The Politics of International Law-Making: Constructing Security in Response to Global Terrorism

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The response of the international community to the problem of global terrorism has been multifaceted and complex. At the heart of this response has been an apparent rush to law, as evidenced by the adoption of a considerable number of global and regional counter-terrorism treaties, supplemented by an increasingly sophisticated role of key institutions, including, in particular, the United Nations Security Council. At one level it might be possible to argue that international law is coming of age and is, as a result, developing into a sophisticated legal system which is capable of analysis and application at both the domestic and international level. However, this apparent rush to law, whilst generally positive and indicative of a potentially greater normativity of international law, brings with it certain difficulties. For example, the newly asserted legislative role of the United Nations Security Council, augmented by the supremacy provision of Article 103 of the United Nations Charter, creates an hierarchically superior law-making authority which is capable of overriding state consent and has the potential to remove political dialogue from the law-making process.

This paper seeks to analyze the various normative processes at work in the legal response to international terrorism from an interdisciplinary perspective. The first section of the article will provide a brief overview of the institutional responses and the legal issues relevant thereto. Particular focus will be given to the emerging congruence between primary rules and secondary processes which assimilate closely with the positivist legal analysis of H.L.A. Hart,[1] as well as the liberal institutionalist

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[1] See, in particular, H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press (1994) at 155. The legal responses to global terrorism will be taken at face value and the legal analysis will draw primarily on positivism and critiques thereof. It is accepted that Hart's version of legal positivism is but one variation of this theory. For an account of a more modern approach to legal positivism, see Bruno Simma & Andreas L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 Am. J. Int'l L. (302). Nevertheless, as noted in the text, it is the apparent congruence of primary and secondary rules visible in the institutional response to global terrorism which is at the heart of the present article. This insight demands the use of Hart's concept of law as the stating point for the present analysis. By focusing on the positivist legal responses to global terrorism the article does not seek to develop more critical analysis, for example, by drawing on New Haven scholarship, critical legal studies or feminism.

vision of 'legalization'.[2] Central to the institutional response to global terrorism is the emerging legislative role of the United Nations Security Council, as evidenced, in particular, by Resolution 1373. Consideration will be given to the legality of this legislative response before the legitimacy of the process is examined. A range of theoretical insights from both international law and international relations will be examined to argue that the legitimacy of the process of Security Council legislation derives from state compliance secured through the development of shared understandings as a result of iterative discourse and increased socialization.[3] It will be argued thereafter that, even if legitimate, the positivist legalization model is limited insofar as the internal morality of the ensuing law is open to question. Thus, it will be argued that continued state compliance with law-making responses to global terrorism cannot be secured without greater involvement of states and non-state actors in the law-making process itself through processes of communicative action and rhetorical activity.

Law-Making Responses to Global Terrorism – An Overview

As was noted in the introduction, there has been an apparent rush to law in response to the threat of global terrorism. In particular, there has been a significant development in primary rules. The process of rule making in response to terrorism began in the 1960s with a series of conventions, which were aimed at dealing with particular types of terrorist offences. By the early 1990s there were ten sectoral or offence-specific anti-terrorism conventions in total,[4] all of which 'had evolved

[2] See the special issue of *International Organization*, Volume 54, Summer 2000. This work builds upon the dual agenda analysis of liberal institutionalism developed by Anne-Marie Slaughter in her groundbreaking article 'International Law and International Relations: A Dual Agenda' (1993) 87 Am. J. Intl L. 205 and relies directly on the legal positivism of H.L.A. Hart. See Kenneth W. Abbott, Robert O Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, 'The Concept of Legalization' 54 *International Organization* 401 at 403.

[3] In developing insights from IR theory, in addition to the analysis of liberal institutionalism inherent in the concept of legalization, consideration will be given also to the rationalist/constructivist debate. The primary theoretical framework for the article, alongside legal positivism, derives from constructivism, which this author believes is the IR theory that offers the most to international lawyers. Insights derived from realism might inform the analysis of legal positivism in the first part of this article but the deliberate decision to focus on the Hartian model of legal positivism mitigates against the specific development of realist analysis in this context.

[4] Tokyo Convention on Offences and Certain other Acts Committed on Board Aircraft 1963 (704 *UNTS* 219); Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970 (860 *UNTS* 105); Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 (974 *UNTS* 177); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973 (1035 *UNTS* 167); International Convention against the Taking of Hostages 1979 (1316 *UNTS* 205); Convention on the Physical Protection of Nuclear Material 1980 (1456 UNTS 246); Protocol to the Montreal Convention for the Suppression of Unlawful Acts of Violence Serving International Civil Aviation 1988 (1589 *UNTS* 474); Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (1678 *UNTS* 221); Protocol to the Rome Convention for the

piecemeal, usually in response to particular terrorist activities.'[5] This process of law making might usefully be referred to as a process of crisis management.[6] However, the process changed significantly during the 1990s. First, the General Assembly adopted a Declaration on Measures to Eliminate International Terrorism in 1994.[7] It followed this up in 1996 with a Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism. Article 9 of the latter resolution indicated the decision of the General Assembly to establish an Ad Hoc Committee 'to elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement existing international instruments and, thereafter to address by means of further developing a comprehensive legal framework of conventions dealing with international terrorism.'[8] The Convention for the Suppression of Terrorist Bombings was adopted by the General Assembly in 1997 and entered into force in May 2001, three and a half months before the events of 9/11.[9] The Ad Hoc Committee has subsequently promulgated two further Conventions on the Suppression of the Financing of Terrorism in 1999[10] and on Nuclear Terrorism in 2005.[11] This process is continuing in the form of the current work of the General Assembly's Ad Hoc Committee focusing on the promulgation of a Comprehensive Terrorism Convention, which is intended to supplement rather than replace the existing anti-terrorism Conventions. The Ad Hoc Committee has been working on the draft articles for this convention for a number of years[12] but has yet to agree on a final draft. It is commonly asserted that the primary stumbling block is a failure to agree on a definition of terrorism, although other factors, including the relationship between the comprehensive convention and the exiting anti-terrorism conventions, remain problematic, as does the exclusion of the operation of the activities of armed forces of

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Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf 1988 (1678 *UNTS* 304); Convention on the Marking of Plastic Explosives for the Purposes of Detection 1991 (30 *ILM* 721 (1991)).

[5] John P. Grant, 'Beyond the Montreal Convention' (2004) 36 Case W. Res. J.Int'l.L 453 at 454-5.

[6] See Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 Mod. Law Rev. 377.

[7] UNGA Resolution 49/60.

[8] UNGA Resolution 51/210.

[9] 37 *ILM* 249 (1998).

[10] International Convention on the Suppression of the Financing of Terrorism 1999 (39 *ILM* 268 (2000)).

[11] Adopted by the General Assembly on 13 April 2005 (UNGA Resolution 59/290). The treaty will be open for signature between 14 September 2005 and 31 December 2006 and will enter into force 30 days after being ratified by the twenty-second party (Article 25).

[12] The original draft of the proposed convention was based on a working document submitted to the Committee by India in 2000 (UN Doc. A/C.6/51/6).

states by virtue of proposed Article 18 of the draft convention.[13] In spite of the difficulties apparent in drafting a comprehensive terrorism convention, the development of primary rules by the United Nations dealing with the problem has been substantial.

Regional organizations have also promulgated a significant number of counter-terrorism treaties. The OAS Convention to Prevent and Punish Acts of Terrorism taking the form of Crimes against Persons and Related Extortion that are of International Significance,[14] the European Convention on the Suppression of Terrorism 1977[15] and the SAARC Regional Convention on the Suppression of Terrorism 1987[16] were early examples of regional treaties responding to the problem of terrorism. The latter treaty evidences the fact that these conventions were not only being developed by Western-focussed organizations. Indeed, it is particularly noticeable that by the late 1990s some key instruments were beginning to emerge from non-Western regional organizations. Thus, the year 1999 saw the adoption of the Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism 1999,[17] as well as the Convention on the Prevention and Combating of Terrorism, which was adopted by the Organisation of African Unity (now the African Union) in 1999[18].

