over the last few decades, however, a broad range of governmental officials have begun interacting outside the strictures of both the UN and high-level intergovernmental diplomacy. Mid-level government officials, prosecutors, judges, and legislators have been coordinating policy through informal networks.[8] Such coordination has occurred without official or formal legal sanction, and it is often seen as more efficient than cooperation through the UN or through formal diplomatic channels. It is especially prominent in areas of cross-border regulation, including banking, antitrust, environmental protection, and securities law.[9] But it also occurs in more politically charged areas, such as national security and human rights.[10]

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[6] *Id*. at 24.

[7] *Id*. at 32–33.

[8] *See* Romano, in this volume.

[9] Anne-Marie Slaughter, A New World Order (2004); Youri Devuyst, *Transatlantic Competition Relations, in* Transatlantic Governance in the Global Economy 127 (Mark A. Pollack & Gregory Shaffer eds., 2001) [hereinafter Transatlantic Governance]; Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 Stan. J. Int'l L. 207 (2003); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 Va. J. Int'l L. 1 (2002); Christopher Whytock, *A Rational Design Theory of Transgovernmentalism: The Case of E.U.-U.S. Merger Review Cooperation*, 23 B.U. Int'l L. J. 1 (2005); David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 Chi. J. Int'l L. 547 (2005).

[10] *See* Turner, *supra* note 1.

Because networked officials have become important actors in a number of areas of international cooperation, an account of the progress of international organization would be incomplete without a review of their contribution. To provide such an account, this chapter will address three central questions: (1) Under what conditions are transnational networks likely to arise?; (2) How do these networks function, and what are some examples?; (3) What positive and negative effects do they have on the international system?

With respect to the third question, this chapter will argue that, on balance, networks offer a promising new mode of transnational cooperation. By providing for freer sharing of knowledge and expertise, networks strengthen the capacity of nations to implement international norms. Because they rely primarily on persuasion to achieve cooperation, networks are also more likely than traditional international organizations to attain domestic political acceptability. Finally, because they draw upon diverse sources of information and operate in a decentralized manner, networks can also be a source of experimentation and innovation in solving global problems.

B. *The Origins of Transgovernmental Networks*

Political scientists first pointed to the rise of "transgovernmental" networks in the 1970s. Robert Keohane and Joseph Nye argued that foreign affairs were increasingly shaped by "sets of direct interactions among sub-units of different governments that are not controlled or closely guided by the policies of the cabinets or chief executives of those governments."[11] As the complexity of foreign policy increased, lower-level officials began acting more frequently without close supervision from the top. In doing so, they formed direct alliances with their counterparts from abroad, coordinating with one another to facilitate the smooth implementation of foreign policy. At times, they even used these coalitions "with like-minded agencies from other governments against elements of their own administrative structures."[12] As a result of the rise of such transgovernmental coalitions, the state could no longer be viewed as a unitary foreign policy actor.[13]

More recently, Anne-Marie Slaughter has applied the insights of these political scientists to the legal realm. In several law review articles and her book *A New World Order*,[14] she describes and analyzes the proliferation of networks of government

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[11] Robert Keohane & Joseph Nye, *Transgovernmental Relations and International Organizations*, 27 World Pol. 39, 43 (1974).

[12] *Id.* at 44.

[13] *Id.*

[14] Slaughter, *supra* note 9.

actors. Slaughter argues that our "new world order" is increasingly shaped by alliances of government actors across countries, who are working together to create and enforce international rules.[15] Such alliances are typically formed among lower-level government officials charged with implementing regulatory policy that has cross-border effects.[16] Because these officials have a certain amount of discretion in implementing policy, they can participate in transgovernmental networks without involving central authorities. Instead of relaying transnational matters through the State Department or a foreign affairs ministry, they may interact directly with their foreign or supranational counterparts.

One of the main advantages of transnational interaction among government officials is the access it provides to specialized knowledge and expertise. For this reason, networks are most likely to form in response to cross-border problems, the solution of which depends largely on technical expertise rather than on political judgments.[17] In these areas, officials derive the greatest benefits from sharing information and expertise. Coordination is easier in technical areas for another reason as well: The less politicized the issue, the more likely participants are to agree on the policies to be pursued through transgovernmental cooperation.[18]

Areas of cross-border regulation that fit the profile of technical complexity, to a greater or lesser degree, include banking, securities, telecommunications, and antitrust. While some political disagreement exists even in these areas, many disputes can be resolved through appeals to technical expertise. Unsurprisingly, informal networks have been very active in these fields.[19] By contrast, areas such as human rights, national security, and international criminal justice are much more politically contested and, as a general matter, less technical. As such, these fields are less likely to engender cooperation among lower-level government officials.[20] This does not mean that networks in these fields do not exist. Transgovernmental networks have begun to develop in the politically sensitive

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[15] *Id.*

[16] *Id.* at 17, 38–40.

[17] Whytock, *supra* note 9, at 30.

[18] *See* Francesca Bignami, *Transnational Networks vs. Democracy*, 26 Mich. J. Int'l L. 807, 845 (2005) (arguing that networks are more likely to arise where there is broad agreement on policy priorities among the participants).

[19] *E.g.*, Charles K. Whitehead, *What's Your Sign? International Norms, Signals, and Compliance*, 27 Mich. J. Int'l L. 695 (2006) (banking regulation); Raustiala, *supra* note 9, at 29–31 (securities regulation); George Bermann, *Regulatory Cooperation Between the European Commission and U.S. Administrative Agencies*, 9 Admin. L.J. Am. U. 933, 968 (1996) (telecommunications); Whytock, *supra* note 9 (antitrust); Piilola, *supra* note 9 (antitrust).

[20] *See, e.g.*, Bignami, *supra* note 18, at 867 (suggesting that "human rights … is an area in which transnational governance by networks of government prosecutors is unlikely to emerge [because] [s]tates disagree on how to define rights outside of flagrant abuses such as genocide").

area of international criminal justice,[21] as well as in certain areas of national security.[22] In these areas, however, interaction is more likely at times to revert back to high- level intergovernmental politics.[23]

Still, when an issue is too technical for high-level officials to resolve independently, and is not politicized, it is likely to be entrusted to experts down the chain of command.[24] The experts then have greater autonomy to reach out to partners across the globe. Studies of cooperation within the European Union have found that transgovernmental cooperation is more likely to occur in areas where "regulators on each side of the Atlantic enjoy considerable *de facto* or *de jure* independence from their political masters."[25] This is hardly surprising, since the key to the success of networks is their ability to provide fast and flexible responses to global problems, and this ability depends on a degree of autonomy from central governments.

Transgovernmental networks are also more likely to arise when some of the participating states stand to benefit from adopting the regulatory approach of other states.[26] Benefits may include attracting foreign investment, receiving trade concessions, or being admitted to an international organization.[27] When a country wants to be in good standing with certain foreign government agencies so as to attract international trade or investment, lower-level officials may be given greater latitude to interact with their counterparts from the donor or investor state's agencies. An example of this is the rise of networks in the antitrust area, where lower-level officials in many less-developed countries openly cooperate with their counterparts from the European Union or the United States to shape rules and policies intended to help attract investment from these more developed partners.[28]

Where government officials have already begun interacting with one another in international organizations, this cooperation may also encourage the creation of transgovernmental alliances.[29] As Hudson recognized, international organizations provide a forum for regular interaction among state and agency officials, which, in turn, increases trust and understanding.[30] In this way, they offer a starting

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[21] In international criminal law, networks between prosecutors and investigators at international criminal tribunals and their domestic counterparts are rapidly emerging. Even judges are beginning to engage in a transnational dialogue about the substance of international criminal law, although such dialogue is in its very early stages. *See* Turner, *supra* note 1.

[22] Whytock, *supra* note 9, at 30.

[23] *See id*. at 30.

[24] *Id*.

[25] Pollack & Shaffer, *supra* note 9, at 298; *see also* Whytock, *supra* note 9, at 31.

[26] Bignami, *supra* note 18, at 845.

[27] *Id*. (giving the example of foreign investment as a benefit).

[28] *See, e.g.*, Raustiala, *supra* note 9, at 40–41, 60–61; Devuyst, *supra* note 9, at 133.

[29] Whytock, *supra* note 9, at 32.

[30] Hudson, *supra* note 2, at 32–33.

point and a support structure for subsequent, less formal exchanges in transgovernmental networks. In Hudson's time, for example, the International Labor Organization provided a forum for direct contacts between representatives of labor and business. He found this structure very conducive to effective cooperation on labor issues. Each state participated in the ILO through a delegation including representatives of government, labor and business, and this structure "broke down to some extent the monopolistic control of the conduct of international relations by Foreign Offices through diplomatic channels."[31]

The trust and cooperation that builds up in international organizations often allows lower-level governmental officials to pursue alliances outside these organizations as well. A number of transgovernmental networks have arisen as a result of interactions or policies set in international organizations. Such networks may be directly embedded within an international organization such as the European Union, and some of their participants may be supranational officials. For example, members of the European Commission have been involved in shaping the agenda of trans-European networks of prosecutors and law enforcement officials formed to combat the rise of transnational crime in Europe.[32] Alternatively, the relationship between the organization and the networks may be much looser, as is the case with the International Criminal Court and informal alliances between international prosecutors, defense attorneys and judges.[33] In this case, the organization may provide impetus and assistance to the networks, but does not actively direct their activities.

Non-governmental organizations can also serve as a catalyst for networks. They gather information, raise awareness of global problems, lobby governments and international organizations to respond to these problems, and even become directly involved in managing the response.[34] In countries emerging from conflict, for example, NGOs are involved side-by-side with the United Nations and the World Bank in assisting local authorities with the transition to peace and stability. They do so by providing resources, helping draft legislation, and training domestic officials to perform demanding legal and administrative functions.[35]

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[31] *Id*. at 52.

[32] Jörg Monar, *Decision-Making in the Area of Freedom, Security & Justice, in* Accountability and Legitimacy in the European Union 63 (Anthony Arnull & Daniel Wincott eds., 2002).

[33] Turner, *supra* note 10.

[34] *See* Margaret E. Keck & Kathryn Sikkink, Activists Beyond Borders (1998) (offering an empirical study of the rise of transnational networks of non-state actors in the fields of human rights and environmental politics); Thomas Risse-Kappen, *Introduction, in* Bringing Transnational Relations Back In 11–13 (Thomas Risse-Kappen ed., 1995) (providing examples of NGO influence on state responses to transnational problems in the areas of human rights, environmental politics, international security, and economic policy). *See* Schurtman in this volume.

[35] *See, e.g.*, International Center for Transitional Justice, About the ICTJ: Mission and History, *at* http://www.ictj.org/en/about/mission/; Phone Interview with Marieke Wierda, Senior Associate,

NGOs open up paths of cooperation not only between themselves and government officials, but also among government officials from different states. By keeping international problems on the agenda of developed countries and by establishing contact points in the affected countries, they provide the building blocks for more robust transgovernmental cooperation. In a number of areas, including human rights, environmental law, and public health, NGOs have spearheaded initiatives that have later been taken over by transgovernmental networks.[36]

C. *What Transgovernmental Networks Do*

Informal networks may exercise a number of functions that would more traditionally be performed by international organizations or through intergovernmental cooperation under treaties and executive agreements. Such networks may, for example, work to harmonize international rules and standards or coordinate strategies to enforce already existing international rules. Good examples of the effort to create common standards are the Basel Committee on Banking Supervision and the International Organization of Securities Commissioners (IOSCO), which have issued codes of "best practices" for regulating banking and securities and for combating money laundering.[37]

In addition to creating specific guidelines for action, transgovernmental networks may also provide a forum for longer-term dialogue on issues of global concern. Intelligence agencies exchange ideas on the fight against terrorism;[38] legislators

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International Center for Transitional Justice, New York, NY, Feb. 15, 2006. *See* Schurtman, in this volume.

[36] A recent example of NGO influence on an issue that was later taken up by transgovernmental networks is the creation of International Criminal Court. Non-governmental organizations were instrumental in lobbying governments to negotiate and then sign and ratify the Rome Statute of the International Criminal Court. *E.g.*, Christopher Keith Hall, *The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 91 Am. J. Int'l L. 177, 183 (1997). *See* Sadat in this volume. Now a coalition of "like-minded states" and their agencies is at the forefront of efforts to encourage ratification and enforcement of the Rome Statute. *E.g.*, Department on Foreign Affairs and International Trade, Canada's ICC and Accountability Campaign, *at* http://www.dfait-maeci.gc.ca/foreign_policy/icc/accountability-en.asp; European Commission, European Initiative for Democracy and Human Rights: International Criminal Court, *at* http://ec.europa.eu/comm/europeaid/projects/eidhr/themes-icc_en.htm. For other examples of transnational coalitions initiated by NGOs, see Risse-Kappen, *supra* note 34, at 11–13; Thomas Princen, *Ivory, Conservation, and Environmental Transnational Coalitions, in* Bringing Transnational Relations Back In, *supra* note 34, at 227–56.

[37] Zaring, *supra* note 9, at 555–69.

[38] *See, e.g.*, Peter Andreas & Ethan Nadelmann, Policing the Globe (2006).

from different countries discuss strategies to address common environmental and health threats;[39] judges debate the best interpretation of trade rules or human rights through legal opinions and at international conferences.[40] In this way, networks help develop international rules through a decentralized, deliberative process.

Networks promote not only the development, but also the enforcement of international law. They help strengthen domestic compliance in two principal ways. As mentioned earlier, they serve as a conduit for the exchange of valuable information, as their participants share successes and failures in enforcing the law, create "best practices" guidelines, and help develop alternative solutions to common problems. Furthermore, networks provide technical assistance where needed to help individual states realize shared objectives. Environmental law has been an area in which networks have been successful in promoting domestic compliance with international rules.[41] For example, working groups, joint training sessions, and dispute resolution mechanisms created under NAFTA allowed regulators from the United States, Mexico and Canada to pool efforts in enforcing already existing national and international environmental rules.[42] Other networks, sponsored by the UN, have relied heavily on technical assistance and regular meetings and exchanges of information to promote domestic compliance with environmental law.[43]

Whether they work to harmonize rules or to promote compliance, networks are successful in large part because they establish ongoing relationships among individual government agencies or officials. The repeated interactions build trust

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[39] For example, Parliamentarians for Global Action, a network of over 1300 legislators from 114 parliaments, has launched a program on sustainable development and population, which aims to address global environmental and reproductive health problems. Parliamentarians for Global Action, Sustainable Development and Population Program, *at* http://www.pgaction.org/prog_sust.asp.

[40] *See* Waters, in this volume.

[41] Raustiala, *supra* note 9, at 48. *See* Bratspies in this volume.

[42] Slaughter, *supra* note 9, at 53, 57–58, 189–90; Raustiala, *supra* note 9, at 48–49; Daniel Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 Yale L.J. 1490, 1558, 1560 (2006).

[43] *See* Slaughter, *supra* note 9, at 66. The transnational exchanges sponsored by the UN have not been as successful as the North American Commission for Environmental Commission in promoting domestic compliance with environmental laws. Esty, *supra* note 42, at 1557–58; *see also* Jodie Hierlmeier, *UNEP: Retrospect and Prospect—Options for Reforming the Global Environmental Governance Regime*, 14 Geo. Int'l Envtl. L. Rev. 767 (2002). More recently, the UN Environment Programme has therefore tried a new approach—sponsoring public-private partnerships, which would discuss and help put in practice more successful compliance strategies at the national and subnational levels. S. Jacob Scherr & R. Juge Gregg, *Johannesburg and Beyond: The 2002 World Summit on Sustainable Development and the Rise of Partnerships*, 18 Geo. Int'l Envtl. L. Rev. 425 (2006).

and produce stable patterns of cooperation among the officials.[44] "Aid, pressure, socialization, and education" influence individuals within the network, making them more likely to cooperate with their peers from other states.[45]

At the same time, transgovernmental networks are looser, more flexible formations than traditional international organizations.[46] They do not set rules through the typical process of formal treaty negotiations,[47] but instead rely primarily on soft-law mechanisms – standards, guidelines, and memoranda of understanding.[48] Their organization consists largely of peer-to-peer ties among people who work for their respective national governments, but are not part of a separate international bureaucracy.[49] Because networks typically lack an overarching bureaucratic structure, they often adapt and respond more quickly to changes in the environment. Their flexibility also allows them to provide context-sensitive solutions to global problems.

To convey their practical significance, it is helpful to review the landscape of existing transgovernmental networks. As the next Sections discuss in more detail, networks may be vertical or horizontal; they may involve regulators, civil servants, prosecutors, legislators, or judges. They may be rather flexible and informal, serving mainly as a vehicle for coordination and information exchange, or more institutionalized and exercising a broader set of functions. Finally, networks may be responding to either transnational or international law problems.

I. *Vertical versus Horizontal Networks*

Anne-Marie Slaughter distinguishes between two types of networks based on their structure – horizontal and vertical.[50] Horizontal networks are alliances among peers in government agencies of different countries. Examples include the previously mentioned Basel Committee on Banking Supervision, in which representatives of central banks cooperate in exchanging information and setting standards on banking supervision;[51] the International Organization of Securities Commissions, in which members of securities commissions establish standards

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[44] Slaughter, *supra* note 9, at 3.

[45] *Id*. at 35.

[46] *Id*. at 11.

[47] *See* Oellers-Frahm, in this volume.

[48] Raustiala, *supra* note 9, at 22; Whitehead, *supra* note 19, at 716–17. Interestingly, some regulatory networks have gradually adopted more formal administrative procedures, such as notice and comment and the publication of regular reports. Michael S. Barr & Geoffrey Miller, *Global Administrative Law: The View from Basel*, 17 Eur. J. Int'l L. 15 (2006).

[49] *See* Raustiala, *supra* note 9, at 22.

[50] Slaughter, *supra* note 9, at 19–22.

[51] About the Basel Committee, *at* http://www.bis.org/bcbs/index.htm.

for effective surveillance of international securities transactions and provide mutual assistance in enforcing these standards;[52] and the International Competition Network (ICN), in which officials from competition agencies work together to promote convergence in antitrust standards.[53]

Horizontal networks have little coercive power and depend on soft-law mechanisms and informal sanctions to achieve their goals. For example, the International Competition Network expressly disavows rulemaking authority.[54] Instead, it describes itself as a "project-oriented" initiative, "flexibly organized around working groups, the members of which work together largely by Internet, telephone, fax machine and videoconference."[55] Members discuss projects during annual meetings and focus on recommendations and best practices in applying and enforcing competition law, while leaving it to "the individual competition authorities to decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements."[56] Although the ICN is in its early days of operation, it has already been credited with helping to create a consensus about competition norms and with providing technical assistance for the implementation of these norms.[57]

Vertical networks, by contrast, are embedded in or at least connected to a supranational or international organization. Such networks help the organization "pierce the shell of state sovereignty by making individual government institutions—courts, regulatory agencies, or even legislators—responsible for the implementation of rules created by a supranational institution."[58] To that extent, vertical networks have greater coercive power than horizontal alliances.

An example of a vertical alliance is the judicial network that developed at the initiative of the European Court of Justice (ECJ) to enforce European Union law throughout the member states. Article 234 of the Treaty Establishing the European Community provides for "preliminary ruling proceedings" through

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[52] International Organization of Securities Commissions, *at* http://www.iosco.org.

[53] International Competition Network, *at* http://www.internationalcompetitionnetwork.org; *see also* Whytock, *supra* note 9, at 40.

[54] International Competition Network, *supra* note 53.

[55] *Id.*

[56] *Id.*

[57] *See* D. Daniel Sokol, Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age 48 (unpublished manuscript on file with author); *see also* Merit E. Janow, *Observations on Two Multilateral Venues: The International Competition Network (ICN) and the WTO, in* Fordham Corporate Law Institute: International Antitrust Law and Policy 57 (Barry Hawk ed., 2003); William E. Kovacic, *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, 97 Am. Soc'y Int'l L. Proc. 309, 311 (2003).

[58] Slaughter, *supra* note 9, at 132.

which national courts can, or in some cases must, refer a case to the ECJ when they have doubts as to the interpretation of EU law.[59] The procedure might have been used only sparingly had not the ECJ deliberately set out to engage national courts directly and build a network that would make broad implementation of this provision more likely. To that end, European Court judges have actively cultivated relationships with their national counterparts to encourage them to refer cases to the ECJ, which in turn has enhanced the Court's legitimacy and power base.[60] After a case is referred to the ECJ, the Court issues a preliminary ruling on questions of EU law, leaving details of implementation to the national courts.[61] While the ECJ has been careful to establish its authority as the arbiter of EU law, it has also "adopted a strategy of manifest deference to those national courts acting within their proper sphere of jurisdiction."[62] The effect of this ongoing interaction between national and European judges has been not only to strengthen the hand of the ECJ itself, but also to enlist national courts in enforcing EU law consistently throughout the member states.[63]

While the participants in many of the networks discussed in this chapter are regulators—in antitrust, securities and banking regulation, or environmental protection—the example of the European courts' network shows that judges, too, can collaborate informally across borders.[64] Transgovernmental networks have also arisen among prosecutors of transnational and international crimes[65] and among members of legislative bodies.[66] Still, the most common participants in networks are mid-level officials in regulatory agencies—probably because these officials are most likely to encounter problems of technical complexity that spill

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[59] Lower courts may, and courts of last resort must, refer cases to the ECJ whenever they are in doubt as to the interpretation of an EU law. But even courts of last resort may avoid such references by applying the doctrine of *acte clair* – i.e., declaring that the interpretation of the law is so clear that no need for a preliminary ruling from the ECJ arises. *See* CILFIT v. Ministry of Health, Case 283/81, 1982 E.C.R. 3415, paras. 16–20.

[60] Slaughter, *supra* note 9, at 132.

[61] *See, e.g.*, Da Costa en Schaake v. Nederlandse Belasting – Administratie, Cases 28-30/62, 1963 E.C.R. 61.

[62] Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273, 309 (1997).

[63] *See id.* at 310; Karen Alter, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration, in* The European Court and National Courts—Doctrine and Jurisprudence 249–50 (Anne-Marie Slaughter et al. eds., 1998).

[64] Examples of even less formal judicial interaction are discussed in Turner, *supra* note 1; Melissa A. Waters, *Mediating Norms and Identity: Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 Geo. L. J. 487 (2005); and Slaughter, *supra* note 9, at 75–79; 96–99. *See* Waters, and Romano, in this volume.

[65] Turner, *supra* note 1.

[66] Slaughter, *supra* note 9, at 104–30.

across borders, and they have the autonomy to reach out to foreign counterparts and resolve the problem cooperatively.

II. *Coordination and Support Networks Versus Joint Action Networks*

Networks can be categorized based not only on their structure and participants, but also on their level of institutionalization. Some networks lack a centralized institutional structure and instead coordinate their activities through regular communications, conferences and meetings. These might be called "coordination and support networks."[67] They focus on sharing information, developing guidelines for action, and providing technical assistance to members who need it.

Networks in the antitrust field fit this model well. For example, the International Competition Network (ICN) coordinates policy primarily through exchanges by "Internet, telephone, fax machine and videoconference," rather than through a formal institutional structure.[68] This is also true of the working group formed between European Union and U.S. competition authorities to cooperate in the process of merger review. While the working group lacks a central institutional structure, it has issued guidelines to help coordinate its activities.[69] Lawyers and economists who are part of the group collaborate in the collection and evaluation of evidence during merger review and later communicate in the crafting of remedies and settlements.[70] Most of this cooperation occurs, as in the ICN, through informal meetings and electronic or phone communications.

Whereas coordination networks involve more informal, *ad hoc* contacts among their participants, other networks engage participants daily in face-to-face joint activities for a sustained period of time. These might be called "joint action networks."[71] Joint action networks are rarer than coordination and support networks, as they require greater institutionalization and are generally more intrusive upon state sovereignty. But they can be useful in situations where states suffer a serious lack of legal or administrative capacity. They rely on the expertise of network participants to help rebuild a state's administrative capacity, and they do so in collaboration with local authorities in the territory of the affected state.

An example of a joint action network can be found in the UN administration of post-conflict states, such as East Timor. There, UN staff members from a number

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[67] Turner, *supra* note 1.

[68] International Competition Network, *supra* note 53.

[69] Whytock, *supra* note 9, at 41; International Competition Network, Guiding Principles and Recommended Practices for Merger Notification and Review Procedures, *at* http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/mergers/notification-and-procedures.

[70] Whytock, *supra* note 9, at 41.

[71] Turner, *supra* note 1.

of countries were integrated within East Timorese agencies and legal institutions to help the local personnel develop critical administrative skills.[72] Because the UN staff have substantial autonomy in performing their tasks, and because they often work alongside staff assigned by national governments, their interaction with the local authorities is similar to that within transgovernmental networks.[73]

For example, during an earlier phase of the UN administration of East Timor, international judges and prosecutors worked alongside their East Timorese counterparts in so-called "hybrid courts" to conduct trials of serious international and domestic crimes.[74] In these and other hybrid courts sponsored by the UN, international involvement has contributed expertise and resources, and it has strengthened perceptions of the courts' impartiality.[75] At the same time, the participation of local prosecutors and judges has given the courts greater political acceptability, ensured greater respect for local customs, and enhanced understanding of local conditions and concerns.[76] This interaction has also helped build judicial and administrative capacities in post-conflict states.[77]

Similar capacity-building, joint action networks can be created in non-judicial institutions as well. For example, they can develop when a national government temporarily assigns (seconds) its personnel to work within a foreign government. An example of such a network can be found in Sierra Leone, where, as part of international assistance for post-conflict reconstruction, the British government appointed British officers to train and advise the local military and police.[78]

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[72] *See* United Nations Office in Timor-Leste, *at* http://www.unotil.org.

[73] Based on author's conversations with former UNOTIL staff member Martha Araujo.

[74] Turner, *supra* note 1. *See* McGuinness in this volume.

[75] Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 Stan. J. Int'l L. 1, 30–44 (2005) (discussing hybrid courts in East Timor, Kosovo, and Sierra Leone); Laura Dickinson, *The Promise of Hybrid Courts*, 97 Am. J. Int'l L. 295 (2003) (discussing hybrid courts in East Timor, Kosovo, and Sierra Leone).

[76] Turner, *supra* note 75, at 30–44.

[77] While the record of the Kosovo and East Timor hybrid courts in achieving these goals has been mixed, in large part as a result of a lack of resources and insufficient political commitment, later efforts to create hybrid courts in Sierra Leone and Bosnia and Herzegovina have been more successful. *See* Michael E. Hartmann, International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping, U.S. Institute of Peace Spec. Rep. No. 112 (2003); International Center for Transitional Justice, The Serious Crimes Process in Timor-Leste: In Retrospect (2006); Human Rights Watch, Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina (2006); War Crimes Studies Center, University of California-Berkeley, From Mandate to Legacy: The Special Court for Sierra Leone as a Model for "Hybrid Justice" (2005). As a result, new hybrid courts are now being initiated in Burundi, Cambodia, Guatemala, and Lebanon.

[78] As Human Rights Watch has reported, "U.K. military personnel continued to play a major role in advising and directing military operations, including the staffing of key positions within the

Many networks fall somewhere on a continuum between "coordination and support" and "joint action." Interpol, which serves as a global conduit for the exchange of information among national police forces dealing with transnational and international crimes, shares features of both. It helps track down and arrest transnational crimes suspects, but recently it has also begun coordinating the activities of national units specializing in the investigation of transnational and international crimes.[79] Interpol has hosted several working group meetings to identify the needs of these national units, and has committed to playing a larger role in assisting them through the "increased use of Interpol databases, the preparation of a best practice manual, and identification of points of contact in member countries."[80] While Interpol focuses on coordination and exchange of information, it also has an institutionalized framework to support its actions. It relies on National Central Bureaus to serve as contact points for the network in each member state, but also on a centralized administration, including a General Secretariat with about 450 staff members, to coordinate the organization's work.[81]

III. *Problem-Oriented Networks*

Finally, networks can also be classified based on the legal problem they were created to address. Most networks respond to problems of transnational law. These are areas where states are still the principal actors charged with developing and implementing the rules—for instance, antitrust, securities and banking regulation, and anti-terrorism and financial crimes law enforcement. In a global economy, differences in these laws and regulations among states result in greater transaction costs for businesses, and violations of the law in one country produce effects in another. The spillover of these problems across geographic boundaries prompts national authorities to cooperate with each other, even in the absence of an applicable international treaty or an overarching international organization.

Sierra Leone defense headquarters. In coordination with the Commonwealth Secretariat, the U.K. also provided officers and funds for training and administration of the Sierra Leone Police, including the secondment of a British officer as inspector general." Human Rights Watch, World Report 2003: Africa, *at* http://www.hrw.org/wr2k3/africa10.html; *see also* Phone Interview with James O'Connell, Motions Attorney, U.S. Court of Appeals for the Ninth Circuit; Lecturer of Law at Boalt Hall; 2002-03 Open Society Institute/Yale Law School Fellow in Human Rights & Supervisor of Human Rights Clinic, Fourah Bay College, University of Sierra Leone, Feb. 17, 2006.

[79] Interpol, Genocide, War Crimes, and Crimes Against Humanity, *at* http://www.interpol.int/Public/ CrimesAgainstHumanity/default.asp.

[80] *Id*.

[81] Interpol, About Interpol, *at* http://www.interpol.int/public/icpo/default.asp.

A few networks have also arisen to address international (as opposed to transnational) law violations, where treaties already prescribe basic rules, and international institutions have been charged with implementing those rules. Examples are networks emerging in the field of international criminal law. Investigators and prosecutors from the several international and hybrid war crimes tribunals have been sharing information, ideas, and expertise in prosecuting international crimes, and they have increasingly begun to share this knowledge with national authorities pursuing similar investigations and prosecutions.[82]

In areas like international criminal law, global cross-border effects are relatively less significant. This is why transgovernmental alliances are not as likely to develop in response to international crimes such as war crimes and genocide, as they are in reaction to cross-border crimes such as terrorism or money laundering. Still, cross-border effects are not the only reason why networks might form. The moral gravity of international crimes, combined with the presence in the field of NGOs and international organizations, has spurred the development of transgovernmental networks even in international criminal law.[83] In this situation, however, networks generally play a complementary role to international and non-governmental organizations, by filling gaps in enforcement, sharing information about common challenges and effective responses, and providing technical assistance to less-developed partners.[84]

D. *Are Networks a Sign of Progress in International Organization?*

Most commentators have focused on describing, rather than evaluating, the role of networks in the international public order. An exception is Anne-Marie Slaughter, who has argued that networks have the potential to solve what she calls the "globalization paradox," namely, "needing more government and fearing it."[85] In her view, networks present a method of governing that is more effective and potentially more just than either a purely "horizontal," state-centric approach to global issues, or a "vertical," supranational method of governance.[86]

As Slaughter explains, networks are relatively fast and flexible in addressing global problems. By pooling the information and expertise of their members, they can also achieve better results than governments can when acting unilaterally.[87]

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[82] Turner, *supra* note 1.

[83] For further explanation of how such networks are developing, see *id*.

[84] *Id*.

[85] Slaughter, *supra* note 9, at 8.

[86] *Id*. at 6–7.

[87] *See id*. at 11, 24.

In addition, networks do not involve a centralized coercive authority that might be perceived as a threat to state sovereignty. Their primary political authority remains at the national level, and they are more sensitive to the needs of domestic constituencies.[88] Transgovernmental networks also enrich international law doctrine and practice by incorporating the perspectives and expertise of agency officials and other policy experts from around the world.[89] Finally, they strengthen enforcement of the law by gathering information about best practices, disseminating it to all network participants, and then providing technical assistance to implement these approaches.[90]

But there are challenges to the work of transgovernmental networks, which may hinder their effectiveness and legitimacy. This Section reviews three of these challenges and offers some preliminary responses.

First, with respect to networks that work on international law issues, a tension may arise between accommodating domestic preferences and promoting consistency in international law. On one hand, because networks operate informally, relying on persuasion rather than coercion, they tend to be more accommodating of diverse local views than are international organizations.[91] The flip side of this flexibility is that it creates a risk of inconsistency in applying international law. The more malleable the rules that networks establish, the more likely it is that interpretation and enforcement of international law will differ from country to country.

A measure of variation is an important element of the acceptability of international law to domestic constituencies. If national authorities have all the relevant information about alternative approaches to applying international law, yet they choose not to follow these approaches, this may well be a valid choice, driven by "the uniqueness of … national traditions or the intensity of … political preferences."[92] The openness of networks to such diversity might also spur innovation in the development of international law. Decentralized decision-making can help solve problems that actors would be unlikely to address successfully on their own, without exchanging ideas and information with one another.[93]

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[88] *See id*. at 6–7.

[89] *Cf*. Raustiala, *supra* note 9, at 24 (noting that networks foster experimentation and innovation).

[90] *Id*. at 9, 90.

[91] *E.g*., Whitehead, *supra* note 19, at 717–18; 737–39, 740–41.

[92] Slaughter, *supra* note 9, at 182.

[93] *See* Charles F. Sabel & Jonathan Zeitlin, Learning from Difference: The New Architecture of Experimentalist Governance in the European Union, Paper prepared for presentation at the ARENA seminar, Centre for European Studies, University of Oslo, June 13, 2006, at 7 (discussing how local units of regulators within the European Union learn from interacting with one another in a "deliberative polyarchy").

But at some point, divergence from international rules in order to accommodate local preferences may defeat the object and purpose of an international rule. Over time, it may undermine the predictability and legitimacy of international law, and of networks' efforts to enforce it. It is therefore important to think about legal structures that can adequately distinguish between diversity that is salutary and divergence that impermissibly undermines international law. Examples are available from regional legal systems that have faced a similar tension. European supranational courts have developed the doctrines of "subsidiarity" and "margin of appreciation" in an effort to balance respect for local preferences against a need for common regulation at the European level.

Under the doctrine of "margin of appreciation," the European Court of Human Rights (ECtHR) gives state parties to the European Convention on Human Rights some leeway in interpreting and applying the Convention.[94] In deciding how wide a margin of appreciation to grant a government whose policy has been challenged under the Convention, the ECtHR looks to the degree of consensus among the laws of signatory states with respect to that policy. The less consensus there is, the more likely the court is to accept local variation in implementing the Convention.[95] For example, in a recent case concerning the interpretation of the right to life under the European Convention, the court held that "in the absence of any European consensus on the scientific and legal definition of the beginning of life, the issue of when the right to life begins comes within the margin of appreciation" of each signatory state.[96]

The doctrine of subsidiarity, developed in the context of the European Union, demands that decisions be taken at a supranational level "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by [national authorities]."[97] It urges members of the EU to take action as close to the citizen as possible and to act at the supranational level only when this would add some value over and above what would be accomplished at the member state level.[98]

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[94] *See* Lawless v. Ireland, 1 Eur. Ct. H.R. (ser. B) at 408 (1960–1961) (noting that "a government's discharge of [its] responsibilities is essentially a delicate problem of appreciating complex factors and of balancing conflicting considerations of the public interest").

[95] Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273, 316–17 (1997).

[96] Evans v. The United Kingdom, App. No. 6339/05, 2006 Eur. Ct. H.R.

[97] Treaty Establishing The European Community, art. 5, Dec. 24, 2002, 2002 O.J. (C 325) 33; George Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 Colum. L. Rev. 331, 331 (1994).

[98] In particular, the Protocol on the Application of the Principles of Subsidiarity and Proportionality, which is now annexed to the Treaty Establishing the European Community, establishes the following guidelines to determine whether Community action is justified: "[1] the issue under

In practice, subsidiarity has remained largely a political, rather than a legal, safeguard. While the European Court of Justice has refrained from striking down EU legislation as inconsistent with the subsidiarity principle, the European Commission has taken a more proactive approach. It has reviewed proposed legislation for its conformity with subsidiarity, consulted with national and subnational constituencies on subsidiarity questions, and produced an annual report on the application of subsidiarity.[99]

Network participants ought to examine their own actions with reference to principles such as subsidiarity and margin of appreciation. If they do not, it is likely that other actors, including domestic legislatures and NGOs, will subject them to such scrutiny.[100] In deciding whether action is necessary at the transnational level, network members should first examine whether their work adds any value to action at the state level. This is a question that has already arisen for some networks. An example is Europol, a European law enforcement network that supports national efforts against cross-border crime by sharing intelligence information and analysis among its members.[101] In a recent hearing before the U.K. House of Lords, Europol came under scrutiny as to whether it added any real value to national law enforcement efforts, or whether instead it burdened them by requiring domestic police forces to share information with foreign counterparts.[102]

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consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States; [2] actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests; [3] action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States." *Available at* http://europa.eu.int/eur-lex/en/treaties/selected/livre345.html.

[99] Commission of the European Communities, Better Lawmaking 2005, Report Pursuant to Article 9 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality, COM(2006) 289, *available at* http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0289en01.pdf. Despite following these procedures to ensure conformity with subsidiarity, the Commission has been criticized for viewing subsidiarity "as a nuisance or even as an obstacle" to its ability to carry out legislative functions. Florian Sander, *Subsidiarity Infringements Before the European Court of Justice: Futile Interference with Politics or a Substantial Step Towards EU Federalism*?, 12 Colum. J. Eur. L. 517, 543 (2006).

[100] It is unlikely that an international court will have jurisdiction over the actions of networks, since they are not generally created by treaty and are not considered formal subjects of international law. Such oversight may in any event only formalize the actions of networks and hinder their effectiveness.

[101] Europol, Europol at a Glance: Factsheet, *at* http://www.europol.eu.int.

[102] *See* Examination of Assistant Commissioner David Veness, Metropolitan Police, Oct. 27, 2004, *in* House of Lords, European Union Committee, After Madrid: The EU's Response to Terrorism, 5th Report of Session 2004–05 (Mar. 8, 2005) at 76; Examination of Mr. Makinson, *in id.*, at 185.

This is the kind of analysis that networks themselves ought to perform before taking action that might sometimes be better handled by national authorities.

Networks may also need to rely on a "margin of appreciation" analysis to resolve conflicts among some of their members.[103] Imagine, for example, that a network participant is implementing a standard set by the network in a way that diverges from the understanding of the majority of the network's members. In that case, these members, acting jointly, may need to decide if the divergence fundamentally undermines the goals of the network or is a deviation based on a legitimate difference in values and needs. To do so, they can apply the "margin of appreciation" standard and inquire whether the diverging member's interpretation is at odds with a well-formed consensus among the rest of the network members. If so, then the network can attempt to bring the deviating participant's activities into line with that consensus. Where persuasion does not help, the network can apply a range of soft-law sanctions, including shaming, suspending technical assistance, and in the end, even excluding the transgressing member from the network.

The second challenge for networks is to maintain accountability.[104] On the one hand, a key advantage of networks over traditional international organizations is their accountability to domestic constituencies. Even as network participants attend international conferences, exchange information or otherwise interact with their partners across borders, they remain national representatives. They negotiate for international standards that would not interfere unduly with their country's national interests, and they may refuse to enforce a network decision if it conflicts with important domestic policy priorities. On the other hand, networks are effective precisely because, through repeated interaction, dialogue, and socialization into the network, participants manage sometimes to overcome parochial interests and adopt a position that serves the common good. But a decision that promotes global interests may not always reflect the political preferences of a domestic constituency. To the extent that a network participant acts for the common good and against local interests, the democratic accountability of networks may suffer.[105] In the process of socialization, networks may become little more than "a global bourgeoisie with a set of similar elite-class views."[106]

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[103] *Cf.* Yuval Shany, *Toward a General Margin of Appreciation in International Law?*, 16 Eur. J. Int'l L. 907 (2005) (arguing that the doctrine of margin of appreciation can and ought to be used more broadly in international law).

[104] This charge has been leveled especially at regulatory networks, where the perception has been that regulators operate too independently of central national authorities and do not adequately take into account domestic perspectives and preferences. Slaughter, *supra* note 9, at 221–24.

[105] Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 Harv. L. Rev. 1255, 1295–96 (2005).

[106] *Id.*

Recent questions about whether U.S. federal judges should rely on foreign law reveals how such socialization may be seen to conflict with democratic accountability. When Justice Kennedy cited to foreign and international law in interpreting the U.S. Constitution in *Lawrence v. Texas*[107] and *Roper v. Simmons*,[108] he was accused by Justice Scalia of "impos[ing] foreign moods, fads, or fashions on Americans."[109] Yet to consider such other perspectives is exactly what one would expect from a judge who has exchanged ideas with counterparts from abroad as part of an informal network. Commentators have observed that the increasing interactions between U.S. Supreme Court Justices and their foreign peers in face-to-face meetings, conferences and rule of law programs likely influenced the opinions in *Roper* and *Lawrence*.[110]

Some have welcomed these interactions, on the grounds that they "broaden the perspectives" of the judges and "socialize their members as participants in a common global judicial enterprise."[111] But others, like Justice Scalia, have been much more skeptical. As Kenneth Anderson has argued, the issues raised in these constitutional decisions are often tied to fundamental cultural, political, and legal values of a national community, and the difference in views among judges of different nations cannot be resolved simply through repeated dialogue.[112] Anderson and others have argued that when American judges adopt the views of their foreign counterparts, their decisions lack democratic legitimacy.[113] The strength of this criticism can be questioned, however, on the ground that courts are by nature counter-majoritarian institutions that are not supposed to be governed by the preferences of the public.[114]

With the exception of constitutional decisions that may be influenced by a transnational judicial dialogue, the actions of network participants—whether these participants are courts interpreting statutes or regulators promulgating new standards—can be overseen by domestic legislatures. An important way to minimize the democratic deficit of networks would therefore be to ensure that such oversight could occur regularly.

This would require, first of all, transparency of the decision-making of networks. If an agreement on a change of standards occurred at the transnational level,

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[107] 539 U.S. 558 (2003) (striking down as unconstitutional a Texas statute criminalizing sodomy).

[108] 543 U.S. 551 (2005) (holding that state laws permitting the execution of juvenile offenders are unconstitutional).

[109] 539 U.S. at 598 (Scalia, J., dissenting).

[110] Waters, *supra* note 64, at 496 & n.40.

[111] Slaughter, *supra* note 9, at 99.

[112] Anderson, *supra* note 105, at 1286–87.

[113] *Id*. at 1287; Roger P. Alford, *Misusing International Sources To Interpret the Constitution*, 98 Am. J. Int'l L. 57, 58–61 (2004).

[114] *See, e.g*., Sarah Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1, 102 (2006).

away from the gaze of the local media and public, representative domestic institutions may not even learn about it. By contrast, when the decisions are made in a more transparent fashion, domestic representative branches can step in and reject those network policies and rules that significantly interfere with domestic political preferences.[115] Such scrutiny has already occurred in some contexts. Congress has already taken steps to monitor the work of the Basel Committee on Banking Supervision.[116] It has received regular testimony on the progress of the Basel Accord revisions and has called for banking agencies to report on all proposed recommendations of the Basel Committee before agreeing to them.[117] Similarly, the European Parliament and national legislatures have begun to review the actions of criminal justice networks such as Europol and Eurojust.[118] This legislative oversight leaves room for networks to enforce common rules and policies, but only up to a certain point—until their activities conflict with local values to such a degree that the legislative branch is prompted to respond. Such oversight is a crucial tool for increasing the democratic legitimacy of networks.

Another way in which networks can be held accountable is by other networks. For example, a global network of legislators dealing with securities laws may monitor the networks of regulators active in the same area.[119] In international criminal law, alliances of human rights NGOs and international criminal defense attorneys can oversee the work of networks of international prosecutors. International defense attorneys' associations have already begun doing so by filing *amicus* briefs in domestic courts on international criminal law questions, developing their own model codes of international criminal law and procedure, and getting involved in the work of other emerging networks in international criminal law.[120]

In the end, despite a degree of democratic deficit, networks are arguably more accountable in their operations than traditional international organizations. If UN, ICC, or World Bank officials make a decision that conflicts with domestic preferences, there is little that domestic authorities can do to override it, short of

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[115] *But see* Bignami, *supra* note 18, at 811 (observing that "one nation can control transgovernmental networks only if that nation is powerful enough to reject routinely the decisions that result from the network.").

[116] Zaring, *supra* note 9, at 598-99.

[117] *Id*.

[118] Willly Bruggeman, *Policing and Accountability in a Dynamic European Context*, 4 Policing & Soc. 259, 267–72 (2002); House of Lords, *supra* note 102.

[119] Anne-Marie Slaughter & David Zaring, *Networking Goes International: An Update*, 2 Ann. Rev. L. & Soc. Sci. 211, 223 (2006).

[120] International Criminal Defence Attorneys Association, Legal News & Current Issues, *at* http://www.aiad-icdaa.org/documentation/news.php.

leaving the organization or, in some cases, withholding funding. By contrast, networks can be checked more effectively by domestic legislatures and by other transnational networks. This is so because they operate through more informal rules and depend more heavily on domestic authority to enforce their decisions than do international organizations.

A third challenge to the work of networks is that their actions may come to reflect the priorities of their most powerful participants. Instead of encouraging the cross-fertilization of ideas, networks may produce a one-way export of norms from more powerful countries.[121] Commentators have observed that this has already happened in the areas of antitrust and securities regulation,[122] and to some degree, in judicial exchanges on human rights questions.[123]

As a preliminary response, it is worth noting that a one-way export of legal rules does not necessarily mean that these rules are imposed on unwilling recipient states. Countries in transition may wish to import rules from more developed countries to show their commitment to a particular legal regime, a break with the past, and a new credibility as an international partner.[124]

And while it is possible that networks will replicate disparities in the international system, it is not clear that the problem is any greater in networks than it is in traditional international institutions[125] or in a system of bilateral agreements.[126] In fact, traditional relations at the inter-governmental level may lead to greater power asymmetries because powerful nations can easily tie concessions in one area to rewards in another. Networks, by contrast, are typically focused on a single area and cannot readily offer rewards in other areas to pressure participants to agree to a network policy.

Again in this context, transparency is crucial. It enhances the ability of legislatures, NGOs, and networks themselves to monitor the decisions of other networked actors. The increased oversight in turn can compel networks to act with greater integrity and fairness. As part of this commitment to transparency, networks can also introduce a level of administrative "due process" in their decision-making. For example, networks can institute "notice and comment" procedures before agreeing on common standards. Both the Basel Committee and IOSCO have

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[121] Even if all states, rich and poor, have a voice in the collective discussions of networks, having a voice is not the same as being heard. Slaughter, *supra* note 9, at 229.

[122] Raustiala, *supra* note 9, at 32, 68–70.

[123] *See* Waters, *supra* note 64, at 505–29.

[124] *See, e.g.*, Oona Hathaway, *Do Human Rights Treaties Make a Difference*? 111 Yale L.J. 1935, 2022 (2002).

[125] *See* Slaughter, *supra* note 9, at 229.

[126] *E.g.*, Juan Forero, *Bush's Aid Cuts on Court Issue Roils Latin America*, N.Y. Times, Aug. 19, 2005, at A1.

already done so. When the Basel Committee decided to revise its Capital Accord, which contains a set of standards for implementing a credit risk measurement framework for banks, it published the Accord's draft and opened it to public comment.[127] It received hundreds of comments from banks, regulators, and networks of regulators, and after considering them, the Committee disclosed on the Internet its progress in reaching a new consensus on the Accord.[128]

These procedural innovations may at some point interfere with the effectiveness of networks. If networks become overly formal in their decision-making, their arguable advantages over other forms of international cooperation—namely, their informality and flexibility—may diminish. At the same time, greater procedural protections are important to the accountability and fairness of networks. They increase transparency and reduce the possibility that decision-making will be unduly dominated by a few powerful participants.

E. *Conclusion*

Transnational coalitions of governmental officials increasingly influence law and policymaking at the international and domestic levels. They help solve global problems by exchanging information and expertise, issuing policy guidelines, and helping spread the best solutions to these problems. They are more flexible and accountable than international organizations, and are able to draw upon a wide variety of resources in a manner that traditional state-to-state contacts cannot always achieve. In that sense, networks are a promising development for the international public order.s

But networks are still a recent phenomenon and face several important challenges. They must find the proper balance between respecting local preferences and pursuing uniformity; between policy convergence at the transnational level and democratic accountability at home; and between fairness and efficiency. Finding the proper balance is the key to the continued development and success of this new venue for international coordination.

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[127] Zaring, *supra* note 9, at 577.
[128] *Id.*

Part Five

International Jurisdiction and International Jurisprudence

Progress in International Adjudication: Revisiting Hudson's Assessment of the Future of International Courts

By Cesare P.R. Romano

> "There are one-story intellects, two-story intellects, and three-story intellects with skylights. All fact collectors with no aim beyond their facts are one-story men. Two-story men compare reason and generalize, using labors of the fact collectors as well as their own. Three-story men idealize, imagine, and predict. Their best illuminations come from above through the skylight."
>
> Oliver Wendell Holmes Sr. (1809 - 1894)[1]

> "Prediction is very difficult, especially about the future."
>
> Niels Bohr (1885 - 1962)[2]

> "The best way to predict the future is to invent it."
>
> Alan Kay (1940 -)[3]

A. *Introduction*

In 1944, when the Axis defeat was no more a matter of "if" but "when," Manley O. Hudson was asked by the Carnegie Endowment and the Brookings Institution to predict the future of international adjudication. The result of his investigation was published under the title *International Tribunals Past and Future*.[4] As the foreword to *International Tribunals* noted, Hudson's impressive experience and expertise made him "the most competent man available for a study of judicial

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[1] Attributed to Oliver Wendell Holmes, Sr. He mentions a "one-story intellect" in a poem titled, "The Autocrat of the Breakfast Table."

[2] Attributed to Neil Bohr [but also attributed to Yogi Berra and Mark Twain]. *See* Wikipedia, *Niels Bohr*, http://en.wikipedia.org/wiki/Niels_Bohr.

[3] "The origin of the quote came from an early meeting in 1971 of PARC (*Palo Alto Research Center*) folks and the Xerox planners. In a fit of passion I uttered the quote!" Alan Kay, in an email on Sept. 17, 1998 to Peter W. Lount. *See* Wikipedia, *Alan Kay*, http://en.wikipedia.org/wiki/Alan_Kay.

[4] Manley O. Hudson, International Tribunals Past and Future (1944).

Miller & Bratspies (Eds), Progress in International Law, pp. 433–450.

organization in the post-war world."[5] As a legal adviser of the U.S. delegation to the Versailles peace conference, he championed United States' ratification of the Statute of the Permanent Court of International Justice (PCIJ).[6] He became a judge of that court in 1935, and held the position until the outbreak of the Second World War. His works on the PCIJ,[7] and, after the war, on the International Court of Justice (ICJ), including annual reports in the *American Journal of International Law*,[8] are still must-reads for scholars of international courts.

While it is obvious that the world in which Hudson lived is substantially different from the one in which we are living today, it is also true that the degree of difference depends on the area of international organization one examines. Of all the areas surveyed in his lectures, published under the title *Progress in International Organization*,[9] the one that has changed most radically is probably the international judicial function.

Crystal ball-gazing is an intriguing exercise. Hudson was particularly keen to it. Yet, it is intrinsically perilous work, especially when one's success invites future generations of scholars to reread one's writings. Second-guessing several decades later can be merciless and unfair. With this general caveat, using Hudson's signature "survey-perspective" style, this chapter will attempt to map the most notable changes that have occurred in the international judicial function since the publication of his books *Progress* (1932) and *International Tribunals* (1944), and assess whether the development of the international judicial function

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[5] *Id*. at v.

[6] Statute of the Permanent Court of International Justice (PICJ), Dec. 13, 1920, 6 L.N.T.S. 390.

[7] *See* Manley O. Hudson, The Permanent Court of International Justice and the Question of American Participation (1925); Manley O. Hudson, America and the World Court (1926); *In re* the World Court: The Judgment of the American Bar as Expressed in Resolutions of National, State and Local Bar Associations, 1921–1934 (Manley O. Hudson ed., 1934); Manley O. Hudson, The World Court 1921–1938 – A Handbook of the Permanent Court of International Justice (1938); World Court Reports: A Collection of the Judgments, Orders, and Opinions of the Permanent Court of International Justice (Manley O. Hudson ed., vols. I-IV 1922–1942); Manley O. Hudson, The Permanent Court of International Justice 1920–1942 (1943).

[8] *See, e.g.*, Manley O. Hudson, *The Second Year of the Permanent Court of International Justice*, 18 Am. J. Int'l L. 1 (1924); Manley O. Hudson, *The Thirty-Seventh Year of the World Court*, 53 Am. J. Int'l L. 319 (1959).

[9] Manley O. Hudson, Progress in International Organization (1932).

has, indeed, taken place along the lines imagined by that illustrious scholar two or three generations ago.

B. *Some Notable Changes in the International Judicial Function*

The list of differences between the contemporary international judicial landscape and the one in Hudson's era is long and tedious. Accordingly, I will limit this chapter to consideration of only the most notable ones. I will then offer some thoughts on the long, and still much ongoing, march from "dispute settlement" to "international justice."

I. *Enormous Growth of Fora*

In Hudson's era, the number of international courts was relatively small. The only standing international judicial bodies were the PCIJ[10] and the Permanent Court of Arbitration,[11] which was, and still is, only an institutionalized form of arbitration rather than a truly permanent court. Besides these two, for sake of completeness, one should mention the short-lived Central American Court of Justice,[12] which existed between 1908 and 1918, and the aborted International Prize Court,[13] the statute of which, adopted in 1907, never entered into force. Other than these, *ad hoc* international arbitral tribunals dominated the scene. Interestingly, during Hudson's time, a number of other international judicial bodies were proposed, and, in some cases, those early ideas germinated several decades later.[14]

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[10] PICJ, *supra* note 6.

[11] International Convention for the Pacific Settlement of International Disputes (Hague I), July 29, 1899, 32 Stat. 1779.

[12] Convention for the Establishment of a Central American Court of Justice, Dec. 20, 1907, 3 Marten Nouveau Recueil 105. For a short account of the life of the CACJ, *see* Jean Allain, A Century of International Adjudication 67–92 (2000).

[13] Convention Relative à l'Établissement d'une Cour Internationale des Prises, Deuxième Conférence Internationale de la Paix, 1 Actes et Documents 668 (1907) (Fr.) [Convention on the Establishment of an International Prize Court, Second International Peace Conference, 7 Acts and Documents 668 (1907)].

[14] Besides the International Prize Court, Hudson lists the Inter-American Court of International Justice; the International Criminal Court; the International Claims Tribunals, the International Loans Tribunals, various International Commercial and Administrative Tribunals; and Permanent Conciliation Commissions. Hudson, *supra* note 4.

In spite of his enthusiasm for an increasing role for international adjudicatory bodies, Professor Hudson could hardly have imagined the sheer number and diversity of international judicial bodies existing at the beginning of the 21st century. Depending on what criteria of classification are adopted, one can count about two dozen international courts, and almost seventy bodies carrying out quasi-judicial implementation, control, and dispute settlement functions.[15]

Today, four international judicial bodies have, potentially, worldwide jurisdiction. They are the ICJ,[16] the International Tribunal for the Law of the Sea,[17] the International Criminal Court,[18] and the dispute settlement system of the World Trade Organization.[19] While each of these bodies and mechanisms has its own peculiarities and limitations worthy of investigation, a discussion of these matters is beyond the scope of this chapter. Suffice it to say, the jurisdiction of these bodies is not, *per se*, restricted geographically. Any state in the world can become a party to the treaties that created them and thereby be subject to their jurisdiction.

Yet, it is the regional level, not the global, which has provided the most fertile ground for the germination of international judicial bodies.[20] Most are either organs of regional organizations or organs of global international organizations operating in, or with jurisdiction limited to, a specific region (e.g. the ad hoc criminal tribunals for the former Yugoslavia[21] and Rwanda[22]). Some are thriving more than others, but even if only quantitatively, the development is significant.

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[15] For a comprehensive list, see Project on International Courts and Tribunals, Synoptic Chart, http://www.pict-pcti.org/publications/synoptic_chart.html. The chart lists under the heading "international judicial bodies" 22 existing bodies, and three more about to be established. Under the heading "Quasi-judicial, implementation control and other dispute settlement bodies" there are listed 64 bodies and procedures, and five more are about to be established.

[16] U.N. Charter, arts. 7.1, 36.3. Statute of the International Court of Justice, art. 36, 26, June 26, 2945, 59 Stat. 1055, 33 U.N.T.S. 993.

[17] Law of the Sea Convention, Dec. 10, 1982, U.N. Doc. A/CONF. 62/122, 21 I.L.M. 1261 (1982). Part XV, section 2 of the convention is dedicated to the peaceful settlement of disputes. The ITLOS Statute is contained in Annex VI.

[18] Rome Statute of the International Criminal Court (ICC), July 17, 1998, 2187 U.N.T.S. 90.

[19] WTO Agreement. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 (1994). Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex II, Apr. 15, 1994, 1869 U.N.T.S. 401 [hereinafter Rules and Procedures].

[20] *See* Parker, in this volume.

[21] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

[22] International Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

Hudson also did not foresee the specialization and diversification of regional courts:

> The problem of permanent regional tribunals … will doubtless continue to command attention…. If some centralization of an international adjudicature is desirable to safeguard the unity of universal international law, it cannot be pursued in neglect of local requirements, and where States in any region wish to do so they must be free to create local tribunals for handling their disputes….To some extent … special needs could be met by forming chambers within the [PCIJ] ….[23]

Thus, in Hudson's conception, regional courts were a "problem." If some regional courts had to exist, they were going to be only small-scale and geographically limited, that is to say, bodies that could adjudicate disputes between sovereign states belonging to the same region or regional organization. However, the Central American Court of Justice (CACJ),[24] the only regional court that existed during Hudson's time, should have suggested to him that more were to come. Indeed, the CACJ was not only the first truly permanent international court in history, but was also the first instance of an international court open to individual complaints. Its jurisdiction included disputes between nationals of one of the Central American states and any of the other Central American states.[25]

II. *Rise of Non-State Actors*

This leads to the second difference between Hudson's world and our own. While, in his days, international courts almost exclusively adjudicated disputes between sovereign states, nowadays the number of *fora* whose contentious jurisdiction is restricted to states is only a fraction of those that are open to non-state entities.[26] Regional courts thrive not because they provide localized alternatives to global

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[23] Hudson, *supra* note 4 at 252.

[24] CACJ, *supra* note 12.

[25] The CACJ was involved in ten cases during its short existence (1908-1918), of which individuals brought five. None was found admissible, however. Anales de la Corte de Justicia Centroamericana (Regulations of the Central American Court of Justice) (Nov. 1911), *available at* www.worldcourts.com/cacj/eng/documents/1912.11.06_procedure/option_ii/1912.11.06_procedure.pdf. *See also* Allain, *supra* note 12.

[26] Actually, no international judicial body is open *exclusively* to sovereign States. The EC and certain non-sovereign custom territories like Hong Kong and Macao, are members of the WTO and have standing as such in the dispute settlement system. The ICJ is partially open to entities other than States, for it can receive requests of advisory opinions from some UN organs and some of its specialized agencies. The Seabed Dispute Settlement Chamber of the International Tribunal for the Law of the Sea is open to States Parties, the International Seabed Authority, the Enterprise, State enterprises and natural or juridical persons.

courts, as Hudson imagined, but because they provide services that global courts cannot provide.

One of the fundamental features setting contemporary regional courts apart from their global peers is that they can be accessed for all kinds of claims (contentious, advisory, appellate, administrative, preliminary and criminal) by a large and diversified number of non-state entities.[27] Greater political, economic and social integration is attained more easily at the regional than the global level. Greater transfers of sovereignty can take place and states are willing to create judicial bodies where their compliance with international agreements can be challenged not only by other states, but also by their own citizens. For example, a French company cannot challenge protectionist practices of the German government before the WTO dispute settlement bodies (nor, for that matter, those practices adopted by any other country). Yet, it can do so before the European Court of Justice[28] if those practices are cast as a violation of the laws of the European Communities. Similarly, a Senegalese citizen cannot challenge his/her order of expulsion from Spain in violation of the principle of *non-refoulement* before the International Court of Justice. However, that person can complain to the European Court of Human Rights.[29] In addition, it is significant that, in all *fora* where non-state entities have standing, non-state actor cases dominate the docket. Although states can bring cases against other states before the European Court of Human Rights, the Inter-American Court of Human Rights,[30] or the European Court of Justice, for example, instances of such inter-state litigation are extremely rare.

III. *Advent of International Criminal Courts and Tribunals*

Regional economic/political/social integration is not the only force fueling the proliferation of international judicial bodies. Rather, the need to ensure prosecution of war crimes, crimes against humanity and the crime of genocide has also generated, in recent years, a considerable number of international and hybrid judicial bodies.[31] The list of criminal courts and tribunals established interna-

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[27] *See* Schurtman, in this volume; Miller, in this volume.

[28] Treaty on European Union, Feb. 7, 1992, O.J. (C 191) 1 (1992), amended by Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, O.J. (C80) 1 (2001).

[29] European Convention on Human Rights and Fundamental Freedoms, art. 33, Nov. 4, 1950, 213 U.N.T.S. 222, amended by Protocols nos. 3, 5, 8.

[30] Statute of the IACHR, art. 61, O.A.S. Res. 448 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 98, Annual Report of the Inter-American Court on Human Rights, OEA/Ser.L/V.III.3 doc. 13 corr. 1 at 16 (1980), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 133 (1992).

[31] *See* Sadat in this volume.

tionally since the end of the Cold War is long and growing. It includes the "twin tribunals" (the International Criminal Tribunals for the former Yugoslavia[32] and for Rwanda[33]), the International Criminal Court,[34] the Special Court for Sierra Leone,[35] and internationalized panels in East Timor,[36] Kosovo and the Extraordinary chambers in the courts of Cambodia.[37] On the launch pad, there is also a criminal body to prosecute and try the assassins of former Lebanese Prime Minister Rafik Hariri.[38]

When Hudson gave his *Progress* lectures, international criminal law was still an abstract discipline, taking its first tentative steps. Attempts to prosecute the German Kaiser in the wake of World War I had led nowhere.[39] A few of the war crimes committed during that conflict were prosecuted domestically. There was no follow-up on a proposal by the Committee of Jurists, which had been entrusted with the preparation of the Statute of the PCIJ, to establish a High Court of International Justice to try "crimes constituting a breach of international public order or against the universal laws of nations."[40] Likewise, a convention to establish an International Criminal Court to prosecute and try persons accused of acts of terrorism was adopted in 1937 but never entered into force.[41]

Although *International Tribunals* was published in 1944, clearly on the assumption of the inevitable victory of the allied powers, it surprisingly does not contain

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[32] S.C. Res. 827, *supra* note 21.

[33] S.C. Res. 955, *supra* note 22.

[34] ICC, *supra* note 18.

[35] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, app. II, Jan. 16, 2002, http://www.sc-sl.org/scsl-agreement.html.

[36] Resolution on the situation in East Timor, S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999).

[37] Resolution on the situation relating Kosovo, S.C. Res. 1244, UN Doc. S/RES/1244 (June 10, 1999). Draft Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of the Democratic Kampuchea (Khmer Rouge Trials), as adopted by the UN General Assembly, U.N. Doc. A/57/806 (May 22, 2003).

[38] S.C. Res. 1757 (2007).

[39] *See* Jackson Nyamuya Maogoto, State Sovereignty and International Criminal Law: Versailles to Rome (2003) (on the history of international criminal law during the twentieth century).

[40] James Brown Scott, The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists (1920).

[41] Convention for the Creation of an International Criminal Court, Nov. 16, 1937, League of Nations O.J. Spec. Supp. 156 (1938); League of Nations Doc. C.547(I).M.384(I).1937.V, *reprinted in* 7 International Legislation (1937-1938) 878 (Manley O. Hudson, ed., 1941).

any reference to the possibility of trying Nazi and Japanese military leaders for war crimes. Hudson ends the section on the proposed International Criminal Court by concluding:

> Whatever course of development may be imminent with reference to political organization, the time is hardly ripe for the extension of international law to include judicial process for condemning and punishing acts either of States or of individuals.[42]

Within two years, international military tribunals were convened in Nuremberg[43] and Tokyo,[44] setting a milestone in the history of international criminal law. On this point, like others stances Hudson took in *Progress* and *International Tribunals*, he was dramatically proven wrong. However, considering that the rigors of the Cold War made it impossible to repeat the exercise for almost a half-century, Hudson's pessimism was probably not totally off the mark.

IV. *Compulsory Jurisdiction is Becoming the Rule Rather than the Exception*

International courts can exercise jurisdiction only if states have accepted it. This is a basic tenet of the international legal system and a corollary of the fact that states are sovereign entities.[45] This was true in Hudson's time and it continues to be true today. The "problem of consent" is, in the layperson's eyes, what condemns the international system to be but a pale imitation of a true judiciary: national courts. Yet, since Hudson's days, the consent issue has fundamentally morphed.[46] Before and immediately after the Second World War, the international judicial scene was largely populated, on the one hand, by arbitral panels (*ad hoc* or facilitated by the PCA), and on the other hand, by the PCIJ/ICJ. Then, as well as now, states are subject to the jurisdiction of those bodies and procedures if consent has been given by way of an *ad hoc* agreement after the emergence of the dispute. The only way consent can be given *a priori* of the emergence of any dispute is either by way of a compromissory clause contained in a treaty, or, in the case of the PCIJ/ICJ, through the so-called optional declaration. Consent, in any case, must always be explicit and can never be implied.

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[42] Hudson, *supra* note 4, at 186.

[43] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

[44] Special Proclamation of the Supreme Commander for the Allied Powers at Tokyo, Establishment of an International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20.

[45] "[N]o State can, without its consent, be compelled to submit its disputes … to arbitration, or any other kind of pacific settlement." Advisory Opinion No. 5, *Status of Eastern Carelia*, 1923 P.I.C.J. (ser. B) No. 5 at 27 (Jul. 23).

[46] *See* Cesare Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 N.Y.U. J. Int'l. L. & Pol. 101 (2007).

However, in the contemporary world, in the majority of cases, consent to an international judicial body's jurisdiction is implicit in a state's membership in an organization or legal system of which the given judicial body is an organ. Currently, the only bodies where consent must be given explicitly (either *ante* or *post* the emergence of any given dispute) are the ICJ, the International Tribunal for the Law of the Sea, and the Inter-American Court of Human Rights.[47] Interestingly, these are bodies created before the end of the Cold War. All international courts created after the end of the Cold War have compulsory jurisdiction. Membership in the World Trade Organization carries with it acceptance of the dispute settlement system of that organization.[48] Ratification of the Rome Statute of the International Criminal Court implies acceptance of the ICC jurisdiction.[49] Resolutions of the Security Council are binding on UN members, and when the Council decides to establish an *ad hoc* international criminal tribunal, all UN members are bound to comply with decisions and orders of that tribunal.[50] To become Members of the Council of Europe, ratification of the 1950 European Convention on Human Rights and it Protocols (establishing the European Court of Human Rights), is required.[51] The acceptance of the jurisdiction of the European Court of Justice is implicit in the ratification of the EC Treaty.[52]

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[47] Statute of the International Court of Justice, *supra* note 16, art. 36; Organization of American States, American Convention on Human Rights, art. 62, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Law of the Sea Convention, *supra* note 17, arts. 286–96 (Compulsory Procedures) and 297–99 (Limitations and Exceptions).

[48] The Understanding on Rules and Procedures Governing the Settlement of Disputes is an Annex of the WTO Agreement. Rules and Procedures, *supra* note 19.

[49] "A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court. . . . " ICC, *supra* note 18, art. 12.1.

[50] The Prosecutor v. Tadic, Case No. IT-94-1-T, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, July 15, 1999, paras 28–48. (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995).

[51] "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council." Statute of the Council of Europe, May 5, 1949, art. 3, 87 U.N.T.S. 103, Europ. T.S. No. 1. "Any High Contracting Party which shall cease to be a Member of the Council of Europe shall cease to be a Party to [the European Convention] under the same conditions." European Convention, art. 65. Currently, Belarus is the only major European State that has not yet ratified the European Convention and is not member of the Council of Europe. The Parliamentary Assembly of the Council of Europe has determined that Kazakhstan could apply for full membership, because it is partially located in Europe, but that they would not be granted any status whatsoever at the Council unless democratic and human rights record improve.

[52] "The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed." Treaty of Nice, *supra* note 28, art. 220.

Thus, it is clear that the there is a trend towards treating acceptance of international courts' jurisdiction as part and parcel of participation in the legal systems in which those judicial bodies are embedded. It is also clear that this is a trend that is stronger at the regional level and within specialized regimes. Were the ICJ jurisdiction limited only to the interpretation of the U.N. Charter and U.N. legal acts, then general compulsory jurisdiction of the World Court would be conceivable. But, as long as the ICJ's jurisdiction remains as extensive as it is,[53] it is clear that sovereign states wish to determine for themselves when, and under which circumstances, they may submit their disputes to the jurisdiction of the World Court.

In 1932, Hudson wrote: "Today, one may fairly confidently look forward to a time when most of the nations of the world will have conferred on the Court [the PCIJ] a large degree of compulsory jurisdiction."[54] Although this is not yet the case, today compulsory jurisdiction has become the rule rather than the exception.

V. *Birth of an International Legal Profession*

In *International Tribunals* Hudson wrote,

> The selection of the members of international tribunals frequently presents problems of great difficulty, and in some instances the structure of the tribunal is made to depend upon the solution given to these problems. No group of men exists which can be said to form a profession of international judges, and but few individuals are so outstanding as to be repeatedly called upon to serve as members of different tribunals. The number of men actually serving in such positions at any one time is quite limited, and their selection is usually determined by a variety of considerations, some of them more or less fortuitous. The role is not one offering a career for which men are, or can be, specially trained.[55]

Today, the sheer number of international judicial and quasi-judicial bodies makes it possible to argue that an "international judicial operator" profession has emerged. There are more than 240 individuals worldwide who sit on the bench of an international judicial body.[56] Several of these people have served on two or

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[53] Under art. 36 of the statute, it "encompasses any legal dispute concerning a) the interpretation of a treaty; b) any question of international law; c) the existence of any fact which, if established, would constitute a breach of an international obligation; d) and the nature or extent of the reparation to be made for the breach of an international obligation." Statute of the International Court of Justice, *supra* note 16.

[54] Hudson, *supra* note 9, at 59.

[55] Hudson, *supra* note 4, at 32.

[56] *See* Terris, Romano, Swigart, The International Judge (2007).

more international judicial bodies in their careers.[57] If the focus is also enlarged to people staffing the registries, attorneys and counsels frequently appearing before these bodies, and, in the case of criminal tribunals, attorneys working as prosecutors, it is clear that, to paraphrase Hudson, today the role *does* offer a career for which people should be specially trained.

These men and (regrettably few) women are an absolute novelty in the world of international relations. They do not further interests of any one state, as diplomats do, nor those of an international organization, as do top officials of international organizations, like the Secretary General of the U.N. or the President of the World Bank.[58] Instead, their mission sits somewhat astride the maintenance of peace by way of dispute settlement, and that of enforcement of international law; astride the functions of a diplomat and those of a judge, as understood in the domestic context. International judges face extreme and often exponential versions of the challenges faced by their peers on the courts of their home countries. The decisions they take often impact the lives of millions, alter international equilibria, and shape the content of international law, and do so under the close scrutiny of the international community, media, and civil society. They are called upon to develop new jurisprudence for an increasingly interconnected but still diverse world. They must maintain the strictest standards of ethical conduct, including independence and impartiality, while operating in a highly politicized domain. And their work is performed in an institution that brings together individuals whose legal training, professional background, native language, and cultural assumptions may be markedly different.

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[57] For instance, a judge currently serving at the ICJ, Thomas Buergenthal was formerly a judge and President of the IACHR (1979–1991) and then judge, Vice-President, and President of the Administrative Tribunal of the Inter-American Development Bank (1989–1994). At the WTO AB, Georges Abi Saab has been member of the ICTY/ICTR Appeals Chamber and judge ad hoc at the ICJ. At the ICTY, Mohammed Shahabudeen, member of the ICTY/ICTR Appeals Chamber, has been judge at the ICJ (1988–1997) while Christine Van Den Wyngaert, has been ad hoc judge at the ICJ. At the ICC a larger number of judges has previous experience: Elizabeth Odio Benito served at the ICTY (1993–1998), so did Claude Jorda (1994–2003, President between 1999–2003), while Navanethem Pillay was President of the ICTR (1995–2003). Finally, the ECJ has in its ranks four former ECHR judges: Jerzy Makarczyk, Pranas Kuris, Uno Lohmus and Egils Levits, from Poland, Lithuania, Estonia and Latvia, respectively.

[58] *See* Rules of Court, European Court of Human Rights, r.3, *reprinted in* Council of Europe, European Convention on Human Rights 151 (1987), " 'I swear' – or 'I solemnly declare' – 'that I will exercise my functions as a judge honourably, independently and impartially and that I will keep secret all deliberations.' " ICJ (Rules, art. 4), "I solemnly declare that I will perform my duties and exercise my powers as judge honorably, faithfully, impartially and conscientiously." For the rules of procedure of international courts, *see* Dispute Settlement in Public International Law (Karin Oellers-Frahm & Andreas Zimmermann eds., 2d ed. 2001).

Because it is only recently that their ranks have swollen to the point at which it is possible to study them as a group, they remain a largely unknown and obscure lot that warrants research and study. Fundamental questions to be answered are: Who are these people? Where do they come from? How are they trained? How (if at all) do they interact with each other across courts? To whom or to what is their allegiance owed? How do they conceive their mission? What do they think is their proper place in the world of international relations, and society at large? Answering these questions is, of course, beyond the scope of this chapter, but, as Professor Philippe Sands wrote,

> If we are happy to have international courts fulfill political functions that tie them closely to international organizations, then perhaps we should not get too exercised about [them]. If, however, we see international courts as exercising judicial functions analogous to those we expect of our national courts, then it is right to focus our attention on who the judges are and how they attain their offices.[59]

Understanding international judges is essential if we are ever going to understand the forces driving the expansion and transformation of the world of international courts and their direction.[60]

C. *From Dispute Settlement to International Justice*

The cumulative result of all these developments is, ultimately, the transformation of the nature and purpose of international courts. Traditionally, international courts have been viewed as part of the wider discipline of international dispute settlement. The canonical approach to international dispute settlement begins with recalling the obligation states have, under the U.N. Charter, to settle international disputes peacefully and by means of their own choice.[61] Then, traditional exposés analyze, one by one, the whole gamut of typical dispute settlement mechanisms available, starting first with the so-called "diplomatic means," such as negotiation, enquiry, mediation, or conciliation. Eventually they end with those whose outcome is legally binding (known also as adjudicative means), like arbitration and settlement by way of standing international judicial bodies.[62]

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[59] Philippe Sands, *Global Governance and the International Judiciary: Choosing our Judges*, 56 Contemp. Legal Probs. 482, 502 (2003).

[60] For a first attempt to study international judges in all international courts, *see* Terris et al., *supra* note 56.

[61] U.N. Charter, *supra* note 16, arts. 2.3 & 33; United Nations, Handbook on the Peaceful Settlement of Disputes between States (1992).

[62] *See, e.g.*, John G. Merrills, International Dispute Settlement (4th ed. 2005); John Collier & Vaughan Lowe, The Settlement of Disputes in International Law (2000).

Yet, this classical approach to international dispute settlement, which, for historical reasons, is also Hudson's approach, is concerned mostly with disputes between sovereign states. Adjudication is ultimately regarded as a sort of "continuation of diplomacy by judicial means," to paraphrase the famous quote from Carl von Clausewitz in his seminal treatise *On War*.[63] Yet, classifying the work of the international judiciary with the means and ends associated with consultation, mediation, conciliation, and *ad hoc* arbitration is no longer correct and has become potentially misleading. International judicial bodies are no longer one of the many arrows in the quiver of foreign affairs ministries to resolve legal disputes with their peers. They no longer serve as legal arenas within which advisers representing sovereign states "peacefully fight out" disputes, which, otherwise, would be fought out for real on the battlefield.

In the contemporary world, where the majority of courts decide mostly cases involving non-state entities, thus acting outside the state-centered paradigm, the system ought to be about more than just the settlement of disputes. While it is true that, in the overwhelming majority of cases, international courts settle legal disputes on a point of law or fact between two or more parties, contemporary international courts do much more than that.

First, international judicial bodies not only settle disputes but also expand international law by clarifying its content. They transform abstract norms into cogent and binding reality, and, in doing so, they necessarily also contribute to the solidification and development of international law.[64] In international law, pronouncements of international judicial bodies do matter, albeit not in the technical sense of s*tare decisis* as understood in the Anglo-American legal tradition. Even in the case of the International Court of Justice, which is mandated by its own statute to relegate judicial decisions, even its own, to a subsidiary role,[65] precedent and prior case law are often referenced.[66] International courts strive to maintain their own internal coherence. Whenever they feel they need to depart from precedent, they invariably try to explain why the cases are distinguishable and why a change of course is warranted on legal grounds. This effort differs little from that of national supreme or constitutional courts. In addition, although most international courts are not structurally related to each other, they tend to

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[63] Carl von Clausewitz, On War (Michael Howard & Peter Paret trans., Princeton U. Press 1989). The original quote is "war is a continuation of politics by other means."

[64] *See*, Terris et al., *supra* note 56, ch. 4.

[65] ICJ Statute, *supra* note 16, arts. 59 & 38.1.d.

[66] *See* Alain Pellet, *Article 38, in* The Statute of the International Court of Justice 783-90 (Andreas Zimmermann ed., 2006).

take notice of and not to depart unnecessarily from pronouncements of other international courts.[67] International judges tend to be well aware of the fact that, by rendering judgments, they are *de facto*, if not *de jure*, contributing to the development of an overarching international legal order.[68] In so doing, international judges affect a community that is actually much larger than the parties to the given case.

This was evident even in the formative era of international judicial institutions, at least to insightful people like Hudson, who commented

> It does not require any bold leap of imagination to foresee what this will mean to the world half-century hence. If the present use of the Court [the PCIJ] continues, we shall then have at hand a large volume of decisions which will constitute a veritable quarry of international law.[69]

More than half a century later, we do indeed have available a "quarry of international law," an international "common judicial heritage," and one probably far greater than even Hudson dared imagine. It is beyond doubt that this considerable jurisprudential production has advanced international law. Yet, the process has surely been far from unidirectional and consistent, and this is something he would likely not have envisioned.

Second, while the settlement of disputes is the "ur-mission" of international adjudicative bodies, today their goal cannot be summarized in such simple terms. Contemporary international courts exercise two kinds of jurisdiction that were either absent or only just emerging during Hudson's era, and, which, fundamentally depart from the limited aim of settling a dispute between two parties: they are criminal and advisory jurisdiction.

We already addressed the multiplication of international criminal bodies. Let us add that, admittedly, even criminal cases can be seen as disputes between the prosecutor and the indictee on a series of facts and interpretation of those facts in the light of the law. Yet, it is obvious that this is not the primary *raison d'être* of international criminal courts and tribunals. Rather, they are created to sanction international crimes. They administer international criminal justice, an "international public good" that cannot be produced in the necessary quantity or quality by domestic courts.

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[67] Nathan Miller, *An International Jurisprudence? The Operation of "Precedent" Across International Tribunals*, 15 Leiden J. Int'l L. 483-526 (2002).

[68] *See* Terris et al., *supra* note 56, ch. 4.

[69] Hudson, *supra* note 9, at 81.

The first international judicial body to be given the power to render advisory opinions was the PCIJ.[70] This was a fundamental shift from the classical dispute-centered international judiciary paradigm because it enabled the court to render a formal opinion on a point of law outside adversarial proceedings. Hudson was well aware of the importance of this development and its impact on the ultimate nature of the system. In *Progress* he wrote:

> I think that many people had not expected, and certainly some people in this country have not understood, the significance of the [PCIJ] advisory opinions [...]. During the first ten years, the Court has given 19 advisory opinions, and in one instance it has declined to give an opinion. When these opinions are compared with the judgments and orders of the Court, I think there can be little doubt that they have a greater importance. The procedure followed by the Court in giving them has been so largely assimilated to that in contested cases that these authoritative declarations of the law have as much juridical weight as the judgments themselves, and in situations to which they relate are more vital to our current international life than those in which States have been willing to agree to adjudicate differences. ...[71]

Despite initial hesitations on the part of states in the PCIJ era, the ICJ retained this power when its blueprint was laid down in the U.N. Charter.[72] Currently, almost all contemporary international judicial bodies have the power to render advisory opinions. There are two notable exceptions, which further prove the point that the addition of advisory functions to the classical dispute settlement mechanism has fundamentally transformed the nature of the international judiciary. The first is international criminal tribunals, whose nature, structure, and mission are incompatible with the speculation in abstract about the existence and scope of norms of international criminal law. The second is the World Trade Organization dispute settlement system, which, of all, is the international adjudicative process most akin to arbitration (at least at the panels level).

The rationale for advisory jurisdiction is, essentially, to provide a given international organization a means to address fundamental issues for the life of the organization (*e.g.* existence and powers of the organization or its organs, or questions of separations of power between the various organizations' main organs), and/or to promote respect for the law within the given legal regime (U.N. Charter, regional

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[70] While the PICJ Statute did not provide for advisory opinions until its inclusion in the 1929 revised statute, which came into force in 1936, there was nonetheless a practice of requesting opinions well before the revision, premised on the Rule of Court. *See* Stephen Schwebel, *Was the Capacity to Request an Advisory Opinion Wider in the Permanent International Court of Justice than it is in the International Court of Justice*?, 62 Brit. Y.B. Int'l L. 77, 78–81 (1991).

[71] Hudson, *supra* note 9, at 66–67.

[72] U.N. Charter, *supra* note 16, art. 96; ICJ Statute, *supra* note 16, art. 65–68.

human rights systems).[73] Notwithstanding this "constitutional" role, advisory opinions have also been used either as a roundabout way to settle disputes[74] when access to the court is otherwise restricted, or to identify the law on policy issues that are of interest to the international community at large.[75] This, at least, is the history of the use of the advisory jurisdiction of the World Court. As Hudson acutely remarked: "The Court's [the PCIJ/ICJ] place in the international organization of our time might well be a subordinate one if it did not possess this competence to give advisory opinions."[76]

Advisory jurisdiction has allowed the ICJ to make foray into terrain generally considered to be the preserve of politics. It is hard to picture advisory opinions like those in the *Legality of the Threat or Use of Nuclear Weapons*,[77] the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[78] and, partly, those in *South West Africa*,[79] as "UN constitutional issues." They referred, instead, to largely political disputes (between states with nuclear weapons and states without; between Palestinians and the Arabs and Israel; between African states and much of the world, and the apartheid regime in South Africa). When rendering these opinions, the ICJ did more than add its voice to those of the disputing parties. It put itself at the service of humanity and international law, thus transcending its dispute settlement functions.[80]

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[73] Christian Dominicé, *Request of Advisory Opinions in Contentious Cases?, in* International Organizations and International Dispute Settlement 91 (Laurence Boisson de Chazournes et al., eds., 2002).

[74] *Id*.

[75] Laurence Boisson de Chazournes, *Advisory Opinions and the Furtherance of the Common Interest of Mankind, in* International Organizations and International Dispute Settlement, *supra* note 73, at 105.

[76] Hudson, *supra* note 9, at 69.

[77] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (8 July).

[78] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion 2004 I.C.J. 131, (9 July).

[79] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16 (21 June).

[80] *See* Julie Calidonio Schmid, *Advisory Opinions On Human Rights: Moving Beyond A Pyrrhic Victory*, 16 Duke J. Comp. & Int'l L. 415 (2006).

D. *Standing on the Shoulders of Giants …*

In *Progress in International Organization* Hudson noted:

> A century hence people may be as grateful to us for the League of Nations and the Permanent Court of International Justice as we are now grateful to the generation of Washington and Adams and Jefferson and Madison for the Congress and the Supreme Court of the United States.[81]

Three quarters of a century hence, this prediction still seems rather improbable if not hyperbolic. At the risk of being second-guessed in my turn, I dare to say that such a day will probably never come. To some, the "constitutionalization" of the international system, the dawn of the perfect world federation or government equipped with three separate powers (judiciary/executive/legislative), might be a desirable goal.[82] Hudson, at least, seemed to share this aspiration, although he was more open-eyed about the possibility of its actual realization:

> It would be a great advance over what we have known in the past if the whole community of States, the community to which international law applies, were organized in such a way that a court or a system of courts is created by the international community, and vested with power to adjudicate certain or all kinds of disputes regardless of the consent of all parties, and endowed with such a continuing general support that its authority would not lightly drawn into question. … Yet such a development would involve a centralization which has not been attempted in the past.[83]

Today, Hudson's view seems closer to realization in Europe than elsewhere, and certainly more so there than on global terms. However, for the time being, the international system will remain fragmented and will reflect the wide and uneven international distribution of power.[84] For this reason the long march towards the building of an international judiciary is necessarily random and unplanned. Still, one cannot look at the dozens of international judicial and quasi-judicial bodies currently in existence and conclude that they are just an elaborated and institutionalized alternative to direct negotiations between the parties, or even to outright violence, as was the case in Hudson's day. Rather, this is, hopefully, the beginning of a process leading to the construction of a coherent international order based on justice; of an order where all participants (sovereign states, individuals, multinational corporations) can be held accountable for their actions or seek redress through an impartial, independent, objective, and law-based judicial institution. Nothing more, but also nothing less.

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[81] Hudson, *supra* note 9, at 120.

[82] *But see* Walter, in this volume.

[83] Hudson, *supra* note 4, at 235.

[84] José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 Tex. Int'l L.J. 405 (2003).

The "Precedential Judge Hudson"? Rivers, Oceans, Equity, and International Tribunals

By Betsy Baker

> It is generally accepted that the origin of the modern exposition of "equity" in international judicial settlement is found in the individual opinion of Judge Hudson in the Water from the Meuse case between the Netherlands and Belgium in the Permanent Court.[1]

A. *Biography and International Tribunals*

It should come as no surprise that it was Professor Manley O. Hudson (1886–1960) who articulated the basic outlines of how contemporary international tribunals still think about equity. Possibly no American international lawyer has written more about international tribunals than Hudson,[2] in whose early work the theme of equity surfaces repeatedly.[3] When he authored his 1937 individual opinion in the *River Meuse* case,[4] he was a Judge on the Permanent Court of International Justice,[5] the Bemis Professor of International Law at Harvard[6] and a newly appointed

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[1] Shabtai Rosenne, *The Position of the International Court of Justice on the Foundations of the Principle of Equity in International Law, in* Forty Years International Court of Justice: Jurisdiction, Equity and Equality 85, 97 (Arie Bloed & Pieter van Dijk eds. 1988).

[2] Some 350 of the 497 titles attributed to Hudson in the Harvard Law School Library catalog relate to international courts, including casebooks, monographs, journal and newspaper articles, Permanent Court of International Justice (P.C.I.J.) opinions, and American Journal of International Law annual reports for the years of 1923–1946 on the P.C.I.J. and I.C.J.

[3] Barbara Kwiatkowska, *The Contribution of the International Court of Justice to the Development of the Law of the Sea* at 22, http://www.uu.nl/content/STOCKHOL140606.pdf (June 15, 2006) (originally Guest Lecture delivered before Faculty of Law at University of Stockholm (March 3, 1998)). Kwiatkowska referred to the "precedential Judge Hudson;" I borrow her label for my chapter's title, to warn against attributing precedential weight where none exists. *See also infra*, note 37.

[4] Diversion of Water from Meuse (Neth. V. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70, at 73–80 (June 28). This is an individual opinion of Judge Hudson.

[5] 1936–1942.

[6] George Bemis (LL.B. 1839) donated this first endowed professorship in the United States dedicated to the study of international law, to honor his teacher, Joseph Story. Hudson held it 1923–1954;

Miller & Bratspies (Eds), Progress in International Law, pp. 451–472.

Associate of the *Institut de droit international*.[7] The *Institut* adopted his draft resolution on the use of equity by international tribunals almost verbatim just some three months after the *Meuse* decision.[8] Hudson's individual opinion in that case is emblematic of his life's work in several ways, exemplifying his compendious ordering of sources and his typically precise application of a concept to the facts at hand.

Memorializing his colleague in 1960, Julius Stone described Hudson as "a legal technician moved by all the doubt-free assumptions of the earlier twentieth-century positivism, which is perhaps the most striking aspect of his life's work."[9] His technician's positivism and insistence on the accuracy and importance of sources[10] also informed Hudson's clear account of the appropriate and limited use of equity in the *Meuse* case.[11] He would likely wonder that subsequent generations continue to debate the proper use of equity by international tribunals. What he saw as a cut-and-dried matter of limited application,[12] international lawyers have re-visited in multiple *fora*.[13]

Edward Strobel 1898–1906; Jens Iverson Westengard 1915–1918; Julius Stone 1956–1957; Louis B. Sohn, 1961–1981; and Detlev Vagts 1984–2005.

7 As of 1936, *see* 40 Annuaire de l'Institut de droit international XXI (1937) [hereinafter Annuaire-1937].

8 The P.C.I.J. Judgment is dated June 28, 1937; the Institute's 10th Commission met September 1. *See* Annuaire-1937, *supra* note 7, at 132 (adopting the Resolution (*Avis*)). *Id*. at 271. *See also* Rosenne, *supra* note 1, at 98 (connecting Hudson and the Institute's equity discussions).

9 Julius Stone, *Manley Hudson: Campaigner and Teacher of International Law*, 74 Harv. L. Rev. 215, 219 (1960). *But see* Tony Anghie, *International Institutions and the Colonial Origins of International Law* at 67, n. 16, http://www.nyulawglobal.org/documents/Anthony_Anghie.pdf (touching on Hudson's critique of "positivist jurisprudence").

10 Stone, *supra* note 9, at 220–21. Hudson's students included Louis Del Duca and Philip C. Jessup, Jr. 1951–52 International Law Class, MOH Papers, HLS Library, Special Collections Folder 160–7 [hereinafter MOH papers].

11 This is not to discount Hudson's acknowledgment of the need to balance Nineteenth Century positivism with later sociological jurisprudence, *see* Anghie, *supra*, note 9, at 6–14 (discussing Hudson and others). In this piece Anghie cites Manley O. Hudson, *The Prospect for International Law in the Twentieth Century*, 10 Cornell L. Q. 419, 434 (1925). Hudson deals more with the need to state a philosophical basis for international law than to retreat from the positivist approach to it: "[T]he future law of nations must seek contributions from history, from political science, from economics, from sociology and from social psychology if it would keep pace with the society which it serves[.]" *Id*. at 434.

12 *Cf*. Rosenne's, *supra* note 1, at 87, 92 (discussing the *Meuse* case); *see also* text accompanying *infra* note 43.

13 *E.g*., Louis B. Sohn, *The Role of Equity in the Jurisprudence in the International Court of Justice, in* Mélanges Georges Perrin 303 (1984); Ruth Lapidoth, *Equity in International Law*, 22 Israel L. Rev. 161 (1987) (also appearing in 81 Am. Soc'y Int'l L. Proc. 126 (1987)); Kwiatowska, *supra* note 3. *See also* Christopher R. Rossi, Equity and International Law: A Legal Realist Approach to International Decisionmaking (1993) (containing comprehensive references to the vast literature on the topic).

As highlighted elsewhere in this book Hudson helped shape early Twentieth Century thinking about international organizations and tribunals, writing volumes about the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ).[14] Throughout his career he chronicled, codified and articulated sources and principles of international law in order to further the work of tribunals in mediating state-to-state relations.[15] In 1927 he established the Harvard Research in International Law (HRIL)[16] as an effort to progressively develop and codify areas of international law[17] and a precursor of sorts to the International Law Commission. One early HRIL project was to codify the law relating to "Territorial Seas." His notes on two other projects, "Nationality" and "Responsibility of States," implicated questions of international dispute settlement and equity.[18] Thus, between establishing the HRIL, chairing relevant ILC sessions, writing his *Meuse* individual opinion and drafting the basic text for the 1937 *Institut de droit international* Resolution/*Avis* on the use of equity by international tribunals, Hudson participated in multiple complementary *fora*, all of which considered – some more or less simultaneously – fundamental questions of equity in international law. Significantly, participants in these *fora* also considered fundamental questions of the law of the sea, including the limits of

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[14] *See* Romano, in this volume.

[15] For an overview of HRIL, *see* Stone, *supra* note 9. *See also* Craig Barker & John P. Grant, (working title not available) (Hein Publishing anticipated 2008) (assessing HRIL).

[16] "The Research in International Law has been organized, under the auspices of the Faculty of the Harvard Law School, in anticipation of the meeting of a First Conference on the Codification of International Law, projected by the Eighth Assembly of the League of Nations to meet at The Hague." Hudson, Research in International Law, Harvard Law School, The Law of Territorial Waters, Tentative Draft No. 2, February 1, 1929 [Confidential, for Use of Members of the Advisory Committee only], Explanatory Note 3, MOH papers, *supra* note 10, Folder 159–7. The HRIL/ASIL collaboration never materialized and HRIL took over the project *See* Frederic R. Kirgis, *The American Society of International Law: The First Hundred Years* at 2, http://www.asil.org/aboutasil/history.html.

[17] The Carnegie Foundation helped fund HRIL. Arthur E. Sutherland, The Law at Harvard 275–76 (1967). Hudson also secured funding from Chester D. Pugsley, President, Westchester County, NY, Bank. Pugsley named the fund after his maternal grandfather John Harvey Gregory. *See* 1929 Hudson-Pugsley correspondence, MOH papers, *supra* note 10, Folder 160–3. Pugsley, an aspiring internationalist, asked Hudson to mention him as a candidate for Under-Secretary of State (Pugsley to Hudson, January 16, 1933, MOH papers, Folder 160–3).

[18] MOH papers, *supra* note 10. *See, e.g.*, Series X, drafts on: Nationality, Folders 50–9 to 51–5; Territorial Waters, Folders 51–6 to 51–11; Responsibility of States, Folders 52–1 to 52–5. *Id*. Some of these projects were published in other fora. *E.g.*, A collection of the Nationality Laws of various Countries, as contained in Constitutions, Statutes and Treaties (Richard W. Flournoy, Jr. & Manley O. Hudson eds. 1929) [Carnegie Endowment for International Peace].

the continental shelf.[19] Hudson appears to have undertaken all of this activity with a belief in codification's ability to harmonize national laws, to restate, clarify and simplify international law and to create new law.[20]

B. *Shared Resources and Equity*

In his 1937 individual opinion for the *Meuse* case, Judge Hudson did what tribunals have often done when dealing with shared uses of rivers and oceans: he considered equity or equitable principles as a means of resolving the dispute. While his opinion invoked equity in the context of deciding appropriate sources of law, the sharing of resources is at least implicated in such disputes, if not at the heart of them. Maritime delimitations, for example, directly affect access to resources in the delimited areas and have at their core the question of how those resources can be fairly allocated amongst national claims. However, until recently the ICJ has consistently declined to recognize that it is taking economic or resource factors into account in making maritime delimitations, even when looking at "relevant circumstances."[21] Some observers would say that the ICJ finally acknowledged the role of economic interests in its 2002 *Nigeria-Cameroon* decision,[22] which involved the first judicial interpretation of the provisions in the U.N. Convention on the Law of the Sea that required delimitations to "achieve an equitable solution."[23] At least one author has commented that the Court "ignored the three states' substantial oil practice"[24] in order to achieve a more equitable division of the subject oil resources when it announced adjustments to the maritime boundary.

Whether in delimitation or other matters, the question of how to achieve appropriate and equitable use and distribution of shared or neighboring resources has become a live issue in contemporary international environmental law. Can this development plausibly be traced to Judge Hudson's proclamations about equity in the *Meuse* decision, given that his primary concern was not with protecting the

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[19] Investigating Hudson's inquiry into questions of equity and law of the sea in these various fora exceeds the scope of this essay.

[20] Hudson, *supra* note 11, at 441, 446–47 (regarding codification as international "legislation").

[21] *See* Rossi, *supra* note 13, at 206 (citing to Judge Oda).

[22] Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), 2002 I.C.J. 94 (Oct. 10), *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=cn&case=94&k=74.

[23] UNCLOS art. 74 & 83. *See infra* note 130.

[24] David D. Caron & Pieter H.F. Bekker, *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening)*, 97 Am. J. Int'l L. 387, 395 (2003).

environment or distributing resources between countries at different levels of development but rather with sources of law?[25] International lawyers in Hudson's generation were more concerned with creating an "international legislator" than with distributing resources, and did not have concepts of environmental equity readily available as part of their vocabulary.[26] Institutions and tribunals were to be a part of the new legislative machinery and would take into account social and economic realities facing the parties.[27] As will be seen, articulation of "sociological jurisprudence" and the accompanying increased reliance on international tribunals had implications for the subsequent development of Western approaches to legal and non-legal norms of international law.

Some thirty years ago Mark Janis began exploring connections between early- and late-Twentieth Century concepts of equity and their implications for natural resource distribution.[28] One key to Janis' work is his lucid discussion of Judge Hudson's unique contribution to the PCIJ's ability to apply principles of equity. Janis shows how Hudson distinguished the Court's ability to apply such principles as "general principles of law recognized by civilized nations" from its capacity or incapacity to act *ex æquo et bono*.[29] Central to Janis' argument is the distinction between what he termed in 1983 the "Western" and "Third World" traditions in international law. He labels this as the difference between equity as corrective justice, on the one hand, in Aristotle's sense of equity as "a corrective

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[25] Not that environmental/resource issues went unnoticed: The *Institut* and HRIL discussed ocean pollution and protection of marine resources. *See, e.g.*, reference to "l'utililisation des produits marins, *héritage commun de tous les hommes." Deuxième Partie, Session de Luxembourg. – Août-Septembre, Résolutions votées par l'Institut au cours de sa XLIe Session*, Annuaire-1937, *supra* note 7, at 268, 269 (emphasis added) (("1.– Les fondements juridiques de la conservation des richesses de la mer" (Vingt-troisième Commission). Legal scholarship may have overlooked this early appearance of the common heritage concept, instead tracing its first enunciation to Arvid Pardo's 1968 speech to the UN General Assembly. *See, e.g.*, Elisabeth Mann Borgese, *The Common Heritage of Mankind: From Non-living to Living Resources and Beyond, in* 2 Liber Amicorum Judge Shigeru Oda 1313 (N. Ando et al. eds. 2002).

[26] *See, e.g.*, Hudson, *supra* note 11, at 446–47.

[27] Conscious that judicial bodies acted as quasi-legislators by contributing to the development of international law, Hudson was careful to conclude at the *Institut's* 1937 meeting that advisory opinions were legal solutions without obligatory character yet helped ensure law's development: "C'est anisi qu'il est très utile de préciser, comme le fait le Rapporteur dans ses considérants, que l'avis consultatif est une solution de droit sans caractère obligatoire et que la procédure de l'avis est susceptible d'assurer le dèveloppement du droit." Statement during the meeting of the Septième Commission, Sept. 2, 1937 (discussing "[l]a nature juridique des avis consultatifs de la Cour permanent de Justice internationale, leur valuer et leur portée en droit international.") Rapporteur: M. Negulesco, Annuaire-1937, *supra* note 7, at 179.

[28] M. W. Janis, *The Ambiguity of Equity in International Law*, 9 Brook. J. Int'l L. 7 (1983).

[29] *See id*. at 11.

of what is legally just,"[30] and, on the other hand, equity as distributive justice, in the post-colonial tradition of the New International Economic Order.[31] To Janis, the Western model is primarily interested in the decision-maker's ability to use equity while the Third World approach looks instead to the *effects* of equity itself. Presumably the Western interest in providing the decision-maker clear guidelines on when to apply equity grew in part out of the post-World War I search for new means of dispute settlement.[32]

C. *Equity as a Corrective Tool for Judges*

Judge Hudson's individual opinion in the 1937 PCIJ *Diversion of Water from the River Meuse* case[33] is a necessary starting point for considering how international tribunals use equity in cases dealing with rivers and oceans. His opinion has been called "precedential"[34] and even credited with elevating equity to the status of a source of international law.[35] But Hudson arguably intended a much more cabined understanding of equity, as is evident in how positivist inclinations pervade his discussion of equity in the *Meuse* case. Moreover, his view of the role of the international judge required restraint and careful application of the tools available to the judge.

Ruth Lapidoth provides a more measured appraisal of Hudson's *Meuse* opinion, calling it "oft-quoted." She also summarizes the PCIJ's decision cogently:

> In this case, the Court refused to grant a remedy to the Netherlands against Belgium [both of whom were diverting water from the River Meuse in violation of their 1863 treaty obligations] because "one party which is engaged in a continuing non-performance of [its] obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party.[36]

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[30] *Id*. at 7-8.

[31] *Id*. at 17. *See also* Lapidoth, *supra* note 13, at 140 (making this connection). *See infra* text accompanying notes 125, *et seq*.

[32] Janis, *supra* note 28, at 9, n. 3 (citing an increase in Western scholarship in the 1930s exploring international decision-makers' discretion to apply equity).

[33] 1937 P.C.I.J. (ser. A/B) No. 70, at 76 (June 28) (separate opinion).

[34] Kwiatowska, *supra* note 3, at 22 (applying the term "precedential" notwithstanding that precedent or *stare decisis* do not operate per se in decisions of international tribunals). *See, e.g.*, Restatement (Third) of the Foreign Relations Law of the United States § 103 cmt. b (1987).

[35] Daniel C. Turack, Book Review, Equity and International Law: A Legal Realist Approach to International Decisionmaking, By Christopher R. Rossi, 4 Tul. J. Int'l & Comp. L. 139 (1993).

[36] Lapidoth, *supra* note 13, at 139 (discussing obligations arising under the Treaty signed at The Hague, May 12, 1863, establishing the regime for taking water from the *Meuse*).

For the majority, the Court's central problem in dealing with the question of equity was that it had "not been expressly authorized to apply equity as distinguished from law."[37] Article 38 of the PCIJ Statute provided that the Court shall apply "[…] 3. The general principles of law recognized by civilized nations […]," and concludes with the phrase "This provision shall not prejudice the power of the Court to decide a case e*x æquo et bono*, if the parties agree thereto." The majority Judgment specified that the Court must limit its inquiry to the terms of the treaty before it, without reference to outside principles.[38] Hudson replied in his individual opinion that "under Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply."[39] This most abbreviated of excerpts is unfortunately the one most often quoted and, while offering a neat maxim,[40] fails to provide the larger context for Hudson's statement.

In his individual opinion Hudson used sources in his careful and compendious fashion, enlisting support from as many contemporary legal traditions as possible (or deemed relevant), and spanning three decades of jurisprudential practice. He was careful not to claim any wide discretion for international judges, pointing instead to limits on that discretion.

> What are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals. Mérignhac, *Traité théorique et pratique de l'Arbitrage International* (1895), p. 295; Ralston, *Law and Procedure of International Tribunals* (new ed., 1926), pp. 53–57.
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> The Court has not been expressly authorized by its Statute to apply equity as distinguished from law. […] Article 38 of the Statute expressly directs the application of "general principles of law recognized by civilized nations," and in more than one nation principles of equity have an established place in the legal system. The Court's recognition of equity as a part of international law is in no way restricted by the special power conferred upon it "to decide a case *ex æquo et bono*, if the parties agree thereto." […] It must be concluded, therefore, that under Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply.[41]

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[37] 1937 P.C.I.J. (ser. A/B) No. 70, at 76.

[38] *Id*. at 5–6.

[39] *Id*. at 77.

[40] Rossi, *supra* note 13, at 160. Rossi states "an unfortunate bit of obiter dictum," and mentions Lapidoth's observation that the phrase "permits a different conclusion" (citing Lapidoth, *supra* note 13, at 176). *Id*.

[41] Meuse, 1937 P.C.I.J. (ser. A/B) No. 70, at 76–77 [citations to works by Anzilotti, Habicht, Lauterpacht, Monskhéli and Strupp 1928–1930 omitted].

The equitable principles he applied here were those of "equality between the parties" and "clean hands."[42] Importantly, he continued:

> The general principle is one of which an international tribunal should make a very *sparing* application. It is certainly not to be thought that a complete fulfilment of all its obligations under a treaty must be proved as a condition precedent to a State's appearing before an international tribunal to seek an interpretation of that treaty. Yet, *in a proper case, and with scrupulous regard for the limitations* which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness.[43]

Hudson invoked these specific principles because he felt that reliance on the Meuse treaty alone was insufficient to resolve the dispute; reaching a legal conclusion required referring to these equitable principles. But this was required only to reach a decision for that specific case. Shabtai Rosenne emphasizes this limitation and the importance of equity in Hudson's analysis:

> To grasp the role of equity in the Court's process of deciding a dispute, attention has to be focused on the dispute as submitted to the Court and on the decision of the Court on *that* dispute, and only secondarily on the reasons expressed for the basis of that decision.[44]

In analyzing subsequent ICJ and arbitral decisions in which equity played a significant role, Rosenne points out: "In all these cases, it is submitted, 'equity' has been used *not in opposition to the law, but to apply the law in particular circumstances* which, thanks to the very generality of the exposition of the rules of the law, must be regarded *as unforeseen by the law*."[45] This conclusion comports broadly with Janis' "Western" view of equity as a corrective to the law as it would otherwise have been applied.

Rosenne sees a parallel to the ICJ's ability to decide *ex æquo et bono* under Article 38, paragraph 2 of its Statute in Article 293, paragraph 2, of the UN Convention on the Law of the Sea (UNCLOS), which he considers to be "a treaty of universal application."[46] Article 293 deals with jurisdiction for compulsory procedures that entail binding decisions (Part XV, Section 2):

1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

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[42] Or in Roman law, Rossi, *supra* note 13, at 161: "*equitas est equalitas* (Equity is Equality), and "*in adimplenti non est adimplendum*" (He who seeks equity must do equity).

[43] Meuse, 1937 P.C.I.J. (ser. A/B) No. 70, at 77 (emphasis added).

[44] Rosenne, *supra* note 1, at 87 (emphasis in original).

[45] *Id.* at 92 (emphasis added).

[46] *Id.* at 96.

2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex æquo et bono*, if the parties so agree.

The Statute of the International Tribunal for the Law of the Sea provides that ITLOS "shall decide all disputes and applications in accordance with article 293."[47] Rosenne points out that, when UNCLOS was being negotiated,

> a proposal was advanced to the effect that the relevant provisions 'shall not prejudice the right of the parties to a dispute to agree that the dispute be settled *ex æquo et bono*'.[48] This reflects the views of the International Law Commission as expressed in Article 10, paragraph 2 of the Model Rules on Arbitral Procedure of 1958.[49]

Referring to the discussion of the ICJ's ability to decide *ex æquo et bono* under Article 38, Rosenne emphasizes that the Court is not limited by that to which the parties agreed, but rather that it may – but is not forced to - decide *ex æquo et bono*, if the parties agree that it should. Rosenne explains:

> This does not mean that the Court can pronounce a decision *ex æquo et bono* only if the parties agree to such a decision by the Court. What it indicates is that nothing in paragraph 1 of that Article regarding the law to be applied by the Court prejudices the capacity of the Court to render a decision *ex æquo et bono* if the parties are in agreement that it should so act.[50]

Literature contemporary to the *Meuse* decision sheds light on how international lawyers of the day associated the role of the international adjudicator with the question of the proper relation between law and equity. Max Habicht's study of PCIJ Article 38, which Hudson cited in his *Meuse* opinion,[51] provides an historical context for the *Procés Verbaux* of the PCIJ's deliberations on sources of law as it prepared its Statute.[52] Habicht's study situates him, Hudson

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[47] ITLOS Statute art. 23.

[48] Rosenne, *supra* note 1, at 96, n. 26 (referring to Third United Nations Conference on the Law of the Sea, Vol. V, U.N. Doc. A/CONF.62/WP.9, at 111, 114; U.N. Doc. A/CONF.62/WP.9/Rev.1, at 185, 190; Vol. VIII, U.N. Doc. A/CONF.62/WP.10, art. 293, at 1, 47).

[49] *Id*. at n. 27 (referring to the Yearbook of the ILC 1958-II (A/3859, Ch. II), 83).

[50] *Id*. at 95.

[51] Max Habicht, The Power of the International Judge to give a decision "Ex Aequo et Bono" (1935), *see* Meuse, 1937 P.C.I.J. (ser. A/B) No. 70, at 77.

[52] P.C.I.J. Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, June 16th to July 24th, 1920, at 335 (1920). Habicht cites Lord Phillimore's emphasis regarding Point 3 of Article 38 as referring to "The general principles … accepted by all *nations in foro domestico." Id*.

and other contemporaries squarely within a group of lawyers interested in the question of international relations and adjudication.[53] The book appears in a series entitled "The New Commonwealth Institute Monographs," whose contributors included Habicht and Hudson as well as René Cassin, Philip Jessup, Hans Kelsen, Georges Scelle, Alfred Verdross, Hans Wehberg and Georg Schwarzenberger. The Institute's object was stated as "[t]he study of fundamental principles of international relations and research into the particular problems of international justice and security."[54] Its publications were divided into three categories: Principles of International Relations; Questions of International Justice, Law and Equity;[55] and Problems of International Security.

Illuminating the debate about ways in which the PCIJ was expected to use equity, Habicht draws on the *Procés Verbaux* to detail how paragraph 2 (allowing the PCIJ to "decide a case *ex æquo et bono*, if the parties agree thereto") was intended to modify the inclusion of Article 38, paragraph 1, point 3. Point 3 was originally phrased to allow the Court to apply "the general principles of justice," but the final version provides that the Court shall apply "[t]he general principles of law recognized by civilized nations." Habicht attributes to Fromageot,[56] the author of Article 38, paragraph 2, the conclusion that paragraph 2 allowed the Court "to base its judgment exclusively on considerations of equity."[57] Providing no source for this quotation, Habicht states: "If [Fromageot] said 'exclusively,' he meant that the Court can disregard the law and that the judgment *ex æquo et*

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[53] In 1935 Habicht was at the League of Nations Secretariat, Legal Section, and 1926–1928 a "member of the Bureau of International Research of Harvard University and Radcliffe College, on whose behalf he undertook an investigation of treaties for the pacific settlement of international disputes." See Max Habicht, Post-war treaties for the pacific settlement of international disputes; a compilation and analysis of treaties of investigation, conciliation, arbitration, and compulsory adjudication, concluded during the first decade following the world war (1931).

[54] Habicht, *supra* note 53, at 89.

[55] *Id*. Habicht lists his book and four others: Schwarzenbeger and Friedmann (*see* notes 123 and 125 *infra*); Walter Schücking, The Principles of an International Equity Tribunal; and Karl Schmid, The Revision of the Peace Treaties by the Application of Principles of Equity (both in preparation).

[56] Habicht, *supra* note 53, at 20–21. Henri Auguste Fromageot (1864–1949), judge on the P.C.I.J. 1929 –1942, French, not listed as member or associate in Annuaire-1937, *supra* note 7, at XIV-XXIV.

[57] Habicht, *supra* note 53, at 25.

bono will be contrary to this law in so far as it is not 'equitable and good.'[58]"[59] While this understanding of Article 38 comports with the "corrective justice" view of equity described by Janis, it differs from Hudson's point in the *Meuse* case. Hudson emphasized that the PCIJ was not to *disregard* the law (the relevant treaty) but rather, when the law provided an insufficient basis for reaching a decision, to be able to draw on the additional source of equitable principles generally recognized by civilized nations.

Here, Hudson's statements at the September 1937 meeting of the *Institut de Droit International* in the Tenth Commission's discussion of "La competence du juge international en équité" are instructive. The *Meuse* decision had been reported in June that year. The *Avis*,[60] which Hudson drafted for the Tenth Commission's Report on the topic, concludes:

> *1° que léquité [sic] est normalement inhérente à une saine application du droit, et que le juge international, aussi bien que le juge interne, est, de par sa tâche même, appelé à en tenir compte dans la mesure compatible avec le respect du droit; 2° que le juge international ne peut s'inspirer de l'équité pour rendre sa sentence, sans être lié par le droit en vigueur, que si toutes les parties donnent une autorisation claire et expresse à cette fin*.[61]

The *Avis* is but a slight modification of Hudson's statement, submitted during discussion in the Tenth Commission.[62] There, Arnold McNair[63] agreed with Hudson

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[58] *Id*. at 27, n. 1 (citing Hudson and Max Huber). *See also* Manley O. Hudson, A Treatise on the Permanent Court of International Justice 530 (1934). "The provision in the Statute … enables the Court under the condition set to go outside the realm of law to reach a solution of a problem presented; it relieves the Court altogether from the necessity of deciding according to law; it removes the limitations both of the existing law and of a law which might be made for future cases; it makes possible a solution based either on law or solely on considerations of fair dealing and good faith, which may be independent of and even contrary to law." *Id*.

[59] Habicht, *supra* note 53, at 25–27.

[60] Annuaire-1937, *supra* note 7, at 271.

[61] *Id*.

[62] Hudson's first paragraph was omitted from the *Avis*, below, which modified the rest of his Statement only slightly:

> Le rôle de l'équité dans le droit est d'inspirer des décisions conformes à la justice en regard des circonstances concrètes sans, pour autant, que le juge dévie de la fidèle application du droit. L'équité est normalement inhérente à une saine application du droit même, et le juge international, aussi bien que le juge interne, est, de par sa tâche même, appelé à en tenir compte dans la mesure compatible avec le respect du droit compatible avec le respect du droit applicable. Le juge international ne peut s'inspirer de l'équité pour rendre sa sentence, sans être lié par le droit envigueur, que si toutes les Patries donnent une autorisation claire et expresse à cette fin.

Annuaire-1937, *supra* note 7, at 148.

[63] *Institut* Associate, Vice Chancellor, University of Liverpool. *Id*. at XXIII.

that one must distinguish the concept of equity from that of jurisdiction *ex æquo et bono*.[64] Hudson expressed disappointment that the Commission's Report[65] failed to mention equity in national courts, where it had had great importance for centuries. Nor did it cite to the numerous U.S. treaties providing that arbiters should decide according to "law and equity."[66] Hudson pointed out that one had to determine what, exactly, *ex æquo et bono* signified, and noted that the question of the competence of the international judge in equity is, in effect, independent of the interpretation of Article 38 and other documents.[67]

Writing seven years later, Hudson observed that Article 38 served "chiefly to enumerate sources to be drawn upon in the Court's *application* of international law. While it is possible for the Court to apply treaty provisions, its task is not to apply but to deduce principles which it may apply from custom, from general principles of law, and from judicial precedents."[68] He observed that paragraph 2, allowing decisions *ex æquo et bono*, "has tended to produce confusion," remarking that in the *Meuse* decision the PCIJ "did not hesitate to apply a principle of equity" and that this application of equity was not "put upon the ground that the Court had been directed by its Statute to apply 'the general principles of law recognized by civilized nations.' "[69] Having distinguished between the application and the deducing of a general principle of international law, he stated:

> Equity may be said to form a part of international law, serving to temper the application of strict rules, to prevent injustice in particular cases, and to furnish a basis for extension where lines have been forged by experience. Hence a tribunal may include principles of equity in the law which it applies, even in the absence of an express mandate.[70]

As though to check oversimplified application of that maxim or other expansive (mis)readings of his oft-cited statement in the *Meuse* case,[71] Judge Hudson continued:

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[64] *Id*. at 148–49.

[65] Rapporteur Eugène Borel, *Institut* Member, honorary professor of public and private international law, member Permanent Court of Arbitration. *Id*. at XV.

[66] *Id*. at 147–48.

[67] *Id*. at 148. "La question de la compétence du juge international en équité est, en effet, indépendante de l'interprétation de l'article 38 du statut de la Cour ou de l'article 28 de l'Acte Général de Genève, qui correspond à des problèmes distincts." *Id*.

[68] Manley O. Hudson, International Tribunals, Past and Future 102, § 5 (1944) (emphasis added).

[69] *Id*. at 103, § 8.

[70] *Id*.

[71] *See supra* note 42.

> The rôle of an international tribunal in finding the applicable law is not one of unbridled freedom, as is sometimes popularly assumed. The categories of materials to be considered have been more or less determined by a long development of international jurisprudence, and standards are available for appraising their value.[72]

He explained that, if a problem "cannot be disposed of by the application of a provision in an agreement in force between the parties, a tribunal must make a wider search, for which numerous guides are available … [t]he process of finding the applicable international law … is not a discretionary process. At every step it calls for the exercise of a judgment disciplined by learning and experience."[73] This and other statements contemporaneously and after the *Meuse* opinion, make clear his view that international judges operate within a limited range of discretion.

For Hudson, equitable principles – as opposed to deciding a case *ex æquo et bono* – were tools to be applied in interpreting and supplementing legal sources that did not provide sufficient guidance within their own terms to settle a dispute. This view is in keeping with Janis' characterization of the Western concept of equity as corrective justice. Hudson understood that equitable principles are not suited to fit all cases but could be used to reach a judicious result in specific cases, possibly to allow for partitioning or mediating the use of a shared resource.

D. *Equity as a Distributive Rule for Water Resources?*

I. *Resource Equity and Rivers*

The *Meuse* case is one of three river cases Stephen McCaffrey analyzes in writing about freshwater cases before the PCIJ and the ICJ. Concentrating "upon the implications of these decisions for non-navigational uses of international watercourses," McCaffrey places his analysis within the larger theme of shared natural resources[74] and discusses the 1937 PCIJ *Meuse* opinion, the 1929 PCIJ *River Oder*[75] case and the 1997 ICJ *Gabčíkovo-Nagymaros* decision,[76] as well as the

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[72] Hudson, *supra* note 68, at 107–08, § 13.

[73] *Id.*

[74] Stephen C. McCaffrey, *International Watercourses in the Jurisprudence of the World Court, in* 1 Liber Amicorum Judge Shigeru Oda, *supra* note 25, at 1313. McCaffrey observes that maritime delimitation cases also contribute to this larger question but space limitations prevented his treatment of them.

[75] Territorial Jurisdiction of the International Commission of the River Oder, 1929 P.C.I.J. (ser. A) No. 23, at 5-46 (Sept. 10); World Court Reports, vol. II, 609 (Manley O. Hudson ed. 1969).

[76] Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia), 1997 I.C.J. 7 (Sept. 25), reprinted in 37 I.L.M. 162 (1998).

1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses.[77]

Like Hudson in the *Meuse* case, the majority in the *River Oder* case concluded that it could not answer the legal question before it by referring only to the provisions of the relevant treaty. At issue was whether the jurisdiction of the International Commission of the Oder, provided for in the 1919 Treaty of Versailles, extended to the Oder's tributaries. The PCIJ was unable to answer this question based solely on the text of the Oder Treaty, so it looked to "the principles underlying the matter to which the [treaty] text refers." These were the legal principles "governing international fluvial law in general…."[78] In the *Meuse* case Hudson looked to underlying equitable principles of equality and clean hands. The PCIJ identified the underlying principle in the *Oder* case as a "common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others."[79] McCaffrey concludes that "Today, the best designation for this common right with regard to such uses is probably 'equitable utilization'."[80] The *Oder* Court was looking not to equitable principles *per se*, but to principles of international law relevant to international rivers, which happened to contain elements of equitable utilization. This approach does not confirm the Court's ability to apply principles of equity in a corrective vein but rather to apply relevant legal principles (which may happen to be equitable). The effect of applying this particular principle – equitable utilization – arguably has more distributive than corrective implications, falling in the realm of what one might term "resource equity."

The ICJ applied relevant principles of law in a distributive vein seventy years later, in the *Gabčíkovo-Nagymaros* decision. McCaffrey finds the ICJ's willingness to apply principles of equitable utilization in 1997 noteworthy for not relying on the relevant treaty but rather deciding on the basis of customary law. He writes:

> [I]t is remarkable that the Court seemed to believe it was obvious that Slovakia's diversion was *per se* a disproportionate response to Hungary's internationally wrongful act (i.e., its breach of the 1977 treaty). And it arrived at this conclusion on the basis of the customary international law of shared water resources – *in fine*, equitable utilization – rather than the 1977 treaty.[81]

The ICJ applied equitable utilization not because it was an *equitable* principle, but because it was a *general* principle of law under Article 38. But equitable

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[77] McCaffrey, *supra* note 74, at 1059.
[78] River Oder, 1929 P.C.I.J. (ser. A) No. 23, at 26.
[79] *Id*. at 27–28.
[80] McCaffrey, *supra* note 74, at 1057.
[81] *Id*. at 1066.

utilization *per se* has more potentially distributive implications. As McCaffrey points out:

> Finally, in discussing the parties' obligations of reparation, the Court states that the consequences of the parties' wrongful acts will be wiped out "as far as possible" if they implement the "multi-purpose program" in an "equitable and reasonable manner." It does not say that the parties must return to the project as originally foreseen in the 1977 treaty, but only that the entire program of "use, development and protection" must be implemented equitably and reasonably.[82]

The *Gabčíkovo-Nagymaros* majority does not cite Hudson's *Meuse* opinion. But, in their separate and dissenting opinions, Judge Koroma and Judge Skubiszewski do. Koroma draws clearly on Hudson's arguments that the equitable principle of clean hands should apply.[83] However, he over-generalizes Hudson's specific reference to the need to consider special circumstances in cases where reparation is sought:

> Judge Hudson continued, 'Yet, in a particular case in which it is asked to enforce the obligation to make reparation, a court of international law cannot ignore special circumstances which may call for the consideration of equitable principles.' It is my view that this case, because of the circumstances surrounding it, is one which calls for the application of the principles of equity.[84]

Koroma's general call to apply equitable principles and consider special circumstances is based in part on having detailed some of those circumstances in his opinion. However, by closing with such a general reference to principles of equity, in the plural, he does not make clear which of such principles he would have the court apply or whether he is more interested in an equitable outcome. This is in contrast to Hudson's admonition, which Koroma cites earlier, to use equitable principles sparingly and "with scrupulous regard for the limitations which are necessary."[85]

Skubiszweski is clearer in his reference to Hudson's use of the general principle of clean hands, which happens to be an equitable principle. He argues that only

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[82] *Id*. at 1067.

[83] Judge Koroma appears to refer to the equitable doctrine of clean hands: "In the light of the foregoing considerations, I take the view that the operation of Variant C should have been considered as a genuine attempt by an injured party to secure the achievement of the agreed objectives of the 1977 Treaty, in ways not only consistent with that Treaty but with international law and equity." Case concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia), 1997 I.C.J. 7 (separate opinion of Judge Koroma).

[84] *Id*.

[85] Meuse, 1937 P.C.I.J. (ser. A/B) No. 70, at 78. *See* Koroma, *supra* note 83 (citing Meuse).

Hungary, and not Czechoslovakia, "followed a policy of freeing herself from the bonds of the Treaty"[86] and that the ICJ should have applied the equitable doctrine of clean hands to Czechoslovakia's benefit.[87] This approach arguably qualifies as a corrective use of the tool of equitable principles. However, Skubiszewski goes further and argues for applying yet other principles of equity, in a way that comports more with distributional concerns that Janis describes as relating to the effects of the parties' actions of the Court's decision itself. Skubiszewski cites to several ICJ opinions, including the 1982 Tunisia-Libya continental shelf decision, in which equity is considered not in any iteration of individual equitable principles applicable to the case at hand but more broadly as "a direct emanation of the idea of justice."[88] In this regard Skubiszewski's approach begins to parallel that of Koroma, raising the question of whether both judges' relatively non-specific references to equity not only contradict Hudson's limited approach to the use of specific equitable principles but have contributed to the general imprecision with which the term equity is understood in decisions of international tribunals.

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[86] Case concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia), 1997 I.C.J. 7, para. 2 (Sept. 25) (dissenting opinion of Judge Skubiszweski).

[87] *Id*. at paras. 16 & 17:

> 16. In paragraph 72 of its Judgment the Court makes clear that it is aware of the serious problems with which Czechoslovakia was confronted as a result of Hungary's action. … The Court should have made a step further and applied equity as part of international law. It would then have arrived at a holding that would have given more nuance to its decision.
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> 17. In the case relating to the *Diversion of Water from the Meuse* Judge Hudson observed (*1937, P.C.I.J., Series A/B, No*. 70, p. 77): It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party.

[88] *Id*. at para. 19: "The impossible situation in which Hungarian action put Czechoslovakia speaks strongly in favour of the application of equitable principles by the Court in evaluating Variant C.… [e]quity as a legal concept is a direct emanation of the idea of justice. … [T]he legal concept of equity is a general principle directly applicable as law" Continental Shelf Case (Tunisia/Libyan Arab Jamahiriya) (Tunis. V. Libayn Arab Jamahiriya), 1982 I.C.J. 18, 60, para. 71 (Feb. 24)). The Court's "decisions must by definition be just, and therefore in that sense equitable." North Sea Continental Shelf Case (F.R.G. v. Den./F.R.G v. Neth.), 1969 I.C.J. 3, 48–49, para. 88 (Feb. 20). "[A]n equitable solution derive[s] from the applicable law." Fisheries Jurisdiction Case, 1974 I. C.J. 3, 33, para. 78; 202, para. 69 (July 25). Both "the result to be achieved and the means to be applied to reach the result" must be equitable. "It is, however, the result which is predominant; the principles are subordinate to the goal." Continental Shelf at 59–60, para. 70.

2. *Resource Equity and Oceans*

From the earliest days of the International Law Commission Hudson was involved in its efforts to define state interests in the ocean. He presided at its first session in 1949, when the project of codifying the territorial sea regime was introduced.[89] The term "equitable principles" had made its first appearance in the context of maritime delimitation, being introduced in the 1945 Truman Proclamation on the Continental Shelf.[90] Shortly thereafter the ICJ began elaborating upon what "equitable principles" meant in the maritime delimitation context.[91]

Rosenne uses the phrase "equality is equity" when observing that "Judge Hudson's views [in the *Meuse* opinion] have received the strong endorsement of his compatriots, Judge Jessup in the *North Sea Continental Shelf* cases and Judge Dillard in the *Fisheries Jurisdiction* case."[92] In the former cases, the Court rejected Germany's essentially distributive claim for a "just and equitable share" test as being

> wholly at variance with … the most fundamental of all the rules of law relating to the continental shelf … namely, that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land … In short, there is here an inherent right.[93]

This natural prolongation approach, rather than the equidistance approach the Court rejected, was subsequently codified in UNCLOS Article 76(1) on "Definition of the Continental Shelf." Article 76 relies on "natural prolongation," and says nothing about equity or equitable principles in defining the Continental Shelf.

In the *North Sea Continental Shelf* cases, the Court decided that customary international law required the parties to negotiate the specific delimitations with reference to equitable principles and "taking account of all the relevant circumstances."[94] The ICJ treated the three states in a way it considered to be equal by

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[89] 81 Am. Soc'y Int'l L. Proc. 75 (1987), Remarks, Gerard J. Mangone, convening "The Law of the Sea: Customary Norms and Conventional Rules" panel.

[90] Presidential Proclamation No. 2667, September 28, 1945. *See, e.g.*, 1969 I.C.J. 3, paras. 47, 86, 100.

[91] Starting with *North Sea Continental Shelf*, 1969 I.C.J. 3, 1.

[92] Rosenne, *supra* note 1, at 8 (footnotes omitted). 1969 I.C.J. 3, 84 (separate opinion of Judge Jessup); 1974 I.C.J. Reports 3, 63, n. 1 (separate opinion of Judge Dillard); *cf.* the majority: "Equity does not necessarily imply equality." 1969 I.C.J. 3, 49, para. 91.

[93] North Sea Continental Shelf, 1969 I.C.J. 3, 22, para. 19.

[94] *Id.* at paras. 83-101; para. 101(C)(1) "delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other."

using the geographic fact of their respective coastlines as a starting point, then requiring them to negotiate in such a way that adjustments agreed to would lead to a fair result.[95] Rossi, on one hand, describes this move as "the beginning of the Court's attempt to derive [a geographic] structure and [reasonable proportionality] standard."[96] He contends that the "Court's usage of equality comported with Aristotle's notion of universal justice [which] required the Court to do what was lawful," in this case to "place a primacy on geographical considerations."[97] Rossi also sees the Court as assuming an "initial state of absolute equality" but not yet, as a normative matter, applying distributive justice.[98] Lapidoth, however, sees a distributive element in the *North Sea* cases' reference to proportionality as one of the relevant circumstances: "The principle of proportionality has been a guiding idea in particular in matters related to the distribution of natural resources, *e.g*. water."[99]

Germany's non-ratification meant that the relevant convention could not provide grounds for decision so the ICJ turned to the customary rule requiring equitable principles to be used in determining maritime delimitations. But what should happen when a treaty *does* apply and contains extensive references to equitable considerations (admittedly distinguishable from "equitable principles")? When the convention incorporates equitable considerations in its very terms is there no need to resort to them in interpreting the convention? Does equity provide a guideline for interpreting all aspects of the treaty, or only for those provisions mentioning equitable considerations or principles? Are equitable considerations and principles to be applied as corrective rules of decision or as distributive mandates? These are questions beyond the scope of this chapter, but Janis and Rosenne have begun to address them with respect to UNCLOS.[100] Their groundwork suggests a few areas for potentially fruitful research.

Janis effectively categorized the many references to equity or equitable considerations in UNCLOS, tying them loosely to his own distinction between corrective and redistributive equity.[101] Although UNCLOS is replete with such references, it

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[95] *Id*. para. 99

[96] Rossi, *supra* note 13, at 239-41.

[97] *Id*. at 240. Rossi's presentation of equity in Aristotle's notion of "universal justice" does not conflict overtly with Janis' focus on the corrective function of equity in the "Western" model; but Rossi emphasizes more the potential for distributive corrective action than does Janis.

[98] *Id*. at 240.

[99] Lapidoth, *supra* note 13, at 178-79.

[100] *See, e.g*., Janis, supra note 28, at 28; Rosenne, *supra* note 1, at 104.

[101] United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF 62/122 (Oct. 7, 1982).

is not clear how consistently the terms are used, nor how often they represent a compromise of divergent views. A closer investigation of the Official Records and other negotiating histories on this point is one area for further research. One question is whether such negotiating compromises somehow instigated or accelerated the movement toward greater reliance on soft law instruments when the rigorous application of equity as equitable principles was not politically feasible.

As Lapidoth points out, the UNCLOS preamble contains three references to the terms "equitable" or "equal".[102] These and other references to equity in UNCLOS suggest at least some connection to the 1974 Declaration on the Establishment of a New International Economic Order [NIEO],[103] the related 1974 Programme of Action on the Establishment of a New International Economic Order[104] and the 1974 Charter of Economic Rights and Duties of States.[105] Janis sees an influence of these three Resolutions on the use of the term "equity" in what was then recent international practice, including UNCLOS and other documents.[106] Just two examples suggest the need for a thorough and sophisticated genealogy of references to equity in UNCLOS, beyond the following simple identification of linguistic similarities between documents: The Declaration on the Establishment of a NIEO provides that "The benefits of technological progress are not shared equitably by all members of the international community."[107] The preamble to that Declaration draws a direct link between equity and correction of inequalities, stating that the NIEO is "based on equity … which shall correct inequalities. …" Lapidoth helpfully enumerates the individual Articles in UNCLOS that use the term equity or equitable[108] and, more

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[102] Lapidoth, *supra* note 13, at 165-66. The preamble refers to "a legal order for the seas which will … promote the peaceful uses of the seas and oceans, the *equitable* and efficient utilization of their living resources …"; to "a just and *equitable* international economic order"; and to "the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and *equal* rights." (emphasis added). *Id.*

[103] G.A. Res. 3201 (S-VI), 6 (Special) U.N. GAOR Supp. (No. 1) 3, U.N. Doc. A/9556 (May 1, 1974), reprinted in 13 I.L.M. 715, 715-16 (1974).

[104] G.A. Res. 3202 (S-VI), 6 (Special) U.N. GAOR Supp. (No. 1) 5, U.N. Doc. A/9556 (May 1, 1974), reprinted in 13 I.L.M. 720, 722 (1974).

[105] G.A. Res. 3281 (XXIX), 29 U.N. GAOR Supp. (No. 31) 50, U.N. Doc. A/9631 (1974), reprinted in 14 I.L.M. 251, 252 (1975).

[106] Janis, *supra* note 28, at 20. *See also* Rossi, *supra* note 13, at 197.

[107] GA Res. 3201, *supra* note 103, at 3, para. 1.

[108] Janis, *supra* note 28, at 16; Lapidoth, *supra* note 13, at 140. In addition to specifying the Preamble and Art. 59 of UNCLOS as containing references to equity, Lapidoth says that the Convention "envisages an "equitable solution" to problems of delimitation of the continental

recently, Tanaka referred to Articles 74 and 83 as adopting a corrective equity approach.[109]

Article 59 is potentially the most interesting UNCLOS provision for examining potentially redistributive references to equity. Article 59, which Lapidoth observes upon "most remarkably"[110] and which Shearer terms "perhaps the most extraordinary in the whole convention"[111] provides that conflicts between the interest of the coastal state and any other state in the EEZ "should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."[112] As Shearer points out, this "appears to negate the legal presumption which would ordinarily follow the concept of the EEZ as an area of high seas that any doubts as to rights or jurisdiction should be resolved in favour of high seas freedoms."[113] Shearer continues:

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shelf and the [EEZ] of opposite and adjacent states (articles 74 and 83); it foresees an "equitable geographical distribution of membership in the organs of the International Seabed Authority (articles 161(1)(e) and 163); the profits to be derived from activities in the deep seabed lying beyond areas of national jurisdictions are to be distributed on the basis of equitable sharing (articles 140, 155(2), 162(2)(n), 160(2)(j), 173(2)); similarly, the income from payments made with respect to the exploitation of the continental margin beyond the 200-mile zone, is to be distributed "on the basis of equitable sharing criteria" (article 82(4)); landlocked and geographically disadvantaged states should participate, on an equitable basis, in the exploitation of the fish in [EEZs] of states in the same region (articles 69 and 70); the transfer of marine technology on an equitable basis should be encouraged (article 266(3)).".

[109] Yoshifumi Tanaka, *Reflections on Maritime Delimitation in the Cameroon/Nigeria Case*, 53 Int'l & Comp. L.Q. 369 (2004). The articles provide that, as between States with opposite or adjacent coasts, the EEZ (Article 74(1)) and the continental shelf (Article 83(1)) "shall be effected by agreement on the basis of international law, as referred to in Article 38 [of the ICJ Statute], in order to achieve an equitable solution."

[110] Lapidoth, *supra* note 13, at 166.

[111] I.A. Shearer, *Problems of Jurisdiction and Law Enforcement against Delinquent Vessels*, in Law of the Sea 427, 440–41 (Hugo Caminos ed. 2001).

[112] UNCLOS Article 59 provides in whole: "In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal States and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."

[113] Shearer, *supra* note 111, at 440–441.

> It remains to be seen whether this provision will be regarded by international tribunals as constituting a legal norm for the resolution of conflicts arising in the EEZ, or whether its function is merely to provide a directory basis for diplomatic exchanges or for conciliation under Part XV. The phrase "should be", as well as the unspecified nature of "equity" in this context, point in the latter direction.[114]

Rosenne concludes that Article 59 "contains what may be the first direct allusion to 'equity' pure and simple."[115] To date the ITLOS has not had to consider Article 59.

E. *Conclusion*

To conclude this chapter and the list of suggested research topics, I return to individual lawyers' writings about equity and international organization. Enticing bibliographic entries in the New Commonwealth Series referenced above[116] offer promising starting points for investigating how Hudson's contemporaries thought about equity in the periods between and following the two World Wars.[117] Of the three works edited or written by Wolfgang Friedmann (1907–1972)[118] Gustav Radbruch (1878–1949)[119] and Georg Schwarzenberger (1908–1991),[120] what became of the American Proposal for an International Equity Tribunal discussed by Schwarzenberger and Ladd, or Friedmann's analysis of English contributions to the idea of an equity tribunal? Did they, like Hudson, place great faith in the ability of international tribunals to apply equity within the limits of judicial restraint and thus to prevent or replace more violent forms of state conflict? What were their connections to other internationalists of their day and how did

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[114] *Id.* at 441.

[115] Rosenne, *supra* note 1, at 103.

[116] See *supra* notes 56 & 57 and accompanying text.

[117] Rossi, *supra* note 13, at 143–48 (describing the New Commonwealth Institute's attempt to create an international equity tribunal as "The Positivists' Response" to the "resurgence of naturalism"). *Id.* at 143.

[118] Wolfgang Gaston Friedmann, The contribution of English equity to the idea of an international equity tribunal (1935) [preface by Sir William Holdsworth].

[119] Norman Bentwich, A. S. De Bustamante, Donald A. MacLean, Gustav Radbruch & H.A. Smith, Justice and equity in the international sphere (1936).

