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Fisheries Conservation in an Anarchical System: A Comparison of Rational Choice and Constructivist Perspectives

JAYE ELLIS*

INTRODUCTION

Environmental protection and resource conservation and management in areas beyond state jurisdiction pose particularly difficult problems for international law. While it is theoretically possible to create a comprehensive web of law and policy applicable to the high seas, this requires a degree of cooperation among international actors that has thus far proven elusive. More difficult still is implementation and enforcement of legal rules on the high seas. Significant efforts are being made to develop international law and policy for the conservation and management of high seas fisheries resources, yet despite the collapse of a number of high seas fisheries and widespread acknowledgement that the long-term sustainability of these resources is in serious jeopardy,[1] international regulatory efforts remain inadequate. The anarchical structure of international society and the resulting decentralised nature of international law are often viewed as serious obstacles to accomplishing goals such as sustainable high seas fisheries, but these are fundamental features of the landscape to which we must adapt.. Recent developments in high seas fisheries law indicate that such adaptations are possible.

In this paper, I will explore international law's response to illegal, unreported and unregulated (IUU) fishing on the high seas, paying particular attention to non-flag state enforcement of regional and international fisheries law. Current developments in high seas fisheries law involve the placing of limits on two venerable principles of the law of the sea, namely the freedom of states to fish on the high seas,[2] and the jurisdiction of flag states over their vessels which, while not exclusive, suffers few exceptions.[3] These two principles contribute to the structure of high seas fisheries as an open-access common property resource (open-access CPR), a category of resources which are notoriously difficult to conserve and manage. Certain states, along with international organisations such as the United Nations Food and Agricultural Organization (FAO), have introduced a number of innovations into high seas fisheries

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[1] See *infra* at 3.

[2] See discussion *infra* at 6.

[3] See discussion *infra* at 9.

law that have the effect of gradually altering the open-access CPR structure of high seas fisheries, moving this resource closer to the category of club goods, which implies limitations on access to resources to members of a 'club.'[4] Elizabeth DeSombre describes the advantages presented by the club goods structure as follows:

> The main advantage that club goods have over public goods or common-pool resources for the creation of cooperative agreements is the element of exclusion. It is the possibility of free riding – actors gaining the benefits of an agreement without fully participating – that is seen as the main cause of the underprovision of collective goods. Club goods, by allowing those who do not cooperate to be kept from the benefits of the cooperative arrangement, increase the likelihood that those who would benefit from access to the advantages of the club can be persuaded to join the cooperative effort.[5]

In the case of high seas fisheries, attempts have been made to restrict access to fisheries to the vessels of states that are either members of the regional fisheries management organisation (RFMO) responsible for governance or that cooperate with the relevant RFMO and respect its rules.[6] Members of RFMOs are bound by a series of rules and measures, both substantive and procedural, aimed at conservation and management of fish stocks and at implementation of and compliance with those rules and measures. As we will see, many states and regional organisations are experimenting with various ways of imposing penalties and disincentives on states and fishing vessels that choose to remain outside these clubs.

In this article, the shift from open-access CPR to club good is analysed from the perspective of two very different theoretical frameworks: constructivism and rational choice. Constructivists consider legal rules and systems to be constituted by shared understandings developed through iterative processes of interaction. Legal rules are not regarded as commands backed by sanctions, but rather as crystallisations of shared understandings that affect the way in which actors perceive a problem, the range of possible solutions, and their own interests and priorities.[7] Rational choice, on

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[4] See Elizabeth DeSombre, "Fishing under Flags of Convenience: Using Market Power to Increase Participation in International Regulation" (2005) 5 *Global Environmental Politics* 73 at 88 ff.; DeSombre, *Flagging Standards: Globalization and Environmental, Safety, and Labor Regulations at Sea* (Cambridge, Mass.: MIT Press, 2006), Chapter 3.

[5] DeSombre, *Flagging Standards*, *ibid.* at 60.

[6] Agreement for the Implementation of the Provisions of the Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. 4 December 1995, 34 I.L.M. 1542, entered into force 2001 [*FSA*], art. 17.

[7] Among the most influential constructivist works in international law and international relations are Jutta Brunnée & Stephen Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Columbia Journal of Transnational Law 19; John Gerard Ruggie, "'What Makes the World Hang Together?' Neo-Utilitarianism and the Social Constructivist Challenge" (1998) 52 International Organization 855; John R. Searle, *The Construction of Social Reality* (New York: Free Press, 1995); Nicholas Greenwood Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (Columbia, S.C.:

the other hand, begins with the assumption that actors' behaviour can be understood in light of their preferences;[8] changes in behaviour can be brought about through changes to incentives structures.[9] In this paper I will move back and forth between constructivism and rational choice, considering the respective contributions of each to a better understanding of high seas fisheries and attempts to govern exploitation of this resource. I will at the same time consider how each theoretical approach can respond to the challenges put to it by the other.

HIGH SEAS FISHERIES – PROBLEMS OF GOVERNANCE

IUU fishing and its impact

Overexploitation of high seas fisheries is an immense and growing problem. The FAO estimates that

> in 2005, as in recent years, around one-quarter of the stock groups monitored by FAO were underexploited or moderately exploited and could perhaps produce more, whereas about half of the stocks were fully exploited and therefore producing catches that were at, or close to, their maximum sustainable limits, with no room for further expansion. The remaining stocks were either overexploited, depleted or recovering from depletion and thus were yielding less than their maximum potential owing to excess fishing pressure.[10]

A recent study concludes that collapse of fisheries is accelerating, and "projects the global collapse of all taxa currently fished by the mid–21st century."[11] The economic value of fisheries is enormous, with total world trade in fish and fisheries products

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University of South Carolina Press, 1989); Nicholas Greenwood Onuf, "Constructivism: A User's Manual" in Vendulka Kubàlkovà, Nicholas Onuf & Paul Kowert eds., *International Relations in a Constructed World* (Armonk, N.Y.: Sharpe, 1998) at 58.

[8] For particularly pithy, accessible and informative sources on the debates between constructivists and rational choice theorists, see James Fearon *et al.*, "Rationalism v. Constructivism: A Skeptical View" in *Handbook of International Relations* (London: Sage, 2002) at 52 ; Duncan Snidal *et al.*, "Rational Choice and International Relations" in *Handbook of International Relations* (London: Sage, 2002) at 73; Emanuel Adler *et al.*, "Constructivism and International Relations" in *Handbook of International Relations* (London: Sage, 2002) at 95.

[9] George W. Downs, David M. Rocke & Peter N. Barsoom, "Is the Good News about Compliance Good News about Cooperation?" (1996) 50 International Organization 379; George W. Downs, "Enforcement and the Evolution of Cooperation" (1998) 19 Michigan Journal of International Law 319; George W. Downs, Kyle W. Danish & Peter N. Barsoom, "The Transformational Model of International Regime Design: Triumph of Hope or Experience?" (2000) 38 Columbia Journal of Transnational Law 465; George W. Downs & Michael A. Jones, "Reputation, Compliance, and International Law" (2002) 31 Journal of Legal Studies S95.

[10] Food and Agricultural Organization of the United Nations, "World Review of Fisheries and Aquaculture" in *The State of World Fisheries and Aquaculture 2006* (Rome, 2007) at 7.

[11] Boris Worm et al., "Impacts of Biodiversity Loss on Ocean Ecosystem Services" (2006) 314 *Science* 787 at 788, 790.

reaching an export value of US$71.5 billion in 2004, which represents a 17.3% increase during the period 2000-04.[12]

The impact of IUU fishing on fish populations, and on the ability of interested states to manage those fisheries, can be devastating. In the Southern Ocean, it is estimated that IUU fishing for *Dissostichus* spp., better known as Patagonian toothfish or Chilean sea bass, reached 3,080 tonnes in the 2005-6 season, while the total allowable catch for the same period was 4,566 tonnes.[13] Another fishery greatly affected by IUU fishing is the Mediterranean tuna fishery, with IUU fishing accounting for over 50% of the catch.[14]

A large and growing network of conventions, codes of conduct and plans of action exists to manage high seas fishing,[15] but these efforts risk being compromised or even undermined by fishing in violation of applicable rules or by vessels flagged to states that are not parties to the relevant conventions, which are different aspects of the phenomenon of IUU fishing.

High seas fisheries as an open-access CPR

Mention has already been made of the challenges for resource conservation and management posed by the open-access CPR structure of high seas fisheries. Open-access CPRs are defined in light of two criteria: they are rival, meaning that harvesting of a resource by one actor leaves less of that resource for other actors; and they are non-excludable, meaning that anyone who wants to exploit these resources may do so.[16]

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[12] "World Review of Fisheries", *supra* note 10 at 7.

[13] Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), Conservation Measures 41-02, -03 and -04 (2005).

[14] Marine Resource Assessment Group Ltd., *IUU Fishing on the High Seas: Impacts on Ecosystems and Future Science Needs – Final Report* (London, 2005) at 14.

[15] The central instruments are the *FSA*, *supra* note 6; the *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas [Compliance Agreement]*, 29 November 1993, entered into force 24 April 2003; and two non-binding instruments, the United Nations Food and Agricultural Organization (FAO), *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing [International Plan of Action]*, 2 March 2001, available online at <http://www.fao.org/DOCREP/003/y1224e/ y1224e00.HTM> (consulted 23 April 2007) and the FAO *Code of Conduct for Responsible Fisheries* (Rome, 1995).

[16] J. Samuel Barkin and George E. Shambaugh, "Hypotheses on the International Politics of Common Pool Resources" in Barkin and Shambaugh, eds., *Anarchy and the Environment: The International Relations of Common Pool Resources* (Albany: State University of New York Press, 1999) 1 at 3 ff; DeSombre, *Flagging Standards*, *supra* note 4 at 56 ff.

Table 1: Types of goods

		Excludable: *Yes*	Excludable: *No*
Rival	*Yes*	Private goods (e.g.: a fishing vessel)	Common pool resources (e.g.: high seas fisheries)
	No	Club goods (e.g.: a toll highway)	Public goods (e.g.: public radio)

(Adapted from DeSombre, *Flagging Standards* at 57)

High seas fisheries resources are constructed as open-access CPRs in part because of geographic and physical features of the resources: their scarcity, their mobility, their location at some distance from land, etc. But the legal regime applicable to the oceans, and to fisheries resources more particularly, also plays a vital role in the way we understand this resource. This legal regime is shaped, first and foremost, by the decentralised structure of international law, and second by three fundamental principles within the law of the sea: the rule against *pacta tertiis*, or treaties binding third parties;[17] freedom of the high seas, including freedom to fish;[18] and flag state jurisdiction.[19] None of these principles is absolute and, as I will seek to demonstrate, important limitations on the last two principles are gradually gaining acceptance.

Excludability refers to the possibility of limiting access to the resource to certain actors. Because fish move back and forth across the jurisdictional boundaries that are created for the regulation of ocean spaces, they are non-excludable by nature. This remains true regardless of where boundaries are fixed; indeed, it would be the case even if all ocean spaces were under state jurisdiction. Nevertheless, jurisdictional rules create important distinctions among ocean fisheries, the most important being that between the jurisdictional waters of states (internal waters, the territorial sea, and the exclusive economic zone (EEZ)) and the high seas. From the international point of view, fisheries resources in jurisdictional waters may be roughly assimilated to private

[17] This is a fundamental principle of international law, flowing from the sovereignty of states. It has been codified in the *Vienna Convention on the Law of Treaties*, 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331, 21 I.L.M. 1261 (1982), at art. 34. See Eric Franckx, "Pacta Tertiis and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea" (2000) 8 Tulane Journal of International and Comparative Law 49.

[18] *United Nations Convention on the Law of the Sea*, 10 December 1982, entered into force 16 November 1994, 1833 U.N.T.S. 3, 21 I.L.M. 126 [*LOSC*], art. 87(e).

[19] *Ibid*. at art. 92.

property[20] exclusive to coastal states, which may authorize the vessels of other states to exploit this resource but to which no right of access by such vessels obtains.[21]

High seas fisheries, on the other hand, are subject to the high seas freedom to fish.[22] Public international law describes the high seas as *res communis*: no state can assert jurisdiction over these areas, and no state can be excluded from them, so access to this area and its resources is open to the vessels of all states.[23] States are bound, through customary and conventional law, to respect certain conditions in exercising high seas freedoms,[24] but they have access and exploitation rights.

One of the main features of international law as a decentralised system is that rules must be adopted through horizontal processes. In the absence of a central legislator with the authority to impose rules, states must consent to be bound; hence the rule against *pacta tertiis*. This rule must be qualified in various ways. First, while states may be formally free to consent or not to be bound by rules of international law, there are myriad forces – political, economic, social – that operate to constrain that choice. One of the objectives of certain recent developments in the law of high seas fisheries is to place pressure on states to cooperate with international regimes for conservation and management. Second, rules of customary international law are generally applicable. As a result, customary law forms a vital backdrop against which the various global, regional and bilateral conventions adopted by states are arrayed.

Freedom of the high seas is one of the most venerable principles of international law,[25] and the strength of this principle is reinforced by the vastness and inhospitability of ocean spaces and the practical difficulties of exercising authority on the high seas. Freedom to fish, one of the high seas freedoms, is the starting premise in any discussion about obligations to conserve and manage resources or to preserve

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[20] However, when looked at from the point of view of municipal law and policy, this analogy does not hold.

[21] Coastal states are authorized to establish the total allowable catch (TAC) of fish stocks in the exclusive economic zone (EEZ): *LOSC, supra* note 18, art. 61(1). They are also authorized to grant access by other states, through agreement, to that portion of the catch not exploited by the coastal state (*ibid.* at art. 62(2)). The TAC is to be established in light of criteria set out in art. 61 (2) and (3), which are oriented toward conservation of the resources, but art. 62(1) obligates coastal states to "promote the objective of optimum utilisation" of those resources. It is doubtful that these provisions could be interpreted to establish a lower limit for the TAC. The discretion of the coastal state is wide, and exercises of this discretion that favour conservation over exploitation would be easily justified on the basis of the relevant provisions. Furthermore, no other state would be able to claim a right to access of any surplus. This interpretation is supported by *LOSC* at art. 297(3)(a), which exempts from compulsory dispute settlement disputes arising out of the "discretionary powers [of the coastal state] for determining allowable catch, its harvesting capacity, [or] the allocation of surpluses to other States ... ."