Perhaps even more significantly, Islamic States were beginning to work together to adopt their own anti-terrorism measures. These included the Arab Convention on the Suppression of Terrorism 1998, which was adopted by the Arab League on 22 April 1998,[19] as well as the Convention of the Organisation of the Islamic Conference on Combating International Terrorism of 1 July 1999.[20] Major regional anti-terrorism instruments adopted since 9/11 include the Inter-American Convention Against Terrorism 2002, the OSCE Charter on Preventing and Combating Terrorism

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[13] For a more detailed discussion of the work of the *Ad Hoc* Committee on the drafting of the proposed Comprehensive Terrorism Convention see J. Craig Barker, *The Protection of Diplomatic Personnel* (Aldershot: Ashgate, 2006) at 136-8 and John Dugard, 'The Problem of the Definition of Terrorism' in Paul Eden & Thérèse O'Donnell, eds., *September 11 2001: A Turning Point in International and Domestic Law?* (Ardsley, N.Y.:Transnational Publishers Inc., 2005) 187.

[14] Concluded at Washington DC on 2 February 1971 (Deposited with the Secretary-General of the Organization of American States)

[15] ETS 090 (1977)

[16] Signed at Kathmandu on 4 November 1987 (Deposited with the Secretary-General of the South Asian Association for Regional Cooperation).

[17] Done at Minsk on 4 June 1999 (Deposited with the Secretariat of the Commonwealth of Independent States).

[18] Adopted at Algiers on 14 July 1999 (Deposited with the General Secretariat of the Organization of African Unity).

[19] Signed in Cairo on 22 April 1998 (Deposited with the Secretary-General of the League of Arab States).

[20] Adopted at Ouagadougou on 1 July 1999 (Deposited with the Secretary-General of the Organisation of the Islamic Conference.)

2002 and the European Union Framework Decision on Terrorism of June 2002. A new Council of Europe Convention on the Suppression of Terrorism[21] was adopted on 16 May 2005 but has yet to be ratified by a sufficient number of states to enter into force.

This development of primary rules has been supplemented by the invocation of secondary processes. In particular, the involvement of the United Nations Security Council in dealing with the problem of terrorism within this new legal framework has been considerable and began long before the events of 9/11. The direct involvement of the Security Council in the problem of terrorism arguably began with its response to the bombing of Pan Am flight 103 over Lockerbie on 21 December 1988. Although initially slow to react,[22] the Security Council became involved in the process of pressuring Libya to surrender the two persons accused of the Lockerbie bombing to trial. The process, which began with a request to the Libyan government to cooperate,[23] quickly moved to the imposition of sanctions on Libya under the authority of Chapter VII of the UN Charter.[24] Ultimately, the Security Council mandated the creation of the Scottish Court sitting in the Netherlands which tried the two accused.[25]

The position of the Security Council in relation to terrorist attacks has developed considerably in the course of the last decade. The unique circumstances of the Lockerbie process, which facilitated the invocation of domestic criminal law against the two accused, have yet to arise again. In the context of the emerging threat of global terrorism, the near simultaneous attacks on the United States embassies in Kenya and Tanzania, which occurred on 7 August 1998, provided the impetus for the development of a more proactive role for the Security Council. The attacks were immediately 'strongly condemned' by the United Nations Security Council but no specific measures were called for. However, a year after the East African bombings, in Resolution 1269 (1999), the Security Council expressed the view that terrorist acts could be considered as constituting threats to international peace and security thereby raising the possibility of Chapter VII action being taken against terrorist organizations.[26] The resolution called for states to take appropriate steps to combat terrorism. These measures included calls for cooperation and exchange of information to prevent and suppress terrorist acts, including measures to prevent and suppress the preparation and financing of terrorism.[27] However, the resolution was not adopted under the authority of Chapter VII and was accordingly not mandatory and did not

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[21] CETS No. 196.

[22] The destruction of Pan Am Flight 103 was met with an immediate condemnation of the attack by the President of the Security Council but no resolution of the Council ensued.

[23] UNSC Resolution 731 (1992) of 21 January 1992.

[24] UNSC Resolutions 748 (1992) of 31 March 1992 and 883 (1993) of 11 November 1993.

[25] UNSC Resolution 1192 (1998) of 27 August 1998. On the Lockerbie trial see generally John Grant, *The Lockerbie Trial: A Documentary History*, (New York: Oceana, 2004)

[26] UNSC Resolution 1269 (1999).

[27] *Ibid*, paragraph 4.

include any monitoring mechanisms. As a result, the provisions of the resolution were largely ignored.[28]

The tragic events of 11 September 2001 heralded a new approach by the Security Council to the problem of global terrorism. Resolution 1368 (2001) of 12 September 2001 contained the immediate response to the terrorist attacks. In that resolution the Security Council 'unequivocally condemned in the strongest terms' the 9/11 attacks and recognized them as a threat to international peace and security. The resolution also recognized 'the inherent right of individual or collective self defence, in accordance with the Charter.' On 28 September 2001 the Security Council passed Resolution 1373.[29] The resolution imposed a number of mandatory requirements on states in relation to the prevention of terrorist attacks. Crucially, by virtue of paragraph 6 of the resolution, the Security Council established a Counter-Terrorism Committee (CTC), which was charged with monitoring the implementation of the resolution. In addition, states were required to report to the CTC on the steps they had taken to implement the resolution. Since 2004, the work of the CTC has been supported by the creation of the Counter-Terrorism Executive Directorate, which was set up to support the implementation of Resolution 1373 and to further develop the capacity-building work of the CTC.[30] This new approach of the Security Council to the problem of global terrorism has been described as having four prongs: 'condemnation of discrete acts of terrorism,[31] imposition of counterterrorism obligations on all states, capacity building, and imposition of sanctions.'[32]

The counter-terrorism work of the United Nations has been supplemented by a plethora of measures by international governmental organizations, including, in particular, regional organizations. It is beyond the scope of this work to examine these developments in depth. However, it is worth noting the significant structural initiatives which have taken place in a number of key, primarily Western-oriented regional organizations. For example, the Organisation of American States was the first

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[28] Curtis A. Ward, 'Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council' (2003) 8 J Conflict & Security L.289 at 290.

[29] UNSC Resolution 1373 (2001).

[30] The CTED was introduced by virtue of UNSC Resolution 1535 (2004)

[31] Since 2001 the Security Council has passed a number of resolutions in direct response to specific terrorist attacks identifying these attacks as threats to international peace and security. See Resolution 1377 (2001) (on the events of 11 September 2001); Resolution 1438 (2002) (in relation to the attacks in Bali, Indonesia on 12 October 2002); Resolution 1440 (2002) (in relation to the taking of hostages in Moscow, Russia on 23 October 2002); Resolution 1450 (2002) (in relation to attacks in Kenya in November 2002); Resolution 1465 (2003) (in relation to an attack in Bogotá, Columbia); Resolution 1530 (2004) (in relation to the attacks in Madrid, Spain on 11 March 2004); Resolution 1611 (2005) (in relation to the attacks in London, UK on 7 July 2005). See also more general resolutions on threats to international peace and security caused by terrorist acts including 1390 (2002); 1452 (2002); 1455 (2003); 1526 (2004); 1535 (2004); 1566 (2004); 1617 (2005).

[32] Eric Rosand, 'The Security Council's Effort to Monitor the Implementation of Al Quaeda/Taliban Sanctions' (2004) 98 Am. J. Int'l. L.745 at 745.

regional organization to react to the emerging terrorist threat. It established, in 1999, the Inter-American Committee Against Terrorism (CICTE) which was designed to coordinate the efforts of the organization directed against terrorism. CICTE performs an executive role within the organization in response to terrorism. It assists member states in the implementation of domestic anti-terrorism legislation and was responsible for the drafting of the Inter-American Convention Against Terrorism 2002.[33] The Organisation for Security and Cooperation in Europe created an Action Against Terrorism Unit in December 2001.[34] The following year, the OSCE Ministerial Council adopted the OSCE Charter on Preventing and Combating Terrorism.[35] The Council of Europe has also made significant structural adjustments in response to the terrorist threat. In 2003, the Council of Europe created the Committee of Experts on Terrorism (CODEXTER), which is responsible for the coordination of the Council of Europe's counter-terrorism activities.