[120] Georg Schwarzenberger, William Ladd; an examination of an American proposal for an international equity tribunal (1935) [preface by James Brown Scott].

they debate and affect each others' thinking about equity? Did thinking about equity as a distributive mechanism take root there? How did the subsequent trauma of World War II shape their thinking from the 1930s about equity tribunals? Modeling even part of such inquiries on conferences like the one convened in Idaho in 2005 on which this book is based, and which had as its aim the commemoration of the public debate between Senator William Borah and Professor Manley O. Hudson at the University of Idaho in 1931, would serve well the field of international legal biography and improve our historical and contemporary understanding of the use of equity by international tribunals.

The Role of Transnational Judicial Dialogue in Shaping Transnational Speech: International Jurisdictional Conflicts in Hate Speech and Defamation Law

By Melissa A. Waters

A. *Introduction*

Reading Harvard Professor Manley O. Hudson's lectures at the University of Idaho from nearly a century ago, one is struck by the profound sense of optimism with which international lawyers of his era greeted the launch of the great liberal internationalist experiment. Hudson spoke for a generation of scholars and policymakers in stating his firm belief that institution building was the key to the lasting world-wide peace that had eluded previous generations. Institutions were, in his words, "the great simplifiers of human problems."[1] To Hudson, the founding of the League of Nations and the concomitant growth of a complex web of international institutions marked "the beginning of a new era in organized international life."[2] And his generation would be remembered, Hudson was convinced, "for the progress which we have made in organizing the world for co-operation and peace."[3]

To the, perhaps, too-jaundiced eye of the 21st century scholar, Hudson's uncomplicated faith in the emerging international legal system of his day seems somewhat naïve. In the United States, at least, liberal internationalism – the dominant paradigm for international cooperation and governance for the latter half of the 20th century – is increasingly under attack from all sides.[4] As the complex web of

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[1] Manley O. Hudson, Progress in International Organization 121 (1932).

[2] *Id*. at 23.

[3] *Id*. at 5.

[4] I use the term "liberal internationalism" to describe a system for international cooperation and governance based on multilateral negotiation of treaties, and the creation of a variety of international institutions to oversee implementation of those treaties. Other scholars have adopted similar, though not identical, definitions of liberal internationalism. *See, e.g.*, Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 Va. J. Int'l L. 1, 17–19 (2002) (liberal internationalism is a paradigm for international cooperation

Miller & Bratspies (Eds), Progress in International Law, pp. 473–490.

international institutions expands its reach into fields that were previously the exclusive province of domestic authorities, U.S. policymakers increasingly question the wisdom of participating in such institutions.[5] International law and international relations theorists alike argue that liberal internationalist theory no longer captures the reality of international lawmaking; moreover, they question whether international institution building has reached the limits of its potential.[6]

Scholars posit a range of alternatives to Hudson's liberal internationalist faith in treaty-making and institution building. The emphasis for many modern scholars is on "trans-" rather than "inter-" national lawmaking.[7] Moreover, no longer is international

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consisting of "an ever-increasing number of international institutions, constituted by a legally binding treaty, with expanding powers of governance"); David P. Fidler, *Caught Between Traditions: The Security Council in Philosophical Conundrum*, 17 Mich. J. Int'l L. 411, 430 (1996) ("liberal internationalism" is "the tradition of liberal thought that views international organization as vital to the maintenance of international peace and security"); Anne-Marie Slaughter (formerly Anne-Marie Burley), *Toward an Age of Liberal Nations*, 33 Harv. Int'l L.J. 393, 394 (1992) (liberal internationalism is the "belief 'in the necessity of leadership by liberal democracies in the construction of a peaceful world order through multilateral cooperation and effective international organizations.'" (quoting Richard N. Gardner, *The Comeback of Liberal Internationalism*, Wash.U. Q., Summer 1990, at 23)).

[5] A recent example is the controversy over U.S. consular notification obligations under the Vienna Convention on Consular Relations. In a series of decisions the International Court of Justice ruled that the United States had a treaty obligation to provide review and reconsideration of state court criminal proceedings against foreign nationals whose consular notification rights had been violated. *See* La Grand Case (Ger. v. U.S.), 2001 I.C.J. 1 (June 27); *see also* Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31). The Administration of U.S. President George W. Bush ordered the states in question to grant review pursuant to the ICJ ruling. Memorandum from President George W. Bush to U.S. Attorney General, Compliance with the Decision of the International Court of Justice in Avena (Feb. 25, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html. President Bush subsequently withdrew the United States from the Optional Protocol to the Vienna Convention, thus depriving the ICJ of jurisdiction over any future dispute between the United States and other state parties to the Vienna Convention. *See* United Nations, Status of Multilateral Treaties Deposited with the Secretary General, ch. III, § 8 n.1 (2006), available at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty33.asp#N1 (reporting March 7, 2005 letter from U.S. Secretary of State to United Nations (U.N.) Secretary-General that withdrew United States from Optional Protocol).

[6] *See, e.g.*, Anne-Marie Slaughter, A New World Order 8 (2004) (acknowledging that "the international institutions created in the late 1940s … are outdated and inadequate to meet contemporary challenges," but arguing that "world government is both infeasible and undesirable" because it presents "an unavoidable and dangerous threat to individual liberty").

[7] Scholars from the transgovernmentalism school, for example, argue that the real action in international lawmaking is in the worldwide growth of transgovernmental networks among regulatory agencies. *See* Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 Va. J. Int'l L. 1 (2002); Anne-Marie Slaughter,

lawmaking the exclusive province of a unitary executive (with occasional oversight by the legislative branch). Instead, the state itself is disaggregating,[8] and new actors – both public and private – are becoming active participants in shaping international legal norms and influencing the direction of international institutions.[9]

While 21st century scholars should be cautious in sounding the death knell of the last century's great liberal internationalist experiment, there is no question that a sea change is occurring in the processes by which international legal norms are developed and enforced.[10] Nowhere is this change more evident than in the transformation over the last few decades of the role of the domestic court. Courts worldwide are beginning to participate in what I have elsewhere described as an emerging transnational judicial dialogue – that is, an informal network of domestic courts, interacting and engaging each other in a rich and complex conversation on a wide range of issues.[11] Through their participation in transnational judicial dialogue, domestic courts are becoming important transnational actors in developing and enforcing both transnational legal norms and, in some cases, customary international law itself.[12] As such, transnational judicial dialogue offers a wholly new kind of "progress in international organization" – one that is rooted in transborder communication among *domestic* institutions, rather than in the international institutions that were the focus of Professor Hudson's life work.[13]

Much of the scholarship on transnational judicial dialogue has focused on its impact on the interpretation of certain human rights – particularly those dealing

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Governing the Global Economy Through Government Networks, in The Role of Law in International Politics 204 (Michael Byers ed., 2000). Transnational legal process scholars, for their part, argue that international lawmaking is the product of a three-phase process of interaction, interpretation, and internalization of legal norms. *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599, 2646 (1997); Harold Hongju Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181, 183-84 (1996).

[8] *See* Hoffmann, in this volume.

[9] *See* Anne-Marie Slaughter, *The Real New World Order*, 76 Foreign Affairs 183, 184 (1997). Slaughter notes that "[t]he state is not disappearing, it is disaggregating into its separate, functionally distinct parts. These parts – courts, regulatory agencies, executives, and even legislatures – are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order." *See* Schurtman, in this volume; Miller, in this volume; Kaiser, in this volume; Sadat, in this volume.

[10] *See, e.g.*, Slaughter, *supra* note 6. *See* Oellers-Frahm, in this volume; Guzman & Meyer, in this volume.

[11] *See* Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 Geo. L.J. 487 (2005).

[12] *See, e.g., id.* (describing the role of transnational judicial dialogue in developing customary international law on inhuman and degrading treatment or punishment in the death penalty context). *See* Guzman & Meyer, in this volume; Ku, in this volume.

[13] *See* Iontcheva-Turner, in this volume.

with the protection of the person. The goal of this chapter is to explore a lesser known but equally important phenomenon: the emergence of judicial dialogue regarding the transnational regulation of speech (for example, speech on the Internet).[14] As we shall see, in the emerging transnational speech dialogue, judicial battles over the proper limits of extraterritorial jurisdiction have played a key role in shaping emerging international norms regulating speech.[15]

One of the most important arenas for the emerging transnational speech dialogue involves lawsuits based on Internet publication of allegedly defamatory statements. Caught in the crossfire are American media corporations who publish online content on their U.S.-based websites. Because a defamatory statement uploaded in an online publication in the United States can be downloaded and read anywhere in the world, online publishers face potential liability in hundreds of jurisdictions worldwide for a single defamatory statement. Because defamation laws vary widely across jurisdictions, plaintiffs may engage in international forum shopping to seek the most favorable jurisdiction for their defamation claim. In short, publishers fear that they may face liability in any country in the world – "from Afghanistan to Zimbabwe," as the Dow Jones Corporation famously complained in defending a recent defamation suit.[16] Moreover, American publishers view themselves as particularly vulnerable to lawsuits in foreign jurisdictions that do not offer the broad protections of the First Amendment.

This chapter explores the emerging transnational judicial dialogue on speech through the lens of American media corporations' battle – thus far largely a losing battle – to defend themselves from defamation suits in foreign courts for online content posted on U.S.-based websites. I argue that the courts hearing these suits are beginning to use legal doctrines such as jurisdiction and judicial comity, as well as traditional comparative law, to conduct a kind of nascent dialogue. The dialogue focuses not only on the difficult *jurisdictional* issues raised by Internet speech; courts are also using these jurisdictional debates to participate in dialogue regarding the *substantive content* of transnational speech norms.

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[14] *See* Waters, *supra* note 11, at 529–54.

[15] Paul Berman points out that cyberspace creates "an inevitable problem of extraterritoriality" because it "creates the possibility (and perhaps even the likelihood) that content posted online by a person in one physical location will violate the law in some other physical location." Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. Pa. L. Rev. 311, 337 (2002). *See* Holger P. Hestermeyer, *Transboundary Harm: Internet Torts, in* Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration 268 (Rebecca Bratspies and Russell Miller eds., 2006).

[16] *See* Gutnick v. Dow Jones & Co., Inc., (2002) 210 C.L.R. 575, 609, para. 54 (Austl.).

The chapter also explores the role that litigants are playing in shaping the emerging transnational speech dialogue. Some U.S. corporations are beginning to pursue aggressive litigation and public relations strategies in the United States and abroad, and even before international tribunals,[17] in an attempt to extend U.S. First Amendment protections to Internet speech that runs afoul of foreign defamation laws. Indeed, U.S. media corporations like Dow Jones are acting as *transnational norm entrepreneurs*.[18] Rather than simply seeking U.S. court protection from foreign libel judgments, they are going on the offensive by engaging in *norm export*, that is, they are attempting to export American speech norms to the rest of the world.

In short, one can view the growing jurisdictional battles in the Internet defamation arena as a struggle over the creation and evolution of transnational speech norms, a struggle in which domestic courts are playing an important role. Through this lens, the overarching questions for both litigants and courts are these: Will norms on speech converge toward a single normative standard as a result of transnational litigation? If so, *whose* speech norms will become the dominant normative standard – the very broad speech protections offered by the U.S. First Amendment, or the much more restrictive speech norms of many other countries? I will explore these questions by recounting the recent (mis)adventures

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[17] *See* Miller, in this volume.

[18] Harold Hongju Koh describes "transnational norm entrepreneurs" as individuals or transnational non-governmental organizations who serve as important agents of transnational legal process by assisting states in internalizing international norms. *See* Harold Hongju Koh, *Bringing International Law Home*, 35 Hous. L. Rev. 623, 648 (1998). In Koh's conception, transnational norm entrepreneurs: "(1) 'mobilize popular opinion and political support both within their host country and abroad'; (2) 'stimulate and assist in the creation of like-minded organizations in other countries'; (3) 'play a significant role in elevating their objective beyond its identification with the national interests of their government'; and (4) often direct their efforts 'toward persuading foreign audiences, especially foreign elites, that a particular [normative] regime reflects a widely shared or even universal moral sense, rather than the particular moral code of one society.'" *Id.* (quoting Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 Int'l Org. 479, 482 (1990)). The term appears most frequently in international human rights law scholarship. *See, e.g.*, Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. "War on Terrorism"*, 5 Theoretical Inquiries L. 47, 77 (2004). My use of the term "transnational norm entrepreneur" differs in some respects from Koh's conception. He and other transnational legal process scholars have tended to focus largely on the role of transnational norm entrepreneurship in internalizing international norms into domestic legal systems. My focus here is on the important role that transnational norm entrepreneurs can play in exporting domestic norms to foreign legal systems, thus shaping the content of emerging international norms. *See generally* Waters, *supra* note 11, at 499–505 (describing relationship between international and domestic law as a co-constitutive process of norm development, involving both norm export and norm convergence).

of two U.S. media companies – Dow Jones and the *Washington Post* – in the Internet defamation arena. I conclude that the emerging roles of multinational corporations as norm entrepreneurs, and of domestic courts as transnational adjudicators, offer both promise and risk. They thus defy easy labels of "progress," or otherwise, in international organization.

B. Dow Jones v. Harrods and Al Fayed[19]

Dow Jones' first foray into transnational defamation litigation came as the result of an April Fool's joke gone bad. On March 31, 2002, Harrods Department Store in London issued a press release announcing that its owner, Mohamed Al Fayed, planned to "float" Harrods. The press release declared that the following day, Al Fayed would make an important announcement regarding his future plans for the store. The release directed journalists to contact "Loof Lirpa" (April Fool spelled backward) at Harrods for further information. On April 1, Harrods delivered the punch line, announcing that Al Fayed would "float" Harrods by building a ship version of the department store to be moored on the Thames River.[20]

Apparently having missed the joke, Dow Jones published a front-page article in the Wall Street Journal on April 1, reporting that Harrods would be disclosing that day plans to take the company public – that is, to "float shares" of Harrods' stock. A few days later, Dow Jones ran a correction entitled *The Enron of Britain*?, in which it acknowledged its mistake and commented, "If Harrods […] ever goes public, investors would be wise to question its every disclosure."[21] While Dow Jones would later contend that the correction article represented the *Wall Street Journal's* "own brand of wry, light-hearted humor,"[22] Harrods and Al Fayed were not amused. Harrods notified Dow Jones that it was preparing to file a defamation action in the domestic courts of the United Kingdom, and requested that Dow Jones provide certain "pre-action disclosures" pursuant to British law.[23] Dow Jones' response was to attempt a preemptive strike against the UK defamation action. It ignored Harrods' request for pre-action disclosure, and instead filed its own suit against Harrods in the United States District Court for the Southern District of New York.[24]

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[19] Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394 (S.D.N.Y. 2002).
[20] *Id.* at 399–400.
[21] *Id.* at 400–01.
[22] *Id.* at 401.
[23] *Id.* at 402.
[24] *See id.*

Dow Jones' strategy was to adapt to its own uses the (then successful) approach of the Yahoo! corporation in its ongoing battle with French anti-hate groups.[25] In *Yahoo! v. La Ligue Contre Le Racisme et L'Antisemitisme*,[26] Yahoo! had convinced a U.S. District Court in California to issue a declaratory judgment against the French groups. The judgment declared that a French court's previous order requiring Yahoo! to block French citizens' access to Yahoo!'s U.S.-based website was unenforceable under U.S. law. In issuing the declaratory judgment, the trial court in *Yahoo*! was acting proactively; the French parties had not sought to enforce the French court's order in the United States, nor did they have any intention of doing so at that time.[27] By asserting its jurisdiction over the matter, and by proactively engaging in the dispute, the *Yahoo*! court seized the opportunity to participate in a kind of dialogue with the French court over the proper boundaries of extraterritorial regulation of transnational speech. More importantly, the *Yahoo*! court declared its willingness to serve as an active defender on the transnational plane of American speech norms, and of U.S. corporations who might run afoul of other countries' speech laws.[28]

In its dispute with Harrods, Dow Jones adopted a similar but more ambitious strategy. It, too, asked the U.S. court for a declaratory judgment protecting it from any future British court judgment. But it went a considerable step further, asking the court to issue an injunction barring Harrods from pursuing the defamation action not only in the United Kingdom, but in any other judicial forum in the world.[29] Dow Jones' rationale for such a breathtakingly broad request was essentially that the Internet has had a transformative impact on transnational speech, thus presenting U.S. courts with a unique opportunity: "At the cusp of

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[25] *See* Hestermeyer, *supra* note 15.

[26] 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

[27] *See id*. at 1188. The French parties asserted that the U.S. court lacked jurisdiction over the matter on the ground that there was no "actual controversy" before the U.S. court because the matter was still pending in France. *Id*. They argued in the alternative that the U.S. court should abstain from exercising its jurisdiction because Yahoo! was engaging in international forum shopping. *See id*. at 1191 ("Yahoo! simply is unhappy with the outcome of the French litigation and is trying to obtain a more favorable result [in the U.S.].").

[28] *See* Waters, *supra* note 11, at 532–35. Yahoo!'s victory in the U.S. courts was short-lived, however. The Ninth Circuit, sitting en banc, reversed the district court's ruling in a badly fractured 6-5 decision. *See* Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199 (2005). Of the six-member majority, three judges concluded that the case was not ripe for review, while the remaining three judges determined that the district court lacked personal jurisdiction over the French defendants. *Id*.

[29] *See* Dow Jones, 237 F. Supp. 2d at 418. According to the court, "[w]hat Dow Jones asks this Court to do, in general terms distills to this: to apply the [Declaratory Judgment Act] as a defensive shield, a preemptive means to immunize a litigant from the inevitable costs and inconveniences attendant to any form of potential litigation arising from the party's alleged wrongful acts." *Id*.

this momentous development […] United States courts are uniquely poised to seize the opportunity to reinforce and enlarge the First Amendment protections American publishers enjoy so as to bar preemptively potential liability for any alleged defamation injury their commercial activities […] may cause in foreign jurisdictions."[30] Thus, Dow Jones was inviting the U.S. court not merely to add its voice to the transnational judicial dialogue over regulation of the Internet, as the *Yahoo*! court had done. It was also asking the court to seize the opportunity to ensure a powerful role for American Courts and American free speech protections in the dialogue over transnational regulation of speech.

The court, however, refused to take up Dow Jones' challenge. It ruled that it would violate principles of comity for a U.S. court to attempt to preempt the U.K. lawsuit. The court declared:

> Under Dow Jones' hypothesis, the Declaratory Judgment Act would confer upon an American Court a preemptive style of global jurisdiction branching worldwide and able to strike down offending litigation anywhere on Earth. Intriguing as such universal power might appear to any federal judge, this Court must take a more modest view of the limits of its jurisdiction. The court finds nothing in the United States Constitution, nor in the Declaratory Judgment Act, nor in customary practice of international law, that comports with such a robust, Olympian perspective of federal judicial power.[31]

While the New York court refused Dow Jones' request for a preemptive strike against the U.K. defamation action, it also made clear that it would have "little hesitation" in granting a *Yahoo*!-style declaratory judgment to protect Dow Jones from an *existing* UK court judgment.[32] It emphasized that U.S. courts (and other domestic courts worldwide) have a legitimate interest in addressing the "countless legal and policy questions [that] are bound to arise"[33] in the transnational speech context. In the court's view, these kinds of cases "warrant occasion for courts to

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[30] *Id*. at 411.

[31] *Id*. at 411.

[32] *Id*. at 432–33 (noting that a foreign judicial order "actually rendered and sought to be executed in the United States would not be cognizable under American jurisprudence governing freedom of expression.").

[33] *Id*. at 428. In the court's view, transnational speech cases raised the following difficult questions:

> How far may one state reach to protect its citizens from the control of conduct and application of foreign laws that govern their activities in other countries? What conduct occurring within the territorial borders of a state causing harm in another, and what wrongs committed by nationals, or by foreigners outside a state causing adverse effects within its territory, may a state properly regulate? Which state is the proper forum for the resolution of international disputes that fall into recognized jurisdictional interstices and gray zones?

add their rightful perspectives and contributions to inform these debates."[34] But, by declining to intervene prematurely in the case, the court (rightly, in my view) acknowledged that U.S. courts must strike an appropriate balance between assisting U.S. corporations in the defense of their speech rights, on the one hand, and stepping on the jurisdictional toes of foreign courts, on the other.

C. Dow Jones v. Gutnick[35]

Shortly after Dow Jones' defeat in the Harrods litigation, it suffered yet another blow – this time at the hands of the High Court of Australia, in the most important case to date regarding the transnational regulation of Internet speech. In *Dow Jones v. Gutnick*, an Australian businessman alleged that Dow Jones' U.S.-based website, *Barrons Online*, had defamed him in an online news article. The central issue in the case was a particularly thorny question of extraterritorial jurisdiction over Internet-based defamation suits: When a defamatory publication is authored and uploaded onto a website in one country but viewed by readers in another country, where does "publication" occur for purposes of defamation jurisdiction?

To online publishers, the answer to this question is of tremendous importance. If Australian courts and other courts around the world adopt the "single publication" rule followed by most U.S. jurisdictions, publishers would only be liable to suit in a single jurisdiction worldwide, and it would most likely be where their computer servers are located.[36] Such a rule would be a great boon to publishers whose servers are located in the United States. They would enjoy the protection of U.S. defamation laws, which tend to be much more favorable to publishers than the vast majority of foreign jurisdictions. If, on the other hand, Australia and other foreign courts retain their traditional adherence to their own "multiple publication" rules, online publishers may be subject to liability for the same publication in multiple jurisdictions, wherever there is access to the Internet ("from Afghanistan to Zimbabwe").[37]

Keenly aware of the high stakes involved, Dow Jones urged the Australian High Court to adopt the U.S. single publication rule and to treat Internet publication of a defamatory statement as "one global tort (rather than a multiple wrong committed

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[34] *Id.*

[35] *See* Dow Jones & Co. v. Gutnick, (2002) 210 C.L.R. 575 (Austl.).

[36] On the single publication rule in the United States, *see* Unif. Single Publ'n Act § 2, 14 U.L.A. 375 (1990); Restatement (Second) of Torts § 577A (1977).

[37] 210 C.L.R. at 609, para. 54. Jurisdictions following the "multiple publication" rule allow separate causes of action in multiple jurisdictions for every "publication" (or communication) of a defamatory statement. *See, e.g., id.* at 305, para. 60 ("[T]he law in defamation cases has been for centuries that publication takes place where and when the contents of the publication … are seen and heard, (i.e., made manifest to) and comprehended by the reader.").

by […] every Internet hit.)."[38] The High Court unanimously rejected Dow Jones' argument. It refused to abandon Australia's centuries-old multiple publication rule in favor of a special rule for Internet speech. Accordingly, because Australian readers had viewed the defamatory article in Australia, the court held that an Australian court could exercise jurisdiction over Gutnick's defamation claim.[39]

Through the lens of transnational judicial dialogue, the most interesting aspect of the case is the normative debate going on behind the jurisdictional skirmishes – a debate over the substantive content of emerging transnational speech norms. Two concurring opinions in particular – those of Justices Callinan and Kirby – offer intriguing insights into this debate. Justice Callinan championed the superior approach of Australian defamation law over its more liberal American counterpart. He noted that American defamation law "leans heavily, some might say far too heavily, in favour of defendants. Nor has the [American] metaphor for free speech developed by [Justice] Holmes, a marketplace of ideas, escaped criticism [even] in the United States."[40] Justice Callinan argued that Australian law had struck the proper balance between freedom of speech and protection of reputation:

> Quite deliberately, and in my opinion rightly so, Australian law places real value on reputation, and views with scepticism claims that it unduly inhibits freedom of discourse. In my opinion the law in this country provides an appropriate balance which does justice to both a publisher and the subject of a publication.[41]

Moreover, Justice Callinan complained that Dow Jones' strategy smacked of an attempt to impose "American legal hegemony" on other countries,[42] and argued that Australian courts should resist this attempt:

> [W]hat Dow Jones seeks to do, is to impose upon Australian residents for the purposes of this and many other cases, an American legal hegemony in relation to Internet publications. The consequence … would be to confer upon one country, and one notably more benevolent to the commercial and other media than this one, an effective domain over the law of defamation, to the financial advantage of publishers in the United States, and the serious disadvantage of those unfortunate enough to be reputationally damaged outside the United States.[43]

In terms of his participation in the emerging transnational judicial dialogue on Internet speech, Justice Callinan – like the U.S. court in the *Yahoo*! litigation – seemed

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[38] *Id*. at 613, para. 72.

[39] *Id*.

[40] *Id*. at 650, para. 188 (Callinan, J., concurring). Justice Callinan cited Judge Robert H. Bork's famous criticisms of the "marketplace of ideas" metaphor. *See id*. at 650-51, paras. 188–89 (quoting Robert H. Bork, *Adversary Jurisprudence*, New Criterion, May 2002, at 6, 7, 10).

[41] *Id*. at 651, para. 190 (Callinan, J., concurring).

[42] For a broader treatment of contemporary American hegemony, *see* Dellavalle, in this volume.

[43] Gutnick, 210 C.L.R. at 653–54, para. 200 (Callinan, J., concurring).

to view his role as a defender or even advocate for Australian speech norms. In this role, Justice Callinan made a real contribution to the dialogue, offering a strongly worded response to the crucial question, "What norms – or *whose* norms – should become the dominant normative standard on transnational speech?"

Justice Kirby, by contrast, used his concurring opinion in *Gutnick* to explore the potential role of domestic judiciaries in creating transnational legal rules through judicial dialogue. Unlike Justice Callinan, Justice Kirby acknowledged the need for a global solution to the problem of transnational regulation of Internet speech, and he recognized that traditional liberal internationalist approaches (for example, treaty negotiations) thus far had proved inadequate to the task. In his concurrence, Justice Kirby explored the possibility that domestic courts might be able to use dialogue as a way to fill the gap left by policymakers – in his words, by "piecing together gradually a coherent transnational law appropriate to the digital millennium."[44] Thus, under Justice Kirby's conception, transnational judicial dialogue might serve as an alternative form of "international organization" where traditional international institutions and processes have consistently failed to provide a solution to a transnational problem.

How do domestic courts utilize this alternative form of "international organization," that is, how do they use dialogue to shape a "coherent transnational law" on Internet speech and defamation? For example, what common sources can they utilize? Justice Kirby suggested that they look to international human rights treaties to guide their choices regarding the proper balance between protection of speech, on the one hand, and protection of reputation, on the other. But his attempt to look to traditional international law sources proved largely futile. While the International Covenant on Civil and Political Rights (ICCPR) contains provisions protecting both freedom of expression and the right to reputation, it offers no guidance as to the appropriate balance between these rights.[45] Thus, Justice Kirby reluctantly concluded that Australian courts did not have the authority to engage in the kind of "major overhaul" of Australian defamation law that would be required to develop the kind of radical solution needed to address the

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[44] *Id*. at 628, para. 119 (Kirby, J., concurring). He also emphasized the important role that customary international law could play in shaping comity and choice of law doctrines to meet the challenges posed by the Internet. *See id*. at 625–26, para. 114.

[45] *See* International Covenant on Civil and Political Rights, art. 19, para. 3, Dec. 16, 1966 (entered into force Mar. 23, 1976) (right to freedom of expression carries "duties and responsibilities" and may "be subject to certain restrictions, but these shall only be such as are provided by law and are necessary […]."). Justice Kirby cited this provision as support for the proposition that Australia had an obligation to provide a remedy for the tort of Internet defamation. *See* Gutnick, 210 C.L.R. at 626–27, paras. 115–16 (Kirby, J., concurring).

problem of Internet speech.[46] Nevertheless, by exploring the possibilities and limitations of domestic courts in shaping a "coherent transnational law" on Internet speech, Justice Kirby made an important contribution to the emerging dialogue on this issue – and to the broader dialogue regarding the proper role of the (domestic) judiciary in shaping international legal norms.[47]

Justice Kirby's attempt to look to international human rights treaties raises another important question. What if there were more guidance in international law regarding transnational speech norms? For example, what if an international tribunal were to exercise jurisdiction over an Internet defamation case – and in so doing, offer a treaty interpretation that reconciles the ICCPR's provisions on speech and reputation? In fact, Dow Jones' next strategic move in the *Gutnick* case was to seek just such an interpretation. Instead of seeking refuge in the U.S. courts (as it had attempted to do in the *Harrods* case), Dow Jones' attorneys filed a complaint against Australia before the United Nations Human Rights Committee on behalf of the journalist who had written the allegedly defamatory story. The complaint alleged that the Australian defamation suit deprived the journalist of his right to free speech guaranteed by the ICCPR.[48]

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[46] He commented, "In default of local legislation and international agreement, there are limits on the extent to which national courts can provide radical solutions that would oblige a major overhaul of longstanding legal doctrine in the field of defamation law. Where large changes to settled law are involved, in an area as sensitive as the law of defamation, it should cause no surprise when the courts decline the invitation to solve problems that others, in a much better position to devise solutions, have neglected to repair." *Id*. at 643, para. 166. Justice Kirby also echoed Justice Callinan's warning about the danger of "American legal hegemony" that the adoption of a single publication rule might engender. *See id*. at 633, para. 133.

[47] Justice Kirby has written and lectured extensively on the emerging role of domestic courts as transnational actors, and is a strong advocate of the use of foreign and international law in interpreting domestic constitutions. *See, e.g.*, Michael Kirby, *New World Order or a World in Disorder? Testing the Limits of International Law*, 99 Am. Soc'y Int'l L. Proc. 1 (2005). For scholarship critiquing Justice Kirby's views, *see, e.g.*, A. Mark Weisburd, *Using International Law to Interpret National Constitutions – Conceptual Problems*, 99 Am. Soc'y Int'l L. Proc. 22 (2005); Frank Carrigan, *A Blast from the Past: The Resurgence of Legal Formalism*, 27 Melb. U. L. Rev. 163 (2003); Jeffrey Goldsworthy, *Interpreting the Constitution in Its Second Century*, 24 Melb. U. L. Rev. 677 (2000).

[48] *See* Press Release, Dow Jones & Co., Alpert v. Australia: Barron's Writer Challenges the Decision of the High Court of Australia Over Gutnick Case (Apr. 15, 2003) (on file with author). According to the press release, the journalist, William Alpert, filed the complaint because he feared "restrictions on the ability of financial journalists … to report truthfully to United States investors on the activities of foreigners who are actively engaged in the U.S. markets. I even fear for our ability to report on U.S. corporations and business people, who might see the [Australian] High Court's decision as an invitation to attack the U.S. press in a remote forum …. Powerful and sophisticated plaintiffs could search out overseas jurisdictions willing to help stifle news coverage that was only directed at local readers in those journalists' home markets."

Although Dow Jones settled the Australian lawsuit before the Human Rights Committee ruled on its complaint,[49] its short-lived strategy of appealing to an international treaty body is intriguing, suggesting that multinational corporations like Dow Jones may be operating in a far more complicated adjudicatory landscape in future transnational defamation litigation. For the first time, an international human rights tribunal was asked to consider the proper balancing of the provisions on speech and reputation enshrined in the ICCPR, and to apply those provisions to domestic legal rules on defamation. If the Human Rights Committee had taken up the challenge, how would it have reconciled the competing Australian and American approaches to defamation law and the role of the countries' courts in adjudicating the transnational dispute?[50] If the Human Rights Committee had found in favor of Dow Jones, Australia would have been obliged to modify its defamation laws; and its domestic courts would have suffered a not-insignificant rebuke. In that event, the Human Rights Committee likely would have been accused of using its own jurisdiction to import American free speech norms into international treaty provisions – thus assisting the United States in imposing "American legal hegemony" over the rest of the world. If, on the other hand, the Human Rights Committee had upheld Australian defamation law as consistent with the ICCPR's speech protections, its action would have represented a decisive choice to interpret the treaty in line with non-American speech norms. In that event, American critics might accuse the tribunal of favoritism toward Australian (and Western European) conceptions of speech and privacy, and insensitivity toward the special status that the First Amendment enjoys in the minds of many Americans. Either way, the Human Rights Committee was facing a lose-lose proposition. If it had allowed itself to be drawn into a jurisdictional skirmish of this nature, it would have been accused of interfering with traditional conflicts of law principles and usurping legal authority that properly belonged to the domestic courts of Australia and the United States.

D. Bangoura v. Washington Post[51]

Dow Jones is certainly not the only American publisher to have run afoul of foreign defamation laws as a result of its Internet website activities. The *Washington Post*

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[49] *See* Richard Rescigno, *Letter from the Editor: Kafka Lives, Down Under*, Barron's, Oct. 25, 2004, at 51. In announcing the settlement, the editor of Barron's complained that Australian defamation law was "archaic and onerous." He commented, "[T]he law didn't allow us to defend ourselves meaningfully in court. The verdict, had we gone to trial, would have been foregone. Result: a settlement. Kafka and Pirandello are alive and well and chuckling in Victoria." *Id*.

[50] *See* Walter, in this volume; Carazo, in this volume.

[51] Bangoura v. Washington Post, [2004] 235 D.L.R. (4th) 564 (Ont. Super. Ct. Justice), *rev'd*, [2005] 258 D.L.R. (4th) 341 (Ont. Ct. Appeal).

fought its own protracted battle in the Ontario courts over a series of news articles published on the *Post's* U.S.-based website in 1997. At the time the articles were published, the plaintiff, a citizen of Guinea, was working and residing in West Africa as an employee of the United Nations. In 2000, three years after the articles appeared on the *Post's* U.S.-based website, the plaintiff moved to Ontario with his family. Three years later, in 2003, he filed suit against the *Post*, alleging that the 1997 articles had defamed him. The plaintiff was unable to prove that anyone in Ontario, other than his own lawyer, had actually downloaded the allegedly defamatory article from the *Post's* website; indeed, there were only seven known subscribers to the *Post* in Ontario at the time.[52]

Despite Ontario's rather tenuous connection to the parties and the dispute, an intermediate appellate court held that Ontario courts could properly exercise jurisdiction over the lawsuit.[53] The *Post* strenuously argued that the court should decline to exercise jurisdiction as a matter of comity, given the strong public policy of the United States – grounded in First Amendment concerns – against recognition of foreign libel judgments. The intermediate appellate court gave short shrift to such arguments, commenting:

> The key argument advanced by the *Post* is based on a case known as *New York Times Co. v. Sullivan*, where the U.S. Supreme Court refused to enforce British libel judgments on the ground that British libel law is repugnant to the policies of the U.S.A. Our courts do not share the American view that British libel law, which is similar to our own, is any less civilized than the American law.[54]

The court dryly pointed out, "The [High Court of Australia] does not share the American view either."[55] It went on to quote at length from the Australian High Court's decision in *Gutnick*. (It did not acknowledge, however, that its holding represented a significant expansion of *Gutnick*, given Ontario's far more tenuous connection to the parties than was present in the Australian case.)

Finally, the court defended Canadian (and by implication, British and Australian) norms, stating, "Frankly, I see the unwillingness of an American court to enforce a Canadian libel judgment as an unfortunate expression of lack of comity. This should not be allowed to have an impact on Canadian values."[56] The court admitted that the *Post* had "no connection to Ontario." Nonetheless, simply put, "the *Washington Post* is a major newspaper in the capital of the most powerful country in [the] world […] often spoken of in the same breath as the *New York*

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[52] 258 D.L.R. at paras. 1–15.
[53] *See* 235 D.L.R. 564.
[54] *Id*. at para. 22.
[55] *Id*.
[56] *Id*. at para. 23.

Times and the *London Telegraph*."[57] As a consequence, the *Post* "should have reasonably foreseen that the story would follow the plaintiff wherever he resided."[58]

Not surprisingly, the Ontario court's decision in *Bangoura* caused an uproar in the international media and publishing community. Over fifty media organizations from the U.S., Canada, Japan, and Europe – including Dow Jones, Yahoo!, CNN, Google, and the *New York Times* – created the "Media Coalition" specifically to fight the court's ruling.[59] The Coalition intervened on behalf of the *Post* before the Ontario Court of Appeal, arguing that the court should reverse the lower court's ruling and, at the same time, adopt a special jurisdictional framework for lawsuits arising from publication on the Internet.[60]

The *Post* and the Coalition won a partial victory before the Court of Appeal. It overturned the lower court ruling, holding that there was no "significant connection" between the *Post* and Ontario.[61] As to the lower court's view that the *Post* "should have reasonably foreseen that the story would follow the plaintiff wherever he resided," the Court of Appeal responded:

> It was not reasonably foreseeable in […] 1997 that Mr. Bangoura would end up as a resident of Ontario three years later. To hold otherwise would mean that a defendant could be sued almost anywhere in the world based upon where a plaintiff may decide to establish his or her residence long after the publication of the defamation.[62]

Still, the Court of Appeal declined to adopt a special jurisdictional framework for Internet defamation cases. While it found the Coalition's submissions in this regard "helpful and interesting," it chose to reserve consideration of that issue "for another day."[63]

E. *Conclusion*

Hudson's lectures at the University of Idaho reflect the optimism of internationalists of his era. He and his cohort believed firmly in the liberal internationalist experiment – in the power of treaty-making and international institutions to create international legal rules and, more importantly, to ensure

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[57] *Id*. at para. 22.
[58] *Id*.
[59] *See* http://www.mediainstitute.org/Bangoura_Brief_7-30-04.pdf.
[60] *See id*.
[61] 258 D.L.R. at para. 25.
[62] *Id*.
[63] 258 D.L.R. at para. 49.

that nation states abided by those rules. What we see today is a much more complicated world, in which treaties and international institutions are just one piece of the puzzle. An equally important piece is the kind of informal dialogue that is taking place among domestic courts regarding the creation, development and enforcement of international norms.

The recent adventures of Dow Jones and the *Washington Post* in the Internet defamation arena reveal important insights into the role of transnational judicial dialogue in the process of international rulemaking. First, we see the gradual transformation in domestic courts' conceptions of their role in the emerging global legal system. In these cases, we see courts defining a new role for themselves as transnational actors – and in some cases, as transnational representatives or even advocates for domestic norms on speech. In the absence of guidance from political institutions, domestic courts – through dialogue – are attempting to learn from each other, to advocate their own approaches, and, in Justice Kirby's words, to "piece together gradually a coherent transnational law" on Internet defamation. Moreover, in cases like *Yahoo!, Gutnick*, and *Bangoura*, domestic courts are acting as transnational defenders – or even champions – of their own countries' speech norms.

Second, we see the emergence of media and publishing corporations as transnational norm entrepreneurs, using strategic litigation in domestic courts – and possibly before international tribunals – to pursue that role.[64] Transnational norm entrepreneurship is particularly evident in Dow Jones' evolving strategy toward Internet defamation litigation. Thus, in *Harrods*, Dow Jones attempted to convince a U.S. court to engage in norm export by requesting a worldwide injunction imposing U.S. speech norms on foreign jurisdictions. When that effort failed, Dow Jones attempted to export American speech norms – embodied in U.S. defamation law's "single publication rule" – to Australia through the *Gutnick* litigation. When attempts to persuade domestic courts to assist its efforts at norm export failed, Dow Jones urged the Human Rights Committee to weigh in on the dispute. Thus, Dow Jones' complaint before the Human Rights Committee in *Gutnick* was, in essence, an attempt to export American norms on free speech to the rest of the world through their *importation* into an international human rights instrument. Finally, the creation of the Media Coalition to fight the lower court's ruling in *Bangoura* signals a trend toward the development of a "transnational issue network" among media corporations worldwide – a network which serves to "discuss and generate […] solutions […] on the same issues at the global and regional levels."[65]

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[64] *See* discussion, *supra* note 18 and accompanying text.

[65] Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 Hous. L. Rev. 623, 649 (1998).

Hudson's liberal internationalist conception of international rulemaking clearly still has relevance here. Witness, for example, Justice Kirby's recognition in *Gutnick* of the limits of transnational judicial dialogue in the transnational speech context, and his call for policymakers to negotiate an international treaty to resolve these jurisdictional battles.[66] More importantly, *Gutnick* raises the possibility that international tribunals like the Human Rights Committee may involve themselves in future dialogue on these issues – a development that surely would have pleased Hudson. Indeed, the involvement of various supranational and international tribunals has served as an important catalyst in the development of transnational judicial dialogue in other areas – for example, in dialogue regarding the death penalty[67] – and in convergence toward a single international legal norm governing a particular transnational legal issue. If the Human Rights Committee and other supranational tribunals become active participants in judicial dialogue on Internet speech, we may see a similar strengthening of the dialogue in this context and, perhaps, the emergence of international legal norms regarding Internet speech – norms that have been created and shaped largely by domestic and international tribunals working together.

What would Hudson think of this brave new world of transnational judicial dialogue, with its focus on a multiplicity of actors engaging in trans-, rather than inter-national rulemaking? I believe that he would greet it with the same ebullient optimism with which he greeted the dawn of liberal internationalism. At this fairly early stage of its development, transnational judicial dialogue is quite loose and informal; moreover, it is at best a *partial* dialogue, as a relative handful of the world's domestic courts are engaging in it. Thus it would be a stretch to label transnational judicial dialogue as a form of "international organization" in any real sense. And yet, it is a phenomenon that is growing in significance – not only in the transnational speech and human rights arenas, but also in transnational litigation involving bankruptcy, intellectual property, securities regulation, and the like.[68] At a minimum, then, transnational judicial dialogue is emerging as an important kind of progress in *transnational* organization among the courts of the United States, the British Commonwealth nations, and Western European nations, in particular. As such, transnational judicial dialogue may eventually develop into a far more robust form of organization that is truly international in scope.

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[66] *See* discussion, *supra* notes 44–47.

[67] *See, e.g.*, Roper v. Simmons, 125 S.Ct. 1183 (2005) (citing foreign and international legal sources in striking down laws permitting execution of juvenile offenders). *See also* Waters, *supra* note 11, at 505–29 (discussing and critiquing transnational judicial dialogue regarding the death penalty). *See* Parker, in this volume.

[68] *See* Waters, *supra* note 11, at 491–97 (with sources cited therein).

Indeed, Hudson presaged the development and importance of "transnational organization" when he recognized that one should be cautious in drawing sharp distinctions between the domestic and the international. He commented: "It might be an advance toward reality if we began to think of the problems of our international relations as domestic problems, in the sense that they have to do with our immediate and local well being."[69] Moreover, Hudson understood that liberal internationalism, along with the international institutions that it produced, would by necessity be transformed (if not entirely discarded) with the changing times:

> Doubtless the stock of ideas which we cherish will come in their turn to be *passé*. No one can say that any of our current conceptions as to the ends of co-operation will not be discarded by a later generation; but it would seem altogether probable that the institutions which we are creating will be kept alive. None of them can be said to have achieved a final form; all of them will probably be altered and reconstructed; possibly many of them will be adapted to wholly different purposes. The most that we can do is to give them initial form, and to hand them on for future generations to use as they will.[70]

Transnational judicial dialogue – like other kinds of informal dialogue among domestic actors – is an important twenty-first century "form" for international cooperation.[71] As such, it shares the goals of its forebears – namely, to ensure that international law is not merely "soft law," but instead can be interpreted, applied, and enforced. I like to think that Hudson would be pleased with this 21st century attempt to fulfill the promise of his generation's lasting contribution – "for the progress which [they] made in organizing the world for co-operation and peace."[72]

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[69] Hudson, *supra* note 1, at 2.

[70] *Id*. at 119–20.

[71] *See* Iontcheva-Turner, in this volume.

[72] Hudson, supra note 1, at 5.

Expanding Influence: Regional Human Rights Courts and Death Penalty Abolition

By Kelly Parker

A. *Introduction*

Great strides have been made in abolishing the death penalty throughout the world. Although a largely post–World War II effort,[1] an increasing number of nations have moved toward death penalty abolition. So many nations, in fact, that Schabas asserts "[t]he day when abolition of the death penalty becomes a universal norm, entrenched not only by convention but also by custom and qualified as a peremptory rule of *jus cogens*, is undeniably in the foreseeable future."[2] However, another perspective on the numbers reveals the daunting challenges abolitionists face. Seventy-one nations still retain the death penalty,[3] and large numbers of people live in the shadow of its use. Large swaths of Asia and

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[1] At the time the Universal Declaration for Human Rights was adopted, only eight countries had "abolished the death penalty for all crimes. . . ." Amnesty International, Eric Prokosh, Theme Research Coordinator, *Human Rights Versus the Death Penalty*, ACT 50/13/98, Dec. 1, 1998, *available at* http://web.amnesty.org/library/Index/ENGACT500131998. The countries of South and Central America have long been at the forefront of this trend, several having abolished the penalty in the late nineteenth and early twentieth centuries. Roger Hood, The Death Penalty: A Worldwide Perspective 55 (3d ed. 2002).

[2] William A. Schabas, The Abolition of the Death Penalty in International Law 3 (3d ed. 2002) [hereinafter Schabas, Abolition]. Amnesty International reports that, as of June 27, 2006, 125 countries are abolitionist. Amnesty International, The Death Penalty, *Abolitionist and Retentionist Countries*, http://web.amnesty.org/pages/deathpenalty-countries-eng [hereinafter *Abolitionist and Retentionist Countries*]. The organization breaks this down into three categories of abolition: (1) abolitionist for all crimes (87 countries); (2) abolitionist for ordinary crimes only, i.e., "Countries whose laws provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances" (11 countries); and (3) abolitionist in practice (27 countries).

[3] *Abolitionist and Retentionist Countries, supra* note 2.

Miller & Bratspies (Eds), Progress in International Law, pp. 491–516.

Africa retain the death penalty, as do many Muslim nations.[4] The United States is also among these nations, despite some noted retreats,[5] and remains steadfast in its support of the sanction, to the chagrin of its allies.[6] Even where abolition has been achieved, it has sometimes been on weak foundations. Some nations new to abolition, for example, have done so "against the grain of strong public and political sentiment" merely to gain membership in the Council of Europe (COE), seen as a "stepping stone" to European Union (EU) accession.[7] There also exists the problem of "extra-legal killings" in nations that have abolished the death penalty.[8] Furthermore, the nose-counting of abolitionist organizations includes

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[4] *See id*. at 35–55. An argument frequently made by cultural relativists in these regions is that the notion of human rights is "the product of western individualism, and that trying to impose human rights on other cultures is a form of imperialism." David Manasian, *Survey: Human-Rights Law*, Economist, Dec. 3, 1998. The "Asian Way" is among the better known of these arguments, "advanced principally by leaders of Singapore, Malaysia, Indonesia and China," especially around the time of the 1993 World Conference on Human Rights. *A Turn in the 'Asian Way,'* N.Y. Times, Nov. 17, 1996 at 12. The central tenet of this perspective is that "Asians value social order and family over individual rights. Economic growth and social harmony require a strong government that can make unpopular choices. It must be able to control the press and arrest strikers, protesters and dissenters. The decadent West, torn by crime, racial tensions, drug abuse and other social disorders, should mind its own affairs." *Id*. This view is reflected in the fact that the "death penalty remains most entrenched in East Asia. China alone regularly accounts for more executions than the rest of the world combined, and applies it to a wide range of crimes beyond murder." *The Cruel and Ever More Unusual Punishment*, Economist, May 13, 1999.

Manasian finds the arguments of cultural relativists "unconvincing," saying "[i]t assumes that there is a single set of western, Islamic or Asian cultural values respectively. This is patently untrue." He also deems the arguments disingenuous: "It tends to be the people in power who use Islamic or Asian values to justify political repression and restriction of rights, and it tends to be the people they are repressing who appeal to the outside world to uphold those rights." Manasian, *supra*.

[5] *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002) (rendering unconstitutional execution of mentally retarded defendants) and Roper v. Simmons, 543 U.S. 551 (2005) (rendering unconstitutional execution of defendants who were minors at the time they committed their crime). A widely publicized example at the state level was the moratorium on the death penalty by former Illinois governor George Ryan. *Illinois Hesitates*, Economist, Feb. 3, 2000. Other states dogged by controversy have taken similar measures.

[6] *See e.g.*, *The Cruel and Ever More Unusual Punishment, supra* note 4; *An End to Killing Kids*, Economist, Mar. 2, 2005. Thirty-eight states authorize use of the death penalty, as do the federal government and the military. Of these, five states have not executed anyone since 1976. Twelve states and the District of Colombia forbid the practice. Death Penalty Information Center, *Facts about the Death Penalty*, http://www.deathpenaltyinfo.org/FactSheet.pdf. Ironically, Hood reports that "[i]n 1846 the American state of Michigan became the first jurisdiction in modern times to abolish capital punishment for murder." Rhode Island and Wisconsin soon followed. Hood, *supra* note 1, *at* 9.

[7] *Id*. at 31.

[8] *Id*. at 155. Hood stated that "[w]hile the true extent of such executions worldwide cannot be verified, they cannot be ignored in the context of any discussion of the death penalty."

nations that have capital punishment on their books, but have reportedly not used it for the last ten years. This *de facto* abolition is an unreliable measure; for example, Caribbean Commonwealth nations that had long been categorized as abolitionist by these terms "resumed executions after long periods of abeyance."[9] Thus "[i]t is difficult to argue that customary international law contains a rule prohibiting the death penalty."[10]

Nevertheless, progress toward abolition has been achieved on an international scale and regional human rights systems have played a significant role in that process. Progress was a concept of great interest to Harvard Professor Manley O. Hudson and the object of both *Progress in International Organization*[11] and a later volume on international tribunals.[12] In the latter work, written toward the end of World War II, Hudson reflected on the progress of international tribunals to date—good and ill. He noted successes and failures, but remarked on the overall "continuity of effort" since the beginning of the nineteenth century and the foundation that these earlier institutions had established.[13] The fate of the post-war world, to Hudson, appeared to hinge on the use of international tribunals. He wrote, "If there is to be any renaissance of international law, if attempts are to be made to extend its scope and sway, the need for judicial agencies will be greater in the future than in the past. … "[14]

Although "universal" courts existed prior to the war—the Permanent Court of Arbitration and the Permanent Court of International Justice (PCIJ)—Hudson notes that they had had a European flavor and focus. This may have led to his conclusion that "a feeling has existed in certain quarters that a general international tribunal may not be adequate for local needs, and that it should be supplemented by local tribunals to which access can be less expensive, more expeditious, and perhaps more free."[15] A general trend toward regionalism in international organization was already developing in Hudson's era—a "current fashion" including groups such

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[9] *Id*. at 59. This appears to have been due, in large measure, to "concerns generated by the extent of violent crime" in the region. Id. at 60. *See also* Larry Rohter, *In the Caribbean, Support Growing for the Death Penalty*, N.Y. Times, Oct. 4, 1998, at 114; *Hung Up on Getting Strung Up*, Economist, Oct. 3, 2002.

[10] John Dugard & Christine Van Den Wyngaert, *Reconciling Extradition with Human Rights*, 92 Am. J. Int'l L. 187, 196.

[11] Manley O. Hudson, Progress in International Organization (1932) [hereinafter Hudson, Progress].

[12] Manley O. Hudson, International Tribunals Past and Future (1944) [hereinafter Hudson, International Tribunals].

[13] *Id*. at 14.

[14] *Id*. at 137.

[15] *Id*. at 170.

as the Union of American Republics.[16] With regard to judicial bodies among international organizations, resort to regional tribunals was not unprecedented, but their use was often commercial in nature or focused on a particular regional resource.[17] Among the small number of such tribunals was the Central American Court of Justice, which was "designed to 'represent the national conscience of Central America.' "[18] Hudson was skeptical about the need for regional tribunals of this nature, the aims of which he felt could be satisfied through a "regional chamber" within the PCIJ, that might prevent "the danger of a particularistic development of international law."[19] His overall concern in the area of adjudication was to "safeguard the primacy of the general international law, to protect the universality of its application, and to assure uniformity in its administration."[20]

Another development in Hudson's era was active concern for human rights, although not something addressed specifically in Hudson's 1944 volume.[21] While

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[16] *Id*. at 171. This group is also referred to as the Pan-American Union. Christina M. Cerna, *The Inter-American System for the Protection of Human Rights*, 16 Fla. J. Int'l L. 195, 196 (2004). Hudson described the early work of the Union in *Progress in International Organization*, which he said, "has already done much to further co-operation in the Western Hemisphere, and which will doubtless do more in the future." Hudson, Progress, supra note 11, at 12. Although he was dubious as to the Pan American Union's ability to craft international legislation—"many of the convention adoptions are never ratified, or are ratified by but a few of the American States"—Hudson nevertheless complimented its attempts at making a difference. *Id*. at 12–13.

[17] According to Hudson, "[f]ew regional groups of States have attempted to maintain international tribunals for the settlement of disputes. … Some of the international river commissions have exercised judicial powers with respect to local cases, but rarely with respect to inter-State disputes." *Id*. at 172.

[18] *Id*. at 179. This court sat from 1908 to 1918. It sought to achieve its aim through a "broad jurisdiction to deal with inter-State and private individuals." Its contributions were hardly meaningful, according to Hudson, and it ceased to exist. The desire for a regional court persisted however:

> Various tendencies have led to proposals in the International Conferences of American States looking toward creation of an Inter-American Court of International Justice. Chief among them, perhaps, has been the conception of an 'American international law' which has exercised a spell on certain minds for half a century. This conception is not merely a rationalization of a separatist tendency, nor is it necessarily an indication of hostility to European ideas; it had its origin in juristic writings in Latin America, which emphasized special doctrines not sufficiently appreciated in other parts of the world.

Id. at 178–79.

[19] *Id*. at 178.

[20] *Id*. at 179.

[21] Hudson was not oblivious to the notion that the crimes of the Second World War, which we today would refer to as human rights abuses, would need to be rectified. He addressed them in a chapter focusing on an international criminal court.

"philosophical appeals for what today might be described as universal human rights have been heard since the time of the ancient Greek Stoics, … such ideals played almost no part in international politics."[22] Unlike their predecessors following World War I—with "the world too weary and too wretched to think very much about international organization"[23]—the unprecedented horrors the world had faced in World War II did not stop world leaders from taking immediate action on an international scale to prevent future atrocities. These abuses "prompted a profound reconsideration of the relationship between human rights and international peace. … For the first time, a state's treatment of its own citizens officially became a subject of international concern."[24] The United Nations response to the tragedy of World War II was encapsulated in the Universal Declaration of Human Rights, adopted by the General Assembly some three years after the close of hostilities.[25] Expanding on the U.N. Charter's commitment to "reaffirm its faith in fundamental human rights," the Declaration "explicitly link[s] respect for human rights as necessary to the maintenance of international peace."[26] Schabas characterizes the Universal Declaration as "a touchstone for all subsequent international instruments dealing with human rights and fundamental freedoms."[27] These instruments included the European Convention on Human Rights (ECHR) and the American Convention on Human Rights (ACHR) and their related human rights systems.

Although Hudson was skeptical about the merits of regional tribunals, the European and Inter-American human rights regimes have demonstrated that such skepticism may not have been warranted where regional actors aspire to aims that coincide with broadly held goals. The abolition of the death penalty has been among them, although views on its propriety are not universal. The importance of regional tribunals is meaningful, allowing each region to tackle the matter within its own cultural context—a flexibility that avoids relativism. The result has been a mix of unintended consequences, subtle merit, and an overall inability to bring the United States to heel. This chapter addresses the decisions critical to each court's efforts to advance the abolition of the death penalty

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[22] Manasian, *supra* note 4. This survey was written on the eve of the Universal Declaration of Human Rights' fiftieth anniversary.

[23] Hudson, Progress *supra* note 11, at 18. Hudson justifies this inaction remarking that "the atmosphere was as unfavorable as it well could have been for beginning a new era of international organization." *Id.* at 20.

[24] Manasian, *supra* note 4.

[25] United Nations General Assembly, Universal Declaration of Human Rights, G.A. Res. 217(A)(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter Universal Declaration].

[26] Manasian, *supra* note 4.

[27] Schabas, Abolition, *supra* note 2, at 13.

and the effectiveness of those decisions. Each has sought to advance the cause by attempting influence beyond its jurisdiction—something perhaps not anticipated by Hudson himself, but an interesting development and mark of progress nonetheless.

B. *Situational Distinctions between Human Rights Systems and Leading Cases Affecting the Death Penalty*

Hudson stated that "[t]he decision of controverted questions according to law, according to international law especially, is not a mechanistic process. It is not a matter of choosing a gadget which will fit into a particular place. It calls for the exercise of highly creative faculties."[28] Both the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) have, in their own way, lived up to the spirit of Hudson's admonition in their approach to the death penalty; each has faced great challenges in doing so, posed by their respective Conventions, and each has successfully met that challenge through innovative jurisprudence.

The regional human rights systems of Europe and the Americas are the practical result of the Universal Declaration's sentiments and as such "the structures of the European and Inter-American systems demonstrate their drafters' efforts to reduce… external and internal pressures while advancing their constitutive principles."[29] Each system operates amid very different social, economic, and political circumstances.[30] The structures of their human rights regimes also differ. However, among the things they share in common is a commitment to the abolition of the death penalty. This is the case despite the challenges their respective Conventions

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[28] Hudson, International Tribunals, *supra* note 12, at 247. *See also* Manley O. Hudson, *Advisory Opinions of National and International Courts*, 37 Harv. L. Rev. 970, 971 (1924) (stating that "[w]e have become accustomed to thinking of courts only as machinery for handling conflicts between opposing individuals or groups after they have already come into clash.").

[29] Gates Garrity-Rokous & Raymond H. Brescia, *Procedural Justice and International Human Rights: Towards a Procedural Jurisprudence for Human Rights Tribunals*, 18 Yale J. Int'l L. 559, 570 (1993).

[30] The European Court of Human Rights has its origins in the Council of Europe, which was founded in 1949 "as a peaceful association of democratic States which proclaimed their faith in the rule of law.…" J.G. Merrills & A.H. Robertson, Human Rights in Europe: A Study of the European Convention on Human Rights 4 (4th ed. 2001). The Court itself was established in article 19 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (Council of Europe) (entered into force Sept. 3, 1953) [hereinafter ECHR]. It was the first human rights instrument creating legal obligations for its signatories. The ECHR to is among the "best observed." Merrills & Robertson, *supra* at 1. Its provisions regarding the death penalty are described *infra*.

pose to their ability to contribute to the overall abolition effort. Article 2 of ECHR states that "[e]veryone's right to life shall be protected by law," but explicitly allows an exception to this with regard to the death penalty.[31] The ACHR likewise allows for the death penalty under some circumstances,[32] so long as the

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The Inter-American Court of Human Rights has its origins in the Organization of American States, a 1948 reinvention of the nineteenth-century Pan American Union. Cerna, *supra* note 16, at 196. The Organization of American States (OAS) created the Inter-American human rights system to protect the rights of those of in its member states—thirty-five states in 2001—through a "series of instruments governing human rights in the region" starting with its own charter. Jo M. Pasqualucci, The Practice and Procedure of the Inter-American Court of Human Rights 4 (2003). The OAS developed the Inter-American Commission on Human Rights (IACommHR) in 1959, which was tasked with "observing and studying the human rights situation in the Americas." Cerna, *supra* note 16, at 197. The IACommHR's mandate expanded once the ACHR came into force in 1978. Within the Inter-American system of human rights, the IACtHR is the judicial body with responsibility "as the final arbiter" of human rights within the states who have ratified the ACHR. ACHR, art. 33(b); Pasqualucci, *supra*, at 1.

[31] ECHR, art. 2(1). The full text states that "[e]veryone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." Art. 2(2) refers specifically to deprivations of life that occur in the rightful pursuit of law enforcement. Most case law pertaining to this article concerns the right to life in this context. *See* Alistair R. Mowbray, The Development of Positive Obligations under the European Human Convention on Human Rights by the European Court of Human Rights 7–41 (2004).

Various protocols have amended the original Convention since it entered into force. Protocol 6 to the ECHR—which was drafted in 1983 and came into force in 1985—generally abolishes the death penalty, but makes allowances for it during "time of war or of imminent threat of war." Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, C.E.T.S. No. 114. Protocol No. 13—"[c]oncerning the abolition of the death penalty in all circumstances"—is intended to be the final nail in the death penalty's coffin. The protocol was drafted in 2002. Protocol No. 13, May 3, 2003, C.E.T.S. No. 187. Article 1 states simply that "[t]he death penalty shall be abolished. No one shall be condemned to such penalty or executed."

[32] American Convention on Human Rights art. 4(2), 1144 U.N.T.S. 123 (entered into force July 18, 1978). The entire text of article 4 reads as follows:

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
3. The death penalty shall not be reestablished in states that have abolished it.
4. In no case shall capital punishment be inflicted for political offenses or related common crimes.
5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

deprivation of life is not arbitrary.[33] In their efforts not to undermine their respective governing treaties, both the European and Inter-American human rights courts have attacked the death penalty indirectly, often by creatively reframing the questions before them.

I. *Overview of Situational Differences between Human Rights Systems*

At the outset of a discussion of these regimes, it is important to establish the confines within which they operate.

The influence of the Inter-American and European human rights courts has been affected by each system's operational context. Whereas the European human rights system has generally been held up as a success story,[34] the Inter-American system is evaluated more cautiously.[35] This view, cast in general terms, fails to account for historical, social, political, and economic differences that form the respective contexts in which the two tribunals function.[36] The IACtHR does not receive a high level of support from the Organization of American States (OAS) or, for that matter, from all the member states that are signatories to the ACHR, in comparison to the support the ECtHR receives, both from the COE and the

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6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

The American Convention also has a protocol modifying its death penalty provision. The applicable portion of the Inter-American protocol states that "[t]he States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction." Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, 29 I L.M 1447 (entered into force Aug. 28, 1991).

[33] *Id*. at 4(1).

[34] *See, e.g.*, Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273, 290 (1997); Manasian, *supra* note 4 (noting that the ECtHR was "[b]y far the most effective international human-rights regime is not part of the UN at all, but the regional one which has developed since 1953 under the aegis of the Council of Europe. … [Its] judgments have acquired the force of law in most West European countries. In effect, the court has become the final court of appeal, and the European Convention a bill of rights.").

[35] *See e.g.*, Laurence Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes*, 102 Colum. L. Rev. 1832, 1834 (2002). In the *Economist* survey, any mention of the Inter-American system is oblique. Manasian, supra note 4. In comparing it to the European system, it stated that "[a] similar, but weaker, human-rights system established by the Organization of American States in 1959 has been less successful at constraining Latin American governments."

[36] Holly Dawn Jarmul, Note, *The Effect of Decisions of Regional Human Rights Tribunals on National Courts*, 28 N.Y.U. J. Int'l L. & Pol. 311, 311 (1995-1996).

national governments of member states.[37] Countries within the Americas have also faced difficulties that have not troubled western European countries, such as economic instability, higher rates of poverty, and a less educated populace.[38]

Additionally, the human rights abuses addressed within the Inter-American system generally have been more egregious than those confronting Europe. Tom Farer describes the European human rights system as one that does its work "within the context of an orderly, stable, and prosperous community," while the Americas have presented the Inter-American system with a "feral jungle" for its operations.[39] He notes that the efforts of the European human rights system have been "useful, but hardly … essential, means to the preservation of order." Its work, according to Farer, has been an opportunity to "reinforce[ ] national restraints on the exercise of the executive and legislative power…."[40] Members of the Council of Europe have been, largely, states that "protect human rights and have accepted … the judgments of the European Court."[41]

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[37] Pasqualucci, supra note 30, at 340; Brian D. Tittemore, *The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System: An Evolution in the Development and Implementation of International Human Rights Protections*, 13 Wm. & Mary Bill Rts. J. 445 (2004). The IACtHR operates within several difficult constraints. It operates part-time, holding two regular sessions each year. Its judges do not receive salaries, only stipends, travel allowances, and some per diem payments. Id. at 455–57. The money budgeted for the Court's operation is likewise limited—$1,391,300 was budgeted for its operation in 2004, for example, only 1.6% of the entire OAS regular budget. By comparison, the ECtHR received an equivalent of $47,459,080 for its concededly larger operation. Id. at 457. According to Tittemore, "the disparity in funding between the inter-American and European systems is striking particularly in light of the fact that both systems have historically encompassed comparable populations and that the functions of the [IAComm'nHR] and [IACtHR] extend beyond those of the European Court to include promotional and advisory responsibilities." *Id.*

Furthermore, there are varying degrees of commitment from OAS members that the IACtHR must account for in its jurisdiction. Not all OAS members have ratified the [Convention]; of those that have, not all have consented to the IACtHR's contentious jurisdiction. *Id.* at 456. All commitment variations are present in the Caribbean region, which "provides a microcosm of the [Inter-American] system's legal disparities, which in turn affects the options available to the Commission and the Court in processing complaints that may raise issues common to some or all of the countries of the region…." *Id.* Among the Caribbean Commonwealth nations, only Trinidad, in 1991, and Barbados, in 2000, have submitted themselves to the IACtHR's contentious jurisdiction. Trinidad's subsequent denunciation is discussed *infra*.

[38] Jo M. Pasqualucci, *Provisional Measures in the Inter-American Human Rights System: An Innovative Development in International Law*, 26 Vand. J. Transnat'l L. 803, 822 (1993).

[39] Tom Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not yet an Ox*, 19 Hum. Rts. Q. 510, 510 (1997).

[40] *Id.* at 511.

[41] Pasqualucci, *supra* note 38, at 820. The Council of Europe has faced some difficulties with new members from former Eastern Bloc nations, especially in the area of death penalty abolition, such as Russia and the Ukraine. Additionally, while it can be conceded that the success of

This has not been the case in the Inter-American system.[42] The IACtHR began its work in an era when "[d]ictatorships … perpetrated gross and systemic violations of human rights" including "[s]tate sponsored disappearances, extra-judicial killings, and torture."[43] Increasing democratization since the era of disappearances in the 1970s and 1980s has improved the human rights landscape and led to an evolution of the kinds of violations that the IACommHR processes and, by extension, forwards to the IACtHR for consideration. However, even the transition to democracy presented tensions between addressing past human rights abuses and the responsibilities of new governments for the wrongs left behind by repressive regimes.[44] The IACtHR's struggle for footing on this changing terrain has left it vulnerable to critiques from all sides.

By stark contrast, the ECtHR's success and efficacy are widely celebrated. Laurence Helfer and Anne-Marie Slaughter have suggested, for example, that the European Court can be viewed as a model that other supranational institutions might emulate.[45] The ECtHR, during the course of its development, "has succeeded in transforming a relatively empty docket into a relatively teeming one."[46] The ECtHR's legitimacy is also marked by the response of domestic law to its rulings. The ECtHR, Laurence Helfer notes, has had a "high rate of compliance rivaling those found in domestic legal systems."[47] Slaughter notes that the ECtHR "has begun to see its rulings change the shape of domestic law, through legislative revision and administrative decree as well as judicial decision. In particular, it has had an impact on national courts, to the point that some commentators claim

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the European system is due in part to its human rights friendly milieu, "it does not mean that the system has not been useful. The standards set by the European Court of Human Rights helped Spain, Portugal and Greece to establish liberal democratic governments in the 1970s, as well as encouraging established democracies, such as Britain, France and Italy, to tread more carefully." Manasian, *supra* note 4.

[42] *See, e.g.*, Scott Davidson, The Inter-American Human Rights System 207 (1997) (addressing practice of "disappearances" in the region and the challenges of confronting the problem). Forced disappearances were the subject matter at issue in the Court's first three cases. Id. at 206. This practice was used not only by the region's military regimes, but also by some democratically elected governments. Juan E. Mendez & Jose Miguel Vivanco, *Disappearances and the Inter-American Court: Reflections on a Litigation Experience*, 13 Hamline L. Rev. 507, 510–11 (1990).

[43] Pasqualucci *supra* note 30, at 7.

[44] Manuel Antonio Garreton M., *Human Rights in Processes of Democratisation*, 26 J. Latin Am. Stud. 221 (1994).

[45] Helfer & Slaughter, *supra* note 34, at 290. They define "supranational adjudication" as the work of a tribunal "established by a group of states or the entire international community and that exercises jurisdiction over cases directly involving private parties" including between individual(s) and a government their own or foreign. *Id*. at 289.

[46] *Id*. at 293. This success has been most evident in the European systems modifications of its organization and procedures under Protocol 11 to the Convention. *Id*. at 296.

[47] Helfer, *supra* note 35, at 1850.

that Europe is 'witnessing the beginning of a true dialogue between [the Court] and national jurisdictions. … "[48] Also important to the ECtHR's success has been "achiev[ing] substantial compliance with its judgments by forging relationships with domestic government institutions, both directly and indirectly through relationships with private parties."[49]

II. *European Court of Human Rights:* Soering v. UK

Soering v. UK[50] is the central decision of the ECtHR, in which it reframed the death penalty question to move the jurisprudence of the ECHR toward abolition.[51] The case concerned the challenge of a German national, Jens Soering, to his impending extradition to the United States from the United Kingdom to face charges for the murder of his girlfriend's parents in Virginia. Because it is allowed under Article 2(2) of the convention, Soering did not challenge the death penalty itself; rather, he focused on the threat of "torture or … inhuman or degrading treatment or punishment" in violation of Article 3 of the Convention.[52] Soering argued that he was at risk of suffering these human rights violations in the event that he were to be extradited to the United States and subsequently convicted and sentenced to death. The lengthy delay between sentence and execution in the American system, he argued, meant he would face the "death row phenomenon" as the appellate process[53] wound on. The "death row phenomenon" would be

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[48] Anne-Marie Slaughter, *Judicial Globalization*, 40 Va. J. Int'l L. 1103, 1109 (2000).

[49] Helfer & Slaughter, *supra* note 34, at 297–98.

[50] Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989).

[51] The Court within its contentious jurisdiction may receive applications not only from Council of Europe member states, but also "may receive applications from any person, [NGO], or group of individuals claiming to be the victim of a violation." ECHR arts. 33–34. Among the most significant contribution of the European convention has been this individual right to bring claims against governments. Garrity-Roukos & Brescia, *supra* note 29, at 584.

The procedures of the European human rights system were drastically modified by the streamlining provisions of Protocol 11. C.E.T.S. No. 155 (entered into force Nov. 1, 1988). Prior to amendment, the system was similar to the current model followed in the Inter-American system, discussed *infra*, and consisted of the European Commission on Human Rights and the European Court of Human Rights. The change was necessary to accommodate growth in Council of Europe membership—which has tripled since 1950—and the increasing workload placed on the system, that interim measures had failed to address. Merrills & Robertson, *supra* note 31, at 21.

[52] Soering, 161 Eur. Ct. H.R. ¶ 101. Article 3 states "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[53] Although the Court lauded the positive aspects of the U.S. appellate system, it nevertheless felt that "[h]owever well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row. … " *Id.* ¶ 106.

brought on, not only by the conditions of death row itself, but also by "the anguish and mounting tension of living in the ever-present shadow of death."[54] Soering's circumstances at the time of the murders—he was eighteen and may have been mentally disturbed—would only aggravate the possibility of such torture.[55] The broader question facing the ECtHR, then, was "whether the extradition of a fugitive to another State where he would be subjected or likely to be subjected to torture or inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3."[56] The answer to that question, according the ECtHR, was a resounding affirmative and it held that Soering's extradition to the U.S. would violate Article 3.[57]

The ECtHR had an opportunity in 2003 to revisit the relationship between the death penalty and Article 3 in *Öcalan v. Turkey*.[58] Although observers hoped the Court would move beyond its "hesitant position" in *Soering*,[59] the ECtHR nonetheless sidestepped the matter and found a violation of Article 3 in that case not arising from application of the death penalty itself, but rather, in the imposition of a death sentence that followed an "unfair trial."[60]

III. *Inter-American Court of Human Rights* Hilaire v. Trinidad and Tobago

The Inter-American system has issued various decisions demonstrating its ability to reason around the ACHR's textual allowance for the death penalty. This convention provided its interpretive bodies with more maneuverability than does the ECHR because its language is concerned with the *arbitrary* use of the death penalty.

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[54] *Id*. ¶ 106.

[55] *Id*. ¶ 108.

[56] *Id*. ¶ 88.

[57] *Id*. ¶ 128.

[58] Öcalan v. Turkey, 2005-IV Eur. Ct. H.R. 45 (2003). Schabas notes that, before its own demise, the ECommHR had been invited several times to interpret the holding of *Soering* in situations where applicants argued that their extradition might subject them to capital punishment. It declined to do so "due to sufficient assurances that the death penalty would not be imposed, the relatively minor nature of the offense in question, or the unlikelihood of capital punishment actually being imposed in the receiving state." William A. Schabas, *Indirect Abolition: Capital Punishment's Role in Extradition Law and Practice*, 25 Loy. L.A. Int'l & Comp. L. Rev. 581, 589–90 (2003) [hereinafter Schabas, *Indirect Abolition*].

[59] Schabas, Abolition, *supra* note 2, at 278. The Court's position, he said, "seems almost unthinkable in 2001, given the strengthened and unequivocal commitments of the Council of Europe on the subject of capital punishment in the decade since Soering. … The European Court of Human Rights will be challenged to … see that these universal European values are now translated into its jurisprudence."

[60] Öcalan, *supra* note 58, at ¶; 198; Holding ¶ 11.

Primary among these cases was *Hilaire v. Trinidad and Tobago*, which presented the IACtHR with the opportunity to challenge the death penalty while evading article 4(2) of the ACHR.[61] The case before the court concerned thirty-two separate complaints from death row inmates in Trinidad and Tobago that had been submitted by the Inter-American Commission (IACommHR).[62]

The IACtHR's interaction with Trinidad and Tobago throughout the course of the *Hilaire* litigation was marked by escalating state disregard for the IACtHR and the Inter-American human rights system. The IACommHR began receiving petitions from the Trinidadians between 1997 and 1999 and the IACommHR

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[61] Hilaire v. Trinidad and Tobago, Inter-Am. C.H.R. (ser. C) No. 94 (2002). The Inter-American human rights system is bifurcated, with cases initially proceeding before the Commission, which then decides whether to send a matter before the Court.

Another case meaningful to its treatment of the death penalty was the IACtHR's advisory opinion (OC-16/99) [hereinafter *Right to Information on Consular Assistance*], an opinion requested by Mexico, which was concerned about its nationals being sentenced to death in the United States without ever being informed of their rights under the Vienna Convention on Consular Relations (VCCR). *See* Statute of the Inter-American Court for Human Rights art. 2 (outlining jurisdiction of the court and stating that advisory jurisdiction is governed by art. 64 of the ACHR). OAS member states "may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states." ACHR art. 64 ¶ 1. In response, the IACtHR may "may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments." *Id.* ¶ 2. The Court's advisory jurisdiction allows it more breadth to operate because it "can be exercised without the express consent of the States." Pasqualucci, *supra* note 30, at 12.

The International Court of Justice has likewise confronted U.S. failure to fulfill its VCCR commitments, most notably in the *LaGrand Case*. LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27). *See generally* Anthony N. Bishop, *The Unenforceable Rights to Consular Notification and Access in the United States: What's Changed Since the* LaGrand C*ase*, 25 Hous. J. Int'l L. 1 (2002). See also Avena (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

An earlier advisory opinion directly pertaining to the death penalty concerned a disagreement between Guatemala and the Commission over the interpretation of provisions in Article 4 and the legitimacy of Guatemala's related reservations. Advisory Opinion OC-3/83, Restrictions to the Death Penalty, Inter-Am. C.H.R. (ser. A) (1983). *See* Schabas, Abolition, *supra* note 2, at 334–35. Another advisory opinion tackled the "legal implications for a state that reintroduces the death penalty after it has been abolished. . . ." Advisory Opinion, OC 14/94, International Responsibility for the Promulgation and Enforcement of Law in Violation of the Convention, Inter-Am. C.H.R. (ser. A) (1999).

[62] Hilaire, ¶ 1. An individual does not have standing before the IACtHR—only states and the IACommHR do. ACHR art. 61(1). Rather, the individual must start the petition process before the IACommHR. ACHR art. 44. The Commission receives individual complaints, but is also tasked with "conducting on-site investigations with Member States' consent, providing member states and other OAS organs with advice on human rights matters, undertaking promotional initiatives in the area of human rights protection, and litigating before the [IACtHR]." Tittemore, *supra* note 37, at 454. It operates part-time, just as the IACtHR does. *Id.* at 455.

had requested that the IACtHR issue provisional measures to prevent the Trinidadian government from executing these individuals while it investigated their complaints.[63] The measures were disregarded. The IACtHR's request in these measures for status information about the death row inmates was ignored and one inmate, Joey Ramiah, was executed.[64] Before the matter formally reached the IACtHR—with petitions from the IACommHR arriving between 1999 and 2000—Trinidad and Tobago announced its decision to withdraw from the ACHR, effective on May 26, 1999.[65] Trinidad and Tobago was still responsible for its actions prior to the effective date of its withdrawal — and in fact, toward that end, the first petition to the IACtHR from the IACommHR was sent on May 25, 1999.[66] Trinidad and Tobago did not participate in the action before the IACtHR.[67]

In its determination of the case, in 2002, the IACtHR found it problematic that that the death penalty was the only punishment available for a murder conviction. This mandatory death penalty was further compounded by a broad definition of the crime that failed to account for degrees of murder.[68] As such, the IACtHR held, *inter alia*, that the Trinidadian mandatory death penalty statute violated the prohibition on the arbitrary deprivation of life found in Article 4(1) ACHR.[69]

The following section addresses the respective influence of both *Soering* and *Hilaire*.

C. *Examination of Regional Courts' Efforts to Affect the Death Penalty*

In assessing the impact of *Soering* and *Hilaire*, it is most intriguing to look at their power beyond the jurisdiction of the courts that rendered the decisions.

In contentious cases, the Commission makes an initial review of the petition and determines whether a state has committed a violation. Pasqualucci, *supra* note 30, at 6. With regard to its advisory jurisdiction, requests may be made for them by any OAS member. ACHR art 64. Ratification of the ACHR is not required for an OAS member state to request an advisory opinion from the IACtHR; nor must a state have ratified the American Convention to find its actions the subject of an opinion. Pasqualucci, *supra* note 30, at 12.

[63] Hilaire, ¶ 21, 26. *See also* Inter-Am. Ct. H. R., James, et al. Cases, Provisional Measure, May 27, 1998, *available at* http://www.corteidh.or.cr/docs/medidas/james_se_01_ing.doc. Initial measures were eventually extended to cover other individuals.

[64] Hilaire, ¶ 26–33.

[65] *Id*. ¶ 13.

[66] Brian Angelini, *Trinidad and Tobago's Controversial Death Penalty Law: A Note on Hilaire, Constantine and Benjamin v. Trinidad & Tobago*, Sw. J. L. & Trade Am., 361, 369 (2004).

[67] Hilaire, ¶ 16.

[68] *Id*. at ¶ 84.

[69] *Id*. ¶ 103. The Court's decision regarding the mandatory death penalty was unprecedented in the international context. Joanna Harrington, *The Challenge to the Mandatory Death Penalty in the Commonwealth Caribbean*, 98 Am. J. Int'l L. 126, 136 (2004).

Such influence may have been frowned on by Hudson, who subscribed to traditional notions of jurisdiction[70] and cautioned against attempting to "forge the development of the international law which is applicable to States generally. A tribunal has no general mandate to codify existing law, or to determine how the existing law should be modified and shaped to serve new needs."[71] However, in a time of great interconnectedness among nations, transcending one's sphere of influence is the shape progress has come to take, at least as it pertains to the death penalty.

I. *The Effect of Signature Death Penalty Cases*

"Questions of compliance dominate international human rights law," says Laurence Helfer.[72] He notes that international human rights law is "comprised of complex and constraining rules targeted at the heart of domestic legal systems. It contains precise and detailed requirements for governments, and it uses judicial … dispute settlement mechanisms to which aggrieved parties have direct access."[73] The domestic legal systems targeted are often within the court's jurisdiction, but sometimes beyond. This section examines the impact of both the European and Inter-American courts—within their own spheres and outside their spheres—with regard to the death penalty debate and concludes by evaluating their efficacy. Here, where progress has meant efforts to spread these courts' respective influence beyond their jurisdiction, the overall results have been mixed.

1. Soering *and the Influence of the European Court of Human Rights*

Beyond Europe, the ECtHR "has become a source of authoritative pronouncements on human rights law for national courts that are not directly subject to its authority. … "[74] Slaughter notes that the ECtHR's influence has transcended Europe, as it has received favorable notice from courts in other nations and in other regional human rights systems.[75] This is "striking," she notes, because the ECtHR "has no formal authority over any courts outside Europe. Its decisions

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[70] *See, e.g.*, Hudson, International Tribunals *supra* note 12, at 236.

[71] *Id*. at 246.

[72] Helfer, *supra* note 35, at 1834.

[73] *Id*.

[74] Slaughter, *supra* note 48, at 1109. *See, e.g.*, State v. Makwanyane, 1995 (3) SA 391 (CC) (S. Afr.). Even the United States Supreme Court has paid its respect to the court, citing it in *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003). This and other citations to foreign law have generated great controversy despite the fact that the Court "has never based its decisions on foreign sources; it has merely made passing reference to them. … " *The Insidious Wiles of Foreign Influence*, Economist, June 9, 2005.

[75] Slaughter, *supra* note 48, at 1110.

have only persuasive authority; weight is accorded to them out of respect for their legitimacy, care, and quality by judges worldwide engaged in a common enterprise of protecting human rights."[76] *Soering* is a prime example of this.

Soering has not been embraced universally, and its most notable target, the United States, has remained unmoved: "the undeniable truth is that [*Soering*'s] injection of international opprobrium into death penalty debates has hardly been lethal to capital punishment in the United States."[77] However, it has made an indirect impact in the U.S. through the way it has affected extradition. And its most significant contribution has been notion of the "death penalty phenomenon."

a. Soering *and Extradition*

The effects of the *Soering* decision on the European sphere were largely felt in the context of extradition requests to COE member nations from retentionist nations. Although at the time there was "no explicit general rule saying that extradition should be compatible with human rights," *Soering* seemed to indicate movement in this direction.[78] Writing in the immediate aftermath of *Soering*, Van den Wyngaert addressed the troubling Pandora's box such a change could have: "if it is accepted that extradition will have to comply with general human rights, which rights will be applicable, and what kind of violations will be considered…?"[79] Another problem this created, of course, was that "an international obligation *not* to extradite a person… may conflict with another international obligation: the obligation *to extradite* a person pursuant to the applicable extradition law"—in short, which commitment had precedence over the other?[80]

Not coincidentally, *Soering* extended the reach of the ECHR, giving it "extraterritorial effect, because it also applies to potential infringements in third States."[81] The decision in *Soering* was intended to affect the United States, although clearly not subject to the ECtHR's jurisdiction. It has come to do so, but not in the manner intended: "[s]ince *Soering*, Member States of the Council of Europe no longer extradite to states where it is likely that capital punishment will be

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[76] *Id*. at 1111. *See* Waters, in this volume.

[77] Daniel J. Sharfstein, *European Courts, American Rights: Extradition and Prison Conditions*, 67 Brook. L. Rev. 719, 722 (2002).

[78] Christine Van den Wyngaert, *Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box*, 39 Int'l & Comp. L.Q. 757, 759 (1990).

[79] *Id*.

[80] *Id*. at 761–62. Van den Wyngaert also raised the possibility that perhaps, given the barriers this might pose to legitimate extradition, some nations might resort to other practices that would result with "*less* protection for the requested person.…"; however, she concluded that "circumventing extradition by such methods is as old as extradition itself and will probably continue to exist as long as courts persist in their current refusal to consider the issue." *Id*. at 759, 778.

[81] *Id*. at 761.

imposed. Indeed, the *Soering* precedent almost immediately took on a significance that did not strictly correspond to the judgment's text."[82] In citing *Soering*, these states "overlook" the "death row phenomenon" holding and instead rely on the case "as authority for prohibiting extradition where there is merely a threat of capital punishment, although this is not the holding of *Soering*."[83] In this aspect, the result of *Soering* has been both effective and influential.

The effectiveness has been seen in U.S. responsiveness to requests for assurances that capital punishment will not be imposed on those facing extradition. Schabas sees national courts operating at the leading edge of extradition and the death penalty, including those outside the actual influence of the ECHR, such as Canada and South Africa.[84] Abolitionist nations have taken the matter beyond extradition into the area of offering mutual legal assistance.[85]

b. Soering *and the Privy Council*

The reasoning of *Soering* put "the term 'death row phenomenon' [into] the mainstream of the human rights vocabulary."[86] Consequently, the influence of the ECtHR has exceeded its jurisdiction through other entities referring to its precedent, including not only those already mentioned, but also Zimbabwe and the U.N. Human Rights Committee. The latter has looked at *Soering* in narrow terms, "insist[ing] that delay on death row must be accompanied by other extenuating circumstances." But dissenting voices are frequently heard, too.[87] The most remarkable influence of the *Soering* decision has been on the Privy Council and its controversial 1993 decision in *Pratt v. Attorney General*.[88] Critical to the Privy Council decision here was consideration of the "death row phenomenon." The case set a time limit of five years for death row inmates to complete the appellate process before their sentences would have to be commuted.

It is in *Pratt* that the trouble of *Soering*'s holding becomes evident, as a manifestation of its potential to short-circuit the due process efforts of those on death row. As noted by Schabas, "the only real way to avoid gratuitous suffering while awaiting execution is to perform it immediately, yet, where other rights, notably the right to due process, require that proceedings not be rushed."[89] The immediate practical result of *Pratt* was positive: "mass commutation of more

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[82] Schabas, *Indirect Abolition, supra* note 58, at 590.

[83] *Id*.

[84] *Id*. at 596–601.

[85] *Id*. at 603.

[86] William A. Schabas, The Death Penalty as Cruel Treatment and Torture 115 (1996) [hereinafter Schabas, Cruel Treatment].

[87] Schabas, *Indirect Abolition, supra* note 58, at 591.

[88] Pratt v. Attorney General for Jamaica, [1994] 2 A.C. 1, 18, [1993] 4 All E.R. 769, 773 (P.C. 1993).

[89] Schabas, Cruel Treatment, *supra* note 86, at 133.

than two hundred death sentences in the region. . . . "[90] But another consequence was public outrage and resentment toward a former colonial power.

Within the Inter-American human rights system, the Commonwealth Caribbean nations are something of an oddity, as summarized by Lawrence Helfer:

> [A]ll but one of the states in the Commonwealth Caribbean are liberal democracies. Their governments are chosen by free and fair elections among competing political parties, their judiciaries are independent . . . , and state actors protect basic civil and political liberties as well as property rights while upholding the rule of law. Indeed, the strength and resiliency of liberal democratic structures in the Commonwealth Caribbean are unique among developing nations and contrast sharply with the nearby nations of Central and South America, which have been governed by autocratic or unstable regimes until a democratizing trend took hold in the 1980s.[91]

The Commonwealth Caribbean nations also distinguish themselves within the hemisphere, along with the United States, in their "treatment of the death penalty . . . [which] reflects a division between the practice of Spanish and English-speaking countries in the hemisphere."[92] The *Pratt* decision sent many of those nations with obligations in the inter-American human rights system into a collision course with the Inter-American Court of Human Rights.

There existed within the Commonwealth Caribbean lingering resentment toward the former power, Britain. The Privy Council itself was seen by its critics "as antiquated, the last unnecessary remnant of colonialism."[93] The *Pratt* decision was interpreted by some as merely importing "English or European attitudes and notions about the death penalty as a basis for arriving at the five-year rule."[94] As noted by Simmons, "Our people believe that British judges are making a mockery of the death penalty and, by policy decisions, are virtually abolishing the death penalty for the Caribbean in order to make the region comply with a European movement for its universal abolition."[95] The result of *Pratt* in the Commonwealth Caribbean was negative and harmful. As noted by Tittemore, "this decision drastically affected the relations between the Caribbean States and both the UNHRC and the Inter-American Commission by pressing these bodies to accelerate their

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[90] Harrington, *supra* note 69, at 129.

[91] Helfer, *supra* note 35, at 1861–62. Also challenging for the Caribbean nations in its efforts to fit in is the use of English and the difference in legal system, common law as opposed to civil law.

[92] Tittemore, *supra* note 37, at 459.

[93] Rohter, *supra* note 9.

[94] David A.C. Simmons, *Conflicts of Law and Policy in the Caribbean—Human Rights and the Enforcement of the Death Penalty—Between a Rock and a Hard Place*, 9 J. Transnat'l L. & Pol'y 263 (2000). Suspicions on this front are made clear by the "extent" of the Privy Council's reliance on Soering "to support its conclusion that 'there are other authorities which do not accept that delay occasioned by use of appeal procedures is to be disregarded." Jarmul, *supra* note 36, at 364.

[95] *Id.* at 284.

determination of cases, notwithstanding their increasing case loads and limited resources."[96] *Pratt* was criticized not only by Caribbean governments for its insensitivity to regional means of dealing with [high crime rates] challenges, but also combined with an "increase in the number of death penalty petitions lodged against them with the inter-American system. … "[97]

Concerns about the logic of *Soering* were borne out by the Privy Council's enthusiastic response to it. The five-year cap developed by the Privy Council has been criticized and it was one which had a domino effect for nations throughout the Commonwealth Caribbean, such as Trinidad and Tobago.[98] Schabas described this time limit as "wishful thinking," given the length of time needed for both domestic and international appeals, with the latter being infamously time consuming "because these international bodies, understaffed and underfunded, are hardly known for their celerity."[99]

The matter eventually contributed to the withdrawal of Trinidad and Tobago from certain international human rights commitments—an action that affected *all* human rights protected by these instruments, not merely those pertinent to the death penalty discussion.[100]

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[96] Tittemore, *supra* note 37, at 467.

[97] *Id*. at 471.

[98] *See generally* Simmons, *supra* note 94. The Privy Council was not the only avenue pursued by death row inmates in the Commonwealth Caribbean—they also sent petitions to the Human Rights Committee and the Inter-American Commission.

[99] Schabas, Cruel Treatment, *supra* note 86, at 131. One reform that has been recommended for the Inter-American system to address this criticism is that of a "fast track" process for death row inmates. Michael F. Cosgrove, Note, *Protecting the Protectors: Preventing the Decline of the Inter-American System for the Protection of Human Rights*, 32 Case W. Res. J. Int'l L. 39, 73 (2000).

[100] Helfer, *supra* note 35, at 1884–85. Trinidad and Tobago's withdrawal from the American Convention is described infra. However, the country also withdrew—after some back and forth—from the Optional Protocol to the International Covenant on Civil and Political Rights in 2000. Schabas, Abolition, *supra* note 2, at 87–91. Likewise, appeal to the Privy Council is itself endangered, with several states seeking to replace it with a Caribbean Court of Justice. Harrington, supra note 69, at 140. Although this has been attributed to "issues of national pride, sovereignty, and accessibility," it is also influenced by notions that "a court comprised mainly of British judges, presiding in Britain, is out of touch with the local needs and sentiments of the Caribbean population." *Id*. Progress on that front has been halting, despite some strong initial momentum. Inauguration of the CCJ had been set for November 2004, but was delayed "to facilitate some member countries … that have not yet enacted domestic legislation necessary to render the CCJ the court of final appeal in those countries." Tittemore, *supra* note 37, at 515. By the time the court was inaugurated in 2005, despite initial enthusiasm leading twelve countries to sign a treaty establishing the court, it had been emasculated by the particulars of the "convoluted politics of the English-speaking Caribbean.…" *Parochialism Mars a New Tribunal*, Economist, Apr. 14, 2005. Some have stated that "if the new court is to develop an effective constitutional corpus, the CCJ will need to establish its place firmly within the emerging global consensus that deems certain aspects of capital punishment, such as

2. Hilaire *and the Influence of the Inter-American Court of Human Rights*

Given its volatile social context, the IACtHR must often tread carefully: "Regional human rights adjudicators … must balance the protection of human rights in individual cases against the potential long-term consequences of their decisions, a balancing that requires a constant assessment of the social and political milieu."[101] Nowhere has this quote been borne out more than within the context of the IACtHR, which began its operation in a climate of widely employed, state-sponsored violations of human rights. An evaluation of the IACtHR is, thus, necessarily one in which the successes described are modest. As it pertained to the death penalty, the IACtHR found itself within an existing controversy ignited by *Pratt*. Treading carefully was likely pointless for the IACtHR in dealing with *Hilaire*. In this sense, there was little to lose in proceeding.

In the Inter-American human rights context, Pasqualucci asserts that the critical contribution to benefiting these rights is the "chilling effect" that the "mere existence of the American Convention and the Inter-American Court" may have on the potential for violations to occur.[102] Like its counterpart in the European system, the efficacy of the IACtHR also has its basis in the fact that some OAS members have "incorporated the American Convention into domestic law, and have relied on it in domestic rulings."[103]

a. Intersection of Pratt *and Inter-American System*

Prior to the controversy that followed *Pratt*, Caribbean Commonwealth nations "played a longstanding but uncontroversial role in the inter-American human rights system. … "[104] However, this quickly changed in 1996, when lawyers based in London began inundating the IACommHR with petitions regarding the death penalty—ninety-seven between 1996 and 2001.[105] Three cases among these—from Trinidad and Tobago—made their way to the IACtHR.

Trinidad officials contended that further appeals made by lawyers for condemned individuals to the UN and the Inter-American Commission were

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the mandatory sentence, incompatible with enlightened constitutionalism."Margaret A. Burnham, *Indigenous Constitutionalism and the Death Penalty: The Case of the Commonwealth Caribbean*, 3 Int'l J. Const. L. 582, 584 (2005).

[101] Garrity-Rokous & Brescia, *supra* note 29, at 562.

[102] Pasqualucci, *supra* note 30, at 331.

[103] *Id.*

[104] Tittemore, *supra* note 37, at 464.

[105] *Id.* at 473. This amounted to some 10 percent of the Commission's caseload. By contrast, from 1980 to 1996, the Commission published only eight reports pertinent to the region. To contend with the increase in petitions, the Commission modified its processes through such means as dismissing petitions that were also before the U.N. Human Rights Commission and joining petitions from the same nations that appeared to present the same issues. *Id.* at 477.

intended only to ensure that the five-year deadline would elapse.[106] "[W]e cannot fit within the time frame of five years," complained Trinidad's Attorney General, Ramesh Maharaj. "We have pleaded with these international bodies to set up structures to hear these cases promptly and allow us to comply with our national law, but there are too many delays that are obstructing the Government from implementing the death penalty."[107]

These were precisely the sentiments Maharaj articulated in Trinidad's 1998 notice of denunciation of the ACHR.[108] Trinidad laid the blame for its denunciation square on the *Pratt* decision, which made it impossible for the country to "observe its obligations" under the convention owing to the amount of time required for proceedings to operate in the Inter-American system. "The Government of Trinidad and Tobago is unable to allow the inability of the Commission to deal with applications in respect of capital cases expeditiously to frustrate the implementation of the lawful penalty for the crime of murder in Trinidad and Tobago[,]" wrote Maharaj.[109]

A 1999 Privy Council decision facilitated the connection between domestic procedure and international human rights bodies, *Thomas & Hilaire v. Baptiste*, a case in which Trinidad unsuccessfully sought to evade its obligations under the Inter-American human rights system as well as the International Covenant on Civil and Political Rights, overseen by the U.N. Human Rights Committee.[110] Later that year, in June, nine individuals were hanged in Trinidad and Jamaica announced its intention to resume executions as well.[111]

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[106] Rohter, *supra* note 9. *See* Harrington, supra note 69, at 129 (stating that lawyers "[e]ncouraged by the landmark ruling … employed other arguments by which collateral attack on the death penalty could be mounted," which they took to the U.N. Human Rights Committee and Inter-American Commission after exhausting possibilities before domestic courts and the Privy Council).

[107] Rohter, *supra* note 9.

[108] Ministry of Foreign Affairs, Republic of Trinidad & Tobago, Notice to Denounce the American Convention on Human Rights (May 26, 1998), *available at* http://www.oas.org/juridico/english/Sigs/b-32.html.

[109] *Id*.

[110] Thomas & Hilaire v. Baptiste, [1999] 3 W.L.R. 249, [2000] 2 A.C. 1 (P.C.); Tittemore, *supra* note 37, at 467–71. Ultimately, the Privy Council addressed the matter of a mandatory death penalty by finding it unconstitutional in three separate cases. Harrington supra note 69, at 126. The cases were Reyes v. The Queen, [2002] 2 A.C. 235, [2002] 2 W.L.R. 1034 (P.C.); The Queen v. Hughes, [2002] 2 A.C. 259, [2002] W.L.R. 1058 (P.C.); Fox v. The Queen, [2002] 2 A.C. 284, [2002] 2 W.L.R. 1077 (P.C.). "Interestingly, in not one of these three judgments did the Privy Council feel compelled to respond to the argument made by counsel on behalf of the prisoners that the mandatory nature of the death penalty infringed on the right to life." [it used inhuman punishment] The Inter-American Court of Human rights, however, was not as reticent. It issued its decision in *Hilaire* three months later.

[111] *Sudden Spate of Executions Is Sweeping Caribbean*, N.Y. Times, June 9, 1999 at A7.

Meanwhile, proceedings before the IACtHR wound on and were eventually resolved in *Hilaire*. The Court's decision was "the first judgment by an international court to determine the legality of a mandatory penalty of death," and one made regarding a country with a savings clause in its constitution, unlike cases decided by the Privy Council.[112]

Despite the IACtHR's difficulties within the Caribbean, its decision showcasing a concept that gave it the ability to work around the challenges of its convention brought the injustice of the mandatory death penalty to the international stage. For this reason, the IACtHR's handling of the case deserves some praise and may come to some renown in international circles, despite Trinidad and Tobago's renunciation of the system during the course of proceedings. This is evident in the remedies the IACtHR recommended in the case. Among the most significant reparations ordered was for Trinidad and Tobago to reform its criminal statute to create different categories for classifying murder to "account [for] the particular circumstances of both the crime and the offender."[113] Trinidad and Tobago has indeed announced its intention to carry out such a reform.[114] Some optimistic observers say that *Hilaire* has "become the new standard in the Caribbean Community for death penalty cases."[115]

Although a controversial legal issue, the mandatory death penalty issue nevertheless had the remarkable effect of allowing an "interplay between the procedures and jurisprudence of the inter-American human rights system and those of relevant domestic courts."[116]

D. *Evaluating the Work of Regional Human Rights Tribunals*

I. *Implications of* Soering

Soering's impact on extradition policy, especially with the United States, is ultimately a better result than the effect that was achieved through its holding pertinent to the death row phenomenon. The former led to a sort of "indirect abolition" and was a far more constructive means of engaging retentionist nations than taking measures that smack of psychobabble and cultural imperialism. Indirect efforts compel the retentionist nation to consider its commitment to capital punishment. After all, it is not *forced* to decline applying capital

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[112] Harrington, *supra* note 69, at 135.
[113] Hilaire v. Trinidad and Tobago, Inter-Am. C.H.R. (ser. C) No. 94 ¶ 212 (2002).
[114] Angelini, *supra* note 66, at 366.
[115] *Id.*
[116] Tittemore, supra note 37, at 446. *See* Waters, in this volume.

punishment; rather, it must *choose* to do so. Such efforts also make a rententionist nation accountable through its commitment to the sending nation.

By contrast, the effect of short-circuiting appeals processes through arbitrary deadlines in an effort to avoid the "death row phenomenon" is counterproductive, particularly when it gives offense by reigniting anti-colonial sentiment, as was the case with the Commonwealth Caribbean in its response to *Pratt*. As theoretically applied to the United States, this artificiality would disregard the concern that U.S. courts show for due process of law—the appeals process may be arduous, but it seeks to be fair. Other retentionist nations can take the *Soering* logic as a license to do the deed quickly and have done with asking questions.[117]

Soering, furthermore, created havoc internationally, as seen in the response to the Privy Council's reliance on its reasoning in *Pratt*. The practical result of *Soering* for those death row inmates living in areas where a "death row phenomenon" has received legitimacy is reduced access to proper due process as their governments seek to avoid unrealistic time limits while attempting to carry out executions that they are not barred otherwise from carrying out.[118]

II. *Inter-American System*

At some level, the Inter-American system has to be seen for what it is, namely one that reflects the values of its Latin American constituents. This is particularly evident with the *Hilaire* decision. Although the withdrawal of Trinidad and Tobago from the system is seen by some as a blemish, more realistically, it seems a case of fitting a square peg into a round hole.

Among the reasons cited for the withdrawl of Trinidad and Tobago—aside from the fact that the ACHR was not crafted with participation from Commonwealth Caribbean nations[119]—is the "overlegalization" of human rights.[120] Seen in this light, the lack of commitment from the Commonwealth Caribbean is not surprising. But this lack of universality threatens the mission of the Inter-American human rights

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[117] Some members of the U.N. Human Rights Committee, for example, have expressed concern that the phenomenon argument "may actually encourage states to execute offenders more rapidly, rather than be accused of inflicting inhuman treatment through lengthy stays on death row." Schabas, *Indirect Abolition, supra* note 58, at 591.

[118] *See, e.g.*, Harrington, supra note 69, at 127 (stating that "[d]eath by hanging is, however, constitutionally sanctioned (and for some internationally sanctioned) in the nations of the Commonwealth Caribbean").

[119] Helfer, *supra* note 35, at 1864.

[120] *Id.* at 1851–54. Helfer clarifies that overlegalization tends to occur "where a treaty's augmented legalization levels require more extensive changes to national laws and practices than was the case when the state first ratified the treaty, generating domestic opposition to compliance or pressure to revise or exit from the treaty." *Id.* at 1854.

system—not all member states are parties to the ACHR, which "complicates" the operation of the IACommHR, particularly because it "must apply different criteria depending on whether a State is or is not a party to the American Convention."[121] This affects the operation of the IACtHR as well, and the problem becomes further complicated because not all ACHR signatories have accepted the IACtHR's compulsory jurisdiction.[122] The IACtHR has had to dodge these obstacles in its death penalty jurisprudence, with varying degrees of success.

An irony about *Hilaire* is that, while it created difficulty within the Inter-American system, it also placed the notion of the evils of a mandatory death penalty on a broader stage and thus helped the larger cause of preventing use of the death penalty. It also enabled the IACtHR to transcend its jurisdiction in a constructive manner. The logic of the decision—not outlawing the sanction, but instead focusing on its situational propriety—avoids the errors of *Soering*—that is, setting up an arbitrary framework that frustrates resort to a sanction that is lawfully on a nation's books. *Hilaire*'s logic seeks to make the best of a bad legal situation, while *Soering* creates trouble in its impatience.

The practical implications of the IACtHR's decisions are more positive. The *Hilaire* case, through its internationalization of the prohibition on a mandatory death penalty, provides a remedy that may keep some individuals from death row altogether. For example, a recent Privy Council case found that the Bahamian mandatory death penalty violated the country's constitution, putting the death sentences of 28 individuals into question.[123] Modifications to national practice in response to litigation over the mandatory death penalty have occurred, both positive and negative. For example, in Belize and some other Caribbean nations, courts have developed individualized sentencing procedures.[124] By contrast, countries such as Barbados have modified or seek to modify their constitutions to prevent individuals from challenging their sentences on grounds of delay and other factors.[125]

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[121] Pasqualucci, *supra* note 30, at 340.

[122] *Id.* at 341. The obvious absence from ratification of the Convention is the United States (as well as Canada), addressed earlier. There are two lines of thought about the implications of these North American powers' ratification. *Id.* at 342. One is that their ratification, even with considerable reservations, would do more to help the system function more cohesively. On the other hand, some argue that "the lack of integrity of the American Convention caused by multiple reservations may be considered a greater problem" that could actually be more harmful to the overall Inter-American human rights system. *Id.*

[123] Bowe v. The Queen, [2006] U.K.P.C. 10 (P.C. 2006); Amnesty International, *Bahamas: Privy Council Abolishes Mandatory Death Sentence*, AMR 14/001/2006, Mar. 9, 2006, *http://news.amnesty.org/index/ENGAMR140012006/$FILE/newsrelease.pdf*.

[124] *See* Tittemore, *supra* note 37, at 514.

[125] *Id.* at 516.

A prohibition on the mandatory death penalty is one that can be applied elsewhere, without passing judgment on those nations choosing to retain the sanction.

According to some observers, "The Inter-American system's jurisprudence influenced the approach taken by other tribunals on the issue of mandatory sentencing for the death penalty at both the domestic and international levels."[126] Critical among these was the Privy Council's giving

> unprecedented legal domestic legal effect to the procedures of the Inter-American system by preventing states from executing condemned prisoners while their complaints were pending before the Inter-American Commission and Court. Taken together, these developments have demonstrated a direct and effectual interrelationship between the articulation and implementation of human rights standards at the national and international levels.[127]

On the one hand, given the controversy of the Privy Council action described above, it may have been wise for the IACtHR to have acted with more care. On the other hand, by the time the IACtHR rendered its decision, Trinidad and Tobago had withdrawn from the ACHR and perhaps the IACtHR figured it had nothing to lose. The result for those on death row there is sobering, given their reduced options for pursuing international human rights complaints following the withdrawal from the Inter-American human rights system: "Trinidad continued its rigorous campaign to implement the death sentences of several convicted murderers."[128] Nevertheless, it is difficult to label the affair a total loss for the IACtHR, caught up as it was in a larger controversy. The IACtHR was merely one more tribunal amid a chorus of naysayers. Within the Commonwealth Caribbean, it was felt that "invoking domestic and supranational appellate review mechanisms … could effectively force Caribbean governments to commute their death sentences."[129] The work of human rights tribunals became "an obstacle" to imposing the death penalty and their procedures were ones to be abused.[130]

Thus, the IACtHR's involvement has to be seen in context—*Hilaire* arose amid the swirl of controversy and litigation pertinent to the *Pratt* case, which engulfed the Caribbean states with regard to the retention of the death penalty.

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[126] *Id.* at 502.

[127] *Id.*

[128] Natasha Parassram Concepción, Note, *The Legal Implications of Trinidad & Tobago's Withdrawal from the American Convention on Human Rights*, 18 Am. U. Int'l L. Rev. 847, 849 (2001).

[129] Helfer, *supra* note 35, at 1879.

[130] *Id.*

E. *Conclusion*

The ECtHR and the IACtHR have affected domestic policy indirectly, impacting nations both inside and outside their jurisdiction and they have attempted directly to influence the policy of these same nations. The results have been mixed, but constitute a meaningful contribution to the larger effort to abolish the death penalty by raising new perspectives on the issue. The advantage of this regional approach is to allow the issue to be addressed in its cultural context. Attempts to transcend this context, however, can be less beneficial, especially when the result may be to circumvent due process or create resistance to what is perceived as cultural imperialism.[131] At this time, it seems better to provide choices than to try to compel unwilling change.

Abolitionists would do well to remember that there is nothing close to an international consensus on the matter and that patronizing persuasion can only hurt their efforts and perhaps make retentionist nations, over whom they have limited leverage, more obstinate and resistant to change.

According to Hudson, "In the twentieth century, effort has been chiefly concerned with building permanent tribunals and with equipping them in such a way that they may serve the whole community of States. If some of the hopes which have inspired this effort have not been fulfilled, notable successes have been created which should quite clearly be preserved and handed down to the next generation."[132] Whether Hudson would have approved the developments that resulted from the work of regional human rights courts that arise in the latter part of the century, seeking as they did to affect matters beyond their ambit, is not known. However, within the connections of our current international situation, it has been an intriguing development and one worth tracking into the future.

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[131] *See* Simmons, *supra* note 94, at 272.

[132] Hudson, International Tribunals, *supra* note 12, at 250.

Triumph of Progress: The Embrace of International Commercial Arbitration

By Mary A. Bedikian

When the history of our times comes to be written with the perspective which only a half-century can bring, our generation will be distinguished, above all else in the field of social relations, for the progress which we have made in organizing the world for co-operation and peace.[1]

A. *Introduction*

This chapter explores the important role that commercial arbitration has assumed in forging international systems of justice since the formation of the first Permanent Court over 100 years ago. In the last several decades, the growth of arbitration has surpassed the expectations of even the most sanguine. Once limited to a handful of world powers, arbitration today is used by over 150 nations and private parties within those nations to resolve conflicts of varying complexities.

This widespread acceptance of arbitration has not been without challenge to its foundation. One formidable barrier to the growth of arbitration in the years following the creation of the Permanent Court was a distinct form of judicial hostility directed toward the enforcement of arbitration agreements of future, as contrasted with present, disputes. I examine the historical antecedents of this hostility in Part B. and I explain why the hostility, although perhaps misapplied,[2] was of sufficient magnitude to limit arbitration and, indeed, cause its temporary disappearance. In Part C. I discuss the gradual diminution of this hostility,

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[1] Manley O. Hudson, Progress In International Organization 5 (1932) [hereinafter, Hudson, Progress in International Organization].

[2] Some commentators believe that the "hostility" was primarily directed at the underlying bond required to submit cases to arbitration. Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 Yale L.J. 595, 602-03 (1928). But, it is clear, however accurate this view may be, that judges were reluctant to enforce arbitration agreements containing future dispute clauses, perhaps a further indication that "justice" in those days was both political and financial, relying heavily on case fees earmarked for judicial coffers.

Miller & Bratspies (Eds), Progress in International Law, pp. 517–538.

exemplified initially in the passage of the English Arbitration Act of 1889, the New York Arbitration Act of 1920 and, subsequently, the Federal Arbitration Act of 1925, a '*bare-bones*'[3] statute of U.S. origin that prescribed standards for the enforcement of arbitration agreements and awards.

Although the Federal Arbitration Act was the first major step toward overcoming the barrier to enforcing arbitration agreements, it did not go far enough in providing an enforcement mechanism in the United States for disputes that were international in character. It was purely a domestic statute, aimed at removing the common law *animus* toward arbitration. It was not until the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards that the tempo of arbitration's usage accelerated. In Part D. I discuss the impact of the 1958 United Nations Convention, and how it shaped the beginning of an international system of arbitral jurisprudence that would in later years provide support for the development of both substantive and procedural law.

Part E. previews an important trilogy of United States decisional law, *Bremen*,[4] *Scherk*[5] and *Mitsubishi Motors*,[6] which catapulted arbitration into the forefront of an international legal system that was gradually but cautiously moving away from litigation as the primary means of resolving international commercial disputes. In legal discourse, these decisions were heavily criticized for taking arbitration too far afield from its intended scope.[7] I assert, however, that they represented an important turning point in the development of arbitral jurisprudence. Read together, these three decisions legitimized arbitration as a process which vested

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[3] I characterize the Federal Arbitration Act of 1925 (FAA), Ch. 213, 43 Stat. 883 (1925), codified as amended at 9 U.S.C. § 1 et seq. (2000) as skeletal in form. Although the FAA addressed the fundamental concern of enforcement, it otherwise failed to provide specifics of procedure. The Act was, and continues to be, a set of overarching principles relating to enforcement of arbitration agreements and arbitral awards, subject to various exceptions.

[4] M/S Bremen v. Zapata Offshore Co., 407 U.S. 1 (1972).

[5] Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

[6] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

[7] Thomas E. Carbonneau, *The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of* Mitsubishi, 19 Vand. J. Transnat'l L. 265 (1986). See also Christine L. Davitz, Note, *U.S. Supreme Court Subordinated Enforcement of Regulatory Statutes to Enforcement of Arbitration Agreements: From the Bremen's License to the Sky Reefer's Edict*, 30 Vand. J. Transnat'l L. 59, 89 (1997) ("Congress did not intend the goal of international business harmony to override all other U.S. policies."). *Mitsubishi*, in particular, was heavily criticized by commentators who characterized the decision as a jurisprudential anomaly. In *Mitsubishi*, the dealership (Soler) resisted arbitration on the ground that the contract was governed by U.S. antitrust laws. These laws, considered mandatory rules, were undergirded by important public policies and, as such, incapable of being waived by contract. The Supreme Court's explanation that a U.S. court could refuse to enforce an award that lacked fidelity to U.S. antitrust laws rang hollow to those who were concerned that mandatory rules would not be honored by commercial arbitrators who might otherwise bemotivated by the need to "attract clients." Eric A. Posner, *Arbitration and the Harmonization of International Commercial Law: A Defense of*

in private actors the authority to adjudicate rights in a forum devoid of what was then emerging as the trappings of "*Americanized*" litigation.[8]

No more clear evidence of arbitration's importance in resolving major international conflicts can be found than in the Algiers Declaration of 1981,[9] which created the Iran-United States Claims Tribunal. With the ambitious mandate of resolving legal disputes arising from the 1979 Iranian seizure of U.S. hostages and their ultimate release during the opening minutes of the Reagan Administration, this Tribunal issued decisions that shaped international law for years to come. The efficacy of the Tribunal's work is evaluated in Part F. of the essay.

Consideration of international commercial arbitration is not complete without an assessment of the institutional players, whose primary function is to promulgate rules that support the system of international commercial arbitration. This is the focus of Part G. Finally, in Part H. I provide a kaleidoscopic overview of the challenges of international commercial arbitration in the 21st century, and where it fits into the broader scheme of international hegemony.[10] Although arbitration must still overcome certain obstacles, the process offers a predictable enforcement structure that eliminates the involvement of national courts,[11] and enhances the ability of states and private parties to resolve conflict quickly and efficiently, in a world still dominated by the fragility of global relations.

B. *Arbitration's Formative Years – Judicial Hostility as a Barrier*

By the early nineteenth century, the notion that nations could resolve international conflict through means other than force gained momentum. "Conspicuous successes in international arbitration,"[12] albeit sporadic, "gave impetus to the

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Mitsubishi, 39 Va. J. Int'l L. 647, *650 (1999). *See also*, Philip J. McConnaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 Nw. U. L. REV. 453 (1999) (decrying the "substantial erosion of … foundational mandatory law constraints").

[8] I use this term to mean the formal structure of the American judicial system, which incorporates numerous discovery devices. Elena Helmer describes the term "*Americanization*" as "an excessive influence of Anglo-American or common law legal traditions on international arbitration, originally a European/civil law phenomenon." *See* Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?*, 19 Ohio St. J. On Disp. Resol. 35 (2003).

[9] Declaration of the Government of the Democratic and Popular Republic of Algeria Relating to the Commitments Made by Iran and the United States, January 19, 1981, 20 I.L.M. 224; Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran, January 19, 1981, 20 I.L.M. 230.

[10] *See* Dellavalle, in this volume.

[11] *See* Waters, in this volume.

[12] Manley O. Hudson, The World Court 1921–1931, at 1 (3d ed. 1931) [hereinafter Hudson, The World Court].

movement to create an international court."[13] In 1899, the first Hague Peace Conference convened a gathering of delegations inspired by a desire to bring order to a world filled with disillusionment over arms escalation.[14] After months of deliberations, the Permanent Court of Arbitration was established. Ratified[15] by twenty-one of the twenty-six participating states,[16] the Permanent Court was a remarkable feat and a true reflection of the delegations' commitment to create an institution that would furnish the means to a more enduring peace.

The Court's viability was challenged almost immediately. The first case to be submitted to the Court's jurisdiction was the *Pious Fund* arbitration between Mexico and the United States, which involved interest claims against Mexico by Roman-Catholic bishops of California.[17] A five-person tribunal, appointed by the parties, was constituted to review the evidence.[18] After fifteen days of hearings, including both written and oral arguments, the tribunal rendered a unanimous award in favor of the United States.[19] Mexico responded by tendering prompt payment. The *Pious Fund* arbitration was followed by other prominent cases,[20] foreshadowing arbitration's importance in the realm of international law.[21]

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[13] *Id*. at 2. The movement was fostered, in part, by the success of the American-British Alabama Claims Arbitration of 1872, a case involving neutrality violations by Great Britain during the American Civil War. In the end, Great Britain was directed to pay the United States an indemnity of $15,500,000. Manley O. Hudson, International Tribunals Past and Future 6 (1944) [hereinafter Hudson, International Tribunals].

[14] Arthur Eyffinger, The 1899 Hague Peace Conference 214 (1999).

[15] For purposes of this discussion, ratification means that the state had agreed to submit to the jurisdiction of the tribunal. *See generally* Hudson, Progress *supra* note 1, at 58.

[16] Participants [delegations] included Austria-Hungary, Belgium, Bulgaria, China, Denmark, France, Germany, Great Britain and Ireland, Greece, Italy, Japan, Luxembourg, Mexico, The Netherlands, Persia, Portugal, Romania, Russia (and Montenegro), Serbia, Siam, Spain, Sweden, Switzerland, Turkey and the United States. Eyffinger, *supra* note 14, at 126-27.

[17] *Id*. at 445.

[18] *Id*.

[19] *Id*.

[20] The *Preferential Claims* case, which arose on the heels of the *Pious Fund case*, involved the 1902 blockade of the Venezuelan coast. At issue was the preferential status of Germany, Great Britain and Italy-Venezuela with respect to the distribution of certain custom revenues. During the same time, the *Japanese House Tax* case was referred to the Permanent Court. The question before the Permanent Court was whether, "under treaties in force, buildings and land held in Japan under perpetual leases were exempt from taxation other than that stipulated in the leases." Although the proceedings were hampered by procedural complications (admissibility of languages and limited meetings), the matter was concluded, *albeit* not without "diplomatic incident." Eyffinger, *supra* note 14, at 446-47.

[21] Hudson, Progress, *supra* note 1, at 70.

To be sure, the Permanent Court was the culmination of an ambitious vision. In the short term, the Court achieved measurable success, penetrating the international landscape in ways that were quite unanticipated. First, the resolution of disputes was not confined to the Permanent Court itself. Numerous disputes during this time were actually referred to *ad hoc* tribunals that functioned outside the aegis of the Court. Although these tribunals did not have the imprimatur of a formal institution behind them, they were nonetheless effective in bringing conflict among nations to closure.[22] Second, many of the bilateral and multilateral treaties negotiated at this time incorporated provisions for compulsory arbitration, thus recognizing arbitration's value as a settlement mechanism.

Notwithstanding these achievements, the Court was still structurally flawed. In the words of Professor Hudson, it was "little more than a method and a procedure for selecting arbitrators – it was neither *permanent* nor was it a *court*."[23] The Permanent Court's adjudicatory function was limited to only those matters which member states chose to submit to its jurisdiction. The "judges" of the tribunal were not judicial officers *per se*. Their role in re-ordering the international affairs of member states was episodic; the Permanent Court merely facilitated the use of arbitration.

A second Peace Conference convened in 1907 focused on rectifying the structural deficiencies of the Permanent Court. This work was interrupted by the outbreak of World War I, which triggered the collapse of the old political regime and created international exigencies of a type not previously experienced by countries caught in the tumult of re-aligned loyalties. New international players entered the scene,[24] eager for peace and for an international treaty that would establish a new court without the structural impediments of its predecessor. The 1919 Peace Conference in Paris accelerated progress toward this end by entrusting the formulation of the Court's structural parameters to the newly-conceived League of Nations. In 1920, under the League's umbrella, the Permanent Court of International Justice assumed prominence.[25]

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[22] This was an unexpected development since the movement toward international arbitration was in its embryonic stages. That states in conflict might refer their dispute to entities outside the formal structure of the Permanent Court was clearly welcomed by the general public.

[23] Hudson, International Tribunals, *supra* note 13, at 8 (emphasis added).

[24] New entrants on the world scene included Australia, Bolivia, Brazil, Canada, Cuba, Czech-Slovak Republic, the Dominions and India, Ecuador, Guatemala, Haiti, Hedjaz, Honduras, Liberia, Newfoundland, Nicaragua, Panama, Peru, Poland, New Zealand, South Africa, and Uruguay. George A. Finch, *The Peace Conference of Paris*, 1919, 13 Am. J. Int'l L. 159 (1919).

[25] The creation of the International Court of Justice did not displace the Permanent Court, although the work of the latter was not as significant once the new court was established. One suggested reason for the decline of its caseload was the lack of market orientation. The Permanent Court

The work of the Permanent Court of International Justice, which included the promulgation and adoption of governing rules by participating states, began in earnest shortly after its creation. Even though access to the Court was limited – the Protocol of Signature of 1920 was restricted to members of the League of Nations and to those which appeared in the Annex to the Covenant[26] – by all counts, the Permanent Court of International Justice was Prolific. Between 1922 and 1930, the Court issued sixteen judgments and nineteen advisory opinions involving twenty-three states.[27] The importance of the advisory opinions cannot be underestimated. Each advisory opinion represented a state decision to *voluntarily* submit a dispute to the Court for resolution, even though the Court had neither compulsory jurisdiction nor enforcement powers. That the "authoritative declarations of the law" issued as part of these advisory opinions carried as much "juridical weight as the judgments themselves"[28] elevated the Court's significance in international life. Professor Hudson characterized the Court "at once a proof of the need for such an agency in the international affairs of our time and an indication of the contemporary estimate which is placed upon its value."[29] It was a harbinger of things yet to come.

Episodically, arbitration was a fact of commercial life well before the eighteenth century. Early usage can be traced to medieval England, where certain merchants were chartered by the King to hold courts to decide domestic and foreign disputes among merchants "in accordance with the Law Merchant, a comprehensive body of norms created by the merchants and distinct from the common law."[30] These gild and fair courts were an integral part of the English judicial system, hearing cases that were not justiciable at common law because of procedural

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was more a concept, an adjudicatory body, and was incapable institutionally of adapting to the constantly ever-changing political climate. *See* The Flame Rekindled: New Hopes for International Arbitration (Sam Muller & Wim Mijs eds., 1994).

[26] Hudson, Progress, *supra* note 1, at 59.

[27] *Id*. at 63.

[28] *Id*. at 66.

[29] *Id*. at 63. One of the largest contributions made to the jurisprudence of the time was the *Wimbledon* case, in which the Permanent Court ordered the German government to pay France a sum of money for damages sustained as a result of the delay of a French-chartered vessel which was to have passed through the Kiel Canal. Although the payment of the money was blocked, the real purpose of the case was to secure a construction of the treaty language. The enduring feature of the Permanent Court of International Justice was the significant number of treaties which served as its predicate. The treaties provided the institutional sustenance missing from its predecessor, the Permanent Court. *Id*. at 64-65.

[30] Ian R. MacNeil, Richard R. Speidel & Thomas J. Stipanowich, Federal Arbitration Law §4.2.1, at 4:5 (1994) [hereinafter Macneil Treatise] (*quoting* Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. Pa. L. Rev. 132, 137-38 (1934)).

difficulties and because the merchant was regarded as subject to foreign law.[31] The rationale was that royal courts were not well-versed in the nuances of commercial life, and that commercial matters were best resolved by persons with specialized knowledge.[32]

A major setback to arbitration occurred in 1609 when Lord Edward Coke decided *Vynior's Case*,[33] which involved a performance bond that supported the obligation to arbitrate. After enforcing the penalty originally agreed upon by the parties for breach of the agreement to arbitrate, Lord Coke indicated in *dictum* that a party to a dispute could revoke the arbitrator's authority to hear and decide cases, at any time before an award was rendered. Although not critical to deciding the case, Coke's commentary became a *cause celebre* for those eager to preserve judicial authority. Even chancery cases, generally hospitable to arbitration, were adversely impacted by the surplusage of *Vynior's Case*.[34]

Legal theorists have justified Coke's *dictum* in different ways. First, some have argued that arbitration clauses were a grant of power not coupled with an interest, thus capable of being revoked.[35] Others have asserted that arbitrators essentially functioned as agents of the parties.[36] Finally, others saw the *dictum* as evidence of judicial protectionism – a way for the courts to maintain a stronghold over their territory and to continue to reap the financial benefits of collecting fees from the cases that were filed.[37]

The powerful force of Coke's *dictum* did not readily abate. Exported to the United States after the American Revolution, Coke's *dictum* continued to penetrate judicial thinking well into the nineteenth century. Judicial *animus* to arbitration in the United States, for example, was vividly apparent in *Tobey v. Bristol*,[38] a case

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[31] *Id.*

[32] *See* Brode v. DeRipple, Y.B. 49 Edw. 3, 8-9 (1375), *cited in* Julius Henry Cohen, Commercial Arbitration and the Law (1918).

[33] (1609) 77 Eng. Rep. 595, 597 (K.B.).

[34] Hide v. Petit, (1670) 22 Eng. Rep. 754 (Ch. 1698) (holding that a reference to arbitration confirmed by court order was revocable). *See* discussion found in Robert B. von Mehren, *From* Vynior's Case to Mitsubishi: *The Future of Arbitration and Public Law*, 12 Brook. J. Int'l L. 583, 585 (1986).

[35] von Mehren, *supra* note 34, at 585.

[36] Interestingly, Coke never used the word agency. The agency imprimatur appeared years later as a way of rationalizing the result in *Vynior's Case. See* Sayre, *supra* note 2, at 598-99 (asserting that if courts were indeed jealous of their jurisdiction and disapproving of arbitration, they would have held arbitration agreements to be against public policy and held as a nullity a bond made as security for the performance of the underlying agreement).

[37] *Id.* at 598.

[38] 23 F.Cas. 1313 (C.C.Mass. 1845).

which explicitly excoriated the shortcomings of arbitration - arbitrators were not empowered to administer oaths, to compel the attendance of witnesses, to compel the production of documents, or to direct discovery.[39] Litigation, on the other hand, and the safeguards attendant to it, could be easily measured.

While Coke's *dictum* was gaining momentum in the United States, England, on the other hand, was retreating from its earlier position that contracts to submit future disputes to arbitration were revocable at any time before an award was issued. The jealousy of the English courts over their jurisdiction mobilized the English Parliament into passing a series of acts designed to protect and preserve a field within which private arbitration could function, culminating in the Arbitration Act of 1889. In the end, the Arbitration Act "completed the effectiveness of arbitration agreements"[40] by enabling the enforcement of both future and existing dispute resolution clauses, subject to supervision by the courts in special circumstances.[41] The 1889 Arbitration Act thus effectively abrogated the revocability rule in England.

Despite the foresight of the English Parliament, the United States continued to lag behind most civil law countries in terms of adapting to the ever-changing business climate, a climate which decried the intrusive presence of government in the affairs of business. The resistance to fall in line with civil law countries and, in particular, England, was mired in irony. After all, the United States modeled its legal system around that of the English experience. The unwillingness or perhaps incapacity of the United States to modify its view with respect to arbitration was fraught with problems. Early arbitration statutes,[42] applicable in some jurisdictions, were generally too restrictive in their requirements to be useful. Absent a comprehensive statute that rendered irrevocable an agreement to arbitrate future disputes, private parties were on their own to honor arbitration agreements and to execute the arbitration award without having to resort to the courts for assistance. This private ordering of events relied on the good will of the parties. The "exigencies of commerce"[43] demanded more.

By 1915, the enforcement issue reached a high water mark. In *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*,[44] a United States District Court held that an arbitration provision providing that "any dispute arising under this Charter shall be settled in London by arbitration" applied to the entire

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[39] *Id.* at 1321.

[40] Ernest G. Lorenzen, *Commercial Arbitration: International and Interstate Aspects*, 43 Yale L.J. 716 (1934).

[41] *Id.* at 717.

[42] MacNeil Treatise, *supra* note 30, § 4.3. *et seq*, at 4:12.

[43] Sayre, *supra* note 2, at 597-98.

[44] 222 F. 1006 (S.D.N.Y. 1915). *Also cited in* MacNeil Treatise, *supra* note 30, § 4.3.2, at 4:18.

contract, and, was therefore void under the ouster doctrine[45] even though such a provision was perfectly valid under the English Arbitration Act of 1889.[46] The real driving force behind this decision was the revocability doctrine. Without a legislative mandate comparable to the English Arbitration Act, Coke's *dictum* continued to undermine domestic arbitration in the United States, and impact the ability of the United States to be seen as a progressive player on the international scene.

In reality, however, the archaic doctrine of revocability did not preclude the United States from entering into treaties with trading partners and from assuming the obligation to arbitrate when national interests were at stake. An early example is the *Fur Seal* arbitration between Great Britain and the United States. In 1867, Russia ceded to the United States the Aleutian Islands and the Pribilof Islands. The Pribilof Islands, in particular, were known for their valuable fur seal industry. In 1886, in the midst of a threatened extinction of the seal herd, the United States seized three sealing schooners carrying the British flag.[47] After years of diplomatic maneuverings, in 1892, the United States and Great Britain entered into a treaty that provided for arbitration. The arbitration panel, comprised of seven "jurists of distinguished reputation," was to decide, among other things, 'whether the Bering Sea was included in the phrase "Pacific Ocean" in the treaty of 1825, and what right of protection or property, if any, the United States had in the fur seals of the Pribilof Islands if found outside the ordinary three mile limit."[48] The case proceeded in two parts, with the early discussions focusing on the historical and jurisdictional questions, followed by discussions "relating to the life and habits of the seals."[49] Using the "general standard of justice recognized by the nations of the world," the panel voted unanimously that the phrase "Pacific Ocean" included the Bering Sea.[50] In a split 5-2 vote, the arbitration tribunal also held that the United States did not have a right of protection or property in fur seals that were found outside the three mile jurisdictional limit.[51] It was not until 1911, through the North Pacific Sealing Convention, that all pelagic sealing was prohibited, and United States interests were fully vindicated.[52]

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[45] *Id.*

[46] *Id.* In 1889, Parliament passed legislation that enforced existing and future arbitration clauses. Arbitration Act 1889, 52 & 53 Vict. ch. 49, § 1.

[47] William Williams, *Reminiscences of the Bering Sea Arbitration*, 37 Am. J. Int'l L. 562 (1943).

[48] *Id.* at 565.

[49] *Id.* at 570.

[50] *Id.* at 582.

[51] *Id.*

[52] *Id.* at 584.

C. *The 1920s – 1940s: The Gradual Extinction of Arbitration Animus*

The 1920's were characterized by a high degree of industrial self-government. Arbitration, thus, represented "a shield against government intrusion," enabling "businessmen to solve their own problems in their own way – without resort to the clumsy and heavy hand of Government."[53] Through focused lobbying efforts aimed at removing the obstacles to arbitration, the anti-government forces achieved their first major success. The New York Arbitration Act was passed in 1920, providing full legal enforcement of arbitration agreements for both existing and future disputes.[54]

The passage of this comprehensive statute inspired further reform, this time with a broader focus – the federal government. In 1925, with the support of a unanimous Congress, the United States Arbitration Act[55] became law. Combining features of both the New York Arbitration Act and the old New York Civil Procedure Act,[56] the federal legislation was sweeping in scope, subsuming within its breadth the formal requisites for the enforceability of arbitration agreements involving existing and future disputes. What began as a solitary state-driven reform movement culminated in a concerted series of dramatic procedural reforms intended to displace the supremacy of litigation and the legal predictability associated with its outcomes. By 1940, several states had passed a modern arbitration statute, which included an enforcement mechanism for pre-dispute arbitration agreements. For the first time since the revocability doctrine, private parties could be assured that their promise to arbitrate would be given full effect. The remaining vestiges of hostility, engendered by a distorted view of arbitration, were slowly dissipating.

D. *The 1950s – 1960s: The Promulgation and Import of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards*

The 1950's was a period of unprecedented expansion of Western influence and globalization. The Cold War, and its underlying ideology, remained an important force, dominating the world scene and keeping United States and Soviet expansionist ambitions in check. As a result, arbitration was on shaky ground.

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[53] Jerold S. Auerbach, Justice Without Law? (Oxford Press 1983).

[54] Arbitration Act of 1920, 1920 N.Y. Laws ch. 275, § 5.

[55] This Act was later renamed the Federal Arbitration Act.

[56] Macneil Treatise, *supra* note 30, § 5.4.1, at 5:8.

International commercial arbitration continued to be at the mercy of national courts, which were often highly politicized. Early attempts to establish a multilateral arbitration treaty to promote international arbitration proved largely unsuccessful. One need only examine the 1923 Geneva Protocol on Arbitration Clauses[57] to understand why. Its successor, the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards[58] comprised, by and large, members of the 1923 Geneva Protocol. Neither of these treaties provided a uniform enforcement mechanism.[59] Parties seeking enforcement were compelled, by virtue of the treaties, to assume the burden of proving the conditions essential to enforcement. Before enforcement could occur, the award had to become "*final*" in the country of origin. In practice, this constituted "*double-exequatur*." Disenchanted by these deficiencies, and concerned about preserving the independence of state courts,[60] the United States refused to endorse the treaties.

In 1953, the International Chamber of Commerce charged the Economic and Social Council of the United Nations (UNESCO) with preparing a draft Convention that would go beyond the parameters of the Geneva treaties.[61] This was a daunting task – the Council had to grapple with such issues as scope of application, burdens of proof, choice of law, and security issues, the solution to which had proven illusive to those involved in the promulgation of the Geneva treaties. The Council appointed an *ad hoc* committee whose charge it was to promulgate a draft Convention.[62] Four years after the constitution of the committee, UNESCO convened a Conference that included an interesting array of attendees – 45 states, including the United States and Soviet Russia, three intergovernmental organizations and ten nongovernmental organizations.[63] The Convention on the Recognition and Enforcement of Arbitral Awards (The New York Convention) evolved from this Conference. The New York Convention was opened for signature in May 1958, producing almost immediately a significant number of ratifications.[64]

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[57] 1923 Geneva Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 157.

[58] 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 302.

[59] For a listing of other requirements, *see* Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1054 (1961).

[60] International Trade Arbitration: A Road to World-Wide Cooperation 35, 42-43 (Martin Domke ed., 1958).

[61] Quigley, *supra* note 59, at 1059.

[62] *Id.*

[63] *Id.*

[64] Twenty-three states ratified the Convention, ten on the day the Conference adopted the Convention, and another thirteen within the period the Convention was open for signature, *i.e.*, December 31, 1958. Quigley, *supra* note 59, at 1060. The United States was not among the initial group of

In many important respects, the New York Convention improved upon the earlier Geneva treaties.[65] First, the Convention promoted party autonomy by vesting in parties the right to select which substantive law would apply while simultaneously limiting judicial review to deviations from basic norms of fundamental fairness.[66] Second, the Convention abolished the system of "*double exequatur*," making an award once rendered binding on the parties.[67] Third, and perhaps most importantly, the Convention shifted the burden of proving the invalidity of arbitral awards to the party resisting enforcement.[68] This latter feature would serve as a ready deterrent to parties who might otherwise seek to invalidate an award simply because they were dissatisfied with the result. The cornerstone of international commercial arbitration was now in place.

Wide-spread adoption of the New York Convention introduced new and unique challenges for the international business community. Although the increase in trade activity between the economically developed nations bode well for arbitration, important questions remained unanswered. In particular, the New York Convention did not resolve whether parties should submit their disputes to institutional arbitration, or how arbiters should be appointed. While on the one hand institutional arbitration agencies offered more predictability and structure than *ad hoc* proceedings, they also created apprehensions because the institution was often located in the country of one of the parties. This concern over impartiality led parties to include the very antithesis of an effective arbitration clause in their agreements – generic language that simply called for the use of arbitration should disputes arise. Without prerequisites, and more specific references to the mechanics of constituting the arbitral tribunal, the end result of this linguistic imbroglio was the very uncertainty arbitration was intended to avoid.

One other major development during this period was the establishment of the United Nations Commission in International Trade (UNCITRAL).[69] The principal charge of this organization was to consider "steps that might be taken with a view to promoting the harmonization and unification [of international commercial

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signatories, in part due to continuing distrust of arbitration. At the time, fewer than 20 states had adopted their own versions of the Federal Arbitration Act.

[65] Its coverage was broad, applying to all awards made in a state other than the state in which enforcement of the award was sought, including awards not considered domestic. This reference was intended to counter the territorial concept advanced by some countries, such as France, that an award made in that country under foreign law constituted a non-domestic award. *Id.*

[66] Albert Jan Van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation (1981).

[67] *Id.*

[68] Gary B. Born, International Commercial Arbitration (2d ed. 2001).

[69] *See* http://www.uncitral.org/index/html (last visited June 15, 2007). *See also* Pieter Sanders, The Work of Uncitral on Arbitration and Conciliation (2004).

arbitration], having particularly in mind the desirability of avoiding divergencies [sic] among the different instruments on this subject."[70] As part of its mandate, UNCITRAL would consider the propriety of arbitration in charter parties and other shipping documents used in maritime transactions. Although UNCITRAL was an institutional body, it was *not* an arbitral institution. It was not charged with administering arbitrations but rather the promulgation of rules that would facilitate the usage of arbitration. Perhaps its greatest contribution to the institutionalization of arbitration was in its unique status as a non-administering entity, purely neutral, not connected politically or financially to any country, and interested only in planting the procedural seeds of a workable arbitration scheme. Years later, it would promulgate the Model Law,[71] which would serve as a model for states in Europe, the United States and parts of Asia not hostile to the notion of international arbitration, to adopt in their respective legislative mandates.