[22] *Ibid.* at art. 87 particularly para. (e).

[23] *Ibid.*

[24] See discussion *infra* at 7.

[25] R.R. Churchill and A.V. Lowe describe this principle as "a cornerstone of modern international law:" *The Law of the Sea*, 3rd ed. (Manchester: Manchester University Press, 1999) at 204.

ecosystems. High seas freedoms have never been without limits, the most basic coming from the obligation to respect the exercise by other states of their rights in these spaces. More specific and often very detailed rules have been adopted to impose a range of constraints on the exercise of all high seas freedoms; of particular relevance in the fisheries context are customary and conventional obligations to preserve the marine environment, to adopt and implement conservation and management measures for fisheries exploitation, and to cooperate with other states and relevant international organisations in the furtherance of both these goals.[26]

Because open-access CPRs are so difficult to govern, the question arises whether it is possible to modify the structure of the high seas fisheries regime such that it is no longer an open-access good. Because the structure of the regime flows from the three principles of *pacta tertiis*, high seas freedom and flag state jurisdiction, which are themselves solidly anchored in international law, this seems at first glance to be a nearly impossible task. Nevertheless, current developments in international fisheries law do seem to be moving in this direction, in modest but nevertheless potentially significant ways. Innovations in global and regional fisheries conventions are being made that build on and add to existing qualifications and exceptions to the principles of high seas freedom and flag state jurisdiction. The rule against *pacta tertiis* has not been squarely addressed, but reliance is being placed on customary rules, applicable to all states, in order to make it more difficult for states and vessels to avoid altogether the impact of these innovations. While it is not possible to complain of a violation of a conventional rule if the state responsible is not a party to that convention, it is possible to point to more general customary obligations to adopt conservation and management measures and to cooperate in the adoption and implementation of such measures. In this way, the *pacta tertiis* rule is not offended, but no state can be treated as standing altogether outside the international regime for high seas fisheries.

States have adopted a large number of rules at the international and regional level to limit their high seas freedoms. The most basic limitation on the exercise of high seas freedoms is found in the need to respect the exercise of these freedoms by other states.[27] Beyond these basic obligations are more specific obligations geared towards the protection of the fisheries resource. The 1982 United Nations Convention on the Law of the Sea (LOSC) requires states to adopt conservation measures

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[26] See discussion *infra* at 7.

[27] *LOSC*, *supra* note 18, art. 87(2). This obligation also appears in one of the predecessor agreements to the LOSC, the *Geneva Convention on the High Seas*. 29 April 1958, 450 U.N.T.S. 82, art. 2 [*High Seas Convention*], entered into force 30 September 1962. The High Seas Convention attracted 62 ratifications, but it has been superseded by *LOSC*, except with respect to those parties to the former that are not parties to the latter. As Francisco Orrego Vicuña argues, "it would be wrong to state that customary law provides for the unrestricted freedom of fishing in the high seas. It provides for freedom indeed, but subjecting its exercise to other controlling principles that have also been received in the *corpus juris* of customary international law:" Francisco Orrego Vicuña, *The Changing International Law of High Seas Fisheries* (Cambridge: Cambridge University Press, 1999) at 14. This *corpus* includes such customary principles as the requirement "to act with reasonable regard for the rights of others", abuse of rights, and equity, *ibid.* at 13.

applicable to their vessels on the high seas [28] and to cooperate with other states whose vessels fish the same stocks with a view to adopting conservation measures.[29] Under the now largely defunct Geneva Fishing Convention, coastal states were granted considerable influence over high seas conservation measures. Of particular relevance to the phenomenon of IUU fishing is the authorisation given to coastal states to adopt conservation measures applicable to high seas areas adjacent to their territorial seas,[30] where coastal states were deemed to have "a special interest in the maintenance of the productivity of the living resources."[31] This preference for coastal states all but disappears in the LOSC,[32] although this must be balanced against an important gain for coastal states under the LOSC, namely the entrenchment of the EEZ.[33] Many coastal states were not satisfied with the creation of the EEZ, and sought, following the conclusion of the LOSC, for more extensive rights in high seas areas adjacent to their EEZ. These efforts culminated in the adoption of the Fish Stocks Agreement (FSA)[34] in 1995, but this agreement does not go nearly as far as the Geneva Fishing Convention.

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[28] *LOSC*, *supra* note 18, art. 117.

[29] *Ibid.* at art. 118. Similar obligations were found in one of the predecessor convention to the Law of the Sea Convention, the *Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas [Fishing Convention*], 29 April 1958, 559 U.N.T.S. 285, entered into force 20 March 1966, at arts 3 and 4. The Fishing Convention attracted only 37 ratifications and has been superseded by the *LOSC*, except with respect to those parties to the former which are not parties to the latter.

Duties of cooperation are also firmly anchored in customary international law, both with respect to high seas fisheries law and more generally: see Stuart M. Kaye, *International Fisheries Management* (The Hague: Kluwer, 2001) at 111 ff.

[30] *Fishing Convention*, *ibid.* at art. 7. Certain conditions apply: there must be an urgent need for these measures "in the light of the existing knowledge of the fishery" and the measures must be justified on a scientific basis; furthermore, they may not discriminate against foreign fishers. In case of a dispute, these measures remain in force pending resolution pursuant to art. 9.

[31] *Fishing Convention*, *ibid. at* art. 6(1). See Kaye, *supra* note 29 at 71-2.

[32] See Daniel Vignes, Guiseppe Cataldi and Rafael Casado Raigon, *Le droit international de la pêche maritime* (Brussels: Bruylant, 2000) at 129. The *LOSC*, *supra* note 18, art. 116, does subject the rights of states to participate in high seas fisheries to the rights, duties and interests of coastal states, but this provision is ambiguous. These rights, duties and interests are described as being "provided for, *inter alia*, in article 63, paragraph 2, and articles 64 to 67," but these articles provide for cooperation between coastal and fishing states and do not recognise special rights or interests of coastal states in stocks adjacent to their EEZ. This series of articles thus gives rise to important ambiguities and interpretive difficulties: see Vignes, Cataldi and Casado Raigon, *ibid.* at 129-31; Francisco Orrego Vicuña, "The International Law of High Seas Fisheries: From Freedom of Fishing to Sustainable Use" in Olav Schram Stokke, ed., *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (Oxford: Oxford University Press, 2001) 23 at 28; Kaye, *supra* note 29 at 159-62.

[33] The EEZ is defined at *LOSC*, *supra* note 18, arts 55-57. The coastal state is granted by art. 56(1)(a) "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed... :" *ibid.* at art. 56(1)(a).

[34] *FSA*, *supra* note 6.

Article 7 of the FSA simply provides that measures adopted by the coastal state for its EEZ must be taken into account in negotiations between coastal and fishing states for the establishment of conservation measures for the high seas.[35]

Finally, the principle of flag state jurisdiction over vessels on the high seas holds that, as a general rule, only the state to which a vessel is flagged is entitled to exercise jurisdiction over that vessel on the high seas or with respect to activities taking place on the high seas.[36] Because states have no territorial sovereignty on the high seas, their jurisdiction over their ships in these spaces depends on the link of nationality between the state and the vessel. In certain limited circumstances, states may also have jurisdiction over events beyond their jurisdictional waters that have an impact on their territory,[37] and in an even more limited category of cases all states are entitled to exercise jurisdiction.[38] When we consider the way in which jurisdiction is exercised on the high seas, we are immediately confronted with one of the most

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[35] Art. 7 of the *FSA*, *ibid.*, refers to the duty on the part of fishing and coastal states to negotiate conservation measures applicable to straddling stocks. Among the factors to be taken into account in these negotiations are conservation measures adopted by the coastal state (*ibid.* at para. 7(2)(a)) and by the relevant RFMO (*ibid.* at para. 7(2)(b)). Furthermore, conservation measures adopted through negotiations cannot "undermine the effectiveness" of coastal state measures (*ibid.* at para. 7(2)(a)).

[36] *LOSC*, *supra* note 18, arts 91 and 92.

Jurisdiction over vessels used to be based on an analogy between a vessel and state territory. Therefore, flag state jurisdiction was simply an extension of exclusive state jurisdiction over territory: *Lotus Case (France v. Turkey)*, (1927), P.C.I.J (Ser. A) No. 9. This is no longer the case; jurisdiction is exercised by virtue of registry of a vessel, and the relevant conventional provisions make no reference to a territorial analogy: see Rosemary Gail Rayfuse, "Enforcement of High Seas Fisheries Agreements: Observation and Inspection under the Convention on the Conservation of Antarctic Marine Living Resources" (1998) 13 International Journal of Marine and Coastal Law 579; Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Leiden: Martinus Nijhoff, 2004) at 21.

[37] The most common and most well-recognised basis for the exercise of state jurisdiction is territorial. Thus, states have jurisdiction over acts that take place on their territory, in whole or in part, and may also claim jurisdiction over acts that have an impact on their territory. However, since the high seas are not subject to territorial jurisdiction, this basis of jurisdiction is less important here. Coastal states have long sought to argue that there is a territorial basis in their interest in fisheries resources in high seas areas adjacent to their territorial seas and EEZs. The notion that they have an *interest* in these fisheries was accepted in the 1958 *Fishing Convention*, *supra* note 29, arts 6 and 7, in the *LOSC*, *supra* note 18, arts 63 and 116, and in the *FSA*, *supra* note 6, arts 7 and 8, but none of these texts reflect the notion that this interest is linked to jurisdiction over territory. With respect to marine environmental damage, states may rely on a territorial basis for exercising jurisdiction over acts not occurring in their jurisdictional waters in two situations. First, port states are able to exercise jurisdiction over acts in the jurisdictional waters of other states if those acts cause or threaten environmental damage in the port state's territorial waters: *LOSC*, *supra* note 18, at art. 218(2). Second, coastal states may intervene when a maritime casualty threatens pollution damage to "their coastline or related interests" (*Ibid.* at art. 221).

[38] This is known as the universal basis for jurisdiction. The classic example is piracy: see *LOSC*, *ibid.* at art. 105, which gives any state jurisdiction to seize a pirate ship.

important obstacles to high seas fisheries conservation and management: the principle of exclusive flag state jurisdiction. The LOSC clear on this point: the power to prescribe and enforce rules on high seas fishing activities lies primarily with flag states, although this power is accompanied by a duty to exercise jurisdiction 'effectively'[39] and, furthermore, has certain exceptions.[40]

As David Balton points out, a high degree of deference to flag state jurisdiction may have seemed logical at a time when ships were regarded as floating portions of the territory of the states to which they were flagged, but this attitude is harder to understand in a time of beneficial ownership, reflagging and chartering: relationships between ships and states are increasingly complex and slippery.[41] Balton notes that '[t]he international community, in stages, has begun to realise that a fishing vessel is just a fishing vessel – a construct of metal, wood, plastic and rope that is outfitted for fishing – rather than a floating piece of national territory.'[42] Nevertheless, flag state jurisdiction is proving to be a highly resilient concept. The LOSC sets out some exceptions to this principle, but only in narrow and specific terms. The most well-established are the prohibitions on the slave trade[43] and piracy.[44] The LOSC adds

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[39] *LOSC*, *ibid.* at art. 94. A similar provision is found in the *High Seas Convention*, *supra* note 27 at art 5.

[40] Art. 92 of the *LOSC*, *supra* note 18, subjects vessels on the high seas to exclusive flag state jurisdiction, "save in exceptional cases expressly provided for in international treaties or in this Convention." Virtually identical language appears at art. 6 of the *High Seas Convention*, *supra* note 27. See Churchill & Lowe, *supra* note 25 at 208 ff.; Rayfuse, *Non-Flag State Enforcement*, *supra* note 36 at 22. Rayfuse correctly states that we should speak of "'primacy' of flag state jurisdiction, the presumption being in favour of flag state jurisdiction unless a contrary rule applies:" *ibid.*

[41] For discussions of the phenomenon of flags of convenience and its impact on the implementation of environmental labour, safety and other regulatory standards on the high seas, see DeSombre, "Fishing under Flags of Convenience," *supra* note 4 at 88 ff.; DeSombre, "Flags of Convenience and the Enforcement of Environmental, Safety and Labor Regulations at Sea" (2000) 37 International Politics 213; DeSombre, *Flagging Standards*, *supra* note 4.

[42] David Balton, "The Compliance Agreement" in Ellen Hey, ed., *Developments in International Fisheries Law* (The Hague: Kluwer, 1999), 31 at 32.

[43] *LOSC*, *supra* note 18, art. 99; *High Seas Convention*, *supra* note 27 at art. 13. No powers to arrest or prosecute slave ships are granted to ships flying the flag of another state. A right of visit is provided for, but is conferred only on warships and may be exercised only when there is "a reasonable ground for suspecting" that the ship is engaged in the slave trade, is a pirate ship, or is actually flagged to the same state as the visiting ship: *LOSC*, *ibid.* at art. 110; *High Seas Convention*, *supra* note 27 at art. 22.

[44] *LOSC*, *ibid.* at arts. 100-7; *High Seas Convention*, *ibis.*, arts. 14-22. The warships of any state may seize a pirate ship on the high seas: *LOSC*, *ibid.* at art. 105; *High Seas Convention*, *ibid.* at art. 19.

two new categories of prohibited activity on the high seas, namely traffic in narcotics[45] and unauthorised broadcasting.[46]

Issues of governance

The obstacles posed by the open-access nature of high seas fisheries resources are well known[47] but are worth outlining here. First, those exploiting open-access CPRs often have less of a stake in their long-term sustainability than, say the owner of private property would have. Because open-access CPRs belong to no one, actors may not believe that they will benefit tomorrow from any restraint they impose upon themselves today. However, for this assumption to hold true, the actors cannot be very dependent on this particular resource: they must be able to move to other resources and other areas when one particular resource is exhausted. This is often not borne out. For example, it is often argued that coastal states have a greater stake in sustainable fisheries than do others, although the economic, social and cultural reliance on a particular fishery is not necessarily determined by proximity alone.