Amongst the non-Western regional organizations, the Organisation of the Islamic Conference has taken the lead in seeking to dislodge the many misconceptions about the role of Islamic states in the struggle against terrorism. According to Javaid Rehman, the OIC 'can be seen as the mouthpiece of the community of Islamic States.'[36] Rehman explains that 'since its establishment, the OIC has expressed a special commitment to the eradication of all forms of terrorism. The OIC [has] adopted the Convention on Combating International Terrorism and in the aftermath of the attacks on the United States in September 2001 has actively campaigned for further initiatives to condemn and combat terrorist acts.'[37] One such initiative was the establishment, as a result of the Kuala Lumpur Declaration of April 2002, of the Ministerial Level OIC Committee on International Terrorism.[38]

The Legalization of International Law

The congruence of primary and secondary rules apparent in the law-making responses outlined above points towards the emergence of international law as a fully functioning legal system. Such an analysis is based on the highly influential work of H.L.A. Hart who has argued that a legal system must possess both primary rules, that is the rules that directly regulate the conduct of the members of a society, and secondary rules, which state the criteria by which the primary rules are identified,

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[33] OAS Document AG/RES. 1840 (XXXII-O/02)

[34] The Unit was suggested by the Bucharest Plan of Action for Combating Terrorism adopted at the Ministerial Council in December 2001. See OSCE Document MC(9).DEC/1,

[35] OSCE Document MC(10).JOUR/2

[36] Javaid Rehman, *Islamic State Practices, International Law and The Threat from Terrorism: a Critique of the 'Clash of Civilizations' in the New World Order* (Oxford: Hart, 2005) at 191.

[37] *Ibid* at 191-2.

[38] For a detailed discussion of the establishment and role of this committee and the work of the OIC in general, see Rehman, i*bid*, Chapter 7 and pp. 218-9 in particular.

altered and applied.[39] Hart's own conclusion was that international law could not be considered as a legal system because it lacked the necessary secondary rules and the required rule of recognition.[40] However, even if this was a valid assertion of the limits of international law in the 1960s, which it may or may not have been, it is certainly not true of modern international law. Possibly in response to Hart's trenchant criticisms, international lawyers have been working to draft conventions which do not simply state the 'rules' but provide mechanisms for the change and development of those rules within the framework of those conventions.[41] Similar developments are apparent in evolving customary international law.[42] Thus, at one level, it can be asserted that the development of the law-making responses to global terrorism are but a further example of the emerging sophistication of the international legal system.

As well as influencing international lawyers, Hart's analysis has been utilized in international relations scholarship, particularly in relation to the liberal institutionalist vision framed around the concept of 'legalization'. The concept of legalization was proposed by a number of institutionalist writers in 2000 as a way of bridging the gap between international law and international relations scholarship.[43] According to these writers, international institutions can be tested on a scale of legalization depending on three criteria: 'the degree to which rules are obligatory, the precision of those rules and the delegation of some functions of interpretation, monitoring and implementation to a third party.'[44] As noted in the introduction, these writers acknowledge that their work draws heavily on Hart's version of legal positivism:

> Hart's concepts of primary and secondary rules are useful in helping to pinpoint the distinctive characteristics of the phenomenon we observe in international relations. The attributes of obligation and precision refer to international rules that regulate behaviour; these closely resemble Hart's primary rules of obligation. But when we define obligation as an attribute that incorporates general rules, procedures and discourse of international law, we are referring to features of the international system analogous to Hart's three main types of secondary rules: recognition, change and adjudication. And the criterion of delegation necessarily implicates all three of these categories. [45]

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[39] Hart, *supra* note 1 at 155.

[40] *Ibid* at 231.

[41] On the process of secondary norm development in international law see further J Craig Barker, *International Law and International Relations* (London: Continuum, 2000) at 18.

[42] See, in particular, the development of the law of state responsibility which emerged primarily within customary international law before being codified.

[43] See the special issue of *International Organization*, Volume 54, Summer 2000, *supra* note 2.

[44] Judith Goldstein, Miles Kahler, Robert.O Keohane & Anne-Marie Slaughter, 'Introduction: Legalization and World Politics' (2000) 54 International Organization 385 at 387.

[45] Abbott *et al, supra* note 2 at 403.

Testing the institutional reaction to the problem of global terrorism against the forms of international legalization proposed by the legalization theorists indicates increasing degrees of legalization apparent in the development of new counter-terrorism treaties, which provide moderate to high levels of obligation and precision in the treaties themselves. The actual degree of legalization will, of course, depend upon the nature of the instrument in question as well as its purpose. However, insofar as most of these new treaties are modelled on treaties developed by the United Nations, substantial differences between the various regional treaties are not marked. Similarly, the structural developments apparent in most, if not all of the responses by regional organizations to the problem are indicative of the increasing delegation of some functions of interpretation, monitoring and implementation. The variations between the approaches of different organizations in this regard are perhaps more apparent here than in relation to the promulgation of the substantive legal instruments as the level of delegation is dependent upon the relevant constitutional frameworks of each organization. Thus, for example, the Ministerial Level Committee on International Terrorism of the Organisation of the Islamic Conference, which, as the name suggests, operates at the ministerial level, may be significantly less 'legalized' than the Council of Europe's Committee of Experts on Terrorism, which envisages considerably more delegation of supervisory powers.

Given the potential variations in the degree of legalization among regional organizations, it is perhaps surprising to assert that the United Nations, a universal organization, is the most 'legalized' of all of the institutions in relation to its response to global terrorism. However, within the context of the response to global terrorism, the analysis of the promulgation of primary rules and the invocation of secondary process by the United Nations points clearly to the veracity of such a conclusion. Thus, the development of primary rules by the United Nations has led the way in the development of law-making responses to global terrorism. Furthermore, the Counter-Terrorism Committee has established itself as the primary body charged with the interpretation, monitoring and implementation of not only the relevant United Nations law but, more generally, in relation to the operation of counter-terrorism measures regionally and indeed in the domestic sphere.

Security Council Legislation: The Way Forward?

One final, and perhaps crucial, element of the Hartian and legalization models must be addressed at this point, that is, the role of legislation. Both models lead international law in a particular direction, which assimilates very closely with the 'gold standard' of domestic law. However, international law lacks some of the key characteristics of the domestic legal order which Hart was seeking to describe. In the context of the present discussion, the lack of a legislature is key. Although the concept of international legislation is not mentioned in the work of the legalization scholars, it is implicit in their work that the ultimate legalized institution would be one which is capable of enacting legally binding measures on states without their consent. It is no surprise, therefore, that liberal institutionalists who have developed the concept of legalization

repeatedly point to the European Union (EU) as the 'archetype' liberal institution.[46] However, the European Union is a unique organization which benefits from close proximity between the ideals and aspirations of the member states. It is also the case that the process of European Union legislation is complex and highly developed. In particular, the constitutional framework of the European Union contains significant checks and balances on the legislative process sufficient to minimize, if not eliminate, the problem of the so-called democratic deficit. It is unlikely that this level of sophistication will ever be matched in a more globalized institution such as the United Nations.