E. *The 1970s – 1980s: Landmark Decisions that Turned the Tide*

Prior to 1968, the United States was not a member of any multilateral arbitration treaty or convention.[72] Though a participant at the opening of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the United States chose not to execute the Convention for political reasons. Not until 1968 did the United States Senate approve membership in the Convention. Two years later, the United States added a second chapter to the Federal Arbitration Act, providing for the recognition and enforcement of awards made in the territory of another contracting state.[73] This implementing legislation rectified the deficiencies inherent in the 1925 FAA, by speaking specifically to the enforcement of foreign arbitral awards, and the confirmation process.

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[70] Paolo Contini, *Proceedings of the 1968 Annual Meeting of the American Foreign Law Association – The United Nations Commission on International Trade Law (UNCITRAL)*," 16 Am. J. Comp. L. 666, 676 (1968).

[71] The Model Law builds upon the New York Convention in several ways. First, it offers significant detail in areas such as enforcement of arbitration agreements, appointment and challenges to arbitrators, provisional remedies, conduct of proceedings, situs, discovery, applicable law, and recognition and enforcement of awards. Further, the Model Law clarifies the grounds for vacating an award, and "defines the (limited) scope of national court interference in, and assistance to, the arbitral process." UNCITRAL Model Law, art. 5 (1996) (amended 1998); *see also* Born, *supra* note 68, at 30-31.

[72] Quigley, *supra* note 59, at 1074.

[73] *Id.*

The advent of globalization also set the stage for the United States Supreme Court to re-examine its earlier jurisprudence which had declared claims arising under federal statutes to be inarbitrable because such statutes implicated important public interests that could only be vindicated in court. The first case to erode these legal constraints was *Bremen v. Zapata-Off-Shore Company*.[74] In *Bremen*, the Supreme Court enforced a forum selection clause providing for disputes to be resolved in the London Court of Justice, concluding that the clause was *prima facie* valid "in the absence of some compelling and countervailing reason."[75] In a carefully crafted decision, the Supreme Court recognized the growing interdependence of a commercial world dominated by international transactions.[76] Its measured analysis of the forum-selection clause, inserted into contract by parties of equal bargaining power, led the Supreme Court to resoundingly reject earlier incantations that clauses which "oust the jurisdiction of the courts" are contrary to public policy and should not be enforced.[77]

The theme that public law claims had to be shielded from the "black hole" of arbitration was even more forcefully rejected in *Scherk v. Alberto-Culver Co*.[78] Domestic imperatives, and the special protections inherent in securities legislation, were eclipsed by the now more entrenched policy favoring recourse to arbitration in the context of international transactions. One commentator stated that while the *Scherk* doctrine needed refinement, "what formerly had been a fragile and unanchored international consensus in United States policy, supported primarily by foreign legislation [the New York Convention], now was emerging as a centerpiece of United States law – the seedbed for elaborating a comprehensive United States policy toward private international law matters."[79]

The foundational assumptions of *Scherk* were challenged in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*.[80] Public interests, protected by public judges, gave way to the special exigencies of international comity, and "sensitivity to the need of the international commercial system for predictability in the resolution of disputes."[81]

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[74] 407 U.S. 1 (1972).

[75] *Id*. at 1.

[76] "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts … We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *Id*. at 9.

[77] Wilko v. Swan, 346 U.S. 427 (1953) (holding that an agreement to arbitrate a future controversy constituted an impermissible waiver of conditions specified in the Securities Act of 1933 because it would deprive plaintiff of the advantage of a court remedy).

[78] 417 U.S. 506 (1974), *reh'g denied*, 419 U.S. 885 (1974).

[79] Carbonneau, *supra* note 7, at 265.

[80] 473 U.S. 614 (1985).

[81] *Id*. at 615.

It was clear that market place forces were compelling a result that placed sovereign authority into the hands of private actors. Deeply embedded philosophical opposition, directed less toward internationalism and more toward a process with suspect beginnings, succumbed to the view that arbitration's shortcomings were minimized by its collective attributes – speed, efficiency, informality, and predictability. Even the skeptics of arbitration were revisiting their view of arbitration, recognizing that arbitration was not a form of second-class justice, but a way for private parties and states to resolve conflict without account of cultural and national differences.

F. *The 1980s – 2000s: Confrontation Superceded by Amicable Resolution: the Inner Workings of the Iran - U.S. Claims Tribunal*

In November 1979, fifty-two Americans working at the American Embassy in Iran were taken hostage.[82] In swift response, the United States, by executive order, froze all Iranian assets in U.S. banks.[83] From a purely political perspective, the diplomatic crisis was emblematic of an unwillingness to understand the value differences "embraced by two leading members of the Third and First World – a North-South confrontation in the class legal mould."[84]

The hostages' captivity endured for 444 days. During this time, the United States engaged in unrelenting diplomatic, economic and legal maneuvers aimed at securing the safe release of the hostages.[85] On January 19, 1981, Iran and the United States executed the Algiers Accords, comprising two primary declarations, and three ancillary declarations.[86] The first declaration set forth the terms and

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[82] Mark Bowden, Guests of the Ayatollah: The First Battle in America's War With Militant Islam (2006); David Harris, The Crisis: The President, the Prophet, and the Shah (2004).

[83] Exec. Order No. 12, 170, 3 C.F.R. 457, 44 Fed. Reg. 65, 729 (Nov. 14, 1979).

[84] Rahmatullah Khan, the Iran-United States Claims Tribunal: Controversies, Cases and Contribution xi (1990). One of the principal charges against the United States by Iran was "that the United States involved itself in "more than 25 years of continual interference … in the internal affairs of Iran, the shameless exploitation of [the] country and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms." James P. Terry, *The Iranian Hostages Crisis: International Law & United States Policy*, 32 Jag J. 31, 35 (1982).

[85] For an excellent description of this crisis, including the historical and political background leading up to the takeover, *see* Terry, *supra* note 84.

[86] Declaration of the Government of the Democratic and Popular Republic of Algeria Relating to the Commitments Made by Iran and the United States, January 19, 1981, 20 I.L.M. 224; Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning

conditions associated with the release of the hostages.[87] The second declaration established a settlement claims Tribunal, charged with employing a hybrid arbitration process[88] to resolve commercial claims that grew out of trade pacts between Iran and the United States in the period preceding the hostage crisis.

The creation of the Iran-U.S. Claims Tribunal followed one of the longest periods of foreign investing in international history. The unlawful seizure of the U.S. Embassy resulted in a complete destruction of a fragile but otherwise lucrative commercial relationship between Iran and the United States, a relationship that registered $5.7 billion in bilateral trade transactions in 1977.[89] The expropriations of American investments in Iran and the freezing of Iranian assets by the United States government thus became a major focus of concern. It therefore seemed logical that decisions respecting those investments would be made by expert decision-makers prominent in international life, and well-versed in the complexities of international law.

The organizational structure of the Tribunal was not unique, and compared favorably to other international tribunals constituted after major world events.[90] The initial panel was comprised of nine arbitrators, three appointed by Iran, three by the United States, and the balance selected by agreement of the six appointees or "by an independent appointing authority."[91] The Tribunal was further divided into three separate panels "or chambers," with each panel including an Iranian arbitrator, a United States arbitrator, and an arbitrator from a third country, who presided over the proceedings.[92]

What *was* unique, however, was the overarching mandate provided to the Tribunal and the procedures that would govern the arbitral proceedings. Three special features differentiated it from its predecessors. First, the scope of the Tribunal's work extended to "claims arising out of debts, contracts, expropriations,

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the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran, January 19, 1981, 20 I.L.M. 230.

87 *Id.*

88 General Declaration, General Principle B, stipulated that "Iran and the United States will promote the settlement of the claims described in Article II" and that claims not settled within six months "shall be submitted to binding third-party arbitration." *See* John A. Westberg, International Transactions and Claims Involving Government Parties: Case Law of the Iran-United States Claims Tribunal 4 (1991).

89 David P. Stewart & Laura B. Sherman, *Developments at the Iran-United States Claims Tribunal: 1981-1983*, 24 Va. J. Int'l L. 1, 2 (1983).

90 *Id.*

91 *See* Westberg, *supra* note 88, at 4.

92 *Id.*

or other measures affecting property rights."[93] This cluster of permissible claims was far-reaching, touching virtually every aspect of international transactions: copyright licensing, employment contracts, joint venture investing, government loans, and technology transfers.[94] Second, individuals whose claims were $250,000 or more were permitted to retain their own counsel and present directly to the Tribunal, rather than having to prosecute such claims through their national government. Third, and unlike many of its predecessor tribunals, the Iran-U.S. Tribunal was appropriately funded, initially with security of $1 billion.

The early years of the Tribunal were marked by intermittent predictions of both gloom[95] and promise. At the outset, the Tribunal's contributions were overshadowed by considerable skepticism about its capacity to issue substantively quality decisions. Indeed, at least one legal scholar proclaimed that the arbitrators acted cavalierly on doctrinal issues, generating opinions that "occup[ied] a sort of legal ether." Other portions of the Tribunal's work were impacted by conflicts between arbitrators[96] and arbitral resignations, due to both the volume and the complexity of the work. The skepticism that marked the first years of the Tribunal's work was also compounded by legal challenges – American claimants who believed that American courts were better equipped than international tribunals

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[93] *Id*. at 7-8. Claims that were pending by the United States against Iran before the International Court of Justice and any future claims of either the United States Government or former hostages arising out of the crisis, as well as "claims arising out of injury to the United States nationals on their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the government of Iran" were outside the scope of arbitration. *Id*.

[94] *Id*.

[95] The extraordinarily large number of cases—4000—prompted one observer to state, "Assume that each of the [major] 900 cases takes altogether no more than ten days of the Tribunal's time – ten days to deal with all interlocutory stages, read the pleadings, cope with preliminary objections, hold pre-hearing conferences as well as oral hearings on the merits, and then prepare the awards. That means 9,000 working days will be required, or 3,000 for each of the existing chambers. There are some 220 working days in the Tribunal's effective year, if regard is had to the national holidays of the Netherlands, the United States, and Iran; the Scandinavian inclination toward summer holidays beginning in July; the sacrosanctity of August to the French; and the universal inclination to adopt the Englishmen's weekend. On this basis, and unless some new techniques are adopted, it will take each chamber something over 13 years to finish its work;" Elihu Lauterpacht, *The Iran-United States Claim Tribunal – an Assessment, in* Private Investors Abroad – Problems and Solutions in International Business in 1982, at 213, *quoted in* Khan, *supra* note 84, at xii, n. 9. This prediction was not far off the mark. As of 2002, claims subject to the Algiers Accords were being resolved under the auspices of the Tribunal. *See* Westberg, *supra* note 88, at xi.

[96] These conflicts reached their apex "when two Iranian arbitrators manhandled one of their European colleagues in the stairwell of the Tribunal's building." *See* Westberg, *supra* note 88, at xv.

to mete out justice without violating important norms of due process.[97] The challenges went to the heart of "our Republic's governance."[98] By September 1990, some 8 plus years after its mandate commenced, the Tribunal had issued 489 awards, 76 interlocutory and interim awards, and 838 case terminations. This was no small feat and, in the eyes of some commentators, compared favorably with the results produced by "domestic court systems of most countries around the world."[99]

From a more current perspective of the new millennium, the importance of the U.S. – Iran Claims Tribunal cannot be underestimated. The work of the Tribunal produced by far the most prodigious body of jurisprudence since international arbitration became institutionalized, providing a lens through which the complexities of public international conflict could be discerned. It was a remarkably fragile yet remarkably agile institution of its times, fierce in its quest to leave a legacy of case law that would serve as an important template for the contemporary world.

G. *Institutional Players and Their Role in Promoting International Arbitration*

The overall success of international arbitration has been fostered by the growth of arbitral institutions that sponsor arbitrations such as the American Arbitration Association, the International Chamber of Commerce, and the London Court of International Arbitration. There are also several specialized centers that administer arbitrations. These include the International Center for Settlement of Investment Disputes [ICSID], whose jurisdiction is limited to disputes conducted pursuant to the International Center for the Settlement of Investment Disputes Convention[100]

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[97] The most significant legal challenge reached the United States Supreme Court in 1981. In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), Petitioners filed suit against the United States and the Secretary of the Treasury, challenging President Reagan's ratification of President Carter's Executive Order issued pursuant to the International Emergency Economic Powers Act (IEEPA) which "blocked the removal or transfer of all property and interests in property of the Government of Iran … subject to the jurisdiction of the United States." *Id.* at 655. The net effect of the Executive Order was to nullify attachments and liens on Iranian assets in the United States, direct that these assets be transferred to Iran, and suspend claims against Iran until such claims could be presented to the International Claims Tribunal. The United States Supreme Court upheld the propriety of the President's decision, concluding that neither the express language of the International Emergency Economic Powers Act nor the legislative history of either § 1702 or § 5(b) of the Trading With the Enemy Act (TWEA) required a more restrictive reading.

[98] 453 U.S. 654, 655 (1981).

[99] *See* Westberg, *supra* note 88, at xv.

[100] This institution was created pursuant to the Washington Convention of 1965. The ICSID facilitates the resolution of investment disputes that arise out of an "investment" and involve a signatory state. In addition to arbitration, ICSID offers conciliation.

and the Arbitral Centre of the World Property Organization [WIPO], designed primarily for intellectual property disputes.

Although private parties and states may choose to conduct their arbitration *ad hoc* (without the involvement of an administrative agency), institutional providers offer several advantages. First, providers promulgate procedural rules that guide international arbitrations to closure. In the case of either public or private disputes, these rules supplement the parties' contractual provisions, offering a distinct and predictable framework within which the arbitration will be conducted. This is an important feature of the international commercial arbitration process {although comparable rules are also promulgated for cases conducted domestically} since the exigencies of commerce today require parties to move fairly quickly from decision to contract, to implementation. Second, institutional providers actually supervise the conduct of arbitrations, to ensure that parties do not run afoul of the rules, and to protect the overall integrity of the arbitral process by limiting, for example, the nature of *ex-parte* communications parties may have with arbitral candidates or appointees. Supervision of arbitration is typically handled by professionals with multiple language fluency.

Perhaps the greatest contribution of institutional providers is their commitment to *promote* the use of arbitration beyond the mere promulgation of rules. For example, both the ICC and AAA filed *amicus* briefs in the United States Supreme Court while *Mitsubishi* was pending decision, entreating the Court to expand the scope of arbitrable disputes subject to a valid international arbitration agreement.[101] The Supreme Court adopted the urgings of these institutional providers and, in later years, broadened its preference for arbitration to include statutory claims that arise in a purely domestic context.[102]

H. *Challenges and Trends in International Commercial Arbitration – A Preview of the Twenty-First Century*

The landscape of international commercial arbitration, driven by the proliferation of bilateral and multilateral treaties, and cooperative arrangements, has changed dramatically since the formation of the International Court in 1899. What are some of the challenges and trends of the next decade?

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[101] Michael F. Hoellering, *The Influence of Courts and Arbitral Institutions – International Arbitration Agreements: A Look Behind the Scenes, in* Thomas E. Carbonneau & Jeannette A. Jaeggi, AAA Handbook on International Arbitration & ADR, 54 (2006) [hereinafter Carbonneau Handbook].

[102] *See* earlier discussion in Section E of this chapter.

First, we are likely to see enhanced harmonization between civil law and common law approaches in the practice of arbitration, working towards what commentators refer to as the creation of a "transnational commercial law."[103] These diverse approaches subsume many aspects of arbitral practice, including the examination of witnesses, the nature of the "inquisition," and proof of foreign law.[104] Central to the harmonization process is UNCITRAL, which initially promulgated the Arbitration Rules of 1976 and, subsequently, the Model Law of UNCITRAL of 1985. The Model Law's most salient feature is that it neutralizes cultural differences while simultaneously providing enough flexibility to adjust for case complexities and nuances.[105] "The success of the Model Law demonstrates the effectiveness of this approach {toward developments in national laws} and the Model Law will continue to greatly impact the future of international arbitration throughout the world as a factor "contributing to … harmonization and convergence."[106]

Second, the success of arbitration in the commercial international arena will invite the use of other methods of conflict resolution, such as conciliation and mediation.[107] These ADR forms offer parties what arbitration does not – the ability to shape their own resolution without the formality of a quasi-judicial directive that may, in the end, require an enforcement proceeding to confirm the award.

Although arbitration is not likely to be displaced any time soon, the magnetism of mediation and conciliation cannot be overstated. Privacy and flexibility are surpassed by the parties' ability to safeguard their mutual relationship. Moreover, in both conciliation and mediation, the parties have the ability to walk away from the table with impunity – an option not available under the adjudicatory process of arbitration.

Third, the parochialism associated with specific institutional providers is likely to diminish. A key player in this development is the China International Economic and Trade Arbitration Commission (CIETAC),[108] created in 1994 to manage the growing number of disputes involving Chinese companies. Today, CIETAC administers approximately 500 arbitrations per year involving foreign-related disputes. Once viewed as highly political, awards issued under its auspices are more readily enforced, rendering CIETAC a more predictable forum for the

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[103] Julian D.M. Lew & Laurence Shore, *Common Law versus Civil Law – International Commercial Arbitration: Harmonizing Cultural Differences, in* Carbonneau Handbook, *supra* note 101, at 37.

[104] *Id*. at 37-38.

[105] Helmer, *supra* note 8, at 58.

[106] *Id*. at 65. Over 40 jurisdictions to date have adopted the Model Law as their national arbitration statute. *Id*. at 63.

[107] Although conciliation and mediation are often used interchangeably, a conciliator is less pro-active than a mediator.

[108] *See* http://www.cietac.org.cn (last visited June 15, 2007).

growing number of trade disputes between U.S., European, and Chinese companies. In 1999, after 74 years of administrative service, AAA established its first European office in Dublin, with the expectation that parties will begin to view AAA as an "international" player, with less fidelity to U.S.-based interests.

Fourth, prominent arbitral institutions will continue to monitor arbitral practices, and will engraft variations on arbitration rules to respond to the ever-changing realities of market forces. AAA, for example, amended its rules in 2006, allowing parties in International Center of Dispute Resolution[109] arbitrations to have access to interim measures of protection on an emergency basis. This amendment harmonized AAA procedures with those of other service providers. Also, both AAA and the ICC provide a formal mediation or conciliation option, which can be accessed by parties either as a prelude to, or independent of, arbitration.

Fifth, as the demand for international commercial arbitration increases, so will the need to recruit and train a new cadre of international arbitrators, capable of resolving complex disputes over a sustained period of time. In the past, arbitrators were a highly-skilled albeit homogenous group.[110] If arbitration is to continue to attract new recruits, homogeneity must give way to greater diversity in arbitral pools. The reality is that women and minorities continue to be under-represented on multi-member arbitration tribunals, although some recent progress has been made.[111]

Finally, the New York Convention will sustain its allure, particularly to countries interested in ensuring the enforcement of foreign arbitral awards. Today, all major trading states are signatories.[112]

I. *Conclusion*

In the complexity of our times, courts cannot be the sole vehicle through which conflict is resolved. International commercial arbitration, while not without imperfections, has enabled parties to pursue commerce, maintain business relationships, and, in general, create an international body of law that has garnered respect and credibility. Its force in years to come can only strengthen.

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[109] This is the international arm of AAA.

[110] For a profile of the international arbitrator, past and present, *see* Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 Am. U. Int'l L. Rev. 957, 963 (2005).

[111] Louise Barrington, *Arbitral Women: A Study of Women in International Commercial Arbitration, in* The Commercial Way to Justice: The 1996 International Conference of the Chartered Institute of Arbitrators 229 (Geoffrey M. Beresford Hartwell ed., 1996).

[112] For a complete list of signatories to the New York Convention, *see* U.N. Treaty website, http://untreaty.un.org (last visited June 15, 2007)

Part Six
The Use of Force and the World's Peace

International Security and The Use of Force

By Abraham D. Sofaer

A. *Introduction*

In his 1931 lectures at the University of Idaho, Professor Manley O. Hudson advocated United States' membership in the League of Nations. The host in whose name the lectures were dedicated – Senator William E. Borah – represented Idaho in the U.S. Senate, where he led the fight that kept the United States out of the League. In the best traditions of civility and scholarship, Senator Borah introduced Professor Hudson with grace and generosity, stating in so many words that the professor was a well-meaning fellow, entitled to his dangerously erroneous views.[1] Professor Hudson responded in kind, praising Borah for his honesty of purpose, zeal, intelligence and influence, but refusing to "confirm the conclusions at which Senator Borah has arrived."[2]

The gist of Hudson's lectures was – and remains – uncontroversial. He argued that international law and institutions had become common and were providing useful services to states in the burgeoning fields of transnational commerce, health and safety, transport, and other areas of international activity.[3] Borah had no argument with this proposition; as Chairman of the Senate's Foreign Relations Committee he had helped ratify several important treaties that reflected his support for this trend.[4] Hudson spent much of his professional life repeating this theme, which has been taken up by other international-law luminaries.[5] The development of international institutions demonstrates that international law is

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[1] William E. Borah, Remarks at the University of Idaho 6 (Sept. 24, 1931) reproduced in this volume.

[2] Manley O. Hudson, Progress in International Organization 3-4 (1932).

[3] *Id.* at 42, 89-91, 122.

[4] Marian C. McKenna, Borah 219-25 (1961).

[5] Manley O. Hudson, By Pacific Means: the Implementation of Article Two of the Pact of Paris 32-33, 95-96 (1935); Louis Henkin, How Nations Behave (2d ed. 1979); Anne-Marie Slaughter, A New World Order (2004); Lori Damrosch, et al., International Law xxxiv (4th ed. 2001).

Miller & Bratspies (Eds), Progress in International Law, pp. 541–570.

real, and that it is a constitutionally approved part of the U.S. legal system, consisting of treaties duly ratified and implemented.

The major difference between Borah and Hudson stemmed from the central issue of their time – how to ensure international peace and security. Both wanted to prevent war. They disagreed strongly, however, on whether the best way of doing so was through collective action of the League of Nations. The League sought to eliminate resort to war by replacing balance of power politics with negotiation, arbitration, and, ultimately, with enforcement through the principle of collective security. In Article 10 of the League's Charter all Members "undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."[6] In Articles 12, 13 and 15, Members agreed to attempt to resolve differences by peaceful means, and to accept the decisions of arbitrators or the Council concerning such issues. Article 16 provides that:

> Should any Member … resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations

and other sanctions short of force. In addition it became the

> duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.[7]

Hudson believed the League was the best hope for preventing war. He noted in his Idaho lectures that the League supplied a forum for the debate and resolution of disputes among states, and had succeeded in resolving certain dangerous confrontations. In lectures delivered in Calcutta in 1925 he had been even more upbeat, stating that "the use of the League of Nations method in handling acute international situations during these seven years has been so satisfactory as to warrant high hopes for the future."[8]

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[6] The Covenant of the League of Nations art. 10, *available at* http://www.yale.edu/lawweb/avalon/leagcov.htm#art10. "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled." *See* Margaret E. Burton, The Assembly of the League of Nations 388 (1941).

[7] The Covenant of the League of Nations art. 16, *supra* note 6.

[8] Manley O. Hudson, Current International Cooperation 53 (1927).

Borah opposed war as passionately as Hudson. He supported the Kellogg-Briand Pact, in which the United States and France, and thereafter many other states including Germany, Japan and Italy, declared that they would never engage in war.[9] But Borah thought the League would cause war, rather than prevent it. He foresaw the League as an hegemony of powerful states enforcing the undemocratic principles included in the treaties of peace with Germany after World War I. While Borah acknowledged that the League's Charter requirement that the Council act unanimously would enable the United States to block any proposal to use force, he claimed the United States would not exercise this veto power. He feared that U.S. representatives to the League would be dragged into approving the goals cited in the Charter, including enforcing the onerous provisions of the Treaty of Versailles.[10] In his famous speech on the Senate floor urging rejection of League membership Borah invoked President Washington's call for the United States to avoid European entanglements.[11]

In retrospect, the record of United States' participation in the United Nations demonstrates that the dangers Borah anticipated with regard to the League would not have materialized. Despite its shortcomings the United Nations provides a forum that reduces the risk of conflict through debate and negotiation, and sometimes – especially on border disputes – through adjudication.[12] The UN has also played a central role in developing universally accepted humanitarian principles, as well as treaties aimed at such evils as racism, genocide, and terrorism.[13]

Furthermore, Borah's claim that the United States would fail to use its veto in the League is disproved by the actual record of United States' participation in the UN. US representatives to the UN vote as instructed by the government they serve, frequently using the veto in the Security Council, and generally leading rather than being dragged into efforts to improve international security.

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[9] Mckenna *supra* note 4, at 239-50.

[10] William Edgar Borah, The League of Nations: Speech Delivered in the Senate of the United States 4-5, 8-9 (1921).

[11] *Id.* at 39-43.

[12] *See* Hanspeter Neuhold, *The United Nations System for the Peaceful Settlement of International Disputes, in* United Nations 62-69 (Franz Cede, ed., 2001).

[13] The long fight against apartheid is a great achievement in which both the General Assembly and the Security Council played important roles. The UN has authorized and implemented dozens of peacekeeping programs and approved sanctions and enforcement actions in several situations under Chapter VII to punish states guilty of creating threats to international peace and security. *See, e.g.*, Prevention and Punishment of the Crime of Genocide, G.A. Res. 260, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 9, 1948); Elimination of all Forms of Racial Discrimination, G.A. Res. 3379, U.N. GAOR, 30th Sess., U.N. Doc. A/RES/3379 (Nov. 10, 1975); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

The League failed, not because it became the hegemon that Borah feared, using force to impose its will, but because it did not deliver on its commitment to provide security through collective action. The first major failure came in the very year of Hudson's Idaho lectures, 1931.[14] Japan occupied Manchuria, which at the time was part of China. No Member of the League proposed to enforce Articles 10 or 16; indeed, no mechanism existed by which enforcement could have occurred. Instead, the Council created a commission that, after long deliberation, concluded that Japan had some legitimate grievances, but should have exhausted peaceful alternatives before resorting to force. Japan, purportedly offended by this admonition, terminated its membership.[15] In 1935, Mussolini led Italy into Abyssinia, and by 1936 had declared it to be part of the Italian Empire. The League imposed sanctions, but its principal Members consulted with Italy to ensure that the sanctions did no serious economic harm.[16] King Haile Selassie pleaded in vain to the Council that to abandon him would be to abandon the principles upon which the League was formed.[17] The League did abandon him, and formally accepted Italy's conquest in 1938.

Meanwhile, Adolph Hitler was implementing his policy of recouping all the lands lost by Germany after World War I. He began by re-arming Germany. Then, in March 1936, Hitler ordered his army into the demilitarized Rhineland, violating the Locarno Pact, which had been endorsed by the League and guaranteed by Great Britain, France, Belgium, and Italy.[18] The League took no action. On March 12, 1938, Germany marched into Austria. Once again, the League did nothing. At Munich, on September 29, 1938, Britain, France and Belgium agreed to dismember Czechoslovakia, and in March 1939 Hitler seized the rest of that country.[19] Britain tested the potential for collective action by asking several states how they intended to respond if Germany invaded Romania; the states

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[14] Hudson himself acknowledged this failure in the printed version of his speech. *See* Hudson, *supra* note 2 at 90-91.

[15] *See* Sandra Wilson, The Manchurian Crisis and Japanese Society, 1931-33, 25-26 (2001) ("The report was relatively moderate and indeed sympathetic to Japan in places, conceding Japan's 'special position' in Manchuria and acknowledging the complexity of Sino-Japanese relations. However, it rejected the main Japanese justification of the Manchurian Incident, which was that the events of 18 September 1931 had constituted a legitimate and necessary act of self-defense….").

[16] George W. Baer, Test Case: Italy, Ethiopia, and the League of Nations 230-237, 243-244 (1976).

[17] Haile Selassie, His Majesty's Words 95-98, 286-289 (2001).

[18] Eduard Benes, International Security 43-47, 59-63 (1939).

[19] Hamilton Fish Armstrong, *Armistice at Munich*, 17 Foreign Aff. 197 (1938-1939); *see also* Quincy Wright, *The Munich Settlement and International Law*, 33 Am. J. Int'l L. 12 (1939). Regarding the dismemberment, *see* John W. Wheeler-Bennett, *From Brest-Litovsk to Brest-Litovsk*, 18 Foreign Aff. 196, 203-4 (1939-1940). ("The annexation of Bohemia and Moravia in March

agreed only to consult.[20] In May 1940, Hitler dropped all pretenses and invaded Belgium; he had conquered France by the end of June.

Nothing in this sad history suggests that, had the United States joined the League, it would have caused the League to stand up to Japan, Italy, or Germany, thus possibly preventing World War II. The United States was, at that time, eager to stay out of any war in which it was not itself attacked. It did not favor enforcing the harsher aspects of the Versailles Treaty, and had loaned Germany enough money to pay France the compensation owed under the Treaty, and still have plenty left over to buy arms. In 1938, as Czechoslovakia was being dismembered, President Roosevelt informed his former Allies that the United States "will assume no obligations in the conduct of the present negotiations," and his initial reaction to Munich was to congratulate Chamberlain for a "job well done."[21] The United States remained out of the war in Europe and Asia until Japan's attack on Pearl Harbor on December 7, 1941. By then, several European states had been at war with the Axis Powers for over two years, not pursuant to any resolution or action of the League, but after abandoning the League and forming a "coalition of the willing" to use force outside of the strictures of the League Charter. The United States ultimately joined with these states to win World War II, but not before some 50 million people had been killed and countless more injured, at staggering economic and social cost.

The principal lesson of this history, as it relates to the positions of Borah and Hudson in 1931, is that they were both wrong with regard to the power and utility of the League. Both overestimated the League's capacity to provide collective security. While the League became a vehicle for useful international initiatives in many areas, it failed in its basic purpose. The long list of agencies, treaties, and other functions cited by Hudson in his hundreds of speeches and books as reflecting the growing interdependence of mankind, was no substitute for a system of collective security that could withstand what Churchill called the "barbaric and atavistic powers" unleashed during that period.[22] The League principle of collective security failed to prevent some Member States from engaging in aggression.

1939 destroyed the last flickering hopes in London and Paris of reaching an agreement with Germany by the way of appeasement and laid bare the necessity of preparing on a grand scale for the approaching showdown. Great Britain and France endeavored by their guarantees to Poland and other threatened states to build up a 'peace bloc' which should deter Nazi Germany from further aggression; and in their efforts to buttress this formation they sought Soviet cooperation.").

[20] Raymond J. Sontag, A Broken World: 1919-1939, 358-9 (1971).

[21] David Clay Large, Between Two Fires: Europe's Path in the 1930`s, 354 (1990).

[22] Winston Churchill, Chancellor's Address, University of Bristol, Bristol, England, July 2, 1938, *in* 6 Winston S. Churchill: His Complete Speeches, 1897–1963, 5991 (Robert Rhodes James, ed., 1974).

This failure was compounded when the Council failed to use its powers to check the aggressions that occurred and its Member States declined to use or authorize force. Conceivably, some states might have acted unilaterally, or through *ad hoc* coalitions, had no mechanism for collective action been available. But the collective security plan of the League became an additional excuse for inaction.

This history also shows, as far as use-of-force rules are concerned, the disconnect between maintaining international peace, and securing compliance by peace-loving states with a rule that they use force – even to stop aggression – only with the Council's approval. Members of the Council established impeccable records when it came to abiding by the League's legal requirements that aggression be dealt with through collective, not unilateral, response. They opposed the aggressions of Japan, Italy, and Germany and debated their actions in the Council. And when the Council failed unanimously to agree on any effective plan of action they took no unilateral action to challenge the aggressors.[23] Even Winston Churchill invoked the requirement of unanimous action to justify his view that Britain should not act unilaterally to stop Italy's aggression in Ethiopia.

The question to which we are led by this background is whether we have any more reason today than Borah and Hudson had in 1931 to believe that the world has succeeded in establishing an effective collective security system. The answer is, of course, absolutely not. The UN Charter provides greater authority to the Security Council than the Council of the League possessed by eliminating the unanimity requirement that doomed the League, and by authorizing resort to sanctions and force to prevent threats to international security. The Charter also provided for a system in which Member States committed military forces in advance to be used pursuant to the Council's decisions, with the advice of a Military Committee composed of representatives of the armed forces of all the Permanent Members.[24] Unlike the League, the United Nations has a substantial capacity for voluntary peacekeeping and responding to humanitarian crises such as famines and earthquakes, and has, at times, effectively confronted evils such as apartheid and aggression.

But while these arrangements (and the experience of World War II) improved the prospects of a more effective collective security system, in practice they have been insufficient. The mechanisms for collective support of military actions by the UN were never implemented, and the veto given to the five Permanent

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[23] The League's unanimity requirement is found in art. 5 of the League of Nations Covenant, "Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting."

[24] U.N. Charter arts. VII(43), (46), (47).

Members over any substantive Security Council resolution has enabled each of these Members to block the Council from dealing collectively even with threats that all other Members might conclude warrant a collective response.

The result has been repeated failures of collective security over 60 years. The Security Council did nothing to stop or reverse Soviet aggression in Berlin, Hungary, Czechoslovakia, Poland, or Afghanistan. The Council has also failed to protect millions of people from being murdered by their own governments, in violation of international treaties and Council resolutions. Scholars estimate that some 50 million people have been killed in genocidal or political conflicts since the UN was created.[25] Particularly ominous is the development of weapons of mass destruction by irresponsible regimes, with a history of support for terrorist groups. The UN has been unable to face this problem squarely, or to curb this growing danger. It has been unable even to condemn such heinous conduct as suicide bombings aimed at non-combatants.[26] The Secretary General's 2004 High-level Panel on Threats, Challenges and Change concluded that collective security has failed in several respects, including the prevention of gross human rights abuses, but that "the biggest source of inefficiency in our collective security institutions has simply been an unwillingness to get serious about preventing deadly violence."[27] These failures have been colored, moreover, by a lack of equity. The High-level Panel contrasted the UN's swift response to the attacks of September 11, 2001, with its relatively glacial response to the genocide in Rwanda (which experienced "the equivalent of three 11 September 2001 attacks every day for 100 days") and to the unfolding horrors in Darfur, Sudan.[28]

The reasons for the failures of collective security under the UN Charter are the same reasons collective security failed during the League: Security Council members seldom authorize the use force to curb aggression and oppression. They oppose such actions for any number of reasons related to their national interests. This

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[25] *See* Milton Leitenberg, Deaths in Wars and Conflicts Between 1945 and 2000, Paper for the Conference on Data Collection in Armed Conflict, Uppsala, Sweden, (June 8-9, 2001), *available at* http://www.pcr.uu.se/conferenses/ Euroconference/Leitenberg_paper.rtf. ("A compilation of deaths in wars and conflicts between 1945 and 1990, published in 1992, showed approximately 40 million deaths. These data included non-combat civilian mortality whose cause could be directly attributed to war or conflict. The data have now been updated to cover 1945 to 2000, and the total mortality has increased to 50-51 million people.")

[26] *See generally* Matthew Lippman, *The New Terrorism and International Law*, 10 Tul. J. Comp. & Int'l L. 297 (2002-2003).

[27] The Secretary General, *Report of the Secretary-General's High-level Panel on Threats, Challenges and Change: A More Secure World*, 18 (2004), *available at* http://www.un.org/secureworld [hereinafter *High-level Panel Report*].

[28] *Id*. at 19.

outcome is the inevitable product of any system that assigns responsibility over the meaning and implementation of collective security to individual states that will predictably act consistent with what they perceive as their national interests. As Henry Kissinger explains:

> The weakness of collective security is that interests are rarely uniform, and that security is rarely seamless. Members of a general system of collective security are therefore more likely to agree on inaction than on joint action; they either will be held together by glittering generalities, or may witness the defection of the most powerful member, who feels the most secure and therefore least needs the system.[29]

In some respects, it is fair to say, the world is more secure today than it was in 1931 and during the run-up to World War II. The Cold War is over. Thus far, at least, the mayhem and murder rampant in the world is largely local and poses no global, strategic threat. But this improved environment, while providing small comfort to those who seek safety and freedom for people everywhere, has been achieved largely despite the positions adopted by the UN, rather than because of those positions. The collapse of the Soviet Empire, in particular, and the successful effort to end its drive to undermine freedom within and outside its borders, came about through a deliberate campaign of diplomatic, economic, political, and military pressure developed and implemented by the United States and its allies independently of the UN system,[30] and sometimes against the wishes of the UN and other international bodies.[31] The Security Council and other UN bodies have done more in confronting terrorism than they did in confronting Communist aggression. But even after decades of effort, the record of international cooperation against terrorism is mixed, and many activities continue in numerous countries that are harmful to collective security.[32] In the areas of proliferation of

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[29] Henry Kissinger, Diplomacy 90-91 (1994).

[30] Peter Schweizer, Victory: The Reagan Administration's Secret Strategy that Hastened the Collapse of the Soviet Union xi-xvii (1994). One of the few exceptions to this observation was the Security Council's support of the defense of South Korea, which was an anomaly attributable to the Soviet Union's failure to attend the session at which the authorization was approved.

[31] Jeane J. Kirkpatrick, Legitimacy and Force, 1 Political and Moral Dimensions 204-228 (1988), United States' actions in Nicaragua in support of Contra guerillas, for example, were condemned as a breach of international law by the ICJ in Nicaragua v. U.S.A. (June 27, 1986) and were opposed by the United Nations. *See* Nicaragua-USA, S.C. Res. 562, U.N. Doc. S/RES/562 (May 10, 1985).

[32] The *High-level Panel Report* is properly critical of the UN's inability even to define terrorism, noting that the objection that state terrorism must be dealt with simultaneously is a bad excuse for inaction, and that the right to resist foreign occupation or other oppression cannot justify the targeting and killing of civilians. *High-level Panel Report, supra* note 27, at 51.

weapons of mass destruction and violations of human rights, collective action has contributed to security overall, but egregious conduct continues in many places that threatens global security and the rights of individual human beings, especially women and racial, religious or ethnic minorities.

What do these fundamental realities suggest for those of us who, like Borah and Hudson, seek an end to war and inhumanity? What steps should be taken today that could conceivably improve international peace and security? Clearly, any such effort must begin by recognizing the weaknesses of collective security, and by developing greater capacities and authority through all legitimate means to enhance international peace. But proposals from the international legal community, including the Secretary General's High-level Panel and the 2005 World Summit Outcome document, rely almost exclusively on achieving collective security through the Security Council, and thus fail to come to grips with reality.

The High-level Panel Report favored giving the Security Council and/or the Secretary General more money, and greater planning and military capabilities. But these changes can only be accomplished with the consent of Members that have repeatedly demonstrated their unwillingness to accept less controversial commitments. When it comes to recognizing that individual states and "alliances of the willing" must be given a greater role, the Report falls back on the position that, apart from a strictly limited right of self-defense, the only source of authority to use force under the Charter is the Security Council. Member States concerned with the lack of security are advised simply to get the Council to act more often, and more effectively, to enforce the Charter and its resolutions.[33] In other words, if the Council refuses or fails to act, and if the threat does not amount to an attack or "imminent" attack, individual states, or groups of states, may not lawfully use force to deal with the threat to international peace and security. This position is asserted regardless of how clear it may be that such a threat exists and that the use of force would advance the Charter's purposes.[34]

The legal rationale for concluding that the Security Council has a monopoly on the lawful use of force grows from a mix of arguments that have thus far won the day in international legal circles, even though they have no credibility among national security professionals. The ICJ, the learned societies, the bar association

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[33] *High-Level Panel Report, supra*, note 27, at 79-80. The Report does recognize that, where good arguments exist for the use of force to prevent an attack that may not be imminent, the issue should first be put to the Security Council and that, if it chooses not to act, the threatened state will, "by definition," pursue other strategies, including visiting "again the military option." *Id.* at 63.

[34] Louis Henkin et al., *Use of Force: Law and U.S. Policy, in* Right V. Might 40–41 (1991). *See* Foley in this volume.

committees, and most scholars assert, as irrefutable doctrine, positions that are neither mandated by the language or history of the Charter, nor supported to any significant degree in the practice of states.[35] So determined is the international bar's acceptance of these doctrinal assertions that even those scholars who see the current paradigm as hopelessly inadequate to deal with current threats have, instead of supporting other reasonable views, accepted as beyond question the legal exclusivity of current rules.[36] Because states routinely disregard these hallowed rules, we are unlikely ever to see the consequences that would result if they were actually followed in practice.

This is not the occasion to revisit the litany of arguments upon which the existing paradigm rests. The arguments for limiting the use of force by states have become sterile, relying on selective quotations and wishful thinking, rather than on purpose and practice. Rules based on reason are considered unacceptable, even though international law rests on rules formed through purpose-driven analysis and experience, and on the practice of states, where legal uses of force occur in many contexts and are invariably governed by rules based on reason.[37] Too often, the practice of states, and in particular the unambiguous practice of the United States with regard to the meaning of self-defense, is deliberately disregarded.[38] This is so despite the fact that the meaning of treaties, especially ambiguous ones, depends

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[35] The High-level Panel, for example, recognizes that for the first 44 years Member States "often violated" the rules it advances and "used military force literally hundreds of times," but it could not bring itself to question this orthodoxy, asserting simply that the Charter prohibits all uses of force other than in self-defense or as approved by the Council under ch. VII. *High-Level Panel Report, supra*, note 27, at 62.

[36] *E.g.*, Michael Glennon, *The New Interventionism: The Search for a Just International Law*, 78 Foreign Aff. 2 (May-June 1999); Anne-Marie Slaughter, *Al Qaeda Should Be Tried Before the World*, N.Y. Times, Nov. 17, 2001, at A23.

[37] All the early masters of international legal history based what they found to be international law on rules of reason and practice, especially doctrine as to the use of force. Modern writers, with notable exceptions such as Laswell and MacDougal, avoid such analyses, no doubt because it will not lead them to where they want to end up. How the two approaches compare with regard to the issue of preemptive force is described in Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 Eur. J. Int'l L. 211 (2003). Daniel Webster would find alien and incomprehensible the rigid and inapposite use to which his famous words about preemption have been put, for he applied them and meant them to apply only in situations in which the state from which a threat had emerged was both able and willing to deal with that threat, and certainly not in situations where waiting until the last possible moment to deal with a threat would not increase the likelihood that it would be averted by the state government with jurisdiction over its source. *See id.* at 218.

[38] In at least four instances State Department Legal Advisers, during their service, wrote on the meaning of art. 51 of the Charter. In each instance (two Democrats, Chayes and Leonard C. Meeker; and two Republicans, Davis Robinson and myself) these officials argued that the

heavily on practice. Such determined resistance to reasoned, policy-based rule making, especially when U.S. constitutional and statutory interpretation follows far more flexible standards, results from the belief that force is itself inherently evil, and that every effort must be made to restrict its use.[39] This is an untenable position, both morally and legally. Kofi Annan has correctly concluded that collective security has failed, not because of the too-frequent use of force, but because force is too seldom used to uphold international standards of conduct.[40] Ironically, despite the monstrous consequences of allowing aggressors, racists, and sadists to inflict damage on non-combatants, an aversion to the use of force is widespread among those most offended by such behavior.

The routine disregard of rules purporting to enhance international security by limiting the use of force saves humanity from the worst of these consequences, in at least those cases where the rules are ignored. But the lack of rules and practices that could conceivably allow states to act without Security Council approval to provide a higher level of security leaves them without either the guidance or the justification for consistent actions on behalf of the victims of illegal conduct. If Borah and Hudson were here today, they would expect more from us than rules and institutions that are bound to fail. We must somehow do better today in addressing the needs of international peace and security than officials and scholars did in 1931. And we will only do so if we focus on how to achieve collective

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legality of an action is based on an analysis of all the relevant factors, not merely on whether an "attack" had occurred or was "imminent." *See generally*, Abraham D. Sofaer, *International Law and Kosovo*, 36 Stan. J. Int'l L. 6 n. 28 (2000). I have never found, or seen cited, an official document in which a U.S. government lawyer or official took a more restrictive position, let alone the position advocated by most international lawyers.

[39] Louis Henkin, *The Courage of Conceptualizing Violence: Present and Future Developments in International Law*, 60 Albany Law Review 571, 573 (1997). *See* Sofaer, *supra* note 38, at 18.

[40] Kofi A. Annan, *Courage to Fulfill Our Responsibilities*, Economist, Dec. 4, 2004 at 25, *available a* http://www.un.org/News/ossg/sg/stories/articleFullsearch.asp?TID=7&Type=Article. ("However, in the new security environment in which we live, states may also fear threats that are neither imminent nor proximate, but which could culminate in horrific violence if left to fester. The Security Council is already fully empowered by the charter to deal with these threats. It must be prepared to do so, taking decisive action earlier than in the past, when asked to act by states that have based their claims on reliable evidence. The question of action to protect civilians inside states has long been fraught with controversy. Yet it is being recognized more and more widely that the question is better framed not as one of a right to intervene, but of our responsibility to protect—a responsibility borne, first and foremost, by states. The panel members, whose background and experience vary widely, have agreed that the principle of non-intervention in internal affairs cannot be used to protect those who commit genocide, large-scale ethnic cleansing, or other comparable atrocities. I hope UN members will share that view—and that the Security Council will act on it.")

security in a world where it is impractical and unrealistic to expect that it can be achieved exclusively through actions approved by the Security Council.

In this spirit, then, I propose some ideas that could constitute parts of a program to enhance collective security by improving Security Council capacities, and at the same time identifying grounds upon which individual states, alone or in groups, could be permitted if not encouraged to act to advance the Charter's objectives.

B. *Enhancing Security Council Capacities*

The Charter represents a universally-ratified view that collective action to maintain international security is preferable to unilateral action. Collective judgments are more likely to be objective than are those of individual states or even groups of states. Collective commitments to sanctions and military action are in general more likely to be effective than are unilateral measures, and they spread the risks and costs of economic and military measures. In dealing with transnational threats in the modern world of transnational capacities, collective responses are often indispensable to success. As the High-level Panel concludes: "No State, no matter how powerful, can by its own efforts alone make itself invulnerable to today's threats."[41] And where collective measures succeed, the need for unilateral measures diminishes or disappears.

Significant steps could be taken to enhance Security Council capacities beyond the conventional calls for more money and military commitments.[42] Council membership no longer represents the constituencies most responsible for providing the resources (funds and manpower) on which collective security efforts depend. The High-level Panel recommends changes to correct this deficiency,[43] but its

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[41] *High-level Panel Report, supra* note 27, at 16.

[42] The High-level Panel calls for the developed states to transform their existing force capacities into suitable contingents for peace operations, and for all Member States to support UN peace operations by improving "use of strategic deployment stockpiles, standby arrangements, trust funds and other mechanisms to meet the tighter deadlines necessary for effective deployment," and to put rapid action forces at the UN's disposal. *Id*. at 69. Such contributions are unlikely without structural reforms.

[43] *Id*. at 66 ("Thus, the challenge for any reform is to increase both the effectiveness and the credibility of the Security Council and, most importantly, to enhance its capacity and willingness to act in the face of threats. This requires greater involvement in Security Council decision -making by those who contribute most; greater contributions from those with special decision -making authority; and greater consultation with those who must implement its decisions. It also requires a firm consensus on the nature of today's threats, on the obligations of broadened collective security, on the necessity of prevention, and on when and why the Council should authorize the use of force.") *See also id*. at 79-83.

plan seems to have failed, because it required amendments to the Charter that are virtually impossible to secure.[44]

A more practical plan would be to use the existing Charter provisions related to security agreements and military planning to fashion a more representative structure for international security initiatives. The Cold War rendered the original plan for agreements and coordination impossible to implement. Now that the Cold War is over, those provisions could be revisited. Article 43 of the Charter, which calls for agreements between Member States and the Security Council to provide military support for security initiatives,[45] and Article 47, which calls for a military committee composed of Permanent Member representatives to plan Security Council actions,[46] are vehicles by which the Council and Secretariat could obtain the support and involvement of States willing to plan, fund, and implement collective security initiatives.

Security Council supervision of uses of force need not be ineffectual. Support agreements under Article 43 should be written to incorporate the command elements and rules of engagement that the United States and other NATO members support, and that the Council now largely accepts. This would not result in a "standing" UN force, but in stand-by forces allowing for swifter commitments by the Council in situations like Liberia when weeks or months were wasted identifying resources for an agreed operation. Instead of attempting to repeal Article 43, as the High-level Panel proposed, the Military Committee could be used as an international security planning committee composed of the states that are the most substantial contributors to the Council's security initiatives. While plans and proposals developed in this reconstituted Military Committee would

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[44] The High-level Panel anticipated this possibility, "a debate which has made little progress in the last 12 years." *Id*. at 67. The Charter amendments it proposed have little prospect of adoption. *See* Michael J. Glennon, *Idealism at the U.N*., 129 Pol'y Rev. 3 (Feb/Mar 2005), *available at* http://www.hoover.org/publications/policyreview/3431036.html. ("Sadly, however, the core recommendations of the panel's report, concerning the use of armed force, rest upon wishful thinking rather than empirical evidence. The report evinces a view of a world governed by objective, universal morality rather than by competition for power and shifting national interests.")

[45] Article 43 of the Charter requires "[a]ll Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security." *See* U.N. Charter art. 43, para. 1.

[46] *See* U.N. Charter art. 47. ("There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament. …")

be subject to Council review, the Council could establish procedures and voluntary understandings to curb use of the veto in reviewing Committee proposals. Arrangements of this sort seem more likely to develop into real reforms than proposed Charter amendments.

An active and appropriately representative Military Committee should not displace the experienced Secretariat bodies that currently plan and implement the Council's security initiatives. Rather, it should serve as a security-planning arm of the Council, helping to set and implement policy through a process more likely to evoke support for timely and effective operations than current arrangements. The Committee could also advise the Council on post-conflict security, one of the most difficult of all collective security objectives.

The Council should also be encouraged to fashion its actions with a view towards generating maximum impact on leaders or governments. The Council seldom approves and undertakes major military initiatives beyond its traditional peacekeeping role. When the Council does decide to act on issues of international security, however, opportunities to establish norms of behavior and appropriate penalties should be fully exploited. Iraq is a case in point. The Council condemned Saddam Hussein's 1990 aggression in Kuwait, and unanimously authorized force to expel him.[47] In retrospect it is clear the Council should also have approved his removal from power. Saddam Hussein should have been brought to justice and punished severely for having invaded two states and attacked two others; for having used chemical weapons against his foreign and domestic enemies; and for having murdered and tortured hundreds of thousands of Iraqi citizens. Had he been removed and prosecuted at the time he was forced out of Kuwait, other tyrants would have seen that they too could be defeated, removed, and punished by the UN for failing to comply with fundamental sovereign obligations and explicit Council resolutions. On those few occasions in which the Council agrees to act against a serious violator of international norms, it should do so with resolve, so as to obtain the maximum possible deterrent value for its effort.

The Council should also continue its recent practice of adopting resolutions setting generally applicable standards of conduct in major areas of security concern. Resolution No. 1373, for example, adopted 17 days after the attacks of September 11, 2001, reads like a statute, prohibiting states from engaging in various types

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[47] S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990). ("Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements… the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.")

of conduct constituting state support for terrorism.[48] The Council has also adopted such quasi-legislative resolutions on money laundering;[49] and the High-level Panel Report identified other areas in which standard setting could be beneficial, such as in countering the illegal proliferation of weapons of mass destruction and serious human rights violations.[50] Standards adopted by the Council establish the obligations of states and send a warning that breaches of those obligations might lead to sanctions and intervention.

C. *Charter-based Actions*

Enhanced Security Council capacities should result in improved performance in maintaining international peace and security through collective action. But given the experience under both the League of Nations and the United Nations, we cannot rely solely on the Security Council to achieve an acceptable level of international peace and security. Substantial reliance must also be placed on the capacities and actions of individual states and groups of states. The Council must recognize this reality and develop standards by which to judge the legitimacy of such actions.

The starting point for developing appropriate standards should be Article 2(4) of the UN Charter, which provides: "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." Those who claim the Charter prohibits all uses of force beyond a narrow right to defend against "attacks" casually assert that this language "is a general prohibition on the use of force."[51] However, the actual language refutes

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[48] *See* S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001). The Resolution prohibits member states and nationals of member states from actively or passively funding terrorists or terrorist organizations; forbids the safe passage and harboring of terrorists; endorses increased internal and border security of member states; and urges increased communication and bilateral agreements between member states to aid in the capture of terrorists.

[49] *See id*. U.N. Office on Drugs and Crime, *Global Action Against Corruption: the Mérida Papers*, prepared by United Nations Convention Against Corruption in pursuance of U.N. G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Nov. 21, 2003).

[50] *High-level Panel Report, supra* note 27, at 38, 57.

[51] Henry Steiner, et al., Transnational Legal Problems 1048 (4th ed. 1994). This widely used casebook is one of countless examples of the unthinking manner in which the premise of an absolute prohibition has been accepted. The *High-level Panel Report*, similarly asserts (without quoting the actual language) that art. 2(4) "expressly prohibits Member States from using or threatening force against each other, allowing only two exceptions: self-defense under art. 51, and military measures authorized by the Security Council…." *Supra* note 27, at 62. Of course, art. 2(4) expressly contains no such absolute prohibition, and it says nothing about exceptions.

the claim that Article 2(4) prohibits all other uses of force. The language is, on its face, most reasonably read to suggest that the use of force could potentially pass muster as lawful if it is not intended to alter the political independence or territorial integrity of states, and is consistent with the Charter's purposes.[52]

The principal argument against this reading of Article 2(4) is that states cannot safely be entrusted with the flexibility such an approach would allow. States have in fact repeatedly exploited flexibility in legal standards to advance their national interests. But no amount of interpretive inflexibility has been or is likely to be successful in controlling states determined to violate the Charter's purposes.[53] Furthermore, a reasoned reading of Article 2(4) need not give excessive flexibility to states. Objective standards and reliable evidence are available to evaluate the propriety of actions based on Article 2(4) in the form of Security Council determinations that a particular situation presents a threat to international peace and security, identifying both the cause of the threat and its nature. Such situations differ markedly from those in which states assert, without the support of Council findings, that a threat exists that requires the use of force.

The potential scope of Article 2(4) is illustrated by NATO's operation against Serbia to stop the ethnic cleansing of Muslims in Kosovo. That military action was not approved by the Security Council, and cannot reasonably be considered to be self-defense against an attack. Yet, the action was designed to and did advance the Charter's humanitarian purposes without altering Serbia's political or territorial integrity. Security Council determinations provided objective and reliable bases for evaluating whether the conclusions that gave rise to the NATO intervention were in fact true. Before NATO acted, the Council had explicitly

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[52] Anthony D'Amato, *There is No Norm of Intervention or Non-Intervention in International Law*, 7 Int'l Legal Theory 33 (Summer 2001). *See also* A. Mark Weisburd, Use of Force: the Practice of States since World War II 21-22, 51-52, 315-317 (1997); Karol Wolfke, Custom in Present International Law 60-61, 65-66, 92-94 (2nd rev. ed. 1993).

[53] Such interpretations are like the "parchment barriers" that Madison wrote could never provide adequate security against tyranny. The Federalist, No. 48 ("After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be, is the great problem to be solved. Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble, against the more powerful, members of the government."). The absolute prohibition on the use of force in the Kellogg-Briant Pact did not prevent several signatories from waging aggressive war, and from claiming they had acted in self-defense.

found that Serbia was engaged in violations of humanitarian law in Kosovo, and had ordered that the violations cease.[54] The Council was itself unwilling to authorize force to stop Serbia, because one or more Permanent Members had expressed the intent to veto any such resolution. NATO disregarded claims that the Council held a monopoly over the legitimate use of force, and concluded, consistent with the Council's authoritative findings, that Serbia's actions were a threat to international security that should be stopped because of the dire human and political consequences that would otherwise occur. NATO Members resorted to force, moreover, only after making numerous efforts to secure Serbian compliance with the Council's resolutions through methods short of force.[55]

Professor Paust regards the humanitarian intervention in Kosovo as legal, essentially because it was conducted by NATO.[56] That position is a less tenable basis for upholding the operation than a straightforward reading of Article 2(4). The Charter permits groups of Member States to use force legally only in situations where individual states are permitted to do so.[57]

Most international law scholars concluded that the intervention in Serbia, though necessary and justified, was nonetheless illegal. Their explanation for incongruously insisting on adherence to legal principles that they agree should not have applied to Kosovo is that NATO's intervention must be treated as an anomaly, never to be used to justify any other use of force, however similar the situation presented.[58] One would think that any paradigm for controlling the use

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[54] *See* S.C. Res. 1160, U.N. Doc. S/RES/1160 (Mar. 31, 1998). ("Condemning the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as all acts of terrorism by the Kosovo Liberation Army or any other group or individual and all external support for terrorist activity in Kosovo, including finance, arms and training…."); S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 23, 1998). ("Gravely concerned at the recent intense fighting in Kosovo and in particular the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties and, according to the estimate of the Secretary-General, the displacement of over 230,000 persons from their homes….").

[55] *See generally* Sofaer, *supra* note 38.

[56] Jordan J. Paust, *NATO's Use of Force in Yugoslavia*, 2 TRANSLEX (Transnational Law Exchange) 2, 3 (Special Supp. May 1999); *See also* Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 Cornell Int'l L. J., 533, 545-547 (Winter 2002). *See also* Paust in this volume.

[57] Consistent with art. 52, the *High-level Panel Report* welcomes regional peace operations, including those conducted by NATO, so long as they are in "all cases" authorized by and accountable to the Security Council. *High-level Panel Report, supra* note 27, at 85-86.

[58] *E.g.*, Tamia Voon, *Legitimacy & Lawfulness of Humanitarian Intervention, in* International Intervention in the Post-Cold War World 40-53 (Michael C. Davis et al., eds., 2004); Sofaer, *supra*, note 38, at 7.

of force should be reconsidered if its results are so unjust that even its supporters overwhelmingly agree it should be ignored.

Some scholars have proposed that Kosovo and similar interventions should be treated as legal on the ground that humanitarian interventions should be an exception to ordinary use of force rules, or that the Charter should be amended to incorporate such a doctrine.[59] A Charter amendment is highly unlikely, however, and those who believe one is required assume that, without such an amendment, interventions such as Kosovo would be illegal. While some suggest that humanitarian interventions could be considered lawful without Charter amendment,[60] this view has not been widely accepted by States or scholars.[61] The bases for lawful humanitarian intervention have not been widely agreed, and distinctions between humanitarian and other grounds of intervention are difficult to sustain.[62] In any case, the factor that gives the Kosovo intervention legitimacy within a

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[59] Brian D. Lepard, Rethinking Humanitarian Intervention 333-341 (2002). *See also* Fernando R. Teson, *Collective Humanitarian Intervention* 17 Mich. J. Int'l L. 323, 342 (1996). ("The formalism of anti-interventionists thus not only rewards tyrants, but it betrays the purposes of the very international order that they claim to protect. Some may find the concerns of the anti-interventionist persuasive enough to severely limit or reject the lawfulness of unilateral humanitarian intervention. But those concerns have little force against humanitarian intervention properly authorized by the United Nations Security Council."). *See also* Christine Gray, *From Unity to Polarization: International Law and the Use of Force against Iraq*, 13 EJIL 1, 14 (2002) ("The UK government seems to have been alone in expressly relying on the use of the action against Iraq as a precedent for the intervention in Kosovo, and it was prompted to do so by domestic pressure. When asked to justify the NATO action, the UK government said in Parliament that the precedent for the use of force to avert humanitarian catastrophe was the action against the Kurds in 1991. In 1998, when questioned on the legality of any future uses of force against the Serbia, a Foreign and Commonwealth Office Minister answered that the use of force could be justified on the grounds of overwhelming humanitarian necessity, without Security Council authority. At this stage he remarked that '[t]here is no general doctrine of humanitarian necessity in international law,' but cases had arisen as in northern Iraq in 1991 where, in the light of all the circumstances, a limited use of force was justifiable in support of purposes laid down by the Security Council but without the Council's express authorization when that was the only means to avert an immediate and overwhelming humanitarian catastrophe.").

[60] *See generally* Sean D. Murphy, Humanitarian Intervention (1996).

[61] Thomas M. Franck, Recourse To Force 136 (2002) ("no such right made its way into the UN Charter"). The *High-level Panel Report*, for example, endorses the "emerging norm that there is a collective responsibility to protect" victims of violations of fundamental human rights, but regards this duty as "exercisable by the Security Council." *Supra* note 27, at 106.

[62] Arguably, for example, political freedoms are fundamental Charter-based interests necessary to ensure the effective protection of humanitarian rights. *See* David P. Forsythe, *Human Rights Fifty Years after the Universal Declaration*, 13 PS: Pol. Sci. & Pol. 505-511 (Sept. 1998).

Charter-based analysis is not merely the existence of a humanitarian crisis, but the Security Council's findings and conclusions that a crisis existed and created a threat under Chapter 7, that certain parties were responsible for creating that threat, and that the culpable parties must stop their offensive conduct. Such situations can fairly be characterized as "Charter-based interventions."

In an important contribution, the High-level Panel proposed a set of standards for intervention that provide a sound starting point for developing a doctrine of Charter-based intervention. The High-level Panel Report proposed that, apart from the legality of uses of force, the "effectiveness of the global security system … depends ultimately … on the common perception of [the] legitimacy [of uses of force] – their being made on solid evidentiary grounds and for the right reasons, morally as well as legally." The Panel therefore provided five factors for the Council and General Assembly to weigh in deciding whether force *should* be used, apart from its legality: (1) seriousness of threat; (2) proper purpose; (3) last resort; (4) proportional means; and (5) balance of consequences.[63] The Panel states that these criteria should be applied *in addition to* the traditional legal standards, but it is difficult to avoid the conclusion that the legitimacy standards are appropriate in themselves for evaluating uses of force and incorporate those aspects of traditional use-of-force law that states universally agree remain valid. It would therefore be difficult to justify the conclusion that a use of force meeting all the requirements of the Panel's test for legitimacy should ever be considered illegal.

Charter-based interventions could, at least initially, be limited to situations like Kosovo, where the facts and conclusions underlying the legitimacy of a use of force are all established by Council resolutions. Such an interpretation would encompass many of the most egregious failures of collective security that have occurred in recent times. In the last few years alone, the Council adopted resolutions containing findings and conclusions resolving pivotal issues of fact and law pertaining to security threats in Rwanda,[64] the Congo,[65] Darfur,[66] and Liberia,[67]

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[63] *High-level Panel Report, supra* note 27, at 66-67.

[64] *See* S.C. Res. 872, U.N. Doc. S/RES/872 (Oct. 5, 1993).

[65] *See* S.C. Res. 1234, U.N. Doc. S/RES/1234 (Apr. 9, 1999).

[66] *See* S.C. Res. 1556, U.N. Doc. S/RES/1556 (July 30, 2004) ("Condemning all acts of violence and violations of human rights and international humanitarian law by all parties to the crisis, in particular by the Janjaweed, including indiscriminate attacks on civilians, rapes, forced displacements, and acts of violence especially those with an ethnic dimension, and expressing its utmost concern at the consequences of the conflict in Darfur on the civilian population, including women, children, internally displaced persons, and refugees…. Endorses the deployment of international monitors, including the protection force envisioned by the African Union, to the Darfur region of Sudan under the leadership of the African Union and *urges* the international community to continue to support these efforts.")

[67] *See* S. C. Res. 1509, U.N. Doc. S/RES/1509 (Sept. 19, 2003).

though without authorizing the use of force. These resolutions provided important evidence by which to judge the motives of a state or group of states that may have claimed to have legitimately used force to help end the threats posed.

Recognizing the propriety of Charter-based intervention would not guarantee that any state or group of states would actually use force to end a given crisis. But, at least the Council's failure to authorize force in such situations would not provide an excuse for allowing such crises to continue unchecked, or grounds for characterizing the use of force in such situations as illegal.

In the event Charter-based interventions are recognized as a supplement to Council-approved interventions, situations will arise in which the Council's findings are less authoritative and significant than the Council's findings in cases such as Kosovo and Rwanda. While such interventions should never be approved solely on the basis of unilateral assertions by individual states or groups of states, the record should be weighed in each such instance to determine the strength of the evidence on the relevant issues. A Council refusal to adopt resolutions establishing critical facts should not be permitted to undermine the value of objectively verifiable circumstances supporting a particular action.

To the extent Council findings can be used to justify uses of force, Member States in the Council that oppose the use of force in particular situations may well tend to avoid making findings that could be relied upon to justify force in such situations. This tendency does not, however, warrant rejection of the concept of Charter-based intervention. The Council is already well aware of the weight that States give its findings, and this has led in recent years to the realization that the sanctions process in the Council can lead to grave consequences, even when the Council may ultimately be unwilling explicitly to authorize force. Nonetheless, the Council has agreed to commence such processes in several, highly sensitive situations, including North Korea, Iran, and Sudan. It is a dubious contention, moreover, that States should refrain from relying on Council findings, because Members of the Council might then deliberately prevent the adoption of such findings even where fully required by the evidence. What purpose would be served by preserving the Council's willingness to make findings, if those findings cannot be cited as establishing the facts they purport to establish?

D. *Self-Defense*

The right of self-defense, both individual and collective, is an essential means for ensuring international security when collective action cannot be brought to bear. Article 51 provides that:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United

> Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[68]

Claims that Article 51 limits self-defense solely to actions taken in response to attacks misread that provision by disregarding both the word "inherent," and the language stating that nothing in the Charter shall impair that inherent right. Advocates of a narrow interpretation of Article 51 disregard the substantial authority that exists among scholars and in state practice for a more flexible approach.[69] Whatever Article 51 may have been intended to accomplish,[70] it has never been understood in practice to be restricted to actual attacks, and many exceptions have been recognized that qualify an absolutist reading.[71]

The underlying problem with a narrow reading of Article 51 is that it stems from the premise that self-defense must be restricted in order to enhance international peace and security. To the contrary, self-defense is a key element in any sensible program to supplement the inadequate, collective efforts of the Security Council. Actions in self-defense should be judged by their reasonableness, as are uses of force in many other contexts of law enforcement and national law.[72]

An example to examine in this regard is the scope of permissible activity that the United States could lawfully pursue in Afghanistan after the 9/11 attacks. A Security Council resolution confirmed that the attacks on the United States by

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[68] U.N. Charter, art. 51.

[69] Anthony D'Amato, International Law 57-73 (1987); Ahmad M. Ajaj, *Humanitarian Intervention: Second Reading of the Charter of the United Nations*, 7 Arab L.Q. 215 (1993). *See* Foley in this volume.

[70] *See* Sean D. Murphy, Humanitarian Intervention 73-75, 358-362 (1996). *See also* Timothy L. H. McCormack, Self-Defense in International Law: The Israeli Raid on the Iraqi Nuclear Reactor 111-149 (1996).

[71] Julius Stone, Aggression and World Order 42-45, 94-99 (1958); Franck, *supra* note 61, at 5-9 (discusses ways in which the Charter provisions regarding use of force have been adapted to meet needs).

[72] *See* Seyom Brown, Illusion of Control: Force and Foreign Policy in the 21st Century 113 (2003) ("Just as in domestic law and morality, situations can arise in which a potential victim of aggression has reasonable grounds under international law for engaging in preventive violence to disable an attacker before the attacker strikes the first blow. In many modern domestic legal systems, the courts typically apply the "reasonable person" test, which asks whether any emotionally normal person of average intelligence would have believed that using force was necessary to prevent the immediate infliction of greater violence. However, stringent rules of evidence are applied that put the burden of proof on the first user of force. This norm also prevails in the contemporary international arena.").

Al Qaeda terrorists gave rise to the right of self-defense, but the resolution did not otherwise authorize the use of force.[73] This formulation led as eminent a scholar as Professor Paust to conclude that, while the United States acted lawfully in attacking Al Qaeda in Afghanistan, it acted in a "highly problematic" way in targeting and removing the Taliban Government, because the Taliban had not actively participated in the attacks but "merely" harbored and supported Al Qaeda and its training facilities.[74] As a practical matter, however, given the Taliban's support for Al Qaeda and its explicit refusal to comply with Security Council resolutions ordering it to stop Al Qaeda's terrorist operations,[75] the United States attack on the Taliban Government was a reasonable even if not necessary means for accomplishing Al Qaeda's defeat.

The ICJ and international scholars have come up with many rules or asserted limitations on uses of force based on crabbed or unreasonable readings of self-defense. Invoking international law arguments to criticize uses of force has become a sport, in which no contention is too absurd to publish or pronounce.[76] Among the most egregious, and especially pertinent to the present subject, is the argument that, once the Security Council is seized of a matter, a state under attack (such as Kuwait in 1990) may no longer exercise its right of self-defense even if the Council has not yet succeeded in protecting the state or freeing it from occupation.[77] This argument – made by as well-known an international lawyer as Abe Chayes – would condemn individual states to dependence on the Security Council for their security, even while under actual attack, once the Council begins dealing with the matter, regardless of whether the Council's efforts have proved adequate. This rule would evoke precisely the opposite of the conduct the world needs to overcome the inadequacies of collective security.

While international lawyers are busily constructing arguments to narrow the right of self-defense, national security experts are considering the necessity of preventing attacks by terrorists and other threats before they take place. The Charter itself contains no language expressly authorizing preventive action under

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[73] S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

[74] *See* Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond, supra* note 56, at 540-44.

[75] *See* S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 16, 2002) ("Determining that the Taliban have failed to respond to the demands in paragraph 13 of resolution 1214 (1998) of 8 December 1998, paragraph 2 of resolution 1267 (1999) and paragraphs 1,2 and 3 of resolution 1333 (2000)….").

[76] Several untenable rules are usefully rebutted by Professor Franck, *Terrorism and the Right of Self- Defense*, 95 Am. J. Int'l L., 839-840 (2001).

[77] Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements 39-40 (1995). *See* David Schweigman, The Authority of the Security Council under Chapter VII of the UN Charter 42-43 (2001).

any circumstances and some international lawyers insist that no such authority exists.[78] Most recognize that an absolute prohibition of anticipatory self-defense would be unreasonably restrictive. They support an unwritten exception to the strict reading of Article 51 that would allow preemptive actions when the threat involved is substantial and "imminent" leaving no viable alternative.[79] Some have even construed this test to allow uses of force to prevent attacks that present grave threats and that are imminent only in that they are likely to occur but at an unknown time.[80] The United States has rejected the restriction, noting the need to defend against some threats that are not "imminent" but are too serious to tolerate.[81] The claimed right to take defensive action in the absence of an "imminent" threat is widely referred to as "preventive" rather than "preemptive" force.

The case for preventive force is now largely associated with the propriety of preventive war, the most extreme version of preventive force, and specifically the propriety of the war to remove Saddam Hussein in Iraq. In fact, however, the Bush Administration rested its case for intervening in Iraq on the findings, orders, and warnings explicit and implicit in sixteen Security Council Resolutions, and not on a claimed right to use preventive force.[82] Ultimately, the Administration's

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[78] See the authorities collected in Michael J. Glennon, *Idealism at the U.N.*, Pol'y Rev. 8-9 (Feb. & Mar. 2005) (refuting the Report's claim that this was an established aspect of art. 51).

[79] This right is defined in the words used by Secretary of State Daniel Webster in 1837, asserting a claim to anticipatory self-defense when necessity is "instant, overwhelming, leaving no choice of means and no moment for deliberation." The High-level Panel notes that this exception to the rigid interpretation of art. 51 is based on "long established international law…." *High-level PanelReport, supra* note 27, at 63. The entire, "inherent" right of self-defense is "long established international law," and only its historic standard of reasonableness explains the many other exceptions that have been made to the rigid view of art. 51.

[80] *See* Michael C. Wood, "Towards new circumstances in which the use of force may be authorized? The cases of humanitarian intervention, counter-terrorism, and weapons of mass destruction," *in* The Security Council and the Use of Force 14 (Niels M. Blokker & Nico J. Schrijver, eds., 2005).

[81] National Security Strategy of the United States of America 15 (2002), *available at* http://www.whitehouse.gov /nsc/nss.pdf. ("The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively. The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.")

[82] Memorandum from William H. Taft IV, Legal Adviser, Dept. of State, on The Legal Basis for Preemption to Members of the ASIL-CFR Roundtable, (Nov. 18, 2002), *available at* http://www.cfr.org/publication/5250/legal_basis_for_preemption.html. *See also* Ruth Wedgwood,

argument can be viewed as rooted, not in the disregard of Security Council authority, but in the need to make the Council's actions and demands meaningful.

Nonetheless a strong case could be made for the Iraq war under a preventive force analysis. Given the Security Council's findings regarding Saddam Hussein's conduct in a variety of areas (including his attacks on Iran and Kuwait, human rights violations on a massive scale and the use of poison gas on his own people), his removal can be viewed as a reasonable measure necessary to prevent a grave threat, not imminent, but highly likely to take place at some future point.[83] Hussein's openly proclaimed policy of paying the families of suicide bombers for attacking Israeli noncombatants within Israel was clear evidence of his willingness to continue supporting terrorism aimed at his enemies, and the United States and its allies were among his declared enemies. His conduct reflected a mental disposition that could not be responsibly ignored in light of what his capacities were believed to include, or were sure to include with time. While Hussein modeled his conduct on Stalin, rather than Hitler, Henry Kissinger's observations concerning the League of Nations' failure to confront Hitler are pertinent and lend support to the decision to remove Hussein from office:

> In retrospect, it is easy to ridicule the fatuousness of the assessment of Hitler's motives by his contemporaries. But his ambitions, not to mention his criminality, were not all that apparent at the outset…. Statesmen always face the dilemma that, when their scope for action is greatest, they have a minimum of knowledge. By the

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The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction 92 Am. J. Int'l. L. 724 (Oct. 1998). ("And Resolution 687 makes plain that Iraq's stockpiling of weapons of mass destruction is considered to be a continuing threat, violative of international peace and security – especially when seen against a history of using "ballistic missiles in unprovoked attacks," "prior use of chemical weapons" and the "threat…to use weapons in violation of" the 1925 Geneva Protocol banning poisonous gas and bacteriological warfare. *Id*. at n.18. "It is not unreasonable to regard the terms of such a cease-fire as self-executing, just as the violation of a newly settled boundary line or demilitarized zone would entitle a neighboring state to act upon a violation. Iraq could hardly cloak itself in the cease-fire's benefits while flagrantly violating one of its principal conditions." *Id*. at 726).

[83] Sofaer, *Iraq and International Law* Wall St. J., Jan. 31, 2003, at A10. ("The threat posed is substantial: Iraq will use or threaten to use its illegal weapons, or it will give them to terrorists willing to attack the U.S. or its allies. The likelihood that this threat will be realized is reflected in Saddam's openly stated goals (to re-create an "Arab Nation" throughout the Gulf area with Baghdad as its capital); his prior aggressions (against Iran, Kuwait, Saudi Arabia and Israel); his support for terrorism (Abu Nidal and al Qaeda) and for a terrorist assault on former President Bush; and his willingness to engage in horrendous violations of the laws of war and of human rights (chemical weapons, massive environmental damage, torturing and murdering civilians, etc.). It is also clear at this point that every option short of force has been tried to convince Saddam to disarm.").

> time they have garnered sufficient knowledge, the scope for decisive action is likely to have vanished. In the 1930s, British leaders were too unsure about Hitler's objectives and French leaders too unsure about themselves to act on the basis of assessments which they could not prove. The tuition fee for learning about Hitler's true nature was tens of millions of graves stretching from one end of Europe to the other. On the other hand, had the democracies forced a showdown with Hitler early in his rule, historians would still be arguing about whether Hitler had been a misunderstood nationalist or a maniac bent on world domination.[84]

Preventive actions are dangerous and potentially destabilizing.[85] But they are a necessary part of any viable system of international security in light of current threats. This is especially true of preventive actions short of war. Israel's destruction of the nuclear reactor at Osirik, Iraq, was condemned at the time, but has far greater support today, based on the strong evidence that while an Iraqi attack on Israel was not imminent, the possibility of such an attack based on Hussein's statements concerning Israel was substantial and the danger this created once he had nuclear weapons was grave.[86] Attacks on terrorist groups or individuals who have made clear their intent to attack the nationals of a state are now widely considered justified when no other alternative exists.[87] Targeted killings are controversial but increasingly and openly utilized to deal with individuals who are believed to have used deadly force and are prepared to do so again, when the government of the area in which they are located cannot or will not act effectively to eliminate the threat.[88] Other, lesser uses of preventive force are also being utilized, such as stopping and searching vessels from states suspected of shipping

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[84] Kissinger, *supra* note 29, at 294.

[85] *See* Tom Moriarty, *Entering the Valley of Uncertainty* 167 World Aff. (Wash, D.C.) 71 (Fall 2004). ("When deciding whether to authorize a preemptive attack, a political or military leader must weigh the cost versus the benefits (risk versus awards). Because the failure of preemptive attack may cause a conventional war (the ultimate risk), it is difficult to justify what benefit (award) can be so great as to make the inherent risks of preemptive attack acceptable.")

[86] *See* A. Mark Weisburd, Use of Force 288 (1997); Herbert Druks, Uncertain Alliance 225 (2001). ("And on June 7, 1981, Israeli planes bombed Iraq's Osirak atomic reactor. This knocked out Iraq's ability to make plutonium. The Reagan administration deplored Israel's action, suspended the delivery of F-16 jets to Israel, and supported a Security Council resolution that condemned Israel. Apparently, Israel's destruction of Iraqi atomic facilities could have damaged America's anticommunist program. However, during the Persian Gulf War, the United States was grateful that Iraq did not have any ready-to-use nuclear weapons."). *See also* Franck, *supra* note 61, at 106.

[87] *See* Amos N. Guiora, *Legislative and Policy Responses to Terrorism, A Global Perspective*, 7 San Diego Int'l L.J. 125 (2005-2006).

[88] *See id.* at 145-152. *See also* Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 Harv. L. Rev. 1217 (Feb. 2002).

illegal weapons.[89] The dangers faced by states in the current security environment have made preventive actions both reasonable and necessary in some circumstances. An unnecessarily narrow reading of Article 51 that seeks to preclude such actions would diminish not increase international security.

E. *Assistance to Non-Combatants*

Another aspect of any successful program to deal with the inadequacies of collective security is to help non-combatant victims of aggression and inhuman conduct to defend themselves by providing arms and training. The need for such assistance rests on the indisputable fact that states, whether acting collectively or individually, will not always fulfill what is fashionably being called their "responsibility to protect."[90] To the extent that a group of people is left defenseless against some illegal assault, the international community should be prepared where feasible to assist in enhancing that group's capacity for self help. Among the most shameful chapters of human history are the failures of the international community to protect civilian victims of genocidal attacks in Bosnia and Rwanda.[91] We are witnessing another such disgrace in Darfur.

International law permits the Security Council, despite a sovereign state's opposition, to authorize the use of force to protect vulnerable ethnic or racial groups from violations of their human rights that are found to create a threat to international peace and security. In such situations, the Council may also provide – and sometimes has provided – training and other assistance to enable vulnerable groups to defend themselves. For example, in Croatia, Bosnia, and post-war Kosovo, United Nations peacekeepers placed heavy emphasis on building sustainable security forces to enable the victim groups to defend against aggression and violations of human rights. Similar assistance was also provided in Somalia.[92]

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[89] Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 Am. J. Int'l L. 526, 526-545 (July 2004); Sean D. Murphy, ed., *Contemporary Practice of the United States Relating to International Law, Proliferation Security Initiative for Searching Potential WMD Vessels*, 98 Am. J. Int'l L. 349, 355-357 (Apr. 2004).

[90] Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, 81 Foreign Aff. 99 (Nov./Dec. 2002).

[91] Trevor Findlay, The Use of Force in UN Peace Operations 262, 276, 322-323 (2002).

[92] Chester A. Crocker, *The Lessons of Somalia: Not Everything Went Wrong*, 74 Foreign Aff. 2 (May/June 1995), *available at* http://www.foreignaffairs.org/19950501facomment5031/chester-a-crocker/the-lessons-of-somalia-not-everything-went-wrong.html ("As the initial intervention unfolded, Somalia was transformed from a famine-stricken backwater where heartless warlords and hopped-up teenage gangs reigned over helpless innocents into a laboratory for new theories of U.N. peacekeeping. Perhaps, ironically, the impressive leadership, coherence, and dramatic

Often, however, the Council fails, not only to authorize the use of force in such cases, but also to provide assistance to victim groups, despite finding a threat to international peace and security based for example on acts amounting to genocide.[93] Individual groups of states, or even private groups, have sometimes stepped in when the Council has failed to assist a group facing so dire a threat. Meaningful collective security requires that in appropriate cases international law allow individual states, or even NGOs, to assist victim groups by providing the capacities necessary for self-help.

The need to clarify these principles is illustrated by what happened when the Council was faced with the murders and rapes of Muslims in Bosnia. Acting on the advice of the Council's representatives, former Secretary of State Cyrus Vance and Lord Owen, the Council imposed a ban on the supply of arms to anyone in the former Yugoslavia.[94] This ban had the effect of preventing Bosnian Muslims from securing arms, although the Serbian Christians were already armed, and had ready access to additional supplies from Russia and other allies. Vance and Owen reasoned that, if both sides were armed, more people would be killed than if only the Christians were armed.[95] This reasoning accepted a situation in which Muslim

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success of the U.S.-led UNITAF phase made it look too easy, facilitating the "mission creep" that produced UNOSOM II vast nation-building mandate. The sheer ease of intervention, combined with the mastery with which it was initially conducted in Washington and in the field, helped produce the slide toward a modern version of trusteeship over an ex-colonial territory, triggering a violent backlash mounted by a powerful Somali faction.").

[93] S.C. Res. 1556, U.N. Doc. S/RES/1556 (July 30, 2004); S.C. Res. 1296, U.N. Doc. S/RES/1296 (Apr. 19, 2000). The *High-level Panel Report* recognizes the importance of providing post-conflict security to "ordinary people," and advances several proposals that would enhance the Council's capacities, *if* Member States were to provide the forces sought, and *if* the Council used them in a timely and effective manner. *High-level Panel Report, supra* note 27, at 70-71. The text deals, however, with the fact that these prerequisites to protection often fail to occur. The other recommendation made in the Report for the protection of civilians – signing and acting on multilateral treaties, including the Statute of the International Criminal Court – is unlikely to contribute materially to solving the problem of preventing attacks on civilians, given the widespread adoption of these treaties by offending states. *Id*. 72-73.

[94] S.C. Res. 713, U.N. Doc. S/RES/713 (Sept. 25, 1991) ("Commending the efforts undertaken by the European Community and its member Sates, with the support of the States participating in the Conference on Security and Cooperation in Europe, to restore peace and dialogue in Yugoslavia, through, inter alia, the implementation of a cease-fire including the sending of observers, the convening of a conference on Yugoslavia, including the mechanisms set forth within it, and the suspension of the delivery of all weapons and military equipment to Yugoslavia.").

[95] *See generally* Joshua Muravchik, The Future of the United Nations: Understanding the Past to Chart a Way Forward 24-29 (2005); *see also* George Schultz, *Why Bosnia needs NATO and U.S. Forces*, Wash. Times, Jan. 11, 1993, at E4. A counter to the argument offered in text was given by Richard N. Haass, Intervention: The Use of American Military Force in the Post-Cold War World 115 (1998). ("…The indirect strategy of arming the

non-combatants were to remain helpless victims, depriving them of the fundamental human right of self-defense in the face of criminal, military attacks.[96] Some individual states and private groups refused to accept the Council's position, and secretly provided arms to the Muslims in violation of the Council's resolutions. This conduct was widely condoned by the international community,[97] and the UN itself, until the Council finally authorized military intervention.[98] Similarly, in Rwanda, after the Security Council failed to authorize force or to provide any assistance, the Rwandese Patriotic Army provided small arms to Tutsi victims for defensive purposes. Five years later in Kosovo, when the UN failed to intervene to stop the ethnic cleansing, NATO provided military aid to Albanian Kosovars while carrying out an 11-week bombing campaign to end the aggression.[99]

Programs to assist non-combatants faced with murder or other dire threats are difficult to organize, potentially dangerous to implement, and less likely to

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Muslims would not have released the United States and the West from difficult decisions if it proved insufficient. To the contrary, the United States would have felt more rather than less obligated to get involved directly if arming (and possibly training) the Muslims led to a chain of events that on balance worsened their plight in the near term—which was, in fact, likely since Serbia was nearly certain to intensify military operations in the face of a selective lifting of the arms embargo.") This position is certainly reasonable, but it fails to justify inaction. Even if the Warsaw Ghetto fighters were doomed to fail, for example, and assisting them only expedited their deaths, it was proper for the Polish resistance fighters to assist them in extracting a price from their murderers thus deterring such acts and preserving for them a sense of honor and humanity in their deaths.

[96] The Secretary-General, *Report of the Secretary-General on World Conference on Human Rights* U.N. Doc. A/CONF.157/24 (Part I), (Oct. 13, 1993).

[97] On the arming of the KLA, see Chris Hedges, *Kosovo's Next Masters*, 78 Foreign Aff. 24, 39 (1999) ("U.S. officials say they have detected ties to Islamist organizations and suspect that some money has been forwarded to the KLA…. The Serbs also contend that the KLA has about 1,000 foreign mercenaries from Albania, Saudi Arabia, Yemen, Afghanistan, Bosnia, and Croatia, as well as British and German instructors.").

[98] S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

[99] Louis Henkin, Editorial Comment, *Kosovo and the Law of "Humanitarian Intervention*," 93 Am. J. Int'l L. 824-8 (Oct. 1999). "'Kosovo' has compelled us to revisit the troubled law of 'humanitarian intervention.' The terrible facts in and relating to Kosovo in 1998-1999 are known and little disputed. The need to halt horrendous crimes against humanity, massive expulsions and war crimes, was widely recognized. NATO intervention by military force was widely welcomed, but it was also sharply criticized."). Dino Kritsiotis, *The Kosovo Crisis and NATO's Application of Armed Force against the Federal Republic of Yugoslavia*, 49 Int'l & Comp. L.Q. 330 (Apr. 2000). In the main, a clear consensus does appear to have taken shape among a broad cross-section of States, and it is a consensus which favored an armed response to halt, or at least alleviate, the humanitarian catastrophe at the heart of the conflict raging in Kosovo. *Id.*, at 359.

succeed than collective operations.[100] Such efforts may cause more harm than good, in which case other measures must be considered.[101] It is always preferable that the Council authorize and supply trained military forces to protect oppressed groups. The international community should provide the resources necessary to enable the Council rapidly to deploy the relatively small force generally needed to prevent humanitarian disasters.[102] But where the Council fails to act to protect victim groups, especially after having made the findings that would legally justify authorizing force, individual states or private groups should be regarded as legally entitled to attempt to deal with these situations. Sovereignty can no longer be understood to encompass the right to engage with impunity in acts such as

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[100] A comprehensive examination of the problem of protecting victims is John G. Heidenrich, How to Prevent Genocide (2001). Heidenrich recognizes that the international community has failed and is likely to fail in the future in protecting civilians against genocide. He examines what he calls "covert action" options, including secretly arming the imperiled, sabotage, assassination of killers, and non-lethal support. He understates the moral and practical significance of these options, belittling them no doubt in comparison to his preferred solution of a rapid response force under Security Council control. While the latter is clearly preferable, it is very likely that such a force will not be created for some time, and that even after it is created it may not be used. His criticism of the effort to drive the Soviets out of Afghanistan lacks any evaluation of the Reagan Administration's assumption that U.S. policy in Afghanistan contributed to destroying the Soviet empire, thereby freeing millions in Eastern Europe and elsewhere from Communist control. In Afghanistan, after the Soviets used force to take control of the government, the United States and several other states determined, based on their strategic interests as well as on the massive violations of the laws of war that were taking place, to provide opposition groups there with military assistance and training. In that situation, the purpose of the aid was not merely to enable defensive actions, but to liberate the country from Soviet rule. That is a more controversial and dangerous scenario than one in which the purpose is to enable the victim group to defend itself, and the equipment provided in such a limited operation would not be suited to military operations. In any event, the Taliban were able to assume control in Afghanistan, not because the Soviets were driven out, but because the United States and the West ignored the growth of Islamic fundamentalist control in that country.

[101] One of the criteria proposed by the High-level Panel to determine whether an intervention is "legitimate" is the "balance of consequences," long an aspect of Just War theory, making actions illegitimate where their consequences would likely be worse than the consequences of inaction. *High-level Panel Report, supra* note 27, at 67.

[102] *See* Heidenrich, *supra* note 100, at 233-49 (discussing the various options for a rapid deployment force). The United States' position on whether such a force should be created has fluctuated wildly. This may in part be because analysts have been intent on attempting to work out the details of its composition, role, and other details in advance. The issue should be decided in principle and given to the Military Committee to work out in detail, with those states willing to contribute having a proportional voice on the merits. The Council should not and cannot determine the details of how such a force should be developed and used. It would, however, retain ultimate power over its composition and use.

genocide against a group within a state's borders. And however real the dangers and difficulties of assisting groups in exercising their inherent right of self-defense, it will sometimes be preferable to accept such dangers and difficulties in order to attempt to avert the certain disaster of leaving a victim group defenseless.

F. *Conclusion*

Today we face a situation similar to that confronting Borah, Hudson and the League in the 1930s. We know from the debates over the League of Nations that fear of the use of force can be tragically misplaced. Yet, many still act as though the greatest danger to international peace and security is the use of force without Security Council approval, rather than the failure of anyone – the Council, groups of states, or individual states – to use force to advance Charter purposes. The greatest injustices today result, as they did in the run up to World War II, from the failure of the Council to authorize the use of force in the face of aggression and humanitarian threats, and from the failure of individual states to make up for the Council's incapacity. The greatest danger to international peace and security is its absence, not the fact that individual states or groups of states may seek to preserve it without the Council's approval. As President Bush succinctly summed up this issue, "the objective of the U.N. and other institutions must be collective security, not endless debate."[103]

Collective security cannot and will not be achieved through legal norms designed to limit the use of force when force is necessary to achieve Charter purposes. Substitute norms are available, and their development through practice and scholarship would provide a higher level of international security than current rules allow.

The human rights community must stop playing the role of an international burial society, with occasional disinterments to provide evidence to prosecute an occasional tyrant or thug. It should instead take up the effort to give form and content to rules that political leaders and institutions respect and to which they are therefore more likely to adhere. The law relating to the use of force should become a useful and organic aspect of international law, advancing common objectives rather than mistaken assumptions as old as the lectures we celebrate.

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[103] Foreign Policy Speech in Canada, Dec. 1, 2004, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A26231-2004Dec1.

Reforming the Security Council to Achieve Collective Security

By Brian J. Foley

A. *Introduction*

In his chapter on maintaining world peace in *Progress in International Organization*, Professor Manley O. Hudson stated that the focus should be on achieving a legal regime to prevent war rather than to regulate combatants after it has begun, because his generation "thinks its time will be better spent if its energy is devoted to building a legal order in which war will have no place."[1] Seventy-five years later, there appears to be an emerging international norm that sometimes war *does* have a place, that there are "good" and "bad" uses of military force. This norm is not inscribed in the U.N. Charter, which was designed to deal with military aggression, not the proliferation of nuclear weapons and other weapons of mass destruction (WMD), "stateless," transnational terrorist organizations, or human rights abuses carried out by nations within their own borders.[2] In this world of "old rules and new threats,"[3] the idea of "peace at any price" (arguably the thrust of the U.N. Charter) has been replaced by the view that there is "negative peace" (the absence of armed conflict) and "positive peace" (where human rights are protected).[4]

The "old rules" of the U.N. Charter do not prescribe a way for the international community to discuss these ideas and reach consensus about when military force may be used. There is a lack of consensus on which situations, apart from aggression, would justify the use of force (meaning that there is disagreement over what, for the purposes of the U.N. Charter, constitutes a "threat to the peace, breach of

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[1] Manley O. Hudson, Progress in International Organization 88 (1932).

[2] Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, 1, 9, U.N. Doc. A/59/565 (Dec. 2, 2004), *available at http://www.un.org/secureworld/* [hereinafter High-level Panel Report].

[3] Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, 83 Foreign Aff., Jan.–Feb. 2004, at 136, 138.

[4] David Chandler, From Kosovo to Kabul: Human Rights and International Intervention 166 (2002).

Miller & Bratspies (Eds), Progress in International Law, pp. 571–590.

the peace, or act of aggression"[5] that the Security Council may use force to address), and there is a lack of consensus on how to go about deciding whether force should be used if there is such a breach or threat.[6] As a result, there is a danger that nations might "bypass" the Security Council and use force unilaterally if they feel justified in doing so,[7] rendering the Security Council a spectator instead of the primary arbiter that the Charter envisioned.[8] This was the case, for example, with the 2003 U.S.-led invasion of Iraq and the 1999 NATO bombings of Kosovo and the Federal Republic of Yugoslavia (FRY). There is also a danger that the Security Council might fail to act when force perhaps could be used to prevent serious harm, as has been argued regarding the human rights abuses in Darfur, Sudan.[9] These situations have served to undermine the Security Council's legitimacy,[10] which could precipitate further bypass. This has led to the concept of "legitimate" uses of force as distinguished from "legal" uses of force,[11] a distinction that, if unilateral military actions are to be prevented, cannot stand.[12]

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[5] U.N. Charter art. 39.

[6] *See* Charlotte Ku & Harold K. Jacobson, *Toward a Mixed System of Democratic Accountability, in* Democratic Accountability and the Use of Force in International Law 383 (Charlotte Ku & Harold K. Jacobson eds., 2002).

[7] High-level Panel Report, *supra* note 2, paras. 87, 197, 206.

[8] *See* U.N. Charter art. 24.

[9] *See* High-level Panel Report, *supra* note 2, para. 42 ("we have been struck once again by the glacial speed at which our institutions have responded to massive human rights violations in Darfur, Sudan.").

[10] *See* Press Release, Secretary-General Kofi Annan, Adoption of Policy of Preemption Could Result in Proliferation of Unilateral, Lawless Use of Force, Secretary General Tells General Assembly, U.N. Doc. SG/SM/8891-GA/10157 (Sept. 23, 2003), *available at* http:/ /www .un.org/News/Press/docs/2003/sgsm8891.doc.htm (noting "the urgent need for the Council to regain the confidence of States, and of world public opinion – both by demonstrating its ability to deal effectively with the most difficult issues, and by becoming more broadly representative of the international community as a whole, as well as the geopolitical realities of today"). *But see* Mary Ellen O'Connell, *The Counter-Reformation of the Security Council*, 2 J. Int'l L. & Int'l Rel. 107, 110 (2005) (Security Council was vindicated because it "refused to authorize what a clear majority of its members agreed was an unnecessary war"). This chapter takes the position that the Security Council failed the international community because it failed *to prevent* what a clear majority of its members agreed was an unnecessary war.

[11] High-level Panel Report, *supra* note 2, para. 204 (legal decisions must also appear legitimate in that they appear to have been "made on solid evidentiary grounds, and for the right reasons, morally as well as legally"). *See also* Independent International Commission on Kosovo, The Kosovo Report: Conflict, International Response, Lessons Learned, *On the Doctrine of Humanitarian Intervention* (2000) (1999 military intervention in Kosovo "illegal, yet legitimate"), *available at* http://www.reliefweb.int/library/documents/thekosovoreport.htm.

[12] The old rules also lack a way of preventing abuse of these situations as a cover for aggression. Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 Eur. J. Int'l L. 209, 211 (2003), *available at* http://www.ejil.org/journal/Vol14/No2/art1.pdf.

Recognizing the dangers of this situation, in September 2003, U.N. Secretary-General Kofi Annan announced that the international community had "come to a fork in the road" regarding the rules about use of force and collective security and appointed a "High-level panel" to advise him on what, if any, reforms of the rules might be needed.[13] In December, 2004, the High-level Panel published its report.[14] The Secretary-General responded to it in his report in March 2005.[15] The proposals agreed in the main regarding the use of force and argued that the U.N. Charter rules on use of force were adequate;[16] the Security Council is the primary authority for maintaining international peace and security, except when nations must exercise self-defense against actual or imminent armed attacks;[17] the Security Council's powers are broad,[18] which permits it to authorize force for preventive war against non-imminent threats[19] and for carrying out the international community's "responsibility to protect" people from massive human rights abuses by their own government[20]; the Security Council should agree to follow particular criteria before authorizing the use of force;[21] and that there should be changes to

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[13] Kofi Annan, *supra* note 10.

[14] *See* High-level Panel Report, *supra* note 2.

[15] *See* United Nations Secretary-General, Report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. GAOR, 59th Sess., UN Doc. A/59/2005 (Sept. 2005), *available at* http://www.un.org/largerfreedom/ [hereinafter Annan Report].

[16] *Id*. at Annex, para. 6(h); High-level Panel Report, *supra* note 2, paras. 192–98.

[17] Annan Report, *supra* note 15, paras. 124–25; High-level Panel Report, *supra* note 2, paras. 189–94.

[18] *See* Annan Report, *supra* note 15, para. 125; High-level Panel Report, *supra* note 2, para. 198.

[19] Annan Report, *supra* note 15, para. 125; High-level Panel Report, *supra* note 2, para. 194.

[20] Annan Report, *supra* note 15, at paras. 122, 125; High-level Panel Report, *supra* note 2, para. 203.

[21] The Secretary-General suggested the following criteria: "seriousness of the threat; the proper purpose of the proposed military action; whether means short of the use of force might plausibly succeed in stopping the threat; whether the military option is proportional to the threat at hand; and whether there is a reasonable chance of success." Annan Report, *supra* note 15, para. 126. The High-level Panel suggested the following criteria:

a. *Seriousness of threat*: Is the threat of harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force? In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?
b. *Proper purpose*: Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?
c. *Last resort*: Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?
d. *Proportional means*: Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?
e. *Balance of consequences*: Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?

High-level Panel Report, *supra* note 2, para. 207.

the Security Council's membership.[22] Of the reforms, only the proposal that the international community should recognize a "responsibility to protect," which signals that humanitarian intervention might be legal in some instances (though no criteria were provided), was affirmed by the General Assembly.[23] The General Assembly also affirmed the U.N. Charter rules as "sufficient to address the full range of threats to international peace and security" and "further reaffirm[ed] the authority of the Security Council to mandate coercive action to maintain and restore international peace and security."[24]

The need for meaningful reform of Security Council decision making about the use of force persists, however. This chapter proposes a reform that goes a step further than that proposed by the Secretary-General and High-level Panel. This chapter proposes a *mandatory process* for the Security Council to follow whenever it faces a breach of or threat to international peace and security. This process encompasses the criteria that the Secretary-General suggested as guidelines but would *require* the Security Council consider them as well as other criteria, and would require that the Security Council establish conclusively whether the criteria have been met. This proposal differs from the High-level Panel's proposal in another important way: the High-level Panel stated that its goal was "not to guarantee that the objectively best outcome will always prevail," but "rather to maximize the possibility of achieving Security Council consensus around when it is appropriate or not to use coercive action, including armed force; to maximize international support for whatever the Security Council decides; and to minimize the possibility of individual Member States bypassing the Security Council."[25] The proposal in this chapter *is* meant to find the best possible solution, to ensure that military action is taken only when necessary. It agrees with the High-level Panel's conclusion that, "One of the reasons why states may want to bypass the Security Council is a lack of confidence in the quality and objectivity of its decision-making."[26]

This chapter will outline the process.[27] It will also show, through counterfactual approaches to the 2003 invasion of Iraq and 1999 bombing of Kosovo and

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[22] Annan Report, *supra* note 15, paras. 167–70; High-level Panel Report, *supra* note 2, paras. 244–60.

[23] U.N. General Assembly, 2005 *World Summit Outcome*, G.A. Res. 60/1, ¶¶ 139–40, U.N. GAOR, 60th Sess., U.N. Doc. A/RES/60/1 (2005), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement [hereinafter G.A. Summit Outcome].

[24] *Id*. para. 79.

[25] High-level Panel Report, *supra* note 2, para. 206.

[26] *Id*. para. 197.

[27] This chapter builds on an earlier proposal. *See* Brian J. Foley, *Avoiding a Death Dance: Adding Steps to the International Law on the Use of Force to Improve the Search for Alternatives to Force and Prevent Likely Harms*, 29 Brook. J. Int'l L. 129 (2003).

the Federal Republic of Yugoslavia, how the process would work, and then will discuss the benefits the process would bring.

B. *The Process*

I. *Irreparable Harm to U.N. Charter-Protected Interests*

The starting point for discussing whether to use force is often the point where discussion under the "old rules" ends: which situations *prima facie* meet the legal threshold for using force? Efforts to discuss the new threats have become bogged down in what could be called the "definition game" to determine which sorts of conditions constitute a threat to or breach of international peace and security under Article 39. Doctrinal debates have raged over whether humanitarian intervention is legal; whether anticipatory self-defense is legal; whether preemptive war to thwart rogue nations from obtaining nuclear weapons is legal; whether using military force against transnational terrorists is legal.[28] There are two strains to these debates: whether uses of force in these situations would be legal if undertaken by the Security Council,[29] and whether they would be legal if undertaken by nations acting without Security Council authorization.[30] Underlying the latter is the sense, or, more accurately, a fear, that the Security Council might not approve force in such a situation where force might be necessary.[31]

This definition game can inhibit the flexibility needed to address new threats. The focus instead should be on the principle that inheres in all of the definitions: preventing serious irreparable harm, or the threat of serious irreparable harm, to

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[28] *See* Annan Report, *supra* note 15, at para. 122. *See also* Jutta Brunnée & Stephen Toope, *Norms, Institutions and UN Reform: The Responsibility to Protect*, 2 J. Int'l L. & Int'l Rel. 121, 122–23 (2005) (describing debate over humanitarian intervention as a "quagmire" that has persisted "[f]or at least a generation").

[29] The High-level Panel made the peremptory statement, "The Security Council is fully empowered under Chapter VII to address the full range of security threats with which states are concerned. The task is not to find alternatives to the Security Council as a source of authority but to make the Council work better than it has." High-level Panel Report, *supra* note 2, para. 206. Its power has been seen, however, as limited by the "purposes and principles of the [UN] Charter." *See, e.g.*, G.A. Summit Outcome, *supra* note 23, para. 79.

[30] Such as the debates over humanitarian intervention and anticipatory self-defense. The Secretary-General and High-level Panel recommended that states may act unilaterally only where they face an actual armed attack or "imminent" threat, under Article 51; otherwise, nations must turn to the Security Council for help. Annan Report, *supra* note 15, at paras. 124–26; High-level Panel Report, *supra* note 2, paras. 188–192, 198.

[31] *See* Karl M. Meessen, *Unilateral Recourse to Military Force Against Terrorist Attacks*, 28 Yale J. Int'l L. 341, 347 (2003).

interests protected by the U.N. Charter – human life being the most important. The interests protected by the Charter should be seen broadly as peace and human rights. The focus should be on *irreparable* harm, which would very often limit the use of force to situations where human lives are at risk.[32] The definition should be seen as flexible, not necessarily to allow a vast increase in the use of force, which would be undesirable,[33] but to allow consideration of new threats. It would also shift the focus not to the question of whether force can be used for a particular threat, but to the more important question of whether it *should* be used.[34] Indeed, if the Secretary-General and High-level Panel are correct that the Security Council's broad and perhaps even plenary power, then this is where the focus must be.[35]

Accordingly, under an irreparable harm paradigm, the international community may seek to stop a "rogue nation" from acquiring WMD out of a fear that the nation would launch those weapons or make credible, aggressive threats, and that the international community could not stop the WMD-armed nation at that point, or would hand a weapon off to terrorists.[36] Or the international

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[32] The International Commission on Intervention and State Sovereignty developed this standard for use in "responsibility to protect," i.e., humanitarian intervention:

> Military intervention for human protection purposes is an exceptional and extraordinary measure. To be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind:
>
> A. large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
> B. large scale 'ethnic cleansing', actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, xii & paras. 4.19 4.27 (2001) [hereinafter ICISS Report], *available at* http://www.iciss.ca/pdf/Commission-Report.pdf.

[33] Further discussion of this standard could help achieve international consensus.

[34] High-level Panel Report, *supra* note 2, at 53 ("That force *can* legally be used does not always mean that, as a matter of good conscience and good sense, it *should* be used.").

[35] It is unclear whether there is any way for other U.N. organs such as the General Assembly or International Court of Justice (ICJ) to review Security Council decisions for their legality. The General Assembly might be barred given that the Security Council has "primary responsibility" for these matters under Article 24. *See* Bernadetto Conforti, The Law and Practice of the United Nations 216-26 (2005) (arguing that the General Assembly does not have competency in these matters and that past actions by it were illegal). The ICJ suggested, but did not conclusively decide, that judicial review of Security Council actions might be possible. Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States), 1992 I.C.J. 114, 126–27 (Apr. 14).

[36] *See generally* The National Security Strategy of the United States of America [NSS], Chapter V, *available at* http://www.whitehouse.gov/nsc/nss/2002/index.html. The NSS was updated in March, 2006 but was not changed materially for the purposes of this point and is *available at* http://www.whitehouse.gov/nsc/nss/2006/index.html.

community may seek to invade or bomb nations that "support terrorism" out of a fear, at bottom, that if terrorists harbored in that country leave that country to blend into the population of a target country, it will be too late to stop them.[37] Or the international community may seek "humanitarian intervention" to stop imminent or ongoing genocide, mass murder or other massive human rights abuses.[38] The best way to talk about whether to use force in these situations is not whether "using force to stop rogue nations from acquiring WMD" is legal, or whether "humanitarian intervention" is legal, or whether "using force against terrorists" is legal. The best way to approach these situations is to discuss whether there is ongoing serious irreparable harm, or a threat of serious irreparable harm, to human life that force might prove able to stop. Under this process, the Security Council would ask questions about the evidence for the threat and the level of the threat. At this and all stages, fact-finding would be rigorous, as the facts will in most instances be the most important factor in the decision of whether force should be used.

II. *Giving Necessity Its Due*

The process would also require that the Security Council apply the important caveat to the use of force that the U.N. Charter already requires: necessity.[39] The necessity requirement should be seen as creating duties for the Security Council to test whether force would even be effective, and to search for alternatives to the use of force.[40] It would make no sense to use force if it was not necessary to do so in the sense that it would not work, or that other options for preventing the harm could be found.[41]

III. *Looking at Likely Harms and Seeking Ways to Limit Them*

The Security Council would be required to investigate likely harm and seek ways to limit it. This investigation would apply the criterion of proportionality

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[37] *See id*.

[38] The G.A. Summit Outcome gives a more specific definition: "genocide, war crimes, ethnic cleansing, and crimes against humanity." G.A. Summit Outcome, *supra* note 23, at para. 138. These categories unfortunately "may not pre-empt definitional debate," especially where "crimes" are concerned, which "necessitates a legal assessment, which is likely to generate a heated and protracted debate that could actually delay response." Brunnée & Toope, *supra* note 28, at 131.

[39] *See* U.N. Charter arts. 41–42.

[40] Foley, *supra* note 27, at 140–43. *See also* Judith Gardam, Necessity, Proportionality and the Use of Force by States 201 (2004) (force must be last resort under Article 42). For ways decision makers can improve efforts to find alternatives to force, *see* Foley, *supra* note 27, at 152-57. On how the necessity requirement is ignored, *see id*. at 148–52.

[41] The Annan Report and High-level Panel Report do not actually include the term "necessity" in their criteria for when the Security Council should decide to use force but use similar concepts. *See supra* note 21.

suggested by the Secretary-General and High-level Panel, but far more actively in that *ways to limit harms* would be sought rigorously. The Security Council would also consider the requirements of the *jus in bello* here instead of after the war has started.[42] Ensuring that strategic plans are designed to limit the destructiveness of the military action makes more sense than addressing the destruction retrospectively: the damage from military action is often irreparable.[43] It also makes more sense to have the Security Council make many of the targeting decisions (advised by legal and military experts) and decide upon overall principles, rather than leaving those decisions up to the nation(s) carrying out the use of force.[44] Whether certain targets may be attacked is a legal question and in some cases may be a tricky one. However, the question must be answered and will be answered, through action or inaction. It is better to reach the answer by rigorous international inquiry and consensus than solely by the nation(s) acting under the Security Council authorization.

IV. *Balancing the Harm*

The Security Council would have to balance the irreparable harm that force is sought to prevent against the harm that military action is likely to cause, especially the irreparable harm. This can be a difficult question to answer conclusively. How, for example, is one to balance the lives of the people threatened by genocide against the lives of those who might be killed by the use of force designed to stop the genocide? This chapter will not attempt to answer this question.[45] The question must be answered in particular instances, however. The Security Council is in a better position to answer such questions than nations acting unilaterally. It has greater access to information and greater ability to limit harm.

V. *Continuing Control*

This proposed process would also require continuing Security Council control over the use of force, with continued efforts to seek diplomatic and other nonviolent

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[42] *See* James D. Fry, *The UN Security Council and the Law of Armed Conflict: Amity or Enmity?* 38 Geo. Wash. Int'l L. Rev. 327 (2006) (Security Council does not, but should, require that *jus in bello* principles be followed when it authorizes force).

[43] Gardam, *supra* note 40, at 209.

[44] The Council left these decisions to the coalition in the 1991 Gulf War. *Id.* at 210.

[45] For an effort to answer it, *see* Fernando R. Tesón, *The Liberal Case for Humanitarian Intervention, in* Humanitarian Intervention: Ethical, Legal, and Political Dilemmas 93–129 (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

solutions, and to seek ways to limit damages. For more effective control over the military action, the Security Council could set up the Military Staff Committee envisioned in Article 47.[46]

VI. *Burden of Proof*

The burden of proof would be on those proposing that force should be used. This burden accords with the criteria which stipulate that using force should be a last resort or that other means must be tried.[47] The standard of proof should be at least as high as clear and convincing evidence.[48]

VII. *Veto*

The process could require that no veto be permitted until the process has been completed and a determination reached by a majority vote of the Members of the Security Council.[49] A Permanent Member's veto of military action that the majority of Security Council members had approved would lead, in many situations, to a nation's bypassing the Security Council. This unilateral action would likely be less effective and more deadly to civilians and other important interests, however, because the veto would vitiate the Security Council's control over the action. It may be that a member wishing to veto military action that has been approved, or to take military action where the Security Council has decided it should not be approved, would understand these dangers of unilateral military action and refrain from using this political device.

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[46] *See* U.N. Charter art. 47. The Annan Report recommends amending the U.N. Charter to *eliminate* the Military Staff Committee, which is seen as "anachronistic." Annan Report, *supra* note 15, paras. 216–19. The Secretary-General adopted the recommendation of the High-level Panel, which believed that instead of such a committee, the Security-Council could call upon the Secretary-General's military adviser. *See* High-level Panel Report, *supra* note 2, para. 259.

[47] *See supra* note 21 (setting forth criteria).

[48] *See* Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 Yale J. Int'l L. 537, 551 (1999) (suggesting "clear and convincing evidence" regarding using force in self-defense). It has been suggested that regarding certain nations, the burden should be shifted to those nations, and includes among "the usual suspects" Iran, Iraq, and North Korea, who are labeled "defiant regimes." *See* Feinstein & Slaughter, *supra* note 3, at 138, 143–44. Wanting to shift the burden is understandable, but the process this chapter proposes would make ad hoc shifts unnecessary, as there would be full opportunity to test the evidence.

[49] Recent reform proposals suggest that Permanent Members could be requested to refrain from using their veto in particular situations. *See* High-level Panel Report, *supra* note 2, para. 256; *see also* ICISS Report, *supra* note 32, para. 6.21.

VIII. *Limiting Selectivity*

The process this chapter proposes would require the Security Council to address all potential threats of irreparable harm. Therefore, a Kosovo and a Darfur would receive similar attention.[50]

C. *Counterfactuals*

The following counterfactuals will show how the proposed process could have prevented, or at least minimized the destructive consequences of, two recent military actions where the Security Council was bypassed.

I. *Iraq 2003*

After failing to get a Security Council resolution authorizing it to invade Iraq,[51] the U.S. went ahead anyway with a group of nations, claiming that it was justified in doing so[52] as well as that the U.N. was irrelevant, obsolete, and impotent to deal with the threat that Iraq posed.[53] Though it has passed resolutions concerning various aspects of the occupation,[54] the Security Council has never condemned the invasion and occupation, despite the fact that the reasons U.S. officials gave to justify it have been discredited, and the war has met with widespread condemnation.[55]

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[50] *See* High-level Panel Report, *supra* note 2, para. 43 ("When the institutions of collective security respond in an ineffective and inequitable manner, they reveal a much deeper truth about which threats matter. Our institutions of collective security must not just assert that a threat to one is truly a threat to all, but perform accordingly.").

[51] *See* United Nations Security Council, *Spain, United Kingdom of Great Britain and Northern Ireland and United States of America: Draft Resolution*, U.N. Doc. S/2003/215 (March 7, 2003), *available at* http://www.un.org/News/dh/iraq/res-iraq-07mar03-en-rev.pdf. This draft was withdrawn for lack of support.

[52] Press Release, Remarks by the President in Address to the Nation, President Says Saddam Hussein Must Leave Iraq Within 48 Hours (March 17, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html.

[53] An example of this characterization of the U.N. is President Bush's speech to the General Assembly on September 12, 2002. *See* President's Remarks at the United Nations General Assembly (September 12, 2002) ("Will the United Nations serve the purpose of its founding, or will it be irrelevant?"), *available at* http://wwwwhitehouse.gov/news/releases/2002/09/20020912-1.html.

[54] *See, e.g.*, S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 23, 2003); S.C. Res. 1511, U.N. Doc. S/RES/1511 (Oct. 16, 2003); S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004).

[55] Which makes it unlikely that the invasion will result in norm of unilateral preemption. Michael Byers, War Law: Understanding International Law and Armed Conflict 80 (2005).

Perhaps part of the reason for this lack of a clear statement by the Security Council is that the Security Council lacked a definite process to get to the bottom of the U.S. claims about the threat that Iraq posed. After the U.S. took its case to the Security Council, the Security Council created an *ad hoc* process in Resolution 1441 requiring Iraq to submit to weapons inspections by the U.N. and warning of "serious consequences" if Iraq interfered with these inspections or was not forthcoming in its disclosures about its weapons programs.[56] If Iraq did not follow these requirements, then the Security Council would convene immediately[57] and, apparently, decide which "serious consequences" would ensue.[58] It was disputed whether a further resolution was needed before such serious consequences were visited upon Iraq; this concern was expressed in arguments over whether the resolution mandated "automaticity."[59] When U.S. officials saw that they would be unable to win a Security Council decision that Iraq was in breach of 1441, they short-circuited the weapons inspections process[60] and went to war without Security Council approval, claiming that the U.S. had legal authority.[61]

Resolution 1441 did not set up a mechanism for the Security Council to ask penetrating questions about the evidence that Iraq posed a threat, or about likely costs and effects of a war or other contemplated "serious consequences"; nor does it appear that the Security Council asked such questions. Resolution 1441 focused on disclosures by Iraq and U.N. inspections of various sites in Iraq.[62] The Security Council built, *ad hoc*, an awkward and unpredictable box for how it would go forward. In the process this chapter proposes, legal arguments such as the "automaticity" argument could not be made successfully: the authorization to use force would have to be explicit, and would be given only after the Security Council, *inter alia,* tested the evidence regarding the necessity for war and established its findings conclusively. Whether it is legal to invade a country would not

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[56] S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002) at paras. 11–14.

[57] *Id*. at para. 12.

[58] *Id*. at para. 13.

[59] This argument of "automaticity … relies on the combined effect of Security Council Resolutions 678, 687 and 1441." Alex Conte, Security in the 21st Century: The United Nations, Afghanistan and Iraq 141-42 (2005). Byers suggests that this lack of clarity was intentional, that both sides "agreed to disagree … thus protecting the international legal system from the damage that would otherwise have resulted when politics prevailed" risking creating a norm of preemption. Byers, *supra* note 55, at 45.

[60] *See* Conte, *supra* note 59, at 149.

[61] The U.S. and countries that joined it justified the invasion with the "automaticity" argument described. *See supra* note 59. Conte, *supra* note 59, at 140. Conte concludes that this argument is "fundamentally flawed" and that the invasion was illegal. *Id*. at 160–61.

[62] The Security Council is not required to ask such questions.

depend upon abstruse legal arguments, but upon a clear finding that the country poses a danger and that nonviolent means to prevent that danger are unavailable.

Counterfactually, what if the process this chapter proposes had been applied to the question of whether Iraq posed a threat to international peace and security? Before ordering weapons inspections, the Security Council would have engaged in serious examination of U.S. claims about Iraq's weapons programs, testing the reliability of the intelligence to determine whether there was in fact a serious threat of irreparable harm from Iraq. The Security Council would have established before the invasion what became widely known after the invasion: that the U.S. based its claims on, *inter alia,* an Iraqi defector deemed unreliable by many in the U.S. and German intelligence communities;[63] a confession gained coercively from a prisoner at the U.S. Naval Base at Guantanamo Bay that was later recanted;[64] a questionable belief that aluminum tubes Iraq had bought were intended for use in a nuclear weapons program;[65] and fraudulent documents allegedly showing that Iraqi officials sought uranium from Niger.[66] The investigation thus would have exposed the weakness of the view that Iraq posed a threat. The investigation would have provided a forum for dissenting, or at least differing, views among the intelligence community in the U.S. and in other countries.[67] The Security Council also would have considered evidence that Iraq was not a threat and concluded that this evidence was reliable.[68]

Leaving U.S. claims about weapons programs untested arguably left room for doubt. Even if the inspectors found no weapons, it could be argued that the weapons had been cleverly hidden. The position of U.S. leaders, which was to shift the burden of proof to Iraq, was summed up by U.S. Defense Secretary Donald H. Rumsfeld: "The absence of evidence is not evidence of absence."[69]

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[63] *See* Thomas E. Ricks, Fiasco: The American Military Adventure in Iraq 91 (2006).

[64] Joseph Margulies, Guantánamo and the Abuse of Presidential Power 118–19 (2006); Ron Suskind, The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11, at 187 (2006).

[65] Ricks, *supra* note 63, at 376–77 (the tubes were for conventional rockets).

[66] *Id*. at 384; Suskind, *supra* note 64, at 175–77, 191, 243.

[67] *See* Ricks, *supra* note 63, at 50–55, 90–94; Suskind, *supra* note 64, at 186-91.

[68] *See* Ricks, *supra* note 63, at 94 (International Atomic Energy Agency director Mohammed El Baradei told Security Council that inspections found no evidence of prohibited WMD or WMD programs and that Iraq's WMD capacities had "deteriorated substantially").

[69] Rumsfeld has turned this phrase often. *See, e.g.*, United States Department of Defense News Briefing, Office of the Assistant Secretary of Defense, Secretary of Defense Donald H. Rumsfeld & General Richard Myers (February 2, 2002), *available at* http://www.defenselink.mil/transcripts/2002/t02122002_t212sdv2.html. The absence of evidence may well be evidence of absence.

A robust process such as this chapter proposes would place this burden where it properly belongs – on those claiming that war was necessary.[70] The invasion and occupation ultimately represented a costly and destructive way of proving a negative.[71]

The Security Council also would have examined rigorously the claim that, if Iraq were armed with WMD (either at the time or in the future), then it would endanger other countries. The U.S. claim that Iraq would launch nuclear weapons against other countries, especially the U.S., was highly questionable. There was a strong argument that even if Iraq had WMD, it would most likely be deterred from ever using them: Iraq's leaders most likely understood that such use would lead to the annihilation of Iraq.[72]

A process such as the one this chapter proposes would require a rigorous analysis of the effectiveness of alternatives to war. The containment and isolation already imposed on Iraq might have been sufficient for insuring Iraq was not a threat.[73] Other options would have been explored, such as limited uses of force short of an actual war, as Michael Walzer proposed: expanding the no-fly zones to include all of Iraq; searching ships steaming toward Iraq's ports; imposing "smart sanctions" against Iraq; imposing sanctions against countries that violate the smart sanctions and against companies that sell weapons to Iraq; the expansion of weapons inspections; and maintaining forces near Iraq in case Iraq failed to comply.[74]

The Security Council would also have had to address the likely harm of war, such as harm to civilians, soldiers, the environment, cultural artifacts, and economic interests and markets, and determined whether this harm outweighed the risk of not using force. After exposing the weakness of the U.S. claims, the Security Council would have concluded that the certain risks and damages of using force did not outweigh the highly speculative risks that U.S. leaders said they wanted to prevent.[75]

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[70] Experts in the field of critical reasoning agree that the burden of proof properly falls on the side advocating changing the status quo. *See* Brooke Noel Moore & Richard Parker, Critical Thinking 183–87 (8th ed. 2007) (featuring this Iraq example).

[71] *See* Roula Khalaf & Mark Turner, *Blix Found No Sign of Non-Compliance*, Fin. Times (London), Apr. 28, 2005, at 2; Ricks, *supra* note 63, at 35, 37, 145–46, 375–77 (2006).

[72] *See* John J. Mearsheimer & Stephen M. Walt, *Can Saddam Be Contained? History Says Yes*, Nov. 12, 2002, *available at* http://www.comw.org/qdr/fulltext/mearsheimerwalt.pdf.

[73] *Id.*

[74] Michael Walzer, Arguing About War, 157–59 (2004) (reprinting Walzer's *What a Little War Could Do*, N.Y. Times, Mar. 7, 2003).

[75] It is not clear what U.S. leaders believed. Reportedly, the Bush Administration operated under the view that if there was at least a "one percent chance" that Saddam Hussein had WMD, then the U.S. must treat that one percent as if it were a certainty, and act accordingly. *See* Suskind, *supra* note 64, at 62, 79, 123–24, 213–16 (describing "Cheney Doctrine").

The Security Council would also have had to inquire into plans to prevent this harm in the event it authorized military action. The destruction of infrastructure would have to have been avoided, to help Iraq get back on its feet after the war and also to reduce the threat of the civil unrest that now plagues the country.

This inquiry would have exposed that U.S. leaders had adopted an unwarrantedly roseate view of the invasion itself, i.e., that few troops would be needed and that Iraq would easily transform itself into a democracy.[76] Inquiry would have exposed that there was serious dissent within the U.S. government over this view.[77] Looting would have been anticipated and prevented.[78] Indeed, inquiry would have shown that the Bush Administration had no plan for occupation, and that the absence of such a plan would place Iraqis in jeopardy for years to come.[79]

Such a Security Council process might not, of course, have directly prevented the U.S. from invading Iraq. It may be that the U.S. leadership was determined to invade Iraq no matter what.[80] However, it would have exposed, publicly and dramatically, the emptiness of the U.S. claims, which in turn could have undermined support for the war both in the U.S. and in other countries, and the lack of such support might have prevented the war.

II. *Kosovo 1999*

The NATO bombing of Serbian forces in Kosovo and various targets inside the Federal Republic of Yugoslavia (FRY) revealed the limit that the veto places on Security Council discussions, as well as the need for a process such as this chapter proposes. In 1999, in response to a humanitarian crisis in Kosovo, the Security Council was disabled from using force by the threat of a veto by Russia.[81] Regarding itself as justified, NATO bypassed the Security Council and carried out a 78-day aerial bombardment.[82] NATO's action violated the U.N. Charter: it violated Article 2, which prohibits nations from using force outside of Security Council control, and it was not taken in self-defense under Article 51, the sole exception in the Charter for unilateral uses of force.

It was arguably unwise as well. According to Mary Ellen O'Connell,

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[76] Ricks, *supra* note 63, at 59–60, 64–66, 110–11.
[77] *See id.* at 58–85.
[78] *See id.* at 135–38, 148, 150–52.
[79] *See id.* at 107–11.
[80] *See id.* at 59–68; Suskind, *supra* note 64, at 213–16.
[81] Brunnee & Toope, *supra* note 28, at 123. A veto threat should not have ended discussions. Kosovo Commission Report, *Military Intervention and International Law, supra* note 11.
[82] O'Connell, *supra* note 10, at 116.

> U.S. Secretary of State Albright had been warned by military and intelligence officials that a bombing campaign would not meet her stated goals regarding Kosovo–protecting human rights, getting Serb forces out of the province, and removing Slobodan Milosevic from power. In fact, bombing accomplished the opposite. It continued for 78 days, triggering a mass exodus of refugees and widespread killing of civilians by Yugoslav regular forces, militias and by NATO bombs.[83]

O'Connell concluded, "Kosovo is a case study of the military's advice to political leaders that using force to protect human rights is fraught with difficulty. Despite the laudable motives of many advocating for military force in Kosovo, the results show more harm than good."[84]

Counterfactually, the process this chapter outlines would have considered the reports of massive human rights abuses in Kosovo as possible irreparable harm, which would start the process of determining whether force should be authorized. Threat of a veto would not stop the process. The inquiry would be abbreviated where there is strong evidence of emergency of ongoing irreparable harm. Likely (irreparable) harm associated with going to war would be studied and balanced against the irreparable harm of not going to war. Any proposal to bomb Belgrade would have been questioned, and tested for its efficacy in stopping the humanitarian catastrophe in Kosovo. Strategic choices to target civilian infrastructure such as electrical grids, bridges, petroleum facilities (which caused toxic leaks) and a TV station, and to use weapons such as depleted uranium and cluster bombs would have been questioned.[85] There would also have been a continuing diplomatic effort controlled by the Security Council to seek a nonviolent solution,[86] and there would have been examination of the efficacy of using limited amounts of force initially and escalating only if necessary.

The process this chapter proposes would have resulted in a different – and more effective – strategy than the one NATO actually chose. NATO did not use ground forces but restricted its activities to an aerial bombardment from high altitudes, to keep aircraft out of range of Serbian anti-aircraft defenses.[87] The reason for this strategic choice was not that it was seen as the best way to stop the human rights abuses, but politics: NATO governments feared that high casualties among NATO troops might turn the publics in their countries away from supporting the intervention.[88] Indeed, no NATO troops were killed

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[83] *Id.*

[84] *Id.* at 117.

[85] *See* Gardam, *supra* note 40, at 114–21; *See* Kosovo Commission Report, *Conduct of the NATO Air Campaign, supra* note 11.

[86] The pre-intervention negotiations have been criticized as containing demands that Serbian leaders could not meet. *See* Chandler, *supra* note 4, at 178–79.

[87] *See* Gardam, *supra* note 40, at 120.

[88] *See id.* at 116.

in combat.[89] But 400-500 civilians were killed, and many of the deaths have been attributed to deadly misses and mistakes that stemmed from high altitude bombing, which is less accurate than bombing from lower levels.[90] Also, ground troops could have prevented much of the ethnic cleansing that continued and even accelerated during the bombing.[91] Serbian troops crafted countermeasures against the bombing, such as concealing their equipment and foiling NATO radar, which helped many soldiers and their equipment to escape damage and in turn maintain their capability to carry out atrocities.[92] On the other hand, had the process this chapter proposes been applied, publics may have been convinced that military action was necessary to prevent serious irreparable harm, and they might have accepted even high casualties among their nations' troops. In this way, political concerns would have been kept from negatively influencing the military strategy, and much of the damage to civilians in Kosovo and the FRY that resulted from NATO's sole reliance on air power would have been avoided.

D. *Benefits*

As the above counterfactual examples make clear, there are many benefits that this proposed process for the Security Council would bring.

I. *Establishing Security Council Primary Authority Over Uses of Force*

As was seen with the 2003 invasion of Iraq, the 2001 invasion of Afghanistan, the 1999 bombing of Kosovo and FRY, and the 1991 Gulf War, and the ongoing situation in Darfur, the Security Council does not actually have "primary responsibility for the maintenance of international peace and security."[93] It lacks a way to discuss the possibility of using force, especially now that force is proposed to ameliorate various harms other than aggression. It can be paralyzed by a veto or even the threat of a veto.

Adopting the process this chapter proposes would give the Security Council "primary responsibility" over uses of force, because the Security Council would

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[89] *Id*. at 115.

[90] *See id*. at 114–21.

[91] *See* Kosovo Commission Report, *The Cleansing of Kosovo, supra* note 11 (claiming that bombing accelerated cleansing is "difficult to assess"); Timothy Garton Ash, *The War We Almost Lost: Was NATO's Kosovo Campaign a Legitimate Response to a Humanitarian Catastrophe – Or Did It Cause One?*, THE GUARDIAN, Sept. 4, 2000, *available at* http://www.guardian.co.uk/Kosovo/Story/0,,364025,00.html.

[92] *See* Ash, *supra* note 91.

[93] *See* U.N. Charter art. 24.

become the forum for testing the necessity for using force in particular situations, and for finding ways to limit damage if force were approved: in short, it would be the forum for testing the wisdom of using force in particular situations and would develop expertise over time. The threats to international peace and security are many; it is better not to rule out the use of force *a priori* for any one of them (or to authorize use of force for any one of them *a priori*).

II. *Preventing Unilateral Wars*

The existence of this process would make it much more difficult for nations to bypass the Security Council and use military force unilaterally than it is at present. If a nation availing itself of the process were unable to support its claim that force is necessary in a given situation, it would lose the political support crucial for military action, from the international community and from its own people.[94] Nations would find it politically costly to bypass the Security Council process altogether.[95] Doing so would lead much of the international community to conclude that the nation's leaders knew *ab initio* that their claims could not withstand scrutiny.

III. *Difficult Questions Would be Answered – By Consensus*

The process would also require the Security Council to "answer" what have been thorny doctrinal questions, such as whether humanitarian intervention is legal, or if force may be used against "stateless" terrorist groups. The process would also focus the international community on the risks and costs of using force *in the particular instance*. The answers reached might not satisfy the entire international community, but it is better that these questions are asked and answered openly, and consensus reached, rather than for countries to decide the issue unilaterally.

IV. *The Risks of Setting Dangerous "Precedents" Would be Diminished*

The requirement to address each threat independently and rigorously would avoid the setting of dangerous precedents. Because the process would require the Security Council to focus rigorously on particular situations, decisions of the Security Council would have little effect as "precedent," as the rigorous focus required in each case could unearth many details that would distinguish it from others. The reality is that in many instances where force might at first seem an effective way of addressing the threat, rigorous scrutiny will reveal that it is likely to be less effective than hoped. Or, rigorous scrutiny will reveal that military

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[94] *See* Ku & Jacobson, *supra* note 6, at 366.

[95] *See id.*

action will kill many innocent people,[96] which in particular cases would caution against using force. Not every country that tries to arm itself with nuclear weapons poses a threat so great that it must be defeated militarily before it can even develop the nuclear weapon.[97] Not every genocide can be stopped with military force. Not every terrorist group can be defeated with bombs, and "collateral damage" in some cases could rally people to the terrorists' cause, making the action counterproductive.

Therefore, the authorization of military force for a particular threat would not necessarily lead to the conclusion that using force for any other threat of the same sort is "legal" (or vice versa). Indeed, if the Security Council has essentially plenary power and there is no meaningful ability to review its actions,[98] then the decision to use force need not be framed as whether using force in a particular situation is "legal" or "illegal," but whether it is "necessary" or "reasonable" under the circumstances.[99]

V. *Flexibility*

The process would be flexible. For example, in some cases it could be assumed, merely arguendo, that the threshold inquiry of serious irreparable harm is met, so that the Security Council may go on to seek alternatives to force, identify the likely harm and ways to limit it, and balance it against the necessity to use force to prevent irreparable harm. This "arguendo approach" would also satisfy decision makers who like to keep the option of using force available throughout negotiations and efforts at diplomacy. Going through the entire inquiry about whether to use force could result in finding a nonviolent alternative, peaceful resolution, or in the conclusion that military force would be too harmful and therefore unreasonable in the situation. Indeed, the Security Council's recognizing the likely harm and the difficulty of balancing it would lead it to conduct an increasingly rigorous search for nonviolent alternatives.

A more formal process of inquiry into the necessity of the use of force would be an improvement over the current system, where it is unclear whether a finding that an event is, for example, genocide, or that a country possesses prohibited WMD, can lead to the automatic use of force or if further inquiry is needed.

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[96] *See* O'Connell, *supra* note 10, at 115 (death and damage caused by military "rarely come up in discussions of humanitarian intervention").

[97] *See* Feinstein & Slaughter, *supra* note 3, at 143–44.

[98] *See supra* note 35 and accompanying text.

[99] *See* Abraham D. Sofaer, *Professor Franck's Lament*, 27 Hastings Int'l & Comp. L. Rev. 437, 442 (2004) ("My preference would be to adopt an approach to the use of force based on the rule of reason … and that the process is as honest and comprehensive as possible.").

The arguments over whether UNSC Resolution 1441 envisioned "automaticity" for the use of force against Iraq if it were found to be in breach of that resolution is an example of this uncertainty.[100] So, too, is a sense among many advocates of humanitarian intervention that force should not be considered a "last resort" in addressing massive human rights violations.[101] This uncertainty in the current system can have the unfortunate effect of causing members of the international community to argue disingenuously that an alleged crisis (of irreparable harm) is not a crisis, in order to prevent what they see as the greater evil of war,[102] which can cloud the overall issue and make clear thinking about already difficult issues even more difficult.

VI. *Reducing the Dangers of Politics*

Under the current practice, which relies on a political process, not required procedure, there is no guarantee that the sorts of questions outlined in this chapter will be asked or answered. There is no guarantee that decision makers will consider the various factors and constituencies that they should consider. There is also a danger that can result from having *too much* political consensus: the more consensus that exists for using force, especially initially, the less likely there will be debate, and the less likely it is that tough questions will be raised. This one-sided analysis can result in an unnecessary or overly destructive war, or, conversely it can result in no military action where action is necessary.[103] (That these wrong outcomes can result from consensus points up the weakness in the High-level Panel's insistence that its reforms are geared toward seeking consensus, not the best answer in the situation.)[104] It is far better to require that these questions be asked *whenever* there is actual or threatened irreparable harm that force might prevent.

There is also no guarantee under a political (or politicized) process that the well-known abuses of politics will not have an effect. In a political process, nations on the Security Council might cast votes concerning the use of force based simply on their own self-interest. Countries might find themselves being pressured or even bribed by other countries. The process that this chapter proposes would make the thinking on the Security Council more transparent; a

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[100] *See* discussion of "automaticity" *supra* note 59 and accompanying text.

[101] *See* Chandler, *supra* note 4, at 178, 183, 190–91.

[102] *See* Walzer, *supra* note 24, at 151–57 (reprinting *The Right Way*, N.Y. Rev. Books, Mar. 13, 2003).

[103] *See* Charlotte Ku & Harold K. Jacobson, *Introduction, in* Democratic Accountability, *supra* note 6, at 34 (discussing this danger). This phenomenon arguably occurred in the U.S. Congress in the run-up to the 2003 invasion of Iraq. *See* Ricks, *supra* note 63, at 61–64, 85–90.

[104] *See supra* note 25 and accompanying text.

country casting votes, or making tendentious arguments, where the facts do not warrant such a position, could be exposed as engaging in sharp politics.

VII. *Tempering the Effects of the Urge to Punish Nations*

The process that this chapter proposes is perhaps especially important for governing "humanitarian interventions." Without it, there is a danger that once a flagrant abuse of human rights is proved, such as genocide, the international community would not seek ways to avoid harm to civilians and others, out of a felt need to punish the country perpetrating genocide.[105] Many of these civilians and even soldiers are likely innocent of the genocide, however. The process this chapter proposes would prevent this enthusiasm for punishing and seeking retribution from overwhelming critical intellectual faculties that could be used more productively to seek to prevent unnecessary wars and minimize their attendant damages and costs.

E. *Conclusion*

In 2006, as in Professor Hudson's time, the forces that drive nations to war are still with us. Nations still see using military force as a solution to various problems, as evidenced by recent wars and growing military budgets.[106] The weapons industry thrives.[107] Militarism is alive and well in the world's sole superpower.[108] So is the ideology of empire.[109] Perhaps these ideologies and these wills to power will always be with us.

Law cannot by itself eliminate these forces. It can, however, as history has repeatedly shown, serve to contain them. Law can control whether the international community can inquire into a proposed use of military force, prospectively, to determine whether the use is necessary and justified, and, if so, whether it can be carried out with the least cost in lives and property as possible. That is, law can be a tool for determining in individual instances what means would truly be most effective for realizing collective security.

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[105] *See* Chandler, *supra* note 4, at 176–77, 191.

[106] *See Global Military Spending Hits $1.12 Trillion: Report*, Reuters, June 12, 2006.

[107] Professor Hudson mentioned this problem: "It must be added, however, that this new body of law concerning pacific settlement possesses and will continue to possess a somewhat artificial character so long as armaments are being maintained on the present excessive scales … [progress toward disarmament] would do more than any other single measure to give reality to our efforts to develop the methods of pacific settlement." Hudson, *supra* note 1, at 100–01.

[108] Chalmers Johnson, The Sorrows of Empire 39–65 (2002).