A second characteristic of open-access CPRs relates to tensions between long- and short-term interests. The creation of rules to govern exploitation of these resources involves transaction costs that may be quite high, as well as opportunity costs in the form of foregone exploitation. Given a tendency to discount future benefits, actors may not believe that short-term restraint is in their long-term interests. This belief will be reinforced by a third characteristic of open-access CPRs, namely the impossibility (or difficulty) of excluding actors that refuse to accept the need for restraint and cooperation – so-called free riders. The problem of free riders sharpens the tension between short- and long-term interests, since their presence makes it less certain that the benefits of sustainable exploitation will be realised. Moreover, it is difficult to convince actors to exercise restraint when they see others refusing to do so and paying no cost as a result of this refusal.

In the absence of a central authority capable of imposing and enforcing rules in high seas areas, states must cooperate to create a web of conservation and management measures, as well as procedures for implementation and enforcement of those measures, that stretches across the high seas. This international structure must be complemented and reinforced by domestic rules and procedures. The degree of

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[45] *LOSC*, *ibid.* at art. 108.

[46] *Ibid.* at art. 109. The right of visit is extended to cover unauthorised broadcasting but not trafficking in narcotics: *ibid.* at art. 110(1)(c). One might expect some pressure to include terrorism on this list, but a recent occasion to do so was passed over; the 2005 *Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 14 October 2005, [2005] A.T.N.I.F. 30, contains provisions on non-flag state boarding of ships suspected of involvement in terrorist activities, but such boarding is to take place only with the consent of the flag state: *Ibid.* at art. 8(2). The protocol added article 8*bis* to the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 10 March 1988, 27 I.L.M. 672, which entered into force 1 March 1992.

[47] See, e.g., Barkin and Shambaugh, *supra* note 16, particularly at 6-9.

coordination that is required for such a structure to function effectively is very high indeed. Although several strands of the web are currently in place, these strands are simply not dense enough to permit the system to operate as it needs to do in order to obtain the goal of effective conservation and management.

Numerous regional and international conventions, codes of conduct, plans of action and declarations have been produced in an attempt to develop robust and effective legal and policy regimes to alleviate pressure on fisheries resources, but these pressures continue to mount. It is difficult to avoid the conclusion that this is a classic tragedy of the commons problem, as described in Garrett Hardin's famous article.[48] Hardin describes a tragedy in the ancient sense of the world: the actors are driven inexorably to their own undoing. Unlike ancient tragic heroes, however, Hardin's shepherds on common grazing land know precisely what outcome their actions will lead to, but are unable to break out of these patterns of destructive behaviour. Hardin proposes two solutions: privatisation of commons resources or the establishment of a centralised governing authority responsible for such resources. But neither of these options is realistic in the context of high seas fisheries, and it is not apparent whether either would actually solve the problems associated with managing this resource. Privatisation of ocean areas would not eliminate the need for careful coordination among states and regions born of the interdependence of marine and terrestrial ecosystems and given the mobility of many fish stocks across boundaries. The kind of centralised governance structure that would be required would be immense, spanning vast and heterogeneous geographic expanses and being responsible for the behaviour of thousands of actors, state and non-state. Furthermore, this organisation, in order to function effectively, could not restrict its scope of concern to fish; it would need to consider broader ecosystemic factors as well, not to mention an immense range of economic, political and social issues such as world markets for fish, direct and indirect subsidies to the fisheries industry, dependence of local communities on fisheries and so forth. The question is whether an alternative is available – whether it is possible to work within the existing decentralised framework of international law to build a more robust and effective regime for high seas fisheries conservation and management.

One solution that has been proposed is to alter the structure of the high seas fisheries regime to move it closer to the category of a toll good. The best example of a toll good is a toll highway: anyone can have access to the resource upon payment of a fee. Closely related to this concept is the notion of a club good: access to the resource is conditional on membership in a club, and membership is in turn conditional on the acceptance of certain rules and procedures.[49] Transforming high seas fisheries from an open-access CPR to a club good would require acceptance by a critical mass of states of a series of important limitations on their high seas freedoms. As we will see, recent

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[48] Garrett Hardin, "The Tragedy of the Commons" in Hardin and John Baden, *Managing the Commons* (San Francisco: W.H. Freeman, 1977) at 16.

[49] DeSombre, "Fishing under Flags of Convenience," *supra* note 4 at 88 ff.

developments in fisheries law, reflected in the FSA and various regional conventions, tend in this direction.[50]

THEORETICAL FRAMEWORKS FOR STUDYING HIGH SEAS FISHERIES

One theoretical framework that receives a good deal of attention from international relations scholars and, more recently, from international jurists is constructivism. Constructivist approaches focus attention on the role of ideas, understandings, beliefs, attitudes, and values on international society. As Thomas Risse puts it,

> processes of argumentation, deliberation, and persuasion constitute a distinct mode of social interaction to be differentiated from both strategic bargaining – the realm of rational choice – and rule-guided behaviour – the realm of sociological institutionalism. ... [H]uman actors engage in truth seeking with the aim of reaching a mutual understanding based on a reasoned consensus.[51]

Constructivism holds that social institutions are socially constructed, that is, based on shared understandings that develop over the course of myriad interactions among actors.[52] Searle describes this process as involving the assignment of 'a new status to some phenomenon,' such as a portion of the ocean or the relationship between a vessel and a state, 'where that status has an accompanying function that cannot be performed solely in virtue of the intrinsic physical features of the phenomenon in question. This assignment creates a new fact, and institutional fact, a new fact created by human agreement.'[53] Thus, a vessel registered in a particular state becomes a national of that state, in a manner roughly analogous to the acquisition of nationality by a person, with the result that the vessel is considered to be the responsibility of that state, and other states have only very limited authority to take legal measures against it.

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[50] Progress in this direction was already apparent in the LOSC. Articles 66(3)(a) and 67(2) of the *LOSC, supra* note 18, prohibit high seas fishing of, respectively, anadromous stocks such as salmon and catadromous species such as eels. See Patricia W. Birnie, "The Conservation and Management of Marine Mammals and Anadromous and Catadromous Species" in *Developments in International Fisheries Law supra* note 42, 357; Rayfuse, *Non-Flag State Enforcement, supra* note 36 at 103-104. This also represents a significant exception to the high seas freedom to fish, by simply withdrawing certain categories of fish from the category of fisheries to which this freedom applies. The provision on marine mammals does not go so far as those mentioned above, but does provide for stricter regulation by an international organisation of cetaceous species: *LOSC, supra* note 18 at art. 65. See also Birnie, *supra* note 50.

[51] Thomas Risse, "'Let's Argue!': Communicative Action in World Politics" (2000) 54 International Organisation 1 at 1-2.

[52] Searle, *The Construction of Social Reality, supra note* 7, Chapter 1 – "The Building Blocks of Social Reality," particularly at 23 ff.; Alexander Wendt, *Social Theory of International Politics* (Cambridge; New York: Cambridge University Press, 1999) at 159-60; Ruggie, *supra* note 7 at 870.

[53] Searle, *ibid.* at 46.

While constructivists do not deny the importance of material factors – geography, distribution of resources, etc. – to outcomes in international society, they argue that much more important than the mere existence of 'brute facts' such as oceans and fish populations is the way in which actors interpret these facts.[54] As Alexander Wendt has argued, a brute fact such as an arms build-up in a neighbouring state will be treated as threatening or comforting depending on the context and the manner in which this context, and the arms build-up, are interpreted. He writes:

> A fundamental principle of constructivist social theory is that people act toward objects, including other actors, on the basis of the meanings that the objects have for them. States act differently toward enemies than they do toward friends because enemies are threatening and friends are not. Anarchy and the distribution of power are insufficient to tell us which is which.[55]

The distinction between land and water is another such brute fact, but the very different way in which state authority and jurisdiction is understood in land and on water is a social construction. The high seas are difficult to control because of their remoteness from land territory and the often inhospitable conditions in those areas, but the notions of high seas freedom and flag state jurisdiction are shared understandings based on perceptions of the difference between state authority on land and on the high seas. Similarly, distinctions among the high seas, territorial seas and the EEZ represent ways in which we have come to understand and define ocean spaces and the authority of states within them. There is nothing natural or inevitable about these categories or they way they are defined; they are social constructions, created through densely layered shared understandings and subject to change as those shared understandings begin to shift.

If social institutions, including legal rules, are constructed through shared understandings, as constructivists argue, this means that changes in shared understandings lead to changes in those institutions. At times, changes to the rules are done quite deliberately: laws are adopted, definitions are developed, legal relationships are structured and modified. Most of the time, however, these changes take place almost imperceptibly.[56] Searle argues that this is in part due to the fact that we are born and grow up in a world populated by social institutions that we come to take for granted, but that it is also due to a lack of consciousness of the shared understandings in which actors are participating.[57] Respecting grammatical and syntactical rules, using money to purchase goods, and limiting fishing operations to the high seas are all operations based on shared understandings that shore up those understandings and the institutions on which they are based. Gradual shifts in the

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[54] Searle, *ibid.* at 1-2, 7 ff.

[55] Alexander Wendt, "Anarchy is what States Make of it" (1992) 46 International Organisation 391 at 396-7.

[56] Searle, *supra* note 7 at 47.

[57] Searle, *ibid.* at 47.

practice of individuals or states may result in the almost imperceptible modifications of those practices and of the institutions of which they form a part.

Many constructivists take an explicitly normative approach to legal rules, focusing on the interrelation between legal and moral frameworks and on the capacity of legal rules and systems to frame understandings of what *ought* to be done. [58] From this point of view, one of the prominent uses that can be made of legal rules and systems is persuasive:[59] the primary objective of these rules is seen not as the imposition of costs and rewards, but rather the provision of reasons that can be used to persuade actors to adopt one course of behaviour or another.[60] Similarly, Gerald Postema argues that

> law regulates or guides actions of citizens by addressing reasons or norms to them. Rather than altering the social or natural environment of action, or manipulating (nonrational) psychological determinants of action, law seeks to influence behavior by influencing deliberation. It addresses norms to agents and expects them to guide their actions by those norms. Moreover, it expects those norms to figure in deliberation not as contextual features setting the environment or parameters of choice, but as *reasons for* deliberate choice. Thus, rules are intended to be 'internal' in two respects: (a) they figure in the deliberation of agents, and (b) they figure as reasons for, and not merely parameters of, deliberation and choice.[61]

As a result, constructivism is well-suited to highlight the impact of normative developments, such as increasing concern about environmental protection and resource conservation and management, on high seas fisheries.

Important inroads have been made in recent years into freedom of the high seas and freedom to fish in particular, with the result that the rights of states to exploit the resources of the high seas are now teamed with a growing network of obligations. These developments are significant. However, the fact remains that high seas fisheries presents a difficult case for a constructivist framework focused on legal and political norms relating to conservation and management of high seas resources and to marine ecosystem protection. This is in large measure due to the open-access nature of high seas fisheries, as well as the structure of the fishing industry. Vessels can avoid contact with conservation-minded states and their enforcement machinery, and certain states

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[58] Brunnée and Toope, "International Law and Constructivism," *supra* note 7; Ruggie, *supra* note 7; Risse, *supra* note 51.

[59] See, in particular, Risse, *ibid.*

[60] Ruggie refers to rules as *reasons* and not *causes* for behaviour: in other words, actors conforms to a rule not because the rule – and the threat of punishment that stands behind it – compels them to do so, but because the rule forms part of a normative framework, creating and reinforcing expectations about what the actor ought to do: *supra* note 7 at 869.

[61] Gerald J. Postema, "Implicit Law" in Willem J. Witteveen and Wibren van der Burg, eds., *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press 1999) 255 at 262. Fuller was certainly not a constructivist, but both he and interpreters of Fuller such as Postema have had a significant influence on many constructivists.

may feel such a strong incentive to cater to those vessels that the pull of political and legal norms is not felt very strongly. As a result, it seems appropriate to consider the ways in which the incentive structure could be changed such that vessels and states alike benefited less from avoiding application of the rules or from violating them, and benefited more from cooperating in conservation and management regimes. The rational choice approach is particularly promising in this regard, focusing as it does on the interests of actors and seeking to identify ways in which policy and legal frameworks operate on those interests.

Rational choice does not take a normative approach to law. Instead, rational choice scholars focus on the function of legal rules in signalling intentions and expectations and the imposition of legal sanctions or other kinds of consequences on actors that violate the rules. Changes in the rules applicable on the high seas represent attempts to change incentive structures by making it easier to impose costs on actors for behaving in certain ways. This would also provide a stronger incentive to actors that are inclined to cooperate, since they would see that their own efforts are not made in isolation, and that actors that undermine such efforts may be made to pay costs as a result.

In a series of articles, Downs *et al.* have compared constructivist (in their terminology, transformational) approaches with rational choice approaches.[62] They question, in particular, the lack of attention paid by constructivism to punishment as a means of accomplishing policy objectives. These critiques are especially cogent in the context of high seas fisheries, where persuasion and appeals to a normative understanding of the issue-area seem, in the medium term at least, highly unlikely to bear fruit. Rational choice approaches cast a broad net when examining ways to impose undesirable consequences on actors that refuse to cooperate or that violate the rules. Downs defines punishment strategies as comprising '[a]ny threatened action or combination of actions that the designers of an enforcement strategy believe will operate to offset the net benefit that a potential violator could gain from noncompliance.'[63]

I argue that, despite the benefits of looking at high seas fisheries through a rational choice lens, much remains to be learned about this issue-area by taking a constructivist approach. While constructivist authors often focus on the role of norms and values in international society, constructivism as a theoretical framework is in fact ideally suited to consider shared understandings, rules and institutions based not on values alone but also on more instrumental, self-interested foundations.[64] Furthermore, constructivism possesses two important advantages. First, it is capable of describing and analysing the constitution of interests, or in other words, the processes through which actors come to perceive and define their interests, and

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[62] Downs, *supra* note 9; Downs, Rocke & Barsoom, *supra* note 9; Downs & Jones, *supra* note 9; Downs, Danish & Barsoom, *supra* note 9.