In spite of this, many international lawyers have highlighted the emerging legislative role of the United Nations Security Council as marking a new stage in the development of international law.[47] For example, according to Curtis Ward, an independent expert of the Security Council Counter-Terrorism Committee, the response of the international community in general, and the Security Council, in particular, was unprecedented and extraordinary. He has noted that, 'A new dynamic was created and the level of co-operation among the members of the Security Council in dealing with the issues surrounding international terrorism was greatly enhanced … [the Security Council] was quick firm, and unequivocal,' [48] and its response to the events of 9/11 was 'a necessary and prudent exercise of the power and prerogative of the Security Council [as provided for in Article 24(1) of the United Nations Charter].'[49] More broadly, Paul Szasz has argued that Resolution 1373 should stand as a precedent for institutional law-making in the future. According to Szasz:

> The members of the Security Council were most likely unaware, when they hastily adopted Resolution 1373, of the pioneering nature of that decision. Now that this door has been opened, however, it seems likely to constitute a precedent for further legislative activities. If used prudently, this new tool will enhance the United Nations and benefit the world community, whose ability to create international law through traditional processes has lagged behind the urgent requirements of the new millennium.[50]

Some international lawyers have challenged the power of the Security Council to enact legislation. Matthew Happold, for example, has forcefully argued that the

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[46] See, for example, Anne-Marie Slaughter & William Burke-White 'The Future of International Law is Domestic (Or, The European Way of Law)' (2006) 48 Harv Int. L. J. 327 at 327-329.

[47] See, for example, Eric Rosand, 'The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative' (2005) Fordham Int'l L.J. 542; Jane E. Stromseth 'An Imperial Security Council? Implementing Security Council Resolutions 1373 and 1390' (2003) 97 Am. Soc'y Int'l. L. Proc. 41; Paul Szasz, 'The Security Council Starts Legislating' (2002) 96 Am. J. Int'l. Law 901, Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 Am. J. Int'L. L. 175.

[48] Ward, *supra* note 28 at 292-3.

[49] *Ibid*.

[50] Szasz, *supra* note 47 at 905.

legislative role adopted by the Security Council when it promulgated Resolution 1373, as well as a number of prior and subsequent resolutions, was *ultra vires* the power of that organ.[51] He argues that the Security Council can only exercise its power in response to specific situations or conduct.[52] Similarly, José Alvarez has noted that in relation to its counter-terrorism work, 'the Council is no longer responding with discrete action directed at a particular state because of a concrete threat to the peace arising from a specific incident.'[53]

It is, of course, possible for new institutional practices to emerge through teleological interpretations of the constitutive instruments of international organizations. A similar argument to that put forward by Happold and Alvarez in relation to Security Council Resolution 1373 was developed by Burns Weston in relation to Security Council Resolution 678 in 1991.[54] It will be recalled that Resolution 678 authorized 'member states ... to use all necessary means to uphold and implement Security Council Resolution 660 and all subsequent relevant resolutions ...'[55] in relation to the 1990 invasion of Kuwait by Iraq. At the time Weston argued that Resolution 678 lacked legitimacy. He was of the opinion that the United Nations Security Council 'made light of fundamental UN Charter precepts and thereby flirted precariously with "generally accepted principles of right process".'[56] Nevertheless, the practice of the Security Council authorizing states to take military action to uphold relevant United Nations resolutions is now an established feature of the operation of Article 42 of the United Nations Charter. A similar process of evolution of practice might be occurring in relation to the legislative power of the United Nations.

It is a fact that states have moved quickly to comply with the requirements of Resolution 1373 and all member states have submitted reports to the Counter-Terrorism Committee.[57] Furthermore, the activities of many of the regional organizations referred to above have drawn on the specific mandate of Security Council Resolution 1373 as providing the legal basis for their activities. Notably, the OSCE Charter recognized that 'the relevant United Nations conventions and protocols, and United Nations Security Council resolutions, in particular the United Nations Security Council Resolution 1373 (2001), constitute the primary international legal framework for the fight against terrorism.'[58] Similarly, the Euro-Atlantic Partnership

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[51] Matthew Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' in Eden & O'Donnell, *supra* note 13 at 617.

[52] *Ibid*. at 639.

[53] José Alvarez, 'Hegemonic International Law Revisited' (2003) 97 Am.J.Int'l. Law 873 at p. 874.

[54] Burns Weston, 'Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy' (1991) 85 Am. J. Int'l. L. 516.

[55] UNSC Resolution 678 (1990), paragraph 2.

[56] Weston *supra* note 54 at 516.

[57] Eric Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee and the Fight Against Terrorism' (2003) 97 Am. J. Int'l Law 333 at 335.

[58] OSCE Document MC(10).JOUR/2, paragraph 11.

Council, which is closely linked to NATO, endorsed a Partnership Action Plan against Terrorism in November 2002 with a view to 'making all efforts within their power to prevent and suppress terrorism in all its forms and manifestations, in accordance with the universally recognized norms and principles of international law, the United Nations Charter, and the United Nations Security Council Resolution 1373.'[59] Such has been the response to Resolution 1373 that the United Nations Secretary-General has recently observed that, 'The work of the Counter-Terrorism Committee, and the cooperation it has received from Member States, have been unprecedented and exemplary.'[60]

The Legitimacy of Security Council Legislation

How can this 'unprecedented and exemplary' response be explained? One possible explanation might be the threat of sanctions, which arises from the fact that Resolution 1373 was passed by the Security Council under the authority of Chapter VII of the United Nations Charter, which allows for the imposition of economic and military sanctions on non-complying states. However, it is unlikely that the United Nations Security Council would use sanctions against non-cooperating states in the context of Resolution 1373.

An alternative argument arises from the international relations sourced rational choice theory. In their recent work on *The Limits of International Law,*[61] Jack Goldsmith and Eric Posner have relied on rational choice theory to explain that international law 'can be binding and robust, but only when it is rational for states to comply with it.' [62] Although not dealing directly with the threat of global terrorism, Goldsmith and Posner's analysis could go some way to explaining the high degree of cooperation around the problem. All states have an interest in ensuring that the threat of global terrorism is effectively addressed, if not eliminated. Crucially, the counter-terrorism effort, although dominating the international legal agenda, is not an issue of high-level politics. It is not seeking to achieve a balance between conflicting state interests but is, rather, focussed on the development and coordination of measures directed against terrorist organizations.

However, the limits of the rational choice analysis are all too apparent. Goldsmith and Posner's stated aim is to assert the limits of international law and the rational choice theory provides the conceptual framework not only for the possibility

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[59] See http://www.nato.int/docu/basictxt/b021122e.htm.

[60] Quoted at <http://www.un.org/News/Press/docs/2002/sgsm8105.doc.htm>.

[61] Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* (Oxford: OUP, 2005).

[62] *Ibid* at 202. Although Goldsmith and Posner deny that their work is based on a realist account of international relations, this assertion comes remarkably close to that of Morgenthau who noted that international law is complied with by states when their interests demanded it. Thus, where national self interest demanded action contrary to perceived rules of international law, the only obligation on states was to act in their own self-interest. Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Knopf, 1973, 5th rev. edn.) at 291.

of cooperation in the context of legalized international institutions but also provides the opportunity for states to ignore international law when it is in their interests to do so. In the context of global terrorism, Goldsmith and Posner would apparently have little difficulty in asserting a lack of legal rules prohibiting the detention of alleged terrorists at Guantanamo Bay or the use of extraordinary rendition and secret detention centres in spite of the apparent breach of established human rights and humanitarian norms inherent in these activities.[63] It should not be surprising therefore that the criticisms of Goldsmith and Posner's rational choice analysis have been severe.[64]

A common thread in such criticism is that Goldsmith and Posner's analysis is overly simplistic and fails to take account of 'much of the texture of international cooperation.'[65] Paul Berman is particularly dismissive of Goldsmith and Posner's analysis. According to Berman, 'Goldsmith and Posner have first constructed a straw man version of international law – a lumbering positivist enforcer of international moral discipline – that almost no one believes exists and then dispatched this straw man to the dust bin while suggesting that they have therefore said something meaningful about the limits of international law.'[66] This is not to say that the self-interest of states is not important in international law – it clearly is. However, the problem arises where one makes the leap from the assertion that states comply with international law when it is in their self-interest to do so to the conclusion that international law has no independent causal force.[67]

A more subtle and nuanced approach to the importance of state self-interest is to be found in the work of the so-called compliance theorists who argue that compliance with international agreements is best achieved through 'an iterative process of discourse among the parties [to a treaty], the treaty organization, and the wider public.'[68] According to Abram and Antonia Chayes, the iterative discourse, which leads to compliance, occurs not only with other states but also with the treaty organization itself.[69] In relation to Resolution 1373, the iterative discourse between states and the Counter-Terrorism Committee, which represents the treaty organization

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[63] On the apparent conflict between anti-terrorism security measures and established human rights and humanitarian norms, see further below.