[109] *Id.* at 15–37.

Security Multilateralism: Progress and Paradox

By Margaret E. McGuinness

A. *Introduction*

Professor Manley O. Hudson's 1932 book, *Progress in International Organization*, represents a seemingly Utopian vision of the transformative effect of international institutions. Yet, remarkably, by the end of the 20th century, the international community had achieved two of the aspirations Hudson set forth: to develop the habit of interstate cooperation and interaction through international organizations and to make the world more secure. International regulation governing when and how governments may resort to force has never been broader or deeper. Interstate diplomatic interaction through international security organizations is a daily reality. To be sure, armed conflict persists. But the world is generally more peaceful than it was in the first half of the 20th century. More people live peaceful and secure lives and have a say in how they are governed than at any time in history. At the same time, the world faces great and potentially catastrophic threats to the peace, including from weapons of mass destruction ("WMDs"), large-scale environmental and health disasters, and the combined dangers posed by failed governments, religious conflict, and ethnic strife. The rise of non-state actors – on a scale that Hudson could hardly have foreseen – has transformed the way in which individuals govern their own lives and determine their own destinies, but has also brought the threat of new forms of transnational terrorism with global reach.[1]

Hudson's idea that one central international institution could serve to regulate the behavior of states in the service of international security – first laid out in the League Covenant and further refined in the United Nations Charter – has never been fully realized. Cold War politics effectively put on hold the central collective security functions of the UN.[2] In the post-Cold war period, the UN Security

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[1] To be sure, Hudson saw international organizations as non-state actors which were essential to the process of creating international cooperation. *See, e.g.*, Manley O. Hudson, Progress in International Organizations 46–45 (1932) (discussing the International Labor Organization). The rise of a multiplicity of independent non-state actors with the ability to play an independent role in the international system was not contemplated by Hudson.

[2] *See* Foley and Sofaer in this volume.

Miller & Bratspies (Eds), Progress in International Law, pp. 591–614.

Council has been revitalized, but alongside it has emerged a patchwork of unilateral and regional responses to threats. The evolution of security multilateralism away from the vision of one central apparatus need not, however, be viewed as a failure of international organization. To the contrary, three recent security challenges, East Timor, Kosovo, and Iraq, demonstrate that the United Nations remains relevant, adapting itself to new threats and shifting global politics. While some have decried – and others have celebrated – this adaptability and flexibility as the triumph of politics over law, in fact, it reflects well the core features of the system of international organization Hudson envisioned: one that balances (perhaps precariously at times) the moral force of law against the practical necessity of politics, joining legalism with institutional functionalism.

Today, states and non-state actors alike invoke international law and norms, rely on the broader UN-based functions of security multilateralism, and rationalize their actions within the framework of processes and rules governing security multilateralism — even when they act outside the UN. Moreover, as the UN has matured, it has carried out a broader mandate of functions that play a central role in limiting war and its effects.

The essentially political nature of these UN processes produces political responses to emerging global threats, some of which reach the level of global consensus, while others are piecemeal. And some threats are ignored by the international community altogether. Further, the system of security multilateralism is not immune from the criticisms leveled against international organizations more generally: corruption and abuse by officials, unaccountability among bureaucratic elites, and non-democratic procedures and decision making. But it is precisely the leavening of legal formalism with political processes that accounts for the continuing relevance of security multilateralism in the 21st century. The institutions of security multilateralism have proven flexible enough to accommodate the ongoing dialogue within the international community about the content of the rules governing the use of force and the effectiveness of collective security responses. The perfection of international security multilateralism may never be achievable, but the political and legal project of perfecting international security – including through institutional reform – should remain at the center of the project of international organization.

B. *Progress: From Utopianism to Institutionalism*

Just twelve years after the foundation of the League of Nations (the "League"), Hudson presented, in *Progress in International Organization*, his high aspirations for international law and international organization to achieve enduring peace among nations. Indeed, Hudson remained almost naïvely optimistic

about the ability of international organization to secure the long-term peace after World War I:

> The advance of international organization during the past twelve years, the impetus it has given to international co-operation, and the direction in which international law is being developed would seem to have made it possible for us to look forward with some confidence to a greater international security than the world has known in the past.[3]

When Hudson wrote these words, the long shadows of war had already fallen over Europe and Asia. Within the year, Hitler would take power in Germany, and Japan would seize control of Manchuria.[4] The League in which Hudson had placed his faith would soon prove completely ineffectual in slowing the steady march to war. It is therefore tempting to throw Hudson's remarks—indeed, the entire thesis of *Progress in International Organization* – onto the trash heap of historical miscalculations with Neville Chamberlain's famously myopic declaration of "peace for our time" following the Munich Peace Conference of 1938.[5] Hudson grossly miscalculated the ability of the League to prevent war and was profoundly wrong about the short-term viability of international organization. He was not alone in those misjudgments. The diplomats and politicians charged with the post-war peace were similarly overconfident about the short-term prospects of their structural arrangements – arrangements that failed to take adequate account of the destabilizing effects of the economic and political dislocations that had persisted after the first war.[6]

Despite the failure of the League and the horrors of World War II, Hudson's prediction of a more peaceful world was not completely wrong. Nor was he wrong that the world would evolve toward more, rather than less, cooperation among nations. The world is both more peaceful and marked by ongoing interactions at multilateral institutions to address issues of peace and security. The world today is a safer place for nation states than it was in 1932. Interstate war, the scourge of the 19th and the early 20th century, accounted for the deaths of almost 70 million in the century leading up to World War I and another 70 million

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[3] Hudson, *supra* note 1, at 89.

[4] In a footnote amended to his lecture titled *The World's Peace*, which forms a chapter of Progress in International Organization, Hudson noted that Japanese aggression in Manchuria had begun in late 1931. *Id.* at 92. *See* Donald C. Watt, et. al., A History of the World in the Twentieth Century 523 (1968); James L. Mcclain, Japan 413 (2002).

[5] Neville Chamberlain, British Prime Minister, Statement Made In Front of 10 Downing Street, London After Arrival Home from Munich Conference of 1938: Peace for Our Time (Sept. 30, 1938), http://www.britannia.com/history/docs/peacetime.html.

[6] *See, e.g*, Keith Eubank, The Origins of World War II 23 (1969). *See also* John Maynard Keynes, The Economic Consequences of the Peace 212 (1920).

during World War I and II.[7] Following World War II, the incidence of traditional interstate wars declined dramatically as a percentage of armed conflicts (they represent just eighteen percent of all wars by the mid 1990s),[8] even when adjusted for the increased number of states.[9] At the start of the 21st century, interstate war, as Hudson would have understood it, has all but disappeared.[10]

The world is also an improved place for individuals within states.[11] The Wilsonian ideal of self-determination of peoples on which the League, in part, was founded,[12] has today been realized for more than half of the world's population.[13] When Hudson wrote *Progress in International Organization*, the world included 66 nation states,[14] 55 of which were members of the League of Nations.[15] The redrawing of the maps of the great world powers added 105 countries to the world between 1945 and 1990; the end of the Cold War and the break-up of the USSR added another 24 countries between 1991 and 2000.[16] In 2007, there are 192 UN Member States – an increase from just 55 in 1946 – with combined populations of 6.5 billion,[17] up from a global population of less than 2.5 billion[18]

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[7] During the period from 1815–1914 there were approximately 2.2 million casualties that resulted from European conflicts involving interstate war. Peter H. Wilson, *European Warfare 1815–2000, in* War in the Modern World Since 1815, 210 (Jeremy Black ed., 2003). World War I resulted in approximately 10 million military and civilian casualties. *Id*. World War II resulted in approximately 56.5 million military and civilian casualties. *Id*.

[8] Kalevi J. Holsti, The State, War, and the State of War 25 (1996).

[9] During the period between 1815 and 1914, the ratio between the number of interstate wars per year and the total number of nation states was 0.014. *Id*. at 24. This ratio increased to 0.036 between 1914 and 1945, but has fallen to only 0.005 since the conclusion of World War II. *Id*.

[10] *Id*.

[11] *See* Monty G. Marshall & Ted Robert Gurr, Peace and Conflict 2005, 11 (2005) (noting that the "global trend in major armed conflict has continued to decrease markedly in the post-Cold War era both in numbers of states affected by major armed conflicts and in general magnitude").

[12] *See* League of Nations Covenant art. 22, para. 1. *See also* President Woodrow Wilson: Fourteen Points (Jan. 8, 1918).

[13] Freedom House, *Freedom in the World 2006*, http://www.freedomhouse.org/uploads/pdf/Charts2006.pdf (approximately 3 billion people (46% of total population) are considered completely free, while another 1.2 billion (18%) are considered partly free).

[14] The Green Papers, Worldwide Independent Nation-States (2006), http://www.thegreenpapers.com/ww/IndependentNationStates.phtml?format=independence.

[15] Hudson, *supra*, note 1, at 27 (noting that not all "fifty-five members of the League of Nations collaborate in the same measure").

[16] *Independent Nation-States, supra* note 14.

[17] U.S. Census Bureau, *International Database Summary Demographic Data*, http://www.census.gov/ipc/www/idbsum.html.

[18] U.S. Census Bureau, *Total Midyear Population for the World: 1950–2050*, http://www.census.gov/ipc/www/worldpop.html.

in 1946.[19] In 1950, twenty-two states representing 30 percent of the world population were democratic.[20] Today, 89 nations representing 46 percent of the world population are "free" states "in which there is broad scope for open political competition, a climate of respect for civil liberties, significant independent civic life, and independent media."[21] An additional 58 states representing 30 percent of the global population, rate as "partly free" states in which "there is limited respect for political rights and civil liberties…"[22]

However, the relative peace of today is not stabilized by a carefully calibrated balance of power between the few large empires of the early 20th century, or the two superpowers of the late 20th century. It is a fragile peace, facing unprecedented challenges and threats. The main threat to international peace is no longer aggressive interstate war. More than fifty civil wars, fueled by failures of state capacity and legitimacy, occurred between 1960 and 2004.[23] Despite dramatic global improvements in the public health and economic well-being, many parts of the world remain mired in poverty or continue to suffer the devastation of the AIDS epidemic.[24] The danger posed by the proliferation of WMDs, including the possibility of such weapons falling into the hands of terrorists or international criminal networks, rests in the ability of small states or non-state actors to threaten the security of everyone. Even the United States, which spends as much to maintain its unprecedented military power as all the other 191 Member States combined, cannot alone secure the peace.[25] The UN Secretary General's

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[19] United Nations, *Growth in United Nations Membership, 1945–2006*, http://www.un.org/Overview/growth.htm.

[20] *See* Freedom House, *Democracy's Century: A Survey of Political Change in the 20th Century* (1999), http://web.archive.org/web/ 20050307205050/www.freedomhouse.org/reports/century.pdf.

[21] Arch Puddington, *Freedom in the World 2006: Middle East Progress Amid Global Gains*, http://www.freedomhouse.org/template.cfm?page=70&release=317. Notably, between 2004 and 2005, the number of "not free" states dropped from 49 to 45, the lowest number of not free states measured by the survey in over a decade. *Id. See also, Freedom in the World 2006, supra* note 13.

[22] Puddington, *supra* note 21.

[23] *See* Secretary-General's High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* 11 (2004).

[24] *Id*. at 12, 15. *See also*, Report of the Secretary General, In Larger Freedom: Towards Development, Security and Human Rights For All 7 (2005). ("Today, more than a billion people — one in every six human beings — still live on less than a dollar a day, lacking the means to stay alive in the face of chronic hunger, disease and environmental hazards.")

[25] *See* Center for Arms Control and Nuclear Proliferation, U.S. Military Spending vs. the World (Feb. 6, 2006), http://www.armscontrolcenter.org/archives/002244.php (noting that the global amount of military spending is approximately $1,083 billion and that the United States is responsible for $522 billion of that amount).

High-Level Panel on Threats, Challenges and Change concluded, in 2005, that this altered threat landscape requires a change in how the international community should respond:

> The case for collective security today rests on three basic pillars. Today's threats recognize no national boundaries, are connected, and must be addressed at the global and regional as well as the national levels. No State, no matter how powerful, can by its own efforts alone make itself invulnerable to today's threats. And it cannot be assumed that every State will always be able, or willing, to meet its responsibility to protect its own peoples and not to harm its neighbours.[26]

In light of the apparent paradox between expansion of security and the rise of unprecedented threats, it is appropriate to ask whether Hudson's causal thesis, *i.e.*, that international organization would itself create the conditions for increased security, is correct. I suspect that Hudson, a native of Missouri, would appreciate the "show me" spirit that demands an empirical inquiry into the effectiveness of IOs in the area of security.[27] This inquiry requires an examination of the original purposes of security multilateralism and historical practice of the central multilateral security institutions.

Security multilateralism today is the result of evolution in the form and substance of international organization as Hudson understood it in 1932. The League Covenant was formed around two central principles: that war between states could by prevented by the creation and application of pacific, multilateral processes of dispute resolution, and that aggressive war should not be a tool of international relations.[28] Hudson summarized how these two principles operated:

> The daily conduct of intimate relations by various governments, the frequent assembling of conferences where officials can come to know their opposites in other lands, the habit of giving continuous attention to variety of subjects concerning which difference might lead to friction, must have added to the forces which tend toward the safeguarding of the world's peace. But a generation which came through the World War to find ten millions of its most useful men wasted in battle cannot content itself with anything less than a frontal attack on war itself.[29]

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[26] *A More Secure World, supra* note 23, at 9.

[27] Hudson was a member of the faculty of my home institution, the University of Missouri Law School, from 1910–1919. *See* William F. Fratcher, The Law Barn: A Brief History of the School of Law, University of Missouri-Columbia 71 (1988).

[28] *See* League of Nations Covenant art. 10 (declaring that members would "undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."); *See also* Evan Luard, A History of the United Nations 3 (1982) (noting that the creators of the League of Nations hoped it "would be a means of abolishing war from the earth and substituting the saner procedures of international conciliation.").

[29] Hudson, *supra* note 1, at 89.

Hudson did not use the term "security multilateralism" in *Progress in International Organization*. This excerpt nonetheless describes the two elements central to the global project of security multilateralism: (1) the coordination of security relations among states; (2) according to the principles and legal norms governing the use of force.[30]

Hudson was prescient on many counts. He foreshadowed later scholarship with his thesis that the coordination function of multilateralism reflected in the interaction of governmental officials would prevent the miscalculations that lead to war and would also have a transformative effect on the participants. For example, the value of achieving optimal outcomes through participation in international institutions has been explored and systematized by international legal scholars and political scientists within the framework of institutionalist and managerial theories, which posit that international organizations help increase compliance with legal rules by reducing transaction costs, stabilizing the expectations of states, and facilitating interstate cooperation.[31] Constructivist theory within international relations and the transnational legal process approach within international law examine the ways in which actors are shaped by their participation in the international system and ultimately internalize international norms and rules.[32] Hudson's analysis shows that the idea of transforming state behavior through participation in international organizations was there from the founding of the League: institutional procedures would facilitate cooperation and coordination; law would proscribe the boundaries within which states are to behave.

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[30] I adopt this definition from John Ruggie's definition of multilateralism. *See* John Gerard Ruggie, *Multilateralism: the Anatomy of an Institution, in* Multilateralism Matters 3–47 (John Gerard Ruggie, ed., 1992) [hereinafter Multilateralism Matters]. *See also* McCaffrey in this volume.

[31] For an institutionalist view, see Robert O. Keohane, *The Demand for International Regimes, in* International Regimes 141, 153–54 (Stephen D. Krasner, ed., 1983). The managerial theory is described in Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements 22–25 (1995) (noting how "at the simplest level, participating in the regime, attending meetings, responding to requests, and meeting deadlines may lead to a realignment of domestic priorities and agendas," towards compliance with international treaties, and how "more pointed activities" such as ensuring transparency, dispute settlement, and capacity building can also increase the level of compliance).

[32] For an overview of the constructivist view of international institutions, *see* Martha Finnemore & Kathryn Sikkink, *Taking Stock: Constructivist Research Program in International Relations and Comparative Politics*, 4 Ann. Rev. of Poli. Sci. 391 (June 2001). For a discussion of transnational legal process, see Harold Hongju Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181, 183–84 (1996) (transnational legal process "describes the theory and practice of how public and private actors … interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and … internalize rules of transnational law.").

The legal presumption against aggressive war set the behavioral boundary for the League, marking a significant shift away from the general acceptance of war as a means to achieve political objectives and also from the *ad hoc* defense alliances that had served as the only meaningful regulation of war leading up to World War I.[33] The Covenant sought to replace raw power politics with transparency and predictability about how and when armed force could be used. War and the threat of war against any League members would be of concern to all members,[34] and members were to respect the territorial integrity and political independence of other members.[35] The aspiration was no less than "abolishing war from the earth and substituting the saner procedures of international conciliation."[36] Notably, however, the League Covenant did not declare all war to be illegal.[37] Rather, it adopted the idea of mutual security inherent in earlier alliance agreements[38] and allowed for a collective decision to use force where pacific means had failed. It departed from the alliances by allowing for universal membership, though universality was never achieved. In 1933, Germany and Japan withdrew from the League; the United States and Soviet Union never joined.[39]

Despite these lofty goals, and despite a handful of successes resolving relatively minor disputes, the League failed. In the intervening years, commentators have attributed that failure to weaknesses in the League procedures, to lack of political will, and to the absence of key states among the membership.[40] The League did not become the universalized version of a security alliance that its founders had envisioned, but rather a non-universal organization that possessed neither a requirement that members contribute to collective security, nor the means through which to enforce its decisions.

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[33] Margaret E. McGuinness, *Multilateralism and War: A Taxonomy of Institutional Functions*, 51 Vill. L. Rev. 149, 163–64 (2006).

[34] *See* League of Nations Covenant art. 11, para. 1 ("Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League….").

[35] *Id.* art. 10 ("The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League.").

[36] Luard, *supra* note 28, at 3.

[37] The Kellogg-Briand Pact, by contrast, did seek to outlaw war. Kellogg-Briand Pact 1928, art. 1, General Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

[38] The multilateralism of the Concert of Europe was replaced in the latter part of the 19th century by the "attack on one is an attack on all" *ad hoc* defense arrangements exemplified by the Triple Alliance and Triple Entente agreements. *See* John Gerard Ruggie, *Multilateralism: the Anatomy of an Institution, in* Multilateralism Matters: the Theory and Praxis of an Institutional Form 18–19 (John Gerard Ruggie, ed., 1992).

[39] McGuinness, *supra* note 33, at 165.

[40] *Id.* at 166–67. *See* Sofaer in this volume.

In drawing from the immediate lessons of the failures of the League period, the founders of the U.N. melded two approaches aimed at overcoming the deficiencies of the League: (1) embodying in the institution the normative constraint against the use of force, coupled with an effective political mechanism for managing the escalation of disputes and the adoption of collective security measures; and (2) establishing a viable internationalized version of the political and military alliance that defeated Germany and Japan.[41] The UN Charter thus discarded the weak elements of the League Covenant, strengthened the obligations of Member States toward collective enforcement, and, most important, recognized the value of political processes and alliances for achieving effective collective security.

The UN security enforcement provisions would act to establish "coalitions of the willing" acting according to a set of rules.[42] The normative constraint is contained in Article 2(4), which prohibits the unilateral, non-defensive use of force.[43] Like the Covenant, the Charter codified important qualifications to that foundational prohibition. Article 51 permits states to employ force in self-defense, even without Council authorization so long as that self-defense conforms to international law.[44] Article 42 permits the Security Council to authorize the use of force when it has determined it to be necessary to restore peace and security.[45] While the Council may act even absent a violation of international law by a Member State, it must act "in accordance with the Purposes and Principles of the United Nations"[46] to promote peace "in conformity with the principles of justice and international law."[47]

In addition to setting forth these rules governing the use of armed force, the Charter provides the legal basis for the processes that facilitate the coordination

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[41] *See* Luard, *supra* note 28, at 17.

[42] Thomas Franck notes that this modern term "coalition of the willing" has its root in "creative adaption" of art. 43. *See* Thomas M. Franck, Recourse to Force, 25 (2002). Art. 43 envisioned that Member States would contribute troops to be placed under the direction of the UN military committee. *See* discussion of the Military Committee, *infra* note 61. See Sofaer and Foley in this volume.

[43] *See* Christopher C. Joyner, International Law in the 21st Century 165 (2005) (asserting fundamental intent of art. 2(4) is to prevent states from using force against "territorial integrity" or "political independence" of other states). Art. 2(4) states, "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." U.N. Charter art. 2, para. 4.

[44] U.N. Charter art. 51. *See also*, Oscar Schachter, *The Right of States to Use Armed Force*, 82 Mich. L. Rev. 1620, 1633 (1984).

[45] U.N. Charter art. 42.

[46] *Id*. art. 24, para. 2.

[47] *Id*. art. 1, para. 1.

and cooperation of Member States necessary to manage security multilateralism. The coordination processes are reflected in the conferral to the Security Council of "primary responsibility for the maintenance of international peace and security" and agreement by the Member States that the Council "acts on their behalf."[48] The historical compromise between the Allied powers (who sought to concentrate executive powers of the UN in themselves) and the smaller states (who preferred a broader participation in Council measures) was to create the Council as quasi-executive, quasi-legislative organ that does not reflect the universal membership and equal voting rights present in the General Assembly.[49] This conferral of power to a non-majoritarian Council operating under unequal voting rights with five veto-wielding permanent members is extensive and serves as the keystone of all other multilateral security functions carried out by the Council and by the other organs of the UN that act in support of those security functions.[50]

Formalized investigation and dispute resolution procedures to prevent or limit armed conflict are placed squarely under the authority of the Council.[51] Under Chapter VI, the Council is empowered to "investigate any dispute" that might "lead to international friction or give rise to a dispute" as part of its mandate to maintain international peace and security.[52] While the General Assembly has general plenary authority to discuss and pass resolutions relating to disputes, the Council effectively has the ability to preempt the Assembly by taking action on any matter.[53] The Council's dispute resolution authority is connected to Article 2(3), which provides that "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."[54] Article 2(3)'s "detailed elaboration" through Article 33, which empowers the Council to call upon the parties to settle their dispute by "peaceful means," places the full range of dispute resolution activity – fact-finding, negotiation, enquiry, mediation, arbitration and the use of international tribunals – at the heart of the Council's functions.[55]

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[48] U.N. Charter art. 24. *See* U.N. Charter chs. V, VI and VII. For a discussion of the legal basis of the Council's power to bind Member States along with an overview of Council practice under art. 25, see The Charter of the United Nations: A Commentary 458–64 (Bruno Simma ed., 2d ed. 2002) [hereinafter U.N. Charter Commentary].

[49] Chapter V describes the composition, powers and procedures of the Council. *Id.* at 443–44.

[50] *See* U.N. Charter Commentary, *supra* note 48, at 450–52.

[51] *See* U.N. Charter art. 33, para. 2, arts. 34, 35.

[52] *Id.* art. 34.

[53] *See id.* art. 35. *But see* U.N. Charter Commentary, *supra* note 48, at 445–46 (noting that one possible interpretation of art. 24–as corroborated by art. 11(2)–is that Assembly has *no power* in area of international security) (emphasis added).

[54] *See* U.N. Charter art. 2, para. 3.

[55] *See id.* art. 33; *see also* U.N. Charter Commentary, *supra* note 48, at 583–85 (discussing relationship between two Articles).

The most significant improvement the Charter made over the Covenant was the conferral of coercive enforcement power through the use of economic and military sanctions[56] and, ultimately, the application of armed force, wherever the Council "shall determine the existence of any threat to the peace, breach of the peace or act of aggression …."[57] Departing from the League Covenant, the Charter does not require an actual breach of international law as a prerequisite to a Council enforcement action.[58] In effect, all the functions of the Council act in support of these Chapter VII enforcement powers whenever there is a threat to the peace.

Under Article 42, any determination by the Council that dispute resolution measures "would be inadequate or have proved to be inadequate" permits the Council to take military measures to "maintain or restore international peace and security."[59] The Charter contemplated that force could be employed under United Nations command, by a Member State, by a group of Member States or by a regional organization, whenever the Council so authorized.[60] The UN has never deployed its own military force, as the permanent military committee provided for by the Charter never came to pass — a victim of Cold War politics, or, as Bruno Simma has noted, "overtaken by historical events."[61]

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[56] Art. 41 authorizes the Council to "decide what measures *not involving the use of armed force* are to be employed to give effect to its decisions" and to "call upon [Member States] to apply such measures." U.N. Charter art. 41; *see also* U.N. Charter Commentary, *supra* note 48, at 736–37 (noting that art. 16 of League Covenant was precursor and partial model for art. 41). It thereby permits sanctions, *i.e.*, non-military enforcement measures, to be imposed and, in another departure from the League Covenant, enforced against all Member States. U.N. Charter art. 41; *see* U.N. Charter Commentary, *supra* note 48, at 740–45 (discussing other potential measures, including creation of international criminal tribunals and establishment of post-conflict administrative entities).

[57] U.N. Charter art. 39. Ch. VII further permits that the Council "shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." *Id.*

[58] *See* UN Charter Commentary, *supra* note 48, at 705 (distinguishing Chapter VII powers of Charter from collective action measures available under League Covenant, which were characterized as sanctions in response to breach of law).

[59] U.N. Charter art. 42 ("Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.").

[60] See U.N. Charter Commentary, *supra* note 48, at 751 ("While the League Council could merely recommend that States apply armed force against an aggressor, the newly created Secu rity Council should, pursuant to Art. 42, be able to place troops at the disposal of the Security Council.").

[61] U.N. Charter Commentary, *supra* note 48, at 768 ("Article 46 might well be the most obsolete of those provisions of Chapter VII which have been overtaken by historical events"); *id.* art. 46 (explaining that Military Staff Committee shall assist Security Council with plans for application of armed force); *id.* art. 47 (establishing Military Staff Committee to report to and be at disposal of Security Council).

During the Cold War, the General Assembly helped fill the gap through the "Uniting for Peace Resolution," passed to facilitate UN peacekeeping in Korea (1950) and later invoked to send peacekeepers to Suez (1956) and Congo (1960).[62] Peacekeeping operations were not established under Chapter VII authority, but rather under so-called "Chapter 6 ½" – placing the authority somewhere between pacific dispute resolution and enforcement action. Member States who were willing contributed troops. Such deployments were nonetheless rare; there were only twelve such authorizations during the Cold War.[63]

C. *Paradox: The Persistence of Politics*

The track record of United Nations security multilateralism may suggest that neither the process nor the rules governing the use of force affected the behavior of states. Between the end of the war in 1945 and the fall of the Berlin Wall in 1989, the world experienced over 100 separate armed conflicts that left over 20 million dead.[64] During that same period, the Security Council acted under its Chapter VII enforcement powers only twenty-two times.[65] Some legal scholars – including the strange bedfellows of idealist supporters of the UN project and its detractors – have cited the persistence of armed conflict during a period of Council inaction as evidence that the central normative prohibition against aggressive war has been rejected and rendered moot, and the Council reduced to nothing more than a political talking shop.[66] Others reject claims of complete obsolescence of the Council, but nonetheless argue that, to the extent the Council's actions or

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[62] *See* Franck, *supra* note 42, at 36–39.

[63] John Terence O'Neill & Nicholas Rees, United Nations Peacekeeping in the Post-Cold War Era 24 (2005).

[64] *See* Secretary General, Report of the Secretary-General on An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping 14, U.N. Doc. A/47/277–S/24111 (June 17, 1992) (estimating over 100 conflicts, leaving twenty million dead between 1946 and 1989).

[65] *See* Erik Voeten, *The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force*, 59 Int'l Org. 527, 530 (citing Sydney D. Bailey & Sam Daws, *The Procedure of the UN Security Council* 271 (3d ed. 1998).

[66] Thomas Franck stated it bluntly in 1970, "[T]he high-minded resolve of Article 2(4) mocks us from its grave." Thomas M. Franck, *Who Killed Article 2(4)*?, 64 Am. J. Int'l L. 809–810 (1970)). For more recent criticism from UN skeptics, *see* Michael J. Glennon, *Why the Security Council Failed*, 82 Foreign Aff. 16, 27–30 (May 2003) (arguing that the Security Council should be judged on how it actually behaves versus how it ought to behave, and concluding that overall the Security Council has failed to adapt); John R. Bolton, *Clinton Meets "International Law" in Kosovo*, Wall St. J. Apr. 5, 1999, A23 ("The real lesson of Kosovo is that 'international law' in political and military matters is increasingly exposed as an academic sham.").

inactions reflect an inconsistent application of the rules governing the use of force, it squanders its legitimacy and thus its value in regulating international security.[67]

Following the Cold War, rather than sinking into obsolescence, the Council was revitalized, playing a central role in addressing new and emerging conflicts. Between 1990 and 1998, the Security Council passed 145 resolutions under Chapter VII, authorizing 17 interventions in conflicts that it recognized as presenting a threat to international peace and security.[68] Given the Council's relative dormancy during the years 1945-1990, why did it experience this revival during the immediate post-Cold War period? And why, if the legitimacy of UN rules governing the use of force is called into question by either their disuse during the Cold War or their current inconsistent application, do states – as the United States did prior to the 2003 invasion of Iraq – continue to seek approval or intervention by the Council at all?

There are several answers to those questions. The first answer lies in global political reality. The bipolarity of Cold War politics maintained a stabilizing equilibrium for general international security; the end of the Cold War freed up the Council to act where it had been deadlocked by the veto power of the United States and Soviet Union. To be sure, politics continues to place limits on the extent of Council actions,[69] but the expansion of the community of states that shared common approaches to solving global problems facilitated increasing use of the Council. Further, the legitimacy of the Council may not be dependent on whether it acts to address every threat to the peace, or even that it act in ways that are entirely consistent. The Council is not, fundamentally, an adjudicatory body whose purpose it is to "say what the law is." Indeed, the failure of the Council to apply law consistently would perhaps not arise had the International Court of Justice (ICJ) played a larger role in the actual adjudication of questions regarding the use of force. The ICJ, however, has become an even more minor actor than Hudson had cautiously envisioned when he noted that the new court's contribution to the peace will "necessarily be less direct and perhaps less spectacular" than the Council's.[70] Only sixty-five states currently have voluntarily placed

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[67] *See, e.g.*, Fredric Kirgis, *The United Nations at Fifty: The Security Council's First Fifty Years*, 89 Am. J. Int'l. L. 506, 516 (1995) (noting that "if the Council is to be effective in the long run, it needs to demonstrate that it is using the powers judiciously.").

[68] Erik Voeten, *supra* note 65, at 531 (citing to Sydney D. Bailey & Sam Daws, The Procedure of the UN Security Council 271 (3d ed.1998)).

[69] Kosovo represents a central example of the Council's inability to reach consensus because of political opposition by Russia, which effectively threatened a veto. *See* discussion of Kosovo conflict *infra*.

[70] Manley O. Hudson, *The New World Court*, 24 Foreign Aff. 75 (1945–1946) *See also*, Hudson, *supra* note 1, at 59 (describing how "one may … look forward to a time when most of the nations

themselves within the compulsory jurisdiction of the ICJ,[71] which, in the past sixty years, has heard only twenty-two cases requiring it to interpret *jus ad bellum*, the law governing the use of force.[72]

In place of ICJ adjudication, the acts of the Council (and, in a more limited sense, the General Assembly) have served a dual role of law-giving and law-interpreting on questions of resort to force.[73] José Alvarez has referred to the Council's broad powers as the "*deus ex machina* of the international legal system."[74] The political/legal mandate of the Council, Alvarez notes, confers on it a special "gap-filling" role that is otherwise absent in an international system "lacking a single legislative organ, a credible police authority, or a judiciary with compulsory jurisdiction." The gap-filling role includes that of dispute-settlement where there is "need to resolve a conflict between two competing legal principles in a system notoriously lacking a hierarchically superior settler of such conflicts."[75] As Thomas Franck has observed, the political activities of the Council and Assembly "applying the Charter in actual instances" provides the "best guide to what the text means now, and how it will evolve in the proximate future."[76]

A central reason for the resiliency of the Council and its ongoing legitimacy, however, lies in the fact that, despite the infrequent invocation of the Council's enforcement powers, the UN did not stand completely still during the Cold War. Central to the UN project, and drawing directly from the experiences of the League, was the recognition that many factors contribute to sustainable peace and that institutional capacity – or, as Hudson called it "the habit of giving continuous attention to variety of subjects concerning which difference might lead to friction"[77] – would be needed to address those factors. These institutional functions form the taxonomy

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of the world will have conferred on the Court a large degree of compulsory jurisdiction."). Hudson had served as a justice of the Permanent Court of International Justice from 1936 to 1946. Hudson, Manley Ottmer, 1886 Papers; 1894–1969 Finding Aid, Harvard University Library Online Archival Search Information System (Dec. 1971), http://oasis.harvard.edu:10080/oasis/deliver/~law00085.

[71] The United Nations, The International Court of Justice 45 (2004), *available at* http://www.icj-cij.org/icjwww/igeneralinformation/igeninf_Annual_Reports/iicj_annual_report_2004–2005.pdf

[72] Eric A. Posner, *The Decline of the International Court of Justice, in* International Conflict Resolution. 111 (Stefan Voigt, et al., eds., 2006). *See* Foley, in this volume.

[73] Thomas Franck has noted that the law of the Charter "evolves through the persistent and principled practice of its principled organs." Thomas M. Franck, *The Use of Force in International Law*, 11 Tul. J. Int'l & Comp. L. 7, 7 (2003).

[74] Jose Alvarez, *Between Law and Power*, 99 Am. J. Int'l L. 926 (2005) (reviewing Erika de Wet, The Chapter VII Powers of the United Nations Security Council (2004)).

[75] *Id*.

[76] *See* Franck, *supra* note 73, at 7, 8.

[77] Hudson, *supra* note 1, at 89.

of security multilateralism: (1) assessment (information, analysis and determination of threats); (2) intermediation (both neutral non-binding methods of dispute resolution and adjudication); (3) humanitarian assistance (life-sustaining support, before, during and following armed conflict); (4) sanctions (binding political, economic and military restrictions); (5) military intervention (use of force to address threats); and (6) post-conflict administration (peacekeeping and civilian administration).[78] While these functions directly support the Council's core powers to address threats to peace and security, they are dispersed throughout agencies of the UN and thus can operate even where the Council has not acted under its enforcement authority. Moreover, each of these functions is not unique to the UN, and has been carried out by regional organizations or by *ad hoc* groups of states – particularly where those groups are led by credible and committed economic, political or military power. The broad range of the functions that comprise security multilateralism suggests that focusing on the relative desuetude of Chapter VII enforcement actions during the Cold War and the relative revitalization of those actions in the post-Cold War period tells only part of the story.

D. *Some Observations about East Timor, Kosovo and Iraq*

Three recent conflicts offer some insights into the ways in which these functions of security multilateralism can be carried out. In East Timor, the outside use of force and broad political intervention was expressly authorized, supported and led by the UN. In Kosovo, the use of force was not authorized by the UN and was led by a regional security organization. The United States-led invasion of Iraq in 2003, was not expressly authorized by the UN and was supported and carried out by an *ad hoc* group of states.[79] Measured against the Charter rules governing the use of force, only one intervention, East Timor, was clearly lawful as it was explicitly authorized by the Council and carried out under the authority of UN command.[80] In the cases of Kosovo and Iraq, arguments for their legality have been made, and the Kosovo intervention, unlike the Iraq invasion, received wide international support. In neither Kosovo nor Iraq, however, were the coalitions acting under *ex ante* express Chapter VII authority or under well-established law regarding self-defense.[81]

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[78] The taxonomy is discussed in greater detail in McGuinness, *supra* note 33, at 179–94.

[79] I examine these cases in more detail in McGuinness, *supra* note 33, at 193–215.

[80] *See id*. at 201–02.

[81] *See generally* Simon Chesterman, Just War or Just Peace? (2003); Klinton W. Alexander, *NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty in the*

The cases illustrate the possible types of outside use of force to address threats to the peace: UN multilateral; non-UN multilateral; and unilateral. The cases of Kosovo and Iraq have frequently been held up as examples of the failure of the UN, precisely because outside resort to force took place, notwithstanding the absence of UN authorization. A closer examination of each of these cases illustrates, however, that focus solely on the function of military intervention – without taking into account the other functions of security multilateralism – misses the broader role the UN played in each case as an institution and a norm setter. In the cases of Kosovo and Iraq, for example, actors behaved in ways that demonstrate deep reliance on the structures and processes of UN multilateralism as well as on the normative constraints on the use of force, even when the military intervention function is carried out by a non-UN actor.

The cases further illustrate the institutional strengths and weaknesses of the United Nations across each of the functions of security multilateralism in different threat contexts. The intervention of the United Nations to guide East Timor through its independence from Indonesia is held up as a paradigm of UN security multilateralism: The institutions of collective security were brought to bear to protect the right of self-determination of the people of East Timor, resolve a threat to peace and security posed by internal conflict, and provide interim governance during the transition to full independence.[82] Beginning in 1999, the Council passed a number of resolutions that supported the popular consultation process to determine the political future of East Timor; established a UN mission to prepare, carry out and monitor elections; and deployed a multinational peacekeeping force to quell the violence.[83] The Council also authorized the creation of an administrative presence that oversaw the transition to independence.[84] The UN civil administration turned over full powers to the sovereign Timor-Leste in 2002, and the transitional UN military and political presence departed in 2005, leaving behind a small support mission that was to

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Absence of Security Council Approval, 22 Hous. J. Int'l L. 403 (1999). *See* William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. Int'l L. 557, 559–63 (2003) (rationalizing the legality of the Iraq invasion on the basis of prior Security Council resolutions). *See also* Foley and Sofaer in this volume.

[82] For a full discussion of UN involvement in East Timor, *see* McGuinness, *supra* note 33, at 150–3.

[83] *See* S.C. Res. 1246, U.N. Doc. S/RES/1246 (June 11, 1999) (establishing UN Mission in East Timor (UNAMET)); S.C. Res. 1264, U.N. Doc. S/RES/1264 (Sept. 15, 1999) (establishing a multinational force for East Timor (INTERFET)); S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999) (establishing the UN Transitional Administration in East Timor (UNTAET)).

[84] *See* S.C. Res. 1410, U.N. Doc. S/RES/1410 (May 17, 2002) (establishing the UN Mission of Support in East Timor (UNMISET)).

depart in 2006.[85] Within a year, however, Australia and New Zealand – without express UN authorization – deployed troops to Timor-Leste to stabilize a security situation that had deteriorated after the departure of the last UN peacekeepers.[86] The UN subsequently authorized a police mission and UN civilian mission, but left the status of the foreign troops outside UN authority.[87] The much-heralded legitimacy of the UN sponsorship of the East Timor transition has thus not altered the hard reality of the challenges of post-conflict policing and nation-building.

Most legal scholars agree that the 1999 NATO-led intervention in Kosovo was a formal violation of the Charter.[88] Despite the failure to secure authorization from the Security Council, NATO's successful bombing campaign received broad support from the international community, was followed by a UN-authorized stabilization force and civilian administration, and succeeded in forcing political change in Serbia.[89] Moreover, the legal commission empowered to investigate it deemed NATO's intervention "illegal but legitimate," on the grounds it met the requirements of an evolving standard of humanitarian interventionism, garnered international support, and was carried out by a multilateral security organization acting according to well-established norms of collective security.[90] The UN authorized and supported the post-conflict administration of Kosovo along lines similar to the East Timor administration. Seven years after the intervention, however, the long-term political status of Kosovo remains unresolved.[91] As with East Timor, the fact that the UN gave legal authority to the post-intervention phase seems not to have altered the continuing political challenges of reconstruction.

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[85] *See* S.C. Res. 1599, U.N. Doc. S/RES/1599 (Apr. 28, 2005) (establishing UN Support Mission in Timor-Leste (UNOTIL)).

[86] *See* S.C. Res. 1690, paras. 2 & 3, U.N. Doc. S/RES/1690 (June 20, 2006) (expressing appreciation for the deployment of the international forces in Timor-Leste).

[87] *See* S.C. Res. 1704, U.N. Doc. S/RES/1704 (Aug. 25, 2006) (establishing UN Integrated Mission in Timor-Leste (UNMIT) as successor to UNOTIL).

[88] *See, e.g.*, Mary Ellen O'Connell, *The UN, NATO, and International Law After Kosovo*, 22 Hum. RTS. Q. 57, 57 (2000); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 Eur. J. Int'l L. 1, 12 (1999). The Federal Republic of Yugoslavia filed an application in the ICJ challenging NATO's actions as a violation of the *jus ad bellum* and *jus in bello*, which was rejected on jurisdictional grounds. *See* Foley and Sofaer in this volume.

[89] *See* S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999) (establishing the United Nations Interim Administration in Kosovo which had a broad mandate to establish transitional governance and maintain security in Kosovo).

[90] See *Report of the International Commission on Kosovo* (Oct. 2000), *available at* http://www.reliefweb.int/library/documents /thekosovoreport.htm.

[91] *See Kosovo's Final Status Talks: Unraveling the Conundrum, in* Director of Studies Strategy Report (Center for Strategic and International Studies, Washington DC), Dec. 15, 2005, *available at* http://www.csis.org/media/csis/pubs/051215_sr_12.pdft.

The 2003 United States-led invasion of Iraq has spawned a veritable cottage industry of arguments for or against its legality.[92] The *ex-post* resolution of that issue may be of interest as an exercise in doctrinal analysis, but the reality was that the United States and its allies sought, but failed to secure, a Chapter VII resolution from the Security Council prior to the invasion. The U.S. involvement in Iraq thus represents an action taken without explicit authority of the Council, in the face of broad international opposition (including by three of the five permanent members of the Council), and outside the umbrella of any regional security organization. Following the short, successful military campaign that toppled the Saddam Hussein regime, the UN "legalized" the actions of the United States by passing a series of resolutions that recognized the United States and the United Kingdom as occupying forces under international law and established a UN civilian mission in Iraq.[93] The bombing of the UN mission headquarters in Baghdad in August 2003, however, prompted the UN to withdraw its mission for several months and then only returning with a much smaller presence. The UN played a role in overseeing elections in 2004 and 2005, and in legalizing the transition from United States/United Kingdom occupation to sovereignty of the new Iraqi state.[94]

Four years following the invasion, however, Iraq remains very much an American and, to a lesser extent, British project. The United States maintains over 100,000 troops in Iraq along with a large presence of diplomats and civilian contractors.[95] The most concrete *ex ante* rationale for the intervention – Iraq's illegal maintenance of a WMD program in violation of prior Security Council resolutions – proved unfounded when the United States-led coalition failed to uncover any illegal weapons. By 2007 the inability of the United States to prevent or slow the deteriorating security situation careening toward full-blown civil war, left Iraq's future as a state in question, with attendant profound consequences for

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[92] It even prompted a special "moot court" at the 2006 Annual Meeting of the American Society of International Law between Philippe Sands (arguing that it was unlawful) and Ruth Wedgwood (arguing it was lawful). *See Debate: Adjudicating Operation Iraqi Freedom*, American Society of International Law (2006), *available at* http://www.asil.org/events/am06/am06schedule.html. *See also* Philippe Sands, Lawless World (2005); Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 Am. J. Int'l L. 576 (2003).

[93] *See* McGuinness, *supra* note 33, at nn.277–281 and accompanying text.

[94] *See* Iraq Electoral Fact Sheet, *What is the Role of the UN*?, http://www.un.org/news/dh/infocus/iraq/election-fact-sht.htm#role (noting that the role of the UN is to provide technical, administrative, logistic, and financial support for the elections, in addition to advising and supporting the Independent Electoral Commission of Iraq).

[95] *See* Michael O'Hanlon & Nina Kamp, *Tracking Reconstruction & Security in Post-Saddam Iraq* 33 (Brookings Inst. Iraq Index Archive ed., Aug. 21, 2006), *available at* http://www.brookings.edu/fp/saban/iraq/index.pdf.

the region and the world. Whatever the prospects of a continued United States presence, Iraq is therefore likely to remain on the agenda of the Security Council for some time.

These three cases may be used to draw preliminary observations about the nature of security multilateralism and the role of the UN.[96] First, no response to a threat arises as either perfectly multilateral or narrowly unilateral. In these cases, the UN was and remains deeply involved in the conflicts, across a range of functions from human rights assessment, to sanctions, to humanitarian and development assistance. Hudson's vision of a central institution through which to regulate armed conflict is thus only partially realized: the UN plays a large role in some cases and a small role in others. Of further interest regarding these illustrations is the fact that, even examining these three cases from the perspective of the military intervention phase, military interventions are rarely purely unilateral or multilateral. Rather, each of the military interventions in these conflicts were dominated by one state, which contributed the majority of the military power.[97] Iraq came closest to being purely unilateral, with the United States accounting for well over ninety percent of contributed troops. When measured for diversity of troops — that is, measuring the number of different states that contributed at least 100 troops — the Iraq intervention included more participating states than either the NATO intervention in Kosovo or the East Timor UN force.[98] In Kosovo, the United States accounted for sixty-two percent of sorties that made up the NATO air campaign. In East Timor, military leadership and more than sixty percent of the peacekeeping troops were provided by the regional military power, Australia.[99]

Second, in these cases, whether the use of force was authorized by the UN had little bearing on the composition or effectiveness of the military intervention. Effectiveness of the military intervention function is largely determined by the size, composition, command, and rules of engagement of the military force, measured against the threat presented. In each of these cases the initial interventions were successful, in large part because the largest troop contributor was able to control these factors.[100] Diversity of troops, that is, the drawing on troops from many different states to comprise a UN operation, is unrelated to whether they perform

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[96] *See* McGuinness, *supra* note 33, at 215–26.

[97] *See* McGuinness, *supra* note 33, 169–70, 218, Table 5.0: Comparing Military Intervention in the Cases.

[98] *See id*. at 216.

[99] *See id*. at 169–70 (Table 5.0: Comparing Military Intervention in the Cases).

[100] *See* S.C. Res. 1264, U.N. Doc. S/RES/1264 (Sept. 15, 1999) (authorizing the participating states to "take all necessary measures to fulfill [the] mandate," to, among other things, restore peace and security in East Timor).

well. This is an important point, because in all three cases, the composition of the coalition of outside states participating in the military intervention tended to determine the composition of post-conflict administration and peacekeeping, regardless of whether the military phase was authorized by the UN.[101]

Third, these cases illustrate a broader point that the ability of the UN to confer legitimacy on a particular intervention may vary across the functions of security multilateralism and may depend on its effectiveness. The UN may have some institutional advantages in the functions of assessment, sanctions, and civil administration. Indeed, a recent Rand study concluded that the UN is generally more effective in post-conflict civil administration or state building efforts than is the United States.[102] Competence at certain tasks helps bolster legitimacy. Had the United States, for example, carried out the post-conflict administration of Iraq more competently, the intervention would likely be perceived as more legitimate. In many parts of the world, the UN carries with it more than institutional capacity; it carries the "soft power" attributes of perceived impartiality.[103] This impartiality is essential to certain tasks the UN carries out such as running elections (as it did in East Timor and Iraq) and creating special tribunals or commissions to address war crimes (as it did in East Timor and Kosovo).[104]

These cases illustrate that different actors bring different institutional capacities to bear in different contexts. In East Timor, a full range of UN technical and development expertise was quite effective in managing parts of the transition to self-rule, but ultimately was not enough to leave the new government in complete control of the security situation. In Kosovo, NATO served as an effective partner to the UN post-conflict administration. In Iraq, the sanctions policies of the Security Council during the 1990s appear, in retrospect, to have been relatively successful in limiting the threat posed by the former Iraqi regime, but the Council nonetheless failed to reach consensus on how to respond to the regime going forward. The differentiation in results between UN and non-UN actions may be attributable to different contexts and the size of the security challenge. Security Council authority may be more difficult to achieve in cases that are larger, more complex, and which directly affect the interests of political powerful Member States.[105] Iraq may be one of those cases. Ultimately, however, whether the United States fails or succeeds in Iraq will likely hinge on whether outside

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[101] *See* McGuinness, *supra* note 33, at 220.

[102] *See* James Dobbins *et al.*, The UN's Role in Nation Building from the Congo to Iraq (Feb. 2005), *available at* http://www.rand.org/pubs/monographs/2005/RAND_MG304.pdf.

[103] *Id.* at xxx.

[104] McGuinness, *supra* note 33, at 197 Table 2.3, and 204, Table 3.5.

[105] Dobbins, *supra* note 102 at xxxvii (noting that the UN's success may be attributable to the fact that the UN takes on more manageable problems).

intervention was ever an appropriate response to the challenge posed by the Saddam Hussein regime, and not on whether the intervention itself brought with it the imprimatur and institutional leadership of the UN.

E. *Conclusion*

Whether the overall positive developments in security today can be attributed, as Hudson implicitly hypothesized, to "the advance of international organization" and international law remains a central question in international law and international relations research. Observers may assert the importance of international organization in reducing the incidence of war, as for example, did the Secretary General's High-Level Panel when it claimed that "without the United Nations the post-1945 world would *very probably* have been a bloodier place."[106] But as Robert Keohane has noted, attempts to prove or disprove the precise causal effects of international organization on peace and security may be elusive, as there is no null-set hypothesis against which to test the question.[107] That does not mean the empirical project should be abandoned. It may well be, as different studies have shown, that the relative peace of the late 20th century was brought about first by the stability created by the Cold War rivalry[108] and later by American hegemonic stability,[109] or the fall of Soviet communism and the expansion of democratic governance,[110] or global economic growth,[111] or expansion of women's rights,[112] or indeed by a multitude of factors that are correlated with

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[106] *A More Secure World, supra* note 23, at 12 (italics added).

[107] Robert O. Keohane, *Multilateralism: An Agenda for Research*, 45 Int'l Org. 731, 737 (1990).

[108] *See, e.g.*, Mariano-Florentino Cuéllar, *Reflections on Sovereignty and Collective Security*, 40 Stan. J. Int'l L. 211 (2004).

[109] *See, e.g.*, Niall Ferguson, *A World Without Power*, 143 Foreign Pol'y 32 (July 2004); William C. Wohlforth, *The Stability of a Unipolar World*, 24 Int'l Security 5 (1999).

[110] The democratic peace postulate suggests that to the degree states are democratic, they are less likely to engage in violence against their own population and against others. *See*, Bruce Russett, Grasping the Democratic Peace: Principles for a Post Cold War World (1993); John R. Oneal & Bruce Russett, *The Kantian Peace: The Pacific Benefits of Democracy, Interdependence and International Relations*, 1885–1992, 52 World Pol. 1 (1999).

[111] There is a strong correlation between democracy and economic growth. *See, e.g*, John Norton Moore, *Beyond the Democratic Peace: Solving the War Puzzle*, 44 VA. J. Int'l L. 341, 346 (citing Freedom House survey finding that democracies account for disproportionately large part of world economic output).

[112] *See, e.g.,* Mary Caprioli, *Primed for Violence: The Role of Gender Inequality in Predicting Internal Conflict*, 49 Int'l Stud. Q. 161 (2005) (finding states with higher levels of gender inequality have more intrastate conflict); Mary Caprioli, *Gendered Conflict*, 37 J. Peace Res. 53 (2000) (finding states with higher levels of gender equality resort less frequently to the use of military action to settle international disputes).

democracy and self-governance.[113] Studies that validate such theories help us understand the complexity of maintaining international security. They are not incompatible with promotion of international security multilateralism through the UN. To the contrary, better empirical understanding of the causes of armed conflict can inform the political and legal project of international security, including prioritizing reform of UN institutions and the development of institutional capacity to address the problems correlated with war. Despite the impossibility of a null-set for all international organization, both legal scholars and political scientists should also continue the important work of measuring institutional effectiveness, and those studies – such as the Rand study discussed above – can provide a useful focal point for institutional reform.

Against this background, the failure of the most recent efforts toward Security Council procedural reform may not be as troubling as some have claimed.[114] Edward Luck has suggested that the High-level Panel's call for "urgent" reform appears inconsistent with its conclusion that "the Council has, since the end of the Cold War, become more effective and more willing to act, while remaining the UN body 'most capable of organizing action and responding rapidly to new threats.'"[115] Insofar as much of the proposed reform focused on membership and voting procedures, it seems to address the false perception that inequity and inequality in Council procedures had led to any unwillingness to carry out Council mandates. As Luck points out, there is no evidence that this is or historically has been the case.[116] To the contrary, those states that opposed the non-majoritarian structures proposed during the debates at San Francisco, nonetheless have participated fully in its proceedings and mandates. Similarly, the 1965 expansion of the membership of the Council from 10 to 15 did not result is any revival of participation among those that had lobbied for the change.[117] Indeed, the East Timor, Kosovo, and Iraq experiences demonstrate that the perception of legitimacy of Council action is owed as much to the degree to which member states agree with the political goals and the effectiveness of the measures taken to address the threat, as it does to perceptions of participatory fairness. That is not

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[113] For a survey of the political science and economic literature correlating lack of human freedom with a host of factors that contribute to war, *see generally* John Norton Moore, *supra* note 111.

[114] *See, e.g.*, Anne-Marie Slaughter, *A New U.N. for a New Century*, 74 Fordham L. Rev. 2961 (2006); John C. Yoo, *Force Rules: UN Reform and Intervention*, 6 Chi. J. Int'l L. 641 (2006).

[115] Edward C. Luck, Rediscovering *the Security Council: The High-Level Panel and Beyond, in* Reforming the United Nations for Peace and Security, Proceedings of a Workshop to Analyze the Report of the High-level Panel on Threats, Challenges and Change 126 (2005) (internal citations omitted).

[116] *Id.* at 131.

[117] *Id.* at 131.

to say that institutional reform at the UN is not needed. Rather, current reform efforts might best be directed at the range of UN institutions – including the human rights organs and emergency relief and humanitarian agencies – whose effectiveness is crucial to carrying out the functions of security multilateralism. The new UN Human Rights Council formed in 2006 may be a step in the right direction, though early reports on its ability to overcome the bias and ineffectualness of the Human Rights Commission it was designed to replace are not encouraging.[118]

It has become almost an axiom of international diplomacy that, if the United Nations did not exist, we would have to invent it.[119] Fortunately, we do not have to invent it or even re-invent it. The resilience of the UN security multilateralism apparatus is demonstrated by its ability to accommodate political change and non-UN interventions from time to time within a broad system of international organization. Hudson, I believe, would therefore share my cautious optimism about the future of security multilateralism. As he wrote in 1945, when describing the role of the Charter within the future United Nations:

> The Charter would not attempt to lay out ready-made solutions of international problems. Instead, it would create agencies, procedures and methods by which solutions might be sought in the future according to the wisdom of the time.[120]

Progress, then, can be measured by the evolution of institutions and processes toward political decision making that is more transparent, that allows behavior to be measured against broadly accepted norms, and leaves space for assessing the relative effectiveness of different international institutions and actors. Paradoxically, perhaps, a commitment to bringing about a more secure world must embrace both politics and law. The flexibility of the current system is, however, not infinite. The challenge facing the international community going forward is to preserve the flexibility of security multilateralism to permit the most effective responses to the myriad threats facing the world, while not undermining the core normative commitment to a just peace.

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[118] *See* Reform or Regression: An Assessment of the New UN Human Rights Council a report by UN Watch (Sept. 6, 2006), http://www.unwatch.org/site/c.bdKKISNqEmG/b.1330819/k.C6A9/Reports/apps/nl/newsletter2.asp (follow "Reform or Regression" hyperlink) (noting that the new Council failed to address ongoing atrocities in the Darfur region in Sudan, while at the same time focused its attention on the human rights practices of one country: Israel).

[119] *See* Nick Thorne, British Ambassador, Speech to Royal British Legion in Switzerland, The UN at 60: Still Relevant? (Nov. 27, 2004), http://www.britishembassy.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1101396296938.

[120] Manley Hudson, *A Design for a Charter of the General International Organization*, 38 Am. J. Int'l L. 711, 714 (1944).

Legality versus Legitimacy and the Use of Force

By Petr Válek

A. *Introduction*

Senator William E. Borah and Professor Manley Hudson played key roles in the first attempt of the international community to legalize international relations by the establishment of the League of Nations. This process, which is sometimes called the "constitutionalization" of international law,[1] was later continued with the negotiation of the Kellogg-Briand Pact of 1928[2] and particularly by the creation of the U.N. Charter.[3]

The discussion between the Harvard Law Professor and the Idaho Senator, which took place at the University of Idaho in 1931, reflected the dramatically different visions these outstanding men had for the international world order. Hudson enthusiastically supported this legalization project, not only by his influential study published under the title *Progress in International Organization*,[4] but also by his personal involvement in the work of the League of Nations and as a Judge on the Permanent Court of International Justice. Senator Borah, conversely, thought that the United States should stay out of the League of Nations and retain the right to act unilaterally.[5] He could not imagine that a war-making power would be vested in an international body.[6] At the same time, Senator

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[1] Jürgen Habermas, *America and the World, A Conversation with Jurgen Habermas (with Eduardo Mendieta)*, Logos 3.3 (Summer 2004), http://www.logosjournal.com/habermas_america.pdf. *See* Walter in this volume.

[2] General Treaty Providing for the Renunciation of War, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

[3] U.N. Charter.

[4] Manley O. Hudson, Progress in International Organization (1932).

[5] William E. Borah, Speech at the University of Idaho 3 (1931), "If peace can not be had without our retaining that freedom of action, then I am not for peace."

[6] *Id.* at 5: "But you will say. War may come. So it may …. Let it come as the criminal comes, as the murderer comes, not with approval of law and under some fantastic scheme …."

Miller & Bratspies (Eds), Progress in International Law, pp. 615–632.

Borah often relied in his reasoning on justice and morality rather than on positive-international law.[7]

When we read their arguments today, one may easily conclude that these texts were written not decades ago, but in the twenty-first century. They raise the issue, as relevant today as in that bygone era, of the role abstract values such as justice and morality should play in international law. International lawyers have started to struggle with this question again, particularly as a result of the 1999 Kosovo intervention.[8] In order to support this intervention, the concept of the "illegal but legitimate" use of force in international law was invented by The Independent International Commission for Kosovo.[9] The birth of this doctrine is a reaction to the so-called gap between the positive law and other values. Put another way, it is a conflict between legality and legitimacy.

In order to clarify the terms of legality and legitimacy, I will first focus on their definitions and the context in which they have been used in both domestic and international law. Next, I will move to the relationship between the concepts of legality and legitimacy. This relationship was shaped, e.g., by some cases before the German courts and by the creation of the "illegal but legitimate" distinction. Subsequently, I will move to the just war theory and prove that it is still being used in the international law, in particular in the form of the "illegal but legitimate" approach. Finally, I will discuss the possible dangers this modern just war doctrine presents, concluding that, under extreme circumstances, it has a limited role to play in international legal order.

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[7] "In opposing the treaty I do nothing more than decline to renounce and tear out of my life the sacred traditions which throughout fifty years have been translated into my whole intellectual and moral being .... You must respect not territorial boundaries, not territorial integrity, but you must respect and preserve the sentiments and passions for justice and for freedom which God in His infinite wisdom has planted so deep in the human heart hat no form of tyranny however brutal, no persecution however prolonged can wholly uproot and kill." William E. Borah, Speech delivered in the U.S. Senate (Nov. 19, 1919).

[8] *See, e.g.*, Fernando R. Tesón, Humanitarian Intervention: An Inquiry into Law and Morality (1997); Simon Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law (2001); Brian D. Lepard, Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions (2002); Michael Glennon, Limits of Law, Prerogatives of Power: Interventionism After Kosovo (2001); Allen Buchanan, *From Nuremberg to Kosovo: The Morality of Illegal International Reform, in* Humanitarian Intervention, Moral and Political Issues 123 (Aleksandar Jokic ed., 2003); Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention, in* Humanitarian Intervention: Ethic, Legal and Political Dilemmas 204 (J.L. Holzgrefe & Robert O. Keohane eds., 2003); Tania Voon, *Closing the Gap Between Legitimacy and Legality of Humanitarian Intervention: Lessons From East Timor and Kosovo*, 7 UCLA J. Int'l L. & Foreign Aff. 31, 62 (2002).

[9] Independent International Commission on Kosovo, The Kosovo Report 53–54 (2000) *available at* http://www.relief web.int/library/documents/thekosovoreport.htm [hereinafter Kosovo Report].

B. *The Concepts of Legality and Legitimacy*

Legality is a concept well established in every domestic legal system of the world. It would be fair to say it is the essence of the *Rechtsstaat, l'etat de droit* or rule of law.[10] According to the principle of legality, the state organs may act only *intra legem* and *secundum legem*.[11] The *Oxford English Dictionary* defines this concept as an "attachment to or observance of law or rule" and as "the quality of being legal or in conformity with the law; lawfulness."[12] International lawyers may dispute what the law *is*, but they usually do not dispute the meaning of the underlying concept of legality itself, since they know the term well from their domestic legal systems.

But what is legitimacy? To a lawyer, it sounds more like a term from political science, philosophy or theology. Even in political theory, this "concept is a recent innovation. The classics – Hobbes, Locke, Rousseau, Marx – had no use for it."[13] Similarly, Professor Hudson, in his book *Progress in International Organization*, did not use the term.[14]

The *Oxford English Dictionary* describes legitimacy, first, as "the fact of being a legitimate child."[15] Although this meaning once might have been the most common in domestic legal systems, it has no relevance in international law. Second, the dictionary mentions the legitimacy "of a government or the title of a sovereign."[16] Although Hobbes and Locke did not use the word "legitimacy," the legitimacy of domestic government has been a central focus of political theory since at least their time.[17] Later, the concept of legitimacy of government was transferred from the domestic legal system into the system of international law and employed in this institutional perspective in two following contexts.

First, legitimacy serves as a criterion for the formal recognition of governments. While effective control of the state territory is probably the most reliable guide to recognition of governments, the so-called doctrine of legitimacy has also been applied, in particular by the United States in relation to Central America.[18]

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[10] Aleš Gerloch, Teorie Práva 191 (2001) (Czech Rep.).

[11] *Id*. at 194.

[12] 3 Oxford English Dictionary 804 (2d ed. 1989).

[13] Martti Koskenniemi, Detlev Vagts, *Book Review: The Power of Legitimacy Among Nations by T. M. Franck*, 86 Am. J. Int'l L. 175 (1992) ("Legitimacy was introduced at a late stage in liberal political theory to enable criticism of social institutions without relying on earlier routes of critical thought.").

[14] See Hudson, *supra* note 4.

[15] See Oxford English Dictionary, *supra* note 12, at 811.

[16] *Id*.

[17] Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 Am. J. Int'l. L. 596 (1999).

[18] Malcolm N. Shaw, International Law 377–380 (5th ed. 2003).

Under this doctrine, "governments which came into power by extra-constitutional means should not be recognized, at least until the change had been accepted by the people."[19] Since this concept was difficult to reconcile with reality and political consideration, it "gradually declined until it can now be properly accepted merely as a political qualification for recognition to be considered by the recognizing state."[20]

Second, legitimacy has appeared in this institutional context also in relation to various international organizations and their bodies. Since the end of the Cold War, in particular the Security Council has become the frequent subject of criticism for its lack of "legitimacy" because of the robust use of its Chapter VII powers.[21] Five of the most important challenges to the institutional legitimacy of the Security Council have been described by Professor Caron.[22] Professor Hudson dealt with the legitimacy of the Council of the League of Nations, although he used the terms "prestige and authority."[23] In this context, he stated that the Council's position got stronger because of "the publicity of the Council's proceedings, and the character of the representation."[24]

More than seven decades later, the High-level Panel on Threats, Challenges and Change found in its Report that "[t]he Security Council needs greater credibility, legitimacy and representation to do all that we demand of it"[25] and suggested concrete proposals on how to reform the Security Council.[26] Nevertheless, most of these reform options fell under the table, since the 2005 World Summit Outcome recommended only to improve the Security Council's working methods.[27] The current political situation makes any Security Council reform requiring an amendment to the Charter highly unlikely.

The regional international organizations, such as the European Community, have also not been immune to the legitimacy problem. For decades, "[t]he legitimacy of the EC came from elsewhere – from the peace and prosperity that European integration would bring to Western Europe – rather than from its

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[19] *Id*. at 379.

[20] *Id*. at 379–80.

[21] Sean D. Murphy, *The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War*, 32 Colum. J. Transnat'l L. 201, 247 (1994).

[22] David D. Caron, The *Legitimacy of the Collective Authority of the Security Council*, 87 Am. J. Int'l. L. 552, 566 (1993).

[23] Hudson, *supra* note 4, at 37.

[24] *Id*.

[25] Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, UN Doc. A/59/565, at 66–69, paras. 244–60 (2004), *available at* http://www.un.org/secureworld/report.pdf.

[26] *Id*.

[27] World Summit Outcome, G.A. Res. 60/1, 32 at para. 154, U.N. Doc. A/60/L.1, (Sept. 20, 2005).

democratic characteristics."[28] Nowadays, when the unelected EU Council is still the most important law-maker (instead of the elected European Parliament),[29] European lawyers speak about the so called "democratic deficit."[30] This lack of legitimacy was, according to Daniel Bodansky, one of the reasons for the initial rejection of the Maastricht Treaty by Danish voters in 1992.[31] His argument is even more persuasive now, after the Treaty Establishing a Constitution for Europe (better known as the "European Constitution") was rejected by the referenda in France and the Netherlands in 2005. Furthermore, the problem of legitimacy troubles also the international institutions active in the fields of the international environmental law and international trade law.[32]

The term "legitimacy," however, may be approached not only in the institutional perspective related to a government or an international organization, but also to the rules. In this thesis, legitimacy is used exactly in this rules-related meaning. In this (third) context, the *Oxford English Dictionary* defines legitimacy as "conformity to rule or principle; lawfulness."[33] According to Jeffrey L. Dunoff, "[u]nlike legality, legitimacy depends on whether, and how much, the subjects of the rule believe themselves obliged"[34] and further explains that legitimacy is simply understood as consistency "with some theory of justice, or morality, or both."[35]

According to Professor Franck, who wrote a detailed study on the legitimacy of a rule,[36] there are four elements of rule legitimacy: *determinacy, symbolic validation, coherence and adherence*.[37] *Determinacy* means that the text of a rule conveys a clear message.[38] The rules which fulfill this criterion are, on one hand, the rules protecting diplomats and rules on treatment of war prisoners.[39] On the other hand, an example of indeterminacy is the 1974 General Assembly's definition of aggression.[40] The *symbolic validation* of a rule occurs "when a signal is

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[28] Dimitris N. Chryssochoou, *EU Democracy and the Democratic Deficit, in* European Union Politics 365, 367 (Michelle Cini ed., 2003).

[29] Treaty Establishing the European Community, arts. 249–56, Dec. 24, 2002, 2002 O.J. (C325) 33 ("Provisions Common to Several Institutions") regulating the legislative process of the EC.

[30] *See, e.g.*, Rudolf Streinz, Europarecht 92 (1999); Chryssochoou, *supra* note 28, at 365–82.

[31] Bodansky, *supra* note 17, at 598.

[32] *Id*. at 605, 606.

[33] See *supra* note 12, at 811.

[34] Jeffrey L. Dunoff et. al., International Law 176 (2002).

[35] *Id*. at 910.

[36] Thomas M. Franck, *Legitimacy in the International System*, 82 Am. J. Int'l. L. 705 (1988).

[37] *Id*. at 712.

[38] *Id* at 713.

[39] *Id*. at 718.

[40] *Id*. at 717.

used as a cue to elicit compliance with a command,"[41] such as the rituals of accreditation of diplomats.[42] *Coherence* exists when the rules are applied as to preclude capricious checker-boarding, i.e., "when they are applied consistently or, if inconsistently applied, when they make distinctions based on underlying general principles."[43] Professor Franck demonstrates this element on the development of the right to self-determination. While this principle had been applied coherently after World War I, e.g., by creation of Czechoslovakia and Poland, later, it fell into incoherence, since the independence of new states such as Biafra was not permitted.[44] The fourth element is *adherence* to a normative hierarchy and community.[45]

Legitimacy plays an important role in international law, since it helps to explain, why international law subjects comply with the rules of international law in spite of its lack of coercive authority.[46] A possible answer to this question might be a contract theory. As Daniel Bodansky admits, "the legitimacy of consensual obligations such as … treaties is generally regarded as unproblematic,"[47] since the state parties either participated in the drafting of a treaty, or freely decided to accede. The same logic could be applied also to the unilateral acts of international organizations, such as the Security Council resolutions adopted under Chapter VII,[48] since the states are bound by them on the basis of the U.N. Charter. The contract theory, however, does not explain why the subjects of international law comply with the rules based on international customary law. Compliance with these rules of international law may be explained by the theory of the legitimacy.

The doctrine of legitimacy can be used in two ways: either negatively to undermine, or positively to support a rule. An example of the negative use of this theory was the "campaign of the Third World for a New International Economic order,"[49] which challenged applicable international law at that time for its imperialist tendencies, and for the chronic economic inequalities seemingly inherent to the modern international legal system. In the positive sense, legitimacy can be used to support a rule that in positive international law either does not exist or is *in statu nascendi*, such as the rules allowing unilateral humanitarian intervention. In practice, this can be done by raising the arguments of justice and morality.[50]

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[41] *Id*. at 725.
[42] *Id*. at 733.
[43] *Id*. at 750.
[44] *Id*. at 743–47.
[45] *Id*. at 751–59.
[46] *Id*. at 705; *see* Bodansky, *supra* note 17, at 597.
[47] Bodansky, *supra* note 17, at 597.
[48] U.N. Charter, art. 25.
[49] Thomas M. Franck, The Power of Legitimacy Among Nations 12 (1990).
[50] Dunoff et. al., *supra* note 34, at 910.

C. *Legality v. Legitimacy*

The terms of legality and legitimacy come originally from the sphere of domestic law. It was in this context that the relation between those two concepts was first explored. While the legitimacy of positive law has been primarily the point of interest of the natural law thinkers, traditional legal positivism has focused on legality and made no distinctions between legality and legitimacy.[51] According to Max Weber, for example, "law is valid no matter how morally repugnant its content as long as it has been enacted in accordance with the formal criteria for valid law. For it follows from his definition of legitimacy that such law is also by definition legitimate. Legitimacy is collapsed into formal validity."[52]

By analogy, international law is, under a positivist view, "no more nor less than the rules to which states have consented."[53] International law positivists thus believe that the concepts of legality and legitimacy are inseparable within the international legal system.[54] The central argument of this chapter is, however, that legality and legitimacy are indeed two separate terms both in domestic and international law. This conclusion is a consequence of the abuse of legality by various totalitarian regimes in the twentieth century.

The monopoly of the legal positivists was first challenged by the horrors of the Nazi regime. At the Nuremberg Trials, it was apparent that "some of the most heinous crimes committed by the Nazi defendants had been carried out in accordance with German law as defined positivistically."[55] Because of his tragic experience with the Nazi regime, Gustav Radbruch, the former German positivist thinker, rejected the doctrine of the strict separation of law and morals.[56] According to him, "legal positivism made German jurists defenceless against Nazi statutes which had an arbitrary and criminal content."[57] In his famous article,[58] Gustav Radbruch dealt with the relation between legality and principles of justice: "the positive law, besides aiming to achieve the legal values of certainty and purposiveness, must also aim at the legal value of justice. If law does not so

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[51] Aleš Gerloch, *Legitimita, in* Právnický slovník 299 (Dusan Hendrych, ed., 2001) (Czech Rep.).

[52] David Dyzenhaus, *Herman Heller and the Legitimacy of Legality*, 16 O.J.L.S. 641, 643 (1996).

[53] Dunoff et. al., *supra* note 34, at 29.

[54] Daniel H. Joyner, *The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm*, 13 Eur. J. Int'l L. 597, 610 (2002).

[55] Franck, *supra* note 8, at 208.

[56] Herbert L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 616 (1958).

[57] Dyzenhaus, *supra* note 52, at 648.

[58] Gustav Radbruch, *Gesetzliches Recht und übergesetzliches Unrecht*, Süddeutschen Juristenzeitung 105 (1946) (F.R.G.).

aim, it will at some point lose its legal quality."[59] This statement later became known as Radbruch's Formula.

In post-war Germany, Radbruch's Formula was applied by the German courts "in a series of cases involving informers who had taken advantage of the Nazi terror to get rid of personal enemies or unwanted spouses."[60] In one of those cases, a German court refused to apply the Nazi statute, because it "was contrary to the sound conscience and sense of justice of all decent human beings."[61]

In the nineties, conflict between legality and legitimacy appeared again in relation to the group of cases called *Mauerschützenprozesse* that arose from the conduct of border guards in the former East Germany (GRD). These cases, which appeared before both the German courts and the European Court of Human Rights, can be generally divided into two strains: cases involving the soldiers who actually shot persons attempting to cross the border and who attempted to claim obedience to orders as their criminal defense;[62] and cases against the political leaders who ordered the shootings.[63] In one case from the latter group, the Berlin Regional Court held that the applicants could not justify their actions on the basis of the GDR's State Borders Act, which authorized the killing of fugitives, since the GDR's practice "flagrantly and intolerably infringed elementary precepts of justice and human rights protected under international law."[64] In upholding this conclusion, the German Federal Constitutional Court expressly made reference to Radbruch's article.[65] Although the European Court of Human Rights "refused to employ the Radbruch Formula,"[66] the German courts have twice in the last century used the legitimacy approach in order to overcome the legal obstacles of transition from a totalitarian state into a rule of law regime.

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[59] Dyzenhaus, *supra* note 52, at 648.

[60] Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 Harv. L. Rev. 630, 649 (1958).

[61] *Id*.

[62] *See, e.g.*, Shootings at the Berlin Wall Case, Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 3, 1992, 5 StR 370/92, 39 BGHSt 1 (F.R.G), *available at* http://www.oefre.unibe.ch/law/dfr/bs039001.html, the English version *available at* http://www.iecl.ox.ac.uk/gla/judgments/bgh/s921103.htm.

[63] Streletz, Kessler & Krenz v. Germany, App. Nos. 34044/96, 35532/97, 44801/98, Eur. Ct. H.R., *reprinted in* 40 I.L.M. 811 (2001).

[64] *Id*. at 8, para. 19.

[65] *Id*. at 12, para. 22.

[66] Russell Miller, *Rejecting Radbruch: The European Court of Human Rights and the Crimes of the East German Leadership*, 14 Leiden J. Int'l L.653, 654 (2001).

International law arguments drawing from the sphere of legitimacy, such as justice and morals, have been confronted with arguments grounded in legality, in particular in relation to humanitarian intervention. With legal basis as a criterion for distinction, there are two basic types of humanitarian intervention in contemporary international law. The first is humanitarian intervention authorized by the Security Council under Chapter VII of the Charter. Examples of such interventions are those in Somalia,[67] Haiti,[68] and Bosnia and Herzegovina.[69] Since the legality of this type of humanitarian intervention is undisputed,[70] there was no need to reach into the sphere of legitimacy to justify intervention in these cases.

The second type of humanitarian intervention lack Security Council authorization. Such intervention is often styled unilateral humanitarian intervention. The most recent examples of this type of intervention are the Economic Community of West African States' (ECOWAS) intervention in Liberia in 1990–91; the operations in Iraq since 1991 to protect the Kurdish and Shia populations;[71] the 1998 intervention in Sierra Leone, again by ECOWAS;[72] and, of course, the 1999 Kosovo intervention. The legality of unilateral humanitarian intervention, in particular the one in Kosovo, has been highly controversial.[73] Most legal opinions considered NATO's air warfare campaign against Serbia to be illegal regardless of any alleged special circumstances of the case.[74] Others supported this intervention by availing themselves of established or emerging customary international law.[75]

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[67] S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., U.N. Doc. S/RES/794 (1992).

[68] S.C. Res. 940, U.N. SCOR, 48th Sess., 3413th mtg., U.N. Doc. S/RES/940 (1994).

[69] S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg.,U.N. Doc. S/RES/1031 (1995).

[70] *See, e.g.*, Jost Delbruck, *Commentary on International Law: A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 Ind. L.J. 887 (1992); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 Eur. J. Int'l L. 1, 5 (1999); Michael J. Matheson, *Conference: Just War and Humanitarian Intervention: Comment on the Grotius Lecture by Prof. J. B. Elshtain*, 17 Am. U. Int'l L. Rev. 27 (2001); Edmundo Vargas Carreño, *Humanitarian Intervention, in* International Law on the Eve of the Twenty-first Century, Views from the International Law Commission 339 (1997).

[71] Anthony P. V. Rogers, *Humanitarian Intervention and International Law*, 27 Harv. J.L. & Pub. Pol'y 725, 729 (2004).

[72] Leo F. Berger, *State Practice Evidence of the Humanitarian Intervention Doctrine: The ECOWAS Intervention in Sierra Leone*, 11 Ind. Int'l & Comp. L. Rev. 605 (2001).

[73] *See, e.g.*, Petr Valek, *Is Unilateral Humanitarian Intervention Compatible with the U.N. Charter*?, 26 Mich. J. Int'l L. 1223 (2005).

[74] *See, e.g.*, Chesterman, *supra* note 8; Yoram Dinstein, War, Aggression and Self-defence 59, 67 (2001); Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 Mich. J. Int'l L. 1005 (1998).

[75] *See* Chesterman, *supra* note 8, at 53.

In order to defend the Kosovo intervention, some NATO members abandoned a strict consideration of positive international law framework and adopted the "illegal, but legitimate" doctrine.[76] This approach to NATO's humanitarian intervention is based on the presumption that the intervention was illegal, but nonetheless legitimate, given the unique circumstances of the particular humanitarian catastrophe unfolding in relation to the Serbian persecution of Kosovars. Such an approach admits that there are situations in which the international community must act outside the confines of positive law, in ways that are nevertheless legitimate because of the demands of morality and justice.[77] Under such a rationale, the Kosovo intervention becomes an "excusable breach."[78] As such, this justification of otherwise illegal conduct does not imply *per se* "that the system as a whole, or even the particular rule that is violated, is in need of improvement."[79]

One of the world leaders who took this approach was U.N. Secretary General Kofi Annan. On March 24, 1999, the day after NATO commenced bombing, he said that "there are times when the use of force may be legitimate in the pursuit of peace," nevertheless, "the [Security] Council should be involved in any decision to resort to the use of force."[80]

In Germany, the relationship between legality and legitimacy has been examined not only by the academy, but also by the courts. In international law, the contribution of the ICJ to this question is missing. Although the ICJ refused to deal with the Kosovo intervention because of the lack of jurisdiction,[81] the issue has been addressed by other international *fora*, such as The Independent International Commission for Kosovo and The International Commission on Intervention and State Sovereignty. The conclusions of these two bodies will be discussed below.

D. *The Just War Connection*

The core idea behind the just war *(bellum justum)* doctrine is that a war is "lawful when fought for a just purpose by just means."[82] This legal theory can be traced back to antiquity. The foundations of the "just war" doctrine were laid by ancient

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[76] *See, e.g.*, the arguments of the Netherlands, *in* Ige F. Dekker, *Illegality and Legitimacy of Humanitarian Intervention: Synopsis of and Comments on a Dutch Report*, 6 J. Conflict & Sec. L. 115 (2001); the U.S. position, *in* Dunoff, *supra* note 34, at 893–94.

[77] Anne Orford, Reading Humanitarian Intervention 44 (2003).

[78] Yoram Dinstein, *Comments on War*, 27 Harv. J.L. & Pub. Pol'y 877, 881 (2004).

[79] Allen Buchanan, *From Nuremberg to Kosovo: The Morality of Illegal International Reform, in* Humanitarian Intervention 123-4 (Aleksandar Jokic ed., 2003).

[80] U.N. Press Release SG/SM/6938 (Mar. 24, 1999).

[81] Legality of the Use of Force (Serbia & Montenegro v. Belgium), 2004 I.C.J. ¶ 129 (Dec. 15).

[82] Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 Eur. J. Int'l L. 227, 237 (2003).

Rome and the so-called *ius fetiale*.[83] "The *fetiales* were a college of priests who "were also empowered to pronounce whether there were sufficient substantive grounds justifying the outbreak of hostilities."[84]

Nevertheless, "[i]t remained to Christianity to give material content to the formal concept of the *justum bellum* of the Romans."[85] "As long as the Roman emperors were pagans, the Church upheld a pacifistic posture."[86] In this view, "[w]ar is held to be a consequence of original sin, no Christian may, therefore, enlist as a soldier."[87] "But after Christianity had become the official religion of the empire in the days of Constantine, … Christians were expected to shed their blood for the empire."[88]

St. Augustine was the first Christian thinker who formed the just war doctrine as a "scientific system."[89] According to him, the institution of war is "a means of punishment which God inflicts upon the sinful world"[90] as "a sort of police action."[91] However, St. Augustine distinguished between unjust wars, that should be avoided, and just wars, that must be suffered.[92] In his conception of just war as a punitive action, wars were just when they were preceded by an injury and were waged to redress a wrong suffered.[93] The scholastic doctrine of the just war was further developed by Thomas Aquinas who kept the punitive notion of the just war and formulated fundamental just war principles.[94]

At the close of the Middle Ages, the group of lawyers and scholars called "fathers" of international law imported the notion of just war into the newly formed international legal system.[95] Each of them produced "his own favored enumeration of just causes of war."[96] For instance, Vitoria justified the war against Indians asserting that the Indians had violated fundamental rights, such as the

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[83] Dinstein, *supra* note 74, at 59.

[84] *Id.*

[85] Joachim von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 Am. J. Int'l L. 665, 667 (1939).

[86] Dinstein, *supra* note 74, at 60.

[87] Von Elbe, *supra* note 85, at 667.

[88] Dinstein, *supra* note 74, at 60.

[89] Von Elbe, *supra* note 85, at 667–68.

[90] *Id.* at 668.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.* at 669 ("A war in order to be just, must (1) be waged under the authority of a prince as the responsible leader of a nation, not by a private individual; the latter may apply to a tribunal for the defense of his rights. (2) It must have a just cause, and (3) the belligerents must be animated by the right intention, namely to advance the good or to avoid the evil.").

[95] Dinstein, *supra* note 74, at 61.

[96] *Id.*

Spaniard's right to travel freely among them and to propagate Christianity.[97] Another Spanish jurist, Ayala, "contended that a prince has a most just cause of war when he is directing his arms against rebels."[98] According to Grotius, "just causes are primarily defense, recovery of property, and punishment; unjust causes, among others, are the desire for richer land, … or the wish to rule others against their will on the pretext that it is for their good."[99] Suárez took an extreme approach that "any grave injury to one's reputation or honor was a just cause of war."[100]

By the nineteenth century "the attempt to differentiate between just and unjust wars in positive international law was discredited and abandoned."[101] "War itself was regarded as a legal undertaking, questions about the justice of waging it were relegated to other disciplines."[102] As Western civilization moved towards the "severance of morality from law," the just war doctrine disappeared from international law as a relic.[103] Both domestic and international law, in their modern manifestations, were built on the basis of a legal positivism that "leaves little room for moral absolutes."[104]

Although the just war doctrine was already proclaimed dead in the nineteenth century, international lawyers have attempted its revival in relation to various international legal documents. According to Joachim von Elbe, for example, the just war theory was revived by the Versailles Treaty, which recognized the war quilt of Germany. Furthermore, he saw this revival as "the starting-point for a movement once more to distinguish between just and unjust wars."[105] Professor Kelsen argued that the Versailles Treaty, as well as the Covenant of the League of Nations and the Kellog-Briand Pact were all based on just war theory.[106] Some of the central ideas behind just war theory led Professor Hudson to level criticisms at the Versailles Treaty and the Kellog-Briand Pact as well.[107]

Other writers have seen the revival of the just war idea in the U.N. Charter which recognizes two exceptions to the general prohibition of the use of force: the Article 51 right of self-defense and the Chapter VII use of force under the

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[97] *Id.*
[98] *Id.*
[99] Von Elbe, *supra* note 85, at 678–679.
[100] Dinstein, *supra* note 74, at 61.
[101] *Id.* at 63.
[102] David J. Scheffer, *Use of Force After Cold War: Panama, Iraq, and the New World Order* 109, 135, *in* Right v. Might (Louis Henkin et al., 1991).
[103] Franck, *supra* note 8, at 204, 210.
[104] *Id.*
[105] Von Elbe, *supra* note 85, at 687.
[106] Anthony Shaw, *Revival of the Just War Doctrine*?, 3 Auckland U. L. Rev. 156, 165 (1977).
[107] Hudson, *supra* note 4, at 19–20, 97.

authority of the Security Council.[108] This opinion is not very convincing. As J. L. Kunz pointed out, "the concept of *bellum justum* has been replaced by that of *bellum legale*: What counts is a breach of the norms of existing international law, rather than the intrinsic injustice of the cause of war."[109]

Perhaps the first real case of the revival of the just war doctrine was the war of national liberation. "Usually, the rationale offered (principally by the former Soviet Union and the Third World countries) in sustaining the legitimacy of the use of inter-state force when extended in aid of wars of national liberation was that these are just wars."[110] In Soviet legal thinking, colonialism was "regarded as a purely evil state and one which it is legal and just to fight against until the 'yoke of imperialism' has been overthrown and the rights of the oppressed peoples vindicated."[111] It seems that the Soviet Union and the Third World countries used these just war arguments because the Charter does not support the legality of these wars.[112]

Bellum justum was invoked also in situations when the Cold War turned into a "hot war." A *prima facie* example was the Soviet invasion of Czechoslovakia in August 1968. "In the Security Council debate the Soviet representative, Mr. Malik, expressed the Soviet position classically when he said, 'I am proud of the fact that here in this Council I defend a just cause.'[113] Similar statements were made on this aggression by the Soviet Foreign Minister, Mr. Gromyko, and Secretary Brezhnev.[114] Other examples are Nixon's doctrine of "just war" in Vietnam[115] and the "Reagan Doctrine," which Professor Franck called the "restatement of the just war notion."[116] According to Professor Franck, this United States policy made "sophisticated distinctions that exculpate external support for "good" insurgents against "bad" regimes, while excoriating support for "bad" insurgents against "good" regimes."[117]

Finally, the most recent example of the just war revival is the "illegal but legitimate" doctrine supporting the unilateral humanitarian intervention in Kosovo. Officially, the conception of this doctrine can be credited to the Independent International Commission for Kosovo (IICK). The IICK found

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[108] John Dugard, *International Terrorism and the Just War*, 12 Stan. J. Int'l Stud. 21, 23 (1977).
[109] Dinstein, *supra* note 74, at 64.
[110] *Id.* at 65.
[111] Shaw, *supra* note 106, at 170.
[112] *See* Dugard, *supra* note 108, at 23; Dinstein, *supra* note 74, at 65.
[113] Shaw, *supra* note 106, at 174.
[114] *Id.*
[115] *Id.* at 157.
[116] Franck, *supra* note 36, at 720.
[117] *Id.*

that "diplomacy failed to produce these results [to protect the people of Kosovo] in a reliable manner, leaving the options of doing nothing or mounting a military intervention under NATO auspices."[118] As such, they concluded that the NATO campaign was illegal, yet legitimate. Furthermore, the IICK recommended filling the "gap between legality and legitimacy" with a framework of principles, which could be adopted by the General Assembly, as well as by amendment to the Charter itself.[119] However, the General Assembly has not yet adopted any such framework, perhaps because of the unpopularity of the idea of humanitarian intervention among most members of this U.N. body.

Another international body, which dealt with this gap, has been the International Commission on Intervention and State Sovereignty (ICISS). ICISS, which was created as an independent commission intended to support the U.N.,[120] discussed possible solutions for those instances when governments terrorize their own people. It reported back to the U.N. Secretary General and the international community on this issue in December 2001.[121] In doing so, ICISS came up with a new concept to ground humanitarian intervention—an international "responsibility to protect" (embracing three specific responsibilities "to prevent, to react and to rebuild").[122]

According to its report, ICISS had "absolutely no doubt that there is no better or more appropriate body than the Security Council to deal with military intervention issues for human protection purposes. It is the Security Council which should be making the hard decisions in the hard cases about overriding state sovereignty."[123] On the other hand, the ICISS admited that, if the Security Council "fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation – and that the stature and credibility of the United Nations may suffer thereby."[124] In the conclusion to the report, the ICISS

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[118] Kosovo Report, *supra* note 9.

[119] *Id.*

[120] *See* the official website on the International Commission on Intervention and State Sovereignty, http://www.iciss.ca/menu-en.asp ("United Nations Secretary-General Kofi Annan, in his report to the 2000 General Assembly, challenged the international community to try to forge consensus, once and for all, around the basic questions of principle and process involved: when should [humanitarian] intervention occur, under whose authority, and how. The independent International Commission on Intervention and State Sovereignty was established by the Government of Canada in September 2000 to respond to that challenge.").

[121] ICISS, About the Commission, http://www.iciss.ca/mandate-en.asp.

[122] ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty, available at* http://www.iciss.ca/pdf/Commission-Report.pdf, at XI.

[123] *Id.* at 49.

[124] *Id.* at XIII.

expressly endorsed the "illegal but legitimate" doctrine, stating that "large scale loss of life" or "large scale ethnic cleansing" is a "just cause" for humanitarian intervention.[125] By making "just cause" an integral element of the "illegal, but legitimate doctrine," the ICISS gave to legitimacy the revived just war concept. In the context of international law regulating the use of force, the concept of legitimacy, seems to overlap with the just war doctrine. Therefore, "we have moved back to the earlier just war conception insofar as we accept that gross violations of human rights provide a 'just cause' for action."[126] It seems that with the "illegal but legitimate" doctrine, the idea of just war was given new life for the modern era.

After all, the idea of humanitarian intervention can be traced back to one of the just war thinkers, Hugo Grotius. In his famous treatise *De Jure Belli ac Pacis*, he stated that a monarch, who does not respect the basic principles of international law, may lose the international law protection related to state sovereignty.[127] He would be probably happy to know that humanitarian intervention is considered as a modern "just cause" for war today.

E. *Conclusion*

In March 2003, operating in the legal shadows cast by the "illegal but legitimate" doctrine, the American-led "Coalition of the Willing" decided to invade Iraq without a new U.N. Security Council resolution clearly authorizing the use of force against Iraq.[128] After the invasion, President Bush and then-U.S. Deputy Secretary of Defense Paul Wolfowitz invoked just war arguments as justification for the Coalition's use of force, speaking about the suffering of the Iraqi people as

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[125] *Id.* at XII.

[126] Nigel Dower, *Violent Humanitarianism – An Oxymoron?, in* Human Rights and Military Intervention 73, 82 (Alexander Moseley & Roger Norman eds., 2002).

[127] Hugo Grotius, The Rights of War and Peace 288 (Archibald C. Campbell trans., M. W. Dunne 1901) ("Though it is a rule established by the laws of nature and of social order, and a rule confirmed by all the records of history, that every sovereign is supreme judge in his own kingdom and over his own subjects, in whose disputes no foreign power can justly interfere. Yet where a Busiris, a Phalaris or a Thracian Diomede provoke their people to despair and resistance by unheard of cruelties, having themselves abandoned all the laws of nature, they lose the rights of independent sovereigns, and can no longer claim the privilege of the law of nations.").

[128] *See* the description of the unsuccessful attempts of the United States, the United Kingdom and Spain to secure a new Security Council Resolution authorizing the use of force against Iraq *in* the updates to Jeffrey L. Dunoff, et al., *supra* note 34, *available at* http://teaching.law.cornell.edu/faculty/drwcasebook/updates13.htm.

one of the justifications for the invasion.[129] In addition, British Prime Minister Blair spelled out this argument in even stronger terms: "If I am honest about it, there is another reason why I feel so strongly about this issue …. The moral case against war has a moral answer: it is the moral case for removing Saddam."[130]

Nevertheless, the official position of the Coalition governments was not based on the "illegal, but legitimate" or other modern just war doctrines, but rather on legalistic arguments. The United States, Great Britain, Australia and some other states thought that there was enough authority in the previous Security Council resolutions.[131] Therefore, although the just war doctrine has been revived, it would be premature to pronounce a decisive departure of states from legality to legitimacy.

International lawyers should, however, be aware of the risks of such a move. The modern just war doctrine is dangerous for exactly the same reasons that prompted abandonment of the older version of the doctrine. As Professor Michael Bothe explained, "it was impossible to determine in any particular case whose case was just and whose not. As a result, the rule of *bellum justum*, which, at the outset was understood as a legal restraint on war, turned into the opposite."[132] Like Professor Bothe, Professor Hudson was also critical of "Grotius' distinction between good and bad wars."[133]

Moreover, who can truly say what is a legitimate and just cause for taking recourse to military force in the twenty-first century? This doctrine might, therefore, easily open a Pandora's box or cause a "boomerang effect,"[134] generating

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[129] Bob Woodward, Bush at War 339 (2002) (President Bush said about the suffering of the Iraqi people: "Clearly there will be a strategic implication to a regime change in Iraq, if we go forward. But there is something beneath that, as far as I'm concerned, and that is, there is immense suffering."). *See* also the News Transcript, the U. S. Department of Defense (May 9, 2003) (in this interview, Paul Wolfowitz mentioned also the "criminal treatment of the Iraqi people"), *available at* http://www.defenselink.mil/transcripts/2003/tr20030509-depsecdef0223.html.

[130] *See* updates to Dunoff, et al., *supra* note 128.

[131] S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (Nov. 29, 1990); S.C. Res. 687, U.N. SCOR, 46th Sess., 2881st mtg., U.N. Doc. S/RES/687(Apr. 3, 1991); S. C. Res. 1441, U.N. SCOR 57th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (Nov. 8, 2002); the legal arguments of the Coalition states can be found in: Letter dated Mar. 20, 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/350; Letter dated Mar. 20, 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/351; Statement of the British Attorney General Lord Goldsmith (Mar. 17, 2003) and Memorandum of the Australian Attorney General's Dept. and the Dept. of Foreign Affairs & Trade (Mar. 18, 2003), *see* updates to Jeffrey L. Dunoff, et al., *supra* note 34.

[132] Bothe, *supra* note 82, at 238.

[133] Hudson, *supra* note 4, at 98.

[134] Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 Eur. J. Int'l. L. 1, 22 (1999).

more breaches of international law. Moreover, this doctrine could readily serve a state that "conveniently seeks to justify its abuse of power."[135] In addition, such use of force may have a "destructive impact on the universal system of collective security embodied in the Charter."[136]

Finally, there is also a "psychological element" involved in the debate on the use of the concept of legitimacy in international law. This problem has been identified by Michael Walzer, who distinguishes two approaches to international law: First, legal positivism, and second, an approach oriented in terms of policy goals. The advocates of this second approach "substitute utilitarian argument for legal analysis."[137] Furthermore, "[p]olicy-oriented lawyers are in fact moral and political philosophers, and it would be best if they presented themselves that way."[138] This policy approach, invoking the concept of legitimacy and various lists of just causes in order to support a particular use of force, may create a perception that international law is not law at all and reduce it to a mere social science.

Allowing some exceptions from positive international law should not, however, lead us to a complete rejection of the system of international law as such, as proposed by Robert Kagan:

> The point is this: A world without a universal standard of international law need not be a world without morality and justice. Indeed, in the real world, the too-rigid application of the principles of international law can impede the pursuit of morality and justice, as the Europeans recognized in the case of Kosovo.[139]

Compared to the vagueness of the just war and the "illegal but legitimate" doctrine, the concept of legality provides more reliable and concrete ground for international law. After all, the U.N. Charter was created to provide a clear international law framework, a "world constitution."[140] Professor Hudson, who

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[135] Diana Mack, *Too 'Legit': Chomsky Rocks Hutchins*, Res Gestae: The Student Newspaper of U. Mich. L. Sch., Nov. 23, 2004 (quoting Noam Chomsky), *available at* http://www.law.umich.edu/journalsandorgs/rg/main/backissues/ back_issues_main.htm (select "2004" in the dropdown box, then "Too Legit" in the left column).

[136] *Id.*

[137] Michael Walzer, Just and Unjust Wars xix (2001).

[138] *Id.*

[139] Robert Kagan, Paradise & Power: America and Europe in the New World Order 131 (2003).

[140] Bardo Fassbender, UN Security Council Reform and the Right of Veto 37–61 (1998) (The author provides an overview of various approaches to the transfer of the constitutional idea to the sphere of international law); Christian Tomuschat, *International Law as theConstitution of Mankind, in* International Law on the Eve of the Twenty-first Century, Views from the International Law Commission 37, 50 (1997).

today might be called a "multilateralist,"[141] would probably defend the existing system of "international organization," represented by the U.N., and suggest solving international problems within the sphere of legality. Nevertheless, international law is not just a set of rules, it is a dynamic process. Professor Hudson, more than most, seemed to understand this.

Is the strict separation of law and values of morality and justice tenable in the international law of the twenty-first century, in light of the concept of *jus cogens* and human rights? This question will have to be answered, in particular, in extreme situations, when a permanent member of the Security Council opposes a resolution authorizing humanitarian intervention. The ongoing genocide in Darfur unfortunately offers such an extreme situation. [142] Because of China's special relations with Sudan, it has prevented the Security Council from authorizing humanitarian intervention. Contemporary international law does not provide a clear answer to this question. One possible solution, the U.N. General Assembly's "Uniting for Peace" Resolution,[143] was not invoked during the Kosovo crisis; moreover, it rests upon "very shaky legal ground."[144]

Therefore, in line with Radbruch's Formula, when the contradiction between the positive law and justice is "so intolerable that the former must give way to the latter,"[145] such as in the case of genocide, the "illegal but legitimate" doctrine should be applied. As Professor Franck pointed out, domestic legal systems usually accept the need for a way out of the dilemma in which "good law, strictly enforced, conduces to a result which opens an excessive chasm between law and the common moral sense."[146] Furthermore, it would be naive to think that the U.N., with or without reform, will provide a solution to every possible international crisis in the future. In the case of an imminent or ongoing humanitarian catastrophe, the "illegal but legitimate" doctrine could be the right way to resolve the dilemma between legality and legitimacy. Under these exceptional circumstances, this modern version of the just war relic should be able to co-exist with the current international constitutional system.

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[141] Hudson, *supra* note 4, at 90–96.

[142] Secretary Colin L. Powell, Testimony Before the Senate Foreign Relations Committee in Washington, DC (Sept. 9, 2004) ("When we reviewed the evidence compiled by our team, and then put it beside other information available to the State Department and widely known throughout the international community, widely reported upon by the media and by others, we concluded, I concluded, that genocide has been committed in Darfur and that the Government of Sudan and the Jingaweit bear responsibility - and that genocide may still be occurring."), *available at* http://www.state.gov/ secretary/former/powell/remarks/36042.htm.

[143] Uniting for Peace Resolution, G.A. Res. 377(V); U.N. Doc. A/1775 (Nov. 3, 1950).

[144] Joyner, *supra* note 54, at 612.

[145] Streletz, Kessler & Krenz v. Germany.

[146] Franck, *supra* note 49, at 214.

The Phantom of the Neo-Global Era: International Law and the Implications of Non-State Terrorism on the Nexus of Self-Defense and the Use of Force

By L. Waldron Davis

A. *Introduction*

International law and practice regarding the use of force is currently in flux. This uncertainty is due to the contemporary world climate of terrorism and the aggressive retaliatory responses terrorist attacks have provoked from nations like the United States and Israel.[1] As one commentator noted, "today's terrorist organizations could be taken as the ultimate threat by non-state entities against the fundamental organizing system of territorial States."[2] Therefore, in order to see continued progress in international organization, responses to this challenge must be addressed within the context of international law. One area of particular ambiguity in international law is the question of when and under what circumstances will the terrorist activities of non-state actors provide a justification for the use of force in self-defense in another sovereign state. This chapter examines that ambiguity.

The central question posed is whether, under current international law, actions by non-state terrorist actors can provide a justification for the use of force in self-defense in another state, and if so, under what circumstances and conditions would such a right be triggered. In considering this question, two sub-questions must be addressed in turn. First, whether the right to self-defense can be invoked by the victim state when the attacker is not a state. Second, if the self-defense exception to the general prohibition on the use of force can be invoked, can this right extend to justify the victim state's use of force in the territory of the terrorists' origin state?

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[1] *See generally* Michael C. Bonafede, *Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Use of Force in Response to Terrorism After the September 11 Attacks*, 88 Cornell L. Rev. 155 (2002).

[2] Jonathan I. Charney, *The Use of Force against Terrorism and International Law*, 95 Am. J. Int'l L. 835, 838 (2001). *See also* Foley and Sofaer, in this volume.

Miller & Bratspies (Eds), Progress in International Law, pp. 633–650.

The term "origin state" is intended to encompass a limited range of possible connections between a state and a non-state terrorist organization. The term is exclusive of state-sponsored terrorism. Consequently, its use implies a lower degree of complicity. Possible connections falling under the term "origin state," include, but do not necessarily imply, the following: limited support or succor; passive acquiescence; open or clandestine harboring; and failed detection or apprehension due to incapability, omission, or oversight. As will be discussed below, the degree of connectivity between the origin state and the non-state terrorist organization has substantial bearing on whether the use of force is justified in that state.

First, I argue that the right of self-defense is not qualified by the identity of the attacker. Therefore, a state victim of a non-state terrorist attack may invoke its inherent right of self-defense. The issue cannot be examined solely through the lens of a monotypic statist paradigm. States must have recourse, within circumscribed parameters, to respond against the multifarious violent actors operating within the contemporary international environment, be they a state or non-state aggressor. To conclude otherwise would deny states their inherent right of self-defense. Acknowledging that this right is extant under existing or developing customary international law, or alternatively, accepting the reality that state practice demonstrates that such self-defense measures will continue to occur regardless of their status as customary international law is the gatekeeper to the more important issue of circumscribing the parameters of a legitimate self-defense response in this particular context.

Second, I will argue that, even assuming a state's inherent right of self-defense may be invoked following[3] an armed terrorist attack, it must be qualified or limited in order to respect, to some extent, the sovereign rights of the origin state, and to protect the civilians therein. A contrary rule would be anathema to international peace and security, and a harbinger of international disorganization. Furthermore, while positing that the right of self-defense is applicable in this context, in the spirit of progress in international organization, peace, and global security, the instances in which such a response is necessary must be reduced through proactive international efforts at collaborative prevention of, and response to, terrorist acts. Otherwise, the development of customary law in this context will be left to evolve through the unilateral practice of reactionary victim states alone.

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[3] The scope of this chapter is limited solely to a discussion of the right to self-defense following an armed attack and will not discuss issues of preemptive self-defense.

B. *Discussion*

I. *A Square Peg in a Round Hole—Terrorist Organizations as International Warmongers*

Most non-state actors seek to influence law, politics, or economics, and to achieve social change by working within the existing international legal order to reshape the law.[4] That said, some non-state actors (e.g. organized crime rings, pirates, insurgents, rebels, or mercenaries) also work outside the existing legal order by engaging in lawless and violent activities.[5] Now, with the emergence of terrorist organizations like *Al Qaeda*, non-state actors have added another activity to their list of geo-political activities: international warfare.[6]

While terrorism is a reoccurring phenomenon with ancient roots,[7] it has a newer, uglier, and scarier face. As Isaac Cronin points out, "The events of September 11, 2001 … placed the brutal realities of terrorism in front of the entire world. The most effective way to view the … attack is to see it as part of an unfolding historical process."[8] Cronin notes that terrorism has become a form of "warfare" with "evolving causes, motivations, and objectives." Richard Falk calls this new terrorism "megaterrorism," which he defines as "violence against civilian targets that achieves significant levels of substantive as well as symbolic harm, causing damage on a scale once associated with large-scale military attacks under state auspices."[9]

So, if stateless terrorist organizations have evolved into a new breed of international warmongers, the question must be asked: what recourse contemporary international law provide for executing a legitimate response to this new threat to international peace, security, and organization?

II. *The Prohibition on the Use of Force and the Self-Defense Exception*

As Professor Manley O. Hudson noted, "a generation which came through the World War to find tens of millions of its most useful men wasted in battle cannot

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[4] Henry G. Schermers & Niels M. Blokker, International Institutional Law 4 (4th ed., 2003). One of the best examples is the campaign to ban landmines.

[5] Barry E. Carter et al., International Law 135 (2003).

[6] *See* Osama Bin Laden, *Declaration of War Against the Americans Occupying the Land of Two Holy Places* (1996) as reproduced in Isaac Cronin, Confronting Fear: A History of Terrorism 404-405 (2002).

[7] *See* Walter Laquer, *A History of Terrorism, excerpted in* Cronin, *supra* note 6, at 4.

[8] Cronin, *supra* note 6, at 1.

[9] Richard Falk, The Great War Terror XVII 7-8 (2003).

content itself with anything less than a frontal attack on war itself."[10] Anti-sanguinolent logic, such as Hudson's, was embodied in the United Nations Charter itself, with the maintenance of international peace and security[11] and the prevention of future war identified as principle concerns of the world order.[12] To this end, strict legal parameters on the recourse to force, or *jus ad bellum*,[13] were incorporated into the UN Charter. As a guiding principle, the use of force against another sovereign state was expressly prohibited in favor of peaceful settlement of disputes.[14]

However, "the Charter is both pacifist and miltarist—and receives its acceptability by such schizophrenia."[15] The Charter provides two exceptions to this obligation of peaceful settlements of disputes. These exceptions are: (1) authorization by the UN Security Council to use armed force, as expressed in Articles 39 and 42,[16] and; (2) the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the UN, as expressed in Article 51:

> Nothing in this present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[17]

In the traditional realm of state-dominated international affairs the concept of self-defense, as expressed in Article 51, means that states are not required to turn the other cheek when attacked. The inherent right of self-defense allows the victim state to use a proportionate amount of force against the aggressor state if necessary to stymie any further or ongoing attacks. It is well established under customary international law that self-defense permits and typically involves military actions that intrude upon the territorial integrity of the aggressor state.

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[10] Manley O. Hudson, Progress in International Organization 83 (1932). Published in the interim between the World Wars, Hudson's work offers a historical glimpse into progressive thought in international law and policy at that time. Additionally, this book served as the *locus classicus* for the symposium from which this Chapter originated.

[11] U.N. Charter art. 1, para. 1.

[12] *Id*. at preamble.

[13] *See* Steven R. Ratner, *Jus ad Bellum and Jus in Bello after September 11*, 96 Am. J. Int'l L. 905, 905 (2002).

[14] U.N. Charter art. 2, paras. 3-4.

[15] Martii Koskenniemi, *What is International Law For? In* International Law 89, 109 (Malcolm D. Evans ed., 2003).

[16] U.N. Charter arts. 39, 42.

[17] *Id*. art. 51.

It is important to bear in mind that most claims of self-defense arise in circumstances that are less than clear cut.[18] While the concept of self-defense is less befuddling when applied between two nation states in direct armed conflict, the stateless nature of a sophisticated terrorist organization creates even greater uncertainty as to what, if any, action should occur *vis-à-vis* states in a state-dominated, UN Charter-based, international legal system. The complexity of this situation lies in the reality that any self-defense action taken against these "stateless" phantoms will necessarily impinge upon another state's sovereign territory.[19] At this point, blurriness envelops the analysis as to whether a self-defense action that is *de jure* directed against a non-state terrorist organization is in reality a *de facto* use of force against the origin state.

III. *Article 51 Self-Defense and Non-State Attackers*

Answering the question of whether Article 51 permits the use of force against non-state actors requires an analysis of existing and emerging customary international law. Although decisions of the International Court of Justice have no binding force except as between the parties in respect to that particular case, they are highly informative when attempting to ascertain the current state of customary international law.[20] For that reason, this discussion begins with an analysis of the ICJ's recent jurisprudence. In its 2004 advisory opinion on the legality of the Israeli barrier wall in occupied Palestinian territories, the ICJ had the opportunity to pass on the nexus between the use of force, self-defense, and violent non-state actors[21] One possible interpretation of that opinion is that the ICJ rejected an expansive reading of Article 51 that would encompass responses to non-state terrorist attacks.

Israel claimed that the construction of a massive barrier wall was justified as self-defense in response to historical and ongoing terrorist attacks.[22] While it is

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[18] Michael Byers, *Terrorism, the Use of Force and International Law After 11 September*, 51 Int'l & Comp. L. Q. 401, 402 (2002).

[19] A possible exception to the proposition that all terrorists can be found operating from, or located in, some state would be terrorist group operating a long-range missile attack from a vessel located on the high seas. Additionally, a creative imagination could envision a self-defense engagement which occurs on, or under, the high seas, Antarctica, or even outer space. So theoretically, some extraterritorial self-defense actions taken against terrorists would not infringe upon the sovereignty of another state.

[20] *See* Statute of the International Court of Justice, art. 38(1)(d), June 26, 1945, 59 Stat. 1055, T.I.A.S. No. 993.

[21] *See generally* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131 (July 9) [hereinafter Barrier Wall Opinion].

[22] *Id.* para. 138.

well established that Israel suffers from frequent terrorist attacks,[23] the ICJ majority opinion concluded that the justification of self-defense was not available to Israel as an occupying power.[24] The majority reasoned that Article 51 had "no relevance" in that case because Article 51 only contemplated self-defense as a response to aggression by one state against another state.[25] The majority held that, because Palestine is occupied by Israel, the terrorist threats advanced to justify the construction of the wall arose within Israel, and therefore could not be imputed to Palestine.[26] In doing so, the majority appeared to draw a bright line between attacks stemming from state action, which are subject to the Article 51 right of self-defense, and attacks attributable to non-state actors which are not.[27]

In her separate opinion, Judge Higgins addressed concerns raised by the majority's swift and seemingly truncated rejection of Israel's claim of self-defense in response to terrorist attacks.[28] She pointed out that there is: "[N]othing in the text article 51 of the Charter that *thus* stipulates that self-defence is only available only when armed attack is made by a State."[29] As Iain Scobbie noted: "Given the contemporary instigation of acts of terrorism by non-State actors, it does seem odd that the Court should restrain self-defense with a Statist paradigm."[30]

Under a literal interpretation of the majority's rationale, an injured state could only sit back and wait for Security Council authorization before responding to an armed terrorist attack from a non-state actor. It is my opinion that, taken to its logical extreme, this proposition leads to a *reductio ad adsurdam*. A state that suffered a grievous terrorist attack would have no legal right to defend itself against the next devastating terrorist blow, a blow that may well come before the notoriously slow Security Council can deliberate on the appropriate response. Such a narrow interpretation of Article 51 would read the word "inherent" right out of the text and vest all decisionmaking authority with the Security Council following a non-state terrorist attack.[31]

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[23] *Id*. para. 141; *see also Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967*, para. 5, E/CN.4/2004/6 (Sept. 8, 2003).

[24] Barrier Wall Opinion, *supra* note 21, para. 139.

[25] *Id*.

[26] *Id*.

[27] *Id*.

[28] *Id*. paras. 34-35 (separate opinion of Judge Higgins) (citations omitted) (emphasis in original).

[29] *Id*.

[30] Iain Scobbie, *Smoke, Mirrors and Killer Whales: The International Court's Opinion on the Israeli Barrier Wall, Part II of II* 5 German L.J. (2004), available at http://www.germanlawjournal.com/article.php?id=496.

[31] *See* Sofaer, in this volume.

A restrictive approach in analysis of Article 51 is, however, consistent with the ICJ's earlier decisions in *Nicaragua v. U.S.*, which narrowly circumscribed the definition of an armed attack, aggrandized the definition of the "use of force" and empowered the Security Council.[32] Similarly, in the *Barrier Wall Opinion*, the ICJ helped maintain the Security Council's monopoly on the use of force by narrowing the instances in which a state can take a unilateral recourse to the use of force in self-defense. But was the majority's approach too rigid, or, as Judge Higgins called it, "formalism of an unevenhanded sort"?[33] I think not, and, for reasons that will be explained below, I believe that to read the *Barrier Wall Opinion* as generally restricting self-defense as against non-state actors is a wholly inaccurate interpretation and a misunderstanding of the Court's intentions.

The majority's reluctance to rapidly expand the boundaries of self-defense exudes a thoughtful prudence in the context of responding to internal struggles with force under the guise of "combating terrorism." Had the majority opined a more expansive reading of Article 51, future forceful responses to unrest in places like Chechnya, the Basque Country, or Northern Ireland may have been "legitimized" as self-defense responses taken against non-state terrorist actors. Therefore, the applicability of the Majority's state/non-state rationale should be restrictively interpreted to the narrow confines of an occupation situation, such as existed in the *Barrier Wall Opinion*. To extrapolate the application of the state/non-state rationale outside the facts of an occupation situation would be to view the Majority's opinion as a deviant interpretation of Article 51.

For instance, if read outside its unique factual context, the state/non-state distinction contradicts recent UN policy and actions that predated the opinion. In the wake of the September 11th, 2001 *Al Qaeda* attacks on the United States, the Security Council issued Resolution 1368[34] and 1373[35] which collectively reaffirmed the need "to combat by all means threats to international peace and security caused by terrorist acts" and recognized "the inherent right of individual or collective self-defence in accordance with the Charter" as a valid means to combat terrorism.[36] As Thomas Franck points out, "*Al Qaeda* is not a state."[37] Therefore, if interpreted to be applied generally, the ICJ's state/non-state distinction

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[32] *See generally* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) [hereinafter Nicar. v. U.S.].

[33] Barrier Wall Opinion, *supra* note 21, paras. 34-35 (separate opinion of Judge Higgins).

[34] S.C. Res. 1368, U.N. Doc. S./RES/1368 (Sept. 12, 2001).

[35] S.C. Res. 1373, U.N. Doc. S./RES/1373 (Sept. 28, 2001).

[36] *See* Carter *supra* note 5, at 75 ("In other words, the Security Council implicitly recognized that a state could respond militarily against those responsible for the attacks, even though the terrorists were non-state actors. Legally this was an unprecedented move for the United Nations.").

[37] Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 Am. J. Int'l L. 839, 840 (2001).

would fly in the face of the UN's clear recognition of the inherent right of self-defense to respond to terrorist attacks from non-state actors.[38] The ICJ was aware of these resolutions, as it specifically rejected Israel's reference to Resolutions 1368 and 1373 noting that, due to Israel's status as an occupying power, the situation at hand was different from that contemplated by the Security Council in those resolutions.[39] Therefore, no support can be found in the *Barrier Wall Opinion* for the conclusion that Article 51 prohibits all self-defense responses against non-state actors.

While the ICJ's *Barrier Wall Opinion* offers little clarity on the issue, historical and contemporary state practice indicate that, as a matter of existing or emerging customary international law, the invocation of self-defense following an attack from a non-state actor can be legitimate.

For example, following the September 11th *Al Qaeda* attacks, NATO, invoked Article 5 of its joint defense pact for the first time in its history.[40] Australia and New Zealand similarly invoked the ANZUS co-defense treaties, also citing Article 51.[41] Additionally, the European Union, China, Russia, Japan, and Pakistan supported this view.[42] An arguable interpretation of these events is that these actions imply a widely shared consensus amongst states that the right of self-defense is not qualified by the identity of the attacker. Some commentators have suggested that this widespread support for the legality of the U.S. invocation of self-defense against *Al Qaeda* and the Taliban Regime "could constitute instant customary international law and an authoritative reinterpretation of the UN Charter, however radical the alteration from many State's prior conception of the right to self-defense."[43] Because "[c]ustomary law in the traditional conception of it is not a rigid and unchangeable system" this assertion is not extraordinary.[44]

While much focus has been on state practice post-September 11th, the inquiry into whether the right of self-defense extends to executing military response to

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[38] *Id*. at 839-40.

[39] Barrier Wall Opinion, *supra* note 21, para. 139.

[40] Press Release, NATO, Statement by the North Atlantic Council (Sept. 12, 2001), *available at* http://www.nato.int/docu/pr/2001/p01-124e.htm.

[41] *ANZUS: September 11, 2001 Attacks*, Wikipedia, http://en.wikipedia.org/wiki/Australia,_New_Zealand,_United_ States_Security_Treaty#September.C2.A011.2C_2001_Attacks.

[42] Christine Gray, *Self-Defence Against Terrorism, in* International Law *supra* note 13, at 603-605.

[43] *Id*.

[44] Hugh Thirlway, *The Sources of international law, in* International Law *supra* note 13, at 128; *but see* Gray, *supra* note 42 (stating that "Another possible restriction on this apparently very wide and, for many States, new doctrine of self-defence is that … [s]everal States regarded … Security Council backing as crucial to the US claim to self-defence.").

non-state terrorist attacks is not merely a new debate. Then U.S. Secretary of State George Schulz, espoused such a broad interpretation of Article 51 as early as 1984.[45] Additionally, the U.S. history of responding to non-state terrorist attacks, includes several examples that predate September 11th. For instance, in 1998, *Al Qaeda* bombed U.S. embassies in Kenya and Tanzania. Relying on the justification of Article 51, President Clinton authorized missile strikes against terrorist training camps and facilities in Afghanistan and Sudan.[46] These actions received significant international support, though not from the Arab world or Russia.[47] "Neither the Security Council nor the General Assembly took any formal action in response to the U.S. actions against Sudan or Afghanistan."[48] Acceptance of the U.S. action through general support or passive acquiescence is evidence that responding to a non-state terrorist attack was considered a legitimate exercise of self-defense under Article 51, or at least generally tolerable state practice, previous to September 11th.

Additionally, state practice over preceding centuries demonstrates that victim states will and do use force in self-defense against non-state actors in their origin states. Several scholars have pointed to the similarities between U.S. and international efforts to defend against pirates and the contemporary international fight against non-state terrorist organizations.[49] Like the contemporary scourge of international terrorism, the problem of piracy was "a phenomenon that was important and conspicuous in the seventeenth and nineteenth centuries."[50] Piracy by definition occurs on the high seas outside the territorial jurisdiction of any state. For that reason, actions taken against pirates correspondingly occurred on the high seas and did not typically involve the use of force against another state. However, this was not always the case. For instance, Thomas Jefferson forged an international coalition to pursue the Barbary pirates of North Africa,

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[45] *See Excerpt's [sic] From Shultz's Address on International Terrorism*, N.Y. Times, Oct. 26, 1984, at A12; Byers, *supra* note 18, at 402.

[46] For an excellent discussion of the United States' response *see* Ruth Wedgewood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 Yale J. Int'l Law 559 (1999).

[47] Mikael Nabati, *International Law at a Crossroads: Self-Defense, Global Terrorism, and Preemption (A Call to Rethink the Self-Defense Normative Framework)*, 13 Transnat'l L. & Contemp. Probs. 771, 773 (2003).

[48] Jack M. Beard, *Military Actions by Terrorists under International Law: America's New War on Terror: The Case for Self-Defense Under International Law*, 25 Harv. J. L. & Pub. Pol'y 559, 574-75 (2002).

[49] *See, e.g.*, Michael Novak, *Symposium: The Rule of Law in Conflict and Post-Conflict Situations: Just Peace and the Asymmetric Threat: National Self-Defense in Uncharted Waters*, 27 Harv. J. L. & Pub. Pol'y 817, 828-829 (2004); *cf.* Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 Hastings Int'l & Comp. L. Rev. 303 (2002).

[50] Antonio Cassese, International Criminal Law 24 (2003).

and, in 1805, the United States took military action against the Barbary Pirates in the independent Sultanate of Morocco and the three Regencies of Algiers, Tunis, and Tripoli. Collectively, these territories comprised the pirates' origin state(s).[51] The result of the U.S. action was two "Barbary Wars" which included gunship bombardment and Marine operations against coastal cities in the pirates' origin states. This military response eventually put an end to the problem of piracy upon American ships in the Mediterranean. Some scholars have referred to the Barbary Wars as "America's first war on terror."[52] Therefore, the Barbary Wars can be viewed as an early example of state practice involving a successful self-defensive action in the origin state of a violent non-state attacker.

Recognition of the right of self-defense as against non-state actors is also seen in the famous 1837 Caroline Incident—which is frequently cited as an authoritative initial definition of the contours of national self-defense.[53] The Caroline Incident involved British military action taken in "self-defense" against a private, non-state, U.S. vessel that was believed to be supplying Canadian rebels at Niagara Falls. British forces captured or killed those onboard the private non-military American ship, set it ablaze and sent it over the falls.[54] Because Article 51 is seen as embodying existing customary law relating to the use of force at the time of its drafting, it is at least plausible to argue that it embodied the norms reflected in the Caroline Incident which recognized that self-defense applied as against non-state entities.[55]

Another illuminating historical example is that of the U.S. pursuit of Pancho Villa, an infamous figure in American folklore who, due to his nefarious deeds, has of late been compared to Bin Laden.[56] In 1916, Villa stopped a train in

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[51] *See* Gabor Rona, *International Law Under Fire: Interesting Times for International Humanitarian Law: Challenges from the "War on Terror,"* 27 Fletcher F. World Aff. 55, 70, n. 39 (2003); *See generally* Wikipedia, Barbary Wars, *available at* http://en.wikipedia.org/wiki/Barbary_Wars.

[52] *See generally* David Smethurst, Tripoli: The United States' First War on Terror (2007); Joseph Wheelan, Jefferson's War: America's First War on Terror, 1801–1805 (2003).

[53] Jordan J. Paust, *Symposium, Terrorism: The Legal Implications of the Response to September 11, 2001: Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 Cornell Int'l L.J. 533, 534-535 (2001); Mark A. Drumbl, *Victimhood in our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. Rev. 1, 30-31 (2002).

[54] *See* 29 British and Foreign State Papers 1137—38; 30 British and Foreign State Papers 195-196; Robert Jennings, *The Caroline and McLeod Cases*, 32 Am J. Int'l L. 82 (1938); David J. Harris, Cases & Materials on International Law 921 (6th ed. 2004); Byers, *supra* note 18, at 406.

[55] *See* Bowett, International Law & the Use of Force (2000) (arguing that the inclusion of the word "inherent" and the *travoux prépatoires* indicate that Art. 51 was not intended to limit the pre-1945 customary international law right of self-defense); Harris, *supra* note 54, at 922-923.

[56] For a thorough account of the United States' pursuit of Pancho Villa, *see generally* Eileen Welsome, the General & the Jaguar (2006).

Mexico, removed eighteen U.S. citizens, and proceeded to rob and execute them.[57] A few months later, he culminated his terror campaign by crossing onto U.S. soil and attacking the bordertown of Columbus, New Mexico.[58] In that raid, Villa and his band of five- to eight-hundred men killed over seventeen Americans, stole horses and guns, and burned and looted most of the town.[59] After the raid, Villa escaped back across the border and disappeared.[60] Public outrage over Villa's attacks pressured then President Wilson to take action.[61] Wilson demanded that the Mexican government capture Villa, and when it became obvious that Mexico was incapable of doing so, he ordered a large military expeditionary force into Mexico.[62] The orders for the incursion were specifically limited to destroying/capturing Villa and his band and then quickly withdrawing whilst avoiding harm to a struggling Mexico.[63] After the 10,000-strong force spent eleven months searching for Villa in vain, and two clashes with Mexican troops later, the troops returned home leaving behind a bitter relationship between the two countries.[64] However, the mission was successful in that it destroyed Villa's band and neutralized his terrorist threat.[65] The example of the United States pursuit of Villa demonstrates that, as early as the beginning of the last century, state practice was already developing in which self-defense responses to non-state terrorist attacks already involved military incursions into origin states.

Pre-September 11th incidents of self-defense actions taken against non-state terrorists can also be drawn from state practice other than that of the U.S. One example from the mid-1990s is the response of Turkey and Iran to repeated attacks from the PKK, a Kurdish terrorist group operating out of Northern Iraq.[66] Turkey and Iran conducted military operations, on Iraqi soil, with the aim

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[57] John Petersen & Pete Petersen, *Government's pursuit of Pancho Villa a lesson in hunting for terrorists*, Baltimore Sun, at A19, Sept. 19, 2001, *available at* http://www.baltimoresun.com/news/custom/attack/balop.terrorists19sep19,0,951297.story.

[58] *Id.*; Donald R. Shaffer, *The Osama bin Laden of 1916*, History News Service, Sept. 19, 2001, *available at* http://www.h-net.org/~hns/articles/2001/091901a.html.

[59] Alex Tizon, *Crossing America: One Year Later, Time recasts villains, heroes in New Mexico town*, Seattle Times, at A1, Sept. 3, 2002, *available at* http://archives.seattletimes.nwsource.com/cgibin/texis.cgi/web/vortex/display?slug=tizon03m& date=20020903); Shaffer, *supra* note 58.

[60] Petersen & Petersen, *supra* note 57.

[61] Shaffer, *supra* note 58.

[62] *Id.*

[63] Petersen & Petersen, *supra* note 57.

[64] Shaffer, *supra* note 58.

[65] Petersen & Petersen, *supra* note 57.

[66] Danish Institute for International Studies, *New Threats and the Use of Force*, at 68, *available at* www.diis.dk [hereinafter DIIS]; Christine Gray, International Law and the Use of Force 115-117 (2d ed., 2004); Thomas M. Franck, Recourse to Force: State Action Against Threats and Armed Attacks 63-64 (2002).

of neutralizing the PKK threat. Iran expressly invoked the right of self-defense. Iraq did not support the PKK, but rather, was unable to exercise authority in the Kurdish region due to the U.S. imposed no-fly zone intended to protect the Kurdish people from Iraqi oppression. The issue of this self-defense response was not discussed in the UN. The Arab League expressed condemnation over Turkey's aggression. On the other hand, the U.S. expressed support for Turkey's actions.

Another example of state practice in this context is Israel's response in the Entebee Incident.[67] That event involved the hijacking of an international Air-France flight which was diverted by terrorists to the airport at Entebee, Uganda. The Jewish passengers were held hostage and the hijackers released the other passengers. The hijackers demanded release of various Palestinian prisoners in exchange for the release of the Jewish hostages. In response, Israel airlifted an elite group of commandos who stormed the compound by night, killed the terrorists, and freed the hostages. The operation also resulted in extensive damage to the airport, and the death of some Ugandan soldiers. Uganda raised objections over Israel's military incursion into its territory. A debate ensued in the Security Council following the incident yet no resolution was adopted.[68] Although the Entebee incident involved the defense of nationals abroad, it can still be perceived as an example of state practice in the context of self-defense as against non-state actors.[69]

While there still remains room for disagreement over whether Article 51 encompasses responses against non-state actors as a matter of existing or emerging customary international law, I suggest the debate is a moot point. Polemics aside, recent and historical U.S. and Israeli responses to terrorism, and the generalized support or tepid acquiescence to these actions by the community of states, demonstrate that rhetorical discussions over the ambiguities of Article 51 will do little to deter a forceful response to a non–state terrorist attack.[70] This is because

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[67] *See* Michael Akehurst, *The Use of Force to Protect Nationals Abroad*, 5 Int'l Rel. 3 (1977); *See* Francis A. Boyle, *The Entebbe Hostage Crisis*, 29 Neth. Int'l. L. Rev. 32 (1982); *See* Thomas R. Krift, *Self-defense and Self-help: The Israeli Raid on Entebbe*, 4 Brooklyn J. Int'l L. 43 (1977); *See* Roderick D. Margo, *The Legality of the Entebbe Raid in International Law*, 94 S. Afr. L. J. 306 (1977); *See* William Stevenson, 90 Minutes at Entebbe (1976); Harris, *supra* note 54, at 933-35.

[68] *See* U.N., *Security Council Debate and Draft Resolutions Concerning the Operation to Rescue Hijacked Hostages at the Entebbe Airport*, Aug. 5, 1976, U.N. Doc. S/PV. 1939, at 27, 51-59, 92 & U.N. Doc. S/PV. 1941, at 31-32 *reprinted in* 15 I.L.M. 1224 (1976); Harris, *supra* note 54, at 935.

[69] John Dugard, Lecture on Diplomatic Protection at Universiteit Leiden, Netherlands (Oct. 5, 2006).

[70] *But see* Byers, *supra* note 18, at 407 (stating that "[a]lthough invocations of this position to justify specific uses of force have been accepted in some instances, the pattern of response has not been clear enough to establish new customary law.").

"[d]ecisions to use force are never made solely on the basis of legal considerations."[71] Therefore, instead of engaging in theoretical discourse over "whether" the right of self-defense exists in this context, the emphasis of international dialogue should be on how it should be exercised, and more importantly, how the necessity of resorting to self-defense can be minimized through cooperative international efforts of prevention and suppression of terrorist activities. However, if the inevitable is assumed—that states will sometimes need to use force in response to non-state terrorist attacks—then it is still necessary to ask the second sub-question: What are the parameters of a victim state's legitimate use of force in self-defense in the terrorists' origin state?

IV. *Accountability of the Origin State for Actions of Non-State Terrorist Actions*

The approach to determining when a state can invoke its right of self-defense against another state for the actions of non-state actors involves an analysis of the nexus, or degree of connectivity, between the origin state and the non-state terrorist actors.[72] As will be discussed below, in the specific context of terrorism, it appears that tolerance for any degree of connectivity between states and violent non-state actors is declining rapidly and that threshold of complicity has been lowered significantly from the restrictive approach espoused by the ICJ in *Nicaragua*. In that case, the Court held that the acts of paramilitary groups could not *per se* be imputed to their supporting state unless that state had issued "specific instructions" to them.[73] Alternatively, in *Prosecutor v. Tadić*, the International Criminal Tribunal for the Former Yugoslavia proposed the use of an of "overall control" test for determining when the actions of violent non-state actors could be attributed to the state.[74] While the difference between the approaches of the ICJ and ICTY appears subtle, Koskenniemi suggests that *Tadić* "overall control" test signifies a move away from the restrictive approach of the ICJ in *Nicaragua* by significantly enhancing the accountability of foreign states that are indirectly involved in the actions of violent non-state actors.[75]

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[71] DIIS, *supra* note 66, at 14.

[72] Nicar. v. U.S., *supra* note 32, para. 116.

[73] *Id.*, paras. 110-115.

[74] Prosecutor v. Tadić, Case No. IT-94-1-A, Appeal of the Judgment, para. 145 (July 15, 1999); *see also* Ratner, *supra* note 13, at 908.

[75] Koskenniemi, *supra* note 15, at 109.

Moreover, a fresh look at international law and practice now suggests a move away from the necessity of the high level of state complicity espoused in *Nicaragua*.[76] For instance, UN Security Council Resolution 1373 sets out a wide range of proactive affirmative duties that states are required to take in suppressing terrorism, and prohibits even passive support of terrorist groups.[77] The mandated responsibilities include: prevention and suppression of terrorist finances; restraint from provision of any form of support, active or passive, to terrorist groups; suppression of member recruitment to terrorist groups; elimination of the supply of weapons to terrorist groups; provision of early warning of terrorist activity to other states by exchange of information; denial of safe haven to those involved in terrorism; establishment of domestic laws that seriously punish terrorist acts; assistance to other states in criminal investigations and evidence sharing; and the prevention of terrorist movement across borders.[78] Currently, there are twelve multilateral conventions and protocols regarding state responsibility in combating terrorism and numerous other UN resolutions that have expressly expanded state responsibility in the context of controlling non-state terrorist actors.[79]

Therefore, while states not exercising "direct control" or issuing "specific instructions" may have previously been able to argue that the actions of non-state terrorist actors imposed no international responsibility upon them, state practice and UN Resolutions since September 11th affirm that the threshold has been lowered and that states that merely acquiesce to or harbor non-state terrorist actors within their territory can expect to be held complicit and accountable.[80]

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[76] *See* Louis Henkin, Right v. Might: International Law and the Use of Force 46-75 (1991) ("Its opinion [Nicaragua v. United States] gives no guidance as to whether a state responsible for terrorist activities may have committed an armed attack either against the state in whose territory such activities took place or against a state whose nationals were the targets or the victims of those activities."); Ratner, *supra* note 13, at 918 ("the narrow conceptions of the rights of states to self-defense, such as those espoused by the ICJ in the *Nicaragua* case, do not appear to have had much of an impact on how societies and their governments look at self-defense in response to major terrorist attacks.").

[77] S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

[78] *Id.*

[79] DIIS, *supra* note 66, at 94; *see e.g.*, Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177; G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 122, U.N. Doc. A/8018 (Oct. 24, 1970); G.A. Res. 40/61, U.N. GAOR, 40th Sess., Supp. No. 53, at 302, U.N. Doc. A/40/53 (Dec. 9, 1985); G.A. Res. 51/210, U.N. GAOR, 51st Sess., Supp. No. 49, at 348, U.N. Doc. A/51/631 (Dec. 17, 1996); S.C. Res. 1189, U.N. SCOR, 52d Sess., 3915th mtg. at 110, U.N. Doc. S/RES/1189 (Aug. 13, 1998) (resolution condemning U.S. Embassy bombings and expressing similar language regarding state responsibility in situations of mere acquiescence); *see also* Ratner, *supra* note 13, at 908.

[80] DIIS, *supra* note 66 at 12.

This trend can be viewed as progressive development in international organization because its shifts the responsibility of combating terrorism away from the purely responsive actions of victim states alone towards a proactive duty of the world community at large. In the end, this should limit the need for self-defense actions and prove to be a more effective and collaborative method to combat terrorism than relying on unilateral self-defense actions alone. It is important to keep in mind, however, that violations of state responsibility are not typically responded to with force. On the other hand, it can be seen with the example of the UN sanctioned use of force against the Taliban government in Afghanistan that, in the particular context of suppressing terrorism, a violation of state responsibility may lead to forceful measures taken against the origin state.[81]

V. *Elements of a Legitimate Self-Defense Action*

Elements that determine the legitimacy of a self-defense response against the origin state are the production of evidence linking the non-state terrorists to the origin state and the traditional self-defense qualifications of necessity and proportionality.

Decisions concerning the use of force require setting a balance between restraint and the necessity of action.[82] The requirement of necessity accomplishes two things. First, it ensures that the use of force may be applied only as a last resort where other means not involving violence would clearly be ineffective in inducing the origin state to comply with its obligations to suppress terrorism on its own soil. Second, it indicates that the decision of the injured state to resort to self-defense is to be made reasonably and in good faith, and at its own risk.

Self-defense is, by its nature, a unilateral form of self-help.[83] Therefore, the injured state is making a subjective determination of the origin state's connection to the terrorist act. Since self-defense contains a measure of immediacy, there may not be much time for a thorough gathering of evidence linking a terrorist organization to some state before a response is carried out. However, the use of force by evidence-lacking, "bogus self-defenders" could in itself constitute an "armed attack" under

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[81] *See* Paust, *supra* note 53, at 557 ("State responsibility for support of non-state terrorists can lead to use of political, diplomatic, economic, and juridical sanction strategies, but does not simplistically justify the use of military force in the absence of direct involvement by the supporting state in a process of armed attack or permissible Security Council or regional authorizations to use military force.").

[82] Koskenniemi, *supra* note 15, at 109.

[83] If the situation is one of collective self-defense the determination of state-terrorist connectivity becomes multilateral—such as was the case when NATO and the U.N. recognized the United State's right of self-defense against the Taliban regime in Afghanistan for their close ties with *Al Qaeda*.

Article 51, thus triggering the right of both the innocent party and the UN to respond with individual or collective force.[84] Consequently, in the absence of evidence, a purported act of self-defense is not self-defense at all, but is instead a violation of international law in its own right.

However, as Thomas Franck points out, while the production of such evidence may be essential to sustain the right of self-defense, it is not a condition precedent to the exercise of that right.[85] That is, the evidentiary requirement arises "*after*, and not *before*, the right of self-defense is exercised."[86] This is because the right of self-defense is inherent in the victim, and "not a license to be granted by the Security Council."[87] This does not mean, however, that evidence linking the non-state terrorist actor to a state is not an essential element of a justifiable execution of self-defense. All it means is that that evidence need not be disclosed to the Security Council prior to the initial response.

In order to avoid making a mistake on whether the origin state is indeed responsible under international law, the injured state should contact and negotiate with the origin state before taking action solely on the basis of its subjective evaluation of the evidence linking the origin state to the terrorist attacks.[88] The necessity of using armed force and the need to produce further evidence both depend on whether the alleged origin state responds to the injured state's demands by a *fin de non reçevoir*, a curt denial of responsibility, or, to the contrary, offers to take adequate and timely actions to suppress the terrorist activities or bring the terrorists to justice, adopts the attacks as its own, or even explains, to the satisfaction of the injured state, that no internationally wrongful act attributable to it was committed.[89] Requiring the injured state to take into account the extent to which the alleged origin state's response to its demands is "adequate" strikes a proper balance between the position of the injured state and that of the alleged origin state.[90] It seeks to avoid giving the injured state excessive latitude—to the possible detriment of the alleged origin state—in the use of force in self-defense.[91] Examples mentioned previously include President Wilson's request that Mexico apprehend Villa and President Bush's request that the Taliban hand over Bin Laden, which were met with, respectively, incapacity

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[84] Franck, *supra* note 37, at 840.