[63] Downs, "Enforcement", *supra* note 9 at 321.

[64] See in particular Searle, *supra* note 7; Wendt, "Anarchy," *supra* note 55, and Wendt, *Social Theory*, *supra* note 52.

processes through which these perceptions and definitions can be influenced and changed. Second, constructivism is capable of analysing law not merely as a series of discrete rules backed by sanctions which function in the same manner as any other incentive structures, but as a system enjoying relative autonomy from other systems and possessing its own logic. Through constructivism we can come to a richer understanding of legal rules as forming parts of a broader institution which is understood by those who participate in it in a particular way. We can also understand the role played by constitutive rules, such as the distinction among ocean spaces such as the high seas and the EEZ, which cannot readily be understood as commands backed by sanctions.

A constructivist approach to law holds that the most important work done by rules is not to permit, prescribe or punish various types of activities. Rather, the most significant point of contact between actors and rules is at the level of understanding. Both the rules themselves and the processes of legal reasoning proper to law shape actors' understandings, allow them to communicate those understandings to one another, and lead them to hold certain positions and adopt certain courses of action. Basic concepts such as high seas freedom, flag state jurisdiction and the importance of state consent to law's validity quietly operate to shape understandings regarding the existence and nature of the high seas, the nature of the activities that can take place in this area, and the rights, duties and privileges of various categories of actors.

By moving between constructivism and rational choice, we are able to see aspects of the work that law is doing that are obscured by a rational choice approach focused on incentive structures, but that may also escape the attention of constructivists who are more concerned about normative aspects of legal reasoning. Sanctions can be used to deprive actors of the benefits of defection or to signal to actors that certain costs will be associated with particular courses of action. However, from a constructivist point of view, much of the effectiveness of sanctions is more symbolic than instrumental: one is sanctioned following a formal judgment that shared expectations as manifested in a legal rule have not been met. Sanctions represent not only a change in the prevailing incentive structure but also the judgment of a group of states that another state has failed to live up to its legal obligations.[65] By nesting sanctions in arguments about international legal rights and duties, states can present their actions as being consonant with existing legal frameworks, and may also make claims of legitimacy – for example, they can argue that they are serving community interests in protection of fisheries resources, marine ecosystems and a well-functioning international system.

RECENT DEVELOPMENTS IN HIGH SEAS FISHERIES LAW: FROM OPEN ACCESS CPR TO OPEN CLUB GOOD?

The decentralised structure of international law creates a need for creative thinking about the imposition of sanctions. The traditional legal response, involving detention,

[65] Abbott and Snidal discuss this dual role of legal sanctions: Kenneth W. Abbott & Duncan Snidal, "Values and Interests: International Legalization in the Fight against Corruption" (2002) 31 Journal of Legal Studies S141 at S151.

prosecution and the imposition of penalties, will remain out of the reach of non-flag states for the foreseeable future. Other means of imposing costs on vessels and states that refuse to comply or cooperate must be found. This involves identifying the needs of fishing vessels – fuel, repairs, supplies, access to markets, access to fish stocks – and determining the ways in which states other than the flag state have any influence over access by fishing vessels to means to meet these needs.

Punishment strategies based on observations about the opportunities to place pressure on non-compliant vessels and flag states have as their immediate objective to make it more costly to defect, that is, to refuse to cooperate with conservation and management measures or to violate such measures. However, if these punishment strategies are embedded in a larger framework, their effectiveness is likely to be enhanced. Thus, the punishment strategies should not be aimed solely at isolated incidents of rule violation but also at creating incentives for membership in 'clubs' or RFMOs and for respect for the panoply of rules and measures imposed by those organisations. This is, in fact, a reasonably good description of recent developments in high seas fisheries law: the incentive structure is being altered in such a way that high seas fisheries take on more attributes of a club good.

Institutional structure – Regional fisheries management organisations (RFMOs)

As we have seen, Hardin called for either the privatization of commons resources or the creation of centralized governance institutions. The creation of the EEZ represents a kind of privatization, in that coastal states were granted various powers over huge expanses of ocean spaces. In a similar vein, the Geneva Fishing Convention permitted coastal states to act unilaterally in certain circumstances to protect offshore fishing resources.[66] Since the late 1940s, states have been exploring a different option, namely the creation of regional organisations to foster coordination and cooperation in high seas fisheries management and conservation.[67] This multilateral approach is recognised, but not further developed, in the LOSC, which calls upon states to 'cooperate to establish subregional or regional fisheries organizations' to develop and implement conservation and management measures, although this obligation is attenuated by the addition of the words 'as appropriate.'[68] The FSA goes much further, recognising the central role of RFMOs in international conservation and management. The FAO also makes it clear, in its non-binding Code of Conduct for Responsible

[66] *Supra* at 29.

[67] A number of regional fisheries organisations were established in the late 1940s and early 1950s, including the Asia-Pacific Fishery Commission (APFIC) (1948), the General Fisheries Council for the Mediterranean (GFCM) (1949), the Northwest Atlantic Fisheries (ICNAF) (1950, superseded in 1978 by the Northwest Atlantic Fisheries Organization (NAFO)), the Inter-American Tropical Tuna Commission (IATTC) (1950), the Permanent Commission for the South Pacific (1952), and the International Pacific Halibut Commission (1953). There are currently over 30 sub-regional, regional or international RFMOs in existence: Vignes, *supra* note 32 at 182.

[68] *LOSC, supra* note 18, art. 118.

Fisheries[69] and its binding Compliance Agreement,[70] that RFMOs are to play a central role in fisheries conservation and management. States party to the FSA that do not join the RFMO responsible for managing a particular fishery do not escape the obligation to apply the conservation measures adopted by that RFMO.[71] Failure to either join the RFMO or apply its measures results in exclusion from the fishery.[72] Thus, parties to the FSA have accepted some fairly significant inroads into freedom of the high seas and flag state jurisdiction, modifying certain features of the regime to make it less like an open-access CPR and more like a club good.

In addition to making access to regional fisheries conditional upon membership in or cooperation with the relevant RFMO, the FSA establishes certain restrictions on membership in RFMOs: only states with a 'real interest' in the fisheries governed by the RFMO may become a member of that organisation.[73] As a matter of doctrine, this shift is perhaps even more significant than the obligation to belong to or cooperate with RFMOs in order to have access to the fishery. This latter provision is very much in line with the trend in recent decades to make the exercise of the freedom to fish conditional on the fulfilment of various obligations. The requirement of a real interest in the fisheries goes much further: regional fisheries may simply not be open to certain states, regardless of whether they agree to play by the rules or not. This is not merely a condition of the exercise of the freedom to fish; it is an exception to this venerable principle. The practical necessity of such a limitation on membership arises from the fact that many of the world's fisheries are already fully exploited or over-exploited.[74] Under such conditions, the only way in which new entrants may be admitted to a fishery is if existing members of RFMOs exit the fishery or reduce their own fishing efforts to provide room for new entrants.

As potentially significant as this provision is, in practice it may not represent a major departure from previous practice. First of all, the term 'real interest' is not defined. Francisco Orrego Vicuña argues that this term is meant to limit membership to states that 'conduct ... actual fishing operations of significance in the region concerned,' and to exclude states that had fished the stocks in the past or have an intention to do so in the future.[75] Erik Jaap Molenaar, for his part, doubts that the

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[69] *Code of Conduct for Responsible Fisheries, supra* note 15, para. 7.1.3.

[70] *Compliance Agreement, supra* note 15.

[71] *FSA, supra* note 6, art. 8(3).

[72] *Ibid.* at arts 8(4) and 17(2).

[73] *Ibid.* at art. 8(3). While it is possible for non-members to reach agreements with RFMOs and therefore have legal access to the relevant fisheries, non-members are dependent for that access on decision-making processes from which they are excluded, since it is within the RFMO that decisions on total allowable catch and its distribution to members and cooperating states in the form of quotas will be made. Therefore, particularly in fisheries that are fully allocated to RFMO members, membership brings with it real advantages.

[74] *Supra* at 3.

[75] Vicuña, *supra* note 27 at 208.

concept can be used to exclude any state from membership.[76] The most plausible reading of these provisions is that some restriction of access to membership is contemplated, but that there is no consensus on how states entitled to membership are to be identified.[77] Indeed, it may be impossible to specify in advance how the distinction between eligible and non-eligible states is to be made. Any attempt to define real interest could create perverse incentives to begin or accelerate fishing activities in the hopes of being granted membership and a quota.[78] Vignes *et al.* argue that it is essential for RFMOs to promote the widest participation possible, given the essential role played by these organisations in conservation and management of high seas fisheries.[79]

Analysing this provision from a rational choice perspective, we see that membership in an RFMO must confer certain advantages, or states will have no incentive to accept the limitations on their high seas freedoms that such membership entails. It is well understood that the impediments to membership can be a double-edged sword. Redistributing a regional total allowable catch (TAC) to grant access to a fishery to new entrants may well be the price to pay to win cooperation and compliance with conservation and management goals from third states.[80]
Unless an RFMO is in a position to create strong disincentives to fishing by non-members and non-participants, it may well be more effective to extend both membership and quotas to states that express an interest in the fishery, thus creating an incentive for cooperation. Beyond this, means of imposing costs on states and vessels that remain outside RFMOs and continue to fish stocks governed by those organisations will need to be identified, or else non-members will be able to gain most of the benefits of membership without paying any of the costs; in other words, there will be no means to discourage free riders. This issue will be considered in greater detail below; first, we will turn to a constructivist take on the role of RFMOs.

From the perspective of a constructivist, one of the most important keys to the success of the creation of 'clubs' to which one must belong in order to have access to a particular fishery is the extent to which this innovation becomes anchored in actors' understandings of high seas fisheries. The creation of RFMOs represents a

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[76] E. J. Molenaar, "The Concept of 'Real Interest' and Other Aspects of Cooperation through Fisheries Management Mechanisms" (2000) 15 International Journal of Marine and Coastal Law 475 at 497-99; Molenaar, "Regional Fisheries Management Organizations: Issues of Participation, Allocation and Unregulated Fishing" in Alex G. Oude Elferink and Donald R. Rothwell, eds., *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Leiden: Martinus Nijhoff, 2004), at 69.

[77] See Tore Henriksen, Geir Hønneland & Are Sydnes, *Law and Politics in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regimes* (Leiden: Martinus Nijhoff, 2006) at 21.

[78] In any event, art. 11 of the FSA, *supra* note 6, makes it clear that new members or participants in RFMOs do not have a right to receive quotas. Contentious issues are more likely to arise around the distribution of quotas than access to membership.

[79] Vignes *et al.*, *supra* note 32 at 185.

[80] See Molenaar, *supra* note 76 at 500.

compromise between coastal and fishing states, leaving more or less intact the high seas freedom to fish but based on a new understanding of the manner in which that freedom is to be exercised. Reference to RFMOs in the LOSC represents an attempt to anchor this development in the broader law of the sea regime, lending RFMOs legitimacy by effecting a kind of delegation of responsibility to them. This legitimacy can be further enhanced by linking this development to certain needs of international society, notably the need for effective governance structures to address overexploitation of fisheries resources. As for the introduction of the notion of 'interested state' in the FSA, this move would appear contrary to the high seas freedom to fish were it not for the demonstrated need for such limitations in the interest of more effective management of the resource. In addition, a limited consensus in favour of exceptions to high seas freedoms was already arrived at in the case of anadromous and catadromous stocks, paving the way for this more recent attempt to limit high seas freedoms.[81] The vagueness of the concept 'interested state' is no doubt due to the lack of consensus as to which actors have the 'right' to membership in RFMOs and which do not, but the introduction of this admittedly vague concept into the FSA in turn prepares the ground for more ambitious and more restrictive rules that may be developed in the future.

GATHERING INFORMATION

Reporting, monitoring and surveillance

In order to have an impact on the behaviour of flag states and vessels, information on this behaviour is needed. Fisheries conventions generally contain extensive and detailed provisions on the provision of information about vessel position, fishing effort, catch and so on, but detecting violations and encouraging (or compelling) compliance remains difficult. Even more difficult is the gathering of information on vessels flagged to states not parties to relevant conventions. In either case, RFMOs must rely on more indirect means to gather information, such as monitoring and surveillance. When ships are voluntarily in port, the possibilities for gathering information are dramatically increased: port states can conduct inspections and can make access to ports and facilities conditional on the provision of certain information, documentation, declarations or reports.[82] But even given multiple sources of

[81] *Supra* at 81.

[82] The information-gathering processes used by the CCAMLR and the International Commission for the Conservation of Atlantic Tuna (ICCAT) in the compilation of their IUU lists, and, in the case of ICCAT, in the imposition of trade sanctions, are revelatory in two respects: first, in the breadth of sources that are mined; and second, in the care that is taken to verify the information and give flag states opportunities for input: see CCAMLR, *Scheme to Promote Compliance by Non-Contracting Party Vessels with CCAMLR Conservation Measures*, 2005, CCAMLR Conservation Measure 10-07 [*CCAMLR Non-Party Compliance Scheme*]; CCAMLR, *Port Inspections of Vessels Carrying Toothfish*, 2005, CCAMLR Conservation Measure 10-05 [*CCAMLR Port Inspections*]; CCAMLR, *Catch Documentation Scheme for Dissostichus spp.*, 2005, CCAMLR Conservation Measure 10-03 [*CCAMLR Catch Documentation Scheme*]; ICCAT,

information, accuracy remains a problem, and thus RFMOs that seek to have an impact on non-member behaviour generally use presumptions to assist the process of making a case: non-member vessels sighted fishing in the regulatory area will be presumed to be undermining the effectiveness of conservation measures.[83]

The FSA contains some general provisions on the provision of information by vessels to RFMOs, but is essentially a framework agreement spelling out the mechanisms for gathering information that flag states and RFMOs must put in place. There is a series of provisions on the duties and responsibilities of flag states, which include the imposition of requirements on vessels flying their flag to provide information to the flag state and to relevant RFMOs on various aspects of their fishing activity.[84] Other provisions describe in broad outline the responsibilities of RFMOs with respect to creating reporting obligations and carrying out monitoring and surveillance.[85] Reporting obligations applicable to fishing vessels[86] and flag states[87] are to be further specified by RFMOs.[88]

Resolution Concerning Trade Measures, 19 December 2003, GEN 03-15 [*ICCAT Trade Resolution*].