[64] See, for example, Paul S. Berman, 'Seeing Beyond the Limits of International Law', (2006) 84 Tex. L. Rev. 1265; Oona A. Hathaway & Ariel N. Lavinbuk, 'Rationalism and Revisionism in International Law' (2006) 119 Harv. L. Rev. 1404; Kal Raustiala, 'Refining the Limits of International Law' (2006) 34 Ga. J. Int'l & Comp. L. 423; Anne van Aaken, 'To do Away with International Law? Some Limits to the Limits of International Law' (2006) 17 Eur. J. Int'l. L. 289.

[65] Raustiala, *supra* note 64 at 424.

[66] Berman, *supra* note 64 at 1277.

[67] *Ibid*.

[68] Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995) at 25.

[69] Abram Chayes & Antonia Handler Chayes, 'On Compliance' (1993) 47(2) International Organization 175 at 180.

in this context, is ongoing. Although nominally presented as a coercive process, Security Council legislation in the context of Resolution 1373 and the development of the Counter-Terrorism Committee is often seen as being more about persuasion and capacity-building than coercion per se. It is certainly the case that the Counter-Terrorism Committee has been careful not to use its powers to prosecute or directly condemn states. This is made clear by Eric Rosand who notes:

> 'By not targeting individual states, not condemning states and focusing instead on technical capacity building [the CTC] was thus able to garner the support from virtually all 191 UN members ... the CTC has sought to engage in dialogue with all member states concerning their implementation of Resolution 1373, and intends to continue with such dialogue until it is confident that each has taken effective action on all the issues covered by the resolution.[70]

However, mere persuasion may not suffice as an explanation for state compliance with Resolution 1373.

Alastair Iain Johnston has highlighted the importance of treating international institutions as social environments within which cooperation occurs through a process of socialization.[71] Drawing on and developing the work of the compliance theorists and other social science inquiries,[72] Johnston focuses on persuasion and social influence, which he identifies as two basic microprocesses in socialization theory. According to Johnston, persuasion 'involves changing minds, opinions and attitudes about causality and affect (identity) in the absence of overtly material or mental coercion.'[73] However, he considers that theorists have over-emphasized persuasion and paid insufficient attention to social influence which he defines as 'a class of microprocesses that elicit pro-norm behaviour through the distribution of social rewards and punishments.'[74] For Johnston, social influence would include both social back-patting and shaming or opprobrium.[75]

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[70] Rosand, *supra* note 57 at 335.

[71] Alastair Iain Johnston 'Treating International Institutions as Social Environments' (Dec. 2001) 45(4) *International Studies Quarterly* 487 at 492.

[72] *Ibid* at 488.

[73] *Ibid* at 496.

[74] *Ibid* at 499. Johnston uses the term pro-norm 'to indicate action that is consistent with the norm in question, whether done because the norm has been internalized or because some kind of consequentialist calculation makes it useful to follow.' *Ibid* at p. 492.

[75] Crucially, these microprocesses must be public, observable and carried out within an institutionalized setting. Thus, according to Johnston: 'The constructivists and institutionalists are both right. Constructivists are right that socially induced cooperation requires shared understandings of what appropriate behaviour looks like. But this may not be enough without an institutional structure that provides information about the degree to which actors are behaving in ways consistent with this shared understanding.' *Ibid* at p. 502.

Applying Johnston's analysis to Resolution 1373 and the work of the Counter-Terrorism Committee, it would seem that, in addition to the capacity-building elements, there are within the procedures of Resolution 1373 compliance elements of social coercion. Thus, the publication of reports to the CTC by member states involves a high degree of exposure which increases pressure on states to comply with their obligations under Resolution 1373. Furthermore, the reports themselves are subject to detailed analysis by one of three Sub-Committees of the CTC. This involves assessment of the report by a panel of experts, an invitation to the relevant member state to attend the Sub-Committee discussion of the report, and a decision on the necessity of follow-up action.[76] Although all states had submitted their first report by June 2004, the deadline for submission of follow-up reports had already passed and, in November 2003, the Security Council specifically 'named and shamed' 58 states that had failed to submit further reports by the deadline of 31 October 2003.[77] Finally, the creation of the Counter-Terrorism Committee Executive Directorate (CTED) by Resolution 1535, although specifically aimed at providing technical assistance to states to enable them to comply with their obligations, has the effect of ensuring that states are unable to complain of lack of capacity as an excuse for non-compliance.

The participation of states in the process of regular reporting to the Counter-Terrorism Committee and the fulfilling of the domestic requirements of Resolution 1373 provide legitimacy to the institutional response to the problem of global terrorism. In terms of Thomas Franck's legitimacy thesis, this participation of states in the process establishes both symbolic validation and adherence.[78] Participation is secured by a process of iterative discourse which comprises both persuasive and socially coercive elements. Nevertheless, continued participation in the process cannot be guaranteed. Indeed, it has been observed that the need for the Security Council to name and shame non-cooperating states provides evidence to suggest that 'states' efforts to increase their counter terrorism capacity may be beginning to lose momentum.'[79] One of the reasons for this relates to the impact of Security Council legislation on other established rules of international law, including, in particular, human rights and humanitarian norms. It is submitted that this insight is crucial not only to the Security Council's response to the problem of global terrorism but also that of the United Nations and other international institutions more generally. By focusing exclusively on state security and by failing to address the relevance of other, equally important and well-established norms of international law, anti-terrorism law-makers have undermined the authority of their efforts in the longer term. Thus, even if the legality and legitimacy of Security Council Resolution 1373 can be established, questions remain as to the internal morality of the law.

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[76] Eric Donnelly, 'Raising Global Counter-Terrorism Capacity: The Work of the Security Council's Counter-Terrorism Committee' in Eden & O'Donnell, *supra* note 13 at 764.

[77] *Infra*.

[78] Franck, *The Power of Legitimacy Among Nations* (Oxford: OUP, 1990) at 90-5 & 184.

[79] Donnelly, *supra* note 76 at 766.

The Limits of the Positivist/Legalized Response to Global Terrorism

As has already been highlighted, Hart's positivist concept of law requires the presence of both primary and secondary rules. This suggests the limits of a legal system's normativity where the necessary secondary processes are not present. Similarly, the legalization project limits the potential role of international law. Thus, while the legalization analysis welcomes the possibility of the 'ideal type' of legalization where all three criteria are maximized, it also accepts the possibility of the complete absence of legalization, referred to as anarchy, which is described as 'another ideal type'.[80] Taken to its logical conclusion, this analysis identifies a central role for international law where states are seeking to cooperate through an institutionalized framework but predicts the limits of international law where such cooperation and desire for institutionalization is lacking. Accordingly, over-reliance on Hart's concept of law has the potential to create a two-tier system of international law, that is, institutionalized international law which is hard law and binding upon those to whom it is addressed, and soft law which assimilates more closely with political persuasion. It may be argued that such a two-tier normative system already exists in international law.[81] However, the legalization model would effectively compress the category of 'hard' law to the extent that many existing rules of international law might be regarded as hierarchically inferior and, as a consequence, open to being trumped by 'harder' law.