[85] *Id*.

[86] *Id*. at 842.

[87] *Id*. at 840.

[88] *See generally Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Report of the ILC on the Work of its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (Aug. 21, 2001); and comments thereto.

[89] *Id*.

[90] *Id*.

[91] *Id*.

to apprehend and unwillingness to cooperate. Because the governments in both of these cases were either unwilling or unable to neutralize the threat of the non-state terrorists operating within their territory it could be said that the use of force was necessary.

Tricky issues will arise between deciding whether a victim state's right to self-defense takes prominence over the origin state's right to attempt to prosecute or extradite the terrorist.[92] For example, as John B. Bellinger, the top legal advisor to the U.S. State Department commented at a discussion at Leiden University in the Netherlands, the right of self-defense in the context of suppressing terrorism on foreign soil would not extend to the U.S. sending Marines into the Netherlands to shoot terrorists in the streets of Amsterdam.[93] This is because such an exercise of self-defense would not be necessary since the Dutch military and police forces have the capability and desire to suppress any terrorist activities conducted from their own soil and the ability to extradite or punish the perpetrators. On the contrary, the use of force in self-defense could be necessary where the origin state is incapable or unwilling to suppress terrorism on its soil. Such an example would be self-defense operations in failed states, otherwise known as "the black holes" of international law[94] where there is no government which could be expected to suppress violent non-state actors from operating in their terrirtory—take Somalia for example. Or alternatively, the use of force could be necessary in an origin state with a government sympathetic to the non-state terrorists found therein, like the Taliban government in Afghanistan or the North African "States" in the Barbary Wars.

As Ratner points out, difficulties in applying such a rationale may be unjust in marginal situations where a state may not have the law enforcement or military capabilities to suppress terrorist activities within its own borders.[95] In such a situation, however, it would seem logical that the duty of such a state would be to call on the UN or the international community for assistance in suppression. Resolution 1373 is a call for "increased cooperation" in suppressing terrorism not a mandate for the use of force on impoverished states that lack the capability to carry out their suppression responsibilities unaided.

The traditional self-defense parameter of proportionality is especially important in this particular context. Proportionality requires that only measures necessary to respond to and neutralize the threat are utilized and that excessive use of force

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[92] Byers, *supra* note 18, at 413.

[93] Comment by John B. Bellinger at Discussion on U.S. Detainee Policy at Leiden University Faculty of Law, Netherlands (Oct. 10, 2006).

[94] Gerard Krijen, State Failure Sovereignty & Effectiveness viii (2004).

[95] Ratner, *supra* note 13, at 908.

is avoided.[96] Adherence to the doctrine of proportionality is especially important in this situation because actions taken in self-defense against the non-state actor will always injure the origin state to some extent. Because the level of complicity between the origin state and the non-state actors can be tenuous in many situations, such as where an impoverished nation lacks the capability to suppress terrorism on its soil, the victim state should take all measures necessary to focus its operations on neutralizing the non-state actors and targets clearly related to terrorism whilst avoiding harming the origin state.

C. *Conclusion*

Although writing in the pre-Charter era, Hudson believed, that "the direction in which international law is being developed would seem to have made it possible for us to look forward with some confidence to a greater international security than the world has known in the past."[97] Today, the world has a new threat to international security, the violent mega-terrorist organization, the phantom. The challenge of terrorism provides a test piece under which Hudson's optimism in the organizational power of international law can be tried. As discussed above, the UN Charter provides flexibility in addressing this threat. The unilateral use of force in self-defense as expressed in Article 51 is only one of these tools. However, this tool can be clumsy, awkward and dangerous to use. For that reason, its use may not be viable in most circumstances because of the collateral damage it inflicts on the origin state and the high probability that innocent civilians will be killed or injured therein. Therefore, it should be used only as a last resort after all other means have failed and conducted in a manner which minimizes the effects on innocent civilians in the origin state. Because the best defense is prevention, progressive development in the field of increased state responsibility in proactively combating terrorism should help alleviate the need for self-defense measures. The UN Charter is the mechanism that provides the framework for this cooperative internationalism. It was this ability to work multilaterally that inspired Hudson to see a future of greater peace and security. Consequently, one should not conclude that the state-based system cannot meet the challenge.[98] This is because the Charter provides the flexibility for states to work together, or respond unilaterally when necessary, in the global effort to "ghostbust" the state-less terrorist phantom.

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[96] Oil Platforms (Iran v. U. S.) (Merits), 2003 I.C.J., paras. 73-6 (Nov. 6); Legality of the Threat of Use of Nuclear Weapons, 1996 I.C.J., para. 41 (July 8); Nicar. v. U.S., *supra* note 32, para. 176.

[97] Hudson, *supra* note 10, at 89.

[98] Charney, *supra* note 2, at 838.

Progress in Enforcing International Law Against Rogue States?: Comparing the 1930s with the Current Age of Nuclear Proliferation

By Orde F. Kittrie

A. *Introduction*

In his introduction to *Progress in International Organization*, Manley O. Hudson predicted that "when the history of our times comes to be written … our generation will be distinguished, above all else … for the progress which we have made in organizing the world for co-operation and peace."[1] Yet Hudson's interwar generation is today best known to history for its naïve appeasement of Axis aggression.

This chapter will first review why Hudson's generation failed to enforce international law during the 1930s and how this failure contributed to the outbreak of World War II. Then it will turn to one of the greatest security challenges of our time – the proliferation of nuclear weapons – and examine how and why the international community is again failing to take the enforcement measures necessary to prevent a major calamity.

B. *Law, Progress, and the Failure to Prevent World War II*

In his book, Hudson cites as examples of progress towards world co-operation and peace the International Labor Organization (to which he devotes an entire chapter),[2] various international conventions relating to navigation,[3] the founding of the International Institute of Refrigeration, the founding of the International Bureau of Intelligence on Locusts, and the holding of "the *fourth* session of the governing body of the International Educational Cinematographic Institute."[4]

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[1] Manley O. Hudson, Progress in International Organization 5 (1932).
[2] *Id*. at 46.
[3] *Id*. at 77-78.
[4] *Id*. at 42-44 (emphasis in original).

Miller & Bratspies (Eds), Progress in International Law, pp. 651–680.

As Hudson describes it, the post-World-War-I generation of international lawyers were "not interested" in legal issues relating to war, and "the League of Nations has very appropriately disinterested itself in the subject … our generation thinks its time will be better spent if its energy is devoted to building a legal order in which war will have no place."[5] While Hudson and his colleagues were busy focusing on international economic, business and social interests great and small, the leaders of Germany, Italy and Japan were prioritizing their own peoples' perceived need for expansion. Hudson and his colleagues confused their own good will and commitment to progress in international organization with universal progress towards world peace.

The confusion was manifested in the classical legal ideology that played a dominant role in Western democratic, and especially American, foreign policy between World War I and World War II.[6] Classical legal ideology as applied to the international arena has four principal tenets.[7] First, it posits that international order can be established without coercive enforcement; states and their publics are so inclined towards *pacta sunt servanda* (Latin for "pacts must be respected") that laws and impartial dispute settlement can rely for their enforcement solely on reputational and other social pressures rather than centralized coercion.[8] Second, it contends that states are not divided by fundamental or irresolvable conflicts of interests and values.[9] Third, it asserts that persistent conflicts result from the international community's failure to provide neutral, apolitical dispute resolution mechanisms (e.g., legal institutions and laws), which, if properly applied, would be sufficiently effective to uncover the basic commonalities inevitably underlying surface conflicts and enable states to pursue those basic aims without conflicting with each other.[10] Fourth, it contends that law is inexorably evolving to the betterment of mankind, so that laws and legal institutions are increasingly capable of ameliorating international conflict.[11] These classical legal tenets contrast most sharply with realist thought,[12] which holds that states do not comply with international

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[5] *Id*. at 88.

[6] Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: The Twenty Years' Crisis*, 77 S. Cal. L. Rev. 583 (2004). Zasloff's article focuses on the influence of classical legal ideology on American foreign policy from 1921 to 1933. This chapter identifies the persistence of classical legal rhetoric and ideology in American and Western democratic responses to Axis aggression up until the German invasion of Poland on September 1, 1939.

[7] *See, e.g., id*. at 587-88.

[8] *See, e.g., id*. at 588, 609. *See also* Guzman & Meyer, in this volume.

[9] *See, e.g.*, Zasloff, *supra* note 6, at 588. *See also* Dellavalle, in this volume.

[10] *See, e.g.*, Zasloff, *supra* note 6, at 595, 620.

[11] *See, e.g., id*. at 588.

[12] *See* Kemmerer, in this volume.

law for non-instrumental reasons[13] and that there are fundamental conflicts of interest and values between nations which are most effectively addressed by maintaining a balance of power and fear of retaliation for noncompliance.[14]

The primacy of classical legal ideology during the 1920s and 1930s was, in part, a reaction against the failures of the Treaty of Versailles, signed in 1919, which focused on imposing harsh reparations on Germany rather than working out an arrangement that would facilitate peace.[15] Classical legal ideology was reflected in the refusal of the Senate, led by Idaho Senator William E. Borah, to support U.S. entry into the League of Nations out of concern that the League Covenant required parties to take coercive action against aggression.[16] Borah need not have worried. Far from being a hallmark of League activities, coercive action against aggression proved to be almost completely absent from them.[17]

The Treaty for the Renunciation of War (more commonly known as the "Kellogg-Briand Pact"), signed on August 27, 1928,[18] was a particularly salient example of the classical legal view that an impartial international legal rule, reliant on the good will of the parties to it and enforced only by public opinion, could make a serious contribution to international peace. As Secretary of State Henry L.Stimson declared in 1929: "[T]he efficacy of the Pact […] depends upon the sincerity of the Governments which are party to it. … Its sole sanction lies in the power of the public opinion of the countries … whose Governments have joined in the covenant."[19] Again in 1932, Stimson emphasized that the pact "provides for no sanctions of force. … Instead, it rests upon the sanction of public opinion, which can be made one of the most potent sanctions in the world. …"[20]

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[13] *See, e.g.*, Jack L. Goldsmith & Eric A. Posner, The Limits of International Law 13-14 (2005).

[14] *See, e.g.*, Zasloff, *supra* note 6, at 588. *See* Dellavalle, in this volume.

[15] *See, e.g.*, Hudson, *supra* note 1, at 19-20; Philip Bobbitt, The Shield of Achilles: War, Peace and the Course of History (2002) ("The reparations demanded by the Treaty were ludicrously punitive.").

[16] *See, e.g.*, Robert C. Byrd, The Senate: Classic Speeches, Vol. III, at 569-73 (Nov. 19, 1919) (text of Senator William E. Borah speech entitled "The League of Nations," in which Borah complains that the League is "a scheme of world control based on force" that ignores the fact that there is no guarantee of peace other than the power of public opinion), *available at* http://www.senate.gov/artandhistory/history/common/generic/Speeches_Borah_League.htm.

[17] *See* Sofaer, in this volume.

[18] General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

[19] Zasloff, *supra* note 6, at 652 (quoting Press Release, U.S. Department of State, Russian-Chinese Situation (Dec. 7, 1929) (statement by Henry L. Stimson on Dec. 2)).

[20] *Id.* at 665 (quoting Henry L. Stimson, *The Pact of Paris: Three Years of Development, Address Before the Council on Foreign Relations* (Aug. 8, 1932), *in* Henry L. Stimson & Mcgeorge Bundy, On Active Service in Peace and War 259 (1948)).

The gentle mediation championed by classical legal ideology and relied upon by the League of Nations had an early success or two when applied to disputes in which states that valued international law had relatively little at stake. For example, the League played a constructive role in brokering a Finnish-Swedish dispute over the Aaland Islands in 1920-1921.[21] A neutral commission set up by the League Council advised that the Aalands should remain part of Finland.[22] Sweden was disappointed but, "with a loyalty to the League characteristic of the Scandinavian countries," accepted the recommendation.[23]

However, the classical legal approach proved ineffective when applied to violations by Imperial Japan, Mussolini's Italy, and Hitler's Germany. The first major challenge was the Japanese military activity in Manchuria in 1931. Stimson noted that the Japanese attacks violated both the Kellogg-Briand Pact and the Nine-Power Treaty.[24] But the Administration quickly decided that the United States would not undertake any coercive measures (either military or economic) to enforce the treaties.[25] Stimson explained that "the policy of imposing sanctions of force … had been rejected by America in its rejection of the League of Nations.… America had deliberately chosen to rest solely upon treaties with the sanction of public opinion alone…."[26] Nor did any other country sanction Japan for these attacks.[27] The U.S. decided that its response to the Japanese military actions would be to refuse to recognize any Japanese gains from those actions.[28] Stimson apparently genuinely believed that non-recognition would "have a very potent effect."[29] He was wrong.

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[21] *See, e.g.*, George Scott, The Rise and Fall of the League of Nations 60 (1973).

[22] *Id.*

[23] *Id.*

[24] Zasloff, *supra* note 6, at 654.

[25] *Id.* at 655.

[26] *Id.* at 656 (quoting Henry Lewis Stimson, Diary (Nov. 13, 1931), microfilmed on Henry L. Stimson Diaries, r.4/vol.19/p.36, at 1 (Yale University Library Photographic Services)).

[27] Pivotal League of Nations Council deliberations on the Manchurian question occurred between the lectures by Hudson which served as the basis for Progress in International Organization and the book's publication. Hudson, *supra* note 1, at 92 n.1. Hudson characterized the Council's handling of the Manchurian question as an illustration of how international organization had advanced since World War I. *Id.* at 89, 91. Hudson declared that "[w]hether or not" the Council's "effort" to address the Sino-Japanese conflict over Manchuria "succeeds, we cannot fail to be grateful that it is being made, and certainly the peace is more stable because the Council is there and on the job." *Id.* at 92. Hudson was, in retrospect, wrong. The Council's handling of the Manchurian question represented no advance, and Hudson's celebration of process irrespective of results was short-sighted if not naïve. The Council's classical legal emphasis on gentle mediation accomplished nothing but clarification of the League's impotence in the face of Japanese aggression.

[28] *Id.* at 657-59.

[29] *Id.* at 658-59 (quoting Henry Lewis Stimson, Diary (Nov. 9, 1931), microfilmed on Henry L. Stimson Diaries, r.4/vol.19/p.24, at 2 (Yale University Library Photographic Services)).

Less than a month after the non-recognition policy was announced, the Japanese army significantly expanded its operations.

The Western democracies' failure to respond coercively to Japan's violations of international law in Manchuria was followed by failure to take serious enforcement action against a series of violations by Germany and Italy.[30] In March 1935, Germany denounced and proceeded to openly violate the disarmament provisions of the Versailles Treaty.[31] Consistent with classical legal ideology, Britain and the United States disregarded the particular nature of the Nazi regime, accepted German rearmament as reflecting a reasonable desire for "equality of rights,"[32] and no sanctions were imposed.[33]

In October 1935, Italy launched an invasion of Ethiopia, a League of Nations member.[34] This was "a massive and blatant armed attack on another League member, of precisely the kind that the [League Covenant] was originally designed to protect the world against."[35] The League of Nations deemed Italy's aggression to have violated the League of Nations Covenant.[36] Italy, which imported 85 percent of its oil, was clearly vulnerable to oil sanctions.[37] But during the six months it took the Italian army to conquer Ethiopia, the British and French governments "deferred debate on the oil sanction week after week," while negotiations in various *fora* tried to satisfy Italian grievances against Ethiopia with compromise offers of larger and larger portions of that country.[38] Finally, in May 1936, without oil sanctions ever having been imposed, the Italian army completed its conquest of Ethiopia.[39] Two months later, the effort to sanction Italy fell apart entirely.[40]

In March 1936, Germany, emboldened by the weak response to Italy, proceeded to militarize the Rhineland in violation of the treaties of Versailles and Locarno.[41]

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[30] *See, e.g.*, Paul Kennedy, The Parliament of Man: The Past, Present, and Future of the United Nations 19-20 (2006).

[31] *See, e.g.*, Scott, *supra* note 21, at 301-07.

[32] Stephen A. Schuker, *The End of Versailles, in* The Origins of the Second World War Reconsidered 49 (Gordon Martel ed., 1999).

[33] *See, e.g.*, Scott, *supra* note 21, at 307.

[34] Ruth Henig, Origins of the Second World War 38-39 (2004).

[35] F.S. Northedge, The League of Nations: Its Life and Times, 1920-1946, at 223 (1986).

[36] *See, e.g., id.* at 231-33.

[37] *Id.* at 235.

[38] *Id.* at 222, 228, 237-38, 240, 241.

[39] *Id.* at 243.

[40] *Id.* at 245.

[41] Henig, *supra* note 34, at 40.

A firm response could have headed off further aggression by Hitler.[42] Indeed, Hitler later stated:

> The forty-eight hours after the march into the Rhineland were the most nerve-racking in my life. If the French had then marched into the Rhineland we would have had to withdraw with our tails between our legs, for the military resources at our disposal would have been wholly inadequate for even a moderate resistance.[43]

But the French were unwilling to take military action and the British opposed even the French proposal for economic sanctions.[44] Again disregarding the particular nature of the Nazi regime, there was a widespread feeling in Britain that "although technically in breach of treaties, Germany was committing no great crime in sending troops into territory which was, after all, German."[45] Classical legalist "neutral principles," antipathy towards sanctions, and assumptions that all states could be reasoned with contributed once again to a failure to enforce international law against a rogue state. In the summer of 1937, Japan undertook a wholesale invasion of China, including the brutal "rape of Nanking," without incurring substantive sanctions.[46]

At the Munich conference of September 1938, British Prime Minister Neville Chamberlain and French Prime Minister Edouard Daladier met with Adolf Hitler and Benito Mussolini in an attempt to reach a negotiated settlement based on the neutral principle of self-determination.[47] As British historian A.J.P. Taylor wrote in *The Origins of the Second World War*, Chamberlain and Daladier "imagined that there was a 'solution' of the Sudeten German problem and that negotiations would produce it."[48] By this stage, British fear of the revitalized German air force, and its potential use against London if hostilities erupted, had also become a factor.[49] At Munich, the British and French leaders ceded to Hitler large portions of Czechoslovakia.[50] Upon his return from Munich, Chamberlain famously announced

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[42] *Id.* at 41.

[43] *Quoted in* Alan Bullock, Hitler: A Study in Tyranny 135 (1952).

[44] Henig, *supra* note 34, at 42; Donald Kagan, *World War I, World War II, World War III*, Commentary 26 (March 1987).

[45] Scott, *supra* note 21, at 371.

[46] Kennedy, *supra* note 30, at 22.

[47] A.J.P. Taylor, The Origins of the Second World War 195 (1963) (asserting that Chamberlain and Daladier "wished to prevent a European war; they also wished to achieve a settlement more in accordance with the great principle of self-determination than that made in 1919").

[48] *Id.*

[49] William Manchester, The Last Lion: Winston Spencer Churchill; Alone 1932-1940, at 346 (1988).

[50] *See* The Munich Pact, Sept. 29, 1938, *available at* http://www.yale.edu/lawweb/avalon/imt/munich1.htm.

to the British people that he had brought them "peace with honor … peace for our time," and urged them to "go home and get a nice quiet sleep."[51]

Hitler proceeded to seize the rest of Czechoslovakia six months later, again without incurring substantive sanctions. Indeed, even after the Nazi seizure of Czechoslovakia, Chamberlain insisted that he, for his part, intended to stay with his policy of substituting "the method of discussion for the method of force in the settlement of differences."[52] Only when Hitler invaded Poland six months after that, in September 1939, did the Western democracies finally stand up to Hitler's aggression. They were by then in a far worse strategic position than they would have been had they taken a stand just a few years before.[53]

Winston Churchill and a few other Western democratic figures had long urged much tougher enforcement of international law against the burgeoning Axis powers.[54] Churchill took seriously Hitler's statements, "repeated many times in speech and writing that he wanted the new nations [of Eastern Europe] obliterated."[55] The admonitions of Churchill and his supporters to take a strong stand against Hitler, Mussolini and the Japanese "seemed risky and ridiculous to their contemporaries … [b]ut they were right in the long run."[56]

Classical legal ideology had promised to replace coercion in the international arena with law.[57] But classical legal theory suffers from a fatal flaw: it treats nations as interchangeable players in the game of international relations.[58] In reality, national leaderships differ from each other in significant ways.[59] They may have very different views on the appropriate balance between nationalistic (or other ideological) goals and the value of human lives (those of their countrymen and/or foreign persons). They may also differently value compliance with (or having a reputation for compliance with) international law.[60] This approach provides its adherents with no practical response to a state or states with interests or values different from those embodied in the law and willing to threaten or to wage war to attain them.[61] While the Western democracies considered themselves

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[51] Neville Chamberlain, *Peace for our Time*, Sept. 30, 1938, http://www.britannia.com/history/docs/peacetime.html (speech text).

[52] Kagan, *supra* note 44, at 30.

[53] *Id.* at 21, 28.

[54] Kennedy, *supra* note 30, at 22.

[55] Kagan, *supra* note 44, at 26.

[56] *Id.* at 23.

[57] Zasloff, *supra* note 6, at 657.

[58] Kagan, *supra* note 44, at 31.

[59] *Id.*

[60] *See, e.g.*, Goldsmith & Posner, *supra* note 13, at 102-03.

[61] Zasloff, *supra* note 6, at 657.

to be in what Hudson deemed an "era of cooperation,"[62] and thus repeatedly restrained their behavior accordingly, the Axis powers were playing by the unrestrained rules of a prior "strictly competitive era."[63] The attempt to make progress in international organization by replacing coercion with unenforced law simply left the most ruthless states with a monopoly on coercion and law-abiding states with no practical means of keeping the peace.

C. *Law, Progress and the Failure to Prevent Nuclear Proliferation*

Today, international peace and security is once again being challenged by actors that place a low value on human life and feel unbound by international law. The foremost such actors include both states (such as Iran and North Korea) and non-state actors (such as Al Qaeda). Unlike the 1930s, when rogue states had to achieve massive buildups of conventional forces before they could pursue their ambitions, rogue actors today need only acquire and deploy nuclear weapons. Detonation of a single crude nuclear weapon in a major city could kill more than 500,000 people and cause over one trillion dollars in damage.[64]

Much as the Kellogg-Briand Treaty and League of Nations Covenant provided the preeminent legal instruments for addressing aggression before World War II, the Nuclear Nonproliferation Treaty (NPT)[65] and UN Charter provide the key legal instruments for stopping the spread of nuclear weapons today. Classical legal ideology no longer dominates international legal and international relations theory as it did prior to World War II.[66] In comparison with the inter-war years, when classical legal ideology denigrated the value of sanctions, today's foreign policy mandarins tend to view sanctions as an important tool. For example, the recent Report of the U.N. Secretary-General's High-level Panel on Threats, Challenges and Change found that "[t]he threat of sanctions can be a powerful

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[62] Hudson, supra note 1, at 72.

[63] *Id.*

[64] *See, e.g.*, Matthew Bunn, Anthony Wier & John P. Holdren, Controlling Nuclear Warheads and Materials: A Report Card and Action Plan 15-16 (2003).

[65] Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 UST 483, 729 U.N.T.S. 161 (entered into force March 5, 1970) [hereinafter NPT].

[66] *See, e.g.*, Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 Am. J. Int'l L. 64, 66 (2006) (describing how classical legal ideology, which "both provided the intellectual underpinning for international legal scholarship and guided actual American policy" prior to World War II, has been challenged and supplanted in that war's wake); Goldsmith & Posner, supra note 13, at 16 ("realism" is the current "dominant American theory of international relations.").

means of deterrence and prevention."[67] The Panel called sanctions a "vital though imperfect tool … when nations, individuals and rebel groups violate international norms, and where a failure to respond would weaken those norms, embolden other transgressors or be interpreted as consent."[68]

Nevertheless, when it comes to responding to rogue states, including nuclear proliferators, the interwar pattern often seems to be repeating itself. Philip Bobbitt noted in 2002 that much as violence was, during the inter-war years, "renewed on the international scene in a way that utterly discredited the Versailles parliamentary vision of world peace through law … in our day the similar vision animating the U.N. has been discredited by its performance in Bosnia, Rwanda, Cambodia, and elsewhere."[69] In light of space constraints, this chapter focuses on contemporary responses to nuclear proliferators. Given the exceptional threat nuclear weapons pose to peace and security far from proliferators' borders, one might expect the international community to enforce proliferation violations with particular alacrity. Yet with nuclear proliferation now as with aggression between the world wars, the international community has often failed to impose serious sanctions for even egregious violations.

This part of the chapter begins with a brief introduction to the initial successes, more recent failures, and high stakes inherent in the NPT. The chapter then focuses on the international community's responses to two current violators of nuclear nonproliferation norms – North Korea and Iran. In the course of analyzing the international community's responses to Iran's violations of nuclear nonproliferation law, the chapter will also note Iran's related history of violating with impunity other international legal obligations relating to peace and security.

I. *The Nuclear Nonproliferation Treaty*

The NPT entered into force in 1970.[70] In contrast with the anti-aggression treaties of the inter-war years, which quickly proved ineffective, the NPT stood for its first twenty-five years as a paradigm of progress in international organization. In 1963, President Kennedy predicted there could be as many as "fifteen or twenty" states

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[67] United Nations, Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change 55, U.N. Doc. A/59/565, Dec. 1, 2004 [hereinafter UN High-Level Panel].

[68] *Id*.

[69] Bobbitt, *supra* note 15, at 37. The Security Council's current failure to stop the Sudanese government's genocidal violation of international law in Darfur is the latest in the string of human rights enforcement failures. *See* Sofaer, in this volume; Morgan, in this volume; Foley, in this volume; Valek, in this volume.

[70] NPT, *supra* note 65.

possessing nuclear weapons by 1975.[71] In fact, the number of states possessing nuclear weapons grew by only one (from six to seven) between 1970 and 1995.[72] The NPT deserves much of the credit for this.[73] The NPT's membership grew from 43 states at the time of its entry into force in 1970 to 181 by the end of 1995.[74] Only a handful of major countries – including India, Israel and Pakistan – had failed to become NPT parties by the end of 1995.[75] One NPT party – North Korea – threatened to withdraw in 1993 but was induced to remain.[76] A rigorous international inspections regime begun in 1991 kept Iraq's nuclear weapons program in check.[77] Belarus, Kazakhstan, and Ukraine found themselves with nuclear weapons on their territory when the Soviet Union collapsed but chose in the early 1990s to transfer the weapons to Russia and join the NPT as non-nuclear weapons states.[78]

In January 1992, the Security Council announced that "the proliferation of all weapons of mass destruction constitutes a threat to international peace and security"

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[71] At a March 21, 1963 press conference, Kennedy stated: "I am haunted by the feeling that by 1970, unless we are successful there may be ten nuclear powers … and by 1975, fifteen or twenty." Richard Reeves, President Kennedy: Profile of Power 477 (1993) (quoting Pub. Papers of the Presidents: John F. Kennedy, 1961-1963, Mar. 21, 1963).

[72] The additional state was India, which detonated a single nuclear explosive device in 1974. George Perkovich, India's Nuclear Bomb 178 (1999). Britain, China, France, the Soviet Union, and the United States had all manufactured and exploded a nuclear weapon prior to January 1, 1967 and were thus admitted to the NPT as "nuclear-weapon states." Israel is a unique case in that it manufactured nuclear weapons during the 1960s, before the NPT opened for signature, but has still not announced its nuclear arsenal, either by way of a detonation or a public declaration, and has never joined the NPT. Avner Cohen, Israel and the Bomb 273-76 (1998) (Israel had a deliverable nuclear weapon capacity in June 1967, more than a year before the NPT was opened for signature and more than two years before the NPT entered into force); Michael Karpin, The Bomb in the Basement: How Israel Went Nuclear and What That Means for the World (2006).

[73] *See, e.g.*, UN High-Level Panel, *supra* note 67, at 39. ("The strong non-proliferation regime – embodied in IAEA and the [Nuclear Non-Proliferation] Treaty itself – helped dramatically to slow the predicted rate of proliferation.")

[74] *See* NPT (in chronological order by deposit), *available at* http://disarmament2.un.org/TreatyStatus.nsf.

[75] *Id.*

[76] *See, e.g.*, Douglas Jehl, *North Korea Says It Won't Pull Out of Arms Pact Now*, N.Y. Times, June 12, 1993, at 1; Joel S. Wit, Daniel B. Poneman & Robert L. Gallucci, Going Critical: The First North Korean Nuclear Crisis (2004).

[77] Two months after coalition forces liberated Kuwait, the U.N. Security Council adopted Resolution 687, which imposed strict limitations and a rigorous inspection regime on Iraq's nuclear program. S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991).

[78] *See, e.g.*, William C. Martel, *Why Ukraine Gave Up Nuclear Weapons: Nonproliferation Incentives and Disincentives, in* Pulling Back from the Nuclear Brink: Reducing and Countering Nuclear Threats (Barry R. Schneider & William L. Dowdy eds., 1998); Center for Nonproliferation Studies, *Belarus Nuclear Overview, Kazakhstan Nuclear Overview & Ukraine Introduction*, in *Nuclear Threat Initiative Country Profiles*, http://www.nti.org.

and that the Council members "commit themselves to working to prevent the spread of technology related to the research for or production of such weapons and to take appropriate action to that end."[79] "Threat" to "international peace and security" is the threshold legal test for exercise of the Council's authority to impose sanctions under Chapter VII of its Charter.[80] By equating nuclear proliferation with a "threat to international peace and security," the Council put potential nuclear proliferators on notice that the Council deemed itself legally authorized to sanction any proliferant activity, regardless of whether that activity is violative of the NPT or any other treaty.

By May 1995, when an NPT Review Conference voted to extend the NPT in perpetuity,[81] a robust nuclear nonproliferation regime had arisen, consisting of a vibrant NPT, several related multilateral treaties,[82] and the Security Council's notice that it had legal authority to take action against any nuclear proliferation. This regime, with the NPT at its forefront, seemed to have succeeded in converting the acquisition of nuclear weapons from an act of national pride into an act of international outlawry.[83] The treaty's growing number of adherents and extension in perpetuity represented clear progress towards a safer world.

The last dozen years have been less successful for the nuclear nonproliferation regime, which, by now, has lost much of its capacity to hinder proliferation.[84] The U.N. Secretary-General's High-level Panel on Threats, Challenges and Change recently warned of "the erosion and possible collapse of the whole

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[79] Note by the President of the Security Council, U.N. Doc. S/23500 (Jan. 31, 1992) (text of statement made by the President of the Security Council "on behalf of the members of the Council."). The Council later used similar formulations in S.C. Res. 1172, U.N. Doc. S/RES/1172 (June 6, 1998) (responding to the Indian and Pakistani nuclear tests) and S.C. Res. 1718, U.N. Doc. S/RES/1718 (Oct. 14, 2006) (responding to the North Korean nuclear test).

[80] U.N. Charter arts. 39, 41, 42.

[81] Barbara Crossette, *Treaty Aimed at Halting Spread of Nuclear Weapons Extended*, N.Y. Times, May 12, 1995, at A1.

[82] Other legally binding multilateral agreements which are generally considered part of the nuclear nonproliferation regime include the Treaty on South East Asia Nuclear Weapon-Free Zone, Dec. 15, 1995, 35 I.L.M. 635 (1995); South Pacific Nuclear Free Zone Treaty, *opened for signature* Aug. 6, 1985, 1445 U.N.T.S. 177 (entered into force Dec. 11, 1986); Treaty for the Prohibition of Nuclear Weapons in Latin America, *opened for signature* Feb. 14, 1967, 634 U. N.T.S. 281 (entered into force April 25, 1969).

[83] Thomas Graham, Jr., *Nuclear Nonproliferation and Nuclear Terrorism*, 17 Transnat'l Law. 89, 90 (2004).

[84] *See, e.g.*, Chamundeeswari Kuppuswamy, *Is the Nuclear Non-Proliferation Treaty Shaking at Its Foundations? Stock Taking After the 2005 NPT Review Conference*, 11 J. Conflict & Security L. 141 (2006) (describing despondence about NPT's future at December 2005 conference, hosted by UK, which included senior IAEA officials, diplomats from various countries, and non-governmental organizations).

[Nuclear Nonproliferation] Treaty regime," explaining that "[w]e are approaching a point at which the erosion of the non-proliferation regime could become irreversible and result in a cascade of proliferation."[85]

The first major step in the decline of the nuclear nonproliferation regime involved a set of Indian and Pakistani nuclear detonations in 1998.[86] Although India and Pakistan were not parties to the NPT, their flagrant proliferation, and the world's weak response, shook the NPT and did considerable damage to the nuclear nonproliferation regime.[87] Then, in 2003, North Korea announced its withdrawal from the NPT and its possession of nuclear weapons.[88] The Security Council failed to respond to either North Korean announcement. In October 2006, North Korea took another step toward a nuclear arsenal by detonating a nuclear weapon.[89] The Security Council responded with remarkably weak sanctions.

In June 2003, the International Atomic Energy Agency (IAEA) Director General determined that Iran had violated its NPT safeguards agreement.[90] For more than three years thereafter, the Security Council stood mute while Iran failed to redress its violations of the NPT safeguards agreement and refused to take various steps required by the IAEA Board of Governors.[91] When the international community finally imposed sanctions on Iran in December 2006, they were extraordinarily weak.

According to Professor Graham Allison, U.S. Assistant Secretary of Defense during the Clinton Administration and former dean of Harvard's Kennedy School of Government: "on the current path, a nuclear terrorist attack on America

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[85] U.N. High-Level Panel, *supra* note 67, at 39-40.

[86] John F. Burns, *Nuclear Anxiety: The Overview; Pakistan, Answering India, Carries Out Nuclear Tests; Clinton's Appeal Rejected*, N.Y. Times, May 29, 1998, at A1.

[87] *See, e.g.*, Spurgeon M. Keeney, Jr., *South Asia's Nuclear Wake-Up Call*, Arms Control Today (May 1998), http://www.armscontrol.org/act/1998_05/focmy98.asp.

[88] Glenn Kessler & John Pomfret, *North Korea's Threats a Dilemma for China; Ally's Nuclear Gamesmanship Rankles Beijing*, Wash. Post, Apr. 26, 2003, at A1 (reporting "North Korea's declaration this week that it possesses a nuclear arsenal and might sell some of it to the highest bidder").

[89] *See* Evan Ramstad, Jay Solomon & Gordon Fairclough, *Explosion by North Koreans Imperils Nuclear-Control Effort*, Wall St. J., Oct. 10, 2006, at 1.

[90] IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Report by the Director General*, at 7, IAEA Doc. GOV/2003/40 (June 6, 2003) [hereinafter IAEA DG Report of June 6, 2003] ("Iran has failed to meet its obligations under its Safeguards Agreement with respect to the reporting of nuclear material, the subsequent processing and use of that material and the declaration of facilities where the material was stored and processed.").

[91] *See* IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Report by the Director General*, IAEA Doc. GOV/2006/64 (Nov. 14, 2006) [hereinafter IAEA DG Report of Nov. 14, 2006] (describing Iranian non-compliance with steps required by the Board of Governors and provisions of U.N. Security Council Resolution 1696 of July 31, 2006).

in the decade ahead is more likely than not."[92] Robert L. Gallucci, the dean of the Georgetown University School of Foreign Service, who led U.S. negotiations with North Korea in the early 1990s, estimates that "it is more likely than not that Al Qaeda or one of its affiliates will detonate a nuclear weapon in a U.S. city within the next five to ten years."[93] Two of the most likely sources for such nuclear weapons are North Korea and Iran. Yet the response to both countries' nuclear weapons programs has thus far been remarkably weak.

This part of the chapter begins by reviewing two cases (Iraq and Libya) which demonstrated that economic sanctions can be effective in stopping the progress of a country's nuclear weapons program. The chapter then turns to the North Korean and Iranian cases, and analyzes the international community's reluctance to impose sanctions in response to those countries' nuclear proliferant steps.

II. *Sanctions Can Stop Nuclear Weapons Programs: The Cases of Iraq and Libya*

As the world has learned in retrospect, United Nations sanctions succeeded in preventing Saddam Hussein from reconstituting his nuclear weapons program between the Gulf War in 1991 and the coalition occupation of Iraq in 2003. At the time of its eviction from Kuwait in February 1991, Iraq "was only six months away" from a nuclear weapon.[94] In April 1991, the UN Security Council specified that the comprehensive economic sanctions imposed on Iraq following its invasion of Kuwait would be lifted only upon agreement by the Security Council that Iraq had completed various steps including elimination of its nuclear weapons program.[95] The Iraq Survey Group – which led the U.S. government's efforts to find Iraqi weapons of mass destruction following the 2003 coalition occupation of Iraq – determined that "Iraq's ability to reconstitute a nuclear weapons program progressively decayed" during the 12 years between Iraq's eviction from Kuwait in 1991 and the coalition occupation of Iraq in 2003.[96] Iraq Survey Group director Charles Duelfer concluded that

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[92] Graham Allison, Nuclear Terrorism: The Ultimate Preventable Catastrophe 15 (2004).

[93] Robert L. Gallucci, *Averting Nuclear Catastrophe: Contemplating Extreme Responses to U.S. Vulnerability*, 607 Annals Am. Acad. Pol. & Soc. Sci. 51, 52 (Sept. 2006).

[94] *The Lessons and Legacy of UNSCOM: An Interview with Ambassador Richard Butler*, Arms Control Today (June 1999), *available at* http://www.armscontrol.org/act/1999_06/rbjun99.asp (Ambassador Butler, an Australian diplomat, led U.N. inspections of Iraq from 1997 to 1999).

[95] S.C. Res. 687, ¶ 22, U.N. Doc. S/RES/687 (Apr. 3, 1991).

[96] Central Intelligence Agency, *Comprehensive Report of the Special Advisor to the DCI on Iraq's Weapons of Mass Destruction(Duelfer Report)* (Sept. 30, 2004 & March 2005 addenda), *available at* http://www.gpoaccess.gov/duelfer/index.html [hereinafter Iraq Survey Group Report].

"the decay that occurred in the Iraqi [nuclear weapons] program was a function of the sanctions, and … the extraordinary limits put on this regime … an extraordinary set of U.N. regulations."[97] The sanctions helped discourage Saddam from rebuilding his nuclear weapons program, contained his ability to rebuild it by blocking the import of key materials and technologies, and provided the UN with critical leverage to ensure Iraqi cooperation with UN inspections and monitoring.[98]

While the Iraq sanctions were in place, there was a widespread perception in the international community that they were needlessly hurting innocent Iraqis. However, investigations following Saddam's ouster have revealed that the responsibility for the vast majority of suffering attributed to the sanctions lies with the Hussein regime not the Security Council.[99] The Iraq Survey Group Report and the 2005 report of an independent, high-level inquiry committee appointed by the UN reveal that Saddam had succeeded in grossly manipulating the sanctions regime. The Iraqi government generated billions of dollars in illicit revenue from abuses of the sanctions regime.[100] It used some of that revenue to undermine support for sanctions by bribing foreign and UN officials,[101] and other revenue to go "on a palace and mosque building spree in the late 1990s, employing 7,000 construction workers."[102] At the same time, Saddam theatrically exaggerated the

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[97] *Duelfer Report on Iraqi Weapons of Mass Destruction Programs: Hearing of the Senate Armed Services Committee*, 108th Cong. (Oct. 6, 2004) (testimony of Charles Duelfer, Director of Iraq Survey Group) [hereinafter Duelfer Testimony].

[98] George A. Lopez & David Cortright, *Containing Iraq: Sanctions Worked*, 83 Foreign Aff. 90, (July-August 2004) (quoting Rolf Ekeus, chief U.N. weapons inspector in Iraq from 1991 to 1997, as follows: "Keeping the sanctions was the stick, and the carrot was that if Iraq cooperated with the elimination of its weapons of mass destruction, the Security Council would lift the sanctions. Sanctions were the backing for the inspections, and they were what sustained my operation almost for the whole time.").

[99] *See, e.g.*, Kenneth Katzman & Christopher M. Blanchard, *CRS Report For Congress: Iraq: Oil-For-Food Program, Illicit Trade, and Investigations*, Congressional Research Service, Jan. 9, 2006, at 6; *The Impact of the Oil-For-Food Programme on the Iraqi People*, Independent Inquiry Committee into the United Nations Oil-for-Food Program, Sept. 7, 2005, at 177-78, *available at* http://www.iic-offp.org/documents/Sept05/WG_Impact.pdf.

[100] For example, the Independent Inquiry Committee estimated that Iraq earned $12.8 billion in illicit revenue from 1990-2003. *The Management of United Nations Oil-for-Food Programme*, Independent Inquiry Committee into the United Nations Oil-for-Food Program, Vol. I. - The Report of the Committee, at 36, *available at* http://www.iic-offp.org/documents/Sept05/Mgmt_V1.pdf.

[101] Doreen Carvajal & Andrew Kramer, *Report on Oil-for-Food Scheme Gives Details of Bribes to Iraq*, N.Y. Times, Oct. 28, 2005, at A10; Warren Hoge, *The Many Streams That Fed the River of Graft to Hussein*, N.Y. Times, Oct. 28, 2005, at A10; Warren Hoge, *Panel Accuses Former U.N. Official of Bribery*, N.Y. Times, Aug. 9, 2005, at A1.

[102] Iraq Survey Group Report, *supra* note 96, at Vol. I, Regime Strategic Intent, at 21.

impact of the sanctions on average Iraqis,[103] and blamed the sanctions for depriving the average Iraqi of resources Saddam was himself siphoning off. Future sanctions designed to replicate the Iraq sanctions' success in halting Saddam Hussein's nuclear weapons program must be sure to avoid both harm to innocent civilians and the potential for such manipulations by the target country's leadership. Important recommendations for avoiding such harm and manipulations are contained in the UN inquiry committee report and a detailed U.S. Government Accountability Office (GAO) report on the Iraq sanctions.[104]

Strong UN Security Council sanctions[105] also induced Libya's government, "a regime that had become synonymous with international terrorism,"[106] to forsake terrorism[107] and completely and verifiably relinquish its nuclear, chemical and biological weapons programs.[108] The sanctions on Libya both

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[103] *See, e.g.*, David Rieff, *Were Sanctions Right*?, N.Y. Times Mag., July 27, 2003, at 41 (numerous examples of how "Saddam Hussein orchestrated a kind of traffic in suffering – all meant for the television cameras," including ordering hospitals to accumulate childrens' corpses in the morgue until "a sufficient number of bodies accumulated" and then "authorities would stage a mass funeral, railing against the sanctions, even though as often as not there was no connection between a particular child's death and the sanctions.").

[104] Government Accountability Office, United Nations: Lessons Learned from Oil for Food Program Indicate the Need to Strengthen UN Internal Controls and Oversight Activities (April 2006).

[105] Security Council Resolution 748 banned flights destined for or originating in Libya; banned the supply of aircraft, aircraft parts, or servicing to Libya; and banned arms sales to Libya. S.C. Res. 748 (Mar. 31, 1992). Resolution 883 froze various Libyan assets abroad and prohibited the export to Libya of oil pumping, transport and refining equipment. S.C. Res. 883 (Nov. 11, 1993).

[106] Stephen D. Collins, *Dissuading State Support of Terrorism: Strikes or Sanctions? (An Analysis of Dissuasion Measures Employed Against Libya)*, 27 Stud. in Conflict & Terrorism 16 (2004).

[107] In the wake of the sanctions imposed on Libya by Resolutions 748 and 883, Libya ended its support for terrorist organizations. Bruce W. Jentleson & Christopher A. Whytock, *Who "Won" Libya*?, Int'l Security (Winter 2005) at 68. Libya also turned over its two nationals who were suspected of involvement in the Pan Am 103 bombing, formally accepted responsibility for the bombing, and agreed to pay $2.7 billion in compensation to the victims' families. *Id*. at 70; Felicity Barringer, *Libya Admits Culpability in Crash of Pan Am Plane*, N.Y. Times, Aug. 16, 2003 at A6.

[108] Libya announced on December 19, 2003 that it had "decided of its free will to get rid of [WMD] materials, equipment and programs, and to become totally free of internationally banned weapons." *Libyan Call Against Arms*, N.Y. Times, Dec. 20, 2003, at A10 (text of Libyan government statement). Libya proceeded to allow a team of British and American government experts to enter the country and completely dismantle its WMD infrastructure by April 2004. Judith Miller, *Gadhafi's Leap of Faith*, Wall St. J., May 17, 2006, *available at* http://www.opinionjournal.com/forms/printThis.html?id=110008386 [hereinafter Miller, *Gadhafi's Leap*].

contained Qaddafi's ability to develop WMD[109] and ultimately coerced Qaddafi, including by threatening his grip on Libya.[110]

III. *North Korea*

The North Korean regime places little to no value on human life[111] and has an abysmal record of compliance with its international legal obligations.[112] North Korea has several times expressed willingness to sell nuclear weapons to the highest bidder,[113] reportedly sold proliferation-sensitive processed uranium to Libya,[114] and sold ballistic missiles to Iran, Syria, and Libya.[115] William J. Perry, a Stanford University professor who served as U.S. Secretary of Defense during the Clinton Administration, warned in September 2006 of the risk of North Korea selling a nuclear bomb to a terrorist group which then detonates it in a U.S. city. "If North Korea proceeds unchecked with building its nuclear arsenal," said Perry, "the risk of nuclear terrorism increases significantly."[116]

Yet the international community has been strikingly hesitant to take strong enforcement action against North Korean violations of the nuclear nonproliferation

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[109] Judith Miller, *How Gadhafi Lost His Groove*, Wall St. J., May 16, 2006, at A14; Miller, *Gadhafi's Leap, supra* note 108.

[110] Ray Takeyh, *The Rogue Who Came in from the Cold*, 80 Foreign Aff. 62 (May-June 2001).

[111] For example, during the 1990s, a period when the North Korean government was investing heavily in its nuclear weapons program, an estimated one million North Koreans died from famine *See, e.g., A Matter of Survival: The North Korean Government's Control of Food and the Risk of Hunger*, Human Rights Watch, May 2006, at 9, *available at* http://hrw.org/reports/2006/northkorea0506/.

[112] For example, North Korea complies with few if any of the numerous human rights treaties to which it is a party. *See, e.g.*, Situation of Human Rights in the Democratic People's Republic of Korea, U.N. G.A. 3d Comm., 61st Sess., U.N. Doc. A/C.3/61/L.37 (2006) (resolution, passed on Nov. 17, 2006, detailing North Korean human rights obligations and violations). North Korea is "one of the most tightly controlled countries in the world" and "the regime denies North Koreans even the most basic rights." Freedom House, *Freedom in the World – North Korea (2005), in* Freedom in the World 2005.

[113] *See, e.g.*, Kessler & Pomfret, *supra* note 88; David E. Sanger, *A Strategic Jolt*, N.Y. Times, Oct. 10, 2006, at A1 ("North Korea … has never developed a weapons system it did not ultimately sell on the world market, and it has periodically threatened to sell its nuclear technology.").

[114] David E. Sanger & William J. Broad, *Evidence is Cited Linking Koreans to Libyan Uranium*, N.Y. Times, May 23, 2004, at 1.

[115] *See, e.g., North Korea Profile: Missile: Exports*, Nuclear Threat Initiative, July 2003, at http://www.nti.org/e_research/profiles/NK/Missile/66_1279.html; Thom Shanker, *Russia Was Leader in Arms Sales to Developing World in '05*, N.Y. Times, Oct. 29, 2006, at 12 ("North Korea … shipped about 40 ballistic missiles to other nations in the four-year period ending in 2005, the only nation to have done so.").

[116] William J. Perry, *Proliferation on the Peninsula: Five North Korean Nuclear Crises*, 607 Annals Am. Acad. Pol. & Soc. Sci. 78, 84-5 (Sept. 2006).

regime. Indeed, during the eleven years between 1995 and July 2006 – a period in which North Korea was in non-compliance with its NPT safeguard obligations,[117] cheated on its Agreed Framework nonproliferation obligations,[118] withdrew from the NPT,[119] and announced it had manufactured nuclear weapons[120]– the Security Council issued not a single resolution referring to any of these North Korean actions.[121]

A strong response by the international community during this period might well have stopped North Korea from developing its nuclear arsenal. The North Korean regime appears to be extremely vulnerable to sanctions, so long as they are strong and include Chinese participation.[122] China supplies 70 to 90 percent of North Korea's oil needs.[123] When China, in 2003, for two days closed its oil pipeline to North Korea for "maintenance," the North Korean regime was quick to offer concessions.[124]

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[117] As Dr. Pierre Goldschmidt, who served as Deputy Director General of the IAEA from 1999 to 2005, put it in May 2006:

> Since 1993 North Korea has been declared every year by the IAEA to be in non-compliance with its safeguard agreements and reported to the United Nations Security Council (UNSC), without the latter deciding to take any action. In 2003, North Korea notified that it was withdrawing from the NPT (the first time this has happened in the history of the Treaty) and in 2004 declared possessing nuclear weapons, without any move from the UNSC. …

Pierre Goldschmidt, *Is the Nuclear Non-proliferation Regime in Crisis? If so, why? Are there remedies*?, Address Before the Charlottesville Committee On Foreign Relations (May 11, 2006), at 4, *available at* http://www.carnegieendowment.org/static/npp/Goldschmidt_CCFR_May_2006.pdf [hereinafter Goldschmidt, *Crisis*].

[118] Agreed Framework Between the United States of America and the Democratic People's Republic of Korea, October 21, 1994, *available at* http://www.armscontrol.org/documents/af.asp; IAEA, *Fact Sheet on DPRK Nuclear Safeguards, available at* http://www.iaea.org/NewsCenter/Focus/IaeaDprk/fact_sheet_may2003.shtml [hereinafter IAEA DPRK Fact Sheet]. Andrea Koppel & John King, *U.S.: North Korea Admits Nuke Program*, CNN.com, Oct. 15, 2002, *at* http://archives.cnn.com/2002/US/10/16/us.nkorea/.

[119] IAEA DPRK Fact Sheet, *supra* note 118.

[120] Kessler & Pomfret, *supra* note 88.

[121] Goldschmidt, *Crisis, supra* note 117, at 4. *See* Oellers-Frahm, in this volume.

[122] *See, e.g.*, Thomas L. Friedman, *The Bus is Waiting*, N.Y. Times, Oct. 11, 2006, at A27 ("If China told North Korea that unless it dismantled its nuclear program and put its facilities under U.N. inspection, Beijing would cut off its energy and food, Kim Jong-il would relent … Anything less than such an explicit Chinese threat will mean a nuclear North Korea ….); Anna Fifield, *The Search for Pyongyang's Pressure Point*, Fin. Times, Oct. 14, 2006, at 8.

[123] Choe Sang-Hun, *Can Sanctions Touch Pyongyang*?, Int'l Herald Trib., Oct. 11, 2006, *available at* http://www.iht.com/articles/2006/10/11/news/north.php.

[124] Jane Macartney, *Anger in Beijing Indicates Rethink Over Former Ally*, Times of London, Oct. 10, 2006, *available at* http://www.timesonline.co.uk/article/0,,25689-2396153,00.html.

But China is concerned that significant economic or other pressure on North Korea might cause the North Korean regime to collapse, thereby flooding China with refugees that would be costly to care for.[125] So China, armed with its Security Council veto, took the lead in preventing a response by the Security Council to North Korea's proliferation. For example, China, in the spring of 2003, blocked a Security Council statement criticizing North Korea for its NPT non-compliance and withdrawal, declaring that such a statement would "complicate" diplomacy with North Korea.[126] Russia backed the Chinese position, with Russia's UN ambassador urging "dialogue" and stating, "I think it is a bad idea to condemn."[127] Both the Russian and the Chinese statements opposing sanctions would have been at home amongst the classical legal ideologists of the inter-war years. Two weeks later, North Korea responded to this forbearance by declaring that it "possesses a nuclear arsenal and might sell some of it to the highest bidder."[128] The UN Security Council still took no action.

Undeterred by the international community's weak responses to its previous blows to the nuclear nonproliferation regime, North Korea, on October 9, 2006, took another step towards a nuclear arsenal by testing a nuclear weapon.[129] On October 14, 2006, the Security Council responded to North Korea's nuclear test announcement with what U.S. President Bush hailed as a "tough" resolution.[130] Resolution 1718 banned the export to North Korea of items that could contribute to North Korea's nuclear, biological and chemical weapons or ballistic missile programs; heavy military equipment such as battle tanks and warships; and luxury goods.[131] The resolution also banned international travel by, and froze the overseas assets of, people associated with North Korea's WMD programs.[132] In addition, the resolution authorized all countries to inspect cargo going in and out of North Korea to detect illicit weapons.[133]

Japan had urged the adoption of "comprehensive sanctions."[134] But Russia and China refused to let the resolution go forward until it was heavily watered

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[125] *See, e.g.*, Kessler & Pomfret, *supra* note 88.

[126] Colum Lynch & Doug Struck, *China Blocks U.N. Statement Condemning N. Korea; Move Hampers Security Council's Effort to Pressure Pyongyang over Nuclear Weapons Program*, Wash. Post, Apr. 8, 2003, at A16.

[127] Colum Lynch, *U.N. Council Stalled on N. Korea; U.S., Allies Suspend Push for Criticism of Nuclear Efforts*, Wash. Post, Apr. 10, 2003, at A19.

[128] Kessler & Pomfret, *supra* note 88.

[129] *See* Ramstad, Solomon & Fairclough, *supra* note 89.

[130] *The North Korean Nuclear Crisis; Bush Comments*, Hous. Chron., Oct. 15, 2006, at A19.

[131] S.C. Res. 1718, U.N. Doc. S/RES/1718 (Oct. 14, 2006).

[132] *Id.*

[133] *Id.*

[134] Fifield, *supra* note 122.

down.[135] As a result, the sanctions are likely too weak to convince the North Korean regime that its nuclear weapons program comes at too high a price and must be relinquished.[136] Having spent vast sums to successfully develop a nuclear arsenal, the North Korean leadership could hardly be expected to surrender it in exchange for items that could contribute to building a WMD program that has already achieved its major goal, heavy military equipment that is far less necessary to North Korea's defense now that it has nuclear weapons, and luxury goods. Nor were the sanctions on North Korea sufficiently strong to change the cost-benefit calculations of, and thus deter, other countries that might be contemplating nuclear proliferation. Soon after the North Korean sanctions were imposed, it became clear that Iran found their weakness encouraging.[137]

In February 2007, North Korea entered into an agreement with the United States, China, Japan, Russia and South Korea under which North Korea committed to shutting down its Yongbyon nuclear facility in exchange for incentives including 50,000 tons of heavy fuel oil.[138] This agreement appears to be a small step forward, in that it may help cap the size of North Korea's nuclear arsenal. But the agreement is non-binding (indeed it was not even signed but simply issued as a joint statement), freezes only North Korea's plutonium facilities (which were anyway at the end of their useful lives)[139] but not its uranium program, provides little-to-no assurance that North Korea will agree to effective verification of its compliance with the agreed freeze, does not include a North Korean commitment not to detonate or sell nuclear weapons, risks being seen by other potential proliferators as rewarding proliferation, and leaves to subsequent negotiations in the indefinite future any North Korean relinquishment of the nuclear weapons and weapons-grade fissile material it already possesses.[140] The

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[135] *See, e.g.*, Warren Hoge, *Security Council Backs Sanctions on North Korea*, N.Y. Times, Oct. 15, 2006, at 1; Colum Lynch & Glenn Kessler, *U.N. Votes to Impose Sanctions on N. Korea*, Wash. Post, Oct. 15, 2006, at A1.

[136] Fifield, *supra* note 122 (quoting sanctions expert Marcus Noland, who stated that "If the sanctions were going to have any shot at working they would have to be comprehensive sanctions, as suggested by Japan.").

[137] Nazila Fathi, *Iran Seems Unmoved by Specter of Sanctions Against North Korea*, N.Y. Times, Oct. 19, 2006, at A14; Nazila Fathi, *Using a 2nd Network, Iran Raises Enrichment Ability*, N.Y. Times, Oct. 28, 2006, at A5.

[138] *Text: The Agreement*, Int'l Herald Trib., Feb. 13, 2007, *available at* http://www.iht.com/bin/print.php?id=4578209 [hereinafter February 2007 North Korea Agreement].

[139] Bennett Ramberg, *How to Live with a Nuclear North Korea*, Int'l Herald Trib., Feb. 15, 2007, *available at* http://www.iht.com/articles/2007/02/15/opinion/edramberg.php.

[140] *See, e.g.*, Jim Yardley, *Accord Reached on North Korean Nuclear Arsenal*, Int'l Herald Trib., Feb. 12, 2007, *available at* http://www.iht.com/articles/2007/02/13/asia/web.0213korea.php; February 2007 North Korea Agreement, *supra* note 138.

February 2007 agreement thus leaves nuclear nonproliferation in a far worse state than if the Security Council had, before North Korea built its nuclear arsenal, used comprehensive economic sanctions to make it clear to North Korea that its nuclear weapons program was coming at too high a price and had to be relinquished. Progress in combating the global threat posed by North Korean nuclear proliferation has been subordinated to one country's unwillingness to risk the economic costs of North Korean refugees.

IV. *Iran*

The Islamic Republic of Iran has flouted international law with impunity since its founding in 1979 by Ayatollah Ruhollah Khomeini. When Khomeini died in 1989, Ayatollah Ali Khamenei replaced him as Supreme Leader, Iran's most powerful position.[141] Khamenei had served as President of Iran, the country's second most powerful position, from 1981 to 1989, and continues as Supreme Leader at the time of this writing.[142] Khamenei's rise to the position of Supreme Leader unfortunately has done nothing to temper Iran's penchant for egregiously violating international law.

Early violations of international law by the Islamic Republic of Iran included the seizure of the U.S. embassy in Teheran and its diplomats for 444 days beginning in November 1979,[143] and the Iranian-directed bombing of the U.S. Embassy in Beirut in 1983.[144] Iran's violent breaches of international law

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[141] Profile: Ayatollah Ali Khamenei, BBC News, *available at* http://news.bbc.co.uk/2/hi/middle_east/3018932.stm. At this writing, the President of Iran is Mahmoud Ahmadinejad.

[142] *Id.*

[143] *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24). The International Court of Justice ruled that the hostage seizure and holding put Iran in violation of international diplomatic law including the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963.

[144] On April 18, 1983 a truck bomb demolished the U.S. Embassy in Beirut, killing sixty-three people. In 2003, in a case brought by survivors of the attack and relatives of the deceased, U.S. District Court Judge John D. Bates ruled that the government of the Islamic Republic of Iran had orchestrated, funded, and directed the bombing through its agents and co-conspirators who were affiliated with the terrorist organization now known as Hezbollah. Dammarell v. Islamic Republic of Iran, 281 F. Supp. 2d 105 (D.D.C. 2003); Dammarell v. Islamic Republic of Iran, 404 F. Supp. 2d 261 (D.D.C. 2005). Iran's involvement in this bombing violated both the diplomatic and consular conventions and Article 2(4) of the UN Charter, which states: "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 manner inconsistent with the purposes of the United Nations." In Resolution 748 of March 31, 1992, the Security Council reaffirmed as follows that acts of terrorism violate this provision of the Charter: "Reaffirming that, in accordance with the principle in Article 2, paragraph 4, of the Charter of the United

continued during the 1990s. In March 1992, Hizbollah, in coordination with the Iranian Embassy, bombed the Israeli Embassy in Argentina, killing twenty-nine.[145] Another flagrant Iranian violation occurred in September 1992, when Iran assassinated four Iranian Kurdish dissidents in Berlin.[146] A German judge ruled that the Berlin killings had been ordered by Iran's top political leadership, which included Iran's Supreme Leader, Ayatollah Ali Khamenei, and Hashemi Rafsanjani, Iran's President at the time and Iran's third ranking official at the time of this writing.[147] In July, 1994, a truck filled with explosives destroyed the Jewish cultural center in Buenos Aires, Argentina, killing 85 people.[148] This too was the work of Iran, according to experts including Kenneth Pollack, the National Security Council director for Iranian affairs during much of the Clinton Administration.[149] Indeed, in late 2006 an Argentine federal judge issued international arrest warrants for Rafsanjani and seven other Iranian officials (including a former foreign minister) suspected of responsibility for the attack.[150] Remarkably, of all these flagrant violations of international law, only the U.S. embassy seizure was condemned by the Security Council[151] and in none of these cases did the Security Council or, for that matter, the European Union or any other group of states impose economic or other significant sanctions.

Iran has in recent years continued flouting international law with impunity. Iranian President Ahmadinejad's repeated urging that Israel be wiped off the map violates both Article 2(4) of the UN Charter[152] and the Genocide Convention's

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Nations, every State has the duty to refrain from organizing, instigating, assisting, or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force."

145 Kenneth M. Pollack, The Persian Puzzle: The Conflict Between Iran and America 267 (2005). Iran's involvement in this attack violated both the diplomatic and consular conventions and Article 2(4) of the U.N. Charter.

146 Alan Cowell, *Berlin Court Says Top Iran Leaders Ordered Killings*, N.Y. Times, April 11, 1997, at A1. Iran's involvement in these killings violated Article 2(4) of the U.N. Charter.

147 *Id.; See, e.g., Iran: Who Holds the Power*?, BBC News, *available at* http://news.bbc.co.uk/2/shared/spl/hi/middle_east/03/iran_power/html/expediency_council.stm; Pepe Escobar, *Brave new (Middle Eastern) world; Part 2: The Iranian equation*, Asia Times, Sept. 20, 2002, *available at* http://www.atimes.com/atimes/Middle_East/DI20Ak02.html.

148 Pollack, *supra* note 145, at 267.

149 *Id.*

150 *Argentina Seeks Arrest of Iran's Ex-Leader in 1994 Bombing Inquiry*, N.Y. Times, Nov. 10, 2006, at A5.

151 S.C. Res. 457 (Dec. 4, 1979). *See also* S.C. Res. 461 (Dec. 31, 1979).

152 The statements violate the ban, contained in Article 2(4), on "the threat … of force against the territorial integrity or political independence of any state."

prohibition of "direct and public incitement to commit genocide."[153] The Security Council,[154] former Secretary-General Annan,[155] and the European Union[156] have issued statements condemning Ahmadinejad's statements and pointing out their inconsistency with the UN Charter, but no sanctions have been imposed.

Iran is currently the world's most active state sponsor of terrorism, providing Hizballah and various Palestinian terrorist groups including Hamas with "extensive funding, training and weapons."[157] Iran's support for these groups violates several provisions of UN Security Council Resolution 1373, including its requirement that states "refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts."[158] Iran's continued harboring of senior Al Qaeda officials[159] violates Resolution 1373's requirement that all states "Deny safe haven to those who finance, plan, support, or commit terrorist acts."[160] The Security Council has neither condemned any of these Iranian violations of Resolution 1373 nor imposed any sanctions in response to them.

Why has the international community repeatedly failed to sanction Iran for its violations of international law? The international community has other priorities. As German Foreign Minister Klaus Kinkel sought to justify Germany's push to return EU ambassadors to Tehran less than three weeks after the German court found Iran's leadership guilty of murder in Berlin: "You cannot reproach us for following our economic interests."[161] Economic interests, at least with respect to Iran, have trumped progress in the fight against terrorism.

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[153] Convention on the Prevention and Punishment of the Crime of Genocide, art. 3, Dec. 9, 1948, 78 U.N.T.S. 277.

[154] Nazila Fathi, *Iranian President Stands by Call to Wipe Israel Off Map*, N.Y. Times, Oct. 29, 2005, at A3; Stephanie Dujarric, Highlights of the Spokesman's Noon Briefing, *Security Council Condemns Iranian President's Remarks About Israel* (Oct. 31, 2005), available at http://www.un.org/News/ossg/hilites/hilites_arch_view.asp?HighID=417.

[155] Highlights of the Spokesman's Noon Briefing, *Annan Dismayed by Remarks About Israel by Iranian President* (Oct. 27, 2005), *available at* http://www.un.org/News/ossg/hilites/hilites_arch_view.asp?HighID=416; Highlights of the Spokesman's Noon Briefing, *Annan is Clear in Condemnation of Iranian President's Comments on Israel* (Dec. 14, 2005), *available at* http://www.un.org/News/ossg/hilites/hilites_arch_view.asp?HighID=452.

[156] Iran, Statements by the UK Presidency of the European Union (Dec. 17, 2005), *available at* http://www.fco.gov.uk.

[157] U.S. Department of State, Country Reports on Terrorism: 2005, at 173, *available at* http://www.state.gov/s/ct/rls/crt/cl7689.htm.

[158] S.C. Res. 1373 ¶ 2(a) (Sept. 28, 2001).

[159] *See, e.g.*, U.S. Department of State, Country Reports on Terrorism: 2005, *supra* note 157, at 173.

[160] S.C. Res. 1373, *supra* note 158, ¶ 2(c).

[161] *Mixed Response from Europe on Ruling Linking Iran to Killings*, N.Y. Times, April 30, 1997, at A5.

The international community has responded to two decades of Iranian non-compliance with its nuclear nonproliferation obligations as weakly as it has responded to Iranian terrorism and North Korea's nuclear nonproliferation violations. In August 2002, the IAEA "discovered an 18-year pattern of noncompliance by Iran with its obligations to report all its nuclear activities."[162] Over those eighteen years, Iran built major nuclear facilities without telling the IAEA, and without the IAEA detecting them.[163] In June 2003, the IAEA Director General formally reported Iran's non-compliance to the IAEA's Board of Governors.[164] Yet the Board of Governors failed to report Iran's non-compliance to the Security Council until February 2006, two-and-a-half years later.[165] This two-and-a-half year delay in reporting Iran clearly violated the IAEA's own governing statute, which gives the Agency no choice but to promptly report non-compliance to the Security Council and General Assembly.[166]

While the international community negotiated with Iran during those two-and-a-half years, Iran "made stunning advances in mastering all technological aspects of uranium conversion and enrichment without incurring any negative repercussion."[167] Iranian officials have crowed about how the negotiations between it and the West have bought Iran time to move forward with its nuclear program.[168] They insist that this progress has created "facts on the ground" that are "irreversible."[169]

Iran's pursuit of nuclear weapons raises several concerns. A nuclear umbrella might embolden Iran to step up its already aggressive support for terrorism, and

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[162] Pierre Goldschmidt, *Decision Time on Iran*, N.Y. Times, Sept. 14, 2005, at A29.

[163] *See* Nazila Fathi, *Iran: Minister Says "Nuclear Spies" Worked for U.S. and Israel*, N.Y. Times, Dec. 23, 2004, at A11 (noting that in 2002, an Iranian dissident group "revealed the existence of a secret nuclear facility in Natanz and a heavy-water complex near Arak. At the time, the United Nations nuclear monitoring agency was unaware of them.").

[164] IAEA DG Report of June 6, 2003, *supra* note 90, at 7.

[165] IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Report by the Director General*, at 2, IAEA Doc. GOV/2006/15 (Feb. 27, 2006).

[166] *See* IAEA, *Statute of the IAEA*, art. XII(C), *available at* http://www.iaea.org/About/statute_text.html.

[167] Goldschmidt, *Crisis, supra* note 117, at 8.

[168] *See, e.g.*, Phillip Sherwell, *How We Duped the West, By Iran's Nuclear Negotiator*, Telegraph, May 3, 2006, *available at* http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/03/05/wiran05.xml; Middle East Media Research Institute, *Chief Iranian Nuclear Affairs Negotiator Hosein Musavian: The Negotiations with Europe Bought Us Time to Complete the Esfahan UCF Project and the Work on the Centrifuges in Natanz*, Aug. 12, 2005, *available at* http://memri.org/bin/articles.cgi?Page=archives&Area=sd&ID=SP95705.

[169] Elaine Sciolino, *U.N. Agency Says Iran Falls Short on Nuclear Data*, N.Y. Times, Apr. 28, 2006, at A1 (quoting Gholamreza Aghazadeh, head of Iran's Atomic Energy Organization).

an Iranian nuclear arsenal seems likely to spur proliferation by its neighbors.[170] In addition, some have raised concerns that Iran's fanatically religious leadership might welcome a nuclear war as a means of achieving their avowed goal of wiping the United States and Israel off the map[171] and hastening the arrival of the messianic Twelfth Imam.[172] The concern is that, while mutual deterrence kept the United States and Soviet Union from attacking each other during the Cold War, the Iranian leadership might be undeterrable.

On December 23, 2006, in Resolution 1737, the Security Council finally imposed sanctions on Iran for its nuclear nonproliferation violations.[173] Three months later, in Resolution 1747 of March 24, 2007, the Security Council responded to Iran's failure to comply with the requirements of Resolution 1737 by slightly augmenting its sanctions on Iran.[174] Prior to assessing the sanctions imposed by Resolutions 1737 and 1747, it is important to consider Iran's economic situation and its vulnerabilities. Iran's economy has been boosted, and its negotiating leverage enhanced, by its possession of the world's second-largest oil reserves.[175] However, its heavy dependence on oil export revenue and other foreign trade leaves Iran highly vulnerable to economic sanctions.[176] The Iranian government depends on oil export revenues for 40-50

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[170] Fears that an Iranian nuclear arsenal will unleash a cascade of proliferation across the Middle East were strengthened by the disclosure in November 2006 that six Arab states have recently begun to accelerate efforts to acquire nuclear technology. Richard Beeston, *Six Arab States Join Rush to Go Nuclear*, Times of London, Nov. 4, 2006, *available at* http://www.timesonline.co.uk/article/0,,251-2436948,00.html.

[171] *See, e.g., Iranian Leader: Wipe Out Israel*, CNN, Oct. 26, 2005, *available at* www.lexis.com (quoting Iranian President Mahmoud Ahmadinejad as saying "God willing, with the force of God behind it, we shall soon experience a world without the United States and Zionism.").

[172] *See, e.g.*, Bernard Lewis, *August 22*, Wall St. J., Aug. 8, 2006, at A10 (Princeton Prof. Lewis, a leading expert on Islam, describes "the apocalyptic worldview of Iran's present rulers" and asserts that "[f]or people with this mindset, MAD [mutual assured destruction] is not a constraint, it is an inducement."); *An Apocalyptic Religious Zealot Takes on the World*, Der Spiegel Online, May 30, 2006, *available at* http://www.spiegel.de/international/spiegel/0,1518,418691,00.html; Amir Taheri, *The Frightening Truth of Why Iran Wants a Bomb*, Telegraph, Apr.16, 2006, *available at* http://www.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2006/04/16/do1609.xml ("Ahmadinejad … boasts that the [Hidden] Imam gave him the presidency for a single task: provoking a 'clash of civilizations' in which the Muslim world, led by Iran, takes on the 'infidel' West, led by the United States, and defeats it …").

[173] S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006).

[174] S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007).

[175] Neil King, Jr. & Mark Champion, *Nations' Rich Trade with Iran is Hurdle for Sanctions Plan*, Wall St. J., Sept. 20, 2006, at A1.

[176] *See, e.g.*, Friedman, *supra* note 123 ("if China and Iran told Russia that they would join in the toughest possible U.N. economic sanctions on Tehran if it persisted in its nuclear program, the ayatollahs would … back down.").

percent of its budget,[177] and some 90 percent of Iran's population receives its income from the state.[178] Remarkably for a country that has invested so much in nuclear programs, Iran has never developed sufficient capacity to refine the petroleum it pumps out of its own soil, and therefore depends on other countries to refine 40 percent of the gasoline it needs for internal consumption.[179] Despite its oil wealth, Iran's economy has been so grossly mismanaged that the living standard of the average Iranian today is lower than it was at the time of the Islamic revolution in 1979.[180] According to official reports, unemployment among Iranian young people is at 34 percent and headed towards 50 percent.[181] Wealthy Iranians, spooked by President Ahmadinejad and his confrontational ways, have already moved over $200 billion out of Iran since he took office in 2005.[182] Many Iranians, including student groups, have strongly criticized the Iranian government for endangering its economy and international relationships over the nuclear issue; sanctions could strengthen the hand of these opposition figures.[183]

Invoking Chapter VII of the UN Charter, Resolution 1737 ordered Iran to suspend various proliferation-sensitive nuclear activities, including those related to enrichment, reprocessing, and heavy water.[184] The resolution also ordered Iran to "provide such access and cooperation as the IAEA requests to be able to verify" the suspensions and "resolve all outstanding issues."[185] Resolution 1737 also imposed several sanctions on Iran until such time as Iran has fully complied with the requirements of the Security Council and IAEA.[186] These sanctions include: 1) restrictions on the export to Iran of certain specified nuclear and ballistic missile

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[177] United States Energy Information Administration, *OPEC Revenues: Country Details: Iran*, June 16, 2005, *available at* http://www.eia.doe.gov/emeu/cabs/orevcoun.html.

[178] Council on Foreign Relations, Lionel Beehner, *What Sanctions Mean for Iran's Economy*, May 5, 2006, *available at* http://www.cfr.org/publication/10590/what_sanctions_mean_for_irans_economy.html?breadcrumb=default.

[179] Bret Stephens, *How to Stop Iran (Without Firing a Shot)*, Wall St. J., May 16, 2006, at A15.

[180] Council on Foreign Relations, *Takeyh: Iran's Populace Largely Opposes Nuclear Program*, Mar. 2, 2005, *available at* http://www.cfr.org/publication/7885/takeyh.html.

[181] Jahangir Amuzegar, *Iran's Unemployment Crisis*, Middle East Economic Survey, Oct. 11, 2004, *available at* http://www.mees.com/postedarticles/oped/a47n41d01.htm.

[182] Stephens, *supra* note 179.

[183] *See, e.g.*, Golnaz Esfandiari, *Iran: Reformist Student Group Calls For Suspension Of Nuclear Activities*, Radio Free Europe/Radio Liberty, April 19, 2006, *available at* http://www.rferl.org/featuresarticle/2006/04/3684d1a3-43d9-4450-be3f-1a43f5b1afe8.html; Neil King, Jr., *Dissent In Tehran Buoys West*, Wall St. J., Feb. 9, 2007, at A5.

[184] S.C. Res. 1737, *supra* note 173, ¶ 2.

[185] *Id.* ¶ 8.

[186] *Id.* ¶ 24(b).

items, materials, equipment, and technology;[187] and 2) a freeze of foreign assets of twelve named officials and ten entities associated with Iran's proliferation sensitive nuclear activities or the development of nuclear weapon delivery systems.[188] In addition, Resolution 1737 requested that the IAEA Director General provide, within sixty days, a report on Iranian compliance with the resolution.[189] The resolution committed the Council, in the event that the report found Iranian noncompliance, to adopting "further appropriate measures under Article 41" of the UN Charter (*i.e.*, measures not involving the use of armed force) "to persuade Iran to comply with this resolution and the requirements of the IAEA."[190] On February 22, 2007, the IAEA Director General reported that Iran had not complied with the requirements of Resolution 1737.[191]

In response to Iran's continuing non-compliance, the Council, in Resolution 1747, imposed a ban on the export of arms by Iran[192] and extended the foreign asset freeze imposed by Resolution 1737 to fifteen additional named Iranian officials and thirteen additional Iranian entities.[193] Resolution 1747 also requested that the IAEA Director General provide, within sixty days, a report on Iranian compliance with Resolutions 1737 and 1747.[194] In addition, Resolution 1747 committed the Council, in the event that the report found Iranian noncompliance, to adopting "further appropriate measures under Article 41" of the UN Charter to "persuade Iran to comply."[195] A U.S. National Intelligence Estimate (NIE) in November 2007 determined that Iran had likely halted its nuclear weapon design work.[196] However, the most difficult part, by far, of building a nuclear weapon is not the design of the explosive mechanism but rather producing the fissile material (highly enriched uranium or plutonium) needed to fuel the bomb,[197] and Iran was in January 2008 publicly continuing to forge ahead

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[187] *Id.* ¶¶ 3-6.
[188] *Id.* ¶¶ 12-15, annex.
[189] *Id.* ¶ 23.
[190] *Id.* ¶ 24(c).
[191] IAEA, *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolution 1737 (2006) in the Islamic Republic of Iran, Report by the Director General*, IAEA Doc. GOV/2007/8 (Feb. 22, 2007).
[192] S.C. Res. 1737, *supra* note 173, ¶ 5.
[193] *Id.* ¶ 4, annex I.
[194] *Id.* ¶ 12.
[195] *Id.* ¶ 13(c).
[196] National Intelligence Council, *Iran: Nuclear Intentions and Capabilities*, Nov. 2007, available at http://www.dni.gov/press_releases/20071203_release.pdf.
[197] *See, e.g.,* William J. Broad, *The Thin Line Between Civilian and Military Nuclear Programs,* N.Y. Times, Dec. 5, 2007, at A13.

with its fissile material production efforts, in clear violation of the prohibitions contained in Resolution 1747.[198]

Resolutions 1737 and 1747 were too weak to coerce Iran into compliance, contain Iran's ability to advance its nuclear weapons program, or deter other states from following Iran's lead and developing their own nuclear weapons program.[199] The total costs imposed on the Iranian leadership by the resolutions were far less than the costs it would expect to incur from complying with the resolutions' demands. Resolution 1737's ban on exporting sensitive technology to Iran is riddled with exceptions, including a large one for exports to the Russian-built Iranian nuclear reactor at Bushehr.[200] The asset freeze is expected to have little to no impact, as the long negotiations over the sanctions resolution provided the targets with sufficient advance warning that they could withdraw their overseas assets before the freeze was imposed.[201] While Resolution 1747's ban on arms exports by Iran will hinder Iran's ability to supply its terrorist proxies such as Hezballah, arms sales have not been a major source of revenue for the Iranian regime.

The sanctions imposed by Resolutions 1737 and 1747 were far weaker than the sanctions which stopped the Iraqi and Libyan nuclear weapons programs. The Resolution 1737 and 1747 sanctions were weak because Russia, with support from China, refused to let the resolutions go forward until they were heavily watered down.[202] Indeed, the weakness of the sanctions stands in stark contrast

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[198] *See, e.g.,* Nazila Fathi, *U.N. Nuclear Official Urges Iran to Clarify 'Outstanding Issues,'* N.Y. Times, Jan. 12, 2008, at A5.

[199] *See, e.g.*, Helene Cooper & Steven R. Weisman, *West Tries a New Tack to Block Iran's Nuclear Agenda*, N.Y. Times, Jan. 2., 2007, at A3 ("few believe that the sanctions resolution that passed Dec. 23 has the muscle to sway Iran to abandon its nuclear ambitions"); *Bomb and Bombast*, Times of London, Dec. 28, 2006, *available at* http://www.timesonline.co.uk/tol/comment/leading_article/article1264599.ece ("no one is so naïve as to expect that the regime's ambitions will be thwarted by freezing the assets of a handful of Iranian companies and officials"); Maggie Farley, *U.N. Slaps Iran with Sanctions: The Security Council Says the Nation Must Return to Talks and Halt its Uranium Program*, L.A. Times, Dec. 24, 2006, at 1 ("Security Council diplomats … privately conceded that they did not expect the bans to have a significant effect.").

[200] R. Nicholas Burns, Under Secretary for Political Affairs, *Conference Call on UN Sanctions Resolution 1737*, Dec. 23, 2006, *available at* http://www.state.gov/p/us/rm/2006/78246.htm [hereinafter Burns Conference Call].

[201] *See, e.g.*, David Cortright, USA Today Mag., May 2006, ("News reports suggest that Iran is moving financial assets out of Western banks in anticipation of potential sanctions.")

[202] *See, e.g.*, Farley, *supra* note 196; Colum Lynch, *Sanctions on Iran Approved by U.N.*, Wash. Post, Dec. 24, 2006, at A1.

to major Russian and Chinese transactions with Iran that were unaffected by the sanctions and thus represent leverage lost.[203]

Russia's opposition to strong sanctions on Iran is apparently driven by the desire to continue lucrative deals to sell Iran weapons,[204] nuclear reactors and other high-tech machinery,[205] and by Russia's view that Iran is a useful geopolitical counterbalance to the U.S.[206] According to Dimitri Simes, a Russia expert who is president of the Nixon Center think tank in Washington, D.C., "It is clear that Moscow will not support any meaningful resolution that would interfere with Russia's trade with Iran."[207] Alexei Arbatov, the Director of the Center for International Security at the Russian Academy of Sciences and former deputy chair of the Russian parliament's defense committee, says that "[t]here is no doubt that Russia does not want Iran to have nuclear weapons,"[208] but notes that "Russia has huge political and economic interests with Iran."[209] Arbatov has slammed the Russian position as "self-defeating" because the Russian position demands that "Iran give away something very dear to it, while simultaneously removing all tough levers to enforce such a concession."[210]

China has joined Russia in opposing strong sanctions on Iran.[211] China's opposition stems in considerable part from its interest in Iranian fuel. China currently buys 18 percent of its crude oil from Iran (some 338,000 barrels per day, about $7-10 billion per year, depending on price fluctuations).[212] In December 2006,

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[203] For example, Russia was, on the day Resolution 1737 passed, in the process of delivering to Iran 29 Tor-M1 anti-aircraft missile systems purchased by Iran for $1.4 billion dollars. *Russian Anti-aircraft Weapons Sales to Syria, Iran on Schedule*, Agence France-Presse, Jan. 2, 2007, *available at* http://defensenews.com/story.php?F=2455711&C=europe. The anti-aircraft systems are being stationed around Iran's civilian nuclear sites. *Id*. In addition, during the week prior to the passage of Resolution 1737, China's national oil corporation signed a $16 billion agreement to develop Iranian gas fields. Burns Conference Call, *supra* note 197. Since Resolution 1737 did not involve fuel sanctions, it did not cover the Chinese-Iranian deal. *Id*. The Bushehr nuclear reactor which Russia is building in Iran and was exempted from the sanctions is an $800 billion project. Lynch, *supra* note 202.

[204] King & Champion, *supra* note 175.

[205] Nikolai Sokov, *The Prospects of Russian Mediation of the Iranian Nuclear Crisis*, Center for Nonproliferation Studies, Feb. 17, 2006, *available at* http://cns.miis.edu/pubs/week/060217.htm.

[206] Alexei Arbatov, *Russia and the Iranian Nuclear Crisis*, carnegieendowment.org, May 23, 2006, *available at* http://www.carnegieendowment.org/publications/index.cfm?fa=print&id=18364.

[207] King & Champion, *supra* note 175.

[208] Arbatov, *supra* note 206.

[209] *Id*.

[210] *Id*.

[211] Farley, *supra* note 199; Lynch, *supra* note 202.

[212] *See, e.g.*, William Mellor & Le-Min Lim, *To Slake its Thirst for Oil, China Scours Backwaters of the World*, Int'l Herald Trib., Sept. 26, 2006, *available at* http://www.iht.com/articles/2006/09/26/bloomberg/sxpetro.php; King & Champion, *supra* note 175.

amidst the negotiations over Resolution 1737, China signed a $16 billion deal to develop Iran's North Pars gas field and was negotiating a deal to develop Iran's Yadavaran oil field.[213]

Time will tell if the international community learns from its mistakes regarding North Korea and imposes effective sanctions on Iran before it is too late. In the absence of sanctions strong enough to convince the Iranian regime that its noncompliance comes at too high a price, Iran is progressing towards a nuclear arsenal while the nuclear nonproliferation regime continues to erode.

D. *Conclusion*

As the other chapters in this book indicate, great progress has been made in many areas of international organization since Hudson's book was published in 1932. Nevertheless, there has been relatively little progress on an issue pivotal to organizing the world for peace and security: enforcing international law against dangerous rogue states.

The Western allies' experience with Germany, Italy and Japan before and during World War II eroded the credibility of classical legal ideology. Yet efforts to dissuade today's most dangerous rogue states – Iran and North Korea – from developing nuclear arsenals are often as toothless as were the efforts to dissuade the Axis powers from aggression prior to World War II. The results coming out of the Security Council today are sometimes practically indistinguishable from the results that emerged from the League of Nations during the interwar period.

While the interwar generation was blinded in considerable part by naïve ideology, the Security Council today is being rendered ineffectual by avarice. The international community's hesitation to firmly enforce international law against Germany, Italy and Japan contributed to World War II's 60 million deaths in six years. War in this atomic age could be even deadlier. The fruits of progress in other areas of international organization once again risk being spoiled by a failure to firmly enforce international law against rogue states.

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[213] Ruba Husari, *Iran, China Sign Deal for North Pars Gas Field*, Oil Daily, Dec. 21, 2006.

Complexity in the Law of War

By David Kaye

> *Considering that the progress of civilization should have the effect of alleviating as much as possible the calamities of war …*
>
> The 1868 St. Petersburg Declaration[1]

A. *Introduction*

Professor Manley O. Hudson saw in the increasing international legislation of the early 20th Century an "unlimited promise for the future. ..."[2] Perhaps nothing better reflects this promise than the early codification of the laws of war, guided by the then-novel multilateral attempt to alleviate the suffering inherent in war. At the centennial of the 1907 Hague Regulations concerning the law of land warfare,[3] the most prominent and lasting of the early codification efforts, it is easy to regard the legislative project of the laws of war as a forward march of progress. Civilians and combatants around the world enjoy the legal protections of the Geneva Conventions of 1949,[4] the Additional Protocols to the Geneva

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[1] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, *reprinted in* Documents on the Law of War 54, 55 (Adam Roberts & Richard Guelff, eds., 3d ed., 2000) [hereinafter Documents].

[2] Manley O. Hudson, Progress in International Organization 77 (1932). He also knew that legislation alone would be insufficient. *See id*. at 80.

[3] Convention IV Respecting the Laws and Customs of War on Land, with Annexed Regulations, Oct. 18, 1907, *reprinted in* Documents, *supra* note 1, 69-82 [hereinafter Hague Regulations].

[4] Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), Geneva Convention III Relative to the Treatment of Prisoners of War (Third Geneva Convention), Geneva Convention IV Relative to the Protection of Civilian Person in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 75 U.N.T.S. 31-417, *reprinted in* Documents, *supra* note 1, at 197–355.

Miller & Bratspies (Eds), Progress in International Law, pp. 681–706.

Conventions of 1977,[5] the Convention on Conventional Weapons and its five protocols,[6] and customary international law,[7] all of which together provide a remarkable array of detailed rules that regulate nearly all aspects of the conduct of interstate war and the treatment of individuals caught up in its maelstrom. The law has given policymakers, activists and academics the language by which they condemn or justify behavior in war today.[8] Combatants and civilians owe their protections not merely to the military economy or moral sense of an adversary but also to the legal rules that govern in times of armed conflict.

Yet despite progress in the expansion of legal rules, the laws of war – also called international humanitarian law (IHL) or the law of armed conflict[9] – generate substantial disquiet among some who implement or study it. British General Michael Rose has written, "As war has become more complicated, so, sadly, has the language of the treaties and protocols."[10] Professor Ingrid Detter has noted that the law of war "contains rules, some of which are highly technical, susceptible to different legal interpretations and embodied in a complicated inter-woven network of conventions as well as entrenched in general international law."[11] The International Committee of the Red Cross (ICRC) has felt it necessary to simplify the instruments of IHL so that they are widely understandable.[12] The International Court of Justice, seeming to hail the development

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[5] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *esp*. arts. 35-60, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter "Additional Protocol I"], *reprinted in* Documents, *supra* note 1, at 422-479; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *esp*. arts. 13-16, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II], *reprinted in* Documents, *supra* note 1, at 483-493.

[6] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980 [hereinafter CCW], and its five protocols, *reprinted in* Documents, *supra* note 1, at 520-548.

[7] *See generally* Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law (2005). Key instruments other than the ones mentioned above may be found in Documents, *supra* note 1.

[8] Consider the recent efforts by the United Nations Security Council to emphasize IHL in its decision-making. *See, e.g.*, S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (concerning the protection of civilians in armed conflict).

[9] For a discussion of terminology, see Allan Rosas, The Legal Status of Prisoners of War 41 (1976). I use terms such as law of armed conflict, law of war and international humanitarian law (IHL) interchangeably, disregarding the semantic implications of each.

[10] Anthony P.V. Rogers, Law on the Battlefield xv (2d ed. 2004).

[11] Ingrid Detter, The Law of War 156 (2d ed. 2000).

[12] 1978 Red Cross Fundamental Rules of International Humanitarian Law Applicable in Armed Conflict, *reprinted in* Documents, *supra* note 1, at 513.

of IHL, nonetheless noted that current instruments in the field "attest to the unity *and complexity*" of the law of armed conflict.[13]

These observers and practitioners are identifying the basic complexity that plagues certain areas of IHL. Complexity in international law – a side effect of the complexity of international society generally[14] – can be particularly problematic for the law of war, as unambiguous and realistic rules best serve the commanders and soldiers in the field to whom its commands are principally directed. Key provisions of the law of war have become difficult to interpret, frequently undermined by an inability to find consensus on the meaning of important provisions. It has become lawyers' law – an interesting body subject to creative legal argument, focused on questions that affect the well-being of countless individuals, but often difficult to implement by commanders in the field without legal advice. This is not to say that all rules of humanitarian law are complex and designed for lawyers. Yet as one looks across the range of rules that make up humanitarian law, density, technicality, differentiation and indeterminacy, features I borrow from Peter Schuck's assessment of complexity in the American legal system,[15] are not uncommon.

In what specific senses has the law of war become complex, if indeed it has? Has it always been complex? What are the costs of that complexity, and what solutions might be adopted to limit the complexity and reduce those costs? In this chapter, following a brief overview of the development of the law of armed conflict, I explore the complexity problem of humanitarian law. I focus on three particular areas – the definition of a military objective, discrimination between civilian and military objects and the problem of proportionality, and combatant status – in which the rules are famously difficult to interpret or apply and subject to substantial politicization. I conclude with some areas for research and policy that might counter IHL's complexity and improve implementation of the basic principles that these rules reflect. I propose to pose questions rather than provide definitive answers, to suggest consequences, and to identify ways to avoid the costs of complexity.[16]

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[13] Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 256 (July 8) (emphasis added).

[14] *See* Malcolm N. Shaw, International Law 42-45 (5th ed. 2003).

[15] Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 Duke L.J. 1, 3 (1992).

[16] Where a system exhibited features of complexity, Schuck claimed, risks increased for higher transaction costs, greater uncertainty among those who are regulated, and systemic delegitimation. Schuck, *supra* note 15, at 18–25.

B. *A Century of Codification of International Humanitarian Law*

The law of armed conflict contains two sets of norms, the first pertaining to the limits on the military's use of force (so-called means and methods) and the second to the treatment of individuals in a warring power's custody. It has been common (if misleading) to distinguish the two normative frameworks as Hague Law and Geneva Law. Hague Law refers to those treaties dealing principally with the conduct of hostilities and the treatment of belligerents during wartime, named after the agreements concluded as part of the 1899 and 1907 Peace Conferences in The Hague, most importantly the 1907 Hague Convention (IV) and its annexed Regulations.[17] The International Court of Justice has given the opinion that the Hague Regulations have become a part of the customary international law of armed conflict, binding on all states, and the Regulations themselves sought to codify then-existing customary law.[18] In general, the three sections of the regulations – on belligerents, hostilities, and occupation – concern the behavior of soldiers on the field of battle or in occupied territory. Although one may catch glimpses of what we may call today individual rights in wartime,[19] the Hague Regulations more often regulate the conduct of hostilities by a state's military forces, or "the means and methods of warfare."[20]

Two essential principles animate Hague Law. First, "*the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy*."[21] Today this principle embodies the concept of *military necessity*, the root of all law governing means and methods of war, and the related one of *distinction*, namely that belligerents must always distinguish between military and civilian objectives.[22] Second, "*this object would be exceeded*

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[17] *Supra* note 3.

[18] *See* Legality of the Threat or Use of Nuclear Weapons, *supra* note 13, at 257-258. *See also* Hudson, *supra* note 2, at 84 (noting that the Hague Peace Conference codified much of then-existing law).

[19] *See, e.g.*, Hague Regulations, *supra* note 3, arts. 4, 18, 46.

[20] Instruments in this vein also include the nonbinding 1923 Hague Rules of Aerial Warfare, 17 Am. J. Int'l L. Supp. 245 (1923), *reprinted in* Documents, *supra* note 1, at 141-153; the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, *reprinted in id*. at 158-159; the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 U.N.T.S. 240-288, *reprinted in id*. at 373-405, and its Second Protocol of 1999, *reprinted in id*. at 700-719; Additional Protocol I, pt. IV, sec. I, *supra* note 5, at 447-461; and the Convention on Certain Conventional Weapons, and its five protocols, U.N. Doc. A/CONF.95/15 (Oct. 10, 1980).

[21] St. Petersburg Declaration of 1868, pmbl., reprinted in Document, *supra* note 1.

[22] *See* Rogers, *supra* note 10, at 4. I discuss this principle in detail below.

by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable."[23] This principle acknowledges that the law of war does not prohibit the causing of suffering, but military forces may not impose suffering that has no military purpose, that is not consistent with military necessity.[24] It is enough to take the individual combatant off the field of battle – by killing or by injuring, but not by doing so with cruelty. Closely related is the provision that, "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited."[25] This is fundamentally a principle expressing the belief that some weapons or methods – such as poison, declarations of "no quarter," treacherous killing or wounding, perfidious use of a flag of truce – are outside the realm of the legal.[26]

The law of Geneva – beginning with the Geneva Convention of 1864,[27] extending through the four Geneva Conventions of 1949,[28] and concluding thus far with the Third Additional Protocol of 2005[29] – deals primarily with the protection of individuals, whether they are prisoners of war or other individual combatants no longer participating in hostilities, or civilians in the hands of an enemy or in occupied territory.[30] The engines driving Geneva Law, from the outset, have been the increasing violence of war and the ICRC. Thus, the 1864 Convention begins as a modest codification to protect those involved in battlefield relief operations, and we find within each of the Geneva Conventions substantial development of such protections. Later Geneva Conventions in 1906 and 1929 expanded the scope of protections for the "wounded and sick" in the field and developed a set of protections available to prisoners of war. World War II revealed the weaknesses of that system of protections, thus triggering the negotiation of

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[23] St. Petersburg Declaration of 1868, *supra* note 21.

[24] *See, e.g.*, Additional Protocol I, *supra* note 5, art. 35(2), Legality of the Threat or Use of Nuclear Weapons, *supra* note 13, at 257. For a discussion of how military necessity evolved from a constraint to an excuse for military action, see N.C.H. Dunbar, *The Significance of Military Necessity in the Law of War*, 67 Jurid. Rev. 201 (1955); Burrus Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 Am. J. Int'l L. 213 (1998).

[25] Hague Regulations, *supra* note 3, art. 22.

[26] *See id*. at arts. 23–28.

[27] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, 1 Bevans 7.

[28] *See supra* note 4.

[29] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), Dec. 8, 2005, *available at* http://www.icrc.org/ihl.nsf/FULL/615?OpenDocument.

[30] Legality of the Threat or Use of Nuclear Weapons, *supra* note 13, at 256 (Geneva Law "protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities.").

the four Conventions in 1949 that deal with the wounded and sick on land and at sea, prisoners of war and civilians.[31]

Like the Hague Law discussed above, there are two basic principles of Geneva Law. First, "*the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit*."[32] Many of the principles contained in Francis Lieber's eponymous code of instructions for Union Soldiers during the American Civil War translated into the Geneva instruments of the succeeding decades. So too did the principle that humanitarian concerns and military requirements must be balanced, an inherent tension in the law to which much of its later complexity can be traced. Second, where conventional law does not apply, "*the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience*."[33] Called the Martens Clause in honor of the delegate who proposed it, this principle – found in each of the Geneva Conventions of 1949[34] and, in modified form, the 1977 Additional Protocols[35] – states the case for humanitarian concerns and values as a crucial element of the law.[36] While the Martens Clause may not provide specific guidance as conventional IHL does, it does provide an argument for the use of human rights law where the rules of war may not be applicable. Much of human rights law may be applicable in times of armed conflict, giving an extra layer of legal protection to individuals, but it is more common to think of the law of armed conflict as the *lex specialis* to be applied during wartime.[37]

Today, Hague and Geneva Law have merged in the Additional Protocols to the Geneva Conventions, which not only expand individual protections but also

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[31] See *supra* note 4.

[32] Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, art. 22, (Lieber Code) Apr. 24, 1863, *reprinted in* http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument.

[33] Hague Convention, pmbl., *supra* note 3.

[34] *See* First Geneva Convention, *supra* note 4, art. 63; Second Geneva Convention, *supra* note 4, art. 62; Third Geneva Convention, *supra* note 4, art. 142; Fourth Geneva Convention, *supra* note 4, art. 158.

[35] *See* Additional Protocol I, *supra* note 5, art. 1(2); Additional Protocol II, *supra* note 5, pmbl.

[36] *See, e.g.*, Rogers, *supra* note 10, at 7 ("Humanity is, therefore, a guiding principle that puts a brake on undertakings which might otherwise be justified by the principle of military necessity.").

[37] *See* Legality of the Threat or Use of Nuclear Weapons, *supra* note 13, para. 25 (the law of armed conflict must be "determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities."); Abella v. Argentina, Case 11.137, Report No. 55/97, para. 161, Inter-Am. C.H.R, OEA/Ser.L/V/II.95 Doc. 7 rev. at 271, para. 161 (1997). The relationship between human rights law and IHL has been the subject of significant scholarly attention. *See especially* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AJIL 239, 266–73 (2000); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 Am. J. Int'l L. 1 (2004); Dietrich Schindler, *Human Rights and Humanitarian Law*, 31 Am. U. L. Rev. 935 (1982).

include groundbreaking provisions governing the conduct of hostilities.[38] In the statutes for the International Criminal Tribunal for the former Yugoslavia (ICTY)[39] and Rwanda (ICTR),[40] and in the Rome Statute for the International Criminal Court (ICC),[41] the two branches of the law are joined together in unified rules of criminal law and procedure. Together the law provides detailed guidance across a remarkable range of problems faced by military forces and individual soldiers.

Yet there remain significant areas of IHL where the rules are so complex as to make their implementation difficult. Thus, even though we may (and should) applaud the century's progress, we need to confront the fact that several important rules of IHL are not easily accessible to meet the challenges of contemporary armed conflict. Many factors may have contributed to this problem, chief among them the difficulty of negotiating clear rules in the multilateral setting of the Geneva conferences in the 1970s. Jean Pictet introduces the ICRC Commentaries to the Additional Protocols with the following illuminating comment:

> Despite all the efforts, it was not possible to entirely avoid some politics being brought into the debates. This should not come as a great surprise, for, though treaties of this nature have humanitarian aims, their implementation raises political and military problems, to begin with, that of the survival of the State. Thus it was not possible to escape this tension between political and humanitarian requirements. Such tension is in the nature of the law of armed conflict, which is based, as we know, on compromise.[42]

I will now turn to a more specific look at how a few of the key rules in IHL exhibit signs of complexity.

C. *The Complexity of IHL*

I. *What is Complexity?*

Peter Schuck identifies four questions to determine a legal system's degree of complexity. First, are the rules dense, "numerous and encompassing," so that "[t]hey occupy a large portion of the relevant policy space and seek to control a

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[38] *See* Christopher Greenwood, *A Critique of the Additional Protocols to the Geneva Conventions* of 1949, *in* The Changing Face of Conflict and the Efficacy of International Humanitarian Law 1, 9–20 (Helen Durham & Timothy L.H. McCormack, eds., 1999).

[39] Statute of the International Tribunal for the former Yugoslavia, U.N. Doc. S/25704, 32 I.L.M. 1192-95 (May 3, 1993).

[40] Statute of the International Tribunal for Rwanda, U.N. Doc. SC/5974, 33 I.L.M. 1598–1604 (Jan. 12, 1995).

[41] Rome Statute on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998).

[42] Jean Pictet, *General Introduction, in* ICRC, Commentary on the Additional Protocols of 1977 (1987) at xxxiv.

broad range of conduct, which causes them to collide and conflict with their animating policies with some frequency"?[43] IHL, by this measure, certainly has features of density. Consider, for example, the rules governing combatant status, now a pastiche of rules based on the Third Geneva Convention and, for those party to it, Additional Protocol I of 1977. The notion of prisoner *status* collides with the practical imperative of detainee *treatment*, which must in all circumstances be humane.[44] Although the IHL lawyer can explain the basic dichotomy between status and treatment, it ultimately suggests a collision of principles that may be difficult for a commander or policymaker to apply sensibly.[45] Particularly difficult questions include: In what sense can treatment be modified according to a detainee's status? Why distinguish status if all treatment must involve the same minimum standards of humanity?

Second, are the rules technical? "Technical rules," Schuck writes, "require special sophistication or expertise on the part of those who wish to understand and apply them. Technicality is a function of the fineness of the distinctions a rule makes, the specialized terminology it employs, and the refined substantive judgments it requires."[46] One may respond to this point by noting that technicality may benefit legal regulation, as it helps lawmakers specify the precise kind of behavior they want the law to endorse, sanction or encourage. Yet technicality has a harmful effect when it serves to make it *more* difficult for the object of the law's proscriptions – e.g., the military commander in the field, the civilian leader deciding on policy or targets, the military lawyer advising both – to interpret or understand the rules; it encourages rather than resolves disputes over interpretation and implementation. In IHL, some rules are technical whereas others are straightforward and accessible. Non-technical rules are those such as Article 13 of the Third Geneva Convention, which prohibits "physical mutilation" and "medical or scientific experiments of any kind" against POWs.[47] It may be expected that rules pertaining to weapons tend toward the technical, inasmuch as they may involve sophisticated systems that cannot be regulated without resort to technical description.[48] But other areas also have become quite prone to technicality.

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[43] Schuck, *supra* note 15, at 3.

[44] On status, *see* Third Geneva Convention, *supra* note 4, at art. 4. On treatment, see *id.*, arts. 3, 13; Additional Protocol I, *supra* note 5, art. 75.

[45] For an example of the problems that emerge in this field, see Final Report of the Independent Panel to Review DOD Detention Operations 79-83 (Aug. 2004) [hereinafter Schlesinger Report], *available at* http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf.

[46] Schuck, *supra* note 15, at 4.

[47] Third Geneva Convention, *supra* note 4, art. 13.

[48] For instance, the protocols to the Convention on Certain Conventional Weapons require technical familiarity with weapons such as blinding lasers, incendiary devices and landmines. CCW, *supra* note 6, Protocol I on Non-Detectable Fragments, Documents, *supra* note 1, at 527;

Consider, for instance, the recent Third Additional Protocol to the Geneva Conventions, which provides for the adoption of a new symbol – a Red Crystal – to have equal status to the Red Cross and Red Crescent.[49] Like the First Geneva Convention, it distinguishes between indicative and protective uses of the symbol, a distinction that requires expertise to unpack and understand.[50]

Third, is the system of IHL "institutionally differentiated insofar as it contains a number of decision structures that draw upon different sources of legitimacy, possess different kinds of organizational intelligence, and employ different decision processes for creating, elaborating, and applying the rules"?[51] Institutional differentiation is crucial to the framework of IHL, much as it is throughout international law. In particular, elaboration and application of the rules depends on an open set of institutions, from national jurisdictions to international tribunals to international political bodies, and they may each reach different conclusions on the interpretation of rules of IHL. The Geneva Conventions envision just such differentiation when obligating states to prosecute or extradite those alleged to have committed "grave breaches."[52] One may also consider the multiple conflicting legal assessments of the Israeli separation barrier in the West Bank.[53] Moreover, negotiation or elaboration of rules occurs in diverse settings, from Geneva to The Hague to New York and elsewhere, involving increasingly diverse participation.[54]

Finally, are the rules indeterminate? Are they "flexible, multi-factored, and fluid," with "outcomes [that] are often hard to predict."[55] Additional Protocol I, for instance, is replete with references to "feasibility" and "military necessity,"

Protocol II (Amended) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, *supra* note 5; Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, Oct. 10, 1980, *reprinted in* Documents, *supra* note 1, at 533; Protocol IV on Blinding Laser Weapons, Oct. 13, 1995, *reprinted in* Documents, *supra* note 1, at 535.

[49] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), Dec. 8, 2005 (not yet in force), *available at* http://www.icrc.org/ihl.nsf/FULL/615?OpenDocument.

[50] *See* Marco Sassoli & Antoine Bouvier, How Does Law Protect in War 137-140 (1999).

[51] Schuck, *supra* note 15, at 4.

[52] *See, e.g.*, Third Geneva Convention, *supra* note 4, arts. 129-130; Fourth Geneva Convention, *supra* note 4, arts. 146-147.

[53] *Cf.* Zaharan Yunis Muhammad Mara'abe et al. v. The Prime Minister of Israel et al., HCJ 7957/04, Supreme Court of Israel, Sept. 15, 2005; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 (July 9, 2004); G.A. Res. ES-10/14, U.N. Doc. A/ES-10/L.16 (Dec. 8, 2003).

[54] *See, e.g.*, Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society*, 11 Eur. J. Int'l L. 91 (2000).

[55] Schuck, *supra* note 15, at 4.

injecting a sense of uncertainty and subjectivity into rules that otherwise have a core moral imperative. One of the leading scholars of IHL, bemoaning the "far from optimal" protection afforded civilians, notes that "there are a host of ambiguities embedded in the law as it stands."[56]

Complexity may be a necessary feature of the law of armed conflict, as the conduct of war, like other fields subject to international law, has itself become increasingly complex. It is, after all, a body of rules designed to regulate a highly complicated activity, an activity, moreover, in which governments jealously guard their perceived prerogative to take measures consistent with their assessment of military requirements. It could be argued that even minimal, uncertain constraints serve a useful function as "the best that could be achieved" under such circumstances. Consider the position taken by the ICRC's Commentaries on Additional Protocol I to the Geneva Conventions: "The text which was adopted is not always as clear as one might have wished, but it seemed necessary to leave some margin of appreciation to those who will have to apply the rules. Thus their effectiveness will depend to a large extent on the good faith of the belligerents and on their wish to conform to the requirements of humanity."[57]

Good faith may be a basic guarantor of compliance with the law, but it is a lot to ask of warring parties, which is one reason why one should want clear, unambiguous rules in wartime. The complexity of the law may have negative consequences not only because its rules "will not always be easy to interpret, particularly for those who have to decide about an attack and on the means and methods to be used."[58] It may also encourage the public perception that the law "isn't really law," that its constraints are too subjective to amount to real restraints on behavior during war. Or it may contribute to the general problem of noncompliance in IHL.[59] The remainder of this section identifies four examples of complexity in IHL.

II. *Differentiation By Multiple Legal Frameworks*

A set of dichotomies in IHL have shaped debates over its application at least since the negotiations of the 1949 Geneva Conventions. First, the law distinguishes international armed conflicts – those between states – from those internal to

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[56] Yoram Dinstein, The Conduct of Hostilities Under the Law of International Armed Conflict 256 (2004). *See also* Rene Provost, International Human Rights and Humanitarian Law 247-269 (2002).

[57] ICRC, *supra* 42, at 589 (1987).

[58] *Id*. at 635.

[59] On this general problem, see Report prepared by the International Committee of the Red Cross, Improving Compliance with International Humanitarian Law: ICRC Expert Seminars, Geneva, Oct. 2003, *available at* http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5tam64?opendocument (follow "Full text in PDF format" hyperlink).

one state. Thus, Common Article 2 of the Geneva Conventions applies those instruments to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties."[60] Common Article 3 applies a basic minimum set of rules to cases of "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." The distinction between the two forms of armed conflict, in principle, is accessible, but its application can be complicated in situations that have elements of international and non-international conflict.[61] It has been suggested that, between common Articles 2 and 3, all armed conflicts are covered by one or the other set of norms. However, this assertion has come under increasing attack in the wake of the September 11, 2001, terrorist attacks in the United States.[62] The 1977 Additional Protocols added a significant layer of complexity by expanding the notion of international armed conflict to include so-called liberation movements and limiting the application of Additional Protocol II to a certain high-threshold of internal armed conflict, in effect the classic civil war.[63] As a result of the differentiation between the two, international armed conflicts are much more highly regulated than non-international ones.

Second, customary law remains particularly important to governments and advocates arguing about the application of rules. With respect to international armed conflict, a number of major military powers – including the United States – are not party to Additional Protocol I, making the status of its rules vis-à-vis customary law particularly important. With respect to other conflicts, conventional law has limited reach to internal armed conflicts. Discerning the rules of IHL thus requires attention not only to a variety of conventional provisions that may apply in a given situation but also any customary norms that may be said to apply.[64] Yet arguments about the existence or applicability of customary norms of IHL are extremely difficult to make given the paucity of research into widespread state practice and the temptation to cite to non-practice elements – such as the

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[60] Geneva Conventions of 1949, *supra* note 4, common art. 2. Also note that art. 2 applies in all cases of occupation.

[61] *See* Dinstein, *supra* note 56, at 14–15.

[62] For American purposes, the Supreme Court arguably has put this debate to rest by finding that common art. 3 governs all armed conflicts not covered by common art. 2. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 67-68 (2006).

[63] *See* Detter, *supra* note 11, at 206. Early in the Additional Protocol negotiations, Norway proposed negotiating *one* protocol to govern in all conflicts, however characterized as international or non-international. The proposal failed. *See* ICRC, *supra* note 42, at 1328 n.31. *See also* Richard R. Baxter, *Some Existing Problems of Humanitarian Law*, 14 Revue de Droit Penal Militaire et de Droit de la Guerre 297 (1975) (Fr.).

[64] *See* Hamdan v. Rumsfeld, *supra* note 62, at 70 (noting that customary law must be understood as incorporated into the Geneva Conventions).

number of parties to a treaty, resolutions of the United Nations General Assembly, practice of the ICRC, and military manuals – to support the existence of a customary norm. A recent, massive project of the ICRC to collect customary law, while laudable and useful to scholars, has suffered from such practical disadvantages.[65]

Third, depending upon the context of any given conflict, claims may be pressed under both IHL and human rights law.[66] The substance of obligations may not vary in a particular case, but there will be occasions when they do. This is not necessarily fatal, just as a claim that fails in criminal law may yet succeed in tort. Yet, because of the variety of enforcement frameworks under the two bodies of law, we may see an increasing variation in the interpretation of specific rules of law.[67] International human rights bodies may examine application of the rules pertaining to armed conflict, developing law according to their own special methodological and political priorities. This is less a question of which body "gets it right" and more a question of increasing the circle of interpretations of a given rule.

III. *Examples of Complex Rules*

The law of international armed conflict consists of hundreds of rules intended to limit the brutality of war, to inject elements of humanity in the treatment of the detained and the wounded, and to limit the impact of war on civilians. Many, perhaps the vast majority, are admirably direct and clear, such as:

- Civilian medical personnel shall be respected and protected.[68]
- Prisoners of war may in no circumstances renounce in part or in entirety the right secured to them by the present Convention.[69]
- All hospital ships shall make themselves known by hoisting their national flag.[70]
- The Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war.[71]

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[65] Customary International Humanitarian Law (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., 2005); George Aldrich, *Book Review*, 76 Brit. YB Int'l L. (2005). (*See also*, Malcolm MacLaren & Felix Schwendimann, *An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law*, 6 German Law Journal 1217 (2005), *at* http://www.germanlawjournal.com/pdf/Vol06No09/PDF_Vol_06_No_09_1217-1242_Articles_MacLaren_Schwendimann.pdf.

[66] *See generally* Provost, *supra* note 56. *But see* Dinstein, *supra* note 56, at 22–25.

[67] *See* David Kaye, *International Decisions*, 99 Am. J. Int'l L. 873, 878-881 (2005) (Chechnya decisions of the European Court of Human Rights).

[68] Additional Protocol I, *supra* note 5, art. 15(1).

[69] Third Geneva Convention, *supra* note 4, art. 7.

[70] Second Geneva Convention, *supra* note 4, art. 43.

[71] Fourth Geneva Convention, *supra* note 4, art. 83.

There are, however, significant deviations from clarity. The most important deviations may be found in Additional Protocol I pertaining to the conduct of hostilities, particularly targeting and combatant status.

1. *Military Objectives*

At the heart of the law of armed conflict lies the requirement to distinguish between civilian and military objectives and, consequently, to direct attacks only against the latter. The modern rule provides:

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.[72]

The law does not define civilian objectives but instead defines military objectives as:

> those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[73]

This definition seeks to limit the subjective claims of governments in conducting hostilities, and to this extent it is an important achievement. It requires a government to support the lawfulness of a particular action by specific criteria:[74] First, does the target contribute to an adversary's military action effectively, by its nature, location, purpose or use? And second, does attacking it offer the attacker a definite military advantage in the circumstances ruling at the time? It thus combines an external and an internal element, focusing on both parties to the conflict.

Yet the definition "leaves a lot to be desired."[75] Its "abstract and generic" quality is but one of its problems, as it fails to identify specific objectives as military in an illustrative way.[76] The ICRC's Commentary concedes the indeterminacy of this definition.[77] One may see how the rule's indeterminacy can fuel disputes

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[72] Additional Protocol I, *supra* note 5, art. 48.

[73] *Id.*, art. 52(2). The definition has been largely accepted as reflecting customary international law, though states have sought to interpret it in a variety of ways. A useful compendium of sources may be found in Henckaerts & Doswald-Beck, *supra* note 65, pt. 1, at 181–232.

[74] In defense of international law's value in these terms, Malcolm Shaw notes that even should "antagonists dispute the understanding of a particular rule and adopt opposing stands as regards its implementation, they are at least on the same wavelength and communicate by means of the same phrases. That is something." Shaw, *supra* note 14, at 7.

[75] Dinstein, *supra* note 56, at 83.

[76] *Id.*

[77] ICRC, *supra* note 42, at 635.

over the legality of action. Consider, for instance, the decision of NATO to bomb the radio and television station of Serbia during the war in Kosovo. General Wesley Clark describes how European and American decision-makers spent a substantial amount of time trying to determine whether RTS Belgrade met the definition of a military objective for purposes of attacking it.[78] The Office of the Prosecutor of the ICTY resolved the question in favor of NATO, though others believed the attack was unlawful.[79] The law provided a guide but did not resolve the question neatly.[80]

A more recent example is provided by the war between Israel and Hezbollah in Lebanon during the summer of 2006. Was the Beirut airport a military target because of its "use" by Hezbollah to bring in supplies and weapons from Syria and Iran?[81] Was a power station which provides electricity to civilians and Hezbollah a military objective because it contributes to Hezbollah's effectiveness?[82] What about a Lebanese television transmitting tower that transmits Hezbollah television in addition to regular Lebanese programming?[83]

In any given circumstance, application of the rule is uncertain for at least three reasons: First, what is an *effective* contribution to military action? Are there degrees of contribution that can affect an attack's lawfulness? What if, with respect to the Lebanese television transmitter, Hezbollah used it to transmit direct guidance to commanders in the field? What if it used the transmitter only to maintain public support among Lebanese in the south? Our position on this will depend on the purpose of its use, which may not be easy to pin down. Second, what is the scope of such contribution? Some argue that such a contribution includes "war-sustaining" capabilities, in particular economic contributions that a society may make to maintain a military apparatus, while others believe that contribution pertains in

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[78] *See* Wesley K. Clark, Waging Modern War: Bosnia, Kosovo and the Future of Combat 224-250 (2001).

[79] *Cf.* Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, June 13, 2000, and Human Rights Watch, Civilian Deaths in the NATO Campaign, Feb. 2000, *available at* http://www.hrw.org/reports/2000/nato/Natbm200-01.htm#P413_109721.

[80] The NATO spokesman subsequently complained that "many NGOs tell us that we are violating international law when our lawyers tell us we are not. There is obviously a lot of confusion here about what are legitimate and illegitimate targets…." Jamie Shea, *Conveying Military Practice to the Press, in* ICRC, Protecting Civilians in 21st-Century Warfare 45, 54 (2001).

[81] *See* Greg Myre & Steven Erlanger, *Clashes Spread to Lebanon as Hezbollah Raids Israel*, N.Y. Times, July 13, 2006.

[82] *See* Sam Ghattas, *Israel Batters Lebanese Seaports, Roads; Hezbollah Rockets Kill 8 in Haifa*, Wash. Post, July 16, 2006.

[83] *See* Greg Myre, *Israel Approves Call-Up, But Sets No Deployment*, N.Y. Times, July 27, 2006.

a more limited way to "war-making" functions.[84] What if the civilian power station in Lebanon provides 85% of the military power required by Hezbollah? What if the use is less? What if the use is made only for certain purposes excluding military preparations and attacks? Third, how does one assess whether the circumstances at the time supported the determination that an object's destruction offered a definite military advantage? It is a great weight on the shoulders of a commander, who is said to "attack only if he had reasons to think he was threatened."[85] To what extent may the law account for the chaotic realities of conflict under which commanders make such decisions distinguishing military from civilian objectives?[86]

An attempt to alleviate the complexity of Articles 51 and 52 is made by the precautionary principles under Article 57 of Additional Protocol I. In particular, Article 57(1) says that "constant care shall be taken to spare the civilian population."[87] Check and double-check that objectives are military rather than civilian or subject to special protection.[88] Cancel the attack if you see that the objective is not military.[89] Give warning, where possible, of attacks that may affect civilians.[90] These are the kinds of directives that can be easily transferred to the officer on the ground or in the air or on the sea. Even so, Article 57 exacerbates the indeterminacy, as a commander and force legal adviser may yet be unable to determine whether they have done "everything feasible" to "verify" the military nature of targets, or they may be unsure when "it becomes apparent" that an objective "is not a military one," or they may not have the tools available to determine which of several possible objectives will "cause the least danger to civilian lives and to civilian objects."[91] This uncertainty is heightened by the possibility of criminal prosecution, in light of which soldiers will want a higher degree of confidence that their actions are consistent with criminal law norms.

All of these indeterminacies are exacerbated by the reality that multiple decisionmakers may be involved in assessing whether the rule is applied lawfully in

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[84] *See, e.g.*, Horace B. Robertson, *The Principle of the Military Objective in the Law of Armed Conflict, in* The Law of Military Operations: Liber Amicorum Professor Jack Grunawalt, 72 International Law Studies 197 (Jack Grunawalt & Michael Schmidt, eds., 1998); Dinstein, *supra* note 56, at 87.

[85] The San Remo Manual on International Law Applicable to Armed Conflicts at Sea 114 (Louise Doswald-Beck, ed., 1995).

[86] *See* Davis, in this volume.

[87] Additional Protocol I, *supra* note 5, art. 57(1).

[88] *Id.*, art. 57(2)(a).

[89] *Id.*, art. 57(2)(b).

[90] *Id.*, art. 57(2)(c).

[91] *Id.*, art. 57(2).

any given situation. This does not implicate only the varieties of courts and tribunals, international and domestic, that may be engaged in assessing alleged violations. It also implicates the way in which different militaries interpret the rules. The statements and understandings made by governments ratifying Additional Protocol I, for instance, indicate that many Western governments see significant uncertainty in the law. Some state that "the word 'feasible' is to be understood as practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations."[92] There is also a repeated assertion that "[m]ilitary commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time."[93] While all of these assertions may be merited, they also underscore the complexity involved in the rules themselves. Perhaps even more importantly, they suggest that commanders may not be operating under *rules* as much as *standards*,[94] a particularly troubling notion in light of the criminalization of such behavior under the Rome Statute for the ICC.[95] Militaries undoubtedly value the discretion afforded them in these rules, but they nonetheless heighten the differences between warring parties and observers when implementation questions arise.

This leads us to the question: Would it be better *not* to have a rule defining military objectives?[96] Should we embark on an effort to find a simpler rule less

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[92] Statement of Italy on ratification, *reprinted in* Documents, *supra* note 1, at 507. This statement is echoed by other NATO members.

[93] Statement of the United Kingdom on ratification, *id.* at 510. This point is consistent with the statement of the U.S. Military Tribunal at Nuremberg in *The Hostages Trial*, that "[W]e are concerned with the question whether the defendant at the time of [the challenged act's] occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time." Trial of Wilhelm List and Others, United States Military Tribunal, Nuremberg, *reprinted in* United Nations, 8 Law Reports of Trials of War Criminals 34, 69 (1948). *See also* Michael Bothe, et al., Rules for Victims of Armed Conflicts 326 (1982).

[94] *See* Myres S. McDougal & Florentino P. Feliciano, Law and Minimum World Public Order 57 (1961); Cass Sunstein, *Problems with Rules*, 83 Cal. L. Rev. 953, 959 (1995) ("Lawyers have customarily compared standards … to rules…, with rules seeming hard and fast, and standards seeming open-ended.").

[95] *See* Rome Statute, *supra* note 41, art. 8(2)(b)(iv) (including within the Court's subject matter jurisdiction the act of "[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects … which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."). The use of the word "clearly" signifies an understanding of the Statute's drafters that the act criminalized here should be of a certain, high threshold to merit prosecution.

[96] Over forty-five years ago, McDougal and Feliciano saw the effort to define military objectives as futile. *See* McDougal & Feliciano, *supra* note 94, at 526 ("It is not easy to see how military

subject to subjective argumentation? On balance, it appears that the rule expresses a valuable principle that needs clarification. Just what kinds of objects normally constitute military objectives? Debate and confusion may be eliminated by a specification, as Yoram Dinstein has argued, of the kind of objects that should be presumed to be military objectives.[97] Preparing such a list would likely prove difficult, if not impossible, if one considers the kinds of pressure that would be pressed against declaring power stations, airports, etc. as military objectives. At this stage, what would be most useful to the development of this area of the law would be a serious research project exploring exactly how states have implemented this rule in order to tease out from state practice the customary norms at play today. In other words, the codified rule, in all likelihood, provides less guidance than the traditional methods of assessing customary international law, with a premium put on state practice.

2. *The Law of Targeting*

Among the most important provisions of Additional Protocol I are those that further spell out the rules to target only military objectives. Article 51(2) prohibits attacks on the civilian population "as such," a direct descendant of the 1868 St. Petersburg Declaration. "Don't direct attacks against civilians," it demands. It focuses on the intent of the attacker, for it does not prohibit accidental attacks but ones where "the perpetrator *intended* the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack."[98]

Article 51(4) of Additional Protocol I also takes into account intent, suggesting that the key issue is not whether an attacker intends to strike civilian objectives but whether, in effect, *he just doesn't care*. It thus codifies the customary rule prohibiting attacks that may strike civilian and military objectives without distinction,[99] defining such indiscriminate attacks as:

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objectives could be evaluated as legitimate or nonlegitimate save in terms of their relation to some broader political purpose postulated as legitimate.").

[97] Dinstein, *supra* note 56. The specification of military objectives has been undertaken by experts and states. *See, e.g.*, 1923 Hague Draft Rules of Aerial Warfare, *reprinted in* Documents, *supra* note 1, at 141, 145; US Navy Commander's Handbook on the Law of Naval Operations, 73 International Law Studies 402 (1999). For the debate on this subject, *see* San Remo Manual, *supra* note 85, at 114-116.

[98] Elements of Crimes, art. 8(2)(b)(ii), *reprinted in* International Criminal Court, Selected Basic Documents Related to the International Criminal Court (2005) (emphasis added).

[99] *See* The Prosecutor v. Stanislav Galic, IT-98-29-T, Judgment and Opinion, Dec. 5, 2003, n.103; Henckaerts & Doswald-Beck, *supra* note 65, vol. I, at 40.

a. those which are not directed at a specific military objective;
b. those which employ a method or means of combat which cannot be directed at a specific military objective; or
c. those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and, consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

At the negotiations of this provision in Geneva in 1977, the representative of France, the only country to vote against Article 51, said that this definition's "very complexity would seriously hamper the conduct of defensive military operations against an invader and prejudice the inherent right of legitimate defense."[100] Putting aside the French position on the merits, the provision surely lacks legal precision. While the first two elements of the definition seem relatively straightforward – subparagraph (a) suggests an attack launched against an area rather than a specific target, while subparagraph (b) suggests the use of a weapon or other method which cannot be limited to a specific target[101] – the third refers back to another, uncertain section of the law. To what does the provision refer when speaking of "the effects of which cannot be limited as required by this Protocol"? Expert commentators disagree.[102] Even so, it leaves many questions open. For instance, imagine that a guerilla force has dispersed itself and its weapons throughout a residential neighborhood in order to shield itself with civilians and civilian objects, in clear violation of Article 51(7) of Additional Protocol I.[103] How does this provision constrain a military force from attacking the guerillas? May the military force attack the neighborhood, thereby targeting civilians and military objects necessarily without distinction? Or must the force let the guerilla force be, finding other non-forcible mechanisms (if any) to separate the military from the civilian? These are not easy questions, and even if there are answers, it is unlikely that opposing forces will agree on their outcome.

That said, the definition uses objective language and does not provide much room for military forces to argue on subjective grounds.[104] It focuses on the

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[100] French Statement at the Diplomatic Conference Leading to the Adoption of the Additional Protocols, *quoted in* Henckaerts & Doswald-Beck, *supra* note 65, vol. I, at 41.

[101] *See* Rogers, *supra* note 10, at 24.

[102] *See* Judith Gardam, Necessity, Proportionality and the Use of Force by States 93, n.32 (2004).

[103] Art. 51(7) prohibits the use of civilians to "render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations." Additional Protocol I, *supra* note 5, art. 51(7).

[104] *Cf.* Dinstein, *supra* note 56, at 117.

means or method of the attacks themselves, forcing an attacker to consider whether such attacks "are of a nature to strike military objectives and civilians or civilian objects without distinction." For this reason, few if any states or commentators stood with Russia in defending the Russian military bombardment of Grozny, Chechnya, in 1999, which involved large-scale destruction of the city using heavy, imprecise weaponry.[105] The definition's complexity rests on its technical, dense qualities rather than a sense of indeterminacy.

The definition of indiscriminate attacks goes beyond the traditional understanding of the concept to incorporate the separate requirement of proportionality in the effects of attacks.[106] The Protocol prohibits those attacks which cause "incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, *which would be excessive in relation to the concrete and direct military advantage anticipated*."[107] The proportionality rule is packed with imprecision and indeterminacy, problems that have been reviewed comprehensively by Judith Gardam.[108] The rule asks a commander to consider: what is excessive? How to define "military advantage"? Is such advantage according to a particular attack or cumulatively based on an entire operation?[109] Is the "anticipated" advantage to be taken from the subjective vantage point of the attacker or from an objective sense of what a reasonable commander would expect to gain from an attack? Indeed, to take a specific doctrinal example provided by Gardam, there is division over the fundamental question of "whether the military significance of the target can justify heavy civilian casualties."[110] The ICRC has taken the view that the rule "does not provide any justification for attacks which cause extensive civilian and damages. Incidental losses and damages should never be extensive."[111] Yet the substitution of " 'extensive' for 'excessive' destroys the balancing process inherent in the idea of proportionality."[112]

Perhaps division over the meaning and implementation of proportionality could not have been otherwise, as the principle involves a comparison of military and humanitarian elements: are the civilian losses justified by the military gains? Or put another way, are the military gains so important as to justify the civilian losses? How can such an assessment be anything other than subjective and indeterminate?

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[105] *See, e.g.*, Pavel Felgenhauer, *The Russian Army in Chechnya, in* Crimes of War Project, *available at* http://www.crimesofwar.org/chechnya-mag/chech-felgenhauer.html.

[106] Gardam, *supra* note 102, at 94.

[107] Additional Protocol I, *supra* note 5, art. 51(5)(b) (emphasis added).

[108] Gardam, *supra* note 102, at 94 – 121.

[109] *See* Statement of The Netherlands on ratification of Additional Protocol I, *supra* note 5, at 508.

[110] Gardam, *supra* note 102, at 106.

[111] ICRC, *supra* note 42, at 626, *quoted in id.* at 106-07.

[112] Gardam, *supra* note 102, at 107, citing Rogers, *supra* note 10, at 18.

Again the question arises whether we can refer appropriately to proportionality as a rule or a standard which should guide military action. Gardam notes that attacks, even if they offer a definite military advantage, invariably are controversial where there are high levels of civilian damage.[113] Thus, many rest on the hope that militaries will implement the norm of proportionality in good faith in recognition of the imprecision involved in its application and interpretation. Yoram Dinstein writes that "there is no serious alternative" to the subjectivities and indeterminacies of the codified rule.[114]

3. *Combatant Status*

The United States' determination that combatants detained in Afghanistan or elsewhere during the "war on terror" would not be accorded lawful combatant status – that is, the status of a prisoner of war under the Third Geneva Convention – has brought great attention to this area of law.[115] From the U.S. perspective, the decision was solely about the Third Geneva Convention's rules, since it is not a party to Additional Protocol I. The Third Convention's rules are fairly straightforward: a person who meets the conditions of Article 4 should be granted POW status (and the related protections); if there is doubt, a "competent tribunal" under Article 5 will make the appropriate determination.[116] If a person is found not to be a POW, other provisions derived either from the Fourth Convention or from customary law should provide legal protections pertaining to humane treatment.

Additional Protocol I introduces greater density, indeterminacy and technicality into status determinations. First, it defines the armed forces of a party, members of which "are combatants, that is to say, they have the right to participate directly in hostilities."[117] The ICRC Commentary on this article suggests that direct participation is easily defined as the ability to "attack and be attacked."[118] But later on the Commentary suggests a more complicated, nuanced meaning: "Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place."[119] This is exceptionally hard to follow, for lawyers and operators alike.[120]

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[113] Gardam, *supra* note 102, at 137.

[114] Dinstein, *supra* note 56, at 122.

[115] *See* Memorandum from The President, Humane Treatment of al Qaeda and Taliban Detainees, Feb. 7, 2002, *reprinted in* Mark Danner, Torture and Truth 105 (2004).

[116] Third Geneva Convention, *supra* note 4, art. 5.

[117] Additional Protocol I, *supra* note 5, art. 43.

[118] ICRC, *supra* note 42, at 515.

[119] *Id.* at 516.

[120] The ICRC, recognizing the multiple interpretations of direct participation, has endeavored to study this issue. *See* ICRC, *Direct Participation in Hostilities*, at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205?opendocument.

Direct participation is but one of the complexities introduced into combatant status in Additional Protocol I. Article 44 requires that combatants "distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack."[121] It is the following exception to that rule that proves most difficult to unpack:

> Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.[122]

Putting aside the merits of the provision – which, to my mind, undermines the protections available to the civilian population – its application is strikingly dense. First, it is an exception to the rule of distinction. A combatant may fail to distinguish himself from the civilian population if he is not involved in a deployment or engagement. Second, it requires an assessment of the "nature of the hostilities" without actually defining the term. What kind of hostilities would allow such behavior? Third, it does not explain the meaning of carrying arms "openly." And fourth, it limits the requirement to carry arms openly to military engagements and times of visibility to the enemy preceding the launching of the attack. Bear in mind, further, that the provisions here are supplemental to the Third Convention.

A commander facing a question concerning Article 51 of Additional Protocol I is likely to be in a crisis situation, requiring a prompt determination as to whether a plan is consistent with the law. Complexity frustrates that effort. A commander faced with a question concerning combatant status may have more time to consider whether a person has earned it. But the time may not be available in a situation of a military engagement, where a commander will need to determine whether a particular individual has combatant status and is thus liable to be attacked.[123] Snap judgments are required in such situations, where error may involve significant harm to civilians. The complexity of Article 44 – even if the rule

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[121] Additional Protocol I, *supra* note 5, art. 44(3).

[122] *Id.* Christopher Greenwood has noted that this article is "'a disagreement reduced to writing.'" *See* Greenwood, *supra* note 38, at 17-18.

[123] *See, e.g.*, Julian E. Barnes, *A Suspect Iraqi: Do You Fire?*, L.A. Times, Aug. 15, 2006, at A1 ("With insurgents hiding among ordinary Iraqis, that decision ["to kill, or not?"] often must be made in a split second. The wrong choice could mean a guerrilla gets a chance to lay a roadside bomb that kills more Americans or Iraqi civilians. Or it could mean an innocent Iraqi dies at the hands of Americans … [The soldier], one year into his four-year stint with the Marines, radioed his squad leader. He got permission to shoot. Now, the choice was his.").

allowing an exception to the principle of distinction were correct as a policy choice – undermines the ability of the commander to make the right decision.

D. *Consequences and Cures*

The complexity of IHL results from a number of factors, including the increased complexity of warfare, the widespread integration of civilian and military infrastructure, the changing dynamics of multilateral negotiations, the increased participation of states and non-governmental organizations in the negotiation of treaties, and the extreme politicization of conflict that has infected humanitarian law. To embark on a negotiation of a multilateral treaty is to engage other states in compromise, resulting in treaty language that may not be as clear as would be desirable. Even though the compromise rule may be better than no rule, the complexities involve several potential costs, though I hasten to add that determining the costs – and the extent to which they are costly – requires some detailed empirical research not undertaken here. In any event, one may imagine that costs could include limited guidance to commanders and soldiers; increased number of disputes about the content of the law; multiple interpretations of the law across jurisdictions; and transforming political disputes into legal ones that are difficult to resolve over time.

Not all aspects of IHL are infected with the complexities identified in Additional Protocol I, and where it occurs in other contexts it seldom does so to the same degree. Many of the norms of IHL "possess a core meaning and a penumbra which will not accommodate any and all possible applications."[124] Some of the most basic rules may be easily stated by legal advisers and quickly absorbed by commanders and soldiers in the field. For instance, Article 75 of Additional Protocol I provides the baseline rule that, even if a detained person does not deserve protection as, for example, a civilian under the Fourth Geneva Convention or a prisoner under the Third Geneva Convention, he "shall be treated humanely in all circumstances." It goes on to prohibit, among other acts, "violence to the life, health, or physical or mental well-being of persons," "humiliating and degrading treatment," hostage-taking, and collective punishment.[125]

Additional Protocol I implicitly recognizes the complexity of the law. Its solution is the resort to more lawyers. Article 82 provides:

> The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to

[124] Provost, *supra* note 56, at 247.

[125] Additional Protocol I, *supra* note 5, art. 75(2).

> advise military commanders at the appropriate level on the application of the [Geneva] Conventions [of 1949] and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

For the developed world, providing lawyers for the armed services has involved a decades-long effort of building professional legal staff capable of providing apt legal advice in crisis situations and ample instruction in training.[126] We can afford it, after all, and ultimately the public demands that wars be fought within the law. But not all societies can afford the level and extent of legal advice that one may find in NATO militaries or non-NATO ones such as the Israel Defense Forces. Relatively few countries have the capacity (or the time, in some instances) to undertake the kind of two-week legal review of potential targets that may be faced by British military officers.[127]

One response may be that it is the obligation of states to disseminate the rules to their militaries in ways that ensure compliance.[128] States should be expected to boil down the rules to accessible principles that can be followed without the constant need for legal advice in the field. Yet the boiling down of such rules will inevitably entail some glossing over of the complicated compromises that form the basis for the legal rules.[129] Lawyers will still be needed to step in and provide advice where the situation presents a difficult question of how to apply the rule.

Another response may be that IHL, fraught as it is with the highly political and sensitive issues of national security, could only progress by accommodating complexity, over time reducing the complexity to acceptable levels. Progress in all fields is about complexity, and many fields develop mechanisms and training tools to cope with it. Even in international law this is true – increased complexity of environmental law, or nonproliferation, or trade, as examples, has involved the real progress of increased regulation and compliance. Yet those fields differ in their implementation from IHL. Those fields do not typically regulate crisis decision-making with criminal consequences for violation; they typically involve decisions in which careful lawyers have time to analyze a problem from all angles,

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[126] *See* W. Hays Parks, *Teaching the Law of War*, Army Law., June 1987, Department of the Army Pamphlet 27-50-174, 4. The current Department of Defense policy on law of war application and training may be found at DoD Directive 2311.01E, May 9, 2006, *available at* http://www.fas.org/irp/doddir/dod/d2311_01e.pdf.

[127] *See* Tom Boyle, *Proportionality in Decision Making and Combat Actions, in* ICRC, Protecting Civilians in 21st-Century Warfare: Target Selection, Proportionality and Precautionary Measures in Law and Practice 29, 30-32.

[128] *See, e.g.*, Fourth Geneva Convention, *supra* note 4, art. 144; Additional Protocol I, *supra* note 5, art. 83.

[129] *See* Rome Statute, art. 8(b)(i)-(ii), *reprinted in* Documents, *supra* note 1, at 671, 676.

develop legal theories and assessments that may be tested over periods of years. Even in IHL there are areas that allow for such care; for instance, the rules governing the kinds of weapons that may be employed require military officials to assess the legality of weapons in their development, a process that is amenable to thoughtful cogitation.[130] But complexity undermines accessibility, and the law of armed conflict must be accessible to those whose actions are to be informed and constrained by the law.