[83] See, e.g., *NAFO Conservation and Enforcement Measures*, NAFO/FC Doc. 07/1 at art. 42(1) [*NAFO Measures*]; *CCAMLR Non-Party Compliance Scheme*, *supra* note 82 at para. 4; ICCAT, *Recommendation Concerning the Ban on Landings and Transhipments of Vessels from Non-Contracting Parties Identified as Having Committed a Serious Infringement*, entered into force June 21 1999, GEN 90-11 [*ICCAT Landing and Transhipment Recommendation*] at para. 1; ICCAT, *Recommendation to establish a List of Vessels Presumed to have carried out Illegal, Unreported and Unregulated Fishing Activities in the ICCAT Convention Area*, 4 June 2003 (date of entry into force), GEN 02-23 [*ICCAT Vessel List Recommendation*] at para. 1.

[84] *FSA supra* note 6, art.14(1) obligates states to "ensure that fishing vessels flying their flag provide such information as may be necessary in order to fulfil their obligations under this Agreement." Article 18(e) requires flag states to establish "requirements for recording and timely reporting of vessel position, catch ..., fishing effort and other relevant fisheries data in accordance with subregional, regional and global standards ... ." Article 19(1)(c) requires flag states to "require [their vessels] to give information to the investigating authority regarding vessel position, catches, fishing gear, fishing operations and related activities in the area of an alleged violation."

[85] *FSA, ibid*. at art. 10, which sets out the functions of RFMOs, calls on these organisations to "agree on standards for collection, reporting, verification and exchange of data on fisheries for the stocks (para. (e)). Article 14(2)(a) calls on states to work through RFMOs "to agree on the specification of data and the format in which they are to be provided... ."

[86] See, e.g., Northwest Atlantic Fisheries Organization Conservation and Enforcement Measures, NAFO/FC Doc. 07/1 (NAFO Measures), art. 20 – Recording of catch and stowage (obligations imposed on fishing vessels to keep records of fishing activity); North-East Atlantic Fisheries Commission (NEAFC), Scheme of Control and Enforcement [*NEAFC Scheme*], adopted November 2006, to enter into force 1 May 2007, art. 9.

[87] See, e.g., NAFO Measures, art. 21 – Reporting of Catch and Fishing Effort, which requires NAFO members to make monthly reports on fishing activity to the Executive Secretary of NAFO. A similar provision appears in NEAFC's Scheme of Control and Enforcement, *ibid.* at art. 10.

[88] Some RFMOs call for the use of satellite monitoring devices, which send various types of data directly to a central agency such as the Secretariat of the RFMO: See, e.g., NAFO Measures, art. 22 – Vessel Monitoring System. Under this scheme, information on vessel identification, position,

Boarding and inspection at sea

The FSA tackles the exclusivity of flag state jurisdiction in its provision on boarding and inspection of ships on the high seas by non-flag states. It has been argued that this provision also takes on the *pacta tertiis* principle, but in fact it is not opposable to states that are not parties to the FSA.[89] The provision in question, art. 21, states at para. 1 that members of RFMOs may board and inspect vessels of other FSA parties in the area covered by the RFMO in order to ensure compliance with the RFMO's conservation measures. As Rayfuse points out, there are several precedents for provision in a convention for non-flag state enforcement on the high seas.[90] However, the FSA is unique in that it permits inspections by RFMO members of fishing vessels flagged to non-members of that RFMO; in other words, the FSA incorporates by reference the boarding and inspection provisions of regional conventions into the FSA.[91] The FSA thus does break some new ground regarding non-flag state

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and date and time are automatically transmitted to a monitoring centre of the flag state. In addition, under art. 23 – Communication of Catches, fishing vessels are required to transmit electronically to the monitoring centre information on catch on entry into and exit from the NAFO regulatory area, transhipments made within the regulatory area, and information on species. A similar provision appears in NEAFC's Scheme of Control and Enforcement, *ibid.* at art. 11. The information on the position of fishing vessels can be used to gather a good deal of information on fishing activity, as discussed by Erik Jaap Molenaar & Martin Tsamenyi in "Satellite-Based Vessel Monitoring Systems: International Legal Aspects and Developments in State Practice" FAO Legal Papers Online #7, April 2000. The speed and navigation of vessels change when they are engaged in fishing, producing a 'fishing signature.' Fishing for different species produces different signatures, so this positional information can in fact be used to generate information on fishing activities: pp. 3-4.

[89] See Franckx, *supra* note 17; Rosemary Gail Rayfuse, "The United Nations Agreement on Straddling and Highly Migratory Fish Stocks as an Objective Regime: A Case of Wishful Thinking?" (1999) 20 Australian Yearbook of International Law 253.

[90] Rayfuse, *Non-Flag State Enforcement*, *supra* note 36 at 71 ff. The earliest example she cites is a fisheries convention adopted in 1882: *Convention for Regulating the Police of the North Sea Fisheries*, 6 May 1882, 9 Martens Nouveau Recueil Général des Traités (Ser. 2) 556. See also Kaare Bangert, "The Effective Enforcement of High Seas Fishing Regimes: The Case of the Convention for the Regulation of the Policing of the North Sea Fisheries of 6 May 1882" in Guy S. Goodwin-Gil & Stefan Talmon eds., *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford: Clarendon Press, 1999) 1. There are many contemporary examples as well. Rayfuse mentions in particular the *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*, 24 October 1978, 1135 U.N.T.S. 369; *Convention on the Conservation and Management of Antarctic Marine Living Resources*, 5 May 1980, 9 A.T.S. 1982 [*Anadromous Stocks Convention*]; *Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean*, 11 February 1992, 22 Law of the Sea Bulletin 21 (1993); *Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea*, 16 June 1994, 34 I.L.M. 67.

[91] It is often thought that this provision is more ground-breaking than it is, in that it is frequently understood to create an exception to the *pacta tertiis* rule. However, only states parties to the *FSA* – in other words, states that have accepted the provision that effects the incorporation by reference described above – are bound by it. This is the conclusion reached by Rayfuse after a thorough examination of several possible arguments for the contrary position: Rayfuse, *Non-Flag State*, *supra* note 36 at 82 ff.

enforcement,[92] but it is perhaps more appropriate to regard it as another step in a trend departing from the exclusivity principle rather than a major break from that principle. And while this provision certainly represents progress toward flag state accountability, it remains limited. Beyond boarding, inspection and securing evidence of non-compliance,[93] the coastal state has few powers: the matter must be turned over to the flag state, which is obligated to investigate and, where warranted, prosecute, or to authorize the coastal state to carry out an investigation.[94]

Another effort toward innovation was made within the FSA regarding actions to be taken if the flag state is unable or fails to carry out its duties.[95] However, the final text on the matter is highly ambiguous. Under certain conditions, an inspecting vessel may escort a ship to port.[96] It is not clear what exactly the coastal state may do once the foreign-flagged vessel is in its port. The FSA simply states, at art. 21(16), that '[a]ction taken by States other than the flag State having engaged in activities contrary to subregional or regional conservation and management measures shall be proportionate to the seriousness of the violation.' We might conclude that if the coastal state were meant to have jurisdiction to prosecute, this would have been explicitly stated in the FSA, since this would be an exceptional measure.[97] Rayfuse and Orrego Vicuña reach the opposite conclusion: since port state enforcement is not ruled out, and indeed is even hinted at, it must be permitted.[98]

Consideration of the *travaux préparatoires* seems to support the more conservative position that non-flag state arrest and prosecution can be permitted only with explicit flag state consent. A number of proposals to grant inspecting states more extensive powers were circulated.[99] The final text is certainly ambiguous, but the

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[92] *Ibid.* at 74. Hayashi describes it as an "entirely new exception to [the] principle of exclusive flag state jurisdiction:" Moritaka Hayashi, "The Straddling and Highly Migratory Fish Stocks Agreement" in *Developments in International Fisheries Law*, *supra* note 9, 55 at 68.

[93] Securing of evidence may only be carried out if there are clear grounds clear grounds for believing that a vessel has engaged in any activity contrary to ... conservation and management measures:" *FSA*, *supra* note 6, art. 21(5).

[94] *Ibid.* at art. 21(6).

[95] *Ibid.*, art. 21(8).

[96] The flag state is given three working days from notification of an inspection to respond to the inspecting state: *ibid.*, at art. 21(6). If it fails to do so, and if there "are clear grounds for believing that a serious violation has taken place," the coastal state may escort the ship to port: *ibid.* at art. 21(8). Serious violations are defined at art. 21(11), *ibid.*, and include fishing without a valid licence, fishing contrary to a moratorium, using prohibited gear, and failing to keep records or falsifying records. It bears emphasising that at this point the inspectors would have been on board the vessel for at least three days.

[97] See José A. Yturriaga, *The International Regime of Fisheries: From LOSC 1982 to the Presential Sea* (The Hague: Martinus Nijhoff, 1997) at 213-15.

[98] Rayfuse, *Non-Flag State Enforcement*, *supra* note 36 at 331; Vicuña, *supra* note 27 at 253.

[99] For example, it was proposed that the inspecting state be empowered in certain circumstances to detain the vessel until the flag and the inspecting state agree on the action to be taken: Draft Convention on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks on the High Seas (submitted by the delegations of Argentina, Canada, Chile, Iceland

negotiating history does not support an interpretation that would give powers of arrest and prosecution to either the inspecting or the port state.

The ambiguity of art. 21 of the FSA suggests that this provision is a place-holder, awaiting the emergence of consensus. It cannot at present serve to ground a credible argument that the inspecting or port state may arrest or detain a vessel without permission of the flag state. However, if the underlying consensus among states begins to move towards non-flag state powers of arrest and prosecution, the plausibility of this generous interpretation of art. 21 may be enhanced. Furthermore, the fact that the provision leaves the door open to non-flag state enforcement, including prosecution, may encourage states to push for greater powers for inspecting states and port states in the context of regional agreements. At the very least, this provision does not operate as a brake on such developments.

The most recently adopted regional inspection regime is that of the North-East Atlantic Fisheries Commission (NEAFC), which entered into force in May 2007. This regime is closely modelled on the FSA regime, but there are some important distinctions. First of all, it is not possible for a non-flag state to order a vessel to port.

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and New Zealand), 14 July 1993, A/Conf.164/L.11 at art. 11, in Jean-Pierre Lévy & Gunnar G. Schram, *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Selected Documents* (The Hague: Martinus Nijhoff, 1993) at 148. See also Draft Convention on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks on the High Seas (submitted by the delegations of Argentina, Canada, Chile, Iceland and New Zealand), 28 July 1993, A/Conf.164/L.11/Rev.1 at art. 11, reproduced in Lévy & Schram, *ibid.* at 163. Another proposal would have given even greater power to the inspecting state: 48 hours after notification of the flag state, its consent to proceed with arrest and prosecution would be presumed: Moritaka Hayashi, "Enforcement by Non-flag States on the High Seas under the 1995 Agreement on Straddling and Highly Migratory Fish Stocks" (1996) 9 Georgetown International Environmental Law Journal 1 at 16.

These proposals regarding the inspecting state were not incorporated into drafts of the FSA, but certain of these drafts would have given some powers to detain vessels to the port state. It was contemplated up until the 5th (penultimate) session that the port state would be entitled to detain the vessel until the flag state took control of it: *Negotiating Text Prepared by the Chairman*, 2nd Sess., United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, 23 November 1993, A/Conf.164/13 at art. 33, reproduced in Lévy & Schram, *ibid.* at 73; *Revised Negotiating Text Prepared by the Chairman*, 3rd Sess., United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stock, 30 March 1994, A/CONF. 164/INF/7 at art. 38, in Lévy & Schram, *ibid.* at 437; *Draft Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 23 August 1994, A/CONF.164/22 at art. 21(3), in Lévy & Schram, *ibid.* at 621. This language disappeared by the 5th session: *Draft Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 11 April 1995, A/CONF.164/22/Rev.1 at art. 22, in Lévy & Schram, *ibid.* at 671.

Discovery of evidence of a serious violation[100] results in notification of the flag state,[101] which must have an inspection of the vessel carried out within 72 hours[102] and may order the ship to port.[103] If the flag state fails to order the vessel to port, it must justify this decision.[104] This approach is fairly typical of inspection provisions adopted by RFMOs,[105] although not all RFMOs require flag states to provide justification for failing to take action in the face of a violation.

Port state inspections

There are many ways in which port states can enhance the effectiveness of regional and global measures to combat IUU fishing. Port states exercise jurisdiction on the basis of territoriality: ports are part of the territory of states, and ships voluntarily in port come under port state jurisdiction in the same way as an individual in a foreign state is subject to the laws of that state.[106] It is on this basis that port states may inspect vessels, including those not flagged to them. The FSA recognises this right, and adds that states have a *duty* to take measures to promote the effectiveness of conservation and management measures.[107] No obligation to carry out inspections is created; however, the port state "may" conduct an inspection.[108]

Obligations to inspect do exist under certain RFMOs. For example, the NAFO Measures require port states to have inspectors present when a fishing vessel that has been fishing in the NAFO area makes a port call, but no obligation to inspect the vessel is imposed unless the catch is offloaded.[109] The CCAMLR requires port states to conduct inspections of all vessels carrying *Dissostichus* spp.[110] Under the

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[100] Serious violations are defined at art. 29, and include fishing without a valid license, fishing without a quota or exceeding a quota; use of prohibited fishing gear; serious mis-recording of catches; fishing for stocks for which a moratorium has been imposed; and concealing vessel markings, to name a number of examples.

[101] NEAFC, *supra* note 86, art. 30(1).

[102] *Ibid.* at art. 30(2).

[103] *Ibid.* at art. 30(5) and (6).

[104] *Ibid.* at art. 30(7).

[105] CCAMLR System of Inspection, adopted at the 7th Meeting of CCAMLR, 1988 (Report of the 7th Meeting of the Commission, amended in 1993, 1994, 1995, 1996, 1996, 1999 and 2006, available at <http://www.ccamlr.org/pu/e/e_pubs/bd/pt9.pdf> (consulted 23 April 2007); *NAFO Measures*, *supra* note 83, arts 34 and 35.