To some extent this process is already occurring in the context of the response to global terrorism. The promulgation and facilitation of counter-terrorism measures has often occurred at the expense of apparently competing considerations of human rights and humanitarian norms. At the domestic level in particular, individual states have, since 9/11, begun to ratchet up domestic responses to terrorism. In certain totalitarian states this process has led to the imposition of draconian anti-terrorism measures.[82] Even in liberal democracies, state legislatures and governments have struggled to find an appropriate balance between security and civil liberties and new laws have been passed which undermine well-established human rights norms in the name of state security.[83] This ratcheting up of state domestic responses to

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[80] Abbott et al, *supra* note 2 at 401-402.

[81] For a discussion of the concept of soft law, see Alan Boyle, 'Soft Law in International Law-Making' in Malcolm Evans, ed., *International Law* (Oxford: OUP, 2006, 2nd. Ed.).

[82] See, for example, the work of Human Rights First, which has highlighted the problem of the imposition of draconian detention laws in states such as Tanzania, Indonesia, Russia, Pakistan and Uzbekistan. Human Rights First, 'Imbalance of Powers: How Changes to US Law and Policy Since 9/11 Erode Human Rights and Civil Liberties' Cited in Slaughter & Burke-White, *supra* note 46 at 348. The report is available online at http://www.humanrightsfirst.org/us_law/loss/imbalance/powers.pdf.

[83] In support of this assertion see Kim Lane Scheppelle, 'Law in a Time of Emergency: States of Exception and the Temptations of 9/11' 6 U. Pa. J. Const. L. 1001 (2004) and 'We Are All Post-9/11 Now' 75 Fordham L. Rev. 607 (2006). See also Joan Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights' 14 Eur. J. Int'l L 241 (2003), which examines the issue of the impact of terrorism on human rights norms more generally.

international terrorism has, to a considerable extent, been encouraged, if not made possible by, developments at the international level.

Anne-Marie Slaughter and William Burke-White have recently highlighted the danger that 'by compelling national action, the international legal system may undermine local democratic processes and prevent domestic experimentation with alternate approaches.'[84] Slaughter and Burke-White recognize that

> [t]he most significant danger in [the] new functions of international law ... lies in the potential of national governments to co-opt the force of international law to serve their own objectives. ... By strengthening state capacity, international law may actually make states more effective at the very repression and abuse the interference challenge seeks to overcome. Similarly, by compelling state action, international law may give national governments new license to undertake otherwise illegal or unjust policies. Where critical values such as human rights and state security are seen to be in conflict, international legal compulsion of policies that favor one value may come at the expense of the other. This tension is particularly problematic where a repressive regime is able to use compulsion at the international level as a cover or an excuse to undertake its own domestic policies that may undermine legitimate opposition groups and violate citizens' rights.[85]

Slaughter and Burke-White's response to this danger is apparently quite simple. By focusing on the importance of domestic institutions they argue that: '[t]he challenge ... is to design rules that will harness the strengths of well-functioning domestic institutions while targeting and restricting the reach of abusive ones.'[86] Attractive as this response may appear, given the need for universal application of international law, the task of designing international rules that are able to achieve this objective is practically impossible.

Constructing Security in Response to Global Terrorism

A broader and more inclusive understanding of the international political system is provided by constructivist theorists within international relations. The basic tenants of constructivism will be well-known to the readers of this journal and are premised first on the assertion that social or 'normative and ideational structures' are as important as material structures; second, that the social identities of states and other actors condition their interests and actions and thus need to be analyzed; and finally, that normative and ideational structures 'only exist because of the routinised practices of knowledgeable social agents which makes them human artefacts amenable to

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[84] Slaughter & Burke-White, *supra* note 46 at 347.

[85] *Ibid*.

[86] *Ibid*. at 348.

transformation.'[87] These basic tenets resemble closely the insights of compliance theorists referred to earlier. Accordingly, constructivists should have little difficulty in accepting the analysis set out above to the effect that state compliance with Security Council Resolution 1373 and the work of the Counter-Terrorism Committee provides legitimacy to that process of institutional law making as a response to global terrorism.

In response to the question of how to balance human rights with state security, however, constructivist analysis may not appear able at first sight to provide much assistance. Thus, the process of interest and identity formation is not necessarily benign. Even liberal democracies have an interest in ensuring the security of the state. Accordingly, in constructing their own security, liberal democratic states appear to be willing to accept diminution in human rights and civil liberties within the domestic polity in order to ensure enhanced state security against internal and external threats. This insight should not be regarded as particularly controversial insofar as it is reflected in existing regional and international human rights regimes. Thus, for example, Article 4 of the International Covenant on Civil and Political Rights allows for derogations in times of public emergency as does Article 15 of the European Convention on Human Rights and Fundamental Freedoms 1950, although only in relation to certain rights.[88] As a consequence, it becomes difficult for liberal democratic states to challenge the activities of more authoritarian regimes engaging in similar processes but in a more draconian way.

On the other hand, a considerable body of constructivist scholarship focuses on broader questions of morality, ethics and justice in the international political process than this explanation portrays.[89] Indeed, in relation to its relevance to international law, constructivism has been portrayed by Jutta Brunnée and Stephen J. Toope as the possible antidote to legal positivism.[90] Brunnée and Toope's analysis is, to some extent, an attempt to re-introduce moral analysis into international law and draws directly on the scholarship of Lon Fuller who engaged in a debate in the 1950s about

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[87] Christian Reus-Smit, 'The Politics of International Law' in Christian Reus-Smit, ed,. *The Politics of International Law* (Cambridge: CUP 2004) 14 at 22. On the question of agency and structure see further Alexander Wendt, 'The Agent Structure Problem in International Relations Theory' (1997) 41 *International Organization* 2.

[88] These instruments generally provide a wide margin of appreciation for states to derogate from, or at least limit application of, certain substantive rights in times of public emergency. However, both treaties provide that there shall be no derogation in relation to certain rights, including, *inter alia,* the right to life (ICCPR, Article 6; ECHR, Article 2) and the prohibition on torture (ICCPR, Article 7, ECHR, Article 3). See generally Dominic McGoldrick, The Interface Between Public Emergency Powers and International Law' (2004) 2 Int'L J. Const. L. 380.

[89] See Christian Reus-Smit, 'Society, Power and Ethics' in Reus-Smit, *supra* note 87 at 281.

[90] Jutta Brunnée & Stephen J Toope 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39 Colum. J. Transnat'l L. 19 at 38-43. It should be noted that Brunnée & Toope berate some leading constructivist thinkers such as Frederich V. Kratochwil and Nicholas Greenwood Onuf for being 'constrained by an unconscious positivism.' *Ibid.* at 38.

the concepts of positivism and fidelity to law.[91] Fuller's key insight was the development of the idea of 'the internal morality of the law' which focuses on the legitimacy of the law. According to Brunnée and Toope,

> Fuller's concept of 'internal morality' was rooted in his belief that certain conditions need be in place to allow human beings to pursue their purposes through law. If the internal morality of the law is not fulfilled, if the conditions are not met, then the process of law creation, be it through legislation, adjudication or negotiation, is fundamentally flawed and therefore illegitimate.[92]

In relying on Fuller's internal morality of the law thesis, Brunnée and Toope reject Thomas Franck's legitimacy analysis referred to earlier. While acknowledging that Franck's variables of legitimacy, that is determinacy, coherence and adherence 'map onto Fuller's conditions of internal morality,'[93] Brunnée and Toope note that Franck 'treats his variables as elements of 'process fairness', which is distinct, in his view, from 'moral fairness', his term for distributive justice.'[94] For Brunnée and Toope, 'moral fairness' requires a further element, which is to be found in Fuller's 'interactional theory of international law.'[95] Put simply, interactional theory requires mutuality amongst the governing and the governed as well as 'pervasive interaction' between ends and means. Thus, according to Brunnée and Toope, '[W]hen understood as a purposive activity, law is inevitably a construction dependent upon the mutual generative activity and acceptance of the governing and the governed.'[96]

Central to this understanding is communication, referred to by Brunnée and Toope as rhetorical activity, which leads to the development of mutual expectations and shared understandings. Thus, according to Brunnée and Toope, 'Within all systems of legal normativity, even state systems of law, law is constructed through rhetorical activity producing increasingly influential mutual expectations or shared understandings of actors.'[97] This insight assimilates closely with the theory of 'communicative action' propounded by Jürgen Habermas in the 1980s[98] and which

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[91] See H.L.A. Hart, 'Positivism and the Separation of Law and Morals, (1958) 71 Harv. L. Rev. 593 and Lon Fuller, Positivism and Fidelity to Law: A Reply to Professor Hart, (1958) 71 Harv. L. Rev. 630.