Modern militaries deal with the complexity in a variety of ways. Soldiers – in the American military and others – receive distillations of the rules governing their conduct in battle and over those they detain.[131] These distillations read like the Ten Commandments: Thou shalt not engage an enemy who has surrendered. Thou shalt not engage a hospital. Thou shalt treat civilians with respect and dignity and treat all prisoners humanely. And so on. These are crucial rules for every soldier to keep close in time of armed conflict. Yet even so, distillations gloss over the complexities inherent in a vast body of conventional law. Attacks on hospitals are forbidden, but how do I react to the use of a hospital by my enemy as a base of attack? There is a rule for that: "The protection to which civilian medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy."[132] This is a valuable rule, aimed at the protection of those within the care of a medical establishment such as a hospital, and the rule goes on to define acts that "shall not be considered as acts harmful to the enemy."[133] But what acts *are* harmful to the enemy? You will want a lawyer for that question, but even she will need some time to give you an answer, time that is not always available in the midst of conflict.

Many militaries prepare manuals for their commanders to use in determining whether their plans are consistent with the law, yet manuals tend to become just as complicated as the treaties, serving as a tool for lawyers rather than commanders in the field. Thus, the two paths, Hague and Geneva, have involved the accumulation of law to an extent that ensures that it becomes the province of experts, namely lawyers. In theory, the density of the law is a remarkable achievement,

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[130] Additional Protocol I, *supra* note 5, art. 36. It has been argued that this rule, which requires assessment of whether new weapons are consistent with the applicable laws of armed conflict, is a part of customary international law. *See* Christopher Greenwood, *The Law of Weaponry at the Start of the New Millennium, in* U.S. Naval War College, 71 International Law Studies 185, 235, n. 165 (1998).

[131] *See* Operation Desert Storm, US Rules of Engagement: Pocket Card, *reprinted in* Documents, *supra* note 1, at 561.

[132] Additional Protocol I, *supra* note 5, art. 13(1).

[133] *Id.*, art. 13(2).

providing hard detailed guidance to constrain the conduct of hostilities. In some respects, such detailed regulation is one of the signal accomplishments of the post-World War II international community. Yet in practice, key provisions often confuse rather than clarify the basic principles of the law.

E. *Conclusion*

We may simply have to accept complexity in the law of armed conflict. It is, in fact, difficult to imagine "reopening" the major instruments in the law of armed conflict in an effort to simplify key provisions. The experience of recent negotiations in the field – starting with the Additional Protocol negotiations in the 1970s and continuing through landmine, International Criminal Court and Third Emblem negotiations through 2005 – indicates that complexity continues to be a major feature and that politics often play a harmful role in finding consensus solutions. Some organizations have implicitly recognized the complexity of the field and have offered distillations or instructions that seek to simplify the key rules. Such efforts are laudable, but again, as with any simplified instructions, they may elide some of the compromises that inhere in the law itself, a particular problem where criminal sanctions attach to violations.

There are ways to deal with the complexity of the law.

First, many have claimed that despite the existence of extensive rules governing hostilities, widespread noncompliance pervades the field. The ICRC, which has long considered itself the guardian of humanitarian law,[134] has anxiously sought to uncover the reasons for poor implementation of the law.[135] Some may argue that noncompliance exists mainly because states are unlikely to follow or establish a rule that runs against what they perceive to be in their national interest.[136] Part of the effort to explore noncompliance with IHL should attempt to control for the problem of complexity, where there is a real need for serious empirical study. Where rules are complex, do we observe less compliance than in areas where rules are relatively simple? In what sense does state practice reflect or fail to reflect the codified rules?

Second, governments should seek to simplify instructions at the highest level of protection of the norm behind the rule. For years, for instance, the United States

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[134] *See* Sassoli & Bouvier, *supra* note 50, at 275.

[135] *See, e.g.*, ICRC Report, *Improving Compliance with International Humanitarian Law: ICRC Expert Seminars*, Geneva (Oct. 2003).

[136] *See generally* Jack L. Goldsmith & Eric A. Posner, The Limits of International Law (2005).

has taken the position that it would "comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."[137] The result of such instructions is that officers in the field do not need to bother themselves with the nice distinctions involved in determining unlawful and lawful combatants and may avoid confusing soldiers responsible for all detainees' humane treatment. In addition, for the larger project of progress in IHL, to the extent state practice increasingly involves ignoring the complexities at a higher level of protection for the norm behind the rule, customary law may develop so as to provide the simpler, more protective rule than conventional law.

Third, based on an assessment of the role of complexity in compliance, the states parties to the Geneva Conventions should review the principal instruments with an eye to whether some of the provisions do not meet the goal of constraining behavior in wartime and thus undermine civilian protections. Many instruments in complicated areas of international law involve periodic review, and though one may imagine that a review could devolve into political posturing and blaming, a carefully mandated review – perhaps undertaken only by military officers at the outset, on the basis of empirical study of compliance – could provide a useful assessment of whether IHL has room for further progress.

Professor Hudson's contemporary, the great British lawyer, scholar and judge Hersh Lauterpacht, may not have used the language of complexity to express his views about the laws of war, but he famously captured the difficulties a student or practitioner of the law faces when considering the lawfulness of military action:

> In all these matters the lawyer must do his duty regardless of dialectical doubts – though with a feeling of humility springing from the knowledge that if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law. He must continue to expound and to elucidate the various aspects of the law of war for the use of armed forces, of governments, and of others. He must do so with determination though without complacency and perhaps not always very hopefully – the only firm hope being that a world may arise in which no such calls will claim his zeal.[138]

The law of armed conflict has been on its progressive course for well over a century. The increasing complexity of warfare has been reflected in its instruments, and the level of complexity in current law makes one wonder whether the project of progress has reached an unseen limit, a glass ceiling. The only way to test whether this is the case is by empirical study, careful diplomatic and military review and forceful reengagement in the humane norms that underlie the law.

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[137] DoD Directive 2311.01E, *supra* note 126, Rule 4.1.

[138] Hersh Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BYIL 360, 379 (1952).

Part Seven

Challenges of Protecting the Environment and Human Rights

International Organization and the Environment

By Stephen C. McCaffrey

A. *Introduction*

There is a clash of countervailing forces at work in our world today: increasing "progress in international organization"[1] on many fronts and outright resistance to international organization on the part of a certain "hyperpower."[2] This situation bears striking resemblance to the state of affairs that prevailed in the United States between the two World Wars during the first half of the twentieth century. On the one hand, internationalists such as Woodrow Wilson and Professor Manley O. Hudson argued for increased organization of the international community. On the other hand, isolationists such as Senator William E. Borah decried foreign entanglements.

Others have dealt with some of the principal aspects of the contemporary conflict between multilateralism and unilateralism.[3] I will confine myself for the most part to the field of the environment. But to set the stage I feel compelled to refer briefly to some of the evidence of the United States efforts over the past four years to disengage itself from an international system that has greatly benefited it. The most striking piece of evidence is, of course, the United States March, 2003 invasion of Iraq, in defiance of all of the other members of the U.N. Security Council and in *prima facie* violation of Article 2(4) of the U.N. Charter because it was not authorized by the Council.[4] It seems doubtful that even the isolationist

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[1] This is the title of this symposium that gave rise to this volume, and of the 1931 Hudson lectures at the University of Idado. Manley O. Hudson, Progress in International Organization (1932).

[2] This was the term used by France's President Jacques Chirac to refer to the United States in the lead-up to the United States' invasion of Iraq in Mar., 2003.

[3] For contrasting views on this point, *see* Foley and Sofaer in this volume.

[4] Kofi Annan, the U.N. Secretary-General at the time, has characterized the invasion as being unlawful under the Charter. *See, e.g.*, http://www.globalpolicy.org/security/issues/iraq/attack/lawindex.htm (follow "NGO Letter to the Security Council on Iraq (Mar. 14, 2006)" hyperlink). The U.S. administration has relied largely on previous U.N. resolutions, a position that other members of the U.N. Security Council did not accept. *See* the articles by William Howard Taft IV and Todd Buchwald, respectively the Legal Adviser and the Assistant Legal Adviser for Political-Military Affairs of the U.S. Department of State, *Preemption, Iraq and International Law*, 97 AJIL 557 (2003); and *see generally Agora, Future Implications of the Iraq Conflict*, 97 AJIL 553 (2003).

Miller & Bratspies (Eds), Progress in International Law, pp. 709–722.

Senator Borah, who spoke so eloquently about how it was not to be contemplated that the United States would do anything but "compl[y] in good faith and in absolute integrity" with League of Nations decisions if the United States were to join that body, would have embraced this unilateral action.

The evidence also includes United States attempts to avoid complying with the hallowed 1949 Geneva Conventions, which Alberto Gonzales, the U.S. Attorney General, characterized in a 2002 memo as "obsolete" and "quaint,"[5] apparently forgetting that they protect American soldiers and civilians as well as those of other nations.[6] The catalogue further includes the United States spurning of a number of key treaties, including its withdrawal in December, 2001 from the 1972 Anti-Ballistic Missile Treaty;[7] its "un-signing" and active work to undermine the Rome Statute of the International Criminal Court;[8] its withdrawal from the

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See also, e.g., Don Van Natta, Jr., *Bush was Set on Path to War, British Memo Says*, N.Y. Times, Mar. 27, 2006, available at http://www.nytimes.com/2006/03/27/international/europe/27memo.html ?ex=1301115600&en=be186887fe0c83a2&ei=5088&partner. For the British view on the position of the legality of the invasion, *see* Lord Goldsmith, Legal Basis for Use of Force Against Iraq (Mar. 18, 2003), *available at* http://www.pm. gov.uk/output/Page3287.asp.

5 Specifically, Gonzales stated in the memo that "the war against terrorism is a new kind of war" and that "this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions." Alberto Gonzales, White House Counsel, memo of Jan. 25, 2002, *available at* http://www.american progress.org/issues/kfiles/b79532 .html. More recently, the Defense Department decided to delete reference to Common Article 3 of the 1949 Geneva Conventions from the Army Field Manual. This provision, which applies to all detainees – including those classified by the Bush administration as "unlawful enemy combatants" – prohibits, *inter alia*, torture and the use of cruel, humiliating and degrading treatment. This decision has been challenged by the State Department. *See* Julian E. Barnes, *Clash Over Detainee Policy*, Sacramento Bee, June 5, 2006, at A1.

6 If a reminder was necessary in this regard, it was provided by the U.S. Supreme Court in Hamdan v. Rumsfeld, 126 S. Ct. 2749; 165 L. Ed. 2d 723 (2006), in which the Court held that the military commission before which petitioner was to be tried at Guantanamo Bay, Cuba, lacked the power to proceed because it violated both the Uniform Code of Military Justice and the four 1949 Geneva Conventions. However, in response to *Hamdan*, Congress passed and President Bush signed into law in Oct. 2006 the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (2006), whose "court-stripping" provisions were held by the D.C. Circuit to be effective to prevent access by detainees at Guantanamo to U.S. courts. Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007). The Supreme Court initially declined to hear an appeal but reversed itself on the last day of its term in June, 2007. The Court had not announced its ruling when this went to press.

7 Press statement by President George W. Bush, accessed at http://archives.cnn.com/2001/ ALLPOLITICS/12/13/ rec.bush.abm/. Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty), May 26, 1972, 23 U.S.T. 3435, 11 I.L.M. 784 (1972).

8 Rome Statute of the International Criminal Ct., U.N. Doc. A/CONF.183/9 (July 17, 1998), 37 I.L.M. 999 (1998). The "active work" has largely taken the form of bilateral agreements, often with states that rely on U.S. military or other assistance, in which those states promise not to hand Americans over to the Court. *See, e.g.*, Global Policy Forum, *US Bilateral Immunity or So-Called*

Optional Protocol to the 1963 Vienna Convention on Consular Relations,[9] giving the International Court of Justice jurisdiction in cases arising under the 1963 Vienna Convention; and, closer to the subject of my chapter, its refusal to join the 1997 Kyoto Protocol to the 1992 U.N. Framework Convention on Climate Change.[10]

Interestingly, the rhetoric of President George W. Bush's administration may be coming back to bite it. The Bush administration's support for United States ratification of the 1982 United Nations Convention on the Law of the Sea (UNCLOS),[11] presumably driven primarily by the Navy and the Department of Defense rather than by a determination to preserve the marine environment, is the subject of harsh rebukes from the far right, whose apostles have characterized the treaty as "a transfer of sovereignty, a transfer of taxing authority to a world body."[12] This would no doubt come as news to the 149 countries that have already joined the Convention.[13]

On the other hand, if one looks past the United States to the rest of the world – something I often find myself trying to do, but which is difficult at best – the glass may appear to be at least half full: No one else has treated the Geneva Conventions with the same kind of overt disrespect and, not surprisingly, the U.S. military, whose forces are in harm's way, supports them;[14] there *is* an International

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"Article 98" Agreements, available at http://www.globalpolicy.org/intljustice/icc/2003/0606usbilaterals.htm. *See generally* Amnesty International, *US Threats to the International Criminal Court, available at* http://web.amnesty.org /pages/icc-US_threats-eng. To give the administration credit, it followed the proper procedure. Its notification that it did not intend to become a party to the Rome Statute freed it from its obligation under art. 18 of the Vienna Convention on the Law of Treaties to "refrain from acts which would defeat the object and purpose of [the] treaty…." Vienna Convention on the Law of Treaties VCLT, May 22, 1969, U.N. Doc. A/CONF.39/27, at 289 (1969), 8 I.L.M. 679 (1969). Notification received by the U.N. Secretary-General on May 6, 2002, U.N. Treaty database, untreaty.un.org ("the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on Dec. 31, 2000."). While the United States is not a party to the Vienna Convention, it follows the Convention's rules in its practice.

[9] Vienna Convention on Consular Relations and Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 262. *See* Adam Liptak, *U.S. Says It Has Withdrawn From World Judicial Body*, N.Y. Times, Mar. 10, 2005, at A14.

[10] Dec. 10, 1997, U.N. Doc. FCCC/CP/1997/L.7/Add.1, 37 I.L.M. 22 (1998).

[11] United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF. 62/122, 21 I.L.M. 1261 (1982).

[12] Wash. Times, Feb. 19, 2005, at A3, (quoting Pat Buchanan).

[13] *See* United Nations, Chronological list of ratifications of, accessions and successions to the Convention and the related Agreements as of 04 June 2007, www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm.

[14] *See, e.g.*, Douglas Feith, *Conventional Warfare*, Wall St. J., May 24, 2004 (stating that General Richard Myers, the Chair of the Joint Chiefs of Staff, "described the Geneva Conventions as ingrained in U.S. military culture, and said that an American soldier's self-image is bound up with the Conventions"), *available at* http://usinfo.state.gov/mena/Archive/2004/May/24-425032.html; *see* Memorandum on Geneva Conventionsfrom Holly Burkhalter, Council on Foreign

Criminal Court, whose Statute has 100 parties;[15] and there *is* a Kyoto Protocol fully in force.[16] Also, the United States continues to observe the many treaties and rules of customary international law it believes to be in its interest – or perhaps just takes for granted – such as treaties on telecommunications, air transport and intellectual property, the 1994 GATT-WTO treaties, the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations,[17] and a key treaty to which the United States is not a party but respects assiduously anyway, the 1969 Vienna Convention on the Law of Treaties.[18]

These agreements are only a very few illustrations of what I view to be an inevitable trend toward greater international organization. This trend is borne on a tide of globalization in the private sector[19] and ever greater integration in the public sphere.[20] It is also, I believe, a product of the spread of market economies and the related trend toward privatization (trends that may have run their course in Latin America),[21] accelerated by pressure from international financial institutions and large bilateral donors such as the United States. These forces demand certainty and predictability – in a word, the rule of law. A *de* centralized, *dis* organized international community does not provide a congenial environment within which markets can flourish. It also seems fair to say that the international community believes disorganization does not provide the conditions necessary for the preservation of a congenial environment within which life on Earth as we know it can flourish.

Relations to Members of the ASIL – CFR Roundtable (Dec. 12, 2002), *available at* http://www.cfr.org/ publication.html?id=5313.

[15] As of June 7, 2006 there were 100 parties to the Rome Statute. *See* the U.N. Treaty database, http://untreaty.un.org./ ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp. The United States appears to be softening its position on the ICC somewhat. It gave at least passive, if reluctant, "support" to the ICC in the form of its endorsement of a U.N. resolution on referral of Darfur war crimes suspects to the ICC and use of the ICC in trying former Liberian President Charles Taylor. *See* Philip Gordon, *The End of the Bush Revolution*, 85 Foreign Affairs 75, at 83 (July/August 2006).

[16] *See* http://unfccc.int/2860.php (follow "Kyoto Protocol" hyperlink).

[17] As already noted, however, the United States has withdrawn from the Optional Protocol giving the ICJ jurisdiction over disputes arising out of the treaty. *See* note 6 and accompanying text, *supra*.

[18] May 22, 1969, U.N. Doc. A/CONF.39/27, at 289 (1969), 8 I.L.M. 679 (1969). For a discussion of customary international law, *see* Guzman & Meyer in this volume.

[19] *But see* Naill Ferguson, *Sinking Globalization*, 84 Foreign Aff. 64 (2005) (arguing that conditions are ripe for the collapse of globalization).

[20] *See, e.g.*, Anne-Marie Slaughter, A New World Order (2004).

[21] *See* Larry Rohter, *With New Chief, Uruguay Veers Left, in a Latin Pattern*, N.Y. Times, Mar. 1, 2005, at A3 (noting that new leaders in Brazil, Argentina, Ecuador, Venezuela and Uruguay "are united in their conviction that the free-market reforms of the 1990's have failed and by a renewed focus on egalitarianism and social welfare").

The balance of this chapter will explore a few examples in support of this proposition. As we will see, governments have increasingly formalized their cooperation in the field of the environment through what I will refer to as "normative" and "institutional" organization – i.e., through both the creation of new conventional norms and the establishment of new organizations to assist with their implementation.

B. *Multilateral Environmental Agreements*

This section will review some of the unique features and techniques of multilateral environmental agreements that may point the way for enhanced international organization in other fields. These include the near-universal participation in some of the agreements, their focus on encouraging compliance rather than punishing violations, and the establishment by many of them of conferences of the parties that hold regular meetings and add a new kind of institutional layer to the normative organization provided by the agreements' substantive provisions.

I begin with the very fact that states have, especially since the 1980s, concluded a number of multilateral environmental agreements, or MEAs.[22] The international community clearly realizes that when it comes to the environment, cooperation through international organization produces win-win solutions. Put another way, any perceived "surrender of sovereignty" that might be entailed by the acceptance of internationally agreed upon environmental obligations are generally perceived

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[22] *See*, especially, The Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. No. 11,097; 1513 U.N.T.S. 323; 26 I.L.M. 1529 (1987); Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 10, 100th Cong., 1st Sess. 1, 26 I.L.M. 1550 (1987); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, U.N. Doc. UNEP/WG.190.4, UNEP/IG.80/3 (1989), 28 I.L.M. 657 (1989); U. N. Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107; S. Treaty Doc. No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 I.L.M. 849 (1992); Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc. FCCC/CP/1997/7/Add.1; 37 I.L.M. 22 (1998); United Nations Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79; 31 I.L.M. 818 (1992); London Protocol to the International Maritime Organization Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, Nov. 7, 1996, art. 18, 36 I.L.M. 1 (1997); United Nations Convention to Combat Desertification in those Countries Experiencing Drought and/or Desertification, Particularly in Africa, June 17, 1994, art. 22, U.N. Doc. A/AC.241/15/Rev.7 (1994), 33 I.L.M. 1328 (1994); Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 40 I.L.M. 532 (2001). For an exhaustive list of MEAs see the EISIL website, http://www.eisil.org/index.php? sid=297648529&t=sub_pages&cat=18.

as more than offset by the environmental benefits – including health benefits – to be derived from general participation in the regime in question. Not only will an individual state reap local benefits from joining an MEA, the global environment will also benefit from such organization. However, such a calculus only makes sense when all or most of the relevant state parties agree to participate.

A clear illustration of this need to have all the key players in the tent is provided by the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.[23] It would obviously have been futile to attempt to protect the stratospheric ozone layer if some of the major contributors of ozone-depleting substances remained outside the protection regime.[24] Recognition of this fact prompted the negotiating parties to create conditions that would make compliance more likely. Special incentives were devised for developing countries such as India and China – either one of which could alone have frustrated ozone-protection efforts – to encourage them to accede to the Protocol. These incentives involved both financial assistance and the transfer of environmentally-safe substitutes for ozone depleting substances, as well as related technologies, to developing-country parties "under fair and most favorable conditions."[25]

The Montreal Protocol thus included innovative non-compliance procedures that provide appropriate *assistance* for parties who do not comply with their treaty obligations, rather than punishing them—again, with a goal of achieving the objective of the agreement, namely, protection of the stratospheric ozone layer. In many ways, this aspect of the Montreal Protocol represents a new way of structuring international organization—one focused on achieving a specific, community-identified result even at the expense of a bit of compromise on the strict equality of states or the short-term self-interest of certain states. Without serious and practical international organization in this field, we and our children would be left to follow the advice of Donald Hodel, President Reagan's Secretary of the Interior, who suggested what might be called a rugged individualist approach to the problem of ozone depletion: rather than increasing government regulation we could all just wear hats and sunglasses to avoid skin cancer caused by excessive radiation.[26] It is not known whether Secretary Hodel explained this technique to plants, animals and other biological organisms.

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[23] Montreal Protocol, *supra* note 22.

[24] *See generally* Richard Elliot Benedick, Ozone Diplomacy (1991).

[25] Montreal Protocol, *supra* note 22, Annex II, art. 10A. *See* Benedick, *supra* note 24, at 196.

[26] Donald Hodel, President Reagan's Secretary of the Interior, famously stated that rather than require industry to cease CFC production and use, "Americans should be encouraged to wear sunglasses, hats and sunscreen lotion." *See* Chris Rose, Trail-Blazers – The Strategic Role of Greenpeace, http://archive.greenpeace.org/30th/chrisrose.html. *See also* Benedick, *supra* note 24, at 60.

A second important feature of virtually all multilateral environmental agreements concluded since the late 1980s has been the establishment of conferences, or meetings, of the parties. Such bodies are established by, for example, the Montreal Protocol,[27] the Basel Convention on Transboundary Movements of Hazardous Wastes,[28] the Convention on Biological Diversity,[29] the U.N. Framework Convention on Climate Change,[30] the London Protocol to the 1972 London Dumping Convention,[31] the United Nations Convention to Combat Desertification,[32] and the Stockholm Convention on Persistent Organic Pollutants.[33] These bodies are intended to enhance the "normative" organization that is intrinsically provided by a treaty through "institutional" organization.

As such, these conferences of the parties themselves demonstrate many of the characteristics associated with full-blown COP international organizations: they are created by treaties; are assigned specific functions; and have their own officers, secretariats, subsidiary bodies and, sometimes, financial mechanisms. One of the functions of these regular meetings is to review and update the relevant agreement, often by adopting technical annexes or additions to existing annexes.[34] Another function is to take any necessary measures regarding compliance and implementation of the agreement in question.[35] This COP phenomenon clearly demonstrates the recognition by a large majority of the members of the international community of the benefits of organization in the environmental field – organization that takes both normative and institutional forms.

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[27] Montreal Protocol, *supra* note 22, art. 11 (providing for "meetings of the parties" to be held at regular intervals).

[28] Basel Convention, *supra* note 22. The Basel Convention also provides for the establishment of a Secretariat (art. 16) and voluntary funding mechanisms (art. 14).

[29] CBD, art. 23, U.N. Doc. UNEP/Bio.Div/CONF/L.2, 31 I.L.M. 818 (1992). The CBD also establishes a Secretariat (art. 24) and a Subsidiary Body (art. 25).

[30] UNFCCC, art. 7, U.N. Doc. A/CONF.151/26, 31 I.L.M. 849 (1992). The UNFCCC also establishes a Secretariat (art. 8), Subsidiary Bodies (arts. 9 & 10), and a Financial Mechanism (art. 11). The Conference of the Parties of the UNFCCC serves as the "meeting of the Parties" to the Kyoto Protocol. Kyoto Protocol, *supra* note 22, art. 13(1).

[31] London Protocol, *supra* note 22.

[32] U. N. Convention to Combat Desertification in those Countries Experiencing Drought and/or Desertification, Particularly in Africa, June 17, 1994, art. 22, U.N. Doc. A/AC.241/15/Rev.7 (1994), 33 I.L.M. 1328 (1994). The Convention also establishes a Permanent Secretariat (art. 23), and a Committee on Science and Technology (art. 24).

[33] May 22, 2001, Art. 19, U.N. Doc. UNEP/POPS/Conf/2, 40 I.L.M. 532 (2001).

[34] Perhaps the best example is the Montreal Protocol, whose parties have updated the relevant list of substances on numerous occasions. Montreal Protocol, *supra* note 22,

[35] For example, at the Fourth Meeting of the parties to the Montreal Protocol, held in Copenhagen, the member countries agreed to adopt a procedure for noncompliance with the protocol and establish possible measures to be taken in the case of noncompliance.

The following discussion of a regional environmental agreement involving the three countries of North America will help to illustrate the efficacy and some of the features of international organization in the field of the environment.

C. *The North American Commission for Environmental Cooperation*

In 1993, Canada, Mexico and the United States concluded the North American Agreement on Environmental Cooperation (known by the rather unfortunate acronym of NAAEC).[36] The very existence of this agreement is a testament to the synergy between different forms of international organization.

The NAAEC is often referred to as the "environmental side agreement" to the NAFTA[37] – the North American Free Trade Agreement – although many in the environmental community object to this characterization, preferring to view it as a free-standing environmental accord.[38] In any case, it is clear that at least one of the motivations for concluding the NAAEC was the need to avoid Ross Perot's "great sucking sound" of jobs and manufacturing flowing south of the American border into Mexico, due in part to the latter's lower environmental standards – or, to put it more prosaically, to avoid trade distortions caused by differing environmental standards and uneven enforcement.[39] Thus the NAAEC requires each of the three countries to "ensure that its laws and regulations provide for high levels of environmental protection,"[40] and further to "effectively enforce its environmental laws and regulations through appropriate governmental action . . . ."[41]

The NAAEC has not thus far been an unalloyed success. This, however, has less to do with the content of the agreement than with the willingness of the states parties to hold each other to their mutual obligations. As just indicated, the NAAEC provides that all three countries must have laws providing for high levels

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[36] Sept. 14, 1993, 32 I.L.M. 1480 (1993).

[37] *See, e.g.*, Commission for Environmental Cooperation, North American Environmental Law and Policy, Preface, xiii (Winter 1998); Malgosia Fitzmaurice, *Public Participation in the North American Agreement on Environmental Cooperation*, 52 Int'l & Comp. L.Q. 333 (2003). *See* Schurtman in this volume.

[38] *See, e.g.*, Mark R. Goldschmidt, *The Role of Transparency and Public Participation in International Environmental Agreements: The North American Agreement on Environmental Cooperation*, 29 B.C. Envtl. Aff. L.Rev. 343 (2002); and Jonathan Graubart, *Giving Meaning to New Trade-Linked "Soft Law" Agreements on Social Values: A Law-In-Action Analysis of NAFTA's Environmental Side Agreement*, 6 UCLA J. Int'l L. & Foreign Aff. 425, 428 (2002).

[39] NAAEC, *id.*, art. 1(e).

[40] *Id.*, art. 3. That provision goes on to provide that each country "shall strive to continue to improve those laws and regulations."

[41] *Id.*, art. 5(1).

of environmental protection and that they are to effectively enforce those laws. Yet recent experience indicates a trend toward a willingness to ignore, reciprocally, failures to enforce, in particular.[42] These failures have been brought to light in particular through the citizen submission process discussed in the following paragraphs.

The NAAEC establishes the Commission for Environmental Cooperation (CEC),[43] which is composed of a Council, a Joint Public Advisory Committee, or JPAC, and a Secretariat, located in Montreal. The NAAEC also provides for an innovative procedure, which, along with the JPAC, allows civil society to participate in the implementation of the agreement. I will say just a word about this procedure because it illustrates a different level of international organization – one that moves beyond the Westphalian state-to-state paradigm and allows citizens to participate in encouraging compliance with obligations under public international law.

Article 14 of the NAAEC allows an individual or non-governmental organization to file a "submission" with the Secretariat "asserting that a Party is failing to effectively enforce its environmental law. …"[44] If the submission satisfies the rather straightforward criteria set out in the article,[45] the Secretariat determines whether the submission merits requesting a response from the country in question.[46] The Secretariat may then decide, in light of any response, whether the submission merits recommending to the Council that a "Factual Record" be prepared.[47] If the Secretariat makes such a recommendation, the Council may, by a two-thirds vote, instruct the Secretariat to prepare a factual record.[48] The final step in the process is the possibility of making the factual record publicly available, which the Council may decide to do, again by a two-thirds vote. As of this writing, the Secretariat has prepared ten of these factual records, all of which have been made public.[49]

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[42] This pattern has been evident in the narrow definition by the Council of matters as to which the Secretariat may develop factual records. *See, e.g.*, Commission for Environmental Cooaeprtion, Migratory Birds submission, SEM-99-002, party concerned: United States, final factual record publicly released Apr. 24, 2003, *available at* www.cec.org/files/pdf/sem/MigratoryBirds-FFR_EN.pdf.

[43] *See generally* the CEC website, http://www.cec.org/home/index.cfm?varlan=english.

[44] *Id.*, art. 14(1). For more information on the relevant procedures, *see* the CEC web page on citizen submissions, http://www.cec.org/citizen/index.cfm?varlan=english. *See also* Bratspies in this volume.

[45] *See id.*, art. 14(1)(a)-(f).

[46] *Id.*, art. 14(2).

[47] *Id.*, art. 15(1).

[48] *Id.*, art. 15(2).

[49] The factual records are available on the Commission's website, http://www.cec.org/citizen/index.cfm?varlan=english.

This process has led to cooperation between non-governmental environmental organizations in the three North American countries – a phenomenon that might be described as international organization on the private level. By integrating civil society into the treaty relationship, the citizen submission process achieves yet another dimension of international organization – one that enhances environmental governance in North America by making it accessible to the citizenry through the possibility of participating in a "spotlighting" or whistle-blowing procedure.

Let us now move from North America to Africa, where the path toward effective organization has been littered with obstacles.

D. *The Nile Basin Initiative and Cooperative Framework Project*

A rather different illustration of international environmental organization concerns the ten countries in the Nile River Basin: Burundi, D.R. Congo, Egypt, Eritrea, Ethiopia, Kenya, Rwanda, Sudan, Tanzania and Uganda – a group of countries, some might say, that may be more likely to be involved in conflict than cooperation, much less efforts at organization. Flowing for 4,000 miles from Lake Victoria in East Africa to its mouth in the Mediterranean, the Nile is the longest river in the world. And yet this is only one branch of the great watercourse – the White Nile; the Blue Nile, which rises in the Ethiopian highlands and flows through a deep gorge to join the White Nile at Khartoum, supplies well over 80 per cent of the water that ultimately reaches Egypt.

There is not, nor has there ever been, a treaty covering the entire Nile Basin. There is a saying that "[n]othing flows among the countries of the Nile River Basin except water." There is no cross-border transportation to speak of other than air travel, no trade or commerce, no electricity, no intercourse of any kind (except possibly cross-border raids by insurgents and occasional military incursions). Why then do I cite the Nile Basin as an example of growing international organization?

In the early 1990s, the Ministers of Water Affairs of the Nile countries began meeting on a regular basis as the Nile Council of Ministers, or Nile-COM.[50] In 1995 the Ministers initiated the Nile River Basin Cooperative Framework Project, an effort to fashion a legal and institutional framework for the Nile, supported by the United Nations Development Program.[51] In 1999, the Nile-COM launched the Nile Basin Initiative (NBI), an economic development program supported by the World Bank.[52] Both of these programs were thus established by

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[50] *See generally* the NBI website, http://www.nilebasin.org/.

[51] *Id.*

[52] Information about the Nile River Basin Cooperative Framework Project is available at http://www.nilebasin.org/ Cooperative_ Framework.htm.

the Nile-COM, the project to formulate a Nile treaty being a necessary predicate to major investment in basin-wide, or trans-border, development projects: while donors and investors can enter into agreements with individual governments for solely domestic projects, there must be an international organization with legal personality to receive funds for basin-wide or transboundary projects.[53]

Despite the fact that this region has been rife with conflict for many years, these very practically-minded Water Ministers – most of whom are engineers, problem-solvers – view the Nile not as a source of conflict but as an opportunity to produce benefits for their people through cooperation with other Nile Basin countries. Indeed, the "shared vision" they adopted in the context of the Nile Basin Initiative is, "To achieve sustainable socio-economic development through the equitable utilization of, and benefit from, the common Nile Basin water resources."[54]

What is of present interest is how international organization in the Nile Basin has grown. From the first halting and difficult steps in the Cooperative Framework Project, cooperation between the countries slowly gathered momentum. The Nile Basin Initiative demonstrated to the countries that cooperation could produce win-win solutions, rather than the zero-sum game that results from the mere apportionment of water.[55] For example, reforestation in Ethiopia can prevent floods and reduce siltation of the Nile, and consequent harm to dams. A hydropower project on the Kagera River, which feeds Lake Victoria, can produce power for states in the region, not just those in which the dam is located.

The resulting enthusiasm spilled over from the development track of the NBI into the legal and institutional track of the Cooperative Framework Project. The consequence has been that the two tracks have in effect pulled each other forward: progress on the development track builds confidence and mutual trust, encouraging delegates working on the legal and institutional track to make necessary compromises. Correspondingly, progress on the Cooperative Framework track is necessary to provide a legal and institutional platform for the receipt and management of funds for basin-wide and trans-border projects. In fact, proving that necessity is the mother of invention, the Council of Ministers established the NBI as a formal international organization, albeit on a transitional basis, with its seat in Entebbe, Uganda.[56]

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[53] *See* Schurtman, in this volume.

[54] *See* the NBI website, *supra* note 50.

[55] When water is apportioned as between states A and B, whatever A gets, B loses. This is the classic zero-sum game. It characterizes water apportionment treaties, such as the 1944 Treaty Between the United States of America and Mexico Respecting Utilization of Waters of the Colorado and Tijuana and of the Rio Grande (59 Stat. 1219, T.S. 994), which provides that the United States must deliver 1.5 million acre-feet of Colorado River water annually to Mexico.

[56] The organization is also named the "Nile Basin Initiative." Information is available on the NBI website, http://www.nilebasin.org/

There is now a Headquarters Agreement between Uganda and the NBI, and a Secretariat in a building overlooking Lake Victoria. And, Egypt, Sudan and Ethiopia have established a subsidiary program to assist them in implementing joint hydropower and other projects they are planning on the Blue Nile,[57] as have the Nile Equatorial Lakes States with regard to the White Nile.[58]

Has a Cooperative Framework Agreement been concluded? Unfortunately, at this writing, the answer to this question is in the negative. Thus there remains no basin-wide agreement concerning the use, management and protection of the Nile and no permanent international organization for the implementation of decisions taken by the Nile-COM and the receipt of major funding for Nile Basin projects. However, the Nile Basin countries continue to conduct negotiations. While they have made significant progress, they have been unable to resolve the few issues that remain – chiefly the relationship between the new agreement and existing treaties. The process has been a bit like climbing Mt. Kilimanjaro: the going is relatively fast and easy at first, but the closer one gets to the summit the slower and more difficult it becomes. But the negotiators are under increasing pressure from the Nile Basin countries to conclude the agreement, which will in effect unblock the funds necessary to embark on the first eight projects the Council of Ministers has identified.[59] Those projects are intended to build trust across the basin, build capacity within the Nile countries, and create an enabling environment for implementing development projects.

Thus, international organization proceeds steadily ahead in the Nile Basin. The countries are talking together regularly about cooperating toward common goals, and they are actually on the brink of launching joint projects which will bring them shared benefits. Increased integration of the Nile countries seems likely to lead to more stable relations between them, as was true of Europe after the Second World War, as well as within the individual countries. Thus international organization in this context is in this sense more significant than that in the field of the environment which has been described above. It can lead to more peaceful relations and to the alleviation of poverty in a key, and potentially volatile, part of the world.

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[57] This activity is the Eastern Nile Subsidiary Action Program, information available at http://www.nilebasin.org/.

[58] This activity is the Nile Equatorial Lakes Subsidiary Action Program, information available at *id.*

[59] Information on these projects is available *at* id.

E. *Conclusion*

In conclusion, I believe continued progress in international organization is inevitable. Just in the last decade, technology such as the Internet and cell phones has shrunk the world in ways we could not have imagined twenty years ago.[60] Governments must respond to these phenomena, and they are, often formalizing their cooperation in different fields through agreements, giving rise to what I have called "normative organization." Sometimes the parties to these agreements establish organizations to implement the agreed norms – creating what I have called "institutional organization." The examples from the field of the environment that I have referred to evidence this trend toward international organization on the public level, but also show that it is occurring on the private level, as well, in support of the normative organization established by agreement.

Our smaller world also results in wider knowledge of what different peoples and countries are up to, something reflected in a whole spectrum of ways, from popular demands for real elections to the relatively conservative U.S. Supreme Court taking cognizance of the attitudes and practices of other nations – as it did in March, 2005, in deciding that the Constitution forbids capital punishment for crimes committed before the age of 18.[61] This, too, may be viewed as a manifestation of increased international organization.

Even President Bush's fence-mending trip to Europe in early 2005[62] seemed to demonstrate a recognition that the United States, powerful though it may be militarily and economically, cannot in today's world go it alone.[63] In a word, the United States needs international organization. In this connection I would like to close by quoting Yale history professor John Lewis Gaddis, whose advice I think Professor Hudson would endorse and which I hope the United States Government will heed. He observed: "It is always a bad idea to confuse power with wisdom: muscles are not brains."[64]

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[60] *See* Bratspies, also in this volume.

[61] *See* the Court's recent decision in Roper v. Simmons 125 S.Ct. 1183 (2005). *See also* Lawrence v. Texas, 539 U.S. 558 (2003), in which the Court referred to international and foreign law in striking down an anti-sodomy law as violative of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.

[62] *See, e.g., Into the Lions' Den*, Economist, 26 Feb. 2005, 47 (2005).

[63] *See* Philip H. Gordon, *The End of the Bush Revolution*, 85 For. Aff. 75 (July/Aug. 2006), arguing that the president and his team cannot sustain the "Bush doctrine" of preemptive action and support of democracy throughout the world.

[64] John Lewis Gaddis, *Grand Strategy in the Second Term*, 84 Foreign Aff. 2, 7 (2005).

Recourse to International Human Rights: Challenges to the Traditional Paradigm

By Mayo Moran

A. *Introduction*

Contemporary common law legal systems have a standard model of how international treaty law, and in particular international human rights law, achieves domestic effect. According to this model, after the executive signs and the legislature ratifies an international treaty, it becomes binding as a matter of international law. But it has neither domestic force nor domestic effect unless and until it is incorporated or implemented by the domestic legislature.[1] This picture is ubiquitous and underlies many debates in legal theory as well as in legal practice more generally.[2] However, it has particular power in the context of international human rights. The treaty basis of most international human rights, combined with the dualism of common law legal systems, means that international human rights are often thought of as one of the most

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[1] *See* Glashausser in this volume.

[2] I discuss the theoretical implications of this approach in a number of pieces including *Shifting Boundaries: Influential Authority and Binding Law, in* New Perspectives on the Divide Between National and International Law (Andre Nollkaemper & Janne Nijman eds., forthcoming Sept. 2007). This article is part of a larger project with Karen Knop on the changing nature of legal judgment, sources of law and the role of justification that attends the declining significance of the traditional binding law model. On the larger project *see*, Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. Int'l L. & Pol. 501 (2000); Knop, *Reflections on Thomas Franck, Race and Nationalism (1960): 'General Principles of Law' and Situated Generality*, 35 N.Y.U. J. Int'l L. & Pol. 437 (2003); Mayo Moran, *An Uncivil Action?: The Tort of Torture and Cosmopolitan Private Law in* Torture as Tort 661 (Craig Scott ed., 2001); Mayo Moran, *Authority, Influence and Persuasion: Baker, Charter Values and the Puzzle of Method in* The Unity of Public Law 389 (David Dyzenhaus ed., 2004); Moran, *Time, Place and Value, in* Calling Power to Account: Law, Reparations and the Chinese Canadian Head Tax Case (David Dyzenhaus & Mayo Moran eds., 2005); Moran, *Influential Authority and the Estoppel-Like Effect of International Law, in* The Fluid State (Hilary Charlesworth et al. eds., 2005); Moran, *Inimical to Constitutional Values: Complex Migrations of Constitutional Rights, in* The Migration of Constitutional Ideas (Sujit Choudhry ed., 2006).

Miller & Bratspies (Eds), Progress in International Law, pp. 723–748.

entrenched holdouts of the traditional model.[3] It is illuminating to examine how domestic courts in such a system actually have recourse to international norms.

Indeed, as we shall see, even when international human rights instruments have not been domestically incorporated, they may possess a very particular kind of mandatory effect. This occurs, for example, when international norms are "drawn in" through constitutional guarantees, when international treaties are ratified or when governmental representations generate domestic effect. In all of these cases, even though the rights-regime in question lacks domestic force, its fundamental values nonetheless exert a mandatory domestic effect. And this effect is of a very particular kind, lending distinctive structure and constraint to the processes of deliberation and justification. Moreover, such values may also assume a more dramatic posture. Thus, they serve as a critical underpinning of the controversial public policy jurisdiction that courts invoke when they refuse to enforce formally valid legal acts on the ground that they contravene the basic values of the legal order. Thus, paying attention to the distinctive way that courts actually employ international human rights suggests an alternative richer account of legal authority.

This downward force of international law on domestic governance, and especially domestic judicial decision making, evaded the attention of Professor Manley O. Hudson. In his 1931 Idaho lectures, published as *Progress in International Organization*,[4] Hudson is all too preoccupied with theorizing and justifying order *among* the world's states. And confronted with the determined isolationist impulse that carried the day in the United States in the period between the wars, his focus on the international order was a matter of existential strategy. Indeed, Hudson's lectures were presided over by the formidable isolationist Senator William Borah, who stoutly declared at the event "I have never been able to bring myself to believe it would be in the interest of peace to involve this country in the political affairs of Europe."[5] A more plain condemnation of Hudson's vision of an international order based on law is difficult to imagine. But the seeds of the kind of cosmopolitanism that I describe here were already germinating in Hudson's work. "If any lesson stands out from our experience of the past quarter century," he explains in his introductory lecture, "it is that all of the people of the United States, in every section of the country and every walk of life, are dependent in their daily lives on the ordering of the relations which we

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[3] By traditional model, I refer to the background—largely positivist—understanding of law that focuses on the idea of binding rules as the paradigmatic source of legal authority. This model and its implications are discussed in more detail in Section D below.

[4] Manley O. Hudson, Progress in International Organization (1932).

[5] Sen. William Borah, Address at the Inauguration of the University of Idaho Borah Foundation for Peace (Sept. 24, 1931). Published in this volume.

are forced to maintain with other peoples of the world."[6] He might not have dared to venture that international human rights law would someday directly, or, in the innovative ways described in this chapter, indirectly come to influence domestic jurisprudence. But it could hardly have surprised him:

> We have long been accustomed to speak of our relations with other peoples as foreign relations and of our policy in international affairs as foreign policy. … But if I read aright the signs of our times, there is growing to be some danger in this form of speech. It seems to lend weight to a habit of thinking of relations between different nations as foreign to a national polity, and of international affairs as something with which the ordinary citizen need not concern himself. It might be an advance toward reality if we began to think of the problems of our international relations as domestic problems, in the sense that they have to do with our immediate and local well-being.[7]

The phenomenon I document in this chapter is a striking move in this direction. Timid progress, perhaps, but proof in the face of contemporary skeptics[8] that international human rights law can and does have something to do with "our immediate and local well-being."

B. *Constitutional Interpretation and International Human Rights*

In many common law jurisdictions, the least controversial cases of "unorthodox" domestic recourse to international human rights are found in constitutional adjudication.[9] Across a range of jurisdictions, courts "draw in" international human rights in a way that seems precluded by the traditional dualist model. One distinctive link between these jurisdictions and the international human rights regime is found in their "post-war" origins. Thus, commentators have suggested that the post-war model of constitutionalism is distinguished from older constitutional conceptions by a number of features.[10] Critical for my purpose is the way that these modern constitutions draw inspiration from post-war

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[6] Hudson, *supra* note 4 at 1.

[7] *Id*. at 2.

[8] Jack L. Goldsmith and Eric A. Posner, The Limits of International Law (2005).

[9] The exception of course is found in the United States where such drawing in of international or comparative sources is by contrast extremely controversial. A striking illustration of this the debate over the relevance of such sources is found in the United States Supreme Court's consideration of the constitutionality of the juvenile death penalty in Roper v. Simmons, 543 U.S. 551 (2005). For a discussion of some of the other controversies in this area, see Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 Harv. L. Rev. 109 (Nov. 2005).

[10] Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism, in* The Migration of Constitutional Ideas, *supra* note 2 at 84.

international documents such as the International Covenant on Civil and Political Rights (ICCPR),[11] various conventions prohibiting discrimination,[12] and, of course, the European Convention on Human Rights (ECHR).[13] One result of this legacy is a set of shared commitments to equal human dignity as a foundational constitutional value. And this core legal value serves as a vital link between the post-war constitutional order and the international regime of human rights.[14] It is thus perhaps unsurprising that the rights-protecting provisions of post-war constitutions are often regarded as drawing in international human rights through their domestic provisions. This means that international human rights, regardless of their lack of domestic force, exert distinctive pressure on domestic constitutional guarantees. Unlike their ancestors, post-war constitutional orders view international human rights norms as vital sources of law.[15]

The most explicit example of this distinctive relationship between international human rights norms and post-war constitutions is found in the South African Constitution. Section 39 provides that when courts are interpreting the bill of rights, they "must consider international law" and "may consider foreign law."[16] This calls attention to the fact that international law rights hold a distinctive place in the interpretation of constitutional rights—they are a mandatory resource in interpreting the content of domestic constitutional rights. However, the explicitness of this constitutional command regarding international law did not necessarily demand repudiation of the traditional dualist model. The Constitutional Court of South Africa could have subjected this new constitutionalized obligation to consider international law to the old dualist requirements by treating the reference

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[11] Int'l Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

[12] *See* Int'l Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195; and the Convention on the Elimination of All Forms of Discrimination Against Women, Sep. 3, 1981, 1249 U.N.T.S. 13.

[13] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

[14] For a discussion of this idea and its sources, *see* Weinrib, *The Postwar Paradigm, supra* note 10; *see also* Carazo in this volume.

[15] *See, e.g.*, Weinrib, *supra* note 10; Moran, *An Uncivil Action?: The Tort of Torture and Cosmopolitan Private Law, supra* note 2. The American Supreme Court case involving the juvenile death penalty and the controversy over the relevance of international law is one powerful illustration of this. Writing for the majority Justice Kennedy held: "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. … The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." Roper v. Simmons 543 U.S. 551, 578 (2005).

[16] S. Afr. Const., Ch 2. §39 1(b) and (c).

to international law in Section 39 as extending only to domestically binding international law.[17] Under this approach, unless an international treaty had been ratified and domestically incorporated, it would lack the status of international law for the purposes of the interpretive section. The result would have been to preserve and constitutionalize the pre-existing dualist approach to treaties.

The Constitutional Court considered and rejected this approach when it ruled on whether the imposition of the death penalty violated the interim constitution.[18] Chief Justice Chaskalson explicitly rejects this approach, insisting that the reference to "international law" not be narrowly interpreted. And in a repudiation of the dualist approach, he specifically notes that "non-binding as well as binding law"[19] is encompassed by the interpretive section. The shift away from the old dualist model of binding law is also apparent in the Court's willingness to accord a like role to the decisions of a wide variety of tribunals including the European Commission and Court of Human Rights, the United Nations Committee on Human Rights, and the Inter-American Commission and Court of Human Rights. This alternative approach to the authority of international human rights is also illustrated by the Court's reference to a very wide array of international human rights sources to justify their holding that the death penalty is unconstitutional. Thus, for instance, Chief Justice Chaskalson notes that the United Nations Committee on Human Rights had held that the death sentence was, by definition, cruel and unusual punishment.[20] Indeed, international human rights norms along with European sources played a critical role in the finding of unconstitutionality. This points to a larger shift towards a conception of authority in which a particular, mandatory domestic effect is independent of binding domestic force.

Another illustration of South Africa's move away from the dualism of the traditional model can be found in the treatment of socio-economic rights. South Africa signed the International Covenant on Economic, Social and Cultural Rights (ICESCR) in October 1994 but has not yet ratified it.[21] Nonetheless, in its jurisprudence, the Constitutional Court has considered both the terms of the ICESCR as well as the views of the UN Committee on Economic, Social and Cultural Rights established under that convention. In *Grootboom*, the Court found that the concept of a minimum core of social, economic and cultural rights was a relevant consideration in assessing what counted as reasonableness.[22] It then

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[17] *See* Andrews in this volume.

[18] See S v Makwanyane 1995 (3) SA 391 (CC) (S. Afr.).

[19] *Id*. at para. 35.

[20] *Id*. at para. 90.

[21] Int'l Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3.

[22] *Government of the RSA and Others v. Grootboom and Others*, 2001 (1) SA 46 (CC) (S. Afr.); *see also* Andrews and Carazo in this volume.

followed up on this reasoning in *Minister of Health and Others v. Treatment Action Campaign and Others (No.2)*. There too the Court considered the UN Committee's articulation of a minimum core of such rights. Although it rejected the idea that the Bill of Rights made a minimum core of socio-economic rights justiciable, it did hold that such a core was relevant to determinations of reasonableness.[23]

While the South African Constitution is the most explicit example of this constitutional "drawing in" of international human rights norms, it nonetheless shares that basic feature with other post-war constitutional orders. Like the South African Constitution, the Canadian Charter of Rights and Freedoms is a post-war constitutional document that draws much of its inspiration, methodology and substantive core values from the post-war period and the enshrinement of international human rights. Unlike the South African Constitution, however, the relationship between the Canadian Charter and international human rights norms is implicit rather than explicit. Thus, the Charter has no equivalent of the South African interpretive provision that mandates consideration of international law. Yet, despite this and other textual differences, the Supreme Court of Canada approaches the relevance of international human rights obligations in a manner very similar to that of the South African Constitutional Court.

This similar net effect can be seen in the fact that the Supreme Court of Canada has held that international human rights norms infuse the meaning of the guarantees of the Canadian Charter of Rights and Freedoms. For instance in *Keegstra*,[24] its first major hate speech case under the freedom of expression provision of the Charter,[25] the Supreme Court of Canada held that rights protections at the international level are at minimum a relevant and persuasive source for the interpretation of the Charter's freedom of expression rights. Particularly important in *Keegstra*, for instance, was the fact that various aspects of the international regime treat the elimination of hate speech as consistent with a commitment to freedom of expression.[26] These international law norms

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[23] *Minister of Health & Others v. Treatment Action Campaign & Others (No.2)* 2002 (5) SA 721 at paras. 26–39 (S. Afr.).

[24] R. v. Keegstra, [1990] 3 S.C.R. 697 (Can.).

[25] Can. Const. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2(b): "Everyone has the following fundamental freedoms: … freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication[.]"

[26] "*CERD* and *ICCPR* demonstrate that the prohibition of hate-promoting expression is considered to be not only compatible with a signatory nation's guarantee of human rights, but is as well an obligatory aspect of this guarantee. Decisions under the *European Convention for the Protection of Human Rights and Fundamental Freedoms* are also of aid in illustrating the tenor of the international community's approach to hate propaganda and free expression. This is not to deny that finding the correct balance between prohibiting hate propaganda and ensuring freedom of expression has been a source of debate internationally. *See, e.g.*, Natan Lerner, The

were thus drawn into the meaning of the Charter and provided a uniquely salient source of legal authority.

The relevance of international human rights norms to the scope of domestic constitutional guarantees in Canada was also apparent in the Supreme Court of Canada's consideration of what conditions were necessary to make extradition to death penalty jurisdictions consistent with the Section 7 guarantee that deprivations of life, liberty and security of the person can proceed only in conformity with fundamental justice.[27] In *Burns*[28] the Supreme Court of Canada reversed its earlier holding in *Ng*[29] and held that generally such extraditions could only proceed if assurances that the death penalty would not be imposed were given. In arriving at this holding, the Court stressed that international human rights obligations "should inform" the meaning both of Charter rights and of the limits that may constitutionally be placed upon those rights.[30] In the context of the death penalty, the Court then draws on a number of treaties and initiatives at the international level, supported and sometimes championed by Canada, that sought to abolish the death penalty itself or at a minimum to seek assurances in cases of extradition[31] As in the South African example, these non-binding international law obligations exert a distinctive kind of mandatory influence on the meaning of domestic constitutional law guarantees.

A similar approach to the salience of non-binding international human rights norms can also be seen in recent developments under the Human Rights Act in the United Kingdom.[32] For instance, in what is known as the Belmarsh Prison case,

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U.N. Convention on the Elimination of All Forms of Racial Discrimination 43–54 (1980). But despite debate, Canada, along with other members of the international community, has indicated a commitment to prohibiting hate propaganda, and, in my opinion, this Court must have regard to that commitment in investigating the nature of the government objective behind s. 319(2) of the *Criminal Code*. That the international community has collectively acted to condemn hate propaganda, and to oblige State Parties to *CERD* and *ICCPR* to prohibit such expression, thus emphasizes the importance of the objective behind s. 319(2) and the principles of equality and the inherent dignity of all persons that infuse both international human rights and the *Charter*." *Keegstra, supra* note 24 at 754–5.

[27] Can. Const. (Contitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), §7: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[28] United States v. Burns, [2001] 1 S.C.R. 283 (Can.).

[29] Re Ng Extradition [1991] 2 S.C.R. 858 (Can.).

[30] Burns, *supra* note 28 at para. 80 (quoting Dickson J. in Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038 at 1056–7 (Can.)).

[31] *See, e.g.*, Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128 and UN Commission on Human Rights Resolutions 1999/61 (adopted April 28, 1999) and 2000/65 (adopted April 27, 2000) which call for the abolition of the death penalty and request states to seek assurances before complying with extradition requests from death penalty states. In *Burns, supra* note 28, the Supreme Court discusses Canada's role at para 82–87.

[32] Human Rights Act, 1998, c. 42.

the House of Lords considered whether indefinite detention without trial was compatible with the Human Rights Act.[33] In assessing whether the derogation from Article 15 of the ECHR by the United Kingdom complied with its obligations,[34] the House of Lords considered, among other things, the relevant provisions of the international human rights regime. Thus, the provisions of the ICCPR on derogation in times of emergency were read together with the relevant provisions of the ECHR. However, because the primary concern with the UK detention concerned the fact that only non-citizens were subjected to indefinite detention in the absence of trial, the focus of the House of Lords reasoning was on the discriminatory quality of the scheme. And on the question of what constituted discrimination under the Human Rights Act, the House of Lords made extensive use of international human rights materials, including the relevant provisions of the ICCPR, the Convention to End Racial Discrimination (CERD),[35] and the observations and recommendations of the CERD Committee.[36] Lord Bingham acknowledged that these sources were not formally binding on the UK. Nonetheless, he stated that, taken together, these materials clearly demonstrate that a state may not discriminate by detaining foreign nationals but not nationals presenting the same threat in a time of public emergency.[37] These non-binding international human rights sources thus constitute an important part of the House of Lords' conclusion that the UK's detention policy was incompatible with the Human Rights Act. Here again international human rights norms, regardless of their formal "bindingness", play a central role in domestic constitutional determinations.

These cases all demonstrate that international human rights norms may exert a powerful effect on domestic constitutional law regardless of their binding domestic effect. That this effect cannot be easily explained by the traditional model is apparent in the similarity of the use that we see across the range of jurisdictions despite the differences in the domestic constitutional arrangements.[38] Thus, while one could make the argument in South Africa that the constitutional

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[33] A & Others v. Sec'y of State for the Home Dep't, [2005] 2 A.C. 68 (H.L.) (U.K.).

[34] *Supra* note 13, Art. 15 (no indefinite detention).

[35] International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195.

[36] A & Others, *supra* note 33 at para. 62.

[37] A & Others, *supra* note 33 at para. 63.

[38] The distinction between the older American model and the post-war model in this regard is apparent in the very different treatment that non-binding international sources receive in the United States Supreme Court's consideration of the juvenile death penalty in *Roper v. Simmons, supra* note 15. Recourse to an array of non-binding sources of the kind that would be uncontroversial in the post-war jurisdictions, is a subject of deep division within the various opinions on the United States Supreme Court.

provision effectively "incorporates" international law, this is a harder argument to make in Canada and clearly not the case in the UK where the House of Lords describes the ICCPR and the CERD as not legally binding, the Human Rights Act notwithstanding. Nonetheless, as the cases above demonstrate, international human rights norms may exert an extremely demanding effect on the meaning of domestic constitutional norms.

C. *Ratification, Representation and the Salience of International Human Rights*

Apart from the constitutional scenario discussed above it is also possible to identify another group of cases where international human rights seem to exert considerable domestic power even in the absence of formal "bindingness." As noted above, dualist legal systems like those discussed here normally require that, in addition to the act of ratification, the legislative branches specifically grant the international instrument domestic effect. And, in the absence of such domestic incorporation, the international instrument, although ratified, lacks any domestic force. However, in a number of common law jurisdictions, it is possible to see courts taking apart the incorporation requirement's traditional equation between force and mandatory effect. In such instances, a number of domestic courts have found that, notwithstanding the traditional approach, the act of ratification itself gives rise to a mandatory domestic effect. And though mandatory, this effect is not equivalent to ordinary domestic force and indeed differs from it in a number of key ways. Thus, courts insist that this effect does not amount to enforcing the specific rules and provisions of the relevant international convention. What the effect does impose, however, are obligations of respect for the basic values of the ratified convention. While this does not amount to full enforcement of the rights and obligations enshrined in the ratified convention, it imposes restraints and obligations on the kind of public actions that can be taken and can be justified.[39]

The Canadian experience provides an illustration of how ratification alone can lend international human rights a distinctive kind of mandatory effect in the domestic system. In the Supreme Court of Canada's 1999 *Baker* decision the

[39] Elsewhere I suggest that it is possible to make sense of this invocation of non-binding international law as part of a larger reconfiguration of legal authority in the face of the growing inability of the traditional picture to account for much of what seems to preoccupy judges, academics and practitioners alike. *See* Moran, *Authority*, *Influence and Persuasion*, *supra* note 2.

question of the relevance of ratified but unincorporated international law was the only point that divided the majority and the dissent.[40] The majority held that Canada's ratification of the Convention on the Rights of the Child (the Children's Convention)[41] placed some imperatives on how the government's immigration powers could be exercised, even though the Convention had not been domestically incorporated. In contrast, the dissent by Justices Iacobucci and Cory insisted that, because it had not been domestically incorporated, the Children's Convention could have no domestic effect whatsoever.[42]

The case involved Ms. Baker, who had lived in Canada illegally for many years and who had had four children in Canada. She asked to be allowed to make an application for permanent residence status without leaving the country. The effects of a possible deportation on her children, she argued, provided sufficient "humanitarian and compassionate reasons" to justify exempting her from the ordinary application requirements.[43] When the immigration officer refused this request, Ms. Baker sought judicial review. The two lower courts rejected her application but the Supreme Court unanimously reversed. All members of the Supreme Court concurred that the immigration officer was biased and hence failed to reasonably exercise his discretionary power. The majority opinion, authored by Madam Justice L'Heureux-Dubé, also went on to find that any reasonable exercise of the discretionary power must, among other things, be responsive to the needs and interests of the children. Because the immigration officer's decision contained no indication that it had been made in a manner which was "alive, attentive or sensitive" to the interests of Ms. Baker's children, it was unreasonable on that ground as well.[44]

The majority derives the imperative of attentiveness to the interests of children from the purpose of the *Immigration Act* and the guidelines published by the Minister for making immigration decisions on humanitarian and compassionate grounds.[45] However, the domestic sources focus on family reunification and connection rather than making specific reference to the needs of children. In fact, the only source that specifically mandates attentiveness to the special needs of children is the Convention on the Rights of the Child. Madam Justice

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[40] Baker v. Canada, [1999] 2 S.C.R. 817; Knop "Here and There", *supra*, note 2; Stephen J. Toope and Jutta Brunnée *A Hesitant Embrace: The Application of International Law by Canadian Courts*, in The Unity of Public Law at 357–88. I elaborate these arguments in *Baker* in more detail in Moran, *Authority, Influence and Persuasion*, *supra* note 2.

[41] *Convention on the Rights of the Child 1992* Can. T.S. No. 3.

[42] Baker, *supra* note 40 at paras. 78–81.

[43] *Immigration Act*, R.S.C., ch. I-2, §§ 114(2) (1985).

[44] Baker, *supra* note 40 at para. 75.

[45] *Id.* at para. 67.

L'Heureux-Dubé describes Canada's ratification of the Convention as an "indication of the importance of considering the interests of children."[46] Without legislative implementation, she acknowledges, ratification alone is not sufficient to give the Convention "direct application within Canadian law."[47] Despite this, she insists that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation."[48] This is because the legislature is presumed to respect the values and principles enshrined in international law. She also refers to the "important role of international human rights law as an aid in interpreting domestic law," particularly in the context of the Canadian Charter.[49] The Convention, she concludes, helps "to show the values that are central in determining" whether this decision was reasonable.[50] This means that "emphasis on the rights, interests, and needs of children and special attention to childhood are important values that should be considered" in the exercise of discretion.[51] But something stronger than the ordinary presumption is at work here, for she states that "attentiveness and sensitivity to the importance of the rights of children…is *essential*" if the decision is to be reasonable.[52] Yet, while this approach does give the interests of children substantial mandatory weight in any decision, it does not accord them the "primary importance" required by Article 3 (1) of the Children's Convention.

The justifications for invoking the Convention are compatible with a number of possibilities, discussed in other commentary on the case.[53] However, it seems that the fact of ratification gives the Convention a special status – a status not tantamount to incorporation—but nonetheless significant. What is mandatory on this view is attentiveness to the overall scheme of values and principles embodied in the ratified law, not its specific regime of rights. While non-binding international law may well lack domestic force, it may simultaneously possess mandatory domestic effect. It is just this disaggregation of force and effect to which the *Baker* dissent objects when it insists that, if implemented the Children's Convention has full domestic force and effect, but until it is so implemented it has neither and is irrelevant.[54] However, the *Baker* majority is not alone in positing

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[46] *Id*. at para. 69.
[47] *Id*. at para. 69.
[48] *Id*. at para 70 (quoting Ruth Sullivan, Driedger on the Construction of Statutes 330 (3rd ed. 1994)).
[49] *Id*. at para. 70.
[50] *Id*. at para. 71.
[51] *Id*. at para.73.
[52] *Id*. at para 74 [emphasis added].
[53] *See, e.g.*, Knop, *supra* note 2; Toope and Brunnée, *supra* note 40.
[54] Baker, *supra* note 40 at para. 81 (per Justice Iacobucci, Cory J. concurring on this point).

that non-binding law may well have a domestic effect that is mandatory in nature and that imposes a distinctive set of justificatory demands.

Another significant illustration can be found in the various arguments in *Teoh*,[55] the Australian counterpart to *Baker*.[56] Mr. Teoh was refused resident status in Australia. Like Ms. Baker, he argued that deportation would cause hardship for his wife and children. The Review Panel acknowledged the hardship but refused to review the decision because of his serious criminal record. The Federal Court quashed this decision, with the majority holding that the panel's discretion had been exercised inconsistently with the Children's Convention, which Australia had also ratified but had not incorporated.[57] Ratification, in Court's view, was a statement to the national and international communities that Australia respected the rights contained in the Convention. It created a "legitimate expectation" that the Children's Convention rights would be respected and treated as a primary consideration by decision-makers, which had not been done in Mr. Teoh's case.[58] On appeal to the High Court, the Government insisted that a ratified but unincorporated treaty was irrelevant to the elaboration of domestic law.[59] Like the majority in *Baker*, the *Teoh* majority refused to conclude that this meant that the ratified treaty was of no domestic significance. Instead, they approved the view that the ratification was a kind of representation to the nation and to the international community that Australia cared about and intended to respect the rights contained in the Convention.[60] Again, ratification gave rise to a legitimate expectation that the ratified treaty would be respected. And the *Teoh* majority explicitly disapproved of "bad faith" invocations of the incorporation requirement. A solemn legal act like ratification, the majority insisted, cannot subsequently be dismissed as "merely platitudinous or ineffectual" and of no legal effect whatsoever.[61] In support of this approach, the *Teoh* majority drew on the similar New Zealand case, *Tavita*. In that case, which also concerned the domestic impact of the ratified but unincorporated Children's Convention, the New Zealand Court of Appeal

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[55] Minister for Immigration and Ethnic Affairs v. Teoh (1995) 183 C.L.R. 273; 128 A.L.R. 353 (Aus.).

[56] For discussion of *Teoh* and its implications *see*, David Dyzenhaus, Murray Hunt and Michael Taggart, *The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation* 1 Oxford U. Commonwealth L. J. 5, 11–12 (2001); Murray Hunt, Using Human Rights Law in English Courts 242 (1998); Margaret Allars, *Of cocoons and small 'c' constitutionalism: the principle of legality and an Australian perspective on Baker* in The Unity of Public Law *supra* note 2 at 307–334.

[57] Teoh v. Minister for Immigration and Ethnic Affairs (1994) 49 F.C.R. 409; 121 A.L.R. 436 (Aus.).

[58] Teoh, *supra* note 55 at 291.

[59] *Id.*

[60] *Id.* at 291 (per Mason C.J. and Deane J.) and at 301 (per Toohey J.).

[61] *Id.* at 291.

criticized government arguments that implied that New Zealand's ratification of international instruments was "at least partly window-dressing."[62] Thus, *Baker, Teoh* and *Tavita* all support the idea that ratification lends international human rights a distinctive kind of domestic legal significance which, while mandatory in nature, does not amount to the conferral of distinct domestic rights.

The decision of the Judicial Committee of the Privy Council in *Thomas v. Baptiste* also rests on a similar view.[63] Thomas had been convicted of murder and sentenced to death in Trinidad and Tobago. Trinidad and Tobago had ratified the American Convention on Human Rights[64] (ACHR) and in so doing recognized both the Inter-American Commission's competence to entertain petitions from individuals and the compulsory jurisdiction of the Inter-American Court of Human Rights to give binding rulings. Following his conviction, Thomas petitioned the Commission and the Inter-American Court then issued an order requiring the Government to refrain from carrying out the death sentence pending determination.[65] The Government was prepared to defy this order and proceed with the death sentence.[66] On appeal, the Privy Council accepted that Thomas could not enforce the terms of the ACHR, which though ratified, had not been domestically incorporated. But, according to the majority, the appellants were not seeking enforcement of ACHR rights *per se* but rather the general right, implicit in the common law, not to have a pending legal process frustrated by executive action.[67] The majority also observed that "[e]xecutive action may give rise to a settled practice, and this in turn may found a constitutional right which cannot lawfully be withdrawn by executive action alone."[68] Although the right here could be withdrawn, the executive was by no means unfettered in such action.[69] Their Lordships accordingly stayed the executions pending determination of the petitions by the Commission. Lord Goff and Lord Hobhouse dissented, holding that since ratified but unincorporated treaties are not part of domestic law, rights contained therein cannot affect the scope of the domestic due process guarantee.[70]

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[62] Tavita v. Minister of Immigration, [1994] 2 N.Z.L.R. 257 at 266.

[63] [2000] 2 A.C. 1, [1999] 3 W.L.R. 249.

[64] American Convention on Human Rights, 1969.

[65] Thomas, *supra* note 63.

[66] Similarly, the United States Supreme Court has refused to abide by provisional measures in the context of death sentences. *See*, Federal Republic of Germany v. United States, 526 U.S. 111 (1999); Breard v. Greene, 523 U.S. 371 (1998).

[67] Thomas, *supra* note 63 at 11.

[68] *Id.*

[69] *Id.*

[70] The closely related Ontario Court of Appeal decision in Ahani is also instructive: [2002] O.J. No.431. It concerns the Optional Protocol under the *ICCPR* which Canada had ratified but not incorporated. Under the Optional Protocol even the Committee's final views are not binding as

In cases like *Baker, Teoh, Thomas* and others[71] it is possible to see a pattern of relatively consistent reasoning. Domestic courts, it seems, are prepared to uncouple formal binding force and mandatory effect even in the context of non-binding international law. In all of these cases the fundamental values of ratified international human rights instruments may exert a mandatory effect notwithstanding the absence of direct domestic application. And, as the cases above demonstrate, this effect exerts itself in moments of discretion—thus, in *Baker* and *Teoh*, it lends some mandatory content to the exercise of administrative discretion and accordingly also structures the judicial review of such discretion. Similarly, the mandatory effect that such non-binding rights may exert in the exercise of judicial discretion is evident in *Thomas*. So, the case law on the domestic effect of ratified but unincorporated human rights treaties actually suggests a more complex range of possibilities than those inherent in the binary mechanism of the traditional picture.

International human rights as expressed in various treaties may, through the act of ratification, come to exert a mandatory domestic effect. However, courts sometimes also insist on the salience of international human rights norms for another reason. In such cases, courts require that the exercise of government power comply with international human rights norms, not because those norms are contained in ratified instruments, but because they have been the subject of government representations. So notwithstanding the fact that such statements are not formally binding as a matter of domestic law, courts will treat them as grounding reasonable expectations of compliance with the assertion of respect for the relevant rights.

The idea of holding a government to respect at least the core values to which it expresses a formal public commitment is apparent in the Supreme Court of Canada decision in *Burns* discussed above. In that case, as noted, one important reason for insisting on assurances in the context of extradition to death penalty states was found in the way that the norms and values of international human

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a matter of international law. Ahani was a convention refugee who had been ordered deported for security reasons and had exhausted his domestic remedies. He petitioned the Human Rights Committee which asked Canada to stay his deportation order until it had considered the communication. Canada refused. Ahani then sought a stay of deportation pending the Committee's deliberations but the trial judge refused to grant the stay: [2002] O.J. No. 81. A majority of the Ontario Court of Appeal dismissed Ahani's appeal on the ground that to give effect to his request would convert a non-binding request in an unincorporated Protocol into a binding domestic obligation. Rosenberg J.A.'s dissent pointed out that by ratifying, the federal government "committed itself" to the Committee process (at para 73). Having voluntarily decided to extend recourse to the Committee, the federal government could not frustrate the very right it established (at para 86).

[71] *Id.*

rights law infused the domestic constitutional guarantee under Section 7 of the Canadian Charter. The Supreme Court concluded that Canada's rejection of the death penalty revealed a "fundamental Canadian principle of the appropriate limits of the criminal justice system."[72] It supported this conclusion by heading a section of its analysis as follows: "The Abolition of the Death Penalty has Emerged as a Major Canadian Initiative at the International Level."[73] In this section the Court focused on Canada's "advocacy at the international level of the abolition of the death penalty itself."[74] It noted that Canada has been at the forefront of several international initiatives to abolish the death penalty. It also pointed to resolutions sponsored by Canada as well as statements made by Canada to the UN Commission on Human Rights.[75] All of this added up, in the Supreme Court's view, to the conclusion that, since its international representations and actions evinced a strong commitment to the abolition of the death penalty, the government was not free to take domestic actions that were fundamentally inconsistent with this expressed commitment.

An English Court of Appeal decision also demonstrates the way that a government's international representations regarding respect for fundamental rights may give rise to a similar kind of mandatory domestic effect. *Abbasi* considered the constraints on the prerogative power of the executive in the conduct of its diplomatic relations.[76] The case arose out of the detention of a British national by the United States in Guantanamo Bay.[77] The claimant argued that the Foreign Office was subject to a duty imposed by the ECHR to make representations on behalf of a detained citizen. The Court rejected this claim but went on to hold that the doctrine of "legitimate expectations" nonetheless constrained the prerogative power and rendered it, to that extent, justiciable. According to Lord Phillips MR, this doctrine provided "a well-established and flexible means for giving legal effect to a settled policy or practice for the exercise of administrative discretion."[78] Express promises or settled practices could give rise to legitimate expectations, which must be properly taken into account in individual cases.[79] Relevant here was the fact that the Foreign Office made several statements (including to the UN General Assembly) indicating that they would advocate on

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[72] Burns, *supra* note 28 at para 77.

[73] *Id*. at 78–79 (heading of a section, capitalization altered).

[74] *Id*. at 81.

[75] *Id*. at 85–89.

[76] R (on the Aapplication of Abbasi and another) v. Secretary of State for Foreign and Commonwealth Affairs and another, [2002] EWCA (Civ) 1598 (Eng.).

[77] Abbasi was decided before Rasul v. Bush, 542 U.S. 466 (2004), Hamdi v. Rumsfeld, 542 U.S. 507 (2004) and other relevant United State Supreme Court cases.

[78] Abbasi, *supra* note 76 at para. 82.

[79] *Id*. at para. 82.

behalf of nationals abroad where there was evidence of a miscarriage of justice or of fundamental violations of human rights.[80] Though such representations are traditionally devoid of any effect in domestic law, Lord Phillips observed that "it must be a 'normal expectation of every citizen' that, if subjected abroad to a violation of a fundamental right, the British Government will not simply wash their hands of the matter and abandon him to his fate."[81] At a minimum there is a duty to consider making representations to the foreign government. The nature of this duty is subject to various factors, including, vitally, "the nature and extent of the injustice."[82] Nonetheless, "even where there has been a gross miscarriage of justice, there may perhaps be overriding reasons of public policy" which would justify non-intervention.[83]

This suggests that, in addition to the "drawing in" of international human rights norms through the interpretation of constitutional rights provisions, there are also at least two other ways that international human rights can exert themselves in domestic law. First, the act of ratification alone, even in the absence of the ordinary domestic incorporation requirement, seems capable of giving rise to an obligation of respect for the core values of the ratified instrument.[84] A similar obligation of respect may also impose constraints on government action, even in the exercise of its prerogative powers, when the government has indicated in the international (or perhaps even national arena) that it intends to respect or abide by certain fundamental international law values. In both of these cases, international human rights norms possess a distinctive kind of mandatory salience notwithstanding the fact that, under the traditional account, they possess "no force and effect" until they have been domestically incorporated.

D. *International Human Rights: Beyond Incorporation*

I. *Structuring Discretion*

Despite these differences in the manner in which unincorporated international human rights can come to matter, there are strong similarities in how those norms matter across the categories of cases discussed above. Thus, both the ratification

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[80] *Id*. at para.87–89.

[81] *Id*. at para 98 (quoting R. v. Foreign Secretary ex p. Everett, [1989] 1 QB 811.).

[82] *Id*. at para 99–100.

[83] *Id*. at para. 100.

[84] There is an obvious resonance between this approach and the good faith obligation codified in Article 18 of the Vienna Convention on the Law of Treaties, 1980 Can. T.S. No. 37, May 22, 1969.

cases and the representation cases are characterized by the insistence that, although the relevant sources do not give rise to binding rules, they possess a domestic effect of a very particular kind. What is mandatory in these cases is attentiveness to the core values of the relevant regime, not enforcement of its positive rights. Thus, a regime of rights may be thought of as possessing both a "core" of discrete rights and obligations and a kind of force-field of fundamental values emanating from the distinct rights.[85] Elsewhere, I have described the emanations of rights as manifesting a distinct "influential" form of authority.[86] As described above, there are a number of ways in which the basic norms of international human rights law might come to possess this distinctive authority.

The form that this influential authority takes can be distinguished from traditional binding authority both because the source of the obligation differs and because the resulting content of the obligation therefore also varies. This distinct content, associated with influential legal resources such as the international human rights norms discussed above, means that the obligations manifest themselves very differently than traditional binding sources. While the traditional account of binding authorities dictating legal results is undoubtedly too simple, a directly binding source (in its simplest form perhaps, a statutory rule) does figure in a particular way in the conclusion to a legal question. In contrast, influential authorities do not demand (nor indeed often even posit) a particular conclusion. Instead, they exert their influence on the relatively open-textured processes of deliberation and justification, demanding that these processes attend to and respect the relevant values. The resulting constraints on the processes of deliberation and justification shape, in that sense, what may be done and how it may be done. Influential authority—like its cousin, persuasive authority—presses its demands in those discretionary moments of deliberation and justification that, though so constitutive of legal reasoning, also are largely ignored in theoretical accounts of law and legal reasoning.[87] Let us examine a few illustrative cases in order to see how international human rights values play this kind of a role in the processes of deliberation and justification.

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[85] The German constitution recognizes this quality of fundamental rights, noting that they possess both a subjective dimension that applies in particular cases and an objective dimension in which rights have an effect which 'radiates' throughout the legal system. I discuss this quality in *Authority, Influence and Persuasion, supra* note 2.

[86] *Authority, Influence and Persuasion supra* note 2.

[87] Pointing to the existence of this kind of discretionary space in legal decision-making was one of the preoccupations of the legal realists and the Critical Legal Studies movement after them. However, as I discuss in *Authority, Influence and Persuasion and in Shifting Boundaries, supra* note 2, the critics' shared commitment to the positivist underpinnings of the traditional model have meant that they have been largely unable to move beyond this (very important) critical project.

The way that international human rights norms press their demands on the processes of deliberation and justification is apparent in the cases dealing with the Convention on the Rights of the Child, such as *Baker, Teoh*, and *Tavita*. Although the ultimate immigration decisions in those cases remain discretionary in nature, all of the relevant courts insisted that, in the process of exercising that discretion, the values of the Convention must be respected and observed. In this sense, the mandatory values derived from the Children's Convention structure and constrain the discretionary sphere of domestic decision making. Similar dynamics are at work in *Thomas* and in the dissent in *Ahani*. In those cases, the courts insist on respect for the value of the additional procedural possibilities that were agreed to when the relevant documents were ratified. This is not tantamount to being bound by the outcome of such processes but is rather a product of the recognition that even a non-binding opinion from a body like the IACHR or the HRC is the kind of thing that will make a substantial difference to the deliberative process and hence at least warrants consideration.

An explicit recognition of this effect can be found in a passage from *Briggs v. Baptiste* in which the Privy Council explains its earlier related decision in *Thomas* in the following terms:

> If the Court were to rule that the trial had not been fair and to order that the conviction be quashed, the State would be at liberty as a matter of domestic law to ignore the order and carry out the sentence, but it is very difficult to believe that it would have done so. Trinidad and Tobago is a modern democracy which operates under the rule of law and is sensitive to its international obligations. By granting the stay in question the Board ensured that the defendants would obtain that to which they were entitled under the Constitution, the right to pursue their outstanding complaints to the point where a favourable determination was capable of leading to the quashing of their convictions or the commutation of their sentences.[88]

What must be respected is a process which, though not binding in its outcome, nonetheless will make a difference in how the ultimate question is considered and resolved.[89] In these cases, while international human rights norms do not

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[88] Briggs v. Baptiste, P.C. Appeal No. 31 (1999) at 15.

[89] In fact, Briggs v. Baptiste emphasizes this point and reveals in so doing one important limitation of the fact that the authoritative source does not generate a specific outcome. In the follow-up case to *Thomas*, the Privy Council had to consider a number of questions including the significance of the opinion issued by the Commission that although Thomas had had a fair trial, the post-trial procedures resulted in inappropriate delay in the context of a death penalty case. The Commission recommended that consideration be given to either commutation of sentence or to compensation. This was considered by Trinidad and Tobago's domestic Advisory Committee on the Power of Pardon, who rejected it thereby affirming the death penalty. When Briggs appealed the imposition of the death penalty to the Privy Council, a majority concluded that that the ACHR process posed no further obstacle. It noted that there was no longer any issue outstanding

dictate a particular result, they do make a difference to the deliberative process. They alter the process of deliberation about what is to be done. Thus, even in a case where the final outcome is the same, one would expect that additional and different justifications would be required to support a result that rejected the opinion of a respected deliberative body like the IACHR or the HRC. In this sense, then, the influential authority of these international human rights sources can be seen as imposing additional and differently structured justificatory demands.

The way that influential authority affects how courts review discretionary decision-making is also evident in *Abbasi*.[90] There, even in the most discretionary sphere of judgment—executive prerogative—the Court of Appeal insisted that there were factors that must be taken into consideration. As in the Children's Convention cases discussed above, the relevant sources exert their demands not as decision-rules but, rather, in the deliberative process itself. Thus, as Lord Phillips MR indicates, although a significant amount of latitude is inherent in the exercise of its prerogative powers, the Executive does have a duty to "consider" making representations on behalf of its citizens abroad. Discharging this duty requires some investigation into the gravity of the miscarriage of justice. This duty does not generate specific rules but, as in *Thomas*, it necessarily alters the nature of the deliberative process and affects the range of justifications for failure to make representations that will be appropriate in any given case. While it may be open to the Executive to justify failure to make representations even in cases of "gross miscarriages of justice," this can only be countenanced where "overriding reasons of public policy" justify the refusal to make representations.

II. *The Estoppel-Like Effect*

Perhaps the most important posture of influential authority of international human rights norms is found in the demands, discussed above, that it imposes on the relatively discretionary moments of deliberation and justification. In such instances, the sphere of domestic effect of international human rights norms is not limited to cases where the norms are domestically binding. Instead, the cases above demonstrate that force and mandatory effect are not inevitably conjoined in the way the traditional picture suggests. However, in addition to this discretion-structuring effect, the influential authority of international human rights norms also has another, more

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in the Inter-American system. Since all that Thomas required was due consideration of the Inter-American Commission's opinion, and since there was no indication that this was not done in good faith, the ACHR process had been respected and there was no basis on which to interfere with the imposition of the death penalty.

[90] Abbasi & Another v. Secretary of State for Foreign and Commonwealth Affairs, [2002] E.W.C.A. (civ.) 159. See detailed dicussion at *infra* note 104 and following.

dramatic guise. This "estoppel-like" effect is apparent when a court refuses to give legal imprimatur to formally valid legal acts. And when courts assert these estoppel-like limits on their ability to enforce certain kinds of legal acts, they describe their jurisdiction in terms of "public policy." The least controversial source of such policy is found in international human rights, often in combination with domestic constitutional rights. Thus, across jurisdictions such as Canada, the UK and South Africa (as well as other non-common law jurisdictions including Germany, which will not be discussed here), it is possible to identify a relatively coherent pattern.[91] This is apparent both in the sources on which the courts draw for the content of this "public policy" and in the nature of the justifications for exercising this extraordinary jurisdiction. Thus, courts typically justify their refusal to enforce certain kinds of legal arrangements on the ground that to do otherwise would involve a subversion or repudiation of the court's own most fundamental values. In locating the sources of these values, international human rights, often in tandem with constitutional human rights, figure as the most important, least controversial core.

In cases where courts are asked to enforce legal acts that seem to contravene the most fundamental values of the legal order, they often refuse to give such acts their purported effect. As noted above, the doctrinal vehicle that courts invoke in such cases typically takes the form of "public policy." In giving content to this somewhat deceptively termed ideal, courts look to the intersection of a range of domestic constitutional and international sources. This is particularly evident in the case of international norms, which are typically invoked without regard to whether they are domestically binding and, indeed, often without particular concern for the details of the relevant legal rules or regimes. Though one might be tempted to dismiss this as sloppiness on the part of the courts,[92] a closer reading suggests that the authority of the relevant sources is actually influential in form. Thus, it is the values or principles of the sources that matter, not the rules or discrete provisions. Indeed, on rare occasions, courts are explicit about this.[93]

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[91] I discuss this estoppel-like effect and the relevant sources in *Shifting Boundaries*, *supra* note 2.

[92] Indeed, the absence of such force is sometimes cited as a reason to refuse to give international sources any domestic effect. Thus for instance in Noble v. Wolf, [1949] D.R. 503, a unanimous Ontario Court of Appeal upheld a racially discriminatory covenant much like the one in *Drummond Wren*: [1945] D.R. 778. Hogg J.A. rejects *Drummond Wren's* reasoning on the ground that the international law sources "do not seem to have been made a part of the law of this country or of this Province by any legislative enactment of either the Dominion Parliament or the Ontario Legislature." *Id.* at 399. Similarly, he quotes Lord Thankerton's statement that "there can be no justification for expanding the principles of public policy in this country by reference to the public policy of another country." *Id.* This "applies as well to the principles and obligations set forth in international covenants or charters, such as the United Nations Charter, until such time as they should be made a part of the law of the land." *Id.*

[93] *See e.g.*, the discussion of *Canada Trust v. Ontario Human Rights Commission infra* at note 110.

So, while the sources may not themselves be binding, the values that are derived from them are demanding—sufficiently demanding in extreme cases to lead courts to decline to treat certain kinds of "legal" acts as having legal significance.

Unsurprisingly, the estoppel-like effect of mandatory values assumes particular importance when domestic courts are asked to give effect to the laws of other countries, that is, to "foreign law." In cases concerning the recognition of foreign law courts are explicitly concerned, not with the validity of the foreign law (which is generally acknowledged), but, rather, with the extent to which they can give *effect* to the relevant law. In these cases courts strive to reconcile respect for their own fundamental values with the respect demanded by foreign law. And in this process, the basic norms of international human rights law play a particularly important role.

The principle of comity requires a kind of deference to the political choices of other sovereigns. This means that courts may well be required to give legal effect to foreign law that their own jurisdictions view as ill-advised, even erroneous. As the House of Lords stated, "the existence of differences is the very reason why it may be appropriate for the forum court to have recourse to the foreign law." However, courts also insist that "blind adherence to foreign law" is not the role of the court.[94] Indeed, "[e]xceptionally and rarely, a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice" as understood by the court.[95] A brief examination of the cases in which courts have, on this ground, refused to give domestic effect to foreign law reveals important continuities with the instances of influential authority noted above. Here, too, we see the uncoupling of force and effect. The estoppel-like limits on that to which a court can give effect are expressed in the language of "public policy," and among the various sources of such policy, international law values are the most prominent.

The House of Lords decision in *Oppenheimer v. Cattermole* is a good illustration. The case involved a German Jew who fled to England in 1939 to escape Nazi persecution. In 1948 he became a British subject and from 1953 onwards, he was paid an annual pension by the German republic. The United Kingdom taxed him on that pension and he claimed an exemption from double taxation. But to be eligible for the exemption he needed to retain his German citizenship. Thus, a critical issue concerned the effect of an infamous 1941 Nazi decree. Decree 11 abrogated the citizenship of German Jews who left Germany and confiscated their property to be used "to further aims connected with the solution of the Jewish problem."[96] In response to the argument that English courts could not

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[94] Kuwait Airways Corp. v. Iraqi Airways Co. (Nos 4 and 5), [2002] WLR 1353 at 1360 (per Lord Nicholls).

[95] *Id.*

[96] Oppenheimer v. Cattermole, [1976] A.C. 249 at 281 (H.L.) (U.K.) (per Lord Salmon).

give effect to a decree that contravened international law, a majority of the Court of Appeal held that the question of nationality "must be answered in light of the law of that country however inequitable, oppressive or objectionable it may be."[97]

The House of Lords took a very different view. Lord Cross acknowledged that a judge should be slow to recognize the legislation of a foreign state. However, he also noted that it was "part of the public policy of this country that our courts should give effect to clearly established rules of international law."[98] International law itself was cautious, he noted, about any wholesale position regarding confiscatory legislation, at least in part because of the differences between capitalist and socialist regimes. But Decree 11 visited upon German Jews a "discriminatory withdrawal of their rights" and "a discriminatory confiscation of their property."[99] The legislation thus "takes away without compensation from a section of the citizen body singled out on racial grounds all their property" and deprives them of their citizenship.[100] Thus, he concluded: "To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognize it as law at all."[101] Notwithstanding the respect normally accorded to the law of a foreign sovereign, the pull of these mandatory international human rights values precluded giving effect to foreign law.

This reading of *Oppenheimer* is confirmed in *Kuwait Airways* where the House of Lords describes the earlier decision as standing for the principle that the courts *must* possess a residual power to "disregard a provision of foreign law when to do otherwise would affront basic principles of justice and fairness which the courts seek to apply in the administration of justice in this country."[102] *Kuwait Airways* confirms that violations of fundamental human rights form the core of the public policy exception to the recognition of foreign law. At issue in that case was a resolution adopted by Iraq during the invasion of Kuwait. Resolution 369 dissolved the Kuwait Airways Corporation (KAC) and transferred its property to the Iraqi Airways Company (IAC). KAC subsequently brought an action in conversion against IAC in England. Much of the case turned on whether the court was bound to recognize Resolution 369. The House of Lords found that the resolution should be disregarded and awarded damages to KAC. All of the Law Lords accepted, citing *Oppenheimer*, that serious violations of international human rights standards provide a secure foundation for the public policy exception, even in the very limited sphere of its operation in the recognition of foreign law.

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97 Oppenheimer v. Cattermole, *[1973] Ch. 264*.at 273 (C.A.) (U.K.).
98 *Id*. at 278.
99 *Id*. at 277.
100 *Id*. at 278.
101 *Id*.
102 Oppenheimer, as explained in Kuwait Airways, *supra* note 94 at 1360–61 (emphasis added).

The difficult question in the case concerned how far violations of international law outside of core human rights also require this estoppel-like response. On this point, they held that flagrant violations of international law even beyond human rights can provide a basis for non-enforcement. Where a foreign law amounts to a gross violation of established rules of international law of fundamental importance, enforcement or recognition of that law would be "manifestly contrary to the public policy of English law."[103]

A similar reading of *Oppenheimer* and of the "international human rights core" at the heart of public policy was also affirmed by the English Court of Appeal in *Abbasi*.[104] *Abbasi* concerned the question of the extent to which English courts would review the legitimacy of the acts of a foreign government. Mr. Abbasi was a British subject who was captured in Afghanistan and detained by the United States in Guantanamo Bay. His counsel argued that the British Foreign Office had a duty to make representations on his behalf because he faced the prospect of indefinite detention without an opportunity to challenge its legitimacy. The Secretary of State argued that English courts would not examine the legitimacy of the action of a foreign sovereign state. But after extensively quoting the key passage from Lord Cross's opinion in *Oppenheimer*, Lord Phillips noted that there was considerable support for the position that "where fundamental human rights are in play, the courts of this country will not abstain from reviewing the legitimacy of the actions of a foreign sovereign state."[105] Although a court faced with a claim that a foreign state is in breach of its international obligations must exercise caution, nonetheless, such a court must be "free to express a view in relation to what it conceives to be a clear breach of international law, particularly in the context of human rights."[106] Here, as in the cases above, the general principle of respect for a foreign sovereign is limited by the need for the court to act consistently with its own fundamental values. And at the core of those values are fundamental principles of international human rights.

Although the most important illustration of this estoppel-like effect of international human rights values is found in the recognition of foreign law, sometimes the influential authority of such norms also leads a court to refuse to enforce private domestic arrangements. An illustration of this estoppel-like effect can be seen in a Canadian case on the law of trusts. In *Canada Trust Co. v. Ontario Human Rights Commission*[107] post-Charter Ontario courts had to consider the

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[103] *Id.* at 1363.

[104] Abbasi & Another v. Secretary of State for Foreign and Commonwealth Affairs, [2002] E.W.C.A. (Civ.) 159.

[105] *Id.* at para. 53.

[106] *Id.*

[107] (1990), 74 O.R. (2d) 481.

contemporary validity of the "Leonard Foundation Trust," an explicitly racist charitable trust established in 1923. The trust, which provided educational scholarships, excluded from its benefit a number of different groups including "all who are not Christians of the White Race." The trust was formally valid and had been in operation for many decades. However, there was concern about the terms of the trust and eventually a complaint was filed under the Ontario Human Rights Code. The primary question when the case came before the court was whether the trust violated public policy. The trial judge pointed out that the trust suffered from no positive defect at the time of its formation and hence found it valid. However, the Ontario Court of Appeal unanimously rejected the idea that the law extant at the time of the creation of the trust exhausted the norms that a contemporary court was compelled to consider in assessing its validity. Instead, it held that, at least when a court is called upon to pronounce upon the validity of a trust, a settler's freedom to dispose of property is limited by "*current* principles of public policy under which all races and religions are to be treated on a footing of equality."[108] And in locating the content of public policy, the Court of Appeal in *Canada Trust* looked to contemporary rights-protecting documents including not only the Canadian Charter but also international law sources.

The judgment of Justice Tarnopolsky is particularly illuminating. Unsurprisingly, in grounding a public policy against discrimination, he gave explicit recognition to the provisions of the Canadian Charter that guarantee equality rights and multiculturalism. However, he also linked these guarantees to a number of international instruments and sources including the ICCPR, CERD and CEDAW, noting that all three have been "ratified by Canada with the unanimous consent of all of the provinces."[109] Because these sources are being invoked not as rules of decision but, rather, for their influential power, Justice Tarnopolosky stated: "It would be nonsensical to pursue every one of these domestic and international instruments to see whether the public policy invalidity is restricted to any particular activity or service."[110] Clearly, the post-war international documents like the ICCPR and the CERD cannot be invoked on the ground of their "force"—not only did they not even exist when the trust was created in 1923 but, even if they had, they certainly would not have applied to private action. Instead, these sources matter because they express mandatory values which the court must

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[108] *Id*. at 496 (per Robins, J.A.) (emphasis added).

[109] In *Authority, Influence and Persuasion, supra* note 2, I discuss two instances of influential authority, beginning with ratified but unincorporated treaty obligations of the kind discussed by the majority in *Baker v. AG Canada*. I note how the act of ratification may impose a mandatory obligation of respect for fundamental values that bears an important similarity to the Charter's effect upon private and common law.

[110] Canada Trust Appeal, *supra* note 107 at 22 (OJ).

respect. And *Canada Trust* illustrates that such resources can on occasion have a sufficiently powerful mandatory effect that they may invalidate formally valid legal acts far beyond the "force field" where they actually apply.

Canada Trust is in an important sense continuous with an old common law tradition of invoking public policy in order to refuse to give judicial sanction to formally valid legal acts that cut against the very foundation of the legal order. An illustration of this older tradition can be seen in another Canadian private law case, *Re Drummond Wren*. In that 1945 decision, Mackay J. of the Ontario High Court struck down a racially restrictive covenant that prohibited the transfer of the subject land "to Jews, or to persons of objectionable nationality."[111] He reasoned that "[a]ny agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy."[112] He began locating the relevant principles, not by looking to domestic legislation, but, rather, by examining the then-embryonic international human rights regime. The San Francisco Charter, which Canada had signed and ratified, was thus of "profound significance." This was particularly true of the Preamble on the "dignity and worth of the human person" and the anti-discrimination provisions. Similar provisions in the Atlantic Charter bolstered this point. Following this identification of the international sources that Canada had signed and ratified, he turned to domestic legislation. And all of these sources are relevant, not for their rules, but rather "as an aid in determining principles relative to public policy."[113]

Thus, even non-binding international human rights often play an extremely important role in domestic adjudication. They can be understood as part of a larger picture of the judicial role and of the extent to which mandatory values place certain demands and limits on when effect can be given to private common law rights and duties. Though more often appearing in an interpretive posture, the cases above illustrate that influential authority also exerts an estoppel-like effect where a court would otherwise have to issue a decision that would run contrary to its own fundamental values. This estoppel-like posture of influential authorities is explicitly discussed by the South African Constitutional Court in *Du Plessis v. De Klerk*. There the Court adverts to precisely the kind of estoppel-like effect at work in the *Canada Trust, Drummond Wren*, as well as in the foreign law cases:

> But we leave open the possibility that there may be cases where the enforcement of previously acquired rights would in the light of our present constitutional values be

[111] [1945] 4 D.L.R. 674 at 675 (H.C.).
[112] *Id.* at 676 (quoting 7 Hals. (2nd ed.) at 153-54).
[113] *Id.* at 677.

> so grossly unjust and abhorrent that it could not be countenanced, whether as being contrary to public policy or on some other basis …[114]

And in the articulation of those values that shape the discretionary processes of legal reasoning and help to delineate principled limits on the kinds of acts courts can recognize as legally valid, international law, formally binding or not, assumes a place of particular prominence.

E. *Conclusion*

International human rights norms seem to possess crucially important effects that lie well beyond the purview of the traditional model that demands domestic implementation before a norm can possess domestic effect. In the ratification and representation cases, judges note that, according to the traditional view, the relevant international sources are non-binding and hence lack any effect. But they also go on to find that the non-binding source possesses a mandatory effect and so demands respect. And this demand for respect manifests itself in the deliberative process and thus necessarily affects, among other things, the available range of justifications. Even beyond these discretion-structuring effects, international human rights may also exert a more dramatic estoppel-like effect on the kinds of acts that a court can recognize. And in revealing the many mandatory legal effects that even non-binding international law norms may possess in the domestic legal system, we also see the limits of the traditional model of legal authority. There is no more dramatic illustration of this than the demanding or influential role played by apparently non-binding international human rights norms in the domestic legal system.

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[114] DuPlessis v. De Klerk, 1996 (5) BCLR 658 (CC) at para. 20. Elsewhere I suggest that something like this radiating effect of fundamental constitutional rights may help to explain the controversial decision of the United States Supreme Court in Shelley v. Kramer 334 U.S. 1 (1948), *see* Moran, *Inimical to Constitutional Values, supra* note 2.

A Right to Frozen Water? The Institutional Spaces for Supranational Climate Change Petitions

By Hari M. Osofsky

A. *Introduction*

Global climate change is causing frozen water to melt, with significant consequences in localities around the world. In Sagarmatha (Everest) National Park, new glacial lakes threaten to flood local villages.[1] The thinning Artic ice makes the Inuit's traditional way of life more difficult; travel routes are becoming dangerous and animal populations are shifting.[2] Even in more temperate regions, the repercussions are dramatic. For example, the California snow pack is melting earlier and in greater quantities than usual, and water capture systems are unprepared for this increased flow. As a result, the summer drought problems have been heightened.[3]

As melting continues apace, legal systems at local, state, national, and supranational levels must grapple with the value of frozen water. These problems embody the conception expressed by Professor Manley O. Hudson in *Progress in International Organization*: "It might be an advance toward reality if we began to think of the problems of our international relations as domestic problems, in the sense that they have to do with our immediate and local well-being."[4] Emissions from localities around the world—regulated by overlapping regulatory regimes at multiple scales of governance—contribute to the supranational phenomenon of climate change, which has a multiplicity of local impacts.[5]

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[1] *See infra* Section B.I.

[2] *See infra* Section B.II.

[3] *See infra* Section B.III.

[4] Manley O. Hudson, Progress in International Organization 2 (1932).

[5] The Fourth IPCC Assessment reinforces the multiscalar and unequal dimensions of this problem. *See* Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2007: The Physical Basis, Summary for Policymakers, available at* http://www.ipcc.ch/SPM2feb07.pdf; IPCC, *Climate Change 2007: Impacts, Adaptation, and Vulnerability, Summary for Policymakers, available at* http://www.ipcc.ch/SPM13apr07.pdf; IPCC, *Climate Change 2007: Mitigation of Climate Change, Summary for Policymakers, available at* http://www.ipcc.ch/SPM040507.pdf.

Miller & Bratspies (Eds), Progress in International Law, pp. 749–770.

The complex law and geography of this melting represents a new frontier of water conflicts and governance challenges. The ability of acts of private individuals, corporations, and governments around the world to impact profoundly the lives of ostensibly unrelated people around the world poses a far more foundational challenge to sovereignty than U.S. Senator William E. Borah envisioned in his repudiation of the League of Nations. Borah viewed the Treaty of Versailles as imperiling what he saw as "the underlying, the very first principles of this Republic." Namely, he thought it conflicted with "the right of our people to govern themselves free from all restraint, legal or moral, of foreign powers."[6] Although water conflicts traditionally have focused on shared liquid resources—such as a river upon which upstream and downstream users rely[7]—global climate change forces us to examine water more holistically. In particular, it is critical to grapple with water's changes of state and their implications: To what extent is it appropriate to think about melting ice and snow in terms of a *right* to frozen water?

The United States still battles over foundational international law questions such as the extent to which it should restrain itself through treaties—including those focusing on global climate change[8]—or recognize the binding constraints of customary international law.[9] But problems like the melting of frozen water raise core governance questions that these debates rarely capture.[10] The multiscalar nature

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[6] William E. Borah, The League of Nations, Speech Delivered in the Senate of the United States, Nov. 19, 1919.

[7] For a recent discussion of the complexity of such surface water allocation in the Indian law context, see Hope M. Babcock, *Reserved Indian Water Rights in Riparian Jurisdictions: Water, Water Everywhere, Perhaps Some Drops for Us*, 91 Cornell L. Rev. 1203 (2006).

[8] *See, e.g.*, President George W. Bush, Speech Discussing Global Climate Change, June 11, 2001, *available at* http://www.whitehouse.gov/news/releases/2001/06/20010611–2.html (explaining the U.S. decision to withdraw from the Kyoto Protocol).

[9] The controversy over Jack Goldsmith and Eric Posner's recent book, *see* Jack L. Goldsmith & Eric A. Posner, The Limits of International Law (2005), which draws from game theory and rational choice theory to argue for the limits of international law, exemplifies recent debates over international law as law, a debate that often hones in on customary international law. *See, e.g.*, Paul Schiff Berman, Book Review Essay, *Seeing Beyond the Limits of International Law*, 84 Tex. L. Rev. 1265 (2006) (critiquing the assumptions underlying the book); Oona A. Hathaway & Ariel N. Lavinbuk, Book Review, *Rationalism and Revisionism in International Law*, 199 Harv. L. Rev. 1404 (2006) (exploring its methodological contribution and the limits of its particular rationalist analysis); Edward T. Swaine, Review Essay, *Restoring (and Risking) Interest in International Law*, 100 Am J. Int'l L. 259 (2006) (describing the book as a largely successful pioneering work); Anne Van Aaken, *To Do Away With International Law? Some Limits to the 'Limits of International Law'*, 17 Eur. J. Int'l L. 289 (2006) (providing an internal critique of the book that accepts its rationalist assumptions); *Symposium: The Limits of International Law*, Ga. J. Int'l & Comp. L. 253 (symposium issue exploring a range of critiques of the book).

[10] *See* Hari M. Osofsky, *The Geography of Climate Change Litigation Part II:* Massachusetts v. EPA 8, Chi. J. Int'l L. (forthcoming 2008).

of this problem requires a mix of national, subnational, and supranational law and policy efforts in combination to give us a possibility of slowing or halting the melt.[11] Although the pace of globalization[12] has created many situations which demand cross-cutting approaches, thinking on frozen water is particularly underdeveloped. To the extent that we view frozen water as a resource that nation-states should value or that its citizens might have a right to, the interdependence required to address global climate change and this consequence of it poses a fundamental threat to self-governance.

This chapter engages the questions of international institutions' role and progress—debated by Senator Borah and Professor Hudson at the 1931 meeting at the University of Idaho which provided inspiration for this project—through the specific lens of supranational institutions and the process of bringing climate change petitions before them.[13] It focuses on petitions to the Inter-American Commission on Human Rights and the World Heritage Commission in which the underlying facts include problematic melting due to climate change.[14] Although neither of these petitions is framed specifically in terms of a right to frozen water, the rights violations and danger to World Heritage being asserted stem from the changing state of frozen water.[15] Moreover, both petitions faced

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[11] I have explored the multiscalar actors and claims involved in climate change litigation at subnational, national, and supranational levels in Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 Wash U. L.Q. 1789 (2005).

[12] An in-depth exploration of the relationship between globalization and climate change is beyond the scope of this paper. For an overview of some of the discourse around globalization issues, see David Held & Andrew McGrew, *The Great Globalization Debate: An Introduction, in* The Global Transformations Reader: An Introduction to the Globalization Debate 1 (David Held & Andrew McGrew, eds., 2d ed. 2003); *see also* Terence C. Halliday & Pavel Osinsky, *Globalization of Law* 32 Ann. Rev. Soc. 447 (2006).

[13] Although this chapter, in part due to space limitations, focuses on two case studies from international institutions, questions of frozen water and climate change also have arisen in a domestic law context beyond the scope of this discussion. For example, California's Complaint in its nuisance suit against automakers extensively references the problem of snowpack melting. *See* State of Cal. v. General Motors Corp., No. C06–05755 (N.D. Cal., filed Sept. 20, 2006), *available at* http://ag.ca.gov/newsalerts/cms06/06–082_0a.pdf.

[14] *See* Sagarmatha Petition *infra* note 22; Inuit Petition *infra* note 55.

[15] Both petitions refer to the problem of melting ice and snow throughout, as have public portrayals of them. When Sheila Watt-Cloutier made a statement about the Inuit petition at the 2005 Conference of the Parties to the UN Framework Convention on Climate Change, for example, she not only discussed problems related to that melting, but also explained: "What is happening affects virtually every facet of Inuit life—we are a people of the land, ice, snow, and animals.Our hunting culture thrives on the cold. We need it to be cold to maintain our culture and way of life. Climate change has become the ultimate threat to Inuit culture." *See* Presentation by Sheila Watt-Cloutier, Chair, Inuit Circumpolar Conference, Eleventh Conference of Parties to the UN Framework Convention on Climate Change, Montreal, Dec. 7, 2005, http://www.inuitcircumpolar.com/ index.php?ID=318&Lang=En.

substantial resistance from the bodies with which they were filed.[16] The indirect pleas for a right to frozen water and the struggles to obtain institutional action thus serve as a helpful jumping off point for thinking normatively about the role of international institutions in addressing problems, like climate change, which do not fit neatly within existing legal boxes.

A law and geography[17] analysis of the problem of melting ice and snow provides a basis for assessing the capability of supranational institutions to engage its complexity. In particular, the ties to location, or place, in these petitions help reveal the spaces for cross-cutting problems in supranational human rights institutions.[18] This inquiry in turn serves as a window into the underlying spaces created by human rights approaches and institutions, especially because of the institutions involved. Although the Inter-American Commission on Human Rights is clearly a supranational human rights institution, placing the World Heritage Committee in a clear conceptual box is more complex.[19]

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[16] *See infra* pt. D.

[17] A law and geography approach engages both the spatiality of law (Geography in Law)—which reflects a perspective that law can only be understood in broader context—and the way in which "law shapes physical conditions and legitimates spatiality" (Law in Geography). Jane Holder & Carolyn Harrison, *Connecting Law and Geography, in* Law and Geography, 3, 3–5 (Jane Holder & Carolyn Harrison eds., 2003); *accord*. David Delaney et al., *Preface: Where is Law, in* The Legal Geographies Reader xxi (Nicholas Blomley et al., eds., 2001) ("Our legal lives are constituted by shifting intersections of different and not necessarily coherently articulating legal orders associated with different scalar spaces. The relations between these different legal spaces is a dynamic and complex one, but it is a pressing and important subject of inquiry given the ways in which codes operative at various scales intermingle.").

[18] As I have discussed elsewhere, an extensive scholarly literature explores the nuances of these terms. *See* Hari M. Osofsky, *A Law and Geography Perspective on the New Haven School*, 32 Yale J. Int'l L. 421 (2007); *see also* Doreen Massey, For Space (2005); Yi-Fu Tuan, Space and Place: The Perspective of Experience 6 (1977); John A. Agnew & James S. Duncan, Introduction to The Power of Place: Bringing Together Geographical and Sociological Imaginations 1, 1 (John A. Agnew & James S. Duncan eds., 1989); Helen Couclelis, *Location, Place, Region, and Space*, in Geography's Inner Worlds: Pervasive Themes in Contemporary American Geography 215, 215 (Ronald F. Abler et al. eds., 1992); Michael R. Curry, *On Space and Spatial Practice in Contemporary Geography, in* Concepts in Hum. Geography 3, 3 (Carville Earle et al. eds., 1995). This chapter references "place" to engage ties to specific geographic locations, "space" to analyze socio-political and legal structures, and "scale" to refer to the level of governance.

[19] The Convention Concerning the Protection of the World Cultural and Natural Heritage is not framed in terms of individual human rights, but it notes that "the existing international conventions, recommendations and resolutions concerning cultural and natural property demonstrate the importance, for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong." Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151, pmbl., *available at* http://whc.unesco.org/en/conventiontext/.

The chapter begins by presenting three instances in which melting ice and snow raise significant legal and policy questions, and then discusses the complexities of place and space that infuse them. From this base, the chapter explores the ability of supranational petitions to navigate these complexities, examining the value of existing categories and the need for structural and substantive reconceptualization. It concludes with a discussion of the road ahead.

B. *Crisis of Melting Ice and Snow*

The melting of ice and snow[20] has resulted in numerous localized impacts and efforts at solutions. These innovative responses often rely minimally on the legal system. For example, in Switzerland, melting glaciers threaten the long-standing ski industry; in response, a ski resort is experimenting with wrapping the glacier upon which it relies in PVC foam.[21] This Part explores three areas in which severe melting is occurring—Sagarmatha (Everest) National Park, the Arctic, and the mountains of California—as examples of this broader phenomenon. They represent diverse geographies and dilemmas, and as such reveal the contours of the problem.

I. *Sagarmatha (Everest) National Park*

Most Himalayan glaciers have been retreating in cycles of decades of relative stability, followed by decades of lake formation, and "then sudden retreat."[22] The glaciers on the south side of the Himalayan region have been particularly vulnerable.[23]

The resulting glacial lakes threaten mountain villages. At least 44 glacial lakes in Nepal and Bhutan are filling so rapidly that they threaten to burst their banks within the next few years.[24] Such events have proven to be devastating; for example, in 1985, an outburst flood from Nepal's Dig Tsho lake caused major damage to

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[20] I use "melt" or "melting" throughout this chapter as a shorthand way of referring to this phenomenon.

[21] *See Cloak Protects Glacier from Sun*, BBC News (May 10, 2005), *available at* http://news.bbc.co.uk/2/hi/europe/4533945.stm.

[22] Jeffrey S. Kargel et. al., *100 Years of Glacier Retreat in Central Asia, available at* http://www.glims.org/Publications/2003INQUA_AsiaGlac.ppt#256,1,100; *see also* Petition to the World Heritage Committee Requesting Inclusion of Sagarmatha National Park in the List of World Heritage in Danger as a Result of Climate Change and for Protective Measure and Actions (Nov. 15, 2004), *available at* http://www.climatelaw.org/media/UNESCO.petitions.release/nepal.sagarmatha.national.park.doc [hereinafter Sagarmatha Petition].

[23] *See id; cf.* Howard W. French, *A Melting Glacier in Tibet Serves as an Example and a Warning*, N.Y. Times, Nov. 9, 2004, at F3.

[24] UNEP/GRID–Arendal, *Global Warming Triggers Glacial Lakes Flood Threat*, Apr. 16, 2002, *available at* http://www.grida.no/newsroom.cfm?pressReleaseItemID=98.

a hydropower plant and destroyed 14 bridges.[25] Without timely warning, downstream villages could face casualties, as well as major social and economic disruption.

This looming crisis creates the need for expensive mitigation efforts, which serve as short-term fixes in the face of limited action to address the global climate change causing of the melt. Although early warning systems and lowering the water levels in glacial lakes can be effective, their remote location in countries with limited resources slows implementation of those efforts.[26] A project is underway to implement these strategies for the Tsho Rolpa Lake, which threatens the downstream village of Tribeni, but many other such projects are needed.[27]

II. *Arctic*

Climate change is impacting the Arctic region particularly severely, with temperature increases at almost twice the global average.[28] Numerous studies document the multitude of climate-related impacts in the polar regions; with respect to melting ice and snow, these include changes in sea ice, the cumulative mass of small glaciers, ice sheets and shelves, and permafrost.[29]

This melting threatens to speed the pace of global warming and change radically the fabric of life in the Arctic. The thawing permafrost, for example, may reinforce cyclical global warming through exposing carbon to microbial decomposition.[30] Moreover, the conversion of ice to water in this process has significant socioeconomic repercussions. As ice melts within the permafrost, the ground surface subsides unevenly, which results in small hills and depressions known as thermokarst.[31] This subsidence pattern can damage the structural integrity of roads, pipelines, and buildings.[32]

In Alaska, nearly 100,000 people live in areas vulnerable to this phenomenon, and roads and the Trans-Alaska Pipeline stretch across them.[33] Many affected roads, railways, and airstrips must be moved or replaced through alternative construction

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[25] *See id; see also* Sagarmatha Petition, *supra* note 22, at 21.

[26] *See* Global Warming Triggers Glacial Lakes Flood Threat, *supra* note 24.

[27] *See id*.

[28] Impacts of a Warming Arctic, Arctic Climate Impact Assessment (2004), at 8, *available at* http://www.acia.uaf.edu/pages/scientific.html [hereinafter ACIA Assessment].

[29] *See* U.S. Arctic Research Commission, Permafrost Task Force Report, Climate Change, Permafrost, and Impacts on Civil Infrastructure 1 (Dec. 2003), *available at* http://www.arctic.gov/files/PermafrostForWeb.pdf [hereinafter Permafrost Task Force Report].

[30] *See id*. at 1, 19.

[31] *See id*. at 8.

[32] *See id*.; ACIA Assessment, *supra* note 28, at 86–91.

[33] *See* Permafrost Task Force Report, *supra* note 29, at 28.

methods.[34] In urban areas, large facilities, such as schools and tank farms are generally affected first, and even utility and communications networks are at risk.[35]

For the indigenous peoples living throughout the region, the thawing permafrost, and melting river and sea ice create even more profound problems. The animal populations are changing, hunters cannot go as far out to hunt seals because of the diminishing ice cover, and traditional travel routes cut across ice that is melting earlier and more unpredictably.[36] These and other developments pose a significant threat to the Inuit way of life.[37]

III. *California Mountains*

The summer melting of the California snowpack has long helped to provide water for thirsty Southern California.[38] On April 1 of each year, water managers create estimates of the amount of water stored in the snow and therefore how much water will be available from the snowpack during the spring and summer for agricultural and urban uses.[39]

Recent studies identify two trends that present dilemmas for policymakers. First, the April 1 assessments consistently show mostly declining accumulated snow in the Western United States. The primary exception to this rule has occurred in high elevations in the southern Sierra Nevada range, where snow levels have increased.[40] The most severe reductions have occurred at elevations below 3000 meters, which is significant because 80% of snowpack storage occurs in that range.[41]

This decline has broad potential implications for California's economy and natural resources.[42] With respect to water resources, in particular, the decrease in available water in this reservoir occurs in a context in which the state's water systems are severely overtaxed and over half the state's population relies on water imported from outside their area.[43]

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[34] *See id*. at 29.

[35] *See id*. at 31.

[36] ACIA Assessment, *supra* note 28, at 92–97.

[37] *See id*. at 61–68.

[38] Staff Paper from Guido Franco on Climate Change Impacts and Adaptation in California 10 (June 2005) (on file with the California Energy Commission); *see also* State of Cal. v. General Motors Corp., N.D. Cal. at 3.

[39] *See id*.

[40] *Id*. at 10–11.

[41] Katharine Hayhoe, et al., *Emissions Pathways, Climate Change, and Impacts on California* 12425, Proceedings of the National Academy of Sciences of the United States of America (Aug. 24, 2004), *available at* www.pnas.org/cgi/doi/10.1073/pnas.0404500101.

[42] Franco, *supra* note 38, at 15.

[43] *Id*. at 19.

Second, through a combination of increasing temperatures and of changing forms of precipitation, the snowmelt runoff, which is the primary supplier of water from accumulated snow, has shifted to earlier in the year.[44] This early runoff creates an increased risk of flooding, as water managers must juggle between capturing the water for use in the spring and summer and maintaining reservoir space for flood protection.[45]

The combination of the two phenomena puts extra pressure on limited groundwater supplies.[46] It also likely will disrupt the current pattern of month-dependent water rights, as the mid-to-late season rights become less valuable.[47]

C. *Law and Geography Analysis of the Crisis*

The lens of geography helps to illuminate the legal and policy challenges faced in addressing melting ice and snow. Human contributions to global climate change originate in a multiplicity of localities, governed by multiscalar[48] regulatory regimes. Similarly, as demonstrated in the three above-described situations, the effects of this global phenomenon on ice and snow pose place-specific regulatory challenges.

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[44] Hayhoe, et al., *supra* note 41, at 124–25.

[45] *Id*. at 124–26.

[46] *Id*.

[47] *Id*.

[48] As it does with place and space, *see supra* note 18, the geography literature analyzes and debates the nuances of the term "scale." For examples of that scholarship, see Neil Brenner, New State Spaces: Urban Governance and the Rescaling of Statehood 9 (2004); Neil Brenner, *Between Fixity and Motion: Accumulation, Territorial Organization and the Historical Geography of Spatial Scales*, 16 Env't & Plan. D: Soc'y & Space 459, 461 (1998); Neil Brenner, *The Limits to Scale? Methodological Reflections on Scalar Structuration*, 25 Progress in Hum. Geography 591 (2001); Chris Collinge, *Flat Ontology and the Deconstruction of Scale: A Response to Marston, Jones, and Woodward*, 31 Transactions of the Inst. of Brit. Geographers 244 (2006); Kevin R. Cox, *Spaces of Dependence, Spaces of Engagement and the Politics of Scale, Or: Looking for Local Politics*, 17 Pol. Geography 1, 20–21 (1998); David Delaney & Helga Leitner. *The Political Construction of Scale*, 16 Pol. Geography 93, 93 (1997); Andrew Herod, *Scale: The Local and the Global, in* Key Concepts in Geography 229, 234 & 242 (Sarah L. Holloway et al., eds., 2003); Scott William Hoefle, *Eliminating Scale and Killing the Goose that Laid the Golden Egg?*, 31 Transactions of the Inst. of Brit. Geographers 238 (2006); Sallie A. Marston, John Paul Jones III & Keith Woodward, *Human Geography Without Scale*, 30 Transactions of the Inst. of Brit. Geographers 416 (2005); Sallie A. Marston, *The Social Construction of Scale*, 24 Progress in Hum. Geography 219 (2000); Sallie A. Marston & Neil Smith, *States, Scales and Households: Limits to Scale Thinking? A Response to Brenner*, 25 Progress in Hum. Geography 615 (2001); Deborah G. Martin, *Transcending the Fixity of Jurisdictional Scale*, 17 Pol. Geography 33,35 (1998); Anssi Paasi, *Place and Region: Looking through the Prism of Scale*, 28 Progress in Hum. Geography 536, 542–43 (2004); Erik Swyngedouw, *Excluding the*

These complexities of place occur against a spatial backdrop in which legal categories have not caught up with the phenomenon of globalization. Namely, although problems cut across scales and substantive categories, legal solutions often remain highly balkanized.[49] As I have explored elsewhere, internal and external efforts by nation-states to engage global climate change and its effects—whether viewed through a Westphalian or more pluralist lens—must navigate intertwined webs of relationships.[50] Using the three case examples as a backdrop, this part examines the law and geography conundrum posed by melting ice and snow.

I. *Complexities of Place*

The phenomenon of human-induced climate change represents a multilevel geography. The complications begin with a core conundrum driven by scientific and regulatory uncertainties: Who is contributing what to the supranational phenomenon and how does that translate into human harm? This section focuses on a piece of the second half of that question. Namely, it engages the legal challenges posed by climate change induced by melting of ice and snow in particular places.

Underlying physical geography helps to shape the significance of the melting, as the three above-described examples reveal. In Sagarmatha National Park, the danger and the regulatory difficulties are heightened by the remote mountain location.[51] Arctic communities are literally built on the assumption of the permanence of the ice, as the collapsing structures reflect.[52] In California, the connection of the snowpack to the groundwater supplies helps to drive the regulatory challenges posed by the melt.[53]

Other: The Production of Scale and Scaled Politics, in Geographies of Econ. 167, 169 (Roger Lee & Jane Wills, eds., 1997); Erik Swyngedouw, *Neither Global nor Local: "Glocalization" and the Politics of Scale, in* Spaces of Globalization: Reasserting the Power of the Local 137, 141 (Kevin R. Cox ed., 1997). An in-depth exploration of climate change litigation and scale is beyond the scope of this paper, but I have discussed those issues elsewhere. *See* Hari M. Osofsky, *The Intersection of Scale, Science, and Law in* Massachusetts v. EPA, 9 Or. Rev. Int'l L. (forthcoming 2008); Hari M. Osofsky, *Is Climate Change an "International" Legal Problem?* (draft manuscript on file with author).

[49] *See* Osofsky, *supra* note 12; Hari M. Osofsky, *The Inuit Petition as a Bridge?: Beyond Dialectics of Climate Change and Indigenous Peoples' Rights*, 31 Am. Indian L. Rev. (forthcoming 2007).

[50] *See* Osofsky, *supra* note 11; Hari M. Osofsky, *Climate Change Litigation as Pluralist Legal Dialogue*?, Stan. Envtl. L.J. & Stan. J. Int'l L. (forthcoming 2007) (Joint Issue).

[51] *See* Sagarmantha Petition, *supra* note 22 and accompanying text.

[52] *See* Permafrost Task Force Report, *supra* notes 29–35 and accompanying text.

[53] *See* Franco, *supra* note 38, and accompanying text.

Socio-cultural relationships between people and place also influence what responses should look like. At the most intertwined level, indigenous peoples' culture and livelihood are based in the localities in which they live.[54] For the Arctic Inuit, for example, melting ice poses a foundational threat to their continued existence.[55] Beyond the physical disturbances of their subsistence and cultural patterns, the frozen climate itself is deeply imbedded in their sense of who they are.

Even in communities more alienated from the land itself, place and identity are deeply intertwined. Geographer Nicholas Blomley, for example, has explored the dilemmas faced by a people in a small town that is dying after a mill closure. Its inhabitants want to maintain their community, which they greatly value, but they have no viable options for economic livelihood.[56] Likewise, as melting ice and snow threatens infrastructure or established patterns of property rights, peoples' self-concept, and relationships to each other and the place in which they live are brought into flux.[57]

These local challenges occur in a broader web of personal and legal relationships, which the phenomenon of global climate change traces. The affected Inuit, for example, are members of tribes and part of a broader supranational organization, the Inuit Circumpolar Conference. They also are citizens at multiple levels of governance.[58] The greenhouse gas emissions that contribute to their woes stem from intertwined individual, corporate, and governmental decision-making that occurs in localities around the world and, through those entities, often has ties to many other places around the world.[59]

And the dizzying geography spins out from there. With each piece of the global climate change puzzle, another narrative joins the mix. The relevant international conventions, on-going scientific research, lobbying, and creative policy initiatives all contain multiple ties to place. Legal mechanisms that address the melting effectively must somehow engage this nuance.

II. *Inadequacies of Spatial Categories*

Unfortunately, these place-based dynamics occur against a backdrop in which the current spatial categories that undergird the legal system fall short. As discussed

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[54] *See* James Anaya, Indigenous Peoples in International Law 141–48 (2d ed. 2004).

[55] See Petition to the InterAmerican Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec. 7, 2005), *available at* http://www.earthjustice.org/news (follow "Inuit Human Rights Petition Filed over Climate Change" hyperlink) [hereinafter Inuit Petition].

[56] Nicholas K. Blomley, Law, Space, and the Geographies of Power 189–222 (1994).

[57] *See* ACIA Assessment, *supra* note 28, at 16–17.

[58] Inuit Circumpolar Conference Website, http://www.inuitcircumpolar.com/index.php?ID=16&Lang=En.

[59] *See* Osofsky, *supra* note 11.

above, the transnational legal system simply has not caught up with cross-cutting problems that result from it. Current policy failures to contain climate change are emblematic of this difficulty.

In large part, barriers to effective solutions are structural. Nation-states still function as the primary subjects and objects of the international legal system, despite the multiscalar and multi-actor nature of the problems.[60] Moreover, tribal, local, subnational regional, national, and supranational regulatory regimes often interact with the melting, without adequate mechanisms in place to address the overlap.[61]

These structural inadequacies are not merely about navigating choice of law problems more effectively, but rather, as noted above, are infused by the questions of culture and identity that are inextricably bound with the above-described place-based relationships.[62] The "best" solution involves more than a logistical calculus; it must somehow respect people's sense of who they are. The possibilities for progress in the transnational order, which this book explores, depend upon lawmakers ability to engage these scalar and cultural concerns.

While relocating those impacted by the melt may stop them from drowning in the physical sense, the damage from that "solution" may be profound.[63]

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[60] Ian Brownlie, Principles of Public International Law 280–90 (5th ed. 1998). For an analysis of the complexities of state sovereignty and of the dynamics between domestic and the international legal systems, see The Fluid State: International Law and National Legal Systems (Hilary Charlesworth et al, eds., 2005); Becky Mansfield, *Beyond Rescaling: Reintegrating 'National' as a Dimension of Scalar Relations*, 29 Progress in Hum. Geography 458 (2005); Alexander B. Murphy, *The Sovereign State System as Political-Territorial Ideal: Historical and Contemporary Considerations*, in State Sovereignty as Social Construct 81 (Thomas J. Biersteker & Cynthia Weber eds., 1996). *See* Part Three of this volume, with contributions considering the various actors and potential actors in international law.

[61] For an analysis of problems of overlapping environmental regulatory jurisdiction, *see* William Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 Iowa L. Rev. 1 (2003).

[62] *See supra* note 54 and accompanying text. For analyses that engage this issue of cultural entwinement, see Linda McDowell, *The Transformation of Cultural Geography*, in Human Geography: Society, Space, and Social Sciences 146–73 (Derek Gregory, Ron Martin, and Graham Smith eds., 1994); Madhavi Sunder, *Piercing the Veil*, 112 Yale L.J. 1399 (2003).

[63] Numerous scholars have engaged complexities of culture in a colonial and post-colonial setting. *See, e.g.*, Lauren Benton, *Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State*, 41 Comp. Studies in Soc. & Hist. 563 (1999) (exploring the jurisdiction disputes that helped to form the colonial state and to respond to contested cultural boundaries); Michelle A. McKinley, *How Did the Subaltern Speak? Divorce and Concubinage Claims in Ecclesiastical Courts in Lima*, 1632–1936, Law & Hist. Rev. (forthcoming 2008) (examining lower-caste women's engagement with the legal system in colonial and republican Peru); Shalini Randeria, *Globalization of Law, Environmental Justice, World Bank, NGOs and the Cunning State in India*, 51 Current Soc. 305 (2003) ("delineat[ing] the trajectories of the glocalization of law by examining the interplay between the World bank, NGOS, and the state in India").

The Inuit cannot be who they are right now somewhere else; such a move would transform communities that already have been struggling with questions of identity.[64] Similarly, the downstream Nepali villages have deeply-rooted entwinement with the place that they are.[65] Even in the more-urbanized California landscape, conflicts over water rights and the laws that protect them have long been deeply personal.[66]

Legal approaches often fail to value adequately who people are and how they are interconnected. For instance, as explored by Leti Volpp, the legal category of citizenship often fails to capture people's cultural identity.[67] For this new generation of water conflicts, the nexus of structural inadequacy and cultural relevance provides fundamental spatial challenges for law: (1) To what extent can existing categories be used to address these cross-cutting issues?, and (2) What reconceptualization is needed to build upon existing constructs?

D. *Prospects for Supranational Petitions*

The supranational petitions regarding Sagarmatha National Park and the Arctic Inuit provide an opportunity to engage those questions in a more specific way.[68] Each of them represents an innovative casting of the facts and reflects the complex geography of the underlying factual situations.[69] The translation of this legal creativity into substantive change, however, likely will prove more elusive. The petitions thus help to guide an inquiry about the evolution of international law and institutions needed to address cross-cutting problems.

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[64] *See* Inuit Petition, *supra* note 55. For a discussion of some of the ways in which indigenous peoples face external pressures to freeze their cultures and lifestyles in time, see Randeria, *supra* note 63, at 311.

[65] *See* Sagarmatha Petition, *supra* note 22.

[66] The survival of desert communities in the West, which like Blomley's milltown, were greatly valued by their inhabitants, often depended on whether they could maintain access to scarce water resources. *See* Mark Reisner, Cadillac Desert: the American West and Its Disappearing Water (1993). These conflicts have entered popular culture in a variety of ways, such as through the movie *Chinatown*, which in part dramatizes Los Angeles's efforts to obtain Owen Valley's water rights.

[67] Leti Volpp, *The Citizen and the Terrorist*, 49 Ucla L. Rev. 1575 (2002); *see also* Lynn A. Staeheli, *Globalization and the Scales of Citizenship* 19 Geography Res. Forum 60 (1999) (distinguishing between formal and substantive citizenship).

[68] Climate change petitions before state and national courts also raise dilemmas over addressing the melting, but those suits are beyond the scope of this chapter. *See* State of Cal. v. General Motors Corp. *supra* note 13.

[69] I have provided an in-depth analysis of the geography of these petitions elsewhere. *See* Osofsky, *supra* note 11.

I. *Existing Categories*

Both petitions rely upon well-tested legal categories, but apply them in an innovative fashion. In the case of Sagarmatha National Park, petitioners asked the World Heritage Committee to include the park on the List of World Heritage in Danger. Although danger listing is an established process—34 properties are currently on the list[70]—this petition together with three similar ones regarding other areas of the world represents the first time the cause of the danger is human-induced global climate change.[71] Because the source of the problem is supranational, the petition not only requests that the Committee involve Nepal in remediation efforts, but also that it assist local and transnational efforts to address human-induced global climate change.[72]

The Inuit petition follows a similar pattern in its claim that U.S. acts and omissions regarding global climate change violate their rights. Petitioners argue that U.S. law does not adequately and effectively protect the Inuit's rights to life, residence and movement, property, inviolability of home, culture, health, and means of subsistence.[73] The Inter-American Commission and Court of Human Rights have long been at the forefront of environmental rights jurisprudence; in previous decisions, these institutions have recognized such rights as core protected ones of indigenous peoples.[74] The relief requested—which involves U.S.

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[70] *See* World Heritage in Danger List, http://whc.unesco.org/en/danger/.

[71] For copies of those three petitions and report, see Petition to the World Heritage Committee Requesting Inclusion of the Belize Barrier Reef Reserve System in the List of World Heritage in Danger as a Result of Climate Change and for Protective Measures & Actions (Nov. 15, 2004), *available at* http://www.climatelaw.org/media/UNESCO.petitions.release/belize.barrier.reef.doc [hereinafter Belize Petition]; Petition to the World Heritage Committee Requesting the Inclusion of the Huascaran National Park in the List of World Heritage in Danger as a Result of Climate Change (Nov. 17, 2004), *available at* http://www.climatelaw.org/media/UNESCO.petitions.release/peru.huascaran.national.park.doc [hereinafter Peru Petition]; Petition to the World Heritage Committee Requesting Inclusion of Sagarmatha National Park in the List of World Heritage in Danger as a Result of Climate Change and for Protective Measure and Actions (Nov. 15, 2004), *available at* http://www.climatelaw.org/media/UNESCO.petitions.release/nepal.sagarmatha.national.park.doc [hereinafter Nepal Petition]; Sydney Centre for International and Global Law, Global Climate Change and the Great Barrier Reef: Australia's Obligations under the World Heritage Convention (Sept. 21, 2004), *available at* http://www.law.usyd.edu.au/scigl/SCIGLFinalReport21_09_04.pdf.

[72] *See* Nepal Petition, *supra* note 71, at 37–41.

[73] *See* Inuit Petition, *supra* note 55.

[74] For examples of the jurisprudence of the Inter-American Commission and Court on environmental rights, see Case No. 7615, Inter-Am C.H.R. 12/85, OAS/Ser.L/V/II.66, doc. 10 rev 1 (1985) (Yanomami case), Dann v. United States, Case No. 11.140, Inter-Am C.H.R. 75/02 (2001), and The Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Case No. 79, Inter-Am. Ct. H.R., Ser. C (2001).

measures to limit emissions and coordinated efforts to assist Inuit communities—also represents a typical approach.[75] What makes this petition groundbreaking, however, is that what connects U.S. law and policy with violations suffered by the Inuit is the multiscalar phenomenon of human-induced global climate change.[76]

Moreover, the claimants and legal moves in both petitions reflect the multiscalar geography and cross-cutting substantive issues raised by melting ice and snow. The petitioners have ties to affected localities, nationally-based nongovernmental organizations, and transnational advocacy networks.[77] The claims intertwine a supranational environmental problem with other types of internationally recognized values. In so doing, the petitions attempt to use well-established institutional structures not generally associated with environmental issues to fill regulatory gaps left by the transnational climate regime and national and subnational implementation of it.[78]

As innovative as they are, these petitions also highlight the limitations of supranational petition processes. In theory a successful petition would result in law and policy change, but relevant governments may flout the ambiguous status and weak enforcement mechanisms of these bodies. The United States, for example, rejected the recommendations of the Inter-American Commission on Human Rights in *Dann v. United States*, a case involving indigenous peoples' land rights.[79]

Furthermore, in both cases, the tribunals have been unwilling thus far to take specific steps to address the problems faced by the Inuit or Nepali petitioners. The World Heritage Committee initially responded to the climate change petitions by noting that "the impacts of climate change are affecting many and are likely to affect many more World Heritage properties, both natural and cultural in the years to come," encouraging "all States Parties to seriously consider the potential impacts of climate change within their management planning," and requesting that the World Heritage Centre organize collaboratively "a broad working group of experts" to prepare a report on these issues for the thirtieth session.[80] At its 2006 session, the Committee adopted recommendations from those international experts and

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[75] *See* Inuit Petition, *supra* note 55.

[76] *See id*.

[77] For a detailed discussion of the petitioners' geographic ties, see Osofsky, *The Geography of Climate Change Litigation, supra* note 11.

[78] *See id*.

[79] *See* Case No 11.140, Inter-Am. C.H.R. 113/01 (2001); Response Of The Government Of The United States To October 10, 2002 Report No. 53/02 Case No. 11.140 (Mary And Carrie Dann), *available at* http://www.cidh.org/Respuestas/USA.11140.htm.

[80] U.N. Educ., Scientific & Cultural Org. World Heritage Comm., Decisions of the 29th Session of the World Heritage Committee (Durban 2005), Decision 29COM7B.a (Sept. 9, 2005), *available at* http://whc.unesco.org/archive/2005/whc05–29com–22e.pdf [hereinafter Convening of Experts].

requested States Parties and partners to work to protect sites from climate change in accordance with those recommendations. The Committee did not inscribe any sites on the list at that time, however, but rather "decided that sites affected by climate change could be inscribed on the List of World Heritage in Danger, on a case by case basis, and invited a study on alternatives to the Danger List for these sites."[81]

Similarly, in November 2006, the Inter-American Commission declined to process the Inuit's petition. In a two-paragraph letter, it stated that "the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration."[82] Sheila Watt-Cloutier, Chair of the Inuit Circumpolar Conference—together with Earthjustice and the Center for International Environmental Law—responded by asking the Inter-American Commission for additional information regarding why it is not proceeding and requesting a hearing on the linkages between climate change and human rights.[83] The Commission granted Watt-Cloutier's request for this broader hearing, which took place on March 1, 2007, and the Commission is currently deliberating based on it.[84]

Although the formal effects of supranational petitioning processes are often limited, as evidenced by the tribunals, responses to these petitions, the filing of them potentially can have a far greater informal impact. Petitions can put pressure on a government to change its behavior, even as that government denounces that decision. More indirectly, they are used in other advocacy contexts—for example, as persuasive authority in more binding subnational and national litigation or as a symbol in a media campaign—and thus become part of broader civil society initiatives.[85]

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[81] UNESCO, *World Heritage Committee Adopts Strategy on Heritage and Climate Change*, July 10, 2006, http://whc.unesco.org/en/news/262.

[82] Letter from Ariel E. Dulitzky, Assistant Executive Secretary, Org. of Am. States, to Paul Crowley, Legal Representative for Sheila Watt-Cloutier, *et al*. (Nov. 16, 2006) (regarding Petition No. P–1413–05), *available at* http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf.

[83] Letter from Sheila Watt-Cloutier, Martin Wagner, and Daniel Magraw to Santiago Cantón, Executive Secretary, Inter-Am. Comm'n on Human Rights (Jan. 15, 2007) (on file with author).

[84] *See* Letter from the Org. of Am. States to Sheila Watt-Cloutieret al. (Feb. 1, 2007) (on file with author) (regarding Petition No. P–1413–05).

[85] *See* Jonathan Graubart, *"Politicizing" a New Breed of "Legalized" Transnational Opportunity Structures: Labor Activists Uses of NAFTA's Citizen-Petition Mechanism*, 26 Berkeley J. Emp. & Lab. L. 97 (2005) (analyzing the petition as part of the process of creating pressure). *See* Schurtman in this volume. *But see* Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102

An examination of the petitions thus reveals a mixed answer to the first question. Transnational structures, such as the World Heritage Committee or the Inter-American Commission on Human Rights, provide potentially viable fora for engaging this generation of water conflicts. Yet neither the Committee nor the Commission was willing to take the specific steps requested by the petitioners. In addition, the difficulty of changing law and policy through even successful petitions embodies the extent to which an international legal system framed around nation-state consent struggles to engage the challenges of problems like climate change.