[106] See Ted L. McDorman, "Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention" (1997) 28 Journal of Maritime Law and Commerce 305; DeSombre, *Flagging Standards*, *supra* note 4 at 87-91.

[107] *FSA*, *supra* note 6 at art. 23(1).

[108] *FSA*, *ibid.* at art. 23(2) & (3).

[109] *NAFO Measures*, *supra* note 83, art. 39(1).

[110] *CCAMLR Catch Documentation Scheme*, *supra* note 82, para. 1.

NEAFC Scheme, 15% of vessels engaged in landings or transhipments of fish are to be inspected annually,[111] whereas all non-party vessels are to be inspected upon entering port.[112]

The FAO has been working on its own and in conjunction with the International Maritime Organization (IMO) to develop and strengthen port state duties to take measures to discourage IUU fishing. This initiative is inspired by the rather successful model developed by the IMO with respect to merchant vessels' compliance with rules regarding construction, equipment, crewing and operation standards.[113] Through a series of memoranda of understanding,[114] various groups of states have reached agreements regarding the exercise of port state jurisdiction to carry out inspections on vessels visiting their ports. The Paris Memorandum of Understanding (Paris MOU),[115] concluded under the auspices of the IMO, provides a good example of how this coordinated exercise of jurisdiction functions. Its first important feature is a certain restraint: it does not call upon states to exercise enforcement jurisdiction against vessels in violation of applicable standards, even though they have the right to do so under general principles of law of the sea and public international law.[116] Port states party to the MOU must inspect a certain percentage of ships calling at their ports,[117] must not allow sub-standard vessels to continue their voyage until deficiencies have been rectified,[118] and must close their ports to ships that have previously failed inspections and are flagged to states on a black list.[119]

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[111] *NEAFC Scheme, supra* note 86, art. 25(1).

[112] *Ibid.* at art. 40(1).

[113] See Ted L. McDorman, "Regional Port State Control Agreements: Some Issues of International Law" (2000) 5 Ocean and Coastal Law Journal 207 at 216.

[114] See *ibid.* For a list of these memoranda of understanding. See also Richard W.J. Shiferli, "Regional Concepts of Port State Control: A Regional Effort with Global Effects" (1994) 11 Ocean Yearbook 202; Ted L. McDorman, "Port State Control: A Comment on the Tokyo MOU and Issues of International Law" (1997) 7 Asian Yearbook of International Law 229; DeSombre, *Flagging Standards, supra* note 4 at 91 ff.

[115] *Paris Memorandum of Understanding on Port State Control*, 1 July 1982, 21 I.L.M. 1 [*Paris MOU*]. The current version of the MOU, as amended in 2005, is available at <http://www.parismou.org> (accessed 15 March 2006).

[116] Nor does it prevent them from doing so: the *Paris MOU*, *ibid*., contains a saving clause at art. 3.4. McDorman describes this as a limitation on state authority that is found in practice, but not in law: McDorman, "Port State Enforcement", *supra* note 97 at 309. In other words, states refrain from exercising this jurisdiction as a matter of convenience or comity, but do not recognise that this restraint flows from a lack of authority at international law.

[117] *Paris MOU, supra* note 115, art. 1.3. Inspection procedures are provided for at section 3, and include obligations to conduct inspections on ships with certain risk factors: art. 3.2 and 3.3; Annex 1, s. 8.

[118] *Ibid.* at arts. 3.9.1 ff.

[119] *Ibid.* at art. 3.10.5. The obligation to prevent access also applies where vessels have not rectified deficiencies as required by the inspecting port state: art. 3.12.1. Of the 21 ships on the

By agreeing to this common set of obligations, port states have reduced the incentive not to exercise their jurisdiction with respect to the standards in question because they are assured that other states in the region are also exercising their jurisdiction, allowing no one to gain an unfair competitive advantage. Foreign vessels and the states to which they are flagged are in turn given a potentially powerful incentive to comply with these rules and meet the relevant standards, as there is a greater likelihood that violations will be detected and sanctions imposed.

Port state obligations under the Paris MOU and other such IMO initiatives on port state control do not generally apply with respect to fishing vessels,[120] but a series of new obligations and instruments are being developed to enhance port state control of fishing vessels.[121] The FAO's Model Scheme on Port State Measures, for example, recommends a number of port state measures, including an inspection regime.[122] This model scheme, like the IMO MOUs on port state control, proposes that a certain percentage of foreign vessels be inspected.[123]

Changing the incentive structure: sanctions and other consequences of violations

We have seen that non-flag states, acting individually and through RFMOs, have various sources of information about fishing activity and apparent violations of conservation measures on which to draw. The question now arises what use may be made of this information.

Because of the limited capacity of non-flag states to carry out prosecutions or impose sanctions, one possible response to the discovery of an apparent violation is to turn the information over to the flag state for investigation and possible prosecution. Interestingly, this approach has proven effective on many occasions, with flag states

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2004 black list, four are parties and one is a signatory: *Black/Grey/White List*, online: Paris Memorandum of Understanding on Port State Control <http://www.parismou.org/>.

[120] Report of the Joint FAO/IMO Ad Hoc Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters, Rome, 9-11 October 2000, FAO Fisheries Report No. 637, FIIT/R637 (En). The report notes that many IMO instruments on port state control specifically exclude fishing vessels; in other cases, many fishing vessels are excluded because of size limitations contained in those instruments: *ibid.* para. 36. See also Terje Lobach, "Port State Control of Foreign Fishing Vessels" May 2002, FAO Legal Papers Online #29 at 10.

[121] On the utility of a coordinated approach to port state measures to combat IUU fishing, see Terje Lobach, "Measure to be Adopted by the Port State in Combating IUU Fishing," Document AUS:IUU/2000/15 (2000), available at <http://www.fao.org/DOCREP/005/Y3274E/y3274e0h.htm> (consulted 24 April 2007), paras 34 ff.

[122] Food and Agriculture Organization of the United Nations, *Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing*, in *Report of the Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing*, 2 September 2004, FAO Fisheries Report No. 759 FIPL/R759 (En) [*FAO Model Scheme*]. Inspections are provided for in s. 3; port closures in s. 4.

[123] *Ibid.* at App. E at art. 2.8, n. 2.

responding either by prosecuting the vessel master or by deregistering the vessel.[124] In the latter case, the vessel is deemed to be stateless ('assimilated to stateless' in law of the sea parlance) and the inspecting state is free to take enforcement action.

In cases where, for various reasons, actors – vessels or flag states – are less vulnerable to the simple dissemination of information on their non-compliant behaviour, but an expectation has been created that punishment will be imposed on defectors, the mere knowledge that defection has been identified can lead to changes in behaviour. Indeed, the knowledge that various means of information-gathering are at work and that defections *could* be identified may operate as a deterrent. This deterrent effect can be greatly enhanced if information-gathering and -disseminating systems operate in a rigorous, systematic and coordinated way.

In order to make these kinds of threats credible, however, non-flag states have to be able to impose some kinds of consequences on vessels and flag states that violate rules. Non-flag states may have little ability to carry out prosecutions themselves, but there are various ways in which they can use the jurisdiction that they do have over foreign-flagged vessels to impose costs on those vessels.

The state in the best position to impose consequences on vessels and flag states in violation of applicable customary and conventional rules is the port state, which, while it cannot prosecute for violations that occurred outside its jurisdictional waters, can impose a range of consequences on vessels found to have violated conservation measures. This has been referred to as 'justifiable discrimination.'[125] These include prohibitions on landings and transhipments of catch, port closures, denial of port services[126] and trade-related measures.[127] The effectiveness of these measures can be greatly enhanced if port states act in concert, for example by constituting black lists of vessels found to have engaged in IUU fishing, as well as black lists of the states to which they are flagged. Sanctions can then be imposed by all members of RFMOs against black-listed vessels and flag states.

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[124] Rayfuse, *Non-Flag State Enforcement*, *supra* note 36 at 124, 131. These incidents occurred in the North Pacific. On similar cases in the North-East Atlantic, see Henriksen *et al.*, *supra* note 77 at 95.

[125] High Seas Task Force, Promoting Responsible Ports: Final Report (2006), para. 10. The High Seas Task Force is composed of ministerial-level representatives of the Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, as well as representatives of the World Wildlife Fund, World Conservation Union (IUCN) and the Earth Institute at Columbia University and was organized under the auspices of the Organization for Economic Cooperation and Development (OECD).

[126] *Ibid.* at para. 11.

[127] Cathy A. Roheim and Jon G. Sutinen, "Trade and Marketplace Measures to Promote Sustainable Fishing Practices" (Geneva and Paris: International Centre for Trade and Sustainable Development and High Seas Task Force, 2006) at ss. 2.3 and 2.4. One of the recommendations flowing from the review conference of the FSA was for states to implement these measures: *Report of the Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, A/CONF.210/2006/15, 5 July 2006, para. 43(d).

As noted above, the FSA creates an obligation on port states 'to take measures ... to promote the effectiveness of ... conservation and management schemes.'[128] Among the measures the port state may take are inspections (as already mentioned)[129] and prohibitions of landings and transhipments.[130] The FAO's non-binding International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing also calls upon states to take these measures to deter IUU fishing.[131]

Use of black lists

Black lists of vessels discovered engaging in IUU fishing constitute an excellent means of coordinating and systematizing the imposition of sanctions on those vessels and their flag states. A number of regional conventions make use of black lists. These lists are compiled with great care, based on a variety of sources of information on the fishing activities of identified vessels and finalised only after the flag state concerned has had an opportunity to review the evidence against its vessel and make representations.[132] In the case of the CCAMLR, whose scheme extends to members as well as non-members, a difficulty is presented by the fact that Commission members adopt the final IUU list by consensus, which means that a state who-se vessel has been placed on the provisional list effectively holds a veto over its inclusion on the final list.[133] However, member states that seek to exercise this privilege expose themselves to strong criticism by other Commission members, and the vessel remains on the provisional list.[134]

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[128] *FSA, supra* note 6, art. 23(1).

[129] *Ibid.* at art. 23(2).

[130] *Ibid.* at art. 23(3).

[131] *International Plan of Action, supra* note 15 at para. 52.

[132] *NAFO Measures, supra* note 83, paras 43 ff; *NEAFC Scheme, supra* note 86, arts 44 ff.; *CCAMLR Non-Party Compliance Scheme, supra* note 82; CCAMLR, *Scheme to Promote Compliance by Contracting Party Vessels with CCAMLR Conservation Measures*, 2006, CCAMLR Conservation Measure 10-06 [*CCAMLR Party Compliance Scheme*]..

[133] There is little in the way of concrete consequences flowing from inclusion on the provisional list, beyond a certain stigma attached both to the vessel and to the flag state: see *CCAMLR Contracting Party Compliance Scheme, ibid.* at para. 8.

[134] At the XXVth Meeting of the CCAMLR (2006), a Russian vessel, the *Volna*, was placed on the provisions IUU list. Russia disputed various aspects of the evidence against this vessel and refused to consent to its inclusion in the final IUU list. A number of members – the UK, New Zealand, Australia, France, the European Community and the USA – challenged Russia's assessment of the evidence and expressed regret over Russia's veto: *Report of the XXVth Meeting of the Commission* (2006), paras 9.18-33. The UK representative stated that "Russia appeared to be in a state of self-denial over the illegal activities of the *Volna*." I*bid. at* para. 9.18.

The consequences that can be imposed on vessels on black lists include ineligibility for licenses to fish[135] or for registration in RFMO member states;[136] prohibitions on chartering blacklisted vessels;[137] prohibitions to land, tranship, refuel or re-supply;[138] prohibitions applicable to other vessels flagged to RFMO members on accepting transhipments or refuelling or supplying blacklisted vessels;[139] and, in some cases, port closures.[140]

It is interesting to note that blacklisting is applied not only to members of RFMOs but to non-members as well. Indeed, some RFMOs, such as NAFO, maintain black lists only of non-NAFO members.[141] Others, such as CCAMLR, apply blacklisting and related penalties to member and non-member vessels alike. At first glance, this is puzzling, since by definition non-members are not legally bound to respect the conservation measures of RFMOs, unless, of course, they are parties to the FSA. Although these RFMOs do not explicitly name the basis on which they take such measures against non-member states and their vessels, it is apparent that they are operating on a combination of port state jurisdiction and customary international obligations to establish and implement conservation measures and to cooperate in so doing, as well as the responsibilities of flag states found in customary law.

Trade-related measures

The FAO, in its International Plan of Action, not only recommends that states take trade measures to deter IUU fishing but in fact calls on them to do so:

> States should take all steps necessary, consistent with international law, to prevent fish caught by vessels identified by the relevant regional fisheries management organization to have been engaged in IUU fishing being traded or imported into their territories. The

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[135] *NAFO Measures*, *supra* note 83, art. 48(c); *CCAMLR Contracting Party Compliance Scheme*, *supra* note 82, para. 18(i) and (ii); *CCALMR Non-Contracting Party Compliance Scheme*, *supra* note 82, para. 22(i); *NEAFC Scheme*, *supra* note 86, art. 45(2)(b).

[136] *NAFO Measures*, *ibid.* at art. 48(e); *CCAMLR Contracting Party Compliance Scheme*, *ibid.* at para. 18(vii); *CCAMLR Non-Contracting Party Compliance Scheme*, *ibid.* at para. 22(vi); *NEAFC Scheme*, *ibid.* at art. 45(2)(d).

[137] *NAFO Measures*, *ibid.* at art. 48(d); *CCAMLR Contracting Party Compliance Scheme*, *ibid.* at para. 18(vi); *CCAMLR Non-Contracting Party Compliance Scheme*, *ibid.* at para. 22(v); *NEAFC Scheme*, *ibid.* at art. 45(2)(c).

[138] The CCAMLR compliance schemes, by denying access to ports to IUU vessels, effectively deny them access to these services.