[92] Brunnée & Toope, *supra* note 90 at 52-3.

[93] *Ibid*. at 53.

[94] *Ibid*.at 53.

[95] According to Brunnée & Toope: 'contemporary commentators identify this 'interactive' understanding of law, rather than the linkage of law and a special kind of morality, as Fuller's most fruitful insight.' *Ibid*. at 49.

[96] *Ibid*. at 48.

[97] *Ibid*. at 65.

[98] See, in particular, Jürgan Habermas, *The Theory of Communicative Action* (Boston, MA: Beacon Press, 1984).

involves 'processes of argumentation, deliberation and persuasion.'[99] According to Cornelieu Bjola, communicative action allows us to move beyond purely rhetorical activity which is identified as 'instrumental bargaining on the basis of fixed preferences' to a more reasoned process which includes 'a mode of interaction between actors based on the logic of arguing, that is, of convincing each other to change their causal or principled beliefs in order to reach a reasoned consensus.'[100] It is apparent that Brunnée and Toope's understanding of rhetorical activity goes beyond mere instrumental bargaining, although, after referring to the work of Habermas in this context, they chose to refer to rhetorical activity as opposed to communicative action.[101]

For Brunnée and Toope communicative action and rhetorical activity requires not only the input of states but also that of non-state actors.[102] Thus, they note that 'acknowledging multiple sites of legal influence allows international lawyers to move away from a fixation on state sovereignty, as if it were an immutable and objective structure that exhaustively defines the nature of the legal system. This move allows appropriate recognition of the normative influences of non-state actors in international society.'[103]

At first sight, it might appear that Security Council legislation in the response to global terrorism is the antithesis of communicative action and rhetorical activity. Thus, not only is the process of Security Council legislation undertaken to the exclusion of non-state actors, but the vast majority of states are also excluded from the law making process. However, in terms of the interaction thesis, the source of legal obligation may in fact be irrelevant. This point is in fact acknowledged by Brunnée and Toope who note that, 'Once it is recognized that law's existence is best measured by the influence it exerts, and not by formal tests of validity rooted in normative hierarchies,

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[99] Thomas Risse, ''Let's Argue!' Communicative Action in World Politics' (2000) 54 *International Organization* 1 at 1. According to Risse 'Arguing implies that actors try to challenge the validity claims inherent in any causal or normative statement and to seek a communicative consensus about their understanding of a situation as well as justifications for the principles and norms guiding their action. Argumentative rationality also implies that the participants in a discourse are open to being persuaded by the better argument and that relationships of power and social hierarchies recede in the background.' *Ibid*. at 7.

[100] Corneliu Bjola, 'Legitimating the Use of Force in International Politics: A Communicative Action Perspective' (2005) 11 European Journal of International Relations at 266.

[101] See Brunnée and Toope, *supra* note 90 at 26-7. For ease of discussion, reference will be made hereinafter to the process of 'communicative action and rhetorical activity' as a process of communication between actors directed to the development of mutual expectations and shared understandings through a process of argumentation leading to the identification of the better argument.

[102] In this regard, Brunnée and Toope echo the understandings of modern positivists who identify the growing importance of actors other than states, including intergovernmental organizations, non-governmental organizations, global economic players and the global media, in the international legal process. See, for example, Simma & Paulus, *supra* note 1 at 306.

[103] Brunnée & Toope, *supra* note 90 at 65.

international lawyers can finally eschew the preoccupation with legal pedigree (sources) that has constrained creative thinking within the discipline for generations.'[104]

Brunnée and Toope's further assertion that '[l]aw is persuasive when it is perceived as legitimate by most actors,'[105] might simply take us back to Franck's process fairness position. However, when the involvement of non-state actors is taken into consideration, the overwhelmingly positive response of states to the legitimacy of Security Council legislation may not be enough to ensure moral fairness. This is not to say that non-state actors can or should have the power to overrule the legitimacy of a particular process which has received overwhelming state compliance. Rather, it suggests that the process of law creation, as well as the interpretation, application and further development of the law, may well be assisted by reference to actors other than states. Thus, according to Brunnée and Toope,

> international lawyers, like constructivists, must pay close attention to non-state actors. NGOs, corporations, informal intergovernmental expert networks, and a variety of other groups are actively engaged in the creation of shared understandings and the promotion of learning amongst states. Although states remain fully dominant within the system, they are influenced (admittedly in different ways and to different extents) by the persuasive activities of less obviously powerful actors.[106]

It is interesting that Brunnée and Toope have missed from their list of non-state actors perhaps the most influential example, that is, *formal* intergovernmental expert networks. These might include judges constituting an international court, such as the judges of the International Court of Justice, treaty-monitoring bodies, such as the Human Rights Committee, and other formal groups of experts, including, most notably for present purposes, the expert members of the Counter-Terrorism Committee. It is, perhaps, by recognizing the importance of formal intergovernmental expert networks existing alongside the direct interactions of states as well as non-governmental actors that a richer sense of communicative action and rhetorical activity can be developed, particularly when such communicative action and rhetorical activity is undertaken within an institutional framework.

Such an approach would continue a recognition of the importance of formal and informal governmental institutions and regimes as providing 'sets of principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue area.'[107] However, it would allow for international law and legal discourse to be more than simply a process of 'legal bureaucratization', which

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[104] *Ibid*. at 65.

[105] *Ibid*. at 70.

[106] *Ibid*. at 70.

[107] Stephen Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' (1982) 36 *International Organisation* 185 at 186.

might be the outcome of a purely legalized process.[108] It would recognize that institutions provide the opportunity, perhaps the best opportunity, primarily for states, but also for non-state actors, to engage in communicative action and rhetorical activity in order to develop mutual expectations or shared understandings and to facilitate the persuasion of better argument.

The way in which the United Nations and other international institutions are addressing both the process of Security Council legislation and the balance of security and human rights in response to global terrorism provides a useful case study into how communicative action and rhetorical activity might be occurring. In relation to the law-making process, one of the primary deficiencies of Security Council legislation is the limited participation of states and non-state actors in the process. Stefan Talmon has highlighted this lack of communicative action and rhetorical activity involved in the adoption of Resolution 1373.[109] However, he notes that in subsequent 'legislative' resolutions, including Resolution 1422 (2002), 1487 (2003)[110] and 1540 (2004),[111] the Security Council has been more open and transparent. In relation to Resolution 1540, Talmon points out that the adoption of the resolution involved consultation not only

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[108] Krasner's analysis of international regimes suggests that international law exists at the level of rules and decision-making procedures rather than at the level of principles and norms, thereby restricting the role of international law to affecting regimes internally but being unable to affect the norms and principles which 'provide the basic defining characteristics of a regime'. *Ibid*. at 187. This insight forms the basis of the constructivist critique of the concept of legalization. Thus, Martha Finnemore and Stephen J. Toope dismiss legalization as 'legal bureaucratization' Finnemore and Toope, 'Alternatives to 'Legalization' Richer Views of Law and Politics' (2001) 55 *International Organization* 743 at 743.

[109] According to Talmon: 'Resolution 1373 was adopted in just over forty-eight hours. The United States began consultations with the other four permanent members on September 26, 2001; the next day, when the Council met in informal consultations, the United States circulated a draft resolution. The draft resolution as prepared during the Council's informal consultations was adopted in a formal public meeting-- lasting only five minutes--on September 28, 2001. No Council member spoke on the draft resolution or explained its vote; nonmembers of the Council were not consulted and were not present.' Talmon, *supra* note 47 at 187.