II. *Reconceptualization*

In describing the U.S. governmental system, Professor Hudson captured the need for institutional evolution over time: "Styles of thinking have changed, and we have a vastly different world to deal with. But these federal institutions remain."[86] A similar flexibility is demanded of international law and institutions by the current problem of climate change.[87] The obstacles faced by the petitioners are simultaneously structural and substantive. The multiscalar problems fall within the jurisdiction of overlapping institutions, and do not fit neatly within the boxes provided by existing legal categories. Engaging the structural and substantive challenges provides the basis for the institutional progress envisioned by Professor Hudson in the context of melting due to global climate change.

Colum. L. Rev. 1832 (2002) (exploring the dangers of overlegalization in the human rights regime). More broadly, scholars at the intersection of international law and other disciplines, such as international relations and sociology, are engaging questions of why and how international law regimes matter. *See, e.g.*, Harold Hongju Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181 (1996) (transnational judicial process); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 Mich. J. Int'l L. 1041 (2003) (transgovernmentalism); Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. Pa. L. Rev. 311 (2002) (cosmopolitanism); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 Cal. L. Rev. 1823 (2002) (compliance-based); Ryan Goodman & Derek Jinks, *International Law and State Socialization: Conceptual, Empirical, and Normative Challenges*, 54 Duke L.J. 983 (2005) (state socialization); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 Duke L.J. 621 (2004) (same); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 Chi. L. Rev. 469 (2005) (integrated international law-international relations theory). An in-depth comparison of these theories is beyond the scope of this paper.

[86] Hudson, *supra* note 4, at 119.

[87] Domestic institutions also need to be able to respond flexibly in the face of climate change, as the Supreme Court noted in its analysis of the Clean Air Act in Massachusetts v. EPA, 127 S. Ct. 1438, 1462 (2007) (interpreting the "broad language" of the Clean Air Act Section 202(a)(1) as "an intentional effort to confer the flexibility necessary to forestall … obsolescence").

1. *Structural*

Globalization and the growth of multinational enterprise provide the basis for increasing numbers of multiscalar "human rights" petitions. For example, environmental rights petitions to regional and international human rights bodies often focus on governmental underregulation of corporate entities, entities which may have ties to multiple nation-states.[88] The climate change petitions, with their array of ties to place, build out of that tradition but also push the boundaries of the institutional spaces in which they are brought.

Although these petitions' reliance on climate science to draw causal links pushes the substantive boundaries of the tribunals' jurisprudence, the more fundamental institutional challenge that they represent comes from the extent of their multiscalar geography. The process of applying existing laws to the harms caused by global climate change forces supranational human rights bodies to consider new relationships of place, space, and time. They must address the applicability of the institutional framework to problems that are multiscalar, multi-institutional, and occurring over longer periods of time.[89] To the extent that institutions take these challenges seriously, climate change petitions have the potential to help with the "advance toward reality" advocated for by Professor Hudson.[90]

The typical petition to the Inter-American human rights bodies or the World Heritage Committee involves facts occurring on a far more limited scale—both in terms of time and spatial extent—than those described in the climate change petitions. The damage to a World Heritage site, for example, is predominantly caused and/or regulated within the country in which the site is located.[91] Likewise, past environmental rights cases before the Inter-American Commission and Court of Human Rights involve a tighter geographic nexus between at least some of the behavior at issue and the resultant harm, and occur over a far more precisely delineated period of time.[92]

This structural difference requires the bodies to develop approaches to implementation that engage the challenges posed by the novel framing of these problems. As noted above, the World Heritage Committee has created a body of experts to explore both the risks posed by global climate change to sites and a management strategy.[93] An engagement of the underlying geography, both in

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[88] *See* Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 Stan. Env. L.J. 71, 121 (2005).

[89] *See* Osofsky, *supra* note 11.

[90] *See* Hudson *supra* note 4 and accompanying text.

[91] *See* List of World Heritage in Danger, http://whc.unesco.org/pg.cfm?cid=158.

[92] *See* Yanomami Case, *supra* note 74; Dann v. United States, *supra* note 74; The Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Case No. 79, Inter-Am. Ct. H.R., Ser. C (2001).

[93] *See* Convening of Experts, *supra* note 80.

terms of underlying place-dependent relationships and of the spatial categories in which the World Heritage process operates, is critical to developing those management solutions. A plan that simply focuses on the country in which the melting is occurring would not address fundamentally the threat to the World Heritage. Similarly, to respond effectively to a petition like the one brought by the Inuit petitioners, the Commission would need to engage both the front end of greenhouse gas emissions and the back end of mitigating the harmful effects of global climate change.[94] Although such steps are within the capabilities of these bodies, the process of recommending and implementing them causes the institutions to evolve responsively.

2. *Substantive*

As challenging as the structure of these cases is, the issues arising at a substantive level are far more fundamental. This process of solution development must also somehow recognize the value and constraints of the available conceptual boxes. For example, requesting the Sagarmatha National Park be placed on the List of World Heritage in Danger provides a mechanism for getting at the impacts of melting ice and snow, but framing that harm as a world heritage problem only gets at a piece of the puzzle. Neither the environmental nor human rights values—both important parts of the problem—are fully captured by this category. The Inter-American Commission petition's account of the problem in terms of traditional human rights is similarly important as an advocacy strategy, but a human rights narrative is also incomplete as a full description of the problem of climate change or its possible solutions.[95] The petitions themselves are not flawed—they appropriately connect climate change to world heritage and human rights—but the multidimensional nature of climate change poses a formidable barrier to comprehensive approaches.

The question of the appropriateness of thinking in terms of a right to frozen water, with which this piece started, embodies this dilemma. The statutory, treaty, and case law at subnational, national, and supranational levels on frozen water is quite limited. There have been some efforts to deal with frozen water directly in domestic law. In the United States, for example, several common law cases have explored property rights to riparian ice.[96] More specific to climate change, California's

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[94] The Petition's request for relief asks for measures on both of these fronts. *See* Inuit Petition, *supra* note 55.

[95] For a more detailed discussion of the characterization problems that arise in the context of environmental rights cases, see Osofsky, *Learning from Environmental Justice, supra* note 88, at 77–87.

[96] *See, e.g.*, State v. Pottmeyer, 33 Ind. 402 (1870) (owner of land to which riparian ice has attached owns it and can prevent its removal); Washington Ice Co. v. John G. Shortall, 101 Ill. 46 (1881) (same); Bigelow v. Shaw, 65 Mich. 341 (1887) (same).

complaint in *California v. General Motors Corporation* alleges that its snowpack is a natural resource belonging to the state and its people.[97] At a transnational level, international agreements that reference frozen water focus on Antarctica, boundaries and landmarks.[98] The United Nations Framework Convention on Climate Change and the Kyoto Protocol represent important efforts to develop dynamic international environmental law in response evolving scientific understanding, but "rights" in those treaties refer to ones held by nation-state parties.[99] The scholarly literature on the law governing ice and snow is similarly sparse.[100]

And yet, whether framed in terms of human rights or not, the state of that water is a crucial piece of the problem posed by climate change. The problem of melting ice and snow analyzed in detail in this chapter recurs in multiple forms

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[97] State of Cal. v. General Motors Corp., N.D. Cal. at 10.

[98] A search of the database Oceana Law http://www.oceanalaw.com/default.asp, using the terms ice, snow, glacier, and permafrost on June 7, 2006, produced 175 results. Of those results, 24 referred to ice cream or flavored ice and snow. The results that actually had to do with glaciers, snowpacks, permafrost, and other relevant forms of ice and snow included 55 agreements, which predominantly focused on Antarctica, boundaries, and landmarks. None of the agreements engaged a right to frozen water directly. A second search of the United Nations Treaty Database http://untreaty.un.org/English/access.asp (select "United Nations Treaty Series" from the dropdown box) for the same terms produced 37 results. These results were redundant with those found on the Oceana Database. For an example of governance issues resulting from a glacier that straddles a tense national border, see Neal A. Kemkar, Note, *Environmental Peacemaking: Ending the Conflict Between India and Pakistan on the Siachen Glacier Through the Creation of a Transboundary Framework*, 25 Stan. Envt'l. L.J. 67 (2006) (analyzing the conflict over the Siachen Glacier).

[99] *See* United Nations Framework Convention on Climate Change, pmbl., arts. 3, 22, May 9, 1992 S. Treaty Doc. No. 102–38, 1771 U.N.T.S. 164, 166, *available at* http://untreaty.un.org/English/notpubl/unfccc_eng.pdf; Kyoto Protocol to the United Nations Framework Convention on Climate Change, arts. 22, 24, Dec. 10, 1997, 37 I.L.M. 22, *available at* http://untreaty.un.org/English/notpubl/kyoto-en.htm; *see also* Michael Grubb with Christiaan Vrolijk & Duncan Brack, The Kyoto Protocol (1999). International environmental law has long grappled with how to create regimes that can respond to the evolution of problems and scientific knowledge. *See* Rebecca Bratspies, *Trail Smelter's (Semi)Precautionary Legacy, in* Transboundary Harms in International Law: Lessons from the Trail Smelter Arbitration 153 (2006).

[100] The recent legal scholarship on regimes governing frozen water in a transnational context does not have melting due to climate change as a focus. Beyond the articles and books on regimes governing Antarctica and the Arctic, there are a limited number of pieces engaging governance of ice and ice covered regions. *See, e.g.*, Christopher C. Joyner, *Ice-Covered Regions in International Law*, 31 Nat. Resources J. 213 (1991); Bryan S. Geon, Note, *A Right to Ice?: The Application of International and National Water Laws to the Acquisition of Iceberg Rights*, 19 Mich. J. Int'l L. 277 (1997).

around the world.[101] Until legal regimes at multiple levels of governance have mechanisms for valuing water being frozen, one of the major problems caused by climate change is inadequately addressed. Simply focusing on the rights violated once the water melts, or the World Heritage that is lost, fails to capture the phenomenon holistically.

The challenge that these supranational petitions pose for international institutions at a substantive level goes to the heart of what it would mean for these institutions to progress. Can they find ways to capture problems more completely? If not, can they use limited conceptual constructs as a launching pad for addressing multidimensional problems? Or, in other words, to what extent can supranational petitions help address the rights violated through climate change's impacts without formally recognizing a right to frozen water?

E. *Concluding Reflections*

Engaging the ways in which melting ice and snow represent a new frontier of water conflicts requires a broader conversation about how the international legal system must adapt to the challenges of problems like climate change. The existing legal categories and institutions can only keep up with the nexus of globalization and transnational environmental problems through a process of reconceptualization that changes existing categories and responds to nuance. Geography and its insights into the relationships among place, space, and time provide critical analytical tools to assist with these efforts.

Supranational climate change adjudication provides a laboratory for engaging these questions. An analysis of these cases and their limitations helps to unveil innovative progress and the long road ahead. The responses of the Inter-American Commission and World Heritage Committee to these cases provide a map—both positive and negative—for what is needed in the future. In the midst of melting ice and of legal and judicial experiments, such analysis is critical.

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[101] For an analysis of the impact of global warming on glaciers, see IPCC, *Climate Change 2001: Impacts, Adaptation and Vulnerability* § 4.3.11, *available at* http://www.grida.no/climate/ipcc_tar/wg2/index.htm. Climate change is not the only threat to glaciers in our globalizing economy. For example, controversy has arisen over a plan by Barrick Gold Corporation of Canada, the largest gold mining company in the world, to break up glaciers and dump them nearby in order to reach gold underneath in Pascua Lama, Chile. *See* Eduard Gallardo, *Chileans Raise an Outcry over Subglacial Goldmining*, 3/5/06 Phila. Inquirer A8.

The international community seems unlikely to create new, multiscalar, cross-cutting institutions to address these novel problems. Given that, the core challenge is whether our existing institutions can adapt. When posed with melting ice presented in the box of human rights or World Heritage, can the institutions change the box itself? Can our meanings expand to capture the nuanced content provided by these modern water conflicts? The initial response of these institutions reveals resistance to such reframing, but the urgency of the problem demands continuing to ask these questions.

The tension between Professor Hudson's vision of interconnectedness and Senator Borah's concerns about preserving democracy and sovereignty continue to provide challenges for progress in international institutions. As institutions struggle to adapt structurally and conceptually to challenges like innovative framing of global climate change, they must continually grapple with what that progress means. The increasing interwinement of laws, economies, societies, and cultures embodied in complex problems like global climate change only reinforce Professor Hudson's invocation of the dependence of people throughout the United States "in their daily lives on the ordering of the relations which we are forced to maintain with other peoples of the world."[102] And yet this reality makes it ever more important that these challenges are addressed in a way that does not lose sight of the core freedoms that undergird both this country—as eloquently explicated by Senator Borah[103]—and international human rights. The supranational climate change petitions provide just one example of the ever-more-complex terrain on which individuals and institutions struggle to make progress.

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[102] Hudson, *supra* note 4, at 1.

[103] Borah, *supra* note 6.

The "Preference for Pollution" and other Fallacies, or Why Free Trade Isn't "Progress" Absent the Harmonization of Environmental Standards

By Amy Sinden

A. *Introduction*

One of the most striking developments in international organization since Professor Manley O. Hudson published his collection of essays in 1932,[1] has been the dramatic expansion of international trade. That expansion has been accompanied by the emergence of a whole new set of international institutions. Bilateral and multilateral trade agreements have proliferated across the globe, and the World Trade Organization has steadily gained prominence and influence. But does this new breed of international organization—this new international free trade regime—represent "progress"? Another striking new development, largely unforeseen in Hudson's day, has dramatically altered the way we view international relations and raised concerns about free trade. There is now widespread recognition of the capacity of unrestrained free markets to produce environmental harm and broad consensus about the need for government regulation to prevent such harm. In light of these new understandings, many people worry that unless the domestic environmental standards of the countries engaged in free trade are harmonized, trade will inevitably lead to a weakening of environmental protections around the world. They worry that in the absence of harmonization, when a country with stringent environmental standards engages in free trade with a country with lax standards, the stringent country will be faced with the Hobbesian choice of either lowering its standards or watching its industry go out of business. Yet the international institutions that govern trade relations currently require very little in the way of harmonization of environmental standards among trading partners.

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[1] Manley O. Hudson, Progress in International Organization (1932).

Miller & Bratspies (Eds), Progress in International Law, pp. 771–792.

The argument that environmental standards must be harmonized among countries involved in free trade in order to ensure a "level playing field"[2] has been prominent in the recent political discourse surrounding globalization and the expansion of international trade. It formed the basis of much of the popular debate about the North American Free Trade Agreement (NAFTA) in the mid-1990s,[3] played a big role in galvanizing the environmental and labor movements that demonstrated against the WTO in Seattle in 1999, and has most recently emerged in the debates over the Central American Free Trade Agreement.[4]

Given how thoroughly contemporary these harmonization debates seem from where we now stand, it is striking to read Professor Hudson's description of the ambitious international harmonization efforts that were already taking place a century ago with respect to labor standards. In *Progress in International Organization*, Professor Hudson devotes an entire chapter to describing the early efforts of the International Labor Organization to adopt international standards for the protection of workers.[5] As early as 1906, the Berne Convention prohibited the employment of women at night and the manufacture of matches using white phosphorous, which caused a disease called "phossy jaw" among workers.[6] These were labor standards, to be sure, but they were also environmental standards—or more specifically, occupational safety and health standards—though no one would have used those terms then.

For Professor Hudson, these early efforts at harmonization clearly represented "progress." In his view, there were two reasons to harmonize international standards in a world of free trade. One was humanitarian: the notion that there are certain absolute ethical norms that we simply do not want to abridge by, for example, trading for goods produced with slave labor.[7] The other was economic—the need to ensure a level playing field.[8]

Back in 1932, these two arguments made the need for harmonization seem almost self-evident to Hudson. But seven decades later, we are far from consensus on these issues. While humanitarian norms are accepted as a legitimate basis

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[2] *See generally* Robert Howse & Michael J. Trebilcock, *The Fair Trade-Free Trade Debate: Trade, Labor, and the Environment*, 16 Int'l Rev. L. & Econ. 61, 74 (1996) (discussing the "level playing field" argument).

[3] *See* McCaffrey and Schurtman in this volume.

[4] *See, e.g.*, Statement of Senator Russ Feingold on Senate Floor, July 30, 2005, *available at* http://www.senate.gov/~feingold/ statements/05/06/2005630A45.html.

[5] *See* Hudson, *supra* note 1, at 46–55.

[6] *Id.* at 46, 50.

[7] *Id.* at 50.

[8] *Id.* ("Some effort to equalize labor standards is therefore not merely humanitarian—it is also based on a sound economy.").

for harmonization in extreme cases[9]—to prohibit forced labor or child labor, for example—the "level playing field" justification for harmonization has come to be viewed with considerable skepticism. While it still retains some traction in political discourse, among academic economists the level-playing-field argument has been widely rejected.[10] In their view, the whole point of free trade is to exploit inherent *differences* among countries. Differing environmental standards simply reflect the differing preferences for environmental protection among citizens of different countries and, like differences in natural resource endowments, can be exploited *via* free trade in order to increase overall social welfare.[11]

This economic point of view currently dominates international trade policy, and has been institutionalized in international trade treaties and the policies of the World Trade Organization (WTO).[12] Indeed, countries that attempt to prevent free trade from undermining environmental standards by, say, imposing countervailing duties on goods imported from countries with lax standards, run the risk of WTO sanction.[13] And while political pressure from environmental groups did result in the execution of an environmental side agreement to NAFTA intended to foster cooperation between the three countries with respect to environmental policy, it stopped short of requiring harmonization. In fact, the side

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[9] *See infra* note 23.

[10] *See, e.g.*, Jagdish Bhagwati & T.N. Srinivasan, *Trade and the Environment: Does Environmental Diversity Detract from the Case for Free Trade?, in* 1 Fair Trade and Harmonization: Prerequisites for Free Trade? 159, 168–69 (Jagdish Bhagwati & Robert E. Hudec, eds., 1996) [hereafter Fair Trade and Harmonization].

[11] This argument dovetails neatly with environmental sovereignty arguments, which contend that countries and international organizations should not be able to interfere in the entirely domestic concerns of other countries with respect to setting their own environmental standards. *See* Andrew L. Strauss, *From Gattzilla to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization*, 19 U. Penn. J. Intl. Econ. L. 769, 783–84 (1998); David W. Leebron, *Lying Down with Procrustes: An Analysis of Harmonization Claims*, in Fair Trade and Harmonization, *supra* note 10 at 41, 71–78. *See* Bratspies and McCaffrey in this volume.

[12] *See* Jeffrey L. Dunoff, *Rethinking International Trade*, 19 U. Pa. J. Int'l Econ. L. 347, 349–51 (1998).

[13] *See* Robert E. Hudec, *Differences in National Environmental Standards: The Level-Playing-Field Dimension*, 5 Minn. J. Global Trade 1, 14–18 (1996). WTO rules allow member countries to impose countervailing duties on subsidized goods, but the concept of "subsidy" has been narrowly defined. In order to be countervailable, subsidies must be "specific to an enterprise or industry or group of enterprises or industries." *See* Uruguay Round Agreement on Subsidies and Countervailing Measures, art. 2.1 (1994), *available at* www.wto.org/English/docs_e/legal_e/24-scm_01_e.htm. Thus, countervailing duties are not permissible where the subsidy takes the form of some "generally applicable" benefit, like weak or under-enforced environmental laws. *See* Hudec, *Differences in National Environmental Standards,* 3–6.

agreement explicitly "recognize[es] the right of each Party to establish its own levels of domestic environmental protection."[14]

To be sure, the economic worldview has been persistently opposed by those who argue for a level playing field under the banner of "fair trade."[15] But, for the most part, the economists and the "fair traders" have talked past each other in an all too familiar pattern, with the former talking economic efficiency and the latter protesting "but it's not fair!" In my view, the economists are wrong in rejecting the level playing field argument, but shouting about fairness is not the best way to show it. Fairness arguments rarely carry much weight with economists, who tend to see fairness as beside the point and prefer to focus on expanding the pie, with the hope that more "pie" will make the elusive goal of "fairness" more politically attainable. Furthermore, in this context they argue with considerable persuasiveness that when it comes to free trade, it may be difficult, if not impossible to define fairness or "levelness."[16]

If we put aside the fairness issue, however, and examine the economists' argument on its own terms, it collapses of its own weight. While it may be true that free trade without harmonization will increase social welfare in the ideal world of economic theory, there is little reason to think that it will do so in the real world. In particular, the economists' claim depends on the untenable assumption that the countries involved in free trade all set and enforce environmental standards at economically optimal—or efficient—levels.[17] If we instead assume that environmental standards in one or more countries either are set too low to begin with

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[14] North American Agreement on Environmental Cooperation, 32 I.L.M. 1480, art. 3 (1993). *See* Jeffrey Atik, *Environmental Standards within NAFTA: Difference by Design and the Retreat from Harmonization*, 3 Ind. J. Global Legal Stud. 8 (1995).

[15] *See, e.g.*, Robert F. Housman, *A Kantian Approach to Trade and the Environment*, 49 Wash. & Lee L. Rev. 1373 (1992); Strauss, *supra* note 11; Hillary F. French, *Costly Tradeoffs: Reconciling Trade and the Environment*, Worldwatch Paper 113 (March 1993).

[16] The playing field of international trade will never be completely "level." No one would argue that natural resources should be redistributed so that at the outset of free trade each country begins with an equal allotment of forests, farmland, rainfall, and minerals. *See* Hudec, *supra* note 13, at 21–22. Accordingly, to argue for a level playing field on fairness grounds, one needs to be able to distinguish these kinds of advantages in natural resource endowments from advantages conferred by government regulation. Such a distinction is difficult to draw, since the economic advantages and disadvantages of industry are so wrapped up with government regulation and policy in ways that are difficult, if not impossible, to untangle. How should we categorize, for example, a state's tax policy, as well as its investments in infrastructure, health care, or education? *See id*. at 10–12; Richard B. Stewart, *International Trade and Environment: Lessons From the Federal Experience*, 49 Wash. & Lee L. Rev. 1329, 1356 (1992).

[17] This is only one of a number of unrealistic assumptions on which the economists' claim rests. For a survey of other longstanding critiques of the economic theory of free trade, *see* Frank Ackerman, *An Offer You Can't Refuse: Free Trade, Globalization, and the Search for Alternatives, in* The Flawed Foundations of General Equilibrium 149 (Frank Ackerman & Alejandro Nadal, eds. 2004).

or are under-enforced, the economists' claim—that free trade increases social welfare—no longer holds. Yet, as I will argue below, the second assumption is far more likely to reflect actual conditions than the first.

Rather than organizing trade policy on such unrealistic assumptions, we should base it on what we know about how markets and politics actually operate in the real world. Basic tenets of political and economic theory make clear that political and market dynamics tend systematically to skew environmental standard-setting and enforcement to sub-optimal[18] levels. But where that is true, I argue, free trade between countries with differing standards is likely to decrease overall social welfare. Therefore, in order to avoid the potential negative welfare effects associated with free trade in a world of imperfect domestic standards, upward harmonization of environmental standards should be a pre-requisite to free trade.

Such an approach will not guarantee precisely optimal standards in each country. Indeed, to the extent that the theoretically optimal standard varies from county to country, harmonization must necessarily result in some deviance from optimality in at least some instances.[19] But a perfect fit between actual standards and theoretic optima is not achievable in any case. What international organization based on upward harmonization can do in an imperfect world is increase the likelihood that each country's standards move closer to the elusive goal of optimality and decrease the likelihood that free trade will produce perverse, welfare-diminishing effects.

This chapter proceeds in five parts. Part B narrows the issue, distinguishing the level-playing-field argument from other common arguments in favor of the harmonization of environmental standards. Part C describes the economists' response to the level-playing-field argument—that, even where environmental standards differ between trading partners, free trade will increase overall social welfare. Part D demonstrates that this claim depends on two key assumptions—that standards in both countries are optimal, and that standards remain static after free trade commences. If we instead assume sub-optimal standards and/or that the country with higher standards responds to free trade by lowering its standards, free trade will likely decrease social welfare. Part E shows that the latter set of assumptions are far more realistic, both as a matter of empirical evidence and of political and economic theory. Finally, Part F concludes that the upward harmonization of environmental standards should be a pre-requisite to free trade.

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[18] By "optimal" I mean "efficient" in an economic sense. *See infra* notes 34 to 39 and accompanying text.

[19] Even putting aside the problematic notion that preferences for environmental quality may vary from country to country, *see infra* note 77, optimal standards may vary from country to country because of differences in the assimilative capacities of the natural environment, *see infra* note 33.

B. *The Arguments for Harmonization*

This chapter addresses only a narrow slice of the broad range of issues that have come to be identified with the "trade and environment debate." First, my analysis is confined to environmental "process standards"—those standards that govern the process by which a product is made, by, for example, limiting the amount of pollution a manufacturing plant was allowed to emit when the good being traded was produced. Environmental "product standards," on the other hand, which relate to the characteristics of the product itself—requiring, for example, that beef sold within a country's borders to be free of hormones—are outside the scope of this discussion.[20]

Second, by focusing on the level-playing-field argument, I am leaving aside a whole set of other arguments that can be made for the international harmonization of environmental process standards. As Professor Hudson recognized a century ago, humanitarian or ethical concerns may motivate citizens of one country to want to ensure that the processes by which goods they purchase are produced comply with certain minimum ethical norms[21]—that they are not, for example, produced by child labor, or by killing dolphins or sea turtles. Additionally, as our understanding of ecological processes has increased over the past century, we have come to recognize the extent to which activities within one nation can directly affect people and natural resources in other countries through spillover effects and impacts on the global commons. In such instances, it may be reasonable for those countries affected by such activities to insist on harmonization in order to protect their own citizens.[22]

The ethical argument has generated a fair degree of consensus for the extreme cases—like child labor or forced labor[23]—but its resonance in the environmental context is more ambiguous. Spillovers, product standards, and global commons concerns are clearly implicated by a broad range of environmental issues, and provide a relatively uncontroversial justification for harmonization, at least where the external effects are clear.[24] But I am concerned here with the difficult case—that is, with process

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[20] For a discussion of some of the issues raised by product standards, *see* John J. Barcelo III, *Product Standards to Protect the Local Environment—The GATT and the Uruguay Round Sanitary and Phytosanitary Agreement*, 27 Cornell Int'l L. J. 755 (1994).

[21] *See* Hudson, *supra* note 1, at 49–50.

[22] *See* Steve Charnovitz, *Environmental Harmonization and Trade Policy, in* Trade and the Environment: Law, Economics, and Policy 267 (Durwood Zaelke, et al., eds., 1993).

[23] The General Agreement on Tariffs and Trade (GATT) creates an exception to free trade rules for bans on the importation of products produced by prison labor. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX(e), 61 Stat. (5) A3, T.I.A.S. 1700, 55 U.N.R.S. 187, *available at* http://www.wto.org.

[24] *See* Daniel C. Esty, Greening the Gatt: Trade, Environment, and the Future 157 (1994); Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 Yale L. J. 2039, 2061 (1993).

standards regulating environmental harms that either cause no spillover or global commons effects, or where such effects are difficult to prove.

The level-playing-field argument is closely related to the argument that harmonization is necessary to avoid a "race to the bottom" among countries involved in free trade.[25] Both address the incentives faced by government officials to lower their own environmental standards below optimal levels in order to protect domestic industries. The extensive literature on the "race to the bottom," however, has tended to focus on the movement of capital among countries.[26] In this scenario, capital is assumed to move to the country with the lowest standards. This triggers a "race to the bottom" in which each country progressively lowers its standards below those of its trading partners in order to attract industry.

With its focus on capital mobility, the race-to-the-bottom literature has tended to get bogged down in the empirical question of whether capital actually does move in response to differing environmental standards. (A number of studies indicate that it does not.[27]) The level-playing-field argument, however, contends that, even if capital does not move from one country to another, free trade between countries with differing environmental standards forces the country with more stringent standards to either watch its industry go out of business or to lower its standards. Accordingly, free trade will not lead to "progress" unless the international organizations governing trade either require upward harmonization of environmental standards as a prerequisite to free trade or allow countries with more stringent standards to compensate for the extra costs those standards impose on their domestic industries by imposing countervailing duties ("eco-duties") on goods imported from countries with less stringent standards.[28] This is the argument that I focus on.

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[25] Michael J. Trebilcock & Robert Howse, *Trade Policy and Labor Standards*, 14 Minn. J. Global Trade 261, 270 (2005) (discussing the relationship between the two standards).

[26] *See, e.g.*, Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. Rev. 1210 (1992); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 Mich. L. Rev. 570 (1996); Kirsten H. Engel & Scott R. Saleska, *Facts are Stubborn Things: An Empirical Reality Check in the Theoretical Debate Over the Race-to-the-Bottom in State Environmental Standard-Setting*, 8 Cornell J. L. & Pub. Pol'y 55, 64 (1998).

[27] J.D. Friedman, et al., *What Attracts Foreign Multinational Corporations? Evidence from Branch Plant Locations in the United States*, 32 J. Reg. Science 403 (1992); Arik Levinson, *Environmental Regulations and Manufactureres' Location Choices: Evidence from the Census of Manufacturers*, 62 J. Pub. Econ. 5 (1996); Virginia D. McConnell & Robert M. Schwab, *The Impact of Environmental Regulation on Industry Location Decisions: The Motor Vehicle Industry*, 66 Land Econ. 67 (1991).

[28] A number of bills have been introduced in the U.S. Congress over the years that would have imposed such "eco-duties" on goods imported from countries with less stringent environmental standards. *See* Hudec, *supra* note 13.

C. *The Economists' Response: Why Free Trade without Harmonization Increases Social Welfare*

Standard welfare economics is frequently invoked to reject the level-playing-field argument on the grounds set forth below. As a short-hand, I will refer to this as "the economists' argument," though, of course, it does not necessarily reflect the view of all economists or even all of those who subscribe to welfare economics as a useful explanatory or normative tool.[29]

First, from the point of view of welfare economics, the notion that there should be a "level playing field" is entirely incoherent.[30] There is no such thing. In fact, if there were such a thing, free trade would be pointless. The whole point of international trade is to exploit differences between countries. If Country A has fertile soil, but its fishermen have to sail far out to sea at great expense and danger to catch fish, and Country B has lousy soil but a productive near-shore fishery, then free trade between the two will (so to speak) lift all boats. To be sure, agricultural products from Country A will undersell those in Country B and thus put Country B's farmers out of business. But, the labor of Country B's farmers can be better put to use fishing in their productive fishing grounds and contributing to the take-over of the market in Country A for fish.[31] So free trade will ultimately create a market in which Country A produces all the agricultural goods and Country B produces all the fish, and consumers in both countries pay a lot less money to eat. Because both agricultural goods and fish are being produced more efficiently under a free trade regime, social welfare is increased, both within each country and in the aggregate.

It is these differences in "comparative advantage" between countries that drive the welfare enhancing engine of free trade.[32] And, for the economists, differing

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[29] *See, e.g.*, Ackerman, *supra* note 17; Herman Daly, *Problems with Free Trade: Neoclassical and Steady-State Perspectives, in* Trade and the Environment (Durwood Zaelke, et al., eds. 1993).

[30] *See* Hudec, *supra* note 13, at 10–12; Leebron, *supra* note 11, at 60-61; Robert Howse & Michael J. Trebilcock, *The Fair Trade-Free Trade Debate: Trade, Labor, and the Environment*, 16 Int'l Rev. L. & Econ. 61, 74–75.

[31] One of the assumptions incorporated into the economists' model is that involuntary unemployment is impossible. That is, it assumes that all of the farmers in Country A will be instantaneously re-employed in the fishing industry. This assumption has been extensively critiqued as unrealistic. *See infra* note 63 and accompanying text.

[32] The term "comparative advantage" was originally coined in the nineteenth century by David Ricardo to describe a far more subtle and specific phenomenon—the fact that it may be beneficial for two countries to trade even where one can produce all goods more cheaply than the other, as long as there are differences in the *ratio* between the production costs of different goods in each country. *See* Alan O. Sykes, *Comparative Advantage and the Normative Economics of International Trade Policy*, 1 J. Int'l Econ. L. 49, 49–56 (1998). Ricardo used the term "absolute advantage" to denote the simpler concept described above of a country's ability to exploit a superior

levels of environmental regulation are no different from differing natural resource endowments. They simply reflect differing *preferences* of citizens in different countries for environmental protection.[33]

It is important at this point to understand how economists conceptualize environmental regulation. First, welfare economics teaches that a perfectly functioning free market will produce an "efficient" (welfare maximizing) result.[34] Intervention in the free market, in the form of environmental regulation is therefore only necessary where some market failure prevents this efficient outcome—where, for example, pollution produces externalities. In such instances, economists argue, government should calibrate regulation to mimic the economically efficient outcome that a (hypothetical) perfectly functioning market (one without externalities) would have produced. This is done by means of a cost-benefit test. A pollution control regulation, for example, is efficient if it limits pollution to the level at which the net social benefits of pollution control (overall benefits minus overall costs) are maximized.[35] Costs and benefits are measured in terms of citizens' preferences—that is, what they would have been willing to pay in a perfect free market for the benefits of pollution control on the one hand and the costs of pollution control on the other.[36]

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endowment through trade. Nonetheless, in recent decades, use of the term "comparative advantage" in the looser sense to mean simply any exploitation of a country's superior capacities through trade has become widespread in academic literature, and I follow that parlance here.

[33] *See* Bhagwati *supra* note 10, at 168; Leebron, *supra* note 11, at 67–71, 75–78. Where standards are based on discharge levels rather than ambient quality, differing environmental standards among countries may also reflect in part different assimilative capacities of the natural environment. Thus, a country with high winds or big fast-flowing rivers will be able to assimilate larger amounts of pollution than a country with stagnant air or small bodies of water. *See* Stewart, *supra* note 24, at 2052–53. Countries in which existing pollution levels are relatively low may also have more capacity to absorb additional pollution.

[34] *See* Paul A. Samuelson & William D. Nordhaus, Economics 158 (17th ed. 2001).

[35] *See* Tom Teitenberg, Environmental and Natural Resource Economics 73–74 (3d ed. 1992). The point at which net benefits are maximized is also the point at which marginal costs equal marginal benefits. *See id*.

[36] Cost-benefit analysis raises a host of intractable theoretical difficulties, which have been thoroughly elaborated in a rich and extensive literature. *See e.g.*, Frank Ackerman & Lisa Heinzerling, Priceless: On Knowing the Price of Everything and the Value of Nothing (2004); Mark Sagoff, The Economy of the Earth (1988); Thomas O. McGarity, *A Cost-Benefit State*, 50 Admin. L. Rev. 7 (1998); Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 Yale L. J. 165 (1999). For present purposes, I will set these critiques aside and assume that—in theory at least—cost-benefit analysis can provide a coherent standard for conceptualizing the idea of optimal environmental regulation. This is not to say that in practice, cost-benefit analysis can ever be expected to deliver meaningful results. As I have elaborated elsewhere, and as will become relevant in Parts E. and F. below, any attempt to implement cost-benefit analysis in any particular set of circumstances will inevitably yield results that are hopelessly indeterminate. *See* Amy Sinden,

For economists, then, the optimal or efficient (welfare maximizing)[37] level of pollution control in a particular country is tied to the preferences of that country's citizens.[38] In some countries (usually rich countries) the citizens' preferences, or willingness to pay, for environmental protections are high. In those countries the efficient level of environmental regulation as determined by a cost-benefit test is relatively stringent because the benefits of pollution control—measured by citizen willingness to pay— are relatively large and therefore outweigh the costs even at relatively stringent (and costly) levels of control. In other countries (usually poor countries) the citizens' willingness to pay for environmental protection is low. In those countries the efficient level of environmental regulation as determined by a cost-benefit test is relatively lax. In the economists' view, it is not that the citizens in the countries with lax environmental regulation are worse off. It is just that they have less of a *preference* for environmental protection.[39] They like vanilla ice cream better than chocolate.

Therefore, the argument goes, just as it is okay for the fishermen in Country A and the farmers in Country B to go out of business, if lax environmental regulation in one country allows its manufacturers to undersell and put out of business manufacturers that are subject to more stringent regulations in another country, that's okay too. In fact, that is the economically efficient result—just as it was for Country A and Country B.

In order to isolate the welfare-enhancing effects that economists attribute to differing environmental standards between trading partners, imagine a very simple two-country, two-product model. Two countries, Stringentland and Laxland, each have two industries: one that is highly polluting—cement—and one that is not—computer software. Both countries are exactly identical with respect to factor endowments, assimilative capacities, social conditions, and all other relevant conditions, except that Stringentland imposes a relatively stringent emissions limit on air pollution from cement factories and Laxland imposes a relatively lenient emissions limit on such pollution. The effects of this pollution in each country are entirely domestic. That is, there are no spillover or global-commons effects.

In Defense of Absolutes: Combating the Politics of Power in Environmental Law, 90 Iowa L. Rev. 1405, 1425–30 (2005); Amy Sinden, *Cass Sunstein's Cost-Benefit Lite: Economics for Liberals*, 29 Columb. J. Envl. L. 191 (2004).

[37] I am using the terms "optimal" and "efficient" interchangeably.

[38] The country is usually assumed to be the appropriate geographic unit within which to measure social welfare, although welfare economics offers no coherent theoretical justification for that approach. *See* Sykes, *supra* note 32, at 59.

[39] Bhagwati, *supra* note 10, at 168; Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 Minn. L. Rev. 535, 536 (1997); Stewart, *supra* note 24, at 2052.

The economists contend that when free trade is opened between these countries, efficiency gains will ensue. Citizens of Stringentland will be better off trading some of their software for cement from Laxland because they will be able to get more Laxlander cement per unit of software than Stringentlander cement. The producers of cement in Laxland will also be better off with this trading arrangement, because they will have opened up a new lucrative market—Stringentlanders are willing to pay more software per ton of cement than are Laxlanders. Thus, under free trade, Laxland's cement industry will expand while its software industry shrinks, Stringentland's cement industry will shrink while its software industry expands, and overall social welfare will increase within each country as well as globally.[40]

While shareholders and employees of the cement industry in Stringentland will no doubt suffer welfare losses after free trade, the economists contend that those losses will be outweighed by the welfare gains to the shareholders and employees of Stringentland's software industry, added to the welfare gains to cement consumers in Stringentland, who now get to buy cheaper cement. Similarly, in Laxland, welfare losses to the software industry will be offset by gains to the cement industry and the consumers of software. Moreover, pollution will be shifted from Stringentland to Laxland, where it will impose lower social costs because the citizens of Laxland, who have less of a "preference" for a clean environment, suffer less harm from pollution.

D. *The House of Cards, or How the Economists' Model Teeters Atop the Assumptions of Optimal, Static Standards*

The economists' model assumes that the environmental standards in each country are efficient—that is, that they reflect the results that would be reached by a perfect cost-benefit analysis that accurately accounted for the preferences of that country's citizens.[41] Indeed, as this section will show, their claim that free trade enhances efficiency depends on that assumption. If we assume instead that environmental regulations in Laxland are suboptimal, the economists' efficiency claim no longer holds.[42] Yet, as the next section will explore, these are unrealistic assumptions.

Imagine, for example, a Laxland in which a few oligarchs control the political system such that environmental standards for cement manufacturers are set at a level clearly below that which would result from a cost-benefit test based on the

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[40] *See* Sykes, *supra* note 32, at 63–64; Bhagwati, *supra* note 10, at 166.

[41] *See* Bhagwati, *supra* note 10, at 167–68.

[42] *See* Daniel A. Farber, *Environmental Federalism in a Global Economy*, 83 Va. L. Rev. 1283, 1303–06 (1997).

preferences of its citizens. Before free trade, imagine that the cement industry in Laxland produces one million tons of cement per year and the aggregate pollution from cement plants in Laxland causes 100 people to die each year from respiratory diseases, but that the benefits of cement production to consumers and the owners of the cement industry are not nearly enough to compensate for that loss of life under a cost-benefit test. Because opening the borders to free trade with a country with more stringent standards would have the effect of increasing the size of the cement industry in Laxland, it is easy to see that free trade would also have a negative welfare effect in Laxland. If producing a million tons of cement results in a net decrease in social welfare, then producing say two million tons of cement after free trade would result in even more deaths and an even larger decrease in social welfare.[43]

This negative welfare impact in Laxland is not something the economists take into account in their models, since they assume efficient standards and therefore that increased cement production will have a positive rather than a negative impact on Laxlander welfare.[44] And while it is possible that the gains from trade will be large enough to compensate for the increased environmental harm in Laxland, this will not necessarily be so. In any event, it is unlikely that compensating gains will accrue within Laxland itself. Since the benefits of increased cement production to owners and employees of Laxland's cement industry are by definition insufficient to compensate for the increased environmental harm, cheaper software prices would have to provide sufficient benefit to Laxland's consumers to compensate for the additional deaths caused by the expanded cement industry.

Alternatively, sufficient compensating benefits might conceivably accrue to cement consumers and owners and employees of the software industry in Stringentland to offset the environmental harms in Laxland and produce an aggregate welfare gain. But under such a scenario, the economists' claim of welfare gains to each country individually would fail. Instead, free trade would be producing welfare gains for Stringentland at the expense of Laxland's welfare loss, raising significant equity concerns. A primary justification for free trade is that poor countries benefit as well as rich countries. But if wealthy, developed countries generally have more stringent environmental standards and developing countries have less stringent standards, free trade in such a scenario would end up producing a transfer of welfare from the poor to the rich.

What if the environmental standards for cement manufacturers also begin at sub-optimal levels in Stringentland? Before free trade, the cement industry produces

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[43] *See* Ackerman, *supra* note 17, at 159.

[44] *See id.* (assuming efficient domestic standards in each country). *See also* Ackerman, *supra* note 17, at 159 (noting this deficiency in the standard economic model).

a social welfare loss in Stringentland. To the extent that free trade results in the elimination of Stringentland's cement industry, that welfare loss would also be eliminated, producing a welfare gain for the citizens of Stringentland. That welfare gain (in conjunction with any economic gains from trade) could be large enough to offset the welfare loss to Laxland's citizens caused by free trade, thus producing an aggregate welfare gain, but, as above, the economists' claim that free trade benefits each country individually would fail and a redistribution of welfare to wealthy countries as the expense of poor countries would result.

Moreover, whether Stringentland begins at optimal or suboptimal standards, there is reason to believe that it may react to free trade with Laxland by lowering its standards rather than losing its cement industry to Laxland. If Stringentland were to lower its standards to Laxland's level, comparative advantage would be eliminated, and there would be no welfare gains from trade. At the same time, however, this loosening of environmental standards would lead to a welfare loss in Stringentland. Because there would be no offsetting welfare gains from trade in either country, social welfare would decrease both within Stringentland itself and in the aggregate.

Thus, if we assume that environmental standards in Laxland begin at suboptimal levels, the economists' claim of welfare gains from trade no longer holds.[45] Under such circumstances, if we assume that each country retains its standards before and after free trade, free trade may well result in welfare losses within Laxland as well as in the aggregate. Even if Laxland's losses are offset by welfare gains in Stringentland, such a scenario raises significant equity concerns, involving essentially a transfer of welfare from the poor to the rich. Alternatively, Stringentland may react to free trade by lowering its standards, resulting in a welfare loss both within Stringentland and in the aggregate. As the next section explores, this set of alternative assumptions—suboptimal standards in Laxland and a loosening of standards in Stringentland—are far more likely to accurately reflect real-world conditions than those employed by the economists.

E. *Questioning the Assumptions: The Reality of Sub-Optimal Standards and Downward Pressure*

The above analysis has shown that the economists' efficiency claim depends on the assumptions that standards in both countries are both optimal and static and that if we assume instead either sub-optimal standards in Laxland or that Stringentland responds to free trade by lowering its standards, free trade is likely

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[45] *See* Daly, *supra* note 29, at 148–49.

to produce a negative welfare impact in one or both countries. This part will argue that these alternative assumptions are far more likely to reflect actual conditions and therefore provide a far more useful model.

I. *Sub-Optimal Standards*

First, as a purely empirical matter, it is clearly problematic to assume that all of the nations involved in free trade are governed by well-functioning democratic political systems that implement policies even roughly reflecting the preferences of their citizens.[46] Indeed, a quick perusal of the WTO's membership list suffices to demonstrate how untenable such an assumption is. Current WTO members include a number of non-democratic states—for example, Bahrain, China, Cuba, Jordan, Kuwait, and Zimbabwe.[47] Furthermore, in many post-communist and developing countries, the superficial trappings of democracy—what Susan Marks has called "low intensity democracy"—may actually mask the continuing dominance of pre-existing authoritarian power structures.[48]

Second, even putting aside the obvious problem of non-democratic or weakly democratic governments, there are a whole host of problems with assuming, even as a theoretical matter, that a well-functioning democracy will produce optimal environmental standards. We can begin with the problem of market failure. Because environmental harms are usually externalized, an unregulated free market will produce levels of environmental degradation that are higher than optimal.[49] So, in order to assume an optimal level of pollution control in a free market economy, economists must assume a regulatory scheme that successfully internalizes the externalities.[50] But such regulation is exceedingly difficult for any government to implement.

Even if we assume that a reasonable approximation of an optimal, welfare-maximizing environmental policy is possible,[51] public choice theory has cast considerable doubt on the capacity of democratic institutions to produce such outcomes.[52] Indeed, there is plenty of reason to believe that political failure

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[46] *See* Stewart, *supra* note 24, at 2054.

[47] *See* U.S. Department of State, *2005 Country Reports on Human Rights Practices*, available at http://www.state.gov/g/drl/rls/hrrpt/2005.

[48] *See* Susan Marks, The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology 50–75 (2000).

[49] *See* Tom Tietenberg, Environmental and Natural Resource Economics 51–54 (1992).

[50] *See* Bhagwati, *supra* note 10, at 166 (assuming internalization through optimal pollution taxes).

[51] Many would view this as a problematic assumption. *See supra* note 36.

[52] See generally Maxwell L. Stearns, Public Choice and Public Law: Readings and Commentary (1997); See also Daniel A. Farber & Philip P. Frickey, The Jurisprudence of Public Choice, 65 Tex. L. Rev. 873, 907 (1987) (counseling caution in relying on "[t]he easy generalizations and reductionist models found in the early [public choice] literature [, which] have not fared well empirically").

occurs fairly regularly with respect to environmental regulation, even in reasonably well-functioning democracies.[53] It has long been recognized that in virtually all environmental disputes the pressure brought to bear on government decision-makers is asymmetrical, weighted against environmental protection.[54] This is because the interests that favor environmental protection tend to be broadly shared among a large group of individuals, non-economic in character, and often of relatively minor consequence to each member of the group.[55] Accordingly, those who hold such interests face formidable collective action problems in trying to organize to form pressure groups. On the other side, the interests that stand to lose from environmental regulation tend to be held by a much smaller set of corporate rather than individual actors, tend to be economic in character, and tend to have the capacity to impact each actor to a far larger degree.[56] The interests that oppose environmental regulation therefore face fewer collective action barriers to effective organization, have access to substantial corporate wealth, and are able to take advantage of the special access to government decision makers that industry often enjoys.[57]

This power disparity tends to distort government decision-making toward less stringent than optimal regulation. This distortion is exacerbated by other political dynamics as well. First, politicians and public officials tend to respond more readily to immediate harms—like the economic harms that tend to be caused by environmental regulation—than to the benefits of environmental regulation, which often do not accrue until far off in the future.[58] Second, the benefits of environmental regulation often accrue to future generations, who are not represented in the political process.[59] Third, the "tragedy of the regulatory commons" may prevent well-meaning regulators with overlapping or mismatched regulatory jurisdictions from producing adequate levels of regulation.[60] All these dynamics tend to distort government decision making toward less-stringent-than-optimal standards.

Finally, these same dynamics tend to dampen enforcement efforts as well. Even if standards are set at optimal levels, they have no effect unless they are adequately

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[53] Esty, *supra* note 26, at 633; Leebron, *supra* note 11, at 72.

[54] *See* Richard B. Stewart, *Pyramids of Sacrifice: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L. J. 1196, 1213 (1977).

[55] *See id.*

[56] *See id.*

[57] *See id.*; Sinden, *supra* note 36, at 1436–39; Shi-Lng Hsu, *Fairness Versus Efficiency in Environmental Law*, 31 Ecol. L. Q. 303, 356 (2004); *See* Esty, *supra* note 26, at 597–98.

[58] *See* Esty, *supra* note 26, at 632.

[59] *See* Edith Brown Weiss, *Environmentally Sustainable Competitiveness: A Comment*, 102 Yale L. J. 2123, 2127 (1993).

[60] *See* William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 Iowa L. Rev. 1 (2003).

enforced. But under-enforcement of environmental standards is widely recognized to be a pervasive problem throughout the world.[61]

In sum, the assumption that environmental standards in countries engaged in free trade are set and enforced at optimal levels is both theoretically and empirically problematic. An assumption that one or both countries begin with suboptimal environmental standards and/or enforcement is far more likely to reflect actual conditions.

II. *Downward Pressure on Stringentland's Standards*

Although the economists' model assumes that both countries retain their respective standards both before and after free trade,[62] an understanding of the real-world mechanics of environmental standard setting and the political dynamics that underlie those processes reveals this assumption of stable standards to be unwarranted. Under free trade, competition from Laxland's industry will put downward pressure on Stringentland's environmental standards *via* two distinct mechanisms: directly by altering the cost calculus that goes into the standard-setting formula; and indirectly by increasing political pressure for loosening standards. Yet, if Stringentland's standards start out at or below optimal levels, then any lowering of its standards will lead to a net welfare loss. Furthermore, any lowering of Stringentland's standards will reduce the difference in comparative advantage between the two countries and thus reduce the potential for any welfare gains from trade.

1. *Direct Impact on the Standard Setting Cost Calculus*

Economists acknowledge that opening the borders to free trade between Stringentland and Laxland will impose social costs on Stringentland's cement industry in the form of plant closings and mass layoffs. Because they do not have to pay as much for pollution control equipment, Laxland's cement manufacturers will be able to sell cement at a lower price. Cement manufacturers in Stringentland will have to lower their prices to compete. Facing lower profit margins, some Stringentland factories will be forced to close and lay off workers.

Economists acknowledge these costs but contend that they will be offset by gains in other sectors of the economy. Stringentland's consumers will enjoy cheaper prices for cement; the owners of Stringentland's software companies will enjoy higher profits; and the displaced employees from Stringentland's cement

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[61] *See* Durwood Zaelke, et al., *Compliance, Rule of Law, and Good Governance, in* Making Law Work: Environmental Compliance and Sustainable Development 47–51 (Durwood Zaelke, et al., eds. 2005); Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 Harv. Envtl. L. Rev. 297 (1999).

[62] *See* Bhagwati, *supra* note 10, at 169.

industry will be instantaneously re-employed in the software industry. This last assumption is, of course, entirely unrealistic and has been extensively critiqued.[63] It is unlikely that employees of the cement industry would have the training or live in a location that would allow them to be immediately re-employed in the software industry.

Another problem with the economic model that has not been widely recognized, however, is the feedback loop that these new social costs will create with respect to Stringentland's environmental standard-setting process. Assuming that the standard-setting formula in Stringentland is one that takes the costs of regulation into account in some way, then as free trade causes the social costs associated with cement manufacture to change (e.g., by causing plant closings and mass layoffs), the level at which Stringentland's environmental standards are set under the formula will also change.

In an economist's ideal world, of course, the standard-setting formula would be cost-benefit analysis. Whether the changes brought about by free trade would cause the standard calculated by cost-benefit analysis to rise or fall is difficult to say in the abstract. The added social costs of plant closings and mass layoffs would themselves tend to loosen the standard. But these increased costs might well be offset by the gains to consumers brought about by free trade in the form of lower cement prices. If these consumer gains outweighed the social costs associated with plant closures, overall costs might fall and the standard called for by cost-benefit analysis might rise.

The real world, however, looks nothing like the economists' ideal world. In the real world, cost-benefit analysis is rarely the formula by which environmental standards are set. Particularly since the benefits of environmental protection typically involve non-economic values like human life, ecosystem health, or aesthetic values, attempts at cost-benefit analysis in this context often become highly contestable and uncertain.[64] In part because of these difficulties, the feasibility principle is far more commonly used in setting environmental standards.[65]

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[63] *See* Ackerman, *supra* note 17, at 158–59.

[64] *See* Sinden, *In Defense, supra* note 36, at 1418–20, 1423–30.

[65] *See* David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 B.C. Envtl. Aff. L. Rev. 1, 20–26 (2004); Wendy E. Wagner, *The Triumph of Technology-Based Standards*, 2000 U. Ill. L. Rev. 83; Neil Gunningham, *Environmental Management Systems and Community Participation: Rethinking Chemical Industry Regulation*, 16 U.C.L.A. J. Envtl. L. & Pol'y 319, 327 (1997–98)("Governments throughout Western Europe and North America, have relied heavily on a regulatory standards approach involving the establishment of technology-based standards."); Oliver A. Houck, *Clean Water Act and Related Programs*, ALI-ABA Course of Study, SB52 ALI-ABA 241, 258 n.166 (1997) ("The European Community … has adopted technology-based standards for water toxins for all of its member countries with the exception of Great Britain.").

Numerous environmental statutes embody this principle, which essentially instructs agencies to set standards at the most stringent level that is economically and technologically feasible. That is, the agency must reduce pollution levels as much as it can without crossing the threshold of "infeasibility." The precise location of this infeasibility threshold is of course a little ambiguous, but generally, courts and agencies have set the threshold just shy of the point at which further reductions in pollution would cause widespread plant closings.[66]

Because the feasibility principle is cost-based, if the social costs associated with a particular level of pollution control change, then the level at which the principle sets the standard will also change. In general, increasing the costs associated with a particular pollution control standard will eventually cause the standard to cross the threshold from feasible to infeasible thus triggering a move to a less stringent standard. Because the feasibility threshold is pegged to widespread plant shutdowns, when the increased social costs come in the form of plant closings caused by overseas competition, it is particularly likely that the feasibility threshold will be crossed, thus resulting in a loosening of the standard.

At this point, the economists will protest that I have only told half the story. While it may be true that free trade will impose extra costs on Stringentland's cement industry in the form of plant shutdowns and worker layoffs, the economists will point out that free trade will also bring benefits to Stringentland. The increased costs to Stringentland's cement industry will be offset by the welfare gains to Stringentland's consumers who will enjoy cheaper prices for cement imported from Laxland.[67] Therefore, free trade will not result in a net increase in costs to the citizens of Stringentland.

The problem with the economists' argument here is that it assumes that these two values are fungible. Free trade essentially has the effect of substituting one kind of cost for another—the pre-free-trade cost of higher consumer prices is replaced by the post-free-trade cost of plant shutdowns and layoffs. And yet it is not clear that the diffuse and individually minor harm caused by many consumers paying incrementally higher prices for goods is equivalent to the concentrated harm of plant shutdowns, which tend to impose severe, sometimes catastrophic, costs on a relatively small, cohesive group of individuals.[68]

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[66] *See* Driesen, *supra* note 65, at 9–20.

[67] It will also be offset by gains to the owners and employees of Stringentland's software industry.

[68] In a normative scheme like welfare economics that measures welfare in the aggregate and ignores distributional inequalities, these two costs are equivalent. And indeed, a cost-benefit analysis would treat them that way. David Driesen has argued that the feasibility principle is based on adifferent normative scheme—one that is grounded in fairness concerns and that views distributional equity as an important goal. *See* Driesen, *supra* note 65, at 70–72. *Cf.*, Graham Mayeda, *Developing Disharmony? The SPS and TBT Agreements and the Impact of Harmonization on Developing Countries*, 7 J. Int'l Econ. L. 737, 741–42 (2004).

These two types of costs are unlikely to be accorded equivalent treatment by the feasibility principle. Thus, costs in the form of plant shutdowns may well trigger a loosening of standards under the feasibility formula even where the same or higher costs in the form of increased consumer prices would not. Accordingly, even if the dollar value of the gains to Stringentland's consumers are equal to or greater than the dollar value of the losses occasioned by plant closings, the change in the nature of the costs imposed (from diffuse consumer costs pre-free-trade to concentrated plant shutdown costs post-free-trade) will put downward pressure on the feasibility formula and thus may well produce a loosening of environmental standards in Stringentland.[69]

2. *Increased Political Pressure for Weakening Standards*

Free trade between Stringentland and Laxland will also put downward pressure on Stringentland's environmental standards by increasing the political pressure on Stringentland's agencies to weaken those standards. As elaborated above, government decision making on environmental issues tends to be systematically skewed against environmental protection as a result of the endemic power imbalance between the concentrated, corporate interests that stand to lose from environmental regulation and the diffuse, individual interests that stand to gain from it. Free trade between Stringentland and Laxland will tend to exacerbate that dynamic with respect to Stringentland's domestic standard-setting process by increasing the political strength of those lobbying in favor of weaker standards.[70] By thus altering the political dynamic, free trade will put downward pressure on environmental standards in Stringentland.

To see why this is so, recall that under our simple two-country, two-product model, free trade between Stringentland and Laxland will have two effects on the cement market in Stringentland: 1) it will cause Stringentland's cement industry to close plants, and 2) it will lower the price that consumers in Stringentland pay for cement. Another way to conceptualize this is to think of free trade as essentially causing Stringentland to swap the social costs of higher consumer prices for cement (pre-free trade) for the social costs of plant shutdowns (post-free trade).

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[69] An economist would, of course, argue as a normative matter that the feasibility test is not the correct standard-setting formula, and that cost-benefit analysis should be used instead. Under cost-benefit analysis the plant closing costs would be offset by the consumer gains. But my point here is not to make a normative argument in favor of the feasibility formula over cost-benefit analysis (though I am sympathetic to such arguments, *see* Driesen, *supra* note 65). My point is simply to make a descriptive claim based on the fact that the feasibility principle is in actuality more likely to be used in setting environmental standards.

[70] *See* Daniel C. Esty & Damien Geradin, *Environmental Protection and International Competitiveness: A Conceptual Framework*, J. World Trade, June 1998, at 5, 19–20 (examples of proposed environmental legislation in several developed countries defeated due to lobbying citing international competitiveness concerns).

As noted in the last section, these are two very different sorts of costs. And among other things, they can be expected to trigger very different sets of political dynamics. The diffuse set of consumers who bear the costs of stringent environmental standards before free trade face classic collective action problems and thus are unlikely to form an effective pressure group.[71] (Their interests in seeing environmental standards weakened, however, are unlikely to go unheeded by regulators and lawmakers since they are more than adequately represented by the powerful corporate lobbyists who also favor weakened standards.) After free trade, however, this diffuse and relatively powerless set of interests is replaced by a far more powerful lobby: those who stand to lose from plant closings. This is a small, discrete group of people, each of whom stands to suffer significant economic loss and who may already be organized in unions. This post-free-trade group does not face nearly the collective action problems of the consumers who are harmed by stringent regulation before free trade. This group is therefore likely to form a strong and effective pressure group pushing for a loosening of environmental standards in Stringentland after free trade is implemented.[72] This pressure group joins forces with the powerful corporate interests already lobbying for weaker environmental standards both before and after free trade.

One might wonder how free trade agreements ever get ratified to begin with if those who stand to benefit from free trade (consumers) are so politically powerless and those who stand to lose are so powerful. In the free trade debate, however, the powerless consumer constituency is joined by a far more powerful political force—the export industry. These corporate interests stand to gain substantially from free trade and expend enormous resources lobbying for the removal of trade restrictions, in opposition to trade unions and others who stand to lose from plant closings.[73] The export industry has no particular stake in the environmental standards debate, however. Accordingly, when it comes to that debate, the trade unions and others lobbying for weakened standards have no such powerful opponent.

In sum, by swapping the diffuse costs of higher consumer prices for the concentrated costs of plant shutdowns, free trade fundamentally alters the political dynamic underlying environmental standard setting in Stringentland. By redistributing the costs of environmental protection from the relatively diffuse harms caused by increased consumer prices to the concentrated, sometimes catastrophic, harms of plant closings, free trade tends to foster the creation of a highly

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[71] The same people who have an interest as consumers in lower prices may also have (opposing) interests as citizens in environmental protection. *See* Sagoff, *supra* note 36.

[72] *Cf.* Stewart, *supra* note 16, at 1330–31 (superior organizational strength and political power of producer interests over consumer interests explains the imposition of welfare-reducing trade barriers in some instances).

[73] *See* Stewart, *supra*, note 24, at 2047.

motivated, organized lobbying group pushing for a loosening of environmental standards.

F. *Conclusion: The Upward Harmonization Solution*

If we substitute realistic assumptions for the unrealistic assumptions that economists employ, it becomes clear that free trade between countries with differing environmental standards may well have a negative impact on social welfare. The solution is to return to the principle of international organization that seemed self-evident to Professor Hudson seventy-five years ago—to make upward harmonization of environmental standards a pre-requisite to free trade.[74] Harmonization must be upward, rather than downward, in order to help to counteract the market and political dynamics that already skew standard setting below optimal levels.

Some will argue that harmonization is a bad solution because by taking a one-size-fits-all approach, it will inevitably lead to the imposition of inefficient standards on some countries. They argue that even in a perfect world, we should still expect even optimal levels of environmental regulation vary across countries. Optimal standards in developing countries, for example, should be less stringent than in developed countries because the citizens of developing countries are likely to be less willing to trade income for environmental protection.[75] Upward harmonization, then, is likely to impose inefficient, higher-than-optimal standards on developing countries.

But this argument contains several erroneous assumptions. First, it assumes that "the environment is an amenity—a luxury for which there is significant demand only when basic needs have been satisfied."[76] Numerous environmental problems in the developing world, however, threaten the very necessities of human existence, like adequate food and clean drinking water.[77] Second, it

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[74] While this may seem a radical proposal to some, it is consistent with general trends in U.S. and European Union law—two "free trade" regimes with more long-standing and well-established pedigrees than the still nascent international free trade system. *See* Farber, *supra* note 42, at 1307–19. *See also* Bratspies in this volume.

[75] *See, e.g.*, Bhagwati, *supra* note 10, at 166–68.

[76] *See* Weiss, *supra* note 59, at 2125 (criticizing this view); Carmen G. Gonzalez, *Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade*, 78 Denv. U. L. Rev. 979 (2001)(same).

[77] *See id.* at 983–1000. The idea that the poor might have less of a preference for clean drinking water than the rich confuses willingness to pay with ability to pay and ignores the well-known problem of wealth effects—that is, because a dollar provides more utility to a poor person than a rich person, measuring preferences in terms of dollars necessarily undercounts the preferences of the poor relative to those of the rich.

assumes that standards in Stringentland are themselves optimal to begin with and higher than perfectly optimal standards in Laxland would be. Yet political and market dynamics may well push standards in Stringentland below the theoretic optimum for both countries. Finally, and perhaps most importantly, the argument erroneously assumes that a country's optimal standard can be pinpointed with precision. The long laundry list of theoretical and practical obstacles to the implementation of cost-benefit analysis makes it clear that the notion of a precise, optimum standard is illusory.[78] In practice, the best we can hope for under any standard-setting formula is a rough approximation of optimality. We may not know where the optimal level of regulation is, but we do know for sure that political and market failures can be expected to push standards well below that theoretic level. Given that reality, a free trade regime that truly seeks progress in international organization should be set up to counteract this dynamic rather than to exacerbate it. Upward harmonization pushes in the right direction.

[78] *See supra* note 36.

Enhancing Human Rights Protection through Procedure: Procedural Rights and Guarantees Derived from Substantial Norms in Human Rights Treaties

By María Pía Carazo

A. *International Organization, International Legal Development and Human Rights*[1]

Professor Manley O. Hudson firmly believed that the development of international law was crucial for the maintenance of peace.[2] According to Professor Hudson, each human generation contributes in its own way to the process of the creation of international organizations[3] and, thus, in the development of international law.

Nothing being eternal, Professor Hudson foresaw the possibility that an international organization may cease to exist, be altered, reconstructed or given wholly different purposes.[4] He knew, however, that even in the face of change "institutions have a strange way of keeping themselves alive … [and] once they become established they may influence the thought of men in ways not dreamed of by their founders."[5]

The United Nations, successor of the League of Nations, clearly proves Professor Hudson's point: the idea of peace through international cooperation

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[1] All judgments and decisions are cited with volume number and page number whenever possible. In the case of new or unpublished decisions or judgments, an internet link is provided. In the case of judgments by the European Court of Human Rights, the link leads to HUDOC, the main searching machine of the Court's jurisprudence. The link provided for the decisions of the Human Rights Committee leads to the Committee's jurisprudence portal, where the desired document can be searched in light of the number of the decision provided in the footnote. Electronic versions of the judgments of the Inter American Court of Human Rights all have a direct link.

[2] *See* Manley O. Hudson, Progress in International Organization 88 (1932).

[3] Hudson, *supra* note 2, at 121.

[4] "No one can say that any of our current conceptions … will not be discarded by a later generation … " Hudson, *supra* note 2, at 120.

[5] Hudson, *supra* note 2, at 120-21. Institutions, according to Hudson "develop a hardiness which carries them through strain and stress … Habits form around them, loyalties cling to them, methods evolve from their use, order springs from their existence."

Miller & Bratspies (Eds), Progress in International Law, pp. 793–812.

survived the destructive force of the Second World War and resurfaced as the organization we know today. With the contribution of the (at least) three generations that have taken up an active role in public life after World War II, the United Nations has seen great changes and furthered the development of International Law well beyond its classical inter-state roots.

Moreover, the events between 1933 and 1945 taught humankind that world peace may not be achieved without true protection of the rights of peoples and individuals. As a result, international law underwent a revolutionary expansion into a new field: human rights treaties were born and a new era of individual empowerment began. Today, there is no doubt that securing and guaranteeing the rights of individuals[6] and peoples, alongside the prevention of inter-state conflict, constitutes a vital pillar in the maintenance of peace.

International organizations dealing with issues concerning human rights have done commendable work in promoting human rights protection. The courts and other bodies in charge of adjudicating these rights perform the daily task of interpreting the treaties by which they are governed. These bodies are, using Professor Hudson's words, certainly "influenced by the thought[s] of men;"[7] men and women who adapt the judicial understanding of human rights norms to suit the needs of their generation.

This chapter will focus on the jurisprudential development of international human rights law. One main purpose of the chapter is to show the existence of a minimum common standard in relation to procedural rights and guarantees present in the jurisprudence and case-law of the three most important human rights protection bodies: the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR) and the United Nations Human Rights Committee (HRC). Additionally, this chapter intends to exemplify how the aforementioned jurisprudence and case-law has expanded the sphere of protection of material provisions through interpretation.

B. *Effective and Evolutive Interpretation of Human Rights Treaties*

The world is experiencing a revolution in human rights jurisprudence. The number of individual petitions dealt with by international human rights courts and bodies has risen dramatically in the past ten years and with it the intricacy of the cases presented.[8] In an ever-changing world, these bodies have been con-

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[6] *See* Sadat, in this volume.

[7] Hudson, *supra* note 2, at 120.

[8] For example, whereas the former European Human Rights Commission and the former ECtHR gave a total of 38,389 decisions and judgments in the 44 years up to 1998, the single permanent ECtHR gave no less than 61,633 judgments in 5 years (1999-2003). In 2003 alone the Court adopted some 18,000 decisions and 700 judgments. In 2005 this figure rose to 1105 judgments.

fronted with the difficult task of interpreting their governing treaties in a manner concordant with the situation prevailing at the time. The HRC, the ECtHR and the IACtHR have played a central role in the development of international human rights law through their jurisprudence and case-law; based on principles of interpretation[9] such as the effectiveness principle and the principle of dynamic or evolutive[10] interpretation.

According to the effectiveness principle, the protection awarded to individuals by the State must be *effective*, that is, actually ensuring and guaranteeing such rights.[11] A human rights norm, thus, should "be interpreted so as to give it its full meaning and to enable the system for the protection of human rights entrusted to [its organs] to attain its 'appropriate effects'."[12] This interpretive vision is a guiding principle for the three human rights protection bodies, which, in accordance with Article 31.1 of

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The number of applications registered rose from 5,979 in 1998 to 13,858 in 2001. *See* Martin Eaton & Jeroen Schokkenbroek, *Reforming the Human Rights Protection System Established by the European Convention on Human Rights*, 26 Hum. Rts. L.J. 1 (2005). For more Court statistics, *see also* http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+surveys+of+activity/.

9 Although these bodies use an array of interpretation tools and principles (depending sometimes on the norm to be interpreted), this paper concentrates on the effectiveness and the evolutive interpretation principle, since these have been primordial for the jurisprudential expansion of human rights norms. Other interpretation principles and tools used by human rights courts and committees are, for example: the strict interpretation principle, the doctrine of the margin of appreciation, the principle of proportionality, etc. For the interpretation of treaties in general, *see* Ian Brownlie, Principles of Public International Law (6th ed. 2003); *see also* Rudolf Bernhardt, *Interpretation in International Law, in* Encyclopaedia of Public International Law (EPIL): Vol. II (E-I) (Rudolf Bernhardt ed., 1995). For interpretation of human rights treaties in particular, *see* L'Interpretation de la Convention Européene des Droits de L'Homme (Frédériс Sudre ed., 1998); Antônio Augusto Cançado Trindade, El Derecho Internacional de los Derechos Humanos en el Siglo XXI (2001).

10 The terms 'evolutive' and 'dynamic' are used by authors and the ECtHR to refer to the interpretative approach used by human rights bodies when adapting their jurisprudence to current-day situations. *See, e.g.*, Stafford v. United Kingdom, 2002-IV Eur. Ct. H.R. 115, 137-138, para. 68-69; Öcalan v. Turkey, 2005-IV Eur. Ct. H.R. 45, para. 163, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=ocalan%20%7C%20v.%20%7C%20turkey&sessionid=900614&skin=hudoc-en. *See, e.g.*, Alastair Mowbray, *The Creativity of the European Court of Human Rights*, 5 Hum. Rts. L. Rev. 57, 64 (2005); Rudolf Bernhardt, *Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights*, 42 German Y.B. Int'l L. 11, 11 (1999).

11 *See* Velásquez Rodríguez v. Honduras, Inter-Am. C.H.R. (ser. C) No. 4, 152, para. 167 (1988); Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) 12-13, para. 24 (1979).

12 Velásquez Rodríguez v. Honduras, Inter-Am. C.H.R. (ser. C) No. 4, 152, para. 167 (the term 'appropriate effects' was chosen by the translator as the translation of the term 'efecto útil' which appears in the official Spanish version). The ECtHR uses the terms 'effectiveness' and 'effet utile.' *See* Klass v. Germany, 28 Eur. Ct. H.R. (ser. A) 18, para. 34 (1978).

the Vienna Convention on the Law of Treaties are called upon to interpret the treaties in question in light of their object and purpose.[13] Protection of the human rights provided by the respective treaties constitutes the object and purpose of the human rights treaties, and the jurisprudence of the corresponding bodies must grant real, that is, effective protection to these rights. These organs are called upon to take into consideration the context of the individual being affected and not merely formalities or appearances. Failing to do so, these organs would run the risk of bestowing the right in question a mere illusory or theoretical protection.

As a complement to the effectiveness principle, the principle of dynamic or evolutive interpretation requires that (using the words of the ECtHR) human rights conventions and treaties "must be interpreted in the light of present-day conditions."[14] Human rights treaties (especially multilateral ones) are intended to remain valid and applicable for long periods of time and have been drafted using broad wording—laying down general rules. They are considered "living instruments."[15] Thus, the standards of valid protection required at a certain time may change in the future, to match developments inside the signatory states and their societies.[16]

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[13] Vienna Convention on the Law of Treaties, adopted on May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force January 27, 1980). On this point, the ECtHR has stated that "[i]n interpreting the convention, regards must be had to its special character as a treat for the collective enforcement of human rights and fundamental freedoms … thus the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective …" Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) 34, para. 87 (1989). *See also*, Paul Mahoney, *The European Convention on Human Rights as a Living Instrument*, 11/12 Bulletin des Droits de L'Homme 106 (2005).

[14] Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) 15, para. 31 (1978). *See also* Judge v. Canada, U.N. Human Rights Comm., 78th Sess., U.N. Doc. CCPR/C/78/D/829/1998 (October 20, 2003), para. 10.3, *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/cb752ca5a0c62b61c1256dbb002a67fe?Opendocument; Villagrán Morales v. Guatemala, Inter-Am. C. H.R. (ser. C) No. 63, 184, para. 193 (1999); *see also* William J. Aceves, *The Right to Information on Consular Assistance in the Framework of Guarantees of the Due Process of Law; Advisory Opinion OC-16-99*, 94 Am. J. Int'l L. 555 (2000).

[15] The term was coined by the ECtHR. *See, e.g.*, Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) 15; Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) 26, ¶ 71 (1995); Mamatkulov & Askarov v. Turkey, App. Nos. 46827/99 & 46951/99, 2005-I Eur. Ct. H.R. ¶ 121, http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Mamatkulov%20%7C%20Askarov%20%7C%20v.%20%7C%20Turkey&sessionid=900855&skin=hudoc-en. The IACtHR has echoed the terms of the ECtHR in its advisory and contentious jurisdiction. *See* Villagrán Morales v. Guatemala, Inter-Am. C.H.R. (ser. C) No. 63; *see also* Aceves, *supra* note 14.

[16] According to Rudolf Bernhardt, former judge at the ECtHR, "the object and purpose of human rights treaties may often lead to a broader interpretation of individual rights on the one hand and restrictions on State activities on the other." Bernhardt, *supra* note 10, at 14.

Achieving an adequate dynamic and effective interpretation of human rights treaties is, perhaps, one of the greatest challenges in human rights law today. It requires adapting jurisprudence to current standards in order to award true effective protection and prevent the treaty from becoming obsolete without acting *ultra vires*.[17] In the words of Rudolf Bernhardt, former president of the ECtHR, "not the existence, but the extent of the evolutive or dynamic element in any treaty interpretation is the real problem."[18] An adequate exercise of these tools of interpretation is possible and – even more – necessary. Without it, human rights protection would stagnate and not match present day conditions. The remaining sections of this chapter will show how the bodies under consideration have fared in their attempt to adapt their conventions to today's requirements.

C. *Development of Human Rights Law: From Liberal to Multidimensional Rights*

The expansion of the scope of protection of material human rights norms has taken place continuously and steadily during the past five decades.[19] One can divide this expansion in three different stages or eras of development.[20]

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[17] The prerogatives of human rights bodies in the effective and evolutive interpretation of treaties are not unlimited. First, judges and commissioners are only empowered to interpret and not to revise. Furthermore, other interpretation principles and rules limit the extent of additional obligations stemming from effective and dynamic interpretation, e.g., historic interpretation, systematic interpretation, and the wording of a specific provision. For more hereto *see* Cordula Dröge, Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention 235 (2003). For a thorough analysis of both interpretation principles, *see* Ramona Toma, La réalité Judiciaire de la Cour européene des droits de l'homme 30, 49 (2003). On the question of limits of interpretation *see* Peter van Dijk, *'Positive Obligations' Implied in the European Convention on Human Rights, in* The Role of the Nation-State in the 21st Century: Human Rights, International Organisations and Foreign Policy 17, 22 (Monique Castermans-Holleman et al. eds., 1998).

[18] *See* Bernhardt, *supra* note 10, at 16.

[19] It must be said that the jurisprudential development dealt with in this paper refers to that which has occurred in relation to treaties that mostly deal with civil and political rights.

[20] The proposed categorization is made for the purpose of making the development of human rights law more easily grasped. Because the stages overlap, an absolute and precise distinction between the jurisprudential stages of development is not possible. The dates provided above mark the period between the beginning of the human rights conception in question and the moment when the next stage of interpretation gained strength.

I. *The Era of Negative Rights / Negative Obligations (1945 – 1980)*

This era is marked by a strong liberal conception of human rights. International civil and political human rights treaties drafted during this era contain classical human rights of the so-called first generation, which mirror those incorporated into the domestic constitutional law of many states in the 18th and 19th Centuries. Accordingly, civil and political rights were originally conceived of as imposing only negative obligations upon the state; that is, prohibiting the state from infringing upon the rights enshrined in the respective document.[21] Substantive provisions within civil and political human rights treaties were intended to contain positive obligations for the contracting states only as an exception.[22] This liberal approach remains, until now, the fundamental basis for individual protection. Consequently, the central obligation of states is to *respect* human rights.

II. *The Era of Positive Rights / Positive Obligations (1980 – 1990)*

With the passage of time and respective changes in society, the dichotomy between civil and political rights as pure negative rights and other rights as pure positive rights has ceased to exist.[23] The developments of the second half of the 20th century showed a tendency towards a more (pro)active role of states towards their nationals. Hence, human rights also began to be considered not only as

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[21] This is one of the main reasons why the international human rights system was created with two different sets of norms: one covenant mainly to protect individuals against state interference in their civil and political rights (ICCPR) and the other furthering state action for the fulfillment of economic, social and cultural rights (ICESCR). The dichotomy in the understanding of the two sets of rights also lead to the set-up of distinct implementation and control systems, the ICESCR having a weaker implementation system than the ICCPR. For more *see* Frédéric Sudre, Droit Européen et International des Droits de L'Homme 234–36 (7th ed. 2005); *see also* Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2d ed. 2005); Sarah Joseph et al., The International Covenant on Civil and Political Rights: Cases, Materials and Commentary 33–34 (2d ed. 2004); Jörg Künzli, Zwischen Rigidität und Flexibilität: Der Verpflichtungsgrad Internationaler Menschenrechte 190–91 (2001); Robin Clapp, *Challenging the Traditional Conception of Civil Rights*, 33 Zambia L.J. 51 (2001).

[22] For example, Article 6 ECHR, Article 8 ACHR, and Article 14 ICCPR all guarantee the right to fair trial by independent and impartial tribunals, a guarantee that implicates a state obligation to provide such judicial infrastructure. *See* van Dijk, *supra* note 17, at 17. These articles also contain express positive obligations, such as the duty to inform accused persons on the nature and cause of the accusation against them, the duty to provide the necessary facilities to the accused for the preparation of his defense, the duty to provide for interpreters, etc.

[23] *See* Künzli, *supra* note 21, at 191, 210-13. *See also* Gérard Cohen-Jonathan, *L'évolution du droit internationale des droits de l'homme, in* Mélanges Offerts à Hubert Thierry: L'évolution du Droit International 114–15 (1998).

instruments prohibiting state interference, but also as imposing positive obligations on the state; for example, the obligation to *protect* individuals against other third-parties[24] and the obligation to *fulfill* human rights by means of additional positive measures.[25] This development marks the second era in the expansion of civil and political rights – forged to a great degree by human rights bodies through their jurisprudence in the late seventies and early eighties.[26]

Positive obligations address the state's wrongful omissions and view the state as a guarantor of rights. Thus, the main differentiation between negative and positive obligations is "whether the human right ascertained by the right holder can be realized with or without the state's assistance."[27] Positive rights impose obligations on states to act, to do or to provide something in order to make rights effective.[28] Accordingly, today it is widely accepted that civil and political rights impose both express *and* implied positive obligations,[29] in addition to nega-

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[24] For example, at the face of death threats, etc. *See infra* Part D, I, 1.

[25] For example, through legislative, administrative or judicial measures, procuring the implementation of human rights to the greatest extent possible. *See* HRC, General Comment No. 31, May 26, 2004, U.N. Doc. CCPR/C/21/Rev.1/add.13, para. 7, *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/58f5d4646e861359c1256ff600533f5f?Opendocument [hereinafter HRC, General Comment No. 31].

[26] As early as 1979, the ECtHR had proclaimed the existence of positive obligations arising out of the human rights guarantees of the ECHR. *See* Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) 15, para. 31 (1979); Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) 15-16, para. 26. The IACtHR showed its agreement with the ECtHR on the issue of positive obligations in its very first contentious cases, the so-called "Honduran Cases." *See* Velásquez Rodríguez v. Honduras, Inter-Am. C.H.R. (ser. C) No. 4, 152-53, para. 166-67 (1988); Godínez Cruz v. Honduras, Inter-Am. C.H.R. (ser. C) No. 5, 111, para. 176 (1989). The HRC declared the existence of positive duties arising from material norms of the ICCPR already in the 1980s, *see* Grille Motta v. Uruguay, U.N. Human Rights Comm., U.N. Doc. CCPR/C/10/D/11/1977 (July 29, 1980), para. 14, *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/03cab23b399bfa4bc1256ab20040eba0?Opendocument; Bleier Lewenhoff & Valino de Bleier v. Uruguay, U.N. Human Rights Comm., U.N. Doc. CCPR/C/15/D/30/1978 (Mar. 29, 1982), para. 13.3, *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/c932c40a308bd292c1256ab5002a6fd0?Opendocument. *See also* HRC, General Comment No. 31, *supra* note 25, at paras. 6-8.

[27] Dröge, *supra* note 17, at 380.

[28] Dröge distinguishes two dimensions of positive obligations: 1. A horizontal dimension: e.g. the state must protect individuals against acts of private parties which may affect their rights, and 2. A social dimension: e.g. the state has social duties to aid in the realization of the effective enjoyment of rights in reality. *See* Dröge, *supra* note 17, at 11, 381. *See also* Sudre, *supra* note 21, at 234.

[29] For the distinction between express and implied positive obligations, *see* van Dijk, *supra* note 17, at 18. Examples of express positive duties are those incorporated within the right to personal liberty or the right to an effective remedy. A further distinction can be made between obviously implied obligations and other implied obligations (the later requiring the exercise of evolutionary interpretation in a more substantial manner). An example of the latter is the requirement to create the necessary judicial infrastructure in order to comply with the right to fair trial. *See supra* note 22.

tive obligations. In addition, this positive-obligation approach emphasizes procedural rights and guarantees as the latest field of expansion in human rights protection, as part of the jurisprudential adaptation to today's reality.[30]

III. *The Era of Procedural Rights and Guarantees (1990 – Present)*

One of the most recent and innovative interpretation of human rights obligations[31] has lead to the current era of human rights development: Human rights norms have been granted an additional procedural dimension. This new dimension is not to be confused with the express rights and guarantees of a procedural nature already contained in the International Covenant on Civil and Political Rights (ICCPR), European Convention on Human Rights (ECHR) and American Convention on Human Rights (ACHR).[32] The organs called upon to interpret these conventions have proclaimed the existence of *additional* procedural rights and guarantees *deriving* from substantive norms. These derived procedural rights and guarantees are related to both negative obligations and positive obligations, and lie transversally to both negative and positive dimensions of each human right.[33] They serve as both an effective defense against state interference, and a requirement for better state enforcement of positive obligations. Due to their novelty, shall be illustrated in greater depth below.

IV. *Human Rights Norms as Multidimensional Rights*

As can be seen from the short exposition above, human rights have moved from a liberal to a multidimensional conception.[34] Each norm would, accordingly, impose both negative and positive obligations on the state, in addition to several procedural duties. Metaphorically speaking, one may imagine the development of human rights norms as the baking of a cake. With the passage of time, the recipe becomes more complicated and the cake gains a more intricate design. The initial cake may be

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[30] *See* Franz Matscher, *Les contraintes de l'interprétation juridictionnelle: Les méthodes d'interpretation de la convention européene, in* L'Interprétation de la Convention Européene des Droits de L'Homme 2, 25 (Fréderic Sudre ed., 1998).

[31] Other areas of innovation in human rights law are those corresponding to group and collective rights, as well as to social, cultural and economic rights. *See* Magdalena Sepúlveda, The Nature and Obligations under the International Covenant on Economic, Social and Cultural Rights 10 (2003); Henry J. Steiner & Philip Alston, International Human Rights in Context 237, 1306 (2000).

[32] Such as the right to liberty, which usually includes the right to be brought promptly before a judge and to take proceedings by which the lawfulness of his detention can be decided. *See* Article 5 § 3 and § 4 ECHR; Article 9 § 3 and § 4 ICCPR; and Article 7 § 5 and § 6 ACHR.

[33] On the ECHR, *see* Dröge, *supra* note 17, at 382.

[34] For more, *see* Dröge, *supra* note 17, at 215, 380.

described as "one-layered sponge cake" (negative obligations). After a certain time it seemed necessary to add a new flavor, thus the cake became a "two-layered cake" (composed of super-imposed negative and positive obligations). Finally, it turned out that the cake would taste better if the layers intermixed, which led to the baking of a "marble cake" (super-imposed, distinct obligations *plus* procedural guarantees and rights which cut across, or swirl amongst, all other obligations).

Needless to say, the expansion of the scope of protection of human rights has taken place not only during this process, but also *during each one of the stages* differentiated above. Each additional phase has meant a gigantic leap for the scope and content of the human rights enshrined in the different treaties, meaning greater protection for the individuals falling under their jurisdiction.

It is apparent that international human rights judges and commissioners, as members of their generation,[35] have adopted criteria argued by human rights theorists and philosophers of their time – and, more importantly, by national tribunals and national legislation.[36] In this manner, they have aided the adaptation of human rights jurisprudence to the required standards for today's world.

D. *Procedural Rights and Guarantees Derived by Interpretation from Substantive Human Rights Provisions*

As was mentioned above, the ICCPR, ECHR and ACHR all include express or obviously implicit procedural rights and guarantees.[37] The following analysis centers on procedural rights and guarantees that derive from substantive human rights norms, as they have been conceptualized and delineated in the jurisprudence of the aforementioned bodies.

I. *Main Types of Procedural Rights and Guarantees*

A study of the jurisprudence of the HRC, the ECtHR and the IACtHR shows a distinction between two main kinds of derivative procedural rights and guarantees. A first group involves those rights and guarantees that entail the establishment of preventive and organizational procedures and/or regulations. A second group contains those rights and guarantees that grant individuals access to judicial or administrative procedures. This last group also embodies other obligations of the state to create adequate procedures in the face of human rights violations and is closely interrelated to the right to an effective remedy.

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[35] *See supra* note 5.

[36] *See, e.g.*, Stafford v. the United Kingdom, 2002-IV Eur. Ct. H.R. 115.

[37] *See supra* note 32.

1. *Procedural Rights and Guarantees Entailing the Establishment of Preventive and Organizational Procedures and/or Regulations*

This first group of procedural rights and guarantees possesses more of a preventive or proactive character. The HRC, ECtHR and IACtHR have, through progressive interpretation, asserted the existence of a variety of state obligations in relation to the numerous rights enshrined in their respective treaties. Although these organs have not pronounced themselves on all issues in equal manner (understandable in light of their dissimilar case load, not to mention distinctions in the language of the texts they interpret) their recognition of additional state duties is clear. It is, thus, possible to filter a minimum common denominator. The following are among the most salient preventive or organizational state obligations of a procedural nature enunciated by human rights protection bodies.

a. Duties of organization and control of police and military operations in order to minimize the risk of violation of the rights to life, personal integrity and liberty, among others.[38]
b. Preventive measures of protection against possible infringement of certain rights by private actors,[39] coupled with additional duties of suppression and

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[38] McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) 46, para. 150, 194 (1995); Makaratzis v. Greece, 2004-I Eur. Ct. H.R., App. No. 50385/99, para. 59, 69-71, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Makaratzis%20%7C%20v.%20%7C%20Greece&sessionid=901097&skin=hudoc-en. For more on the duty of the state to prevent violations *see* Velásquez Rodríguez v. Honduras, Inter-Am. C.H.R. (ser. C) No. 4, 147, para. 154; Huilca Tecse v. Peru, Inter-Am. C.H.R. (ser. C) No. 121, para. 66 (2005); 19 Merchants v. Colombia, Inter-Am. C.H.R. (ser. C) No. 109, para. 140 (2004); HRC, General Comment No. 6, April 20, 1982, *available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument* [hereinafter HRC, General Comment No. 6]. The responsibility of the State can also be engaged in situations where state agents fail to take all feasible precautions in the choice of means and methods of a security operation, which are necessary to avoid and/or minimize incidental loss of civilian life. *See* Ergi v. Turkey, 1998-IV Eur. Ct. H.R. 1776, para. 79; 19 Merchants v. Colombia, Inter-Am. C.H.R. (ser. C) No. 109, para. 140. For more on duties of control and planning of military or police operations in the ECHR-system *see* Ralph Möller, Verfahrensdimensionen materieller Garantien der Europäischen Menschenrechtskonvention 100 (2005); *see also* Leach, *infra* note 44, at 183.

[39] For more on this preventive duty in regard to the right to life *see* Jiménez Vaca v. Colombia, U.N. Human Rights Comm., U.N. Doc. CCPR/C/74/D/859/1999 (April 15, 2002), para. 7.2–7.3, *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/b8708c80eebeec9ec1256c1b004c520f?Opendocument; Chongwe v. Zambia, U.N. Human Rights Comm., U.N. Doc. CCPR/C/70/D/821/1998 (Nov. 9, 2000), para. 5.2–5.3, *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/1ddfd80adca7109bc12569ae00311e17?Opendocument; Kiliç v. Turkey, 2000-III Eur. Ct. H.R. 99, paras. 76-77; Edwards v. United Kingdom, 2002-II Eur. Ct. H.R. 161-62,

sanctioning of breaches thereof,[40] for example, through the establishment of a well-functioning law-enforcement system.

c. Procedures to minimize the risk of torture or cruel/inhuman treatment.[41]

The failure of the state to carry out the procedural safeguards or duties described above would – as a rule – *not* be claim enough to substantiate a violation of the substantial right in question. That is, the existence of an *additional* claim arguing the failure of the state to comply with a substantial positive or negative obligation is required.[42] This auxiliary nature, however, is not a *sine qua non* of all procedural guarantees,[43] as shall be seen hereinafter.

2. *Procedural Rights and Guarantees Granting Individuals Access to Judicial or Administrative Procedures*

This second type of derivative procedural state duties relates to the state's obligation to create judicial or administrative proceedings and – albeit not in all instances – ensure the access of the affected individual or his/her next-of-kin thereto. The HRC, ECtHR and IACtHR have conceived additional obligations to create or establish judicial or administrative proceedings arising out of substantial rights, such as the right to life. The following are examples of such derived obligations to judicial or administrative proceedings.

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para. 61-64; Öneryildiz v. Turkey, Eur. Ct. H.R., Application No. 48939/99, para. 90, 101 (2004), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm& action =html&highlight=%D6neryildiz%20%7C%20v.%20%7C%20Turkey&sessionid=901252 &skin=hudoc-en. The obligation has also been acknowledged when individuals are at risk of torture or inhuman treatment, *see* HRC, General Comment No. 20, March 10, 1992, para. 13-14,*available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed 004c8ae5?Opendocument [hereinafter HRC. General Comment No. 20]. This may include duties of the state to protect children from parental or family abuse. *See* E. v. United Kingdom, Eur. Ct. H.R., Application No. 33218/96, para. 97-101 (2002), *available at* http://cmiskp.echr .coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=33218/96 &sessionid=901266&skin=hudoc-en.

[40] Osman v. United Kingdom, 1998-VII Eur. Ct. H.R. 3124, para. 115. Mack Chang v. Guatemala, Inter-Am. C.H.R. (ser. C) No. 101, para. 153 (2003); HRC, General Comment No. 31, *supra* note 25, at paras. 7-8.

[41] *See* HRC, General Comment No. 20, *supra* note 39, at para.11. *See also* Kurt v. Turkey, 1998-III Eur. Ct. H.R. 1185-86, para.125.

[42] *See* Dröge, *supra* note 17, at 383.

[43] It would also depend on the gravity of the omission or failure.

a. The duty to perform an effective investigation in the face of death, torture and forced disappearance.[44]
b. The duty to create and provide access to other procedures including, for example, inquiries to determine alternatives and solutions to interference with private and family life by airplane noise[45] and other activities affecting the environment and health,[46] proceedings intending to solve issues of slander, defamation;[47] and proceedings that would permit landlords to regain the use of their property and/or compensation in case of non-execution of judicial judgments.[48]

II. *Interconnection Between the Two Types or Groups of Procedural Rights and Guarantees*

The aforementioned derivative procedural rights and guarantees are intended to permeate different stages of state action (or inaction). This approach is indeed ideal since all state structures and activities must be organized and carried out in such a manner as to effectively protect and ensure human rights in different spheres.[49]

In case of actions or omissions by *state agents*, the state must be organized in such a way as to guarantee that: 1) preventive rules guide the conduct of state agents; 2) organizational rules guide the planning and execution of state action; 3) appropriate mechanisms and controls apply during the execution of state action; 4) proper supervision and evaluation mechanisms exist posterior to state action; and 5) control

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[44] The jurisprudence concerning intromissions in the right to life is dealt with detail below. In relation to torture see, among many others. Assenov v. Bulgary, 1998-VIII Eur. Ct. H.R. 3291, para. 102. On disappearances *see, e.g.*, Velásquez Rodríguez v. Honduras, Inter-Am. C.H.R. (ser. C) No. 4, 155-57, para. 174-81; and ECtHR, Kurt v. Turkey, 1998-III Eur. Ct. H.R. 1185, para 124. *See also* Philip Leach, Taking a Case to the European Court of Human Rights 190-98 (2d ed. 2005).

[45] *See* Powell & Rainer v. United Kingdom, Eur. Ct. H.R. (ser. A) No. 171, 15-17, para. 34-36 (1990); Hatton v. United Kingdom, 2003-VIII Eur. Ct. H.R. 217-18, 224, 227-28, paras. 101, 119, 128 (respectively).

[46] *See* Powell & Rainer v. the United Kingdom, Eur. Ct. H.R. (ser. A) No. 171, 15-17, para. 34-36.

[47] *See* Dröge, *supra* note 17, at 16-18.

[48] *Id*. at 52-53.

[49] In this regard, the IACtHR stated in its first contentious case: "[one] … obligation of … States Parties is to "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, *all the structures through which public power is exercised*, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation." Velásquez Rodríguez v. Honduras, Inter-Am. C.H.R. (ser. C) No. 4, 152, para. 166.

mechanisms such as judicial and administrative proceedings are available in case of possible violations, which might entail the prosecution and eventual punishment of state officials, as well as the compensation of the victims or their next of kin.

In regards to the procedural obligations of the state in cases where *private parties* are involved, the state is obliged to create or ensure: 1) preventive measures to minimize negative effects of the actions of non-state actors on the rights of other private persons, including legislation on the matter; 2) investigation of the actions of non-state actors that might entail human rights violations; 3) establishment of procedures that would allow victims to obtain a remedy or compensation for violations perpetrated by non-state actors.

Of all these distinct procedural rights and guarantees, the right to an effective investigation stands out in the jurisprudence and case law of the HRC, ECtHR and IACtHR. It has been extensively developed by all three bodies and is, due to its characteristics and contours, an ideal candidate for a closer examination.

III. *The Right to an Effective Investigation in Connection with the Right to Life*

The right to an effective investigation was first constructed in the jurisprudence of the HRC, IACtHR and ECtHR in cases dealing with the right to life. The first of the aforementioned bodies to pronounce itself on the matter was the HRC, in several decisions concerning the enforced disappearance of persons in Uruguay and Colombia.[50] The HRC was soon followed by the IACtHR who declared a duty of the state to investigate in its first contentious cases, also concerning enforced disappearances, this time in Honduras.[51] The last jurisdictional organ to deal with the issue was the ECtHR in a case concerning the United Kingdom.[52]

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[50] *See* Bleier Lewenhoff & Valino de Bleier v. Uruguay, U.N. Human Rights Comm., U.N. Doc. CCPR/C/15/D/30/1978 (Mar. 29, 1982), para. 13.3, *available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/c932c40a308bd292c1256ab5002a6fd0?Opendocument*; Herrera Rubio v. Colombia, U.N. Human Rights Comm., U.N. Doc. CCPR/C/31/D/161/1983 (Nov. 2, 1987), para. 10.3, *available at* http://www.unhchr.ch/tbs/doc.nsf; Sanjuán Arévalo v. Colombia, U.N. Human Rights Comm., U.N. Doc. CCPR/C/37/D/181/1984 (Nov. 22, 1989), para. 10, *available at* http://www.unhchr.ch/tbs/doc.nsf.

[51] *See* Velásquez Rodríguez v. Honduras, Inter-Am. C.H.R. (ser. C) No. 4, 155, para. 174; Godínez Cruz v. Honduras, Inter-Am. C.H.R. (ser. C) No. 5, 152-53, para. 184.

[52] McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) 46, para. 161. While at first sight it may appear surprising that the ECtHR pronounced itself on the matter so much later than its counterparts, this is well explained by the fact that until the mid-1990's the court had never dealt with a case concerning the right to life. This changed quite dramatically in the late 1990s with the admission and processing of innumerable cases of death, disappearance and mistreatment in Turkey. *See, e.g.*, Kaya v Turkey, 1998-I Eur. Ct. H.R. No. 65, 324, para. 86. For a more complete overview of the ECtHR's jurisprudence on the duty to investigate *see* Leach, *supra* note 44, 191.

Today, the duty to perform effective investigations in cases of violent deaths can be regarded as part of the consolidated jurisprudence of all three organs.[53]

1. *Scope of the Obligation*

A study of the jurisprudence of the three bodies chosen for this study renders a clear picture as to the minimum standards of the obligation to investigate. There are however, no uniform criteria on all aspects or requirements of an effective investigation due to the differences in their caseload, the language of their founding conventions and the facts of the cases they have considered.[54] In spite of these differences, however, it is possible to render a clear picture of the nature of the obligation to proceed with an investigation in connection with the right to life. It is to be expected that the criteria set by the ECtHR will be incorporated by the IACtHR and HRC in their judgments and decisions in the future.[55]

a. When to Investigate?

As a rule, the state has an obligation to investigate instances of violent deaths or those deaths which occurred under vague circumstances. This obligation exists

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[53] *See*, among many others, Mojica v. Dominican Republic, U.N. Human Rights Comm., U.N. Doc. CCPR/C/51/D/449/1991 (Aug. 10, 1994), para. 5.5-5.7, *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/510213ee6c3b84ab8025672700592383?Opendocument; HRC, Laureano v. Peru, U.N. Human Rights Comm., U.N. Doc. CCPR/C/56/D/540/1993 (April 16, 1996) para. 8.3-8.4, *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/1fa0463b1dc827dd8025670b0041986a?Opendocument; Mack Chang v. Peru, Inter-Am. C. H.R. (ser. C) No. 101, paras. 156-58 (2003); Mapiripán Massacre Case (Colombia), Inter-Am. C.H.R. (ser. C) No. 134, paras. 137, 219–22 (2005); Velikova v. Bulgaria, 2000-VI Eur. Ct. H.R. 26, para. 80; Tahsin Acar v. Turkey, 2004-III Eur. Ct. H.R. 45, para. 220-22; Tanis v. Turkey, Eur. Ct. H.R., App. No. 65899/01 (2005).

[54] Despite the late date by which the ECtHR received and processed cases dealing with the issue, this court has overtaken the other two organs in respect to the amount and the detailed nature of its decisions, and thus has a more in-depth jurisprudence on the issue. This is due, first, to the higher number of petitions presented and reviewed by the ECtHR and to the more intricate nature of the claims presented. The IACtHR and HRC are still mostly confronted by cases concerning such blatant failures of governmental bodies that these organs have had little need to review details of the state's actions or omissions. *See, e.g.*, Isayeva, Yusupova & Bazayeva v. Russia, 41 Eur. Ct. H.R. 847, Apps. No. 57947/00; 57948/00; 57949/00, para. 209 (2005), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Isayeva&sessionid=901528&skin=hudoc-en; Mapiripán Massacre Case (Colombia), Inter-Am. Ct. H.R. (ser. C) No. 134 para. 219.

[55] These bodies, especially the two regional courts, frequently quote each other in issues of interpretation and try to develop and maintain an internationally coherent jurisprudence. *See* Antônio Augusto Cançado Trindade, *The Development of International Human Rights Law by the Operation and the Case-Law of the European and Inter-American Courts of Human Rights*, 25 Hum. Rts. L.J. 157 (2004); *see also* Jo M. Pasqualucci, *Interim Measures in International Human Rights: Evolution and Harmonization*, 38 Vand. J. Transnat'l L. 1 (2005).

primarily when someone perishes at the hands of state officials,[56] but would also apply to those cases where a person has disappeared in circumstances that may be regarded as life-threatening.[57] The duty also extends to situations where it is not proven whether the person has died at the hands of the state, including, for example, civilians shot in confrontations with guerilla-like movements,[58] death in situations where the exact details of the possible involvement of state agents are not clear[59] or where the perpetrators were unknown persons.[60] In general, this obligation stretches to situations where a person has died not only as a result of a violent act, but also where it is unclear whether the death was due to natural causes.[61]

b. How to Investigate?

The duty to conduct such an investigation begins immediately after the body of the deceased is found, the death of a person has been reported,[62] or when a person has gone missing. State officials must act on their own initiative; that is, without the need for the victim or anyone else to initiate proceedings.[63]

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[56] *See* McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) 46, para. 161; Isayeva v. Russia, Eur. Ct. H.R., App. No. 57950/00 (2005), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Isayeva&sessionid=901560&skin=hudoc-en; Velásquez Rodríguez v. Honduras, Inter-Am. C.H.R. (ser. C.) No. 4, 155-56, para. 176-77; HRC, General Comment No. 31, *supra* note 25, para. 15; Mulezi v. Democratic Republic of Congo, U.N. Human Rights Comm., U.N. Doc. CCPR/C/81/D/962/2001 (July 23, 2004), para. 7, *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/a08b07c195c8e1fcc1256ee5004d0457?Opendocument.

[57] Velásquez Rodríguez v. Honduras, Inter-Am. C.H.R. (ser. C.) No. 4, 156, para. 176-81; Gómez Palomino v. Peru, Inter-Am. C.H.R. (ser. C) No. 136, 31-32, para. 76; Tahsin Acar v. Turkey, 2004-III Eur. Ct. H.R. 45, para. 226; Tanis v. Turkey, Eur. Ct. H.R., App. No. 65899/01, para. 205; HRC, General Comment No. 6, *supra* note 38, para. 4; Laureano Atachahua v. Peru, U.N.Human Rights Comm., U.N. Doc. CCPR/C/56/D/540/1993 (April 6, 1996), para. 8.3, *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/1fa0463b1dc827dd8025670b0041986a?Opendocument; Sanjuán Arévalo v. Colombia, U.N. Human Rights Comm., U.N. Human Rights Comm., U.N. Doc. CCPR/C/37/D/181/1984(Nov. 22, 1989), para. 10.

[58] *See* Ergi v. Turkey, 1998-IV Eur. Ct. H.R. 1776, para. 82; Zengin v. Turkey, Eur. Ct. H.R., App. No. 46928/99 (2004), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=zengin&sessionid=901618&skin=hudoc-en; HRC, General Comment No. 31, *supra* note 25, paras. 8, 15.

[59] Mapiripán Massacre Case, Inter-Am. C.H.R.,(ser. C) No. 134, paras. 101-23, 137.

[60] Tanrikulu v. Turkey, 1999-IV Eur. Ct. H.R. 487, para. 101-03.

[61] This could be extended to violent deaths in accidents or deaths resulting from malpractice in public hospitals, etc.

[62] *See, e.g.*, Isayeva, Yusupova & Bazayeva v. Russia, Eur. Ct. H.R., App. Nos. 57947/00; 57948/00; 57949/00, para. 209, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Bazayeva&sessionid=901631&skin=hudoc-en; Mapiripán Massacre Case at para. 219.

[63] *Id.*

Furthermore, the investigation must be effective. The effectiveness requirement has several corollaries. First, the investigation must be carried out by authorities who are independent from those implicated in the events.[64] Second, the investigation must be capable of leading to the identification and punishment of those persons who might be responsible[65] and to the determination whether the deadly use of force was justified or not (in cases of death at the hands of public officials).[66] In all cases, the inquiry should be able to search for and lead to the truth behind the events.[67] Thus, authorities must take all reasonable steps to secure evidence[68] and not only rely on the activities of the parties.[69] This includes, among others, securing witness testimony, forensic evidence and – when so required by the circumstances – an autopsy.[70] Thirdly, a prompt and reasonably expeditious official investigation is imperative.[71] The state's obligation to investigate acts that violate an individual's right to life is one of means and not of results.[72]

Moreover, the investigation or inquiry on instances of possible violations of the right to life must be open to public scrutiny.[73] Courts – or other administrative or judicial bodies – in charge of authorizing and supervising investigative procedures

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[64] The independence of the persons carrying out the investigation must be formal and practical. *See* Güleç v. Turkey, 1998-IV Eur. Ct. H.R. No. 80, paras. 81-82; Isayeva, Yusupova & Bazayeva v. Russia, Eur. Ct. H.R., App. Nos. 57947/00; 57948/00; 57949/00, para. 210; Mapiripán Massacre Case at para. 219.

[65] Oğur v. Turkey, 1999-III Eur. Ct. H.R. 551, para. 88; Gómez Palomino v. Peru, Inter-Am. C.H.R. (ser. C) No. 136, 31-32, para. 80; HRC, General Comment No. 6, *supra* note 38, para. 3.

[66] *See, e.g.*, Kaya v. Turkey, 1998-I Eur. Ct. H.R. No. 65, 324, para. 87.

[67] *Id*. Velásquez Rodríguez v. Honduras, Inter-Am. C.H.R. (ser. C) No. 4, 156, para. 177; Mapiripán Massacre Case, Inter-Am. C.H.R. (ser. C) No. 134, para. 219.

[68] *See, e.g.*, Tanrikulu v. Turkey, 1999-IV Eur. Ct. H.R. 488, para. 104.

[69] Isayeva, Yusupova & Bazayeva v. Russia, Eur. Ct. H.R., App. Nos. 57947/00; 57948/00; 57949/00, para. 210; Mapiripán Massacre Case, Inter-Am. C.H.R.,(ser. C) No. 134, para. 219.

[70] Tanrikulu v. Turkey, 1999-IV Eur. Ct. H.R. 488, para. 105-09; Salman v. Turkey, 2000-VII Eur. Ct. H.R. 398-99, para. 106. The IACtHR summarily states that the investigation must be carried out with all due diligence. *See* Gómez Palomino v. Peru, Inter-Am. C.H.R. (ser. C) No. 136, 31-32, para. 80.

[71] *See* Mahmut Kaya v. Turkey, 2000-III Eur. Ct. H.R. 182, paras. 106-07; Isayeva, Yusupova & Bazayeva v. Russia, Eur. Ct. H.R., App. Nos. 57947/00; 57948/00; 57949/00, para. 212; Gómez Palomino v. Peru, Inter-Am. C.H.R. (ser. C) No. 136, para. 219; Gómez Paquiyauri v. Peru, Inter-Am C.H.R. (ser. C) No. 110, para. 146 (2004).

[72] Velásquez Rodríguez v. Honduras, Inter-Am. C.H.R. (ser. C) No. 4, 156, para. 177; Hugh Jordan v. United Kingdom, Eur. Ct. H.R., App. No. 24746/94, para. 107 (2001), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=hugh%20%7C%20jordan&sessionid=901696&skin=hudoc-en.

[73] Isayeva, Yusupova & Bazayeva v. Russia, Eur. Ct. H.R., App. Nos. 57947/00; 57948/00; 57949/00, para. 213; Mapiripan Massacre Case, Inter-Am. C.H.R. (ser. C) No. 134, para. 219.

must comply with the requirements of the right to fair trial and due process[74] in order to secure accountability.

2. *Corollaries of the Duty to Investigate*

Coupled to the duty to conduct an effective investigation in cases involving the right to life is the aforementioned duty of the state to prosecute and – depending on the outcome of the trial – punish those accountable for violations of right to life. This obligation entails several "sub-obligations" stretching out to distinct levels of the state apparatus.

The first and main sub-obligation demands the creation and constant review of laws and norms regulating investigations, hearings, trials and the like.[75] In this context, the state has an obligation to provide an effective remedy to enforce the affected right. Moreover, the victims' next-of-kin must have access to all stages of the process in order to guarantee the protection of the latter's and/or their legitimate interests, which would include payment of compensation for damages.[76] Compensation could take place within criminal or civil procedures, depending on the state's legal system.

The State may also have a duty to prosecute and – depending on the circumstances – to punish those accountable for grave violations of human rights.[77] For this, the state has the obligation to establish and maintain a well-functioning criminal legal system and to provide for effective criminal proceedings against offenders (including private parties[78]). Statutes of limitations (depending on the circumstances of the case), amnesties or any other actions tending to impede the investigation, prosecution or punishment of those accountable would be contrary to the duty to investigate and would entail violations not only of the right to life, but also of other provisions.[79]

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[74] Especially the IACtHR considers that shortages or failures in investigations also constitute violations of the rights to due process and effective remedy. *See, e.g.*, Huilca Tecse v. Peru, Inter-Am. C. H.R. (ser. C) No. 121, para. 80-83 and IACtHR, Gómez Paquiyauri v. Peru, Inter-Am. C.H.R. (ser. C) No. 136, para. 146-56.

[75] *See* Velásquez Rodríguez v. Honduras, Inter-Am. C.H.R. (ser. C) No. 4, 5, para 175.

[76] Mapiripan Massacre Case, Inter-Am. C.H.R. (ser. C) No. 134, para. 219; Güleç v. Turkey, 1998-IV Eur. Ct. H.R. No. 80, para. 78; Kaya v. Turkey, 1998-I Eur. Ct. H.R. No. 65, 324, para. 107; Isayeva, Yusupova & Bazayeva v. Russia, Eur. Ct. H.R., App. Nos. 57947/00; 57948/00; 57949/00, para. 213.

[77] *See* Kaya v. Turkey, 1998-I Eur. Ct. H.R. No. 65, 179-80, para. 96; Mapiripan Massacre Case, Inter-Am. C.H.R. (ser. C) No. 134, paras. 219, 237.

[78] *See* Kiliç v. Turkey, 2000-III Eur. Ct. H.R. 99, para. 74.

[79] Gómez Paquiyauri v. Peru, Inter-Am. C.H.R. (ser. C) No. 136, para. 150-51. *See also* Barrios Altos Case (Peru), Inter-Am. C.H.R. (ser. C) No. 75, 77, para. 41 (2001).

The duty to investigate is recognized as an autonomous positive obligation; that is, the failure of the state to carry out its obligations is claim enough and may be grounds alone for a violation of the respective substantive right.[80] There is no need to present a claim of a failure to comply with other substantive negative or positive obligations. In light of this autonomous character, individuals have a corresponding subjective right to an adequate and effective investigation.

Furthermore, the failure to comply with the obligation to investigate constitutes a continuous violation of the treaty or convention in question.[81] This means that the State would be in violation of the convention until the investigation has been completed or there is no longer uncertainty about the fate of the person. In cases of enforced disappearances, for example, the obligation ceases to exist when *all* efforts have been made to locate the whereabouts of the person's remains and an official declaration regarding the death of the person is given.

In sum, the duty to perform an investigation in relation to infringements upon the right to life is of outmost importance in light of the state's monopoly of all inquisitorial powers. The lack of investigation and, thus, a lack of evidence could violate not only the substantial right to life, but also the rights to fair trial and remedy. Such an inequality of arms would exacerbate the despair and lack of protection of affected individuals or their next-of-kin, who would be deprived of all possibilities of remedying their situation. States must create a legal and procedural frame through which the individual can defend himself effectively against state and non-state agents. The affected individual should be capable of requesting judicial bodies to review not only State actions, but also State omissions. If the State fails to fulfill these obligations, it will be thus condemned for violating the substantial right to life – which might be perceived as a higher condemnation than the violation of rights of a more procedural character.

E. *International Organization and Jurisprudence – Closing the Circle*

Through their interpretation of human rights treaties these judicial and quasi-judicial bodies have aided in the consequential expansion of the scope of protection of human rights norms, adjusting it to today's circumstances.

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[80] For example, the ECtHR declares the existence of a violation of the substantive right only on the grounds of a deficient investigation, even when all other issues cannot be proven. *See* Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. 41, para. 132. *See also* A.R. Mowbray, The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights 27 (2004).

[81] Velásquez Rodríguez v. Honduras, Inter-Am. C.H.R. (ser. C) No. 4, para.181; Blake v. Guatemala, Inter-Am Ct. H.R. (ser. C) No. 36, 129-30, para. 63-67 (1998); Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. 41, para. 136.

Jurisprudence adapts in order to match modern life, with all its intricacies and is, thus, truly multidimensional.

The HRC, the ECtHR and the IACtHR have not only permeated the minds of men, as Hudson suggested, but, in the process, have also reshaped the human rights norms themselves. In addition, through their jurisprudence, these bodies influence one another and thus collaborate in the creation of a more homogenous, worldwide interpretation of the scope of human rights,[82] in what could be referred to as 'horizontal jurisprudential expansion process.' The jurisprudence of the ECtHR and IACtHR, and to a much lesser degree the HRC, also permeates national legal systems and the jurisprudence of courts in the respective state parties to the conventions, thus also allowing for the expansion of the scope of protection downwards in a 'vertical jurisprudential expansion process.'

People interrelate, power has shifted: human rights violations do not stem anymore solely from State action. The State, as guarantor of rights and regulator of inter-personal relations must create a framework for the State, which must effectively prevent, sanction and repair infringements upon the rights of individuals. Procedure is the key to the effectiveness of this framework and thus of human rights protection. Certainly, there is no right without a remedy but even more, there is no right without procedure.

For Hudson, "institutions, methods, habits are needed to assure that intelligence will be brought to bear when situations become acute, and these mean international organization."[83] International organization is a process. The jurisprudence of human rights organs is a process. By permeating international and national law, they aid in the resolution of conflicts and the furthering of peace; as well as in the more obvious immediate objective of protecting the rights of the individual. Human rights protection bodies have gone from mere controllers of state action to promoters and protectors of an objective or public order with which States have agreed to comply with. The jurisprudence of these bodies certainly assure that intelligence be brought to bear not only after, but *before* situations become acute, through the creation and consolidation of a tighter grid of individual protection and a more effective guarantee of these rights.

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[82] *See* Romano, in this Volume; *see also* Cançado Trindade, *supra* note 55, at 157.

[83] Hudson, *supra* note 2, at 96.

Reconciling the Irreconcilable: Progress Toward Sustainable Development

By Rebecca M. Bratspies

A. *Introduction*

In his 1931 Idaho lectures, Professor Manley O. Hudson opined that the history of his times could be written and assessed only from the "perspective which only half a century can bring."[1] From the vantage point of 75 years, half again as long as his prescribed half-century, Hudson's lectures seem both prescient and tragic: prescient because he foretold so many of modern international law's major developments; tragic because he completely missed the looming cataclysm of the Second World War. The League of Nations, which Hudson thought would spearhead a "great quickening of international thought and [] stimulation of cooperative effort,"[2] and would thus be a harbinger of a new, more integrated, and more peaceful world, did not exactly live up to billing. The twentieth century's legacy of war and brutality, and this new century's short but bloody history make it difficult to imagine writing, as Hudson did, of "the progress we have made on organizing the world for cooperation and peace."[3] Yet scholars, citizens, and leaders still yearn for peace. Increasingly, their quest invokes a *pax mercatoria* as the basis for a commitment to lawmaking on a global scale.[4]

Hudson offered a progress narrative in which international legal organizations, led by the League of Nations, would assure peace and security to the peoples of the world. Although the post-modern world embodies so little of his optimistic belief in the capacity of human institutions to prevent violence and injustice,[5]

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[1] Manley O. Hudson, Progress in International Organization 5 (1932).

[2] *Id*. at 42.

[3] *Id*.

[4] Very similar rhetoric, now garbed in the cloak of economic liberalism, undergirds some of the more extravagant claims for a *pax mercatoria* in which the spread of a market economy under the banner of global economic integration will bring democracy and peace in its wake. *See e.g.*, Thomas L. Friedman, The Lexus and the Olive Tree (1999).

[5] Hudson's writing embodies his firm belief that he knew what progress was, and could identify it on the ground. In a post-modern context, the term progress is fraught with normative ambiguity,

Miller & Bratspies (Eds), Progress in International Law, pp. 813–834.

Hudson's lectures did accurately predict many of the institutional developments in international law. Hudson correctly fortold that the growth and development of international institutions like the Universal Postal Union, the International Bureau of Intelligence on Locusts and the International Labor Organization would mean that an ever-increasing number of problems were directed into these international channels, and affairs that previously had been "left to spasmodic and frequently casual activity … are now the subjects of continuous and sustained effort, for which new agencies exist, new methods have been proved, and definite aims are being pursued."[6]

While Hudson certainly predicted that new issues would cross the international scene, he could not have anticipated that *fin de siécle* international public law would focus increasingly on the relationship between environmental degradation and economic development (sustainable or otherwise).[7] Indeed, in 1931, these issues were barely a blip on the newly-invented radar screens.[8] The International Joint Commission had just issued its report in the *Trail Smelter* dispute between the United States and Canada,[9] and had largely rejected the United States' claims that sulfur dioxide emissions from the smelter were polluting

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and many postmodern thinkers would reject the notion that there is or can be much agreement on what constitutes progress. Nevertheless, as David Kennedy points out, international law still clings to its shared orientation "to a past of sovereign states and a future of international law. The discipline looks forward, confident that we will arrive in the future with history at our side." David Kennedy, *When Renewal Repeats: Thinking Against the Box*, N.Y.U. J. Int'l L. & Pol. 335, 347–72 (2000). Indeed, international law's various progress narratives are deeply ambivalent about "the direction progress takes and the terms with which it is marked." *Id.* at 347.

[6] Hudson, *supra* note 1, at 43.

[7] Sustainability has many different definitions, but clear contours for the notion are emerging. The Bruntland Report provided the most commonly used definition as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." Report of the World Commission on Environment and Development, G.A. Res. 42/187, 96th plen. mtg., U.N. Doc. A/RES/42/187 (Dec. 11, 1987). For a more detailed definition that fleshes out the economic, social, and environmental aspects of sustainable development, *see* Tim O'Riordan et al., *The Evolution of the Precautionary Principle, in* Reinterpreting the Precautionary Principle 9, 14 (Tim O'Riordan et al., eds., 2001). Regardless of the precise definition, sustainability is an attempt to merge the logic of development, which is predicated on continued exploitation of labor and natural resources, with that of the environment, which starts by assuming that natural resources are inherently scarce.

[8] For an interesting discussion of the origins of RADAR, *see* Seán S. Swords, Technical History of the Beginnings of Radar (1986).

[9] The parties initially agreed to refer the dispute to the International Joint Commission, which made recommendations pursuant to Article IX of the Treaty Relating to Boundary Waters between the United States and Canada, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448; *see generally* Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration (Rebecca M. Bratspies & Russell A. Miller eds., 2006).

the Columbia River and were injuring livestock and crops in Washington State.[10] The *Trail Smelter* dispute was still a decade away from its groundbreaking 1941 Final Arbitral Ruling, which established *sic utere tuo ut alienum non laedas*[11] and "the polluter pays" as foundational principles of international law.[12] Although conflict over pollution from mining and industrial activities had been a growing area of social discord for decades,[13] the link between environmental harms and industrial activities was not yet well-established.[14] Moreover, the notion that disputes over the proper balance between economic development and protection of human or environmental health should be governed by law, let alone by international law, was still in its infancy. Explorations of the contours of a right to development would become a central issue only with widespread decolonization and the emergence of the Third World.[15]

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[10] *Id*. Indeed water pollution from the smelter's operations remains a source of ongoing controversy between the United States and Canada. *See* Neil Craik, *Transboundary Pollution, Unilateralism and the Limits of Extraterritorial Jurisdiction: the Second Trail Smelter Dispute, in* Transboundary Harm in International Law, *supra* note 9; Michael Robinson-Dorn, *The Trail Smelter: Is What's Past Prologue? EPA Blazes a New Trail for CERCLA*, 14 N.Y.U. Envtl. L.J. 233 (2006); Austin Parrish, *Trail Smelter Déjà vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canada-U.S. Transboundary Water Pollution Disputes*, 85 Boston U. L. Rev. 363 (2005).

[11] "One should use one's own property in such a manner as not to injure that of another." It was with the Trail Smelter decision that this nuisance principle took on the character of an international obligation.

[12] For a thorough exploration of the *Trail Smelter Arbitration, see* Transboundary Harm in International Law, *supra* note 9. Of course, within the decade, Hudson, in his role as a Judge on the Permanent Court of Justice, directly confronted the question of equitable distribution of resources. *See* Diversion of Water from the River Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70, at 76 (June 28) (Hudson J., separate opinion). For a discussion of this case, *see* Baker in this volume.

[13] John D. Wirth, Smelter Smoke in North America: The Politics of Transborder Pollution (2000); Donald Macmillan, Smoke Wars: Anaconda Copper, Montana Air Pollution and the Courts, 1890–1924 (2000).

[14] Indeed, in the subsequent iterations of the Trail Smelter Arbitration, Canada argued that the smelter's emissions caused no harm. *See* Trail Smelter Final Arbitral Decision (1941), *reprinted in* Transboundary Harm in International Law, *supra* note 9 at app.

[15] Some characterize the embrace of "sustainable development," particularly by the Bretton Woods Institutions, as merely a new, more intrusive set of reasons justifying intervention into the management of developing countries, or even a new form of colonialism. *See e.g*. Balakrishnan Rajagopal, International Law from Below: Development, Social Movements and Third World Resistance 114–34 (2003). To the extent this concern has resonance, globalization – and in particular the spectacular rise of transnational corporations—begs the question of who is doing the colonizing. The answer may not be states.

Seventy-five years later, this situation has changed dramatically. There is a growing consensus that human activities are threatening the integrity of the earth's ecosystems, and that environmental degradation is among the most serious threats to global stability.[16] Indeed, the United Nation's Millennium Declaration identifies "respect for nature" as one of the fundamental values for the twenty-first century (along with freedom, equality, solidarity, tolerance and shared responsibility),[17] and environmental sustainability was identified as one of the eight Millennium Development Goals.[18] As a result, no contemporary account of progress in international organization can be complete without an assessment of the international community's stumbling progression toward sustainability. This chapter measures that progression against Hudson's definition of progress as the "building of institutions which promise to serve the needs of future generations."[19] The analysis measures international moves toward sustainable development against three different conceptions of progress: rhetorical, conceptual, and material.

B. *The Looming Environmental Crisis*

While it took more than a decade after Hudson's death for the United Nations to explicitly recognize a "rising [environmental] crisis of worldwide proportions,"[20] hints that international law would be called on to respond to a looming environmental crisis appeared much earlier. As early as the 1880s, the *Bering Fur Seals* dispute revealed the potential for disputes over the conservation of living resources to escalate into confrontations with the potential to breach the world's peace.[21]

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[16] The Secretary-General, *High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, 12, 53-54, U.N. Doc. A/59/565 (Dec. 2, 2004).

[17] United Nations Millennium Declaration, G.A. Res. 55/2, U.N. GAOR, 55th Sess., U.N. Doc. A/Res/55/2 (Sept. 18, 2000).

[18] United Nations Millennium Development Goals, *available at* http://www.unmillenniumproject.org/index.htm.

[19] Hudson, *supra* note 1, at 122.

[20] U.N. Econ. & Soc. Council, *Report of the Secretary General on the Problems of the Human Environment*, ¶ 1, U.N. Doc. E/4667 (May 26, 1969).

[21] Citing destruction of breeding stocks and wasteful killings that were threatening the survival of the Bering fur seals, the United States attempted to extend its jurisdiction beyond the traditional 3 mile territorial waters in order to conserve the seal population. The U.S. Congress passed a series of laws prohibited the taking of Bering fur seals in the waters "adjacent to their breeding grounds" on U.S. territory, except under certain, narrowly specified circumstances. *See* A Resolution More Efficiently to Protect the Fur Seal in Alaska, S. Res. 22, 40th Cong., 15 Stat. 348

The *Lac Lanoux* dispute, which began in 1919 and lasted for decades,[22] put competing uses of scarce natural resources onto the international agenda, and the *Trail Smelter* dispute, which similarly stretched over decades forced international thinkers to confront the problem of transboundary pollution. Moreover, the *Trail Smelter, Lac Lanoux and Bering Sea Fur Seals* arbitrations all became international incidents precisely because the environmental effects of human economic activities transcended state jurisdictional boundaries. Viewed retrospectively, these early cases were already hinting that it would not be enough for individual states to make sustainable decisions within their domestic realms. All of these disputes raised questions of how the international legal order should respond to state and private conduct that resulted in environmental degradation, both within states and in the global commons, and all can be read as affirming that customary international law required that states cooperate to resolve such issues.[23] Thus, when Hudson gave his 1931 lectures, the international community was just beginning to grapple with how to include environmental disputes into a system of international organization intended to preserve the world's peace.

Modern international environmental regimes are both the logical emanation from these early arbitral decisions and a sharp break with them. While the *Bering Fur Seals, Lac Lanoux*, and *Trail Smelter* arbitrations certainly laid a foundation that developed into modern international environmental law, one must be careful not to project a modern environmental consciousness onto these incidents and their resolution.[24] Certainly the participants did not frame the disputes as attempts to vindicate international environmental rights and probably would not have characterized their actions as creating a new body of international law.[25]

(Mar. 3, 1869). When it began enforcing this ban in 1886, United States coast guard vessels applied this law to waters 60 miles from land to seize British sealing vessels, in the process precipitating an international incident that was ultimately the subject of an international arbitration. *See* Bering Sea Fur Seals Arbitration (Gr. Brit. v. U.S. 1893), *reprinted in* 1 John Bassett Moore, History and Digest of the International Arbitrations to which the United States Has Been a Party 755 (1898); *see also* Phillipe Sands, Principles of International Environmental Law 563 (2nd ed. 2003). The arbitration led to the relatively successful 1911 Convention respecting Measures for the Preservation and Protection of the Fur Seals in the North Pacific Ocean, T.S. No. 564, 104 B.S.P. 175 (1911).

[22] *Affaire du Lac Lanoux, XII United Nations Reports of International Arbitral Awards*at 285–317, Lake Lanoux Arbitration (Fr. v. Spain), *translated in* 24 I.L.R. 101 (1957).

[23] For an exploration of customary law, *see* Guzman and Meyer in this volume.

[24] The same holds true for Hudson's separate opinion in the Muese case, *supra* note 12. See Baker in this volume.

[25] For example, the American Journal of International Law cited with approval President Roosevelt's proposal that the United States itself exterminate the fur seals as a means of resolving the ongoing dispute. *Editorial Comment*, 1 Am. J. Int'l L. 727, 747 (1907). However, other contemporary

In their day, these disputes were conventional clashes between Westphalian sovereigns engaged in state-to-state interactions over national prerogative. Rather than as a new vision for the possibilities embodied by international law, these arbitrations were very much in line with existing visions of international law as a relatively *ad hoc* process mediating the relationship between states.[26] That said, the arbitrations did introduce the threads of conservation, pollution prevention, and conflicting claims to common resources into international legal discourse. These threads would later coalesce into a more multilateral vision of international law's role in environmental protection, and they certainly provide a context for the detailed modern international environmental regimes that today cover a broad range of environmental issues.

By 1962, the UN General Assembly had already begun weaving together conservation and economic development—two of the central strands in what became sustainable development—when it called on states to integrate natural resource protection measures into their economic development plans.[27] Ten years later, the Stockholm Convention on the Human Environment[28] solidified these links even further by concluding that underdevelopment and poverty were as much root causes of environmental problems as were overdevelopment and waste.[29] Without using the term sustainable development, the Stockholm Convention laid the foundation for integrated consideration of environment and development issues[30] and "provided a focus for new environmental tasks that were likely

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accounts make an eloquent plea for conservation of the species, *see* J. Stanley Brown, *Fur Seals and the Bering Sea Arbitration*, 26 J. Am. Geograph. Soc'y 327 (1894). The title of this chapter, "Reconciling the Irreconcilable" comes from the conclusion of that article. *Id*. at 372.

[26] For a thorough study documenting why international adjudication is of limited value for dealing with environmental disputes, *see* Cesare Romano, The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach (2000) (warning against naiveté about the ability of adjudication to resolve environmental problems).

[27] Economic Development and the Conservation of Nature, G.A. Res. 1831(XVII), U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/RES/1831 (XVII) (1962). Some have characterized this declaration's call for assistance to help developing countries incorporate environmental concerns into economic planning as a harbinger of the "common but differentiated responsibility." Alhaj, B. M. Marong, *From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development*, 16 Geo. Int'l Envtl. L. Rev. 21, 25 (2003) (citing sources).

[28] U.N. Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972 *Declaration*, U.N. Doc. A/CONF.48/14 (June 16, 1972), *reprinted in* 11 I.L.M. 1416 [hereinafter Stockholm Declaration].

[29] Development and Environmental Report and Working Group Papers of a Panel of Experts Convened by the Secretary-General of the United Nations Conference on the Human Environment, 6 para 1.5 (1972).

[30] Stockholm Declaration, *supra* note 28 at pmbl. Principle 13 provides for the integration of environment and development in decision-making.

to fall to international organizations."[31] Today, this integration of environmental and economic concerns forms the cornerstone of sustainable development.[32]

UNESCO's 1968 Intergovernmental Conference of Experts on the Scientific Basis for Rational Use and Conservation of the Resources of the Biosphere[33] was the first major international initiative to confront the global nature of environmental problems like pollution, deforestation, and destruction of habitat. The 1972 Stockholm Convention picked up on these themes, and is generally considered as marking the beginning of international institutional engagement with environmental protection.[34] The Convention produced the Declaration of the United Nations Conference on the Human Environment (commonly called the Stockholm Declaration) intended to respond to concerns about "dangerous levels of pollution in water, air, earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources"[35]—the very same environmental problems that had been addressed piecemeal in the earlier arbitrations.

Since Stockholm, the United Nations and other international organizations have consistently viewed environmental questions as global and systemic challenges, rather than the stuff of piecemeal bilateral relationships.[36] As a result, multilateral treaties and declarations became the legal instrument of choice for addressing these

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[31] Brian Johnson, *The United Nations' Institutional Response to Stockholm: A Case Study in the International Politics of Institutional Change*, 26 Int'l Org. 255, 256 (1972).

[32] *See e.g.*, International Law Association, New Delhi Declaration of Principles of International Law Relating to Sustainable Development, Res. 3/2002 (Apr. 6, 2002), *available at* http://www.cisdl.org/pdf/ILAdeclaration.pdf. *See also* Edward B. Barbier, *The Concept of Sustainable Economic Development*, 14 Envt'l Conserv. 101, 103 (1987) (defining sustainable economic development).

[33] UNESCO, Final Report of the Intergovernmental Conference of Experts on the Scientific Basis for Rational Use and Conservation of the Resources of the Biosphere, held at UNESCO House, Paris, Sept. 4–13, 1968, UNESCO Doc. SC/MD/9 (Jan. 9, 1969), *reprinted in* UNESCO, Use and Conservation of the Biosphere 191 (1970).

[34] Indeed, in its 1968 resolution supporting the conference, the UN Economic and Social Council identified the main objectives of the Convention as "creat[ing] the basis for comprehensive consideration within the United Nations of the problems of the human environment" and focusing governmental and civil society's attention on these problems. ECOSOC, Questions of Convening an International Conference on Problems of the Human Environment, Res. 1346, 45 U.N. Doc E./4561/Add.I at 19 (1968), available from http://www.un.org/ecosoc/docs/resdec1946_2000.asp.

[35] Stockholm Declaration, *supra* note 28 at para. 3.

[36] There are, of course, exceptions. The Gabçikovo-Nagymoros dispute, for example, involved a bilateral environmental issue. Case Concerning the Gabçikovo Nagymoros Project (Hungary v. Slovakia) 1997 I.C.J. 7, 110 (Sept. 27). Nevertheless, Judge Weeramantry used the case as a springboard for a rich discussion of sustainable development. *Id.* at 97–110 (separate opinion of J. Weeramantry).

questions and have been the mainstay of international environmental law ever since. The recognition that it is possible for humans to "do massive and irreversible harm to the earthly environment on which our life and well-being depend"[37] must be counted a form of progress in itself. The challenge, of course, is progressing even further and moving from identifying the phenomenon to developing an effective response.[38] Unfortunately, limited as they are to the lowest common denominator of sovereign consent, the myriad multilateral environmental regimes largely fail to accomplish this task.

From the very beginning it was clear that any translation of these environmental goals into behaviors would have to strike a delicate balance not only between environmental protection and economic development, but also between state sovereignty and global environmental interests. Principle 21 of the Stockholm Convention reflected a careful balancing act between dynamic and conflicting pressures:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[39]

Indeed, the Declaration was deeply embedded in its decolonization context, and explicitly linked problems of underdevelopment as well as those of overdevelopment with environmental degradation.[40]

The primary answer contributed by international law has been the concept of sustainable development. The rest of this chapter tests the discourse and practice of sustainable development against the notion of progress. This exploration is divided into two parts: first, an assessment of whether widespread embrace of the goal of sustainable development itself represents progress—whether there is normative value to a coherent international vision that posits a connection between economic activities and a safe and wholesome environment; and second, this chapter provides an analysis of how we might measure actual progress towards

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[37] Stockholm Declaration, *supra* note 28 at para. 6.

[38] Romano, *supra* note 26.

[39] Stockholm Declaration, *supra* note 28, at princ. 21. This language foreshadowed the notion of "common but differentiated responsibility" that underscores many of the more recent multilateral environmental agreements.

[40] Stockholm Declaration, *supra* note 28, at para. 4. For an in depth contemporaneous perspective of the lead up to the Stockholm Convention, *see* Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 Harv. Int'l L. J. 423 (1973). For an alternative perspective, *see* Rajagopal, *supra* note 15, at 114–17.

the goal of sustainability through assessing the international community's ability to account for the needs of future generations, and to respond to the challenges of economic globalization.

C. *Rhetorical Progress: Embracing the Concept of Sustainable Development*

The 1992 United Nations Conference on the Environment and Development[41] (UNCED or the Rio Conference) brought environmental issues into the international mainstream and focused global attention on the unsustainable nature of current human activities. The Rio Declaration echoed the posture struck twenty years earlier in the Stockholm Declaration: recognizing that human activity was undermining the integrity of these natural systems on which human life and society depend while also affirming that development decisions are within the sovereign competence of states.

Despite a need to finesse the conflict between pressure from developed countries for stringent environmental restrictions and demands from developing countries for adherence to the Westphalian principle of non-interference, Rio marked a transition point—the point at which sustainability became a tenet of environmental law's central narrative and a new watchword in international environmental discourse. Sustainable development—the satisfaction of human needs in a fashion that does not impede the ability of future generations to also satisfy their needs[42]—was the compromise between the two positions. The term was ambiguous enough to satisfy all participants in the international dialogue. Sustainable development thus became the internationally sanctioned decisionmaking framework for corporate, state and organizational actors—a global consensus for developing global solutions to environmental problems.[43] A wealth of multilateral environmental agreements covering

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[41] U.N. Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on the Environment and Development*, Annex I, at 3, U.N. Doc. A/CONF.151/26/Rev.1 (Vol.I) (1993) [hereinafter Rio Declaration].

[42] World Commission on Environment and Development, Our Common Future 42 (1987). This is the definition of sustainable development most commonly used. A situation is unsustainable when natural capital is depleted more rapidly than it can be replenished. Thus, at a minimum, sustainability requires that human activity not exceed the regenerative rate for natural resources and capacities.

[43] *See* Agenda 21: Program of Action for Sustainable Development, ch.30, U.N. Doc. A/CONF.151/26, Rev.1 (June 14, 1992); *see also* Philippe Sands, Principles of International Environmental Law 252-65 (2d ed. 2003) (presenting the development of the concept of sustainable development in international environmental law).

everything from access to environmental information[44] to greenhouse gas emissions[45] to persistent organic pollutants[46] purport to advance the goal of sustainability.

Sustainable development is a central commitment of the U.N. Millennium Development Goals,[47] and was the focus of the 2002 Johannesburg World Summit on Sustainable Development.[48] Embracing these goals, the World Bank instituted a Secretariat of Sustainable Development[49] tasked with "manifesting the Bank's commitment to socially and environmentally responsible development."[50] The Bank's new development strategy views economic growth as embedded in social balance and environmental sustainability.[51] The OECD similarly established a Development Cooperation Directorate charged with facilitating collaboration between member and non-member countries over environmental issues.[52]

The recently established United Nations Division for Sustainable Development and the affiliated Commission on Sustainable Development similarly reflect that sustainability has become a basis for policy development, program design, and delivery. These programs are intended to integrate sustainable development into international, regional, and local policymaking,[53] and thus spearhead progress towards sustainability. Along similar lines, the U.N. General Assembly declared the decade from 2005 to 2014 to be a decade of education for sustainable development.[54]

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[44] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 517 (hereafter Aarhus Convention).