[139] *NAFO Measures*, *supra* note 83, art. 48(b); *CCAMLR Contracting Party Compliance Scheme*, *supra* note 82, para. 18(iii); *CCAMLR Non-Contracting Party Compliance Scheme*, *supra* note 82, para. 22(ii).

[140] *CCAMLR Contracting Party Compliance Scheme*, *ibid.* at para. 18(iv); *CCAMLR Non-Contracting Party Compliance Scheme*, *ibid.* at para. 22(iii); *NEAFC Scheme*, *supra* note 86, art. 45(2)(a).

[141] The provisions for the constitution of IUU lists are contained in Chapter VI of the *NAFO Measures*, *supra* note 83.

> identification of the vessels by the regional fisheries management organization should be made through agreed procedures in a fair, transparent and non-discriminatory manner. Trade-related measures should be adopted and implemented in accordance with international law, including principles, rights and obligations established in WTO Agreements, and implemented in a fair, transparent and non-discriminatory manner. Trade-related measures should only be used in exceptional circumstances, where other measures have proven unsuccessful to prevent, deter and eliminate IUU fishing, and only after prior consultation with interested States. Unilateral trade-related measures should be avoided.[142]

The measures in question can be grouped into three categories: the requirement of documentation on catch as a condition for transhipment and landing, as well as import and re-export of catch; prohibitions on landings and transhipments by certain vessels; and trade-restrictive measures.[143]

A small group of RFMOs have taken up this call. The International Commission for the Conservation of Atlantic Tuna (ICCAT) and the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), maintain programmes for the documentation of southern bluefin tuna[144] and *Dissostichus* spp.,[145] respectively. Import or re-export of these fish is permitted only when a validated document accompanies the shipment.[146]

It appears that these programmes are having some impact. An estimated 90% of *Dissostichus* in trade are documented, and there is some evidence that

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[142] *International Plan of Action, supra* note 15, para. 66. This recommendation was also made by the FSA Review Conference, *surpa* note 127, para. 43(i).

See also Marcus Haward, "IUU Fishing: Contemporary Practice" in Elferink and Rothwell, *supra* note 76, at 94. .

[143] Roheim and Sutinen, *supra* note 127 at 2.

[144] This programme was created through *Recommendation by ICCAT concerning the ICCAT Bluefin Tuna Statistical Document Program [ICCAT Bluefin Document Program]*, 1992-01 and has been modified subsequently by Recommendations 1992-03, 1997-04 and 1998-12. ICCAT called in 2000 for the extension of the programme to swordfish and bigeye tuna: *ICCAT, Recommendation on Establishing Statistical Document Programs for Swordfish, Bigeye Tuna, and Other Species managed by ICCAT*, 00-22, entered into force 26 June 2001. Effect was given to this recommendation for swordfish (*ICCAT, Recommendation establishing a Swordfish Statistical Documentation Program*, 01-22, entered into force 21 September 2002) and respecting bigeye tuna (*ICCAT, Recommendation concerning the ICCAT Bigeye Tuna Statistical Documentation Programme*, 01-21, entered into force 21 September 2002) in 2001.

[145] *CCAMLR Catch Documentation Scheme, supra* note 82, art. 2.

[146] *ICCAT Bluefin Document Program, supra* note 144; *CCAMLR Catch Documentation Scheme, ibid.* See Haward, *supra* note 142 at 95 ff.; FAO, *Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (Rome, 2002) *[Implementation of the IPOA]* at 50 ff.; Roheim and Sutinen, *supra* note 127 at s. 2.1. Other catch documentation programmes exist, under the Commission for the Conservation of Southern Bluefin Tuna and the Indian Ocean Tuna Commission: see Roheim and Sutinen, *supra* note 127 at 3.

uncertified stocks fetch a lower price than certified stocks.[147] Furthermore, estimated IUU catches of *Dissostichus* have fallen significantly in recent years.[148]

A proposal has been placed before the CCAMLR to impose trade restrictions on states whose vessels are involved in IUU fishing for *Dissostichus*.[149] This additional step has already been taken, somewhat gingerly, by the International Commission for the Conservation of Atlantic Tuna (ICCAT).[150] Under ICCAT's Resolution concerning Trade-Related Measures, the Commission examines information on IUU fishing activities by members and non-members from a wide variety of sources[151] and, after giving the state concerned an opportunity to respond to the evidence,[152] the matter is turned over to the Compliance Committee, which can propose to the Commission the imposition of trade measures. If the Commission decides to go this route, it makes a recommendation to its members to take such measures.[153]

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[147] Rachel Baird, "CCAMLR Initiatives to counter Flag State Non-Enforcement in Southern Ocean Fisheries" (2005) 36 Victoria U. Wellington L. Rev. 733 at 735-6.

[148] Report of the Standing Committee on Implementation and Compliance, Report of the 25th Meeting of the CCAMLR (2006), Annex 5, para. 2.2. But see Roheim and Sutinen for a discussion of problems and weaknesses in the programme: *supra* note 127 at 3-4.

In a study conducted by Judith Swan, RFMOs were asked to report on, among other things, the effectiveness of measures to combat IUU fishing. Swan summarises the CCAMLR's response as follows: "In general, IUU fishing activities have been localized and dealt with effectively on a case-by-case basis. ... [M]ost perceived offenders have been identified ... .:" "International action and Responses by Regional Fishery Bodies or Arrangements to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing" FAO Fisheries Circular No.. 996 (2004) at 36. Similarly, the CCSBT reported that "[t]he trade documentation scheme has eliminated flag of convenience vessels from a number of countries ... because the market has been made inaccessible:" *ibid.*

[149] Proposal for a Conservation Measure concerning the Adoption of a Trade Measure to Promote Compliance, Report of the 25th Meeting of the CCAMLR (2006), Annex 9.

[150] *Resolution by ICCAT concerning Trade Measures,* 03-15, 19 December 2003 *[ICCAT Trade Measures]*. See *Implementation of the IPOA, supra* note 146 at 49 ff.

Trade measures have been taken, under these Trade Measures and predecessor measures, against Cambodia (ICCAT, *Recommendation concerning the Lifting of Bigeye Tuna Trade Restrictive Measures against Cambodia*, 2004, ICCAT SANC 04-15), Sierra Leone (ICCAT, *Recommendation for Trade Restrictive Measures on Sierra Leone*, 2002, ICCAT 02-19), Georgia (ICCAT, *Recommendation for Bigeye Tuna Trade Restrictive Measures on Georgia*, 2003, ICCAT 03-18 [*ICCAT Georgia Measures*]) and Saint Vincent and the Grenadines (ICCAT, *Recommendation concerning the Trade Sanction against St. Vincent and the Grenadines*, 200, ICCAT 02-20).

[151] Parties and cooperating states have obligations to collect and transmit data on landings and imports of tuna: *ICCAT Trade Measures, ibid.* at para. 1. In addition, the Commission gathers data on compliance with conservation and enforcement measures and obligations to promote compliance with such measures: *ibid*. at para. 2. Additional information includes "the catch data compiled by the Commission; trade information on these species obtained from National Statistics; the ICCAT statistical document programs; the list of the IUU vessels adopted by ICCAT, as well as any other information obtained in the ports and on the fishing grounds:" i*bid.* at para. 2(b).

[152] *Ibid.* at para. 3.

[153] *Ibid.* at para. 7.

As with IUU vessel lists, trade measures may be imposed by ICCAT against member and non-member states alike. In the provision referring to non-members, reference is made to non-compliance with obligations under international law to co-operate with ICCAT in the conservation and management of tuna and tuna-like species, in particular, by not taking measures or exercising effective control to ensure that their vessels do not engage in any activity that undermines the effectiveness of ICCAT conservation and management measures.[154] These 'obligations under international law' refer, no doubt, to obligations contained in the LOSC and in customary law to establish conservation and management measures and to cooperate with other states in their establishment.

> Trade measures are not a perfect instrument, of course. The task of gathering information sufficient to establish violations of international obligations and/or activities that undermine the effectiveness of conservation measures requires a good deal of diligence and collaboration. This information is inevitably incomplete, and presumptions must be relied on. As a result, such conclusions are open to challenge by the states concerned. Furthermore, it is difficult to ensure that contracting parties will impose trade measures consistently and rigorously. They may face their own incentives not to follow through on punishment strategies. Trade disputes involve a number of costs, the expense of international negotiations and arbitral procedures and damage to economic and political relationships being the two most obvious ones. Indeed, under ICCAT, the Commission can only recommend to contracting parties that measures be imposed. Furthermore, the possibility of challenges before the WTO is ever-present.

The question of the legality of multilateral trade measures under the WTO is a complex and fascinating one, and the issue cannot receive comprehensive treatment here. Nevertheless, it is important to try to understand the seriousness of these concerns by focusing on multilateral trade measures taken in virtue of an international convention. Related issues of unilateral measures[155] and *ad hoc* measures which states seek to justify as counter-measures will not be discussed here.[156]

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[154] *Ibid.* at para. 2(a)(ii).

[155] A trade dispute developed between Chile and the EC regarding port closures pursuant to domestic law. The dispute was submitted to both the International Tribunal for the Law of the Sea and the World Trade Organisation, but a settlement was reached between the two countries. This case is different from those discussed above in that it involved the unilateral imposition of port closures. See Andrew Serdy, "See You in Port: Australia and New Zealand as Third Parties in the Dispute between Chile and the European Community over Chile's Denial of Port Access to Spanish Vessels Fishing for Swordfish on the High Seas" (2002) 3 Melbourne Journal of International Law 79.

[156] McDorman concludes that "[t]rade measures as a reprisal while rare, are countenanced in international law" but goes on to note that "[t]his statement is not free of controversy:" Ted L. McDorman, "Fisheries Conservation and Management and International Trade Law" in *Developments in International Fisheries Law*, *supra* note 42, 501 at 518.

McDorman, in discussing the legality of trade measures taken in virtue of an international convention, concludes that such measures pose no difficulties between parties, but raises questions about their legality when imposed against non-parties.[157] McDorman's discussion points to a further distinction: he contemplates the case in which the trade measures target fish taken in violation of a particular rule and notes that the exception in GATT concerning measures for the management of an exhaustible resource could be invoked. However, this raises doubts about the legality of a more aggressive strategy that targets not only fish caught in violation of relevant measures but all fish caught under the flags of states whose vessels have been involved in IUU fishing. The justification would be that, given the failure of the flag state to live up to its responsibilities, all fish caught by that state's vessels are suspect.[158] Elizabeth DeSombre is fairly optimistic about the chances of carefully crafted multilateral environmental measures passing WTO muster: she notes that WTO dispute resolution panels have demonstrated 'an increasing acceptance of environmental protection as a legitimate reason for restricting trade, as long as restrictions on trade are applied in a non-discriminatory way, are designed specifically for environmental protection, and are accompanied by multilateral attempts to address the environmental issue.'[159]

DeSombre's conclusions on the effectiveness of trade and related measures are also cautiously optimistic, particularly with respect to their impact on the behaviour of flag states. She acknowledges that there is strong evidence that vessels are simply reflagging in response to more rigorous enforcement by these states, and notes that the impact on estimated rates of IUU fishing has been uneven and in some cases not particularly significant.[160] However, even these rather limited measures can have some impact, at least at the level of states. It may never be the case that all the port states of the world exploit their jurisdictional powers to reduce IUU fishing, but as individual states and RFMOs gain experience working with these measures, they may come to be more widespread. It will thus become increasingly difficult and costly – though probably never impossible or unfeasible – for vessels to land IUU catches.

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[157] *Ibid.* at 522.

[158] This approach has been taken by ICCAT: see the discussion in DeSombre, "Fishing under Flags of Convenience", *supra* note 4 at 79 ff. For a recent example of such a measures, see ICCAT's trade measures against Georgia: *ICCAT Georgia Measures*, *supra* note 150.

[159] DeSombre, *ibid.* at 89; McDorman echoes this: McDorman, *supra* note 156 at 523, as does Haward, *supra* note 142 at 94. The Committee on Trade and Environment of the WTO wrote, with respect to trade measures under ICCAT and CCAMLR: "Both are considered to provide examples of appropriate and WTO-consistent (i.e. non-discriminatory) use of trade measures in multilateral environmental agreements:" World Trade Organization, *Environmental Benefits of Removing Trade Restrictions and Distortions: The Fisheries Sector*, WT/CTE/W/167 at 9.

[160] DeSombre, "Fishing under Flags of Convenience," *supra* note 4 at 89-90.

COMBATING IUU FISHING – RATIONAL CHOICE AND CONSTRUCTIVIST PERSPECTIVES

Attempts to modify the regime of high seas fishing to give it some of the characteristics of a club good are relatively easy to analyse using a rational choice approach. Given the limited jurisdiction of non-flag states over vessels fishing on the high seas, there is only a small number of points of contact between those vessels and states wishing to enforce conservation measures. Nevertheless, these points of contact exist, and recent developments in high seas fisheries law demonstrate a growing willingness on the part of states belonging to RFMOs to exploit these points of contact and impose costs both on the vessels themselves and on the states that flag them. Simply put, the vessels require fuel, supplies, maintenance, facilities for landing catch and, of course, markets. The point of the measures examined above is, equally simply, to deny IUU vessels access to these facilities and services. Similarly, by imposing restrictions on port access, trade measures and other penalties not only on vessels actually engaged in IUU fishing but on all vessels flagged to states that tolerate IUU fishing, the benefits that flag-of-convenience states gain from remaining outside fisheries conventions and failing to exercise their flag state responsibilities are diminished. Furthermore, by applying these measures in systematic and coordinated ways across whole regions, increasingly strong signals are sent both to IUU vessels and the states that flag them that there will be costs associated with this behaviour.