[110] Resolutions 1422 and 1487 request the International Criminal Court not to instigate proceedings against current or former officials or personnel from a State not a Party to the Rome Statute over acts or omissions relating to a UN-established or authorized peace-keeping operation for a period of 12 months. Whether these resolutions truly constitute examples of UN legislation is debateable. For a discussion of the conflicting arguments in this regard, see Happold, *supra* note 51 at 643-645.

[111] Resolution 1540 is considerably more akin to Resolution 1373 and imposes obligations on member states not to provide any support to non-state actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear chemical or biological weapons and their means of delivery (Paragraph 1) as well as further obligations concerning the amendment of their domestic laws. The resolution also set up a Committee referred to as the 1540 Committee, which operates in a similar manner to the Counter-Terrorism Committee (Paragraph 4).

with members of the Security Council itself but also with different groups of states, such as the Non-Aligned Movement as well as an open meeting with member states.[112]

Increased communication is undoubtedly occurring not only in relation to the adoption of the relevant resolutions but also to the actions of the Security Council in responding to criticisms from member states and non-governmental actors about the need for openness and transparency in the process. The echoes of Fuller's interactional theory are clearly audible in the comments of the representative of Spain at the open debate on Resolution 1540, who declared that 'since the Council is legislating for the entire international community,' the draft resolution should be adopted 'after consultation with non-members of the Council.'[113] But, as Risse makes clear, 'communicative behavior is all-pervasive in international relations.' [114] Accordingly, communicative action and rhetorical activity must be more than cheap talk if it is to be meaningful. Relevant questions must be asked about whether consultation is genuine and serious. Answers to such questions may not be immediately apparent. However, if it can be shown that the relevant increased consultation was meaningful, it might be possible to argue that the Security Council is learning through a process of communicative action and rhetorical activity how best to ensure the legitimacy of its legislative acts.[115]

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[112] According to Talmon: 'The five permanent members of the Council spent some six months working on the text of the draft resolution. On March 24, 2004, the text was shared with the ten elected members of the Council. At the same time, offers were made to different groups of states, such as the Non-Aligned Movement (representing 116 countries), to brief them on parts of that text. The Council members that sponsored the draft resolution went to great lengths to explain the text and listened closely to member states within and outside the Council. Informal consultations of the Council members took place on April 8, 20, and 28. On April 22, at the request of several states, the Council held an open debate with the active participation of fifty-one UN member states, including thirty-six that were not members of the Council.' Talmon., *supra* note 47 at 188.

[113] UN Doc. S/PV.4950 at 7. Quoted in Talmon, *ibid.* at 188.

[114] Risse, *supra* note 99 at 8.,

[115] The concept of learning is a controversial one within international relations analysis. Amongst compliance, and constructivist theorists, the possibility of states learning from their interactions with one another is a key insight. See, for example Chayes and Chayes who noted as far back as 1993 that: 'Treaties, like other legal arrangements, are artifacts of political choice and social existence. The process by which they are formulated and concluded is designed to ensure that the final result will represent, to some degree, an accommodation of the interests of the negotiating states ... But modern treaty making, like legislation in a democratic polity, can be seen as a creative enterprise through which the parties not only weigh the benefits and burdens of commitment but explore, redefine, and sometimes discover their interests. It is at its best a learning process in which not only national positions but also conceptions of national interest evolve.' Abram Chayes & Antonia Chayes, *supra* note 69 at 180. Rationalists argue, on the other hand, that 'Compliance is most often a game of altering strategies and behavior only with agents leaving a regime (or its institutional home) as they entered it.' Jeffrey T. Checkel, 'Why Comply? Social Learning and European Identity Change' (2001) 55(3) *International Organization* 553 at 556. Checkel has sought to bridge the divide between constructivist and rational thinking on the issue of learning by introducing the concept of social learning which focuses on the micro- and agency level. (*Ibid.* at 560). Whether any of this analysis can be extrapolated to the level of the

Returning to the question of how to achieve the balance between state security and human rights in the context of Resolution 1373 and the actions of the Counter-Terrorism Committee, it has already been noted that the Counter-Terrorism Committee's primary role is one of capacity building and communication with states about how best to implement their obligations under international law. Early pronouncements from the Committee viewed human rights as a separate issue falling outside its mandate.[116] However, the establishment of the Counter-Terrorism Committee Executive Directorate (CTED) by virtue of Security Council Resolution 1535 envisaged greater cooperation between the Committee and the Office of the United Nations High Commissioner for Human Rights and other human rights organizations.[117] Thus, the process of dialogue and debate is being formalized within the United Nations and is also taking place in the dialogue between the Counter-Terrorism Committee and the member states.

Similar processes of communicative action and rhetorical activity are occurring in the United Nations General Assembly which promulgated, on 8 September 2006, the United Nations Global Counter-Terrorism Strategy and Plan of Action which includes, in addition to measures on further capacity-building and other actions to combat terrorism, a series of measures aimed at 'ensuring human rights for all and the rule of law.'[118] In addition, regional organizations, through the developments outlined in the first part of this article, have set in place the institutional framework for communicative action and rhetorical activity to occur. Outside the institutional framework, these processes are occurring in the work of non-governmental organizations and other interest groups who are not only probing the work of the Counter-Terrorism Committee but also highlighting the draconian measures being implemented in totalitarian states in the name of counter-terrorism.[119] They are occurring also at the domestic level where judicial and democratic institutions are being given the opportunity to question some of the more illiberal measures being proposed or implemented by domestic authorities.

Communicative action and rhetorical activity are not an immediate solution to the promulgation of excessive counter-terrorism measures at either the domestic or the international level. Nor will they always lead to the development of a moral result. However, they contribute to the process of development and learning of mutual expectations or shared understandings. The extent of communicative action and rhetorical activity is continually developing at the international level and may well contribute to an understanding of the interaction of the governing and the governed in international law and ultimately to the 'internal morality of international law'.

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institution itself is questionable but may be possible if one accepts that international institutions are as much socially constructed as states themselves.

[116] See the comments of the first Chair of the Committee to the Security Council on 18 January 2002. Reported online at http://www.un.org/sc/ctc/humanrights.shtml.

[117] *Ibid*.

[118] See http://www.un.org/terrorism/strategy

[119] See note 82 above

Conclusions

The immediate reaction of states to the events of 11 September 2001 was to focus on state security and develop a range of institutional measures which were designed to criminalize terrorism-related activities, to deny funding and safe havens to terrorists and to provide for the exchange of information on terrorist groups.[120] This was achieved through the process of what has come to be referred to as United Nations Security Council legislation and, in particular, the promulgation by the Security Council of Resolution 1373. Measures taken by regional organizations imposed similar obligations on states through the more traditional means of treaty negotiation and saw the introduction of a range of secondary processes designed at ensuring the efficient implementation of the relevant primary rules. All of these measures point towards the increased legalization of international law. However, the positivist/legalization project brings with it attendant difficulties relating not only to the constitutional question of the power of the Security Council to enact legislation but also in relation to the legitimacy of the process and the impact of Security Council legislation on other well-established rules of international law.

All members of the United Nations have complied with the obligations imposed by Resolution 1373. Furthermore, states have complied assiduously with their obligations in the context of regional organizations. This compliance points towards the legitimacy of these various institutional counter-terrorism efforts. It also points towards a conclusion that institutionalism and legalization provide a useful theoretical framework for an analysis of the developments referred to above. However, this should not be an end to the matter. Positive law making at the international level, especially where it occurs outside the 'normal' processes of negotiation and ratification, such as through Security Council legislation, brings about the possibility of one set of state interests being preferred to others. It is only when communicative action and rhetorical activity occurs that the entire range of interests and identities of international actors can be fully developed and a balanced construction of security in response to global terrorism can take place.

[120] See http://www.un.org/sc/ctc/mandate.shtml