[45] U.N. Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102–38, 1771 U.N.T.S. 107; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22.

[46] United Nations Environment Programme Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 40 I.L.M. 532.

[47] U.N. Millennium Development Goals, *available at* http://www.un.org/millenniumgoals.

[48] *See* U.N. Report of the World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26-Sept. 4, 2002, U.N. Doc A/CONF.199.20.

[49] *See* World Bank, Environmentally and Socially Sustainable Reference Guide, *available at* http://lnweb18.worldbank.org/essd/sdvext.nsf/43ByDocName/WorldBankSustainableDevelopmentReferenceGuideText /$FILE/ESSDReferenceGuideText.pdf.

[50] *Id.*

[51] *Id.* at 5.

[52] Information about the OECD Development Cooperation Directorate is available at http://www.oecd.org/about/0,3347,en_2649_34421_1_1_1_1_1,00.html.

[53] *See* United Nations Department of Economic and Social Affairs, Commission on Sustainable Development, http://www.un.org/esa/sustdev.

[54] *See* G.A. Res. 57/254, ¶1, U.N. Doc. A/RES/S7/254 (Dec. 20, 2002). UNESCO is the leading agency in this decade of education. *See* UNESCO, http://portal.unesco.org/education/en/ev.phpURL_ID=27234&URL_DO=DO_TOPIC&URL_SECTION=201.html.

Many now argue that sustainable development has become a norm of international law.[55]

Does this coalescing rhetoric have normative import? Some argue that sustainable development is nothing more than rhetoric—pretty sounding lingo bereft of concrete meaning and incapable of shaping real-world choices.[56] Others suggest that sustainable development functions as a "bait and switch"—distracting attention from the continued exploitation of environments and workers while resulting in little or no change in exploitative behaviors.[57] Though both of these objections to sustainable development have weight, they significantly underestimate the normative impact that rhetoric can have on social expectations, and on state and private behaviors. For this reason, I view the near universal embrace of sustainable development as a critical component of international organization to be real progress. It reflects a broad international recognition that ecosystems are not co-extensive with the jurisdictional reach of nation-states,[58] and that international cooperation will be necessary "to conserve, protect and restore the health and integrity of the Earth's ecosystems."[59] As such, this rhetoric is the first critical step of progress towards an environmentally sustainable global society.

Notwithstanding impressive progress toward creating a substantial body of normative international law (hard and soft) embracing sustainable development, that progress has not yet translated into slowing the overexploitation of natural resources—nor has it stemmed the production of toxic and hazardous pollutants. Environmental regimes are notoriously weak, and a wide gulf remains between theory and practice. The poorly understood complexity of environmental systems, coupled with the tangled relationship between economic development, social development, and environmental protection has so far meant that sustainable use of resources eludes policymakers. The unfortunate lesson is that progress

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[55] *See* Sustainable Justice: Reconciling Economic, Social and Environmental Law (Marie-Claire Cordonier & C.G. Weeramantry 2005) (making this argument); *but see* Alhaji B.M. Marong, *From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development*, 16 Geo. Int'l Envtl. L. Rev. 21, 33–34 (2003) (arguing that sustainable development is not a norm of customary law).

[56] *See e.g.* Alexander Gillespi, The Illusion of Progress: Unsustainable Development in International Law and Policy (2001).

[57] As Baird Callicott and Karen Mumford point out, "everyone agrees that sustainability is a good thing" but the term is "at grave risk of being co-opted by people primarily concerned about other things." J. Baird Callicott & Karen Mumford, *Ecological Sustainability as a Conservation Concept*, 11 Conserv. Biol. 32 (Feb. 1997).

[58] *See* Transboundary Harm in International Law, *supra* note 9; Rebecca Bratspies, *Finessing King Neptune: Fisheries Management and the Limits of International Law*, 25 Harv. Envtl. L. Rev. 213 (2001).

[59] Rio Declaration, *supra* note 41, princ. 7.

in negotiating legal documents, though an important step, is not the same thing as achieving material progress in protecting the earth's threatened ecosystems.

D. *Beyond Words—Progress in Implementing Sustainable Development*

If there is a hierarchy of progress toward sustainable development, the first level surely involves rhetorical embrace of the concept. As described above, there has already been significant progress on this front. Unfortunately, implementation remains scant—the international community has thus far been long on promises, but short on action. While this situation can be ascribed, in part, to the normative indeterminacy of the term "sustainable development" itself,[60] there has also been an unwillingness to make and live with the choices necessary to achieve real progress toward this goal. Moreover, as the Bruntland Commission pointed out, there is a mismatch between the scale of environmental law—which is bounded by the territorial limitation of states and tends to focus on specific sectors or species—and the world's pressing global and integrated environmental challenges[61] that "endanger[] the Earth's capacity to sustain current and future generations."[62]

Looking beyond the language of multilateral environmental agreements, a second measure of progress toward sustainable development must examine the degree to which policymaking actually includes the interests of future generations,[63] because that inclusion marks yet another step towards "ensur[ing] that our small planet is passed over to future generations in a condition which guarantees a life of human dignity for all."[64] This is the kind of norm internalization[65]

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[60] Sustainable development obliges states to balance human and economic development with conservation and preservation of the environment, but does not dictate what that balance should be. For an exploration of this point, *see* Rebecca Bratspies, *Rethinking Decisionmaking in International Environmental Law: A Process-Oriented Inquiry into Sustainable Development*, 32 Yale J. Int'l L. 369 (2007).

[61] Our Common Future, *supra* note 42 at 330–34.

[62] Millennium Ecosystem Assessment, Living Beyond our Means: National Assessments and Human Well-Being 3, *available at* http://www.millenniumassessment.org/en/BoardStatement.aspx (follow Download Now hyperlink) (2005).

[63] Lothar Gundling, *Our Responsibility to Future Generations*, 84 Am. J. Int'l L. 207, 208 (1990) (arguing that sustainable development "is to be understood as development that takes into account not only the needs and interests of the present generation, but also of generations to come.")

[64] Nairobi Declaration on the State of the Worldwide Environment, UN Environmental Programme, 10th Sess., Agenda Item 4, U.N. Doc. UNEP/GC.10/INF.5 (1982) at para. 10, *reprinted in* 21 I.L.M. 676.

[65] For an important account of the norm internalization process, *see* Harold Hongju Koh, *Why Do Nations Obey International Law*?, 106 Yale L.J. 2599 (1997).

that Hudson would readily have identified as progress. Finally, a third measure of progress involves assessing the international community's willingness to confront these conflicts in a world carved into public and private law spheres, and to respond to the root challenge to sustainable development posed by economic globalization. As David Kennedy points out, it is a mistake to view questions of international governance as separate from the global market economy.[66]

I. *Process as Progress: Accounting for Future Generations*

Janet Koven Levit describes international lawmaking as a "dynamic, iterative process" with deep theoretical roots.[67] How does such a process internalize norms and create shared reference points for the next iteration of lawmaking? Hudson answered that question by identifying the "building of institutions which promise to serve the needs of future generations"[68] as the *sin qua non* of progress in international organization. The Stockholm Declaration, which recognized "a solemn responsibility to protect and improve the environment for present and future generations,"[69] embraced this vision of progress in an environmental context. The 1987 Bruntland Commission took this notion one step further when it highlighted intergenerational equity—the imperative that current generations pass to future generations an environment of a quality that permits them to meet their own needs.[70] Even the International Monetary Fund recognized that sustainability, taken seriously, requires that the needs of future generations be part of any decisional calculus.[71]

Intergenerational equity stems in part from a vision of the state as a partnership between past, present and future generations.[72] This vision has been embraced, albeit cautiously, by some areas of international law. For example, Article 3(1) of the Framework Convention on Climate Change identifies as a basic principle that

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[66] David Kennedy, *The Forgotten Politics of International Governance*, 2 Eur. Hum. Rts. L. Rev. 117 (2001). A necessary part of any such analysis is consideration of the central role played by transnational corporations—non-state actors that often wield the power of states but whose activities remain outside the current international legal order.

[67] Janet Koven Levit, *Sanchez-Llamas v. Oregon: the Glass is Half Full*, 11 Lewis & Clark L. Rev. 29, 41 (2007). For a complete description of the New Haven School approach, *see* Harold D. Lasswell & Myres S. McDougal, Jurisprudence for a Free Society (1992). *See also* Harold Hongju Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181, 183 (1996).

[68] Hudson, *supra* note 1, at 122.

[69] Stockholm Declaration, *supra* note 28, princ. 1.

[70] Our Common Future, *supra* note 42.

[71] IMF, *Fiscal Dimensions of Sustainable Development*, Pamphlet 54 (2002) at 1, *available at* http://www.imf.org/external/pubs/ft/pam/pam54/pam54.pdf.

[72] Edmund Burke, Reflections on the Revolution in France 139–40 (1790), *quoted in* Edith Brown Weiss, In Fairness to Future Generations (1988).

"[t]he Parties should protect the climate system for the benefit of present and future generations of humankind."[73] At the International Court of Justice, Judge Weeramantry's separate opinions in the Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway),[74] and Gabcikovo Nagymoros,[75] and his dissent in Nuclear Tests (New Zealand v. France)[76] explore the need to consider future generations as participants in sustainable development. Nevertheless, international law struggles with how to account for the interests of future generations and for the costs they will bear as they reap the results of risks sown in the past and the present.[77]

Most scholars characterize intergenerational equity as a component of sustainable development.[78] Other voices argue strenuously against the very idea of intergenerational equity.[79] It is admittedly a tough sell to convince the public to incur costs today in order to accrue benefits to the distant future,[80] and such an analysis can be fraught with ambiguity. For example, through strategic selection of a

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[73] U.N. Framework Convention on Climate Change, *supra* note 45, art. 3, para. 1.

[74] In his separate opinion, Judge Weeramantry referred to intergenerational equity and specifically to "the concept of wise stewardship [of natural resources] … and their conservation for the benefit of future generations." Maritime Delimination in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 241–43 (June 14) (separate opinion of Judge Weeramantry).

[75] Gabçikovo Nagymoros, *supra* note 36.

[76] In *Nuclear Tests* 1995, Judge Weeramantry characterized the issue before the court as raising "as no case before the court has done, the principle of intergenerational equity—an important and rapidly developing principle of contemporary environmental law." Request for an Examination of the Situation in Accordance With Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Test Cases (New Zealand v. France), 1995 I.C.J. 288, 341 (Sept. 22) (dissenting opinion of Judge Weeramantry). He goes on to note that "The court has not thus far had occasion to make any pronouncement on this rapidly developing field. This case presents it with a pre-eminent opportunity to do so as it raises in pointed form the possibility of damage to generations yet unborn." *Id.*

[77] For an in depth exploration of this issue, *see* Weiss, *supra* note 72.

[78] *See e.g.*, Phillipe Sands, *Environmental Protection in the Twenty-First Century: Sustainable Development and International Law*, in Environmental Law, the Economy and Sustainable Development (Richard L. Revesz et al., eds.) 369, 374 (2000); *see generally*, International Law and Sustainable Development: Past Achievements and Future Challenges (Alan Boyle & David Freestone eds.) 8–16 (1999); John C. Dernbach, *Sustainable Development: Now More Than Ever*, 32 Envt'l L. Rep. 10,003 (2002).

[79] Opposition comes both from market-based classical economists and from conservation biologists. The former believe that the sum choices of value-maximizing individuals represent the public good, and thus ideas of intergenerational equity are wrongheaded. The latter bristle at the anthrocentric vision that views the natural and biological resources of the earth through a lens of human development, with little or no attention to the inherent rights of other creatures.

[80] *See* Cass Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 Colum. L. Rev. 553 (2007).

"social rate of time preference"[81] discount rate, a policymaker can dramatically skew the resulting analysis.[82] The larger the discount rate, the more the assessment values those costs and benefits incurred in the near term rather than costs and benefits incurred in the future. By selecting a lengthy time period or a high discount rate, it is possible to argue that even modest current expenditures that would have dramatic future benefits do not make sense.[83]

Recent debates over measures to avoid climate change have turned on different discount rates. In 2007, the British Government issued the Stern Review on the Economics of Climate Change,[84] which described large potential losses from global warming and urged immediate and significant action to avert those losses. One of the Report's central conclusions was that "the benefits of strong and early action far outweigh the economic costs of not acting."[85] These recommendations dramatically contradicted earlier recommendations that called for only modest investment to slow climate change in the near term, with more significant investments in the medium and long term.[86] The different analyses and recommendations

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[81] An assumption built into this calculation is that future generations will be wealthier, and thus will not value a given unit as much as the present generation. *See*, William R. Cline, *Discounting for the Very Long Term, in* Discounting and Intergenerational Equity 131, 132 (Paul R. Portney & John P. Weyant eds., 1999). For a critique of this assumption, see Partha Dasgupta et al., *Intergenerational Equity, Social Discount Rates, and Global Warming, in* Discounting and Intergenerational Equity *supra* at 51. Of course, this assumption ignores intra-generational effects—the fact that poor people and poor countries will suffer first and most from the effects of climate change while the benefits of not altering consumption patterns to avoid that outcome accrue predominantly to the wealthy. *See* Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 Iowa L. Rev. 1405 (2005). *See also* Sinden in this volume.

[82] A zero social discount rate would treat costs and benefits to future generations into the indefinite future equally with present generations, while a positive social discount rate means that the costs or benefits that accrue to future generations are reduced or "discounted" compared to those borne by the present generation. For an explanation, *see* Discounting and Intergenerational Equity (Paul Portney & John Weyant, eds., 1999). For a critique of discounting, *see* Frank Ackerman & Lisa Heinzerling, Priceless: On Knowing the Price of Everything and the Value of Nothing (2004).

[83] This cost-benefit argument is typically buttressed by the philosophical claim that we cannot know the conditions of future generations, nor can we assume that they share our conception of the good. *See e.g.*, Martin P. Golding, *Obligations to Future Generations*, in Responsibilities to Future Generations (Ernest Partridge, ed., 1980).

[84] Her Majesty's Treasury, Stern Review: The Economics of Climate Change (2006), online at http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm.

[85] *Id.* at Summary of Conclusions, at 1.

[86] *See e.g.*, David L. Kelly & Charles D. Kolstad, *Integrated Assessment Models For Climate Change Control, in* International Yearbook of Environmental and Resource Economics 1999/2000: A Survey

were driven, in part, by the selection of differing discount rates in response to different weightings ascribed to intergenerational equity.

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Overall, despite oft-repeated concerns for intergenerational equity, this is an area where progress has been halting. Conceptually, the lack of *intra*-generational equity poses a fundamental challenge to claims for *inter*-generational equity.[87] Practically, the challenges of actually incorporating intergenerational equity into decisionmaking are substantial, and there have been few serious attempts to allocate resources based on genuine intergenerational equity. The simplicity of the idea has not facilitated its implementation. Intergenerational equity has instead been perceived more as a slogan, or at best a moral duty towards future generations rather than as an imperative for transforming decisionmaking to include their voice by proxy.

II. *Material Progress—Environmental Globalization*

Global trade has created a growing demand for natural resources—a demand that is coupled with a shrinking resource base. Incompatible imperatives compete against a backdrop of increased international environmental obligations, which have expanded in both nature and scope since Stockholm. These obligations create an ambitious international public agenda at the same time that deregulation of a growing private sector seems to compromise the ability of states to achieve such an agenda. Economic globalization, with its mobile capital and transnational actors, has weakened the traditional public policy levers for shaping markets and societies, whether or not accompanied by the much heralded "retreat of the state."[88] Deregulation, advances in technology and communications, and the development of a global capital market have concentrated power in the hands of global firms and corporate alliances, which now emerge as a rival power base to states.[89]

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of Current Issues (Henk Folmer & Tom Tietenberg, eds. 1999). The Bush Administration stands with this latter camp claiming that global warming, if it exists at all, will have only modest effects that justify only minimal, voluntary investments.

[87] Gundling, *supra* note 63 at 211 (1990)(making this point); *see also* Amy Chua, World on Fire (2003) (detailing the relationship between globalization and inequality).

[88] *See e.g.* Susan Strange, The Retreat of the State (1996). For an exploration of how globalization is reshaping international law, *see* Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 Eur. J. Int'l L. 435 (1997).

[89] *See* Commission on Global Governance, Our Global Neighborhood 3 (1995).

At precisely the moment that global governance needs to exert control over how products are designed, manufactured, transported, and consumed to promote sustainability, the political sphere is ceding ever more ground to an abstraction termed "the market." Indeed, "the market" has somehow become an inevitable background assumption, invisibly limiting and shaping discourse about sustainable development without a full exploration of the consequences or acceptability of those limits. The rhetoric of free trade and the global market has become so pervasive that disentangling the question of sustainable development has become extremely difficult, yet actual progress toward sustainability will only happen if the assumptions that undergird that rhetoric are examined for their (un)sustainable consequences, what Upendra Baxi calls "the inevitable contradiction between the notions of a 'people-centered development' and the colossal hegemony of newly emergent technomonopolies."[90]

The central question is whether sustainable development must accommodate itself within the globalized free market or whether that free market will exist within a sustainable paradigm. Truly sustainable practices can happen only under the latter circumstance. The market can exist in any number of configurations, some of which are more conducive to sustainable development than others. There is, unfortunately, no reason to think that absent deliberate choices on the part of states, both individually and as a community, that economic globalization will produce a market that promotes sustainability, or that can even co-exist with it. Choices must be made, and if the community of states does not make those choices on a global scale, the sum of private choices by private actors will do it for them. The question thus becomes who will shape the new global order? Will that result in anything Hudson would recognize as progress?

Challenges like global warming illustrate the incongruity between the scope of problems and the international legal tools available for their resolution. Responding to these challenges will require expanding the global imagination about the relationships between formally public and formally private law, and between states and markets. National efforts to address these issues cannot be effective unless they are part of a global process that reflects the geographic and biological scope of the problem.[91] No such process or organization currently exists in the environmental context, though more and more environmental disputes fall, at least tangentially, within the purview of the most notable example of such a wide-reaching organization—the World Trade Organization.

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[90] Upendra Baxi, *"Global Neighborhood" and the "Universal Otherhood": Notes on the Report of the Commission on Global Governance*, 21 Alternatives 525, 532 (1996).

[91] For a passionate argument of this point, *see* McCaffrey in this volume.

Even before the WTO came into existence, Agenda 21 explicitly recognized the link between an "appropriate" international trade regime and sustainable development.[92] The problem is that a trade regime "appropriate" for nurturing sustainable development is not necessarily a trade regime devoted to increasing "free trade." Economic globalization creates pressure for centralizing all kinds of regulatory decisions in order to facilitate what is called "free trade." One effect of the move towards centralization is a shift in the locus of decision away from the state to the WTO. The WTO, however, does not have the goals of sustainable development as a central part of its mandate or mindset. Instead, at the same time that the WTO aims for the "substantial reduction of tariffs and other barriers to trade"[93] and prohibits quantitative restrictions,[94] some environmental conventions employ trade measures as their primary means of enforcement. This tension between two central norms of modern international law is emblematic of the wider concerns about fragmentation in international law.[95]

A response to this dilemma has been support for the notion of "fair trade." Forcing environmental disputes into the language of "fair trade" is an awkward fit. While states that do not comply with environmental obligations may gain a competitive advantage,[96] and unsustainable exploitation of natural resources may compromise free trade, those objections are really beside the point. The primary objections to unsustainability are the threats such conduct poses for human survival, welfare and dignity, and for the ecological stability of the earth's ecosystems, not the economic advantage the culpable party garners.

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In today's globalizing world, the line between those concerns within the purview of the nation state and those properly addressed by the community of states as a whole becomes ever more blurred. Drugs, terror, pollution—increasingly these and other issues of global significance challenge the very notion that a distinction can be drawn between the two realms. [97] While the challenges are increasing perceived

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[92] Agenda 21, ch.2, *supra* note 43.

[93] General Agreement on Tariffs and Trade, preamble, third paragraph.

[94] *Id*. at art. XI.

[95] *See e.g*. International Law Commission, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, ¶ 450, U.N. Doc A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi).

[96] *See* Sinden, in this volume.

[97] For an in depth exploration of this question in the context of global warming, *see* Hari Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 Wash. U. L.Q. 1789, 1813–18 (2005); Hari Osofsky, *The Geography of Climate Change Litigation Part II: Narratives of Nation States and Thirdspaces, available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976560&high=%20osofsky.

on a global scale, their resolution is still sought primarily within frameworks based on, and bounded by a geopolitical system based on the sovereign state.[98] The notion that there is a robust correlation between trade and peace holds great sway among academics, politicians and economists. *Pax mercatoria* has been lauded in terms Hudson would recognize—as a "second chance for peace in our times."[99]

Since its establishment in 1995, the WTO has become the institution through which important international trade matters are discussed, including conflicts between national policies and global trade rules. Its top-down process is very different from the cooperation between voluntary transgovernmental networks that Anne-Marie Slaughter, Kal Raustiala and others describe.[100] As the WTO considers more and more "trade" questions challenging environmental and public health regulation,[101] there seems to be a root contest over who will decide critical questions of public policy and via what decisional process?

Resort to the WTO dispute resolution mechanism[102] effectively shifts the locus of decision from individual states to a centralized international bureaucracy. The expanding authority of the WTO is typically portrayed as a thickening of the legal-normative structures and a corresponding receding of politics. Critics characterize this move toward centralized international decisionmaking as a democracy

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[98] Of course, this state-bounded vision is not universal. Legal pluralists explore how actors other than the nation-state create norms and legal rules. *See e.g.*, Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 Yale J. Int'l L. 301 (2007); Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 Am. J. Int'l L. 1 (1959); Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, 19 J. Legal Educ. 253 (1966–67).

[99] Jim Chen, *Pax Mercatoria: Globalization as a Second Chance for Peace in Our Time*, 24 Fordham Int'l L. J. 217, 225 (2000) (arguing that laws fostering globalization, free trade, economic development, and international economic cooperation provide the jurisprudential infrastructure for peace).

[100] Anne-Marie Slaughter, A New World Order (2004); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 Mich. J. Int'l L. 1041 (2003) (exploring transgovernmental regulatory networks and their relationship to democracy); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 Va. J. Int'l L. 1, 10–22 (2002).

[101] *See e.g.*, Panel Report, European Communities–Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291-293/R (Sept. 29, 2006); Panel Report, European Communities–Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R/ (Sept. 18, 2000);Appellate Body Report, United States–Import Prohibitions of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998).

[102] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1226 (1994).

deficit.[103] The rising role of the WTO, coupled with the growing influence of transnational corporations both domestically and internationally, means that the decisionmakers are no longer democratically accountable to citizens. As push-back to this democracy deficit has grown, the proposed solutions dovetail concerns at the heart of sustainable development. Calls for transparency, process and access resonate both as a tool for sustainable development, and as a means to shore up eroding democratic structures.[104] For example, "prior informed consent" has become something of a rallying cry. The Aarhus Convention,[105] the Biosafety Protocol,[106] and the Rotterdam Convention[107] are just a few of the efforts to use procedural checks and access to information as a means of achieving sustainability and reinserting democratic controls into globalized trade.

Concern for public participation has been a cornerstone of sustainable development from its inception. The buildup to the Stockholm Convention was notable for its inclusiveness. Its organizers encouraged the participation of multiple voices, going well beyond the usual suspects of academics, jurists and politicians. Indeed, contemporaneous accounts described this inclusiveness as reflecting "intergovernmental acknowledgement of the deep interest of professional, local, and private groups in environmental questions"[108] as well as the important role

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[103] *See generally* Alfred C. Aman, Jr., The Democracy Deficit: Taming Globalization Through Law Reform (2004) (arguing that decisions made by transnational actors are beyond the direct democratic control or influence of the publics that they impact); Joseph E. Stiglitz, Globalization and Its Discontents 18–22 (2002) (detailing how the IMF and the World Bank contribute to a democracy deficit); Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 Law & Contemp. Probs., Summer/Autumn 2005, at 15 (proposing global administrative space as a new approach to resolving the democratic deficit). *But see* Slaughter, *supra* note 100, at 194–95 (observing that disaggregated transgovernmental networks are not inconsistent with democracy); Raustiala, *supra* note 100, at 10–11 (theorizing that transgovernmental networks will supplement rather than supplant liberal internationalism). Some have proposed that NGOs can help fill the democracy gap and make international legal institutions more transparent, by expanding participation and spreading information and expertise widely to the interested public. *See* Anna-Karin Lindblom, Non-Governmental Organisations in International Law 34–35 (2005).

[104] Sustainable Justice, *supra* note 55.

[105] Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Jun. 25, 1998, U.N. Doc. ECE/CEP/43, *reprinted in* 38 I.L.M. 517 (1999).

[106] Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Feb. 23, 2000, *reprinted in* 39 I.L.M. 1027.

[107] Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Sept. 11, 1998, 38 I.L.M. 1 (1999) (commonly known as the Rotterdam Convention).

[108] Johnson, *supra* note 31 at 256.

civil society played in bringing international attention to environmental issues. Agenda 21 emphasized that broad public participation in decisionmaking is a crucial element of sustainable development, and specified that participation included a right of access to information.[109]

Sustainable development, with its focus on participation and transparency, may offer an alternative narrative and a starting point to reinvigorate democracy in an ever-globalizing world. Embracing sustainable development could be much more than a means to an environmentally acceptable end—it could be the basis for reassessing the neoclassical economic paradigm and might offer an alternative normative framework for thinking about economic development. Through the lens of sustainable development, the primary objective of development shifts from bald increases in GDP[110] to equitable distribution of the products of development—particularly food, education, healthcare, sanitation and clean water.[111] Such a move would represent progress indeed.

E. *Conclusion*

We live in a world of ever-increasing interactions on a global scale. The constantly accelerating rate of technological change means that the range and intensity of these interactions are rapidly expanding. The ramifications of these interactions transcend national boundaries, and it is past time to think rigorously about their consequences for law.

Progress in responding to global environmental problems necessarily entails balancing complex interdependencies, and accounting for rapid technological change amidst conflicting national imperatives. The realities of global warming, ozone depletion, desertification, and spreading invasive species make a mockery of the traditional distinction between transboundary and wholly domestic harms, and between private and public spheres.[112] In responding to these new challenges,

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[109] Agenda 21, *supra* note 43, princ. 23.3.

[110] Economic development should be a broader measure than mere economic output, and should encompass changes in the technical and institutional arrangements by which output is produced and distributed, as well as changes in patterns of ownership, human skills and preferences. Edward B. Barbier, *The Concept of Sustainable Economic Development*, 14 Env. Conserv. 101 (1987). Yet, difficulties in quantifying these variables has led to a distorted vision of development based on an overreliance on GDP and *per capita* incomes, regardless of distribution.

[111] For an expansion on this theme, *see* Gunther Handl, *Environmental Security and Global Change: The Challenge to International Law*, 1 YB Int'l Econ. L. 3 (1990).

[112] For a thorough exploration of this question, see Transboundary Harm in International Law, *supra* note 9.

no single solution stands alone. Success will require progress on many levels: rhetorical, conceptual and material. If we would live together and flourish on our shrinking, warming planet, we must reach beyond oversimplified and dated dichotomies that place international and domestic law in separate realms, while at the same time hold fast to the human rights and democratic values at the core of the United Nations system. Who knows, perhaps real progress toward protecting and conserving "spaceship earth" will also generate more progress toward the goals of peace and justice that Hudson aspired to so long ago.

Incorporating International Human Rights Law in National Constitutions: The South African Experience

By Penelope E. Andrews

A. *Introduction*

In his 1931 lectures at the University of Idaho College of Law, Professor Manley O. Hudson reflected on the benefits and possibilities of a global legal order. His vision was one in which the global community of states engaged with, and relied upon, the imprimatur of international law.[1] This vision incorporated the idea of the United States as a good global citizen, generating an international agenda of human rights and good governance.[2] Even though Professor Hudson's insights predated the establishment of the United Nations and the drafting of the Universal Declaration of Human Rights, his sentiments were very much in line with those that spurred the creation of the modern international legal order.

The focus of this book is partly to revisit that vision, and partly to explore the universal ramifications of that vision. What I intend to do in this chapter is to assess the challenge of incorporating and applying international law within national legal frameworks, and more specifically international human rights law, by examining one case study, namely, South Africa. In particular, I will examine how this newly democratized country has incorporated international law into its national legal framework, and the possibilities for democracy and human rights that are generated by such incorporation.

This examination is important because the transition from apartheid to democracy in South Africa was of momentous global significance. This democratic transformation, from a country steeped in authoritarianism and racism, to one predicated on international human rights principles, including peaceful co-existence,[3] transparency and accountability, involved the international community at all stages.[4] The struggle

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1 *See generally* Manley O. Hudson, Progress in International Organization (1932).

2 *Id*. at 103-117.

3 Azanian Peoples Org. (AZAPO) v. The President of the Republic of S. Afr. 1996 (4) SALR 637 (CC) at para. 3 (S. Afr.) (stating, "[t]he Constitution provides a historic bridge between the past

Miller & Bratspies (Eds), Progress in International Law, pp. 835–854.

against apartheid had an enormous impact on the development of international human rights law, specifically the evolving international principles geared toward the proscription of apartheid and racism.[5] Indeed, apartheid was declared a crime against humanity by the United Nations in 1966.[6] Moreover, the struggle against racism and for self-determination, pursued mostly by formerly colonized communities, was informed by global abhorrence to the policies of apartheid, as illustrated by the numerous resolutions passed by the United Nations against the apartheid government.[7] The post-apartheid democratic state became the first to incorporate international human rights principles into its Constitution, and into the structure of its system of governance.[8]

This chapter assesses the human rights project in South Africa by examining first, how international law has been incorporated in South Africa's Bill of Rights. Second, this chapter explores the interpretation of these rights by the South African Constitutional Court, and more specifically, how the Court has embraced international human rights principles in its jurisprudence. This exploration also involves examining the strategic choices made by the Court as to how it will adopt those principles and under what conditions, as well as when it chooses to reject those international human rights principles in favor of a localized reading. Finally, this chapter concludes by examining some lessons to be learned from this experience, and in particular how the adoption of international legal principles by the South African Constitutional Court may provide lessons for countries both similarly and differently situated.

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of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence …").

[4] *See generally*, Louis B. Sohn, Rights in Conflict: The United Nations and South Africa (1994).

[5] *Id.; See also* Henry J. Richardson, *Self-Determination, International Law and the South African Bantustan Policy*, 17 Colum. J. Transnat'l L. 185 (1978); Edgar Brookes, Apartheid (1968); Brian Bunting, The Rise of the South African Reich (1986); Arthur J. Goldberg, *The Status of Apartheid Under International Law*, 13 Hastings Const. L. Q. 1 (1985).

[6] International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243.

[7] Kevin Hopkins, *Assessing the World's Response to Apartheid: A Historical Account of International Law and its Part in the South African Transformation*, 10 U. Miami Int'l & Comp. L. Rev. 241 (2001-2002). *See, e.g.*, Decade for Action to Combat Racism and Racial Discrimination, G.A. Res. 3057 (XXVIII), U.N. Doc. A/CONF.119/15 (Nov. 2, 1973). *See, e.g.*, Resolution Against Apartheid in Sports G.A. Res. 40/64, U.N. Doc. A/40/53 (Dec. 10, 1985).

[8] For a detailed exploration of the South African Constitution, *see generally*, The Post Apartheid Constitutions (Penelope Andrews & Stephen Ellmann, eds., 2001).

B. *From Apartheid to Democracy*

The period preceding the establishment of the United Nations involved a brief moment of global optimism, one that also involved South Africa. Indeed, Jan Smuts, the Prime Minister of South Africa at the time, was President of the Committee on the General Assembly of the United Nations, and served as a principal drafter of the Charter of the United Nations.[9] But South Africa's positive involvement in this exercise of global governance was shortlived. In 1948, the Nationalist Party came to power in South Africa on a platform of white supremacy, embarking on a Kafkaesque project to separate the citizens of South Africa according to clearly demarcated racial groups.[10] This project was bolstered by a legal system designed to ensure that all aspects of life, including work, marriage, education, health, and travel, were rigidly regulated.[11] In addition, a brutal security and police apparatus made certain that these laws were obeyed and that political dissent was stifled.[12] A cursory reading of the volumes of the reports of the South African Truth and Reconciliation Commission bear testimony to the grotesque lengths the apartheid government went, to ensure that the system was reinforced.[13]

This system of apartheid increasingly became of concern to the global community, even as the apartheid government was hiding behind the principle of state sovereignty.[14] Indeed, it is arguable that the state-centric model of international law confronted some challenge, as the United Nations and many governments across the world began to recognize the anti-apartheid opposition movements, and particularly the African National Congress and the Pan-Africanist Congress,

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[9] Sohn, *supra* note 4.

[10] In pursuit of this goal, the apartheid government passed a series of statutes to institutionalize racial discrimination. These statutes included: Population Act of 1950; Prohibition of Mixed Marriages Act of 1949; Group Areas Act of 1950; The Reservation of Separate Amenities Act of 1959. *See* Apartheid: The Facts, International Defence and Aid Fund (1982) [hereinafter Apartheid: the Facts].

[11] Apartheid: the Facts, *supra* note 10.

[12] *See generally*, John Dugard, Human Rights and the South African Legal Order (1982); *see also* International Commission of Jurists, South Africa: Human Rights and the Law (Geofrey Bindman ed., 1988).

[13] *See* Truth and Reconciliation Commission, *Final Report*, http://www.doj.gov.za/trc/report/execsum.htm. *See also*, Penelope E. Andrews, *Reparations for Apartheid's Victims: The Path to Reconciliation?*, 53 Depaul L. Rev. 1155 (2004); Kader Asmal, et al., Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance (2d ed. 1997).

[14] *See* African National Congress, *Submission to the Truth and Reconciliation Commission*, http://www.anc.org.za/ancdocs/ misc/trc03.html; *see also* Jacquie Cassette, *Towards Justice in the Wake of Armed Conflicts? The Evolution of Warm Crimes Tribunals*, 9 African Security Review (2000), http://www.iss.co.za/pubs/ASR/9No5And6/Cassette.html# Anchor-Convention-9012.

as representing the majority of South Africans.[15] In addition, once apartheid was deemed a crime against humanity by the United Nations,[16] the constant objections of the South African government to the international consensus against apartheid, could not relieve it of its duty to abide by the new international norms. Apartheid South Africa is a commonly cited example for the international law principle that the persistent objector rule does not apply where the customary international law involves a *jus cogens* norm.[17]

The international struggle against apartheid underpinned the global fight against racism. Many key documents of international human rights law proscribing racism, most specifically the International Convention of Elimination of All Forms of Racism,[18] were developed in response to apartheid. Indeed Henry Richardson,[19] Louis Sohn[20] and John Dugard[21] have in their scholarship traced the link between international law and apartheid.[22]

At the end of the 1980s and the beginning of the 1990s, when the end of apartheid became inevitable, negotiations commenced in South Africa about the shape of the future constitutional democracy. These negotiations centered on a range of issues relevant to democratic governance, including the question of human rights. The general consensus about the inclusion of civil and political rights in a Bill of Rights was established immediately.[23] This was not surprising, in the wake of apartheid and its systematic denial of a range of civil and political rights.

The consensus about the inclusion of social and economic rights, and in particular, their justiciability, came later. For despite the recognition that the processes of apartheid had effectively institutionalized economic inequality, and that the majority of black South Africans languished in poverty, there was not general agreement about how to attain economic equity.[24]

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[15] *See* G.A. Res. 37/69, U.N. Doc. A/RES/37/69 (Dec. 9, 1982) (calling on the international community to reaffirm "the legitimacy of the oppressed people of South Africa and their national liberation movement … .").

[16] International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243, 246.

[17] *See* Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 Brit. Y.B. Int'l L. 1 (1985).

[18] 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

[19] *See, e.g.*, Henry J. Richardson, *Self-Determination, International Law and the South African Bantustan Policy*, 17 Colum. J. of Transnat'l L. 185 (1978)

[20] *See* Sohn, *supra* note 4.

[21] See Dugard, *supra* note 12.

[22] For a thoughtful discussion on apartheid and international law, *see* Goldberg, *supra* note 5.

[23] *See* The Small Miracle: South Africa's Negotiated Settlement (Doreen Atkinson & Stephen Friedman eds., 1994).

[24] *See* Center for Human Rights, University of Pretoria, Introduction to Socio-Economic Rights in the South African Constitution, http://www.chr.up.ac.za/centre_projects/socio/compilation1part1.

This also was not surprising. Although the national liberation movements had largely been committed to policies of economic redistribution, by the 1990s the international consensus had shifted to one in which human rights were embodied not by redistribution of material resources in the world, but in legal texts such as bills of rights. Indeed Upendra Baxi, the Indian legal scholar, has articulated how this text-based version of human rights discourse was seeking to "supplant all other ethical discourses."[25] In a similar vein, Boa de Sousa Santos, the Portuguese scholar, has noted how human rights has become the lingua franca of "progressive politics," providing an "emancipatory script" for those seeking redress from injustice.[26]

The South African Constitution and its expansive Bill of Rights reflects this paradigmatic shift in the characterization and articulation of human rights norms. In addition, the South African Constitution represents a vindication of decades of human rights activism, not just because of its expressed human rights commitment in the Bill of Rights, but also because the Constitution made South Africa, formally at least, a version of the penultimate human rights state.[27] As Makau wa Mutua, the Kenyan human rights scholar notes:

> The construction of the post-apartheid state represents the first deliberate and calculated effort in history to craft a human rights state – a polity that is primarily animated by human rights norms. South Africa was the first state to be reborn after the universal acceptance (at least rhetorically) of human rights ideals by states of all the major cultural and political traditions.[28]

If one looks at the trajectory of human rights discourse during the decades following the passage of the Universal Declaration of Human Rights, including those shameful periods when human rights became hostage to cold war politics, the South Africa embrace of human rights principles provided a welcoming ray of hope.

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html; *see also* Nicholas Haysom, *Giving Effect to Socio-Economic Rights*, Community Law Center, Socio-Economic Rights Project, Vol. 1 No. 4 (March 1999) at 1, http://www.communitylawcentre.org.za/Projects/Socio-Economic-Rights/esr-review (follow "Download this edition in pdf format" hyperlink).

[25] Upendra Baxi, *Voices of Suffering and the Future of Human Rights*, 8 Transnat'l J. of L. & Contemp. Probs. 125, 147 (1998).

[26] Boaventura de Sousa Santos, *Toward a Multicultural Conception of Human Rights*, I Zeitschrift Fur Rechtssoziologie 1 (1997) (F.R.G.).

[27] Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 Harv. Hum. Rts. L. J. 63 (1997).

[28] *Id*. at 65.

C. *The South African Constitution*

The South African Constitution reflects not only the influence of the global human rights struggle, but is in many ways a by-product of that struggle. The Constitution embraces international law in several ways.[29] First, the Constitution's comprehensive Bill of Rights[30] is drawn entirely from several human rights instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights[31] and the International Covenant on Economic, Social and Cultural rights.[32] The Bill of Rights is expansive, incorporating a range of civil and political rights, as well as economic, social and cultural rights.[33] Implicit in this comprehensive embrace of rights is the notion that rights are interdependent, and that civil and political rights reinforce social and economic rights, and vice-versa.[34] This recognition implicitly eschews a bifurcated or hierarchical approach to rights, in favor of one that views all rights as integral to the pursuance of dignity and equity. This vision is further bolstered by the provisions of Article 38 in the Bill of Rights, which explicitly renders all rights justiciable.[35]

The second way that the Constitution incorporates international law is that Article 39 of the Constitution specifically directs the South African courts to consider international law in their deliberations.[36] Finally, Article 232 of the Constitution provides for the direct incorporation of international law into the

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[29] For a thoughtful analysis of the engagement of the South African Constitution with international law, *see* John Dugard, *International Law and the 'Final' Constitution*, 11 Sajhr 241 (1995).

[30] S. Afr. Const. 1996, The Bill of Rights, ch. 2, *available at* http://www.info.gov.za/documents/constitution/index.htm.

[31] 1966 U.S.T. 521, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

[32] G.A. Res. 2200A (XXI), 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

[33] *See* S. Afr. Const. 1996, *supra* note 30. For a thoughtful discussion on the incorporation of social and economic rights in the S. Afr. Const. 1996, see Sandra Liebenberg, *The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa*, 11 SAJHR 359 (1995).

[34] *See* Neil MacCormick, Legal Rights and Social Democracy: Essays in Legal and Political Philosophy 42 (1982).

[35] *See* Pierre De Vos, *Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution*, 13 SAJHR 67 (1997); *see also* Penelope E. Andrews, *The South African Bill of Rights: Lessons for Australia, in* Comparative Perspectives on Bills of Rights (Christine Debono & Tania Colwell eds., 2004).

[36] S. Afr. Const. 1996, *supra* note 30, § 39 provides that, "[w]hen considering the Bill of Rights, a court … must consider international law … . § 233 provides that, "when interpreting any legislation, every court *must prefer* any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law." (emphasis added).

South African legal system.[37] South Africa is party to several international human rights instruments that range from the elimination of racial discrimination, slavery and genocide, the suppression of human trafficking, the rights of women, children and refugees.[38] Article 37-4(b)(1) of the Constitution specifically provides that emergency legislation enacted may derogate from the Bill of Rights only to the extent that it is consistent with South Africa's obligations under international law.[39]

In its founding provisions, the Constitution outlines the human rights principles on which the new democratic state is promised. These include:

- Human dignity, the achievement of equality and the advancement of human rights and freedoms
- Non-racialism and non-sexism
- Supremacy of the constitution and the rule of law
- Universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability responsiveness and openness.[40]

The Constitution, with its expansive Bill of Rights, has been universally heralded for the range of protections it affords, and the purposive manner in which it affords such protections.[41] For example, the Bill of Rights outlaws both direct and indirect discrimination, an approach that reflects a deep appreciation of the invidious manner in which discrimination is manifest, both consciously and unconsciously.[42] The Bill of Rights contains a general commitment to equality before the law and equal protection under the law, and provides several grounds

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[37] *Id*. § 232 specifically provides that customary international law is the law of South Africa unless such law contradicts the Constitution or an Act of Parliament. § 231 outlines the conditions under which international agreements become part of South African law. § 198 provides that the Security services must act "in accordance with … customary international law and international agreements … ."

[38] *See* Human Rights & Documentation Centre, Gender Issues and Democracy in Southern Africa, http://www.hrdc. unam.na/rsa_hr.htm.

[39] S. Afr. Const. 1996, *supra* note 30, § 37(4)(b)(i).

[40] *Id*. §§ 1-6.

[41] *See* Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 SAJHR 146 (1998); *see also* Craig Scott & Philip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise*, 16 SAJHR 206 (2000).

[42] S. Afr. Const. 1996, *supra* note 30, § 9, para. 4 provides that, "[n]o person may discriminate directly or indirectly against any one on one or more grounds." For an interesting discussion on the subliminal manner in which, for example, racism is often manifest, see Charles Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987).

on which the states may not unfairly discriminate, including race, color, gender, religion, ethnicity, age, disability and sexual orientation.[43] In addition, the Bill of Rights recognizes that sometimes these grounds of discrimination overlap, and therefore incorporates protections against the intersectionality of different grounds of discrimination.[44] The Bill of Rights protects the human rights of women, and in particular seeks to respond to the phenomenon of violence against women in several ways, including the outlawing of violence "from either public or private sources."[45] Drawing from the African concept of ubuntu,[46] the Bill of Rights provides for the right to have one's dignity respected and protected.[47]

In particular, the following civil and political rights are protected: the right to life,[48] freedom and security of the person,[49] the right against slavery, servitude and forced labor,[50] the right to privacy, freedom of religion, belief, expression, opinion, assembly, movement, association[51] and a range of property[52] and labor rights.[53] In addition, the Constitution also incorporates the right of access to information,[54] to due process, the right to a fair trial and access to the courts.[55] All of these rights derive from those incorporated in the Universal Declaration of Human Rights

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[43] S. Afr. Const. 1996, *supra* note 30, § 9, para. 3 provides that "[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

[44] *Id.* § 9, para. 5 provides that, "[d]iscrimination *on one or more grounds* … is unfair unless it is established that the discrimination is fair." (emphasis added). This concept of intersectionality has been analyzed in some detail by critical race scholars. *See e.g.*, Kimberley Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, in Identities 175 (Linda Alcoff & Eduardo Mendieta eds., 2002); *see also* Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581 (1991).

[45] *Id.* § 12(1)(c) provides that, "[e]veryone has the right to security and freedom of the person which includes the right … to be free from all forms of violence from either public or private sources …."

[46] For an explanation of *ubuntu, see* Justice Yvonne Mokgoro, Ubuntu and the Law in South Africa at http://epf.ecoport. org/appendix3.html.

[47] S. Afr. Const. 1996, *supra* note 30, provides that, "[e]veryone has inherent dignity and the right to have their dignity respected and protected."

[48] *Id.* § 11.

[49] *Id.* § 11-12.

[50] *Id.* § 13.

[51] *Id.* § 15–18.

[52] *Id.* § 25.

[53] *Id.* § 22-23.

[54] *Id.* § 32.

[55] *Id.* § 33–35.

and the International Covenant on Civil and Political Rights. In a series of cases, the South African Constitutional Court has interpreted the relevant constitutional right in light of the international human rights document from which it derives, thereby interpreting such international document in the South African context.[56] For example, in *S v Baloyi*,[57] in balancing the procedural rights of the accused, on the one hand, and the need to stem private violence against women, on the other, the Constitutional Court interpreted South Africa's obligations under the United Nations Declaration on Violence Against Women[58] and Convention on the Elimination of All Forms of Discrimination Against Women,[59] to reject a challenge to the constitutionality of domestic violence legislation.[60]

In addition to these so-called first-generation rights, the Bill of Rights incorporates a range of socio-economic rights, including the right to an environment that is beneficial,[61] the right to have access to housing,[62] health care,[63] food, water, social security,[64] education.[65] Theses social and economic rights are not available on demand, as first-generation rights are. That said, the state must provide these rights "within its available resources".[66] Drawing from the Convention on the Rights of the Child,[67] the Bill of Rights provides for a series of children's rights, protecting them from abuse, but also providing for a host of socio-economic rights that they are entitled to, including the right to basic nutrition, health care, shelter and social services.[68]

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[56] For example, in the first case heard by the Constitutional Court that involved the abolition of the death penalty, the Court went through an extended analysis of the International Covenant on Civil and Political Rights. See S v Makwanyane 1995 (3) SA 391 (CC) (S. Afr.).

[57] 2000 (2) SA 674 (CC) (S. Afr.).

[58] G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/RES/48/49 (Dec. 20, 1993).

[59] Adopted and opened for signature, ratification and accession by G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 18, 1979) (entered into force Sept. 3, 1981).

[60] S v Baloyi, *supra* note 57, at para. 13.

[61] S. Afr. Const. 1996, *supra* note 30, § 24.

[62] *Id.* § 26.

[63] *Id.* § 27.

[64] *Id.*

[65] *Id.* § 29.

[66] *Id.*

[67] Adopted and opened for signature, ratification and accession by G.A. Res. 44/25, U.N. GAOR, 4th Sess., Supp. No. 49, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) (entered into force Sept. 2, 1990).

[68] S. Afr. Const. 1996, *supra* note 30, § 28.

Under South African law, several bodies are mandated to pursue the human rights embodied in the Constitution, including: the Public Protector;[69] the Human Rights Commission;[70] the Commission for Gender Equality;[71] the Electoral Commission[72] and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.[73] Of these bodies, the Human Rights Commission and the Gender Commission are central to the implementation and enforcement of the human rights embodied in the Bill of Rights. The establishment of two separate bodies with ostensibly similar functions, albeit the one focusing only on gender, created controversy. Many women advocates were of the opinion that a structure such as a Gender Commission would marginalize and even trivialize women's equality.[74] They believed that the pursuit of women's rights should be incorporated into a structure that promotes rights for all.[75] Opponents argue that only a separate body can deal comprehensively with gender equality concerns and develop a sustained and systemic approach to the eradication of sexism and patriarchy.[76] In the final analysis, the latter sentiments held sway and a separate body, the Gender Commission, was established. In addition to the constitutionally mandated bodies, several human rights bodies, including the office of the Status of Women, of the Office on the Rights of the Child and the Office on the Rights of People with Disabilities, have been set up in the office of the President.

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[69] *Id*. § 182, empowering the Public Protector to "investigate any conduct in state affairs, or in the public administration, or in any sphere of government that is alleged or suspected to be improper or to result in any impropriety or prejudice … ."

[70] The Human Rights Commission is mandated to: "promote respect for human rights and a culture of human rights; promote the protection, development and attainment of human rights; monitor and assess the observance of human rights" in South Africa. *Id*. § 184.

[71] The Commission for Gender Equality is empowered to "promote respect for gender equality, and the protection, development and attainment of gender equality … ." *Id*. § 187.

[72] The task of the Electoral Commission is to "manage elections" and to "ensure that they are free and fair." *Id*. § 190.

[73] As its name suggests, the Commission is mandated to "promote respect for the rights of cultural, religious and linguistic communities; to promote and develop peace, friendship, humanity, tolerance and national unity amongst cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association … ." *Id*. § 185.

[74] *See* Catherine Albertyn, *National Machinery for Ensuring Gender Equality, in* The Constitution of South Africa From a Gender Perspective 17 (Sandra Liebenberg ed., 1995); *see also* Catherine Albertyn, *Women and the Transition to Democracy in South Africa, in* Gender and the South African Legal Order 39 (Christina Murray ed. 1994).

[75] For an interesting discussion of this debate, see Albertyn, *National Machinery for Ensuring Gender Equality*, supra note 74, at 16-17.

[76] *See* Penelope E. Andrews, *Striking the Rock: Confronting Gender Equality in South Africa*, in 3 Mich. J. Race & L. 307, 330-331 (1998).

D. *The Jurisprudence of the Constitutional Court and International Law*

The Constitutional Court of South Africa has adopted a bold vision of human rights in its jurisprudence. Since its inception in 1995, the Constitutional Court has heard several cases that directly implicate the international human rights agenda embodied in the Constitution. In this endeavor the Constitutional Court has incorporated international human rights law in its interpretation of the Bill of Rights, and by doing so has spawned an international human rights jurisprudence that continues to be cited in many jurisdictions.[77] Indeed, the international human rights legal literature constantly references the transformative human rights jurisprudence of the South African Constitutional Court.[78]

The Court's docket has included international legal issues in several landmark cases. The first case that the Court heard in 1995, *S v Makwanyane*, concerned the constitutionality of the death penalty.[79] The Court, invoking the right to life and right to dignity found in the Bill of Rights, the International Covenant on Civil and Political Rights, and other human rights instruments, struck down the death penalty as unconstitutional.[80] In this case, the Constitutional Court demonstrated its central role in the democratic transformation process in South Africa. The case, littered with references to international law, including the International Covenant on Civil and Political Rights,[81] and foreign law, including the United States Supreme Court decision in *Furman v. Georgia*[82] has demonstrated that its approach was jurisprudentially expansive, as opposed to a more self-referential approach taken by the United States Supreme Court, for example.

In a series of cases, the Court examined the question of equality, the paramount principle in the Bill of Rights and in international law. Exploring a range of factual situations, including those involving the rights of HIV positive persons not to be

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[77] *See* Jennifer L. Hube, *Legal Representation for Indigent Criminal Defendants*, 5 Duke J. Comp. & Int'l L. 425 (1995) (citing *S v Baloyi*); Alan Clarke, *Terrorism, Extradition and the Death Penalty*, 29 Wm. Mitchell L. Rev. 803 (2003); Martha L. Salomon, *AIDS is Risky Business: Examining the Effects of the AIDS Crisis on Publicly Traded Companies in South Africa and the Implications for Both South African and U.S. Investors*, 37 Vand. J. Transnat'l L. 1473 (2004).

[78] *See, eg.*, Klare, *supra* note 41; *see also*, Dennis Davis, Democracy and Deliberation (1999).

[79] S v Makwanyane, *supra* note 56.

[80] *Id.*, para. 151.

[81] Adopted and opened for signature, ratification and accession by G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6319 (Dec. 16, 1966) (entered into force Mar. 23 1976)(mentioned at para. 62).

[82] 408 U.S. 238 (1972) (mentioned at para. 40).

discriminated against in their employment,[83] the rights of permanent residents not to be treated unfairly in comparison to citizens in the workplace,[84] the rights of homosexuals to be engage in consenting sexual conduct[85] and the rights of African girls and women not to be discriminated against under indigenous customary law,[86] the Court has formulated a substantive vision of equality.[87] In doing so the Court has moved from a mere formal approach to one that recognizes the peculiar realities of South Africa and has attempted to contextualize equality within the South African context.[88] The court has accomplished this by embracing international human rights principles, whilst at the same time recognizing the peculiar context of South Africa's history of inequality, and the need to develop a comprehensive indigenous version of equality.[89]

This was demonstrated in one of the earliest cases that analyzed the right to equality, in which the court was confronted with a challenge by a convicted male prisoner to a Presidential Pardon.[90] The challenged Presidential Pardon, issued by President Nelson Mandela after South Africa's first democratic election, had pardoned certain categories of prisoners, including women in prison who had children under the age of twelve.[91] The complainant challenged the Presidential Pardon on the basis that it violated his constitutional rights to equality and that

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[83] Hoffman v S. Afr. Airways 2001 (1) SA 1 (CC) (S. Afr.) (unanimously holding that the airline could not exclude an otherwise qualified asymptomatic HIV-positive job applicant and rejecting the airline's economic interests as compelling when balanced against the infringement of the applicant's right to equality).

[84] Larbi-Odam v Member of the Exec. Council For Educ. (Nw Province) 1998 (1) SA 745 (CC) (S. Afr.) (unanimously invalidating a regulation that prohibited foreign citizens from permanent employment as teachers in state schools).

[85] Nat'l Coal. for Gay and Lesbian Equal. v Minister of Justice 1999 (1) SA 1 (CC) (S. Afr.) (declaring unconstitutional the common law offense of sodomy and applicable criminal laws on sodomy).

[86] BHE v Mag. (1) SA 563 (CC) (S. Afr.) (finding the inheritance rules for black estates found in the Black Administration Act and the system of male primogeniture in African customary law inconsistent with the Constitution).

[87] *See* Catherine Albertyn & Janet Kentridge, *Introducing the Right to Equality in the Interim Constitution*, 10 SAJHR 149 (1994).

[88] *See* Pierre de Vos, *Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness*, 17 SAJHR 258 (2001).

[89] A classic example was AZAPO v Pres. of the Republic of S. Afr., *supra* note 3, in which the Constitutional Court struck down a challenge to the amnesty provisions of the Truth and Reconciliation Commission. Recognizing the important international human rights principles implicated in the amnesty provisions, the Court nonetheless rejected the international law approach, in favor of the principles agreed to during South Africa's negotiations towards a constitutional democracy.

[90] President of the Republic of S. Afr. v Hugo 1997 (4) SA 1 (CC) (S. Afr.).

[91] Presidential Act No. 17 of 1994.

it discriminated against him on the basis of sex. The Court, in its judgment, engaged in a comprehensive discussion of equality.

Applying the test outlined in the Constitution, the Court found that the discrimination was unfair.[92] But the Court also found that the discrimination could be justified because of the benefits derived from the pardon, including those that accrued to children and their mothers;[93] in the Court's opinion, the latter was clearly the most disadvantaged group in South African society. Although acknowledging that its findings may reinforce a stereotype about women, child caring and child rearing, the Court recognized that mothers are the primary caregivers of children. The Court saw its approach as pragmatic: one that placed the issue squarely within the reality of the South African context. Finding the discrimination valid, the Court stated that because women have historically been discriminated against, the adoption of this contextual approach would benefit women, and not perpetuate a disadvantage.[94] A literal reading of the Court's judgment suggests a contradiction of one of the principles incorporated in The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), namely, that state parties need:

> To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.[95]

The dissent forcefully challenged the pragmatic approach taken by the majority and the stereotypes that the majority appeared to perpetuate, stating very clearly that the Constitution was meant to be transformative.[96] But the majority judgment, despite the dissent, reflected that the judges interpreted the Constitution as not just providing a formal flavor to equality. They grappled with both the

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[92] The Constitution articulates a two-part test for finding discrimination. First, if discrimination is alleged and found on any of the listed grounds, such as race, gender, marital status or nationality, that finding creates a presumption of unfairness. The person against whom the allegation of discrimination is made must then rebut the presumption of unfairness by showing the validity of the action. *See* S. Afr. Const. 1996, *supra* note 30, § 9, paras. 1 & 5.

[93] President of the Republic of S. Afr. v Hugo, *supra* note 90, paras. 39 & 47.

[94] "In this case, mothers have been afforded an advantage on the basis of a proposition that is generally speaking true. There is no doubt that the goal of equality entrenched in our constitution were better served if the responsibilities for child rearing were more fairly shared between mothers and fathers. The simple fact of the matter is that at present they are not. For the moment then, and for some time to come, mothers are going to carry greater burdens than fathers in the rearing of children. We cannot ignore this crucial fact in considering the impact of discrimination in this case." *Id.*, (judgment of Justice O'Regan at 113).

[95] Article 5(b), http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article5.

[96] President of the Republic of S. Afr. v Hugo, *supra* note 90, at 63 (judgment of Justice Kriegler).

contemporary realities of formal equality in South Africa, and the deeply entrenched patterns of gender equality, one of the legacies of apartheid. As so eloquently stated by Justice O'Regan:

> To determine whether the discrimination is unfair it is necessary to recognize that although the long-term goal of our constitutional order is equal treatment, insisting upon equal treatment in circumstances of established inequality may well result in the entrenchment of that inequality.[97]

In its approach to curbing violence against women, several decisions of the Court have been particularly compelling. In these decisions, the Court utilized the imperatives in the Bill of Rights, as well as those found in international instruments such as the International Convention on the Elimination of All Forms of Discrimination Against Women[98] and the Vienna Declaration on Violence Against Women.[99] The Court adopted a purposive approach, outlining very clearly in its pronouncements the need to eradicate the ubiquitous problem of violence against women in South Africa, and has applied this approach in both the public as well as the private law arena. In *S v Baloyi*, a challenge to South Africa's domestic violence legislation, the Court has articulated clearly that while it will protect the procedural rights of those accused of domestic violence, it will ensure that the constitutional mandate that prohibits all forms of violence, including violence committed in the home, be clearly pursued to protect women.[100] Justice Albie Sachs, writing an impressive judgment for the majority noted:

> All crime has harsh effects on society. What distinguishes domestic violence is its hidden repetitive character and its immeasurable ripple effects on our society and in particular, on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished.[101]

The Court, reinforcing its commitment to stemming public violence against women, has held the police and other government authorities liable where they negligently failed to protect women from violence committed by third parties.[102] By doing so the Court has infused into the common law, in this case the law of

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[97] *Id*. at 112 (judgment of Justice O'Regan).

[98] Adopted and opened for signature, ratification and accession by G. A. Res. 34/180 U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 18, 1979) (entered into force Sept. 3, 1981).

[99] Vienna Declaration and Programme of Action, World Conference on Human Rights, U.N. Doc. A/CONF. 157/23 July 12, 1993.

[100] S v Baloyi, *supra* note 57.

[101] *Id*. at 11.

[102] Alix Jean Carmichele v Minister of Safety & Sec. 2001 (4) SA 938 (CC) (S. Afr.).

torts, the principles embodied in the Constitution.[103] In this case the police and prosecutors had recommended the release without bail of a man awaiting trial on a charge of attempted rape, and who later brutally attacked another woman. The Court held that the common law could be sufficiently developed to impose on police and prosecutors a legal duty to protect such third parties, in light of the Constitution and international law's prohibition on gender discrimination and the right to dignity, freedom and security of women.[104]

The Court has struck an impressive balance between the competing rights of privacy and state regulation,[105] and religious rights and equality,[106] appreciating the context of the lived realities and steadfastly held beliefs of individuals and groups, and the need to create a society predicated on equality and dignity. In the same vein the Court has tried to strike a healthy accord between the rights of criminals in a very violent society, such as South Africa, and the rights of individuals to security of the person.[107]

By far the most impressive accomplishments of the Court has been its slow evolution of a socio-rights jurisprudence that attempts to redress the appalling economic conditions within which a large number of South Africans still find themselves. Mindful of the doctrine of separation of powers and not wishing to overcome the prerogative of Parliament, the Court has nonetheless attempted to ensure that the

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[103] S. Afr. Const. 1996, *supra* note 30, § 39, para. 2, provides that, "[w]hen interpreting any legislation and when *developing the common law* … every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." (emphasis added).

[104] Alix Jean Carmichele v Minister of Safety & Sec., *supra* note 102, para. 33.

[105] *See* Nat'l Coal. for Gay and Lesbian Equal. v Minister of Justice, *supra* note 85. *See also* De Reuck v Dir. Pub. Prosec. (W.L.D.) 2004 (1) SA 406 (CC) (S. Afr.) (finding a law prohibiting the importation and possession of child pornography to be a reasonable interference with privacy and not overbroad, given an objective definition of child pornography whose primary element is the stimulation of erotic rather than aesthetic feeling, and the presence of a good cause exemption for individuals conducting research on child pornography).

[106] *See* Christian Educ. S. Afr. v Minister of Educ. (4) SA 757 (CC) (S. Afr.) (recognizing that corporal punishment in Christian schools may constitute an important part of religious identity and ethos, the Court nonetheless upheld a law of general applicability prohibiting corporal punishment in schools given the compelling public interest in protecting students from physical and emotional abuse and what it viewed as a limited interference in the ability of parents to otherwise follow their religious conscience). *See also* Prince v Pres. of the Law Society of the Cape of Good Hope 2002 (2) SA 794 (CC) (S. Afr.) (finding the right of the Rastafarian religion to use cannabis as part of the religious practice outweighed by the state's interest in enforcing drug legislation intended to curb its use).

[107] *See* Alix Jean Carmichele v Minister of Safety & Sec., *supra* note 102. *See also* K v Minister of Safety & Sec. 2005 (9) BCLR 835 (CC) (S. Afr.).

government addresses the needs of the poor in the country. In *The Government of the Republic of South Africa, et al. v Grootboom and Others*,[108] a case widely regarded as international test case on the enforceability of social and economic rights, the Court outlined in great detail the obligation of the government to provide housing for those desperate for shelter. The case concerned an application for temporary shelter brought by a group of people, including a number of children, who were without shelter following their brutal eviction from private land on which they were squatting. The conditions under which the community lived were deplorable. They had access to water through one tap that served hundreds of people, and no sanitation facilities. The Court affirmed that the government had a duty in terms of Section 26 of the Constitution (the right to adequate housing)[109] to adopt reasonable policy, legislative and budgetary measures to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions. The judgment also dealt in details with the implications of the children's socio-economic rights enshrined in Section 28.[110]

The Court dealt in some detail with the provisions in the International Covenant on Economic, Social and Cultural Rights (ICESCR), and in particular the articles that outline the substantive nature of the rights incorporated in the Covenant as well as the obligations of states to take reasonable steps to realize those rights.[111] Elaborating in the obligation in both ICESR and the South African Constitution, the Court determined that the government had the duty to respect, protect, promote and fulfill these rights.[112] In addition, the Court examined the comments of the United Nations Committee on Economic, Social and Cultural Rights (ECOSOC), and particularly the comment that socio-economic rights contain a minimum core.[113] The Court, pointing out that ICESCR

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[108] 2001 (1) SA 46 (CC) (S. Afr.).

[109] S. Afr. Const. 1996, *supra* note 30, § 26 provides that: "(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right. (3) No one may be evicted from their home, or have their home demolished … ."

[110] *Id.* § 28 covers a range of rights to which children are entitled, including basic nutrition, shelter, basic health care and social services.

[111] In particular, the Court analyzed § 11.1 of the Covenant, which provides that the "[t]he State parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, … The State parties will take appropriate steps to ensure the realization of this right … ." § 2.1 of the Covenant provides that, "[e]ach State party to the present Covenant undertakes to take steps, … to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means."

[112] S. Afr. Const. 1996, *supra* note 30, § 7, para. 2.

[113] Gov't of Republic of S. Afr. v. Grootboom 2000 (11) BCLR 1169 (CC) (S. Afr.).

provides for the right to housing, whereas the South African Constitution provides a right of access to housing, rejected the "minimum core" approach and instead opted for one that imposed on the South African the requirement of reasonableness in its housing policy.[114] Although the Court engaged in an extensive analysis of ICESR and the obligations as articulated by ECOSOC, the Court concluded that the concept "minimum core" did not create sufficient flexibility and appreciation of the peculiar conditions of South Africa.[115]

In line with its requirement of reasonableness, the Court has also mandated the government, in compliance with the right to health as delineated in the Bill of Rights,[116] as well as the rights of children,[117] to provide anti-retroviral drugs to HIV-positive pregnant women at public hospitals throughout South Africa.[118] The Court has also protected those who are not South African citizens from violations of their constitutional socio-economic rights, holding that a scheme that excluded permanent residents from social assistance was discriminatory and unfair.[119]

The above analysis demonstrates the manner in which the Constitutional Court has embraced international legal principles, and particularly with regard to its human rights, equality and socio-economic rights jurisprudence. And even though the Court may not have adopted the methodological approaches of the relevant international human rights body, such as its diversion from that taken by the United Nations Committee on Economic, Social and Cultural Rights on the question of the minimum core content of a right, the Court has for the most part embraced both the substance and the spirit of the various international legal documents.

In some cases, however, the Court has found that resort to international law was irrelevant or marginal to the determination of the constitutionality or otherwise of a statute or other form of governmental action.[120] This was essentially the approach

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[114] *Id*. paras. 27-29.

[115] *Id*. para. 33.

[116] S. Afr. Const. 1996, *supra* note 30, § 27 provides that everyone "has the right to have access to health care services, including reproductive health care" and that the "state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of all of these rights …."

[117] Gov't of Republic of S. Afr. v. Grootboom, *supra* note 113.

[118] Minister of Health v. Treatment Action Campaign 2002 (2) SA 721 (CC) (S. Afr.) (finding unreasonable the government's refusal to make widely available the anti-retroviral drug nevirapine until it had further tested the safety and efficacy of the drug and its failure to set out a time frame for a national program to reduce mother-to-child transmission of HIV).

[119] Khosa v. Minister Soc. Dev.; Mahlaule v. Minister Soc. Dev. 2004 (6) SA 505 (CC) (S. Afr.) (finding in the scheme a violation of the right to equality as well as finding that the Constitution vests a right to social security in "everyone").

[120] For a thoughtful analysis of the way in which the Constitutional Court "reads in and out" international law, see Catherine Adcock Admay, *Constitutional Comity: Mediating the Rule of Law Divide*, 26 N.C. J. Int'l & Com. Reg. 723 (2001).

taken by the Court in a highly publicized case challenging both the constitutionality of the Truth and Reconciliation Commission (TRC), as well as its putative violation of international law,[121] in particular, the international law requirement that those who commit gross violations of human rights be punished as mandated by four Geneva Conventions.[122] In this case the Court was faced by a challenge from family members of those tortured and killed by the South African government, that the empowering statute of the TRC,[123] and especially its amnesty committee,[124] was both unconstitutional and in violation of international law.[125]

The petitioners claimed that the well-established international legal principle, that the perpetrator of gross violations of human rights has to compensate the victim for the injuries suffered, are clearly violated by the amnesty provisions of the T.R.C.[126] Regarding the constitutionality of the TRC statute, the petitioners claimed that the amnesty provision immunized perpetrators of gross violations of human rights from criminal and civil liability. This immunity applies as well to those who might be held vicariously liable for the perpetrators' actions, including state authorities.[127] These amnesty provisions clearly violated the Constitution, which provided that:

> Every person shall have the right to have justiciable disputes settled by a court of law, or where appropriate, another independent or impartial forum.[128]

The petitioners argued that the amnesty committee was neither a "court of law" nor an "independent or impartial forum", and that the amnesty committee was not empowered to settle "justiciable disputes."[129] The petitioners relied on the well established international law principle that those who are victims of gross

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[121] AZAPO v Pres. of the Republic of S. Afr., *supra* note 3.

[122] Article 49 of the first Geneva Convention For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Article 50 of the second Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked members of Armed Forces at Sea; Article 29 of the Third Geneva Convention relative to the Treatment of Prisoners of War; and Article 46 of the fourth Geneva Convention relative to the Protection of Civilian Persons during time of War. *See Id.*, para. 25.

[123] Promotion of National Unity and Reconciliation Act No. 34 of 1995.

[124] In terms of the statute, amnesty is to be granted to all "persons who make full disclosure of all the relevant facts relating to acts associated with a political objective. …" *Id.*, § 3(1)(b).

[125] AZAPO v Pres. of the Republic of S. Afr., *supra* note 3, para. 25.

[126] *Id.*

[127] These amnesty provisions are contained in § 20 of the Promotion of National Unity and Reconciliation Act, *supra* note 123.

[128] S. Afr. Const. 1996, *supra* note 30, § 22.

[129] AZAPO v Pres. of the Republic of S. Afr., *supra* note 3, para. 8.

human rights violations have the right of access to a legal forum to have their claims considered and adjudicated.[130]

In a detailed judgment, the Court in effect skirted the relevant international legal principles by focusing only on the constitutionality of the TRC. Judge Mahomed, writing for the majority, found that the TRC had in fact passed constitutional muster. Even though the Constitution clearly provided the right to have "justiciable disputes settled by a court of law," the same section empowers the South African government to provide amnesties for past wrongs where it is deemed appropriate.[131]

The holding in this case generated some controversy, as many commentators were of the opinion that the Court gave short shrift to international law by refusing to engage with the relevant issues in its deliberations.[132] It is arguable that the Court in fact followed the contextual approach it adopted in other cases, and that the constitutional principles provided the Court with a sufficient basis on which to dispose of the challenge to the TRC. The Court has also noted that although the Constitution mandates the Court to consider international law, it does not have to adopt such law.

E. *Conclusion*

As I mentioned earlier in this chapter, the South African Constitution and its Bill of Rights, coupled with an impressive equality and human rights jurisprudence generated by the Constitutional Court, has been admired widely. I tried to demonstrate that healthy synergy between international legal principles and the South African constitutional principles, and how each set injected into the other the possibilities of human rights transformation. I also tried to demonstrate how the Constitutional Court has been strategically mindful of its mandate under the Constitution to consider international and foreign law, and to use international law to pursue the agenda of transformation envisioned by the Constitution. But

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[130] *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, Final Report Submitted by Mr. Theo Van Boven, Special Rapporteur, United Nations Human Rights Commission, U.N. Doc. E/CN.4/Sub.2/1993/8 (July 2, 1993).

[131] S. Afr. Const. 1996, *supra* note 30, § 22.

[132] *See, e.g.*, John Dugard, *Reconciliation and Justice: The South African Experience*, 8 Transnat'l Legal & Contemp. Probs. 277 (1998); *see also* Ziyad Motala, *The Constitutional Court's Approach to International Law and its Method of Interpretation in the 'Amnesty Decision': Intellectual Honesty or Political Expediency*? 21 SAYIL 29 (1996).

the Court has also been mindful of the contextual realities of South Africa, and has attempted to cultivate an indigenous human rights jurisprudence, that will take root in South Africa even though it draws from international and comparative human rights principles.

Of course the human rights project in South Africa extends beyond the text of the Bill of Rights or the deliberations of the Constitutional Court and other legal bodies mandated to interpret and enforce the Bill of Rights. The reality of poverty and the gross economic inequalities so pervasive in South Africa threaten to undermine the constitutional project. Moreover, the increasingly privatized nature of the South African economy may corrode the possibilities generated by the incorporation of socio-economic rights in the Constitution. In order for the formal constitutional project to be effective, at the minimum it has to give rise to a culture of human rights.

Just as apartheid was a concern of the global community, so too the contemporary constitutional project in South Africa generates significant global interest. One aspect of the transformation process, that is, the formal incorporation of human rights is underway. The challenge for South Africa is to translate those formal rights into tangible political, social and economic rights.

The New World Trading System and China

By Li Chen

A. *Introduction*

More than seven decades before, Professor Manley O. Hudson described the development of international organization in his distinguished book Progress in International Organization as stemming from mid-19th century advances in communication and transportation. These advances, made possible by the invention of the steam-engine and the control of electricity, provided the impetus for the establishment of the earliest international organizations, most of which were concerned with communication and transportation. The lessons of World War I convinced some that the world could be saved from another such holocaust only by organization for common action. The establishment of the League of Nations and the Permanent Court of International Justice made great contributions to the progress of international organizations. The functions and jurisdictions of international organizations since then were greatly extended to further international affairs. Hudson submitted his vision on how to measure the progress of international organizations:

> No one can say that any of our current conceptions as to the ends of co-operation will not be discarded by a later generation; but it would seem altogether probable that the institutions which we are creating will be kept alive. None of them can be said to have achieved a final form; all of them will probably be altered and reconstructed; possibly many of them will be adapted to wholly different purposes. The most that we can do is to give them initial form, and to hand them on for future generations to use as they will. Something will have been gained, however, some progress will have been achieved, if we can place in the hands of successors on the stage of international affairs the instruments which we lacked in 1914.[1]

Even Professor Hudson can hardly imagine in his era the globalization as well as the great progress on the scales of international organizations (intergovernmental or nongovernmental organizations (NGOs) after the World War II. One of the most striking changes in international affairs since World War II has been the

[1] Manley O. Hudson, Progress in International Organization, 119-20 (1932).

Miller & Bratspies (Eds), Progress in International Law, pp. 855–876.

tremendous institutionalization of international economic relations. International economic institutions such as the World Trade Organization (WTO),[2] the World Bank,[3] and the International Monetary Fund (IMF)[4] play critical roles in the world economy. They constitute the main structure of the world economic system.[5] With the end of Cold War and the deepening of globalization in the last decade of the 20th century, more attention has been paid to "geo-economics" than to "geo-politics" by the international community.[6] The economic interdependence of different nations has been greatly strengthened, and there are calls for more international cooperation.

Today, we come to the era of WTO-based world trading system. As a permanent negotiating forum, the WTO, whose principal mandate is trade liberalization within a rule-based system, has come to be one of the most powerful institutions in the system of global economic governance. Produced after the lengthy, extensive, and complex Uruguay Round of trade negotiation, the WTO has been described as the "central international economic institution."[7] The WTO is either a modest enhancement of the General Agreement on Tariffs and Trade (GATT),[8] which preceded it, or a watershed moment for the institutions of world economic relations embodied in the Bretton Woods System.[9] The WTO continues the GATT institutional ideas and many of its practices on one hand, and overcomes a

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[2] The World Trade Organization (WTO) is the only international organization dealing with the global rules of trade mainly between nations. Its main function is to ensure that trade flows as smoothly, predictably and as freely as possible. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 (1994) [hereinafter Marrakesh Agreement].

[3] The International Bank for Reconstruction & Development (World Bank) was created to help provide funds for the reconstruction of then war-ravaged nations and to monitor and enforce rules that would regularize and encourage international trade. Articles of Agreement of International Bank for Reconstruction & Development, July 22, 1944, 60 Stat. 1440, 2 U.N.T.S. 134.

[4] The International Monetary Fund (IMF) was established to promote monetary cooperation among nations and stability in foreign exchange. Articles of Agreement of the International Monetary Fund, July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39 [hereinafter IMF].

[5] Deborah Z. Cass, The Constitutionalization of the World Trade Organization (2005); Reforming the World Trading System (Ernst-Ulrich Petermann ed., Int'l Econ. Law Series 2005); WTO: Institutions and Dispute Settlement (Rüdiger Wolfrum, et al. eds., Max Planck Commentaries on World Trade Law Series No. 2, 2006).

[6] *See* John H. Jackson, *Global Economics and International Economic Law*, 1 J. Int'l Econ. L. 1 (1998).

[7] Leonard Bierman et al., *The General Agreement on Tariffs and Trade from a Market Perspective*, 17 U. Pa. J. Int'l Econ. L. 821, 845 (1996).

[8] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 187 (1947) [hereinafter GATT].

[9] John H. Jackson, The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations 399 (2000).

number of the GATT "birth defects" on the other; the WTO Charter offers considerably better opportunities for the future evolution and development of the institutional structure for international trade cooperation, it offers more flexibility for future inclusion of new negotiated rules or measures which can assist nations to face the constantly emerging problems of world economy.[10]

More than ten years have passed since the WTO was founded on January 1, 1995.[11] The operation of the WTO has been proved to be successful in many aspects due to its unique features. As Dr. Supachai Panitchpakdi, the Director General of the World Trade Organization from 2002-2005 said: "The WTO [is] now a major player not only in the conduct of trade relations but in global governance."[12]

Meanwhile, the evolution of the WTO is also facing a serious challenge. Dr. Supachai worried that "[t]he failure to launch a new round of negotiations at the Ministerial Conference in Seattle and the later setback at the midway point of the Doha Development Agenda negotiations in Cancun raised some serious questions about the future of the WTO."[13] One of the questions is that due to the serious divergence between developed and developing members, the Cancun Conference fails to address developed countries' prevailing protectionism in the sectors of agriculture and textiles, on which many developing countries depend for their subsistence. This even led to some doubts and skepticism about the effectiveness of the multilateral trading system.[14]

On November 11, 2001, after 15 years of protracted negotiations, China became a member of the World Trade Organization. As the largest developing country and the fastest growing economic entity in the world,[15] China's accession to the WTO is a landmark event not only in China's economic reform but also in the evolution of the international trading system. China's economy and international trade are so large that the expansion of economic output and trade

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[10] John H. Jackson, *The World Trade Organization: Watershed Innovation or Cautious Small Step Forward? in* The World Economy-Global Trade Policy 1995, 11 (Sven Arndt & Chris Milner, eds., 1995).

[11] *See* Marrakesh Agreement.

[12] Peter Sutherland et al., Report by the Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millenium* (2004), http://www.wto.org/english/thewto_e /10anniv_e/future_wto_e.htm (follow "Foreward" hyperlink) [hereinafter Sutherland Report].

[13] *Id*.

[14] *See* Cho Sungjoon, *A Bridge too Far: The Fall of the Fifth WTO Ministerial Conference in Cancun and the Future of Trade Constitution*, 7 J. Int'l Econ. L. 219, 219 (2004).

[15] According to the latest official statistics, China's domestic products (GDP) rose from 10,965.5 billion Yuan (US $1,324.8 billion) in 2001 to 18,232.1 billion Yuan (US $2,225.7 billion) in 2005, scoring an annual average growth rate of 9.5% for five consecutive years. National Bureau of Statistics of China, http://www.stats.gov.cn.

resulting from its membership is likely to perceptibly affect the growth of global trade and thus the pace of expansion of global output, as the only major trade nation that is not an advanced industrial economy, China will almost certainly bring a distinct perspective to the negotiations and exert its power on matters important to its trade.[16] China's accession to the WTO augurs well for the country's full integration into the world economy. The extent of China's compliance with the WTO rules, its role in this organization, and its possible influence on the future of the WTO has attracted a great deal of attention and interest from the international community.[17]

B. *The Unique Features and New Contribution of the WTO to International Organizations*

The WTO has many features in common with other intergovernmental organizations. For this reason, it is possible to characterize the WTO as a structural descendent of the League of Nations, which Professor Hudson so approvingly described in his 1931 lectures,[18] and which serves as the template for nearly all contemporary international organizations. WTO law also is no different from the normative schemes that operate in other branches of international law. The general principles, customary rules and the way of interpreting international law all apply to the operation of WTO law. Notwithstanding this, the WTO still has many unique characteristics that distinguish it from other international organizations.

I. *Wide Membership*

Typically, membership in intergovernmental organizations such as the United Nations, the IMF, and the WHO is limited to duly recognized nation-states.[19] By contrast, WTO membership consists of both sovereign States and separate customary territories. For example, the European Community holds WTO membership as a regional organization,[20] and the Hong Kong Special Administration Region,

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[16] *See generally* Nicholas R. Lardy, Integrating China Into the Global Economy ch. 5 (2002).

[17] Editorial, *Beware Chinese Promises*, Wash. Post, Oct. 16, 2000, at A26.

[18] Hudson, *supra* note 1, at 25-46.

[19] *See respectively*, U.N. Charter ch. 2; Constitution of the World Health Organization ch. 3, July 22, 1946, 62 Stat. 6279, 14 U.N.T.S. 185; IMF, *supra* note 4, at art. 2.

[20] The European Union (known for legal reasons as the European Communities in WTO matters) has been a WTO member since January 1, 1995. The 27 member states of the European Union are WTO members in their own right. The European Union is a single customs union with a single trade policy and tariff. The European commission speaks for all European Union member States at almost all WTO meetings. WTO, http://www.wto.org.

Macao Special Administration region and the island of Taiwan, under the name Chinese Taipei, enjoy membership in the WTO.[21] As a result, as of July, 2007, there were 151 WTO Members of which 145 were recognized sovereign states and 4 were other entities.

II. *Extensive Jurisdiction*

The WTO Agreement laid the basis for a highly complex international treaty system that consists of some 20 multilateral trade agreements, with supplementary "Understandings," "Protocols," "Ministerial Decisions," "Declarations" and more than 30,000 pages of "Schedules of Concessions" for trade in goods, and "Specific Commitments" for trade in services.[22] In contrast to the GATT, which focused predominantly on tariff agreements, the WTO covers more issues, extending far beyond the traditional domain of tariffs and trade in goods. Its rules reach deeply into domestic affairs affecting areas as diverse as intellectual property (TRIPS),[23] services (GATS)[24] and investment measures (TRIMs).[25] It also puts in place a structure that will necessarily have to face an increasing number of problems during the next few decades.

One of the main functions of the WTO is "to provide a forum for negotiations among WTO Members and a framework for the implementation of the results of those negotiations."[26] The WTO Agreements are the result of eight rounds of negotiations. The umbrella structure of the WTO dictates that the legal system of the WTO is not static, but evolving. Since the first WTO Ministerial Conference in Singapore, many new trade-related subjects have been recommended for incorporation into the WTO legal system, including several attempts to extend the jurisdiction of the WTO to issues relating to the environment, competition policy, investment and labor standards etc. The Doha Ministerial conference

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[21] Article 12 of the Marrakesh Agreement reads, "Any State or Separate Territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Agreements may accede to this Agreement on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and Multilateral Trade Agreements annexed thereto." *See generally* China's accession to the WTO and its relationship to the Chinese Taipei accession and Hong Kong and Macao, China (explaining Hong Kong SAR, Macao SAR and Chinese Taipei membership in the WTO and the related official documents), http://wto.org/english/thewto_e/acc_e/chinabknot_feb01.doc.

[22] WTO Legal Texts, http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

[23] Trade Related Aspects of Intellectual Property, Marrakesh Agreement, Annex 1C [hereinafter TRIPS].

[24] General Agreement on Trade in Services, Marrakesh Agreement, Annex 1B [hereinafter GATS].

[25] Agreement on Trade-Related Investment Measures, Marrakesh Agreement, Annex 1A [hereinafter TRMS].

[26] *See* Marrakesh Agreement, art.3.

decides to launch a new round of trade negotiation—The Doha Development Agenda (DDA)—comprising both future trade liberalization and new rule making, underpinned by commitments to strengthen substantially assistance to developing countries. So DDA takes the WTO into a new era, not only will the WTO continue to improve conditions for worldwide trade, it will also, through enhanced and better rules, be able to play a much fuller role in the pursuit of economic growth, employment and poverty reduction. Better international governance and the promotion of sustainable development is the ambitious backdrop to the agenda. As a result, the line between trade policy and development policy has become much more blurred. This development will be helpful to constitute a more reasonable and fair international economic order.

III. *Powerful Dispute Resolution Mechanism*

The unique contribution of the WTO to the development of international organizations is its powerful Dispute Settlement Mechanism. Through practice, it has become evident that the current WTO dispute settlement procedures are a very significant and positive step forward in the general trend towards rule-based international trade diplomacy.[27] In many ways, the system has already achieved a great deal, and is providing some of the necessary attributes of "security and predictability" that traders and other market participants need, and which is called for in the Dispute Settlement Understanding (DSU), Article 3.[28] The WTO dispute settlement system is used far more frequently than originally anticipated by both developed and developing states. As of 20 July 2006, there have been 369 complaints brought by Members of the WTO. This is a rate many times the average during the history of the GATT for dispute settlement complaints.[29] Another example of the success of the WTO dispute settlement mechanism is the record of compliance to the results of the Disputes Settlement System (DSS). Members found in non-compliance by the Dispute Settlement Body (DSB) must withdraw the contested measures, revise their laws, and adapt to the rulings of a panel or the Appellate Body.[30] No system is perfect, and many of these cases remain unanalyzed, but the record of compliance is indeed quite good. [31]

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[27] John H. Jackson, *Dispute Settlement and the WTO: Emerging Problems*, 1 J. Int'l Econ. L. 329 (1998).

[28] *See generally* Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement, Annex 2, art. 3 (1994) [hereinafter DSU].

[29] WTO, *Chronological List of Dispute Settlements*, http://www.org/english/tratop_e/dispu_e/dispu_status_e.htm#yr2007.

[30] *See generally* DSU, arts. 21-22.

[31] William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. Int'l Econ. L. 15, 17 (2005).

WTO dispute settlement procedures provide for almost all political and legal methods of dispute settlement, such as bilateral and multilateral consultations,[32] good offices,[33] conciliation,[34] mediation,[35] quasi-judicial panels and appellate review procedures,[36] legal binding rulings or non-binding recommendations by the DSB,[37] international arbitration among states or among private parties.[38] But the hallmark of WTO dispute settlement is its "automaticity" and "judicialization." The WTO DSS is a profound reform of the GATT Disputes Settlement System that responds to the problems, or "birth defects" created by the fact that the GATT was never intended to be an organization.[39]

1. *Automatic Jurisdiction*

A WTO Member has a right to bring a case against any other Member.[40] By becoming a party to the WTO agreements, Members have accepted in advance the jurisdiction of the WTO dispute settlement process. In contrast to jurisdiction based on explicit consent of the parties in many international dispute settlement institutions,[41] the jurisdiction of the WTO dispute settlement mechanism is, to some extent, "compulsory."[42]

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[32] DSU, art. 4.

[33] *Id*. at art. 5.

[34] *Id*.

[35] *Id*.

[36] *Id*. at arts. 7-18.

[37] *Id*. at art. 21.

[38] *Id*. at art. 25.

[39] *See* John H. Jackson, William J. Davey, & Alan O. Sykes, Legal Problems of International Economic Relations (American Casebook Series, 4th ed. 2002).

[40] *See generally* DSU, art. 3.

[41] For example, Article 36 of the Statute of the International Court of Justice (ICJ) depicts the Court's contentious jurisdiction. There are basically three ways in which states can submit to the jurisdiction of the ICJ.. First, under Article 36(1), states can accept the court's jurisdiction on an *ad hoc* basis for the adjudication of an existing dispute; second, also under Article 36(1), states can adhere to a treaty, be it bilateral or multilateral, in which the Court's jurisdiction is accepted for cases relating to the interpretation or application of the treaty or for any other disputes that might arise; third, under Article 36(2), which is known as the "optional clause," the states parties to the Statute may by means of a unilateral declaration undertake that "they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes…"involving issues of law or fact governed by rules of international law. Statute of the International Court of Justice, 59 Stat. 1031, T.S. 993 (June 26, 1945).

[42] Under the WTO dispute settlement mechanism, if a member state believes that a measure adopted by another member state has deprived it of a benefit owed to it under the GATT or under other one of the other covered agreements, it may call for consultations with the other member state; if the second state does not response within the deadline, or the consultations fail to resolve the

2. *Strict Timetable*

The WTO system of dispute settlement builds on the practices in the GATT as they had evolved over five decades, largely in a series of informal or "pragmatic" arrangements based on GATT articles 21 and 22. These articles gave little guidance, however. Among the most innovative reforms[43] that the WTO DSU made to the GATT dispute settlement system is the creation of strong deadlines and a fallback procedure whereby the WTO Director-General can appoint the members of a panel if no agreement is reached in a reasonable time. Under Article 4 of the DSU, for instance, if the complaint state calls for consultations with another member state, the second state must to reply within 10 days and enter into consultations within 30 days of receiving the request, if consultations fail to resolve the dispute within 60 days after receipt of request for consultations, the complaint state may request the establishment of a panel; the DSU also provides that the period from the date of composition of the panel to issuance of the final report shall as a general rule not exceed six months.[44]

3. *"Reverse Consensus" Rule*

One of the "birth defects" of the GATT dispute settlement system was its "consensus rule" for decisions on both the establishment of a panel after a request from a complaint, and the "adoption" of a panel report. According to this rule, a Respondent who desired to avoid a panel process, or who had "lost" in the panel could prevent any legal effect by a single "blocking vote."[45] The WTO DSU, by contrast, created a "reverse consensus" procedure for composing a panel or adopting a panel report.

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dispute within 60 days after receipt of the request for consultation, the complaint state may directly request the establishment of a panel. DSU, art. 3, paras. 3, 7.

[43] The WTO system of dispute settlement contains two major innovations: provision for appellate review of panel decisions by a standing Appellate Body, and provision for compensation or retaliation if a respondent party found to be out of compliance does not repeal or modify its objectionable practice. *See generally* Andreas F. Lowenfeld, International Economic Law 135-198 (2003) (discussing other features of WTO dispute settlement mechanism compared to GATT).

[44] DSU, art. 12, para. 8.

[45] The procedure under GATT was for the panel to make its report and "deliver it to the Council," which is the standing body of the GATT, and which met regularly and disposed of most of the business of GATT. (This body was not provided in the GATT text, but arose through practice and decision of the Contracting Parties). The practice then became firmly established that if the Council approved the report by consensus, it became "binding" if it did not approve then the report would not have a binding status. The problem was "consensus," in effect, the procedure which relied on consensus meant that the nation which "lost" in the panel and might otherwise be obligated to follow the panel obligations, could block the council action by raising objections to the consensus. Thus the losing party to the dispute could avoid the consequences of its loss. Jackson, *supra* note 27.

That means that composing a panel or the adoption of a report occurs automatically unless there is "consensus" against such an action.[46] The losing party could no longer single-handedly block the move to compose a dispute resolution panel or to adopt a report generated by such a panel.

4. *Appellate Review*

The existence of appellate jurisdiction also distinguishes the WTO DSB from many other international tribunals. The WTO DSU establishes a unique new appellate procedure by which any disputant can exercise a right to appeal to the Appellate Body after the first level panel report is final and before it is adopted.[47] This incorporation of the appellate function into the international arena is a relatively novel development.[48] To consider any such appeal, the DSU established an Appellate Body consisting of seven persons.[49] From this seven, a "division" of three is selected to handle each appeal.[50] The final report of the Appellate Body then also goes to the DSB, which automatically adopts it through the "reverse consensus process."[51]

IV. *The Emergence of WTO Jurisprudence*

A substantial body of jurisprudence has emerged from the practice of WTO panels and of the Appellate Body. Because WTO law is just another branch of public international law, the basic rules of international law, such as the interpretation of international law, apply equally to the operation of WTO law. In this way, the dispute settlement jurisprudence of the WTO has also provided important insights on many dozens of particular legal issues far beyond the expanding but still discrete mandate of trade law.

1. *Standard of Review and Sovereignty*

Some observers argue that sovereignty is threatened by the ongoing expansion of international economic institutions.[52] In the WTO context, there are numerous examples of how "sovereignty" is meaningfully discussed and argued. In the dispute

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[46] *Id*.

[47] DSU, art. 17.

[48] Hu Jiaxiang, *The Role of International Law in the Development of WTO Law*, 7 J. Int'l Econ. L. 143, 164 (2004).

[49] DSU, art 17, para. 1.

[50] *Id*.

[51] *Id*. at art. 17, para. 14.

[52] *See* John H. Jackson, *The Changing Fundamentals of International Law and the Ten Years of The WTO*, 8 J. Int'l Econ. L 3 (2005).

settlement process, a major sovereignty issue involves the "standard of review," the degree of deference that the WTO dispute settlement process should accord to national government decisions when they are challenged as inconsistent with WTO obligations. As Professor John Jackson commented, during the past several years the standard of review question has become something of a touchstone regarding the relationship of "sovereignty" concepts to the GATT/WTO rule system.[53] The standard of review appears to be based on a rule of deference gradually developed in United States administrative law,[54] In the GATT disputes settlement history, there were no express terms stipulating this issue but the subject was discussed in some GATT panel cases,[55] especially antidumping cases. In the 1994 United States restriction on imports of tuna, for instance, the panel noted:

> The reasonableness inherent in the interpretation of "necessary" was not a test of what was reasonable for a government to do, but of what a reasonable government would or could do. In this way, the panel did not substitute its judgment for that of the government. The test of reasonableness was very close to the good faith criterion in international law. Such a standard, in different forms, was also applied in the administrative law of many contracting parties, including the EEC and its member states, and the United States. It was a standard of review of government actions which did not lead to a wholesale second guessing of such actions.[56]

As Jackson has argued, nearly all sovereignty debates are fundamentally debates about power allocation.[57] With the exception of the anti-dumping agreement,[58] there is no explicit language establishing a general standard of review for the WTO

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[53] *See* Steven P. Croley and John H. Jackson, *WTO Dispute Procedures, Standard of Review, and the Deference to National Governments*, 90 Am. J. of Int'l L. 193 (1996).

[54] The leading case is Chevron U.S.A v. National Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778 (1984). *See* Lowenfeld, *supra* note 43, at 292; *see* detailed discussion in Croley & Jackson, *supra* note 53.

[55] A very early GATT case working party discussed this subject involved a complaint by Czechoslovakia against a U.S. escape clause action that had raised tariff barriers on the importation of "hatter's fur." Report on the Withdrawal by the United States of a Tariff Concession Under Article XIX of the GATT, paras. 8-14, GATT Sales No. 1951-3 (Nov. 1951).

[56] Panel Report, *United States – Restrictions on Imports of Tuna*, para. 373, DS29/R (1994) (June 16, 1994).

[57] John Jackson, *Sovereignty, Subsidiary, and Separation of Powers: The High-Wire Balancing Act of Globalization, in* The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec, 13, 13-31 (Daniel L. M. Kennedy & James D. Southwick eds., 2002).

[58] Article 17.6 of the Anti-Dumping Agreement stipulates, "In examining the matter referred to in paragraph 5: (1) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned; (2) the panel shall interpret the relevant provisions of the

dispute settlement system's consideration of Members' decisions. Because the WTO DSU itself contains little in the way of direction on this point, panels and the appellate body have relied heavily on Article 11 and Article 3.[59] It is argued that the criteria in these articles require more deference to Members' decisions.[60]

2. *General International Law in WTO Jurisprudence*

After the initial practice of the WTO and its dispute settlement mechanism, it is generally accepted that "WTO rules are part of the wider corpus of public international law."[61] In the first WTO dispute, the *Gasoline case*, [62] the Appellate Body made it quite clear that the WTO is part of the general international legal landscape.[63] It stressed that "the general rule of interpretation set out in Article 31 of the Vienna Convention on the Interpretation of Treaties (words in an agreement are to be given their ordinary meaning in their context and in the light of the object and purpose of the agreement as a whole) has been relied upon by all contesting parties and third parties in the WTO dispute settlement procedures, although not always in relation to the same issue."[64] That general rule of interpretation "has attained the status of a rule of customary or general international law."[65] The Appellate Body reached this conclusion even though the Vienna Convention has not been ratified by all Members of the WTO.

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agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations." Marrakesh Agreement, Annex 1A.

[59] Article 11 of the DSU calls for a panel to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreement…." Article 3 of the DSU provides that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

[60] Professor Jackson for instance, thought that one of the characteristics that seems to be emerging from the jurisprudence with the Appellate Body is a more deferential attitude by the Appellate Body towards national government decisions (or in other words more deference to national "sovereignty"), than sometimes has been the case for the first-level panels or the panels under GATT. Jackson, *supra* note 27.

[61] See Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go*?, 95 Am. J. Int'l L. 535, 538 (2001).

[62] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter Gasoline Standards].

[63] Gasoline Standards, *supra* note 62, at 17.

[64] *Id*.

[65] *Id*.

3. *The Power of Precedent*

It is generally agreed that the strictest type of precedent, as utilized in many common law jurisdictions, is not applicable in international proceedings.[66] WTO dispute resolution panels and the Appellate Body nonetheless often rely on prior cases. These prior decisions have no binding effect on subsequent panels, but they provide a degree of consistency which, in turn, enhances the predictability of the whole system.[67] In the dispute commonly referred to as *U.S. - Definitive Safeguard Measures on Imports of Certain Steel Products*, the panel report contained over 5,800 footnotes, most of which were references to prior cases, and the case report included a list of the 54 cases actually cited and relied upon.[68] Although there is no provision for *stare decisis* within the WTO process, the Appellate Body effectively created a doctrine of precedent in WTO dispute settlements that is not unlike the way precedent applied in the early days of the common law.

C. *The Challenges to the Future of the WTO*

During the last decade, several related changes in the WTO are worth noting: expanded membership, a move towards regionalization, and the rise of non-state actors. These changes are either challenges or chances to the future of WTO. I will take each point in turn.

I. *Increased Membership*

There has been a dramatic increase in WTO membership, largely representing an increase in developing country membership. The largest developing countries,

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[66] Ian Brownlie, Principles of Public International Law 21 (4th ed., 1990); *see also* the Statute of the ICJ, *supra* note 41, art. 59.

[67] The first WTO case discussing this issue is the *Japan – Taxes on Alcoholic Beverages* case in which the Appellate Body said: "However, we agree with the panel's conclusion in that same paragraph of the panel report that unadopted panel reports have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the contracting parties to GATT or WTO members. Likewise, we agree that a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant. …" Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO members, and therefore, should be taken into account where they are relevant to any dispute. However, they are not binding except with respect to resolving the particular dispute between the parties to that dispute." Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, Oct. 4, 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

[68] Panel Report, *Definitive Safeguards Measures on Imports of Certain Steel Products*, WT/DS248/R, Nov. 10, 2003.

such as India, Brazil and China, will play an increasingly important role in the WTO. The impasse at Cancun[69] was a clear signal that addressing developing country concerns is critical to moving ahead in multilateral trade negotiations. With this increase in WTO membership, the consensus system on which the WTO is based is facing an unprecedented challenge. Enlarged membership at various levels of development makes it more difficult for the WTO to deliver measurable results within a reasonable period of time. The end without substantial result of the Cancun round of negotiations shows that the present decision-making system must be reformed to adapt the growing memberships. WTO need a more effective and efficient decision-making mechanism.

II. *Regional Cooperation*

While there has been an increase in bilateral and regional cooperation, the setbacks in Seattle and Cancun, and the stalled Doha round of negotiations, have to some extent frustrated Members' confidence in multilateral approaches. The failure of the Seattle and Cancun rounds of negotiation has begun to arouse doubts and skepticism about the effectiveness of the multilateral trading system,[70] driving governments towards bilateral or regional cooperation or arrangements instead. The inherent shortcomings of the WTO's consensus system become more obvious with the increasing and more diverse membership, many issues end up without any measurable results. In contrast, countries in one region generally have more commonality so they are more likely to overcome differences and reach agreements on critical issues.[71] Many "Preferential Trade Agreements" were concluded on the basis of Article 24 of the GATT. Over the last decade, more and more customs unions (European Union), common markets (South American Common Market), regional and bilateral free trade areas (NAFTA, CEPA, ASEAN)[72] have emerged or are emerging. As a result, the principle of non-discrimination or Most

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[69] In the Cancun Conference, the North-South positions on many negotiation issues split completely, especially on agriculture. The United States and the European Union announced their joint position on farm subsidies; while the major developing countries, particularly Brazil, India and China succeeded in orchestrating their efforts into a common stance against developed countries on major negotiation topics, such as agriculture and the Singapore issues. *See* Cho Sungjoon, *supra* note 14 (detailing Cancun impasse).

[70] *Id*. at 219.

[71] Kong Qingjiang, *China's WTO Accession and the ASEAN-China Free Trade Area: the Perspective of a Chinese Lawyer*, 7 J. Int'l Econ. L. 839 (2004).

[72] The United States has already sealed a bilateral free trade agreement (FTA) deal with Jordan (Oct. 24, 2000), Singapore (May 6, 2003), Chile (June 6, 2003), and Australia (February 8, 2004), and is negotiating similar deals with Morocco, Central American countries, and the Southern African Customs Union (SACU) members. The United States is also pushing forward the ambitious Free Trade Agreement of the Americas (FTAA).

Favored Nation status (MFN), which is the basic principle of GATT and WTO, to some extent has been eroded. Some observers have commented that

> nearly five decades after the founding of the GATT, MFN is no longer the rule; it is almost the exception. Certainly, much trade between the major economies is still conducted on an MFN basis. However, what has been termed the "spaghetti bowl" of custom unions, common markets, regional and bilateral free trade areas, preferences and an endless assortment of miscellaneous trade deals has almost reached the point where MFN treatment is exceptional treatment. Certainly the term might now be better defined as LFN, Least Favored-Nation treatment.[73]

The boost of bilateral or regional arrangements or cooperation will in some extent erode (lower) the function of WTO, the multilateral trade system.

III. *Non-state Actors*

Finally, no discussion of the WTO can be complete without considering the influence of NGOs and the rise of international terrorism, both as examples of the emerging significance of non-state actors in international law generally and in the WTO system specifically.[74] In the Seattle and Cancun Conferences, NGOs became an important power, exerting influence on the negotiation process.[75] Most NGOs in Seattle and Cancun backed the developing countries' stance and heavily criticized developed countries, in particular the United States and the European Union, for a lack of consideration for their poorer trading partners.[76]

In the meantime, after the September 11, 2001, terrorist attacks in the United States, terrorism poses a potential threat to the free movement assumptions on which the world trading system is built. Stringent border controls to counteract the threat of terrorist activities can have an inhabiting effect on the movement of goods and services across borders, something that a liberalized trading regime seeks encourage.[77]

IV. *North-South Tensions*

Although the operation of the WTO system, in particular its dispute settlement mechanism, has proven successful in the last decade. The WTO system now faces

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[73] *See* Sutherland Report, *supra* note 12.

[74] *See* Schurtman and Miller in this volume.

[75] *See* Bratspies in this volume.

[76] News Release, Greenpeace, USA and EU Sink the WTO Round and We Call on Governments to Create a New Trade System (Sept. 14, 2003); Press Release, Oxfam, Rich Countries Wreck WTO Trade Talks (Sept. 14, 2003); Statement of Lori Wallach, Director of Public Citizen's Global Trade Watch (Sept. 14, 2003).

[77] Marrakesh Agreement.

serious challenges to its operation and development from the North-South divide. The new round of WTO negotiations has stalled due to the sharpening tension between North and South as well as the NGOs' activities. Since the founding of the WTO in 1994, Six Ministerial Conferences[78] have been held, respectively: in December 1996 (Singapore), May 1998 (Geneva), December 1999 (Seattle), November 2001 (Doha), September 2003 (Cancun) and November 2005 (Hong Kong). Despite the achievements made in the Singapore Ministerial Conference,[79] Geneva Conference[80] and Doha Conference,[81] the Ministerial Conferences in Seattle and Cancun collapsed due to poor preparation and the North-South Tension on some politically sensitive issues such as agriculture subsidies,[82] core labor standards[83] and "Singapore issues."[84] For example, developing countries advocated that developed countries eliminate high trade barriers on imports of those primary, labor-intensive goods, such as agricultural products and textiles, on which developing countries hold a comparative advantage. [85] At the same time,

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[78] "There shall be a Ministerial Conference composed of representatives of all the Members, which shall meet at least once every two years." Marrakesh Agreement art. 4, para. 1.

[79] The main achievements of Singapore Conference are: (1) Members agreed to establish "working groups" to examine and study the relationship between trade and some new controversial (between Developed and developing countries) issues such as investment, competition and labor standard; (2) highlighted development concerns of the Least-Developed Countries (LDCs) and warned against their 'marginalization' from the global trading system. WTO, Singapore Ministerial Declaration of 13 December 1996, WT/MIN(96)/DEC/W, 36 I.L.M. 218 (1997) [hereinafter Singapore Ministerial Declaration].

[80] Two developments at this conference is (1) Ministers declared that protection is not the right approach to tackling the financial crisis; (2) Ministers Adopted the *Declaration on Global Electronic Commerce* in which they established a "comprehensive work program" to examine all trade related aspects of electronic commerce and pledged their continuous practice of exempting tariffs on electronic transactions. WTO, Geneva Ministerial Declaration on Global Electronic Commerce of 20 May 1998, WT/MIN(98)/DEC/2, http://www.wto.org/english/tratop_e/ecom_e/mindec1_e.htm.

[81] The Doha agenda, also called the Doha Development Agenda (DDA) or "Development Round," focused on addressing global poverty and the role of trade in poverty alleviation. Its main achievements: (1) producing clear negotiation objectives, transitional deadlines and detailed 'work program' on the DDA, Ministerial Declaration nailed down a final deadline of January 1, 2005 as the date for completing the Doha Round; (2) issuing two important development related legal documents: *Declaration on the TRIPs Agreement and Public Health*, which endorses Members to grant compulsory licenses in the face of public health crisis, and *Decision of 14 November 2001 on Implementation*, which spells out implementation-related issues and concerns; (3) leaving ground for future negotiation of the Singapore issues. WTO, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

[82] Cho Sungjoon, *supra* note 14.

[83] *Id*.

[84] They connote four issues: trade facilitation, transparency in government procurement, investment, and competition. Singapore Ministerial Declaration, *supra* note 79, paras. 20-23.

[85] Sutherland Report, *supra* note 12.

developing countries also complained of the "uneven distribution" of benefits among Members and criticized the failure to realize the WTO's foremost goal, namely "sustainable development."[86] By contrast, developed countries generally advocated that the WTO should reflect the realities of the ever-growing relevance of many non-trade issues to trade. Led by the United States, developed countries managed to push onto the WTO agenda hitherto controversial issues, such as investment, competition policy, and labor standards. Developing countries fear that developed countries will use these negotiations to solidify their advantage in these areas while at the same time legitimizing new trade barriers that work to the detriment of developing countries by restricting their ability to export of agricultural products and textiles in the name of environmental protection, investment and competition.[87]

D. *Conclusion: China and World Trade Organization*

To enter the World Trade Organization was an inevitable choice for Chinese people due to the economic globalization. China's membership in the WTO shows a recognition of the basic game rules formed in the GATT-WTO history and a decision to act within the boundary of WTO rules whenever China intends to promote its trade interests or fulfill its obligation towards other WTO members. China also actively participated in the Doha Round Negotiation and made its own contributions to the evolvement of the world trading system. The Chinese Government is of the view that the Doha Round is a development round, "the round should effectively ensure that developing members benefit from the outcome of the negotiations. The negotiations on each and every specific subject should take full account of the level of development and capacity of developing embers; should put special and differential treatment into effect to allow them to implement development strategy that suits their own conditions within their

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[86] *Cf.* Mike Moore, Address at the Conference of African Trade Ministers, Algiers (September 23, 1999) *in* Africa and the Multilateral Trading System: Challenges and Opportunities, http://www.wto.org/english/news_e/spmm_e/spmm07_e.htm.

[87] In the Cancun conference, the rift between developed and developing countries became more apparent, centering on North-South issues such as core labor standards, investment, and competition. As for core labor standards, developing countries succeeded in de-linking this issue from trade by stipulating that the International Labor Organization (ILO) is the competent body to handle this issue and that the use of labor standards for protectionist purposes should be rejected. In contrast, developed countries managed to push onto the WTO agenda hitherto controversial issues, such as investment and competition, which were later dubbed the "Singapore issues." WTO, The Fifth WTO Ministerial Conference of 14 September 2003, http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_e.htm (follow "Day 5" hyperlink).

territories."[88] But in the eyes of China, although WTO rules are a result of contentions and compromises between developed and developing countries, there is no denying that the developed world led in the making of WTO rules. For example, WTO rules to a large extent are based on the "comparative advantage" theory and "game" theory which represent the interests of the developed countries. Therefore, not all WTO rules are reasonable.[89]

Since China's economic reform and opening to the world at the end of the 1970s, its economy has grown rapidly. The latest official figures show that the Chinese economy is the sixth largest in the world.[90] The Washington, D.C.-based Earth Policy Institute says that China is now an emerging economic "superpower," one that is writing economic history.[91] Notwithstanding this, China became a member of the WTO more than fifteen years after it first formally requested membership in the GATT, in 1986.

Under pressure from industrialized countries, the Chinese government made a series of realistic choices in its accession instruments. First, the Protocol of Accession[92] and the Report of the Working Group governing China's accession to the WTO urged additional liberalization of China's trade regime and the further opening up of opportunities for foreign direct investment in China.[93] The scope and depth of China's market access commitments on goods (industrial and sensitive agricultural products) and services compare favorably with those of other WTO members. For example, China has made commitments in all of the services (telecommunications; financial services including banking, insurance, securities, fund management, and other financial services; distribution; professional services such as legal, accounting, management consultancy, architectural, engineering, urban planning, medical, computer and so on; audiovisual services; construction services) covered by the WTO General Agreement on Trade in Services (GATS). Only a handful of members come close to meeting this standard.[94]

Second, under the Protocol, China has granted WTO Members unprecedented authority to limit imports of Chinese products. China's WTO commitments on

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[88] *See* Trade Policy Review Report by the People's Republic of China, to the WTO Trade Policy Review Body WT/TPR/G/161 (Mar. 17, 2006).

[89] *See* Kong Qingjiang, *supra* note 71.

[90] Moore, *supra* note 86.

[91] *See* BBC News, *China Emerges as Global Consumer*, Feb. 17, 2005, http://news.bbc.co.uk/2/hi/asia-pacific/4272577.stm.

[92] WTO, China's Protocol on the Accession of the People's Republic of China. WT/L/432 (Nov. 23, 2001) [hereinafter China's Protocol].

[93] Lardy, *supra* note 16, at 65.

[94] Only 11 members of 122 have made commitments in as many as eleven or twelve of the total of twelve different types of services. WTO, *Summary of Specific Commitments* (www.wto.org/wto/services/websum.htm).

some rule-based issues also far surpass those accepted by any other member of the World Trade Organization. In two important areas: safeguards and anti-dumping, China was pressed to accept discriminatory treatment, that is, it is subject to a WTO-plus regime, including WTO limits and requirements more onerous than those accepted by other WTO members.[95] According to the "transitional product-specific safeguard clause"[96] included in China's WTO Protocol of Accession, other members can apply special safeguard measures to Chinese export products up to twelve years after its accession to the WTO. These special safeguards diverge in several dimensions from the safeguard provision included in the WTO agreement in order to make it easier for other WTO Members to impose restrictions on goods imported from China. For example, the injury standard in China's transitional product-specific safeguard is lower, requiring only "market disruption," than the "serious injury" standard required in the regular WTO safeguard.[97] The former U.S. Trade Representative, Charlene Barshefsky, also recognized that the transitional product-specific safeguard "permits us to act based on the lowest showing of injury."[98] Similarly, under Article 15 of the Access Protocol, China, in anti-dumping cases, will be treated as a "Non-Market Economy"[99] for fifteen years from the time of its accession and is thus subject to very different methods for the determination of dumping than are used by current WTO members against each other.[100] China has long been treated as a "non-market economy" or "state trade country" by trading partners, especially the United States and European Union, in anti-dumping cases. As such, in taking anti-dumping measures against Chinese products, both the United States and European Union authorities adopt the so called "surrogate approach" to determine the fair (normal) value and the anti-dumping margin. Under this approach, the administering authority can simply use a standard for "normal value" of the cost of production of the like product in a third country (surrogate country) of comparable economic development. In doing so, the European Union and the United States routinely disregard China's actual micro-economic situation, including cost of production, level of economic

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[95] Lardy, *supra* note 16, at 80.

[96] China's Protocol, *supra* note 92, art. 16.

[97] Agreement on Safeguards, art 4, Apr. 15, 1994, http://www.wto.org/english/docs_e/legal_e/25-safeg.pdf.

[98] *China's WTO Accession: American Interests, Values, and Strategy*, Hearings before the Senate Committee on Finance, p9 February 23, 2000 (statement of Charlene Barshefsky, United States Trade Representative), www.senate.gov/ ~finance/2-23bars.htm.

[99] "The term 'nonmarket economy country' means any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." Tariff Act of 1930, 19 U.S.C.A. § 1677(18)(a) (1996).

[100] WTO, The Agreement on Implementation, Article VI of GATT, art. 2.

development, labor costs, and so on.[101] This treatment of China is rooted in the early Cold War and has not changed since China adopted its open-door policy in 1978 or acceded to WTO in 2001. This aspect of the protocol disadvantages China in several aspects. Because there is no formal definition of what constitutes market economy conditions, each WTO Member has broad discretion in setting or even changing the conditions under which it applies non-market economic provisions in anti-dumping cases against Chinese firms. All too often this results in applications that negate the comparative advantage that Chinese producers have over worldwide competitors based on microeconomic conditions rather than any unfair trading practices. For example, countries that are selected as surrogates sometimes have labor costs that are much higher than those prevailing in China. In practice the most commonly selected surrogates in U.S. anti-dumping cases against Chinese firms have been Brazil, India, Indonesia, Pakistan, and Thailand. Per capita gross national product in Thailand and Brazil is about three and five times, respectively, the level in China. In many cases the dumping margins determined by the NME approach are so large that Chinese goods are essentially shut out of foreign markets. In the *Chinese Furniture* case, due to China's non-market economy status, most Chinese furniture exporters were assigned a countrywide prohibitive rate of 198.08%, an outcome that puts the U.S. furniture market out of reach to these producers.

The implications of China's membership in the WTO for the world economy, and the international trading system are immense. Both China and the world have experienced remarkable growth as a result of China's WTO accession. According to a recent World Bank report, market opening measures and other economic reforms that came with China's WTO accession have been worth more than $40 billion a year to the Chinese economy and have added about $75 billion a year to real incomes worldwide.[102] China's participation in the WTO also provides a measure of its increased global commitments and responsibility. After China's accession, Chinese officials clearly stated on various occasions that China would honor its own commitments, and China has developed a track record of following WTO rules, using WTO rules to its advantage and actively participating in the making of new rules. For example, in accordance with the WTO accession commitments, the average tariff level has been slashed from 15.3% at the time of accession to 9.9% in 2005. The average tariff rate of 14.8% for industrial goods prior to WTO accession was reduced to 9.0% in 2005. The average rate of

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[101] *See generally* Lardy, *supra* note 16, at 87-88; *see* Daniel Ikenson, *Non-market Nonsense: U.S. Antidumping Policy Toward China*, http://www.freetrade.org/node/63.

[102] The World Bank Group, *Accession to WTO Delivers $40 Billion A Year to China's Economy But Gains Unevenly Shared*, http://www.worldbank.org.cn/english/content/747j63205722.shtml.

23.2% at the time of accession for agricultural products was reduced to 15.3% in 2005. As of January 2005, China had, in accordance with the *Information Technology Agreement* (ITA), eliminated tariffs for all ITA products. Since China's accession to WTO, China has submitted more than 30 proposals and position papers in the Doha Round Negotiations, which had played a positive and constructive role in advancing the negotiations, bridging understanding among WTO Members and narrowing differences.[103]

Although some still cast doubts on China's ability and interest in complying with its WTO obligations, China's actual practices as a WTO Member have shown China to be a responsible and faithful WTO Member. To date, China has cut its tariffs dramatically; has implemented its commitments in some services even before it entered or ahead of the promised schedule; and has liberalized trading rights in advance of scheduled obligations. For example, in July 2001 China granted all foreign-invested firms, regardless of the foreign ownership share, the right to export any product. Under China's WTO commitments, some foreign-invested firms were not scheduled to receive this right until three years after accession, thus those firms received this right 3 years ahead of schedule. Indeed, China began to implement some of its WTO obligations even before it became a member by amending a few of the most important laws in advance of its entry. For example, in 2001, The National People's Congress Standing Committee passed amendments to the law governing Sino-foreign cooperative joint ventures and foreign-funded enterprises to be consistent with China's TRIMs obligations.[104] China also revised several laws dealing with intellectual property (Patent law, Copyright law and Trademark law, etc.) to make them consistent with international standards and its TRIPs obligations.[105]

China's accession to the WTO also signals its willingness to assume a more important role in global trade liberalization. For the international community, China's accession to the WTO is bringing benefits beyond the systemic ones. In the 2001 APEC Summit, China played a positive role in helping invigorate

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[103] *See generally* WTO Secretariat, People's Republic of China Trade Policy Review Report, WT/TPR/G/161 (Mar. 17, 2006).

[104] Law on Chinese Foreign Equity Joint Venture (promulgated by the Fifth Nat'l People's Cong., and effective on July 8, 1979); Regulations for the Implementation of the Law on Chinese-Foreign Equity Joint Venture (promulgated by the State Council, and effective on Sept. 20, 1983); Law of the People's Republic of China on Wholly Foreign-Owned Enterprises (promulgated by the Sixth Nat'l People's Cong., and effective on Apr. 12, 1986), http://www.chinaiprlaw.com.

[105] Trademark Law of The People's Republic of China, (promulgated by The Standing Comm. of the Fifth Nat'l People's Cong., Aug. 23, 1982, effective Mar. 3, 2001); Patent Law of the People's Republic of China, (promulgated by the Sixth Nat'l People's Cong., and made effective on Mar. 12, 1984); Copyright Law of the People's Republic of China, (promulgated by the Standing Comm. of the Seventh Nat'l People's Cong., and effective on Sept. 7, 1990), http://www.chinaiprlaw.com.

efforts in launching a new round of global trade negotiations by prodding other APEC countries to support the new negotiations at Doha.[106] Since the Seattle Conference, China, with other "super" developing countries like Brazil and India, has acted as the voice for other developing countries. China has been vocal in criticizing the WTO decision making process as dominated by a few states acting behind the scenes, and has been a strong proponent of the contention that the views and interests of developing countries are not adequately considered. China has strengthened the argument that the new WTO round should have limited objectives and that any expansion of the scope of WTO beyond trade issues should be based on consensus. China firmly opposed any linkage between trade and labor standards and the use of environment standards as a new form of protectionism.

Since China has been subject to more anti-dumping actions than any other country,[107] it has resorted to bilateral consultations with other countries to recognize its market economy status in advance, and it may well take the lead in insisting on reforms of WTO anti-dumping procedures. In the Cancun Ministerial Conference, China and other developing countries (G-21 in Cancun) called for the elimination of export subsidies on all products, in particular the farm subsidies.[108] Chinese views on labor and environmental standards, anti-dumping, and agricultural subsidies are part of an agenda that China has urged the WTO to give higher priority, in the interests of developing countries," so that they can benefit more from the multilateral trade system."[109] China's and other developing countries' demands in Cancun won strong support not only from NGOs but also from many intergovernmental organizations, such as the IMF and the World Bank.[110]

Due to the political and historical reasons, China has missed two constitutional moments of the global trading system: the birth of GATT 1947 and the birth of the WTO. As the largest developing member of the WTO, China has to

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[106] Asia-Pacific Economic Cooperation, *Economic Leaders' Declaration: Meeting New Challenges In The New Century*. Oct. 21, 2001, http://www.apec.org/apec/leaders__declarations/2001.html.

[107] According to the statistics of WTO, from Jan. 1, 1995 to Dec. 31, 2005, China has been the leading target of antidumping investigations from other countries, 469 antidumping investigations have been initiated toward China of which 338 has been taken measures from other countries. http://www.wto.org/english/traptop_e/adp_e/adp_stattab1-epdf.

[108] Zhang Ming, *Failure of WTO Big Six Bad News for All*, http://www.china.org.cn/english/international/176770.htm.

[109] *Long Yongtu Addresses APEC Ministers' Meeting*, Xinhua (June 30, 1999) FBIS-CHI-1999-0630, available at www.iqhei.ulaval.ca/pdf/mriessailoisporath.pdf.

[110] Press Release, IMF and World Bank Announce Plans to Support Developing Countries with Trade-Related Adjustment Needs in WTO Round (Aug. 21, 2003), http://www.imf.org/external/np/sec/pr/2003/pr03140.htm.

accept the game-rules made mainly by the western countries. But China will not miss the third constitutional moment that will create a more fair, viable and durable multilateral trading system. The trade world has witnessed and will continue to witness the important function of "China Factor" to the formulation of a new world economic constitution.

Appendix

1. Address at the Inauguration of the William Edgar Borah Foundation for the Outlawry of War*

By Senator William E. Borah

I want, out of a full heart, to express the thanks of the people of the State of Idaho, of the University, and of myself to the author of this Foundation. It has been my pleasure and to my great advantage to know Mr. S. O. Levinson for many years. We met for the first time in the interesting days immediately following the World War. All were thinking at that time of peace, talking and writing of peace, and devising plans with the great hope of making peace effective and permanent. There were many views, many plans, some visionary, some dangerous, all, no doubt, sincerely urged. In that multitude of workers in the cause of peace there were none more earnest, more unselfish, none who held a firmer grasp of the vast problem than S. O. Levinson. Others were more in the public eye, but none contributed more to the laying of the foundation upon which peace must ultimately rest.

A lawyer by profession, engaged in active practice, daily advising in large business affairs, yet he found time for the great cause which was nearest his heart. The time and study he gave to the subject were extraordinary. His enthusiasm drove him past all obstacles and his restless and well-trained mind seemed to find inspiration rather than discouragement in the many questions which the problem presented. He was the first within my knowledge to reach the daring conclusion that war, as an institution, could, and should, be outlawed, placed beyond the pale or recognition of international law. His conception of peace was to condemn and renounce the use of force in international relations. A peculiar and exceptional glory attaches to his name by reason of this fact. In this view he long stood alone. But he labored untiringly. He built argument after argument around his theme. He has lived to see the great principle for which he contended recognized throughout the world. I regard the [Kellogg-Briand] Peace Pact as the embodiment of the principle for which he has so earnestly contended. It may be that this principle is in advance of the times. Time alone can tell. But permanent peace must rest at last upon this great foundation principle. I pay sincere tribute to his ability, his vision, his great moral courage.

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* Delivered at the University of Idaho, Moscow, Idaho (Sept. 24, 1931).

Miller & Bratspies (Eds), Progress in International Law, pp. 879–886.

I want to add a word of a personal nature. I am sure under the circumstances you will pardon my doing so. I am proud to have my name associated with the Foundation. I am happy in the thought also that my name is to be more closely identified with the work of this University. Mr. Levinson did not advise me of his purpose to create the foundation and consulted in no respect in reference to it. Had I known in advance, I would have candidly – and I trust through no false modesty – urged him not to associate my name with the Foundation. While I feel I am a sincere believer in peace, I understand perfectly well many of the advocates of peace do not regard me as such. I have never been able to bring myself to believe it would be in the interest of peace to involve this country in the political affairs of Europe. And if I should ever reach that conclusion, still I would not purchase peace at that price. There are some things in this world more to be desired than peace, and one of them is the unembarrassed and unhampered and untrammeled political independence of this Republic – the right and power to determine in every crisis, when that crisis comes, untrammeled by any previous commitments, the course which it is best for the people of this nation to pursue. If peace can not be had without our retaining that freedom of action, then I am not for peace. For these reasons, briefly and inadequately stated – for it is not my purpose today to discuss them – my position has not been in harmony with many of the advocates of peace, and they will think my name out of place in this Foundation title. Had I been consulted, therefore, I would have gladly foregone that honor for the more universal support which such a course might have given to the Foundation.

Much has been said, and will continue to be said, for the doctrine of force dies hard, about implementing the Peace Pact. It is said we must put teeth in it – an apt word revealing again that theory of peace which is based upon tearing, maiming, destroying, murdering. Many have inquired of me: What is meant by implementing the Peace Pact? I will seek to make it plain. What they mean is to change the Peace Pact into a military pact. They would transform it into another peace scheme, based upon force, and force is another name for war. By putting teeth into it, they mean an agreement to employ armies and navies whenever the fertile mind of some ambitious schemer can find an aggressor. Implementing the Pact, putting teeth in the Pact, is to revert to the doctrine of force in all its hideous, hellish, brutality. Force, as a factor in international controversies, has been tried out for three thousand years, and at this very hour it has brought the world near to a state of economic chaos and financial breakdown, it has filled the earth with the maimed and the insane, it has crowded the hospitals in three continents with youth of the land, it has wrecked and destroyed in a large measure the economic system until hungry men and women tramp the streets and the highways for work which they can not find. I have no language to express my horror of this proposal to build peace treaties, or peace schemes, upon the doctrine, of force.

I never have, and never shall, support any scheme of peace based upon the use of force in international controversies. The revolting inconsistency of employing war to maintain peace is the doctrine of a Caesar, of a Napoleon, of a Cromwell. If the German General Staff, assuming that its purposes were such as were attributed to it during the War, had won, it would have given the world peace based upon force. It might not have been justice and liberty might have disappeared from the earth, but it would have been peace.

We have heard within the last few weeks of a proposal to create a great central international military power. Give into its hands an army and a navy and send it about over the earth to crush all aggressors. An aggressor at this time in Europe would be any people or nation who might challenge the Versailles Treaty. I assert that the doctrine of force never appeared in a more revolting form than in this very proposition lately made.

But you will say: War may come. So it may. But if it comes, let it come as an outlaw in violation of peace treaties and in violation of international law, and not under the sanction and by the authority and with the blessings of the advocates of peace. Let it come as the criminal comes, as the murderer comes, not with the approval of law and under some fantastic scheme by which you would differentiate between good and bad murder, between good and bad wars, but in violation of all law. I take the position there is not an international controversy but may be peacefully adjusted if the will to settle it peaceably is at hand. And it will be at hand if the enlightened public opinion of the world so decrees. This is the doctrine and the belief of S. O. Levinson, inadequately interpreted by my poor self. This is the doctrine of this Foundation. When it ceases to be the doctrine of this Foundation, I trust someone will erase my name from the title. This is not said in jest. I shall leave this part of my address in the archives of the University.

I trust this Foundation will always be an open forum for the free and frank discussion of all schemes and plans for peace. Free speech consists in the right of those with whom we disagree to speak as freely as those with whom we are in accord. When we are unwilling to hear our opponents, it is clear proof that we have already begun to doubt the worth of our own views. When speech is free, truth and right will ultimately prevail.

The distinguished visitor who opens this course of lectures entertains views with which I am not in accord. We differ upon some important matters. But, for myself, I heartily welcome him to this forum. The University has been fortunate in securing him here for this course of lectures. He is a profound student, a man of scholarly attainments, associated with one of the great and honored institutions of our country, and he is the ablest and most resourceful advocate of the view which he, and so many others, entertain whom it has been my privilege to know. I repeat, I welcome him here and trust this will endear him to this University in which we are so deeply interested and of whose work we are very proud.

2. Progress in International Organization**

By Manley O. Hudson

Chapter I – Introduction

The establishment at the University of Idaho of the William Edgar Borah Foundation for the Outlawry of War is a happy augury of a significant development in the international relations of the United States. It is a recognition, first of all, of the great role which these inland states are playing and will continue to play in shaping the attitude of the American people toward other peoples of the world and in determining the policy of our national government on international issues. The time is past when that attitude and policy can be dominated by the people on the Atlantic seaboard; nor is it longer possible that they should be controlled in the interest of any small section of our people. If any lesson stands out from our experience of the past quarter-century, it is that all of the people of the United States, in every section of the country and in every walk of life, are dependent in their daily lives on the ordering of the relations which we are forced to maintain with other peoples of the world.

This Foundation has been established to assist in that ordering, and to foster the cultivation of a public opinion which will make it continuous and effective.

We have long been accustomed to speak of our relations with other peoples as foreign relations and of our policy in international affairs as foreign policy. A standing committee of our Senate is called a Committee on Foreign Relations, and a committee of the House of Representatives is called a Committee on Foreign Affairs. Similarly many governments in the world maintain ministries to which a title is given such as *Ministere des Affaires Etrangeres*. But if I read aright the signs of our times, there is growing to be some danger in this form of speech. It seems to lend weight to a habit of thinking of relations between different nations as foreign to a national polity, and of international affairs as something with which the ordinary citizen need not concern himself. It might be an advance toward reality if we began to think of the problems of our international relations as domestic problems, in the sense that they have to do with our immediate and local well-being. It is now many years since the people of Idaho contented themselves with a state polity, and your public servants must now be guided by a national outlook. Even that is not enough for your protection. An international outlook is just as essential today as was a national outlook a half-century ago;

** Manley O. Hudson, Progress in International Organization 1-5; 118-122 (1932).

and perhaps we should make some advance if we ceased to speak of our relations with other peoples as foreign relations. It is peculiarly fitting that this Foundation, which is to be devoted to encouraging the study of international affairs, should bear the name of the distinguished statesman through whom the people of Idaho have so long exercised a large influence on the international relations of the United States. For a quarter of a century, now, Mr. Borah has been kept by the people of this state in the Senate of the United States, and for a large part of that period he has had an influence second to none in moulding both public opinion and governmental action on international issues. As chairman of the Senate's Committee on Foreign Relations since 1924 he has been a great power in shaping our policy during a critical period, and the effect of his influence will doubtless live long beyond his days. His leadership has not been confined to the people of this state, nor indeed to the body in which he serves; he has been heeded and followed by people in every part of the country. On issues of great import for the future of the United States and of the world, he has stood at times above all other Americans in the range of his persuasion; and it is not the smallest element of his strength that he has found it possible to change his emphasis with the shifting of our fast-moving international scene.

I can think of no better program for the immediate purpose of this Foundation than to explore some of the themes to which Senator Borah has addressed himself during these critical years, with such honesty of purpose, such intensity of zeal, and such probity of intelligence. Of course, it would not be the object of such exploration to confirm the conclusions at which Senator Borah has arrived—that would mean only a stultification of the effort—and certainly the object would not be to refute any of his conclusions. No purpose of activity becomes a university except that of facing all the facts as they can be ascertained in accordance with the conceptions, the standards, and the ideals of the time. In our work in the universities we can never know when we start where we shall end, and unless it is to be free from subservience to authority it might better not be begun. In this spirit, then, I hope this Foundation will devote itself to a study of international relations, and its success will but enhance the honor which you would bestow by the choice of its name.

I have been honored by the invitation of the President and Faculty of the University to give four addresses as a part of the inauguration of this Foundation, and I have chosen as a general subject a theme in which Senator Borah has been much interested and in connection with which his work will long be remembered. I invite you to consider with me the subject of "Progress in International Organization," principally as it has been affected by the efforts of various nations in the course of the twelve years since the World War. For four long years, from 1914 to 1918, the world suffered a travail in which many of the resources of the Western World were diverted from all normal channels and directed to destruction and

devastation on a scale which had never before been known. Now that we seem to be emerging from that catastrophic experience, we may well ask ourselves what has been gained from it all. Is the world of 1931 more fortunate in any respect than was the world of 1914, or has all of that blood and treasure been wasted in vain? What do we have today which the world lacked in the pre-war years?

I believe that when the history of our times comes to be written with the perspective which only a half-century can bring, our generation will be distinguished, above all else in the field of social relations, for the progress which we have made in organizing the world for co-operation and peace. I invite your attention to this subject, therefore, with confidence that you will regard it as appropriate for this occasion, and with the hope that your interest in it may be continued in the program of this Foundation in the years to come.

Chapter X – The Measure of Progress in International Organization

The subject of these addresses has not been chosen without some appreciation of the difficulty which anyone must feel in attempting to measure progress. Most of us are prone to make it depend on the success of our own endeavors, on the triumph of some cause on which our hearts are set. Perhaps I have not freed myself from such a disposition; but I find myself constantly wondering what the truer gauge may be, continually asking the question how it is, in human affairs, that people have achieved what could be later called progress. I hope I have not been led to confuse my own enthusiasm and my judgment as to the processes of history. One does not need to be a historian to know that the lost causes of history include most of those which were for a time successful. Each generation seems to insist upon a freedom to deal with its own problems in its own way. While it is never quite possible for a people to escape what their forbears have handed down to them, it seems to be a common habit for them to attempt to do so. Yet, paradoxically, they often combine with this an exaggerated respect for what their forbears have wrought and said – "there were giants in those days." "Mid-Victorian" has been in our time both an epithet and a eulogy. How difficult it is, therefore, to judge what may endure!

Yet I believe some answer to the problem can be found in the history of these United States. The early struggles of our Republic were largely concerned with the creation of federal institutions. If we in our time have reaped the advantage of having to serve us a Congress and a Supreme Court which were not of our own creation, it is because one hundred and forty years ago their beginnings were forged in the heat of a violent political contest. We inherited from that period a constitution part of which still serves as the framework of our national government. Contributions were made in those early days which have endured

now for almost a century and a half, and which may endure in some form for as many years to come. Surely we can say that the building of our federal institutions was a work of progress. Most of the ideas of that early period to which men then clung so tenaciously have long since been abandoned. Styles of thinking have changed, and we have a vastly different world to deal with. But these federal institutions remain.

Now perhaps we may apply some such test to the handiwork of our own generation. Doubtless the stock of ideas which we cherish will come in their turn to be passé. No one can say that any of our current conceptions as to the ends of co-operation will not be discarded by a later generation; but it would seem altogether probable that the institutions which we are creating will be kept alive. None of them can be said to have achieved a final form; all of them will probably be altered and reconstructed; possibly many of them will be adapted to wholly different purposes. The most that we can do is to give them initial form, and to hand them on for future generations to use as they will. Something will have been gained, however, some progress will have been achieved, if we can place in the hands of our successors on the stage of international affairs the instruments which we lacked in 1914. For sixty years the Universal Postal Union has been serving such a useful purpose that no one could think of abolishing it today. The Permanent Court of Arbitration even survived a war which it failed to prevent. A century hence people may be as grateful to us for the League of Nations and the Permanent Court of International Justice as we are now grateful to the generation of Washington and Adams and Jefferson and Madison for the Congress and the Supreme Court of the United States.

For institutions seem to have a strange way of keeping themselves alive. They develop a hardiness which carries them through strain and stress. Despite the difficulties of their creation, frequently despite small beginnings, once they become established they may influence the thought of men in ways not dreamed of by their founders. Habits form around them, loyalties cling to them, methods evolve from their use, order springs from their existence.*** It is true that even

*** "The important thing is to get the right kind of an institution started, even though it be in the most rudimentary form. There is one unfailing characteristic of human nature which comes into play when an institution is once started. It is that after an institution is established and is conspicuous and universally known, it enters into the basis of thought of the people who have to do with the subjects to which it relates. People begin to think differently about such subjects. They begin to think that way, and if the institution is so conducted as to command confidence within its original limited scope, it grows naturally and inevitably because the fundamental idea being no longer a novelty and being accepted, enlargements and improvements of the idea are soon readily accepted." Elihu Root, *Steps Toward Preserving Peace*, 3 Foreign Affairs 351, 356 (April 1925).

the best of our institutions do not operate themselves. They are not substitutes for intelligence, and none of them is immune from decay. Yet they are the great simplifiers of human problems, and they constitute a large part of the heritage of each generation. Now if this line of thought be adopted, I think it becomes clear that the importance of the developments which I have attempted to trace transcends that of the numerous perplexing problems which appear and disappear on our international scene. Shantung was a burning issue in 1919, but since 1922 it has been forgotten. Corfu crossed our headlines for a brief moment in 1923, but disappeared as suddenly as it came. The occupation of the Ruhr in 1924 may have left a trail of untoward consequences, but it has ceased to trouble our minds. Locarno seemed a new star in our firmament in 1925, but its radiance is now fast dimming. In 1928, the Kellogg-Briand pact seemed to many people to point the way to a millennium, but our appropriations and much of our discussion proceed today as if it did not exist. During this year and the next the Disarmament Conference will absorb our interest, and one often hears nowadays the alarmist talk that its failure would mark the end of our civilization. In the course of time we may even have ceased to worry about reparations, and let us hope that the political boundaries in Eastern Europe will have ceased to clash with economic and cultural frontiers. Yet not one of these perplexities has thwarted the movement of our time toward international organization. They may retard, and at times they may defeat advances; but they do not destroy the momentum which has been gained. Each of them must be approached by the student with appreciation of the general trend.

In this brief period since the war, our generation has not been idle. It has suffered, as all generations suffer, from apathy, from ignorance, from opposition to its steady purpose. Yet it promises to leave something to show for its efforts. It has followed the method by which progress is achieved. It is building institutions which promise to serve the needs of future generations. It has made greater progress in organizing the world for co-operation and peace than was made in a hundred years before the war.

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Miller & Bratspies (Eds), Progress in International Law, pp. 887-912.