When sanctions constitute a credible threat and are carefully crafted, they can have a significant impact on incentive structures and on the behaviour of actors. As we have sought to demonstrate in the above discussion, neither the horizontal structure of international law nor the open-access nature of high seas fisheries need pose insurmountable obstacles to the establishment of potentially effective punishment strategies. However, rational choice approaches encounter difficulties in explaining how to convince relevant actors to put incentive-shifting punishment strategies in place to begin with. It surely did not escape the attention of members of RFMOs that the use of port state jurisdiction combined with trade measures could be an effective deterrent to IUU fishing activities. Their reasons for failing for so long to move in this direction, and their eventual decision to begin experimenting with such measures, must be explained in some other way. After all, the choice of a regime that establishes general objectives rather than specific obligations and avoids the imposition of sanctions for non-compliance is generally not made because it is believed that such a regime will prove more effective, but rather because the regime's member states have not yet developed the kind of deep consensus about the issue-area that would permit a more rigorous regime. As Brunnée and Toope argue:

> The effectiveness of formal mechanisms is likely to depend upon the degree to which they are embedded in contextual regimes where shared perspectives have evolved – and political and legal legitimacy has been recognized and accepted. ... Now it may be that over time a contextual regime will harden in such a way that

> binding mechanisms of dispute resolution become useful. But such mechanisms are best defined at that point, so that they are truly appropriate to the level of cooperation present within the regime.[161]

Rational choice theorists such as Downs are of course interested in a much broader array of strategies than the lawyerly approach of creating binding dispute settlement mechanisms with sanctioning authority. Nevertheless, effective punishment strategies do not arise *ex nihilo*, and constructivist approaches in particular can help describe how they evolve and come to be accepted, and how language and discourse contribute to the operation of punishment strategies and their effectiveness.

As we have seen, many rational choice scholars see the use of language as important: in addition to actually imposing sanctions, actors can signal their willingness and capacity to do so. The difference between constructivist and rational choice approaches is that the latter do not posit that *normative* understanding or consensus is reached through these communications: they serve to transmit information, on the basis of which actors can make rational decisions balancing costs against benefits.

Some rational choice theorists have responded to constructivist challenges by acknowledging that actors' preferences may include promotion of certain values or conformity with legal or moral norms. Abbott and Snidal conclude that

> [t]he coordinating value of law as cheap talk in the rationalist account depends solely on its ability to signal ends (equilibria) and not at all on the substantive content of the talk. Thus, a purely rational account can explain neither why "legal" as opposed to some other language is used nor why international legal language so commonly includes extensive normative content.[162]

They note that, along with law's capacity to change incentive structures and to coordinate behaviour – both well-understood in rationalist accounts of law – it is also able to engage 'processes of persuasion, education, socialization, and legitimation.'[163]

> Constructivist approaches do not necessarily contradict many of the central insights of rational choice theory into the question of incentives, but they do present these issues in a theoretical framework that has a greater capacity to evoke and explain the role of language and understandings in these transactions. Constructivism permits the identification of linkages between

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[161] Jutta Brunnée and Stephen J. Toope, "Environmental Security and Freshwater Resources: Ecosystem Regime Building" (1997) 91 *American Journal of International Law* 26 at 47.

[162] Abbott & Snidal, *supra* note 65 at 152.

[163] *Ibid.* at 151. This approach seems to be a departure from an earlier position taken in Kenneth W. Abbott *et al.*, "The Concept of Legalization" (2000) 54 International Organization 401, and possibly a response to the constructivist critique of "Legalization" by Finnemore and Toope: Martha Finnemore & Stephen Toope, "Alternatives to 'Legalization:' Richer Views of Law and Politics" (2001) 55 International Organization 743, which is cited in Abbott & Snidal, *supra* note 65 at n. 2.

> these isolated communications and broader networks of meaning, including legal systems. Actors' interactions with legal systems may be instrumental or normative; generally speaking, they are a bit of both, depending on the actor and the context.

Let us now turn to the more specifically discursive aspects of punishment strategies. Rational choice theorists would accept that punishment strategies can be more effective if not only actual incentive structures but also expectations about costs and benefits are changed, and promulgating legal rules is one way to do this.[164] Discursive activity such as the identification of IUU vessels, communications between RFMO member and non-member states regarding such vessels, and various other precursor activities to the imposition of penalties can strengthen these signals. At the same time, this sort of discursive activity can weaken these signals if it becomes apparent that evidence of IUU activity is endlessly discussed but no decisions or action are ever taken.

If we accept that most vessel owners and masters will not be susceptible to accepting responsibilities and obligations in the name of ecosystem protection alone, we need not make the same assumption about the states to which they are actually or potentially flagged. These states may be more susceptible to persuasion, and punishment strategies may be relied on if they are not. But even where persuasion is likely to be ineffective, appeals to the objectives of the legal regime and to normativity in general will hardly be out of place.

When RFMOs seek to impose costs on non-member states, they do well to embed these punishment strategies in the language of law and legitimacy. A non-cooperating state that faces punishment by an RFMO of which it is not a member is likely to include a legal element in its response to the RFMO: the defector will invoke rules related to the principles of high seas freedom, exclusive flag state jurisdiction and *pacta tertiis*, among others. If the RFMO cannot in turn invoke legal rules in defence of its action, it will suddenly find itself in the role of defector. This may weaken the system of rules on which the RFMO seeks to rely. Of course, the RFMO need not remain mute in the face of charges that it is violating rules of international law; it can invoke the principle of territorial sovereignty as it applies to ports, as well as the network of obligations in customary and conventional law regarding conservation, cooperation and the exercise of flag state responsibilities. It can also appeal to a series of principles of a moral or quasi-legal order that inform international fisheries law, notably sustainable use and the ecosystem approach. After all, RFMOs cannot ignore the fact that it is the sovereign right of states to choose whether or not to enter into international conventions. Furthermore, states' refusal to become parties to conventions is not necessarily done in bad faith; there may be perfectly legitimate objections to a convention or certain of its provisions. RFMOs therefore need to justify their decision to take action against non-parties. If the RFMO cannot in turn invoke legal rules in defence of its action, it will suddenly be cast in the role of violator of international law.

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[164] See Downs, "Enforcement", *supra* note 9 at 325.

RFMOs seeking to impose costs on non-cooperating third states can invoke the overarching objectives of sustainable exploitation of fisheries resources to support their actions, but ultimately they require a legal basis as well, which can be provided with reference to general principles of the law of the sea, including obligations to cooperate in the conservation and management of high seas fisheries resources and obligations to adopt conservation and management measures. They can also point to the principle of territorial sovereignty as it applies to ports.

If utterances by the RFMO about the legitimacy of its actions and the illegitimacy of non-cooperation are not effective in bringing about changes in behaviour, then the punishment strategy informed by a rational choice perspective remains. However, it is unlikely that these utterances will be mere cheap talk, at least not from the point of view of all relevant actors. It must be recalled that these exchanges take place before a wide and varied audience made up of states, vessel owners and masters, fishing communities, international organisations, and the many and varied actors that make up civil society.

Constructivists in particular understand that the series of utterances that comprise the kinds of claims and counter-claims described above are far from isolated events; they take place against a backdrop of shared understandings and social institutions that give them meaning and anchor them in the shared reality of the various interested actors. These actors may not agree, for example, on all the implications of a principle such as freedom of the high seas, but they do agree that the principle exists and also agree to a great extent on its core meaning. If one actor argues with greater skill and persuasiveness than another, making one interpretation seem more compelling, then the other actor is forced either to concede or to try to shift the debate onto different terrain. As shared understandings about the meaning of freedom of high seas fisheries begin to shift towards a conception of freedom sharply conditioned by responsibility and obligation, it becomes much more difficult to justify avoidance of and failure to implement conservation and management obligations. Defectors thus have an increasingly difficult time standing on their sovereign rights.

Conclusion

This paper has outlined some emerging trends that affect the high seas freedom to fish and the principle of flag state jurisdiction and pointed to changes to existing rules that could be implemented without significant difficulty. I have also sought to draw attention to the discursive power of law while at the same time taking seriously the challenges that IUU fishing poses to constructivist approaches.

Action on at least three fronts is warranted. To begin with, important changes are slowly taking place at the level of conceptual frameworks applicable to the law of the seas. The content of the high seas freedom to fish, for example, has changed significantly in recent decades, and the notion that non-flag states should have authority to carry out measures such as boarding and inspection is gaining ground. It remains to be seen whether the more significant inroads made into this freedom by the FSA will take hold, but the notion that the vessels of all states have unconditional access to all high seas fisheries no longer obtains. It may be argued that, without the power to enforce these limitations on high seas freedoms, coastal states will be at the

mercy of recalcitrant flag states. However, this conclusion does not take into sufficient account the discursive power of international law: if it becomes generally recognised that vessels of non-parties do not have access to regulatory areas, then those states will no longer be able to invoke the high seas freedom to fish as a justification for their vessel's actions and their own inaction.

On a second front, more extensive use of surveillance and monitoring and, where conventions provide for it, boarding and inspection could make the oceans a much more transparent arena. Flows of information about levels of compliance are essential to the success of a regulatory regime. States whose vessels are routinely observed engaging in illegal fishing will be aware that their lack of diligence is being observed and reported throughout the region and, potentially, around the world. The incentive of maintaining a good reputation, as well as good relations with other fishing states, may well be sufficient – along, in appropriate circumstances, with diplomatic and political pressure – to bring about better compliance.

Third, even if it is not possible in the short term to grant coastal and port states the right to detain, arrest and prosecute vessels for high seas violations, there are various ways in which the incentive structure within which those vessels operate can be altered. Denial of port access is one possibility, and, if done in a coordinated fashion, as it is in the CCAMLR regime, it could impose significant costs on non-complying vessels. Denial of market access is another. Of course, when this issue is raised, concerns about compliance with WTO rules inevitably arise, and these concerns may well be grounded. However, it should not be assumed that such measures constitute WTO violations, or that they cannot be constructed in such a way as to be in compliance with such measures.

There is a fourth front on which significant progress must be made: the salience of fisheries conservation and management, and marine ecosystem protection more generally, must be significantly increased within the machinery of governments and in the public imagination. It is striking that government representatives and citizens reacted quickly and strongly to dolphin mortality in tuna fisheries, and equally striking that the fate of tuna themselves is simply not showing up on political and public radar. If citizens and politicians cannot be made to care about this issue, all the monitoring technology, port inspections and trade measures in the world will not make a significant difference. Law cannot bear the burden of fisheries conservation and management alone.

Shifting Paradigms of Parochialism: Lessons for International Trade Law*

ELIZABETH TRUJILLO**

John Sexton characterized the endeavour of teaching globally as an academic calling for the 'global common enterprise.'[1] He explains that the rule of law plays an integral role in integrating a 'global village' and bridging different legal and cultural traditions.[2] It is in this exchange that involved parties may begin to question their own laws, redefine legal applications through comparative inquiry and adapt their legal systems for the sake of a larger common enterprise.

Much of the study of international private law has focused on exploring differences in legal systems in light of domestic issues or harmonization.[3] Much less

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[1] John Sexton, *The Academic Calling: To Global Common Enterprise*, 51 J. Legal Educ. 403 (2001).

[2] *Ibid.* at 403 (stating that '[t]he rule of law will permeate an emerging global village, touching societies it never has touched . And the success of this new community will depend in large part upon the integration and accommodation of disparate traditions through law.').

[3] See generally, Mark A. Drumbl, *Amalgam in the Americas: A Law School Curriculum for Free Markets and Open Borders*, 35 SAN DIEGO L. REV. 1053 (1998) (exploring ways in which to create a NAFTA curriculum that will foster harmonization within the context of NAFTA); Steven Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 ARIZ. J. INT'L & COMP. LAW 401 (1995) (stating that NAFTA will encourage harmonization among the three countries at various levels and that university programs can be key to fostering harmonization). But see, Adelle Blackett, *Globalization and Its Ambiguities: Implications for Law School Curricular Reform*, 37 COLUM. J. TRANSNAT'L L. 57, 58 (1998) (proposing a different

attention has focused on accepting these differences as part of the global legal structure and on examining the traditions engendering these differences as a source of understanding parochial interests.[4] Exploring the cultural and legal differences among trading partners brings light to a world of 'hybrid legal spaces,' adding complexity to the adjudication of commercial, foreign investment and even trade disputes.[5]

This paper asserts that globalized legal education can explore differences in laws not only as a means for harmonization or convergence or for finding solutions in domestic law, but also as a means of fostering understanding of domestic parochial interests within a society. Particularly in the context of regionalism, it is in building alliances that extend beyond the parochial network that a new common tradition may form.[6] In exchanging parochial attitudes, students may begin to appreciate that compliance with international principles is driven in part by the recognition that through voluntary cooperation, domestic interests may also be best served.

While thinking 'globally' appears too vast and amorphous of a concept to translate into practical terms, thinking 'regionally' offers an opportunity for a real exchange by tapping into common regional interests and, in turn, a true exchange in culture, values and social norms.[7] In the context of the North American Free Trade Area (NAFTA) for example, the United States, Canada and Mexico have not only increased trade[8] but also have attempted to find ways of coordinating regulations in order to enhance economic exchange. Furthermore, this coordination has emerged not only in the form of harmonization but also as convergence. For example, NAFTA

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starting point for the globalization in legal education—one that focuses on the 'ambiguities of globalization.'); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. INT'L L. 1103, 1116 (2000) (characterizing the influence of judicial applications of various domestic constitutions as an important part of the 'cross-fertilization' within a domestic legal system).

[4] See Patrick Glenn, *Symposium on Continuing Progress in Internationalizing Legal Education—21st Century Global Challenges: Integrating Civil and Common Law Teaching Throughout the Curriculum: The Canadian Experience*, 21 PENN. ST. INT'L L. REV. 69, 74 (2002) 74 (recognizing that while teaching of multiple laws is challenging, 'the object of transnational legal education is not legal unification or even facilitating convergence, but rather understanding of difference and the underlying reasons for difference').

[5] See generally, Paul Schiff Berman, *Global Legal Pluralism*, 80 SOUTHERN CALIFORNIA LAW REVIEW, (forthcoming 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id =985340 (applying a pluralist framework to international law and arguing that this framework can help 'manage a world of hybrid legal spaces').

[6] See H. Patrick Glenn, LEGAL TRADITIONS OF THE WORLD at 49 (discussing that globalization allows for an extension of traditions that are beyond the state).

[7] See Patrick Glenn, *Conflicting Laws in a Common Market? The NAFTA Experiment*, 76 CHI-KENT L. REV. 1789 (2001) (explaining that regionalization is an important factor in the elimination of physical, political and legal borders because 'we define the new regions not so much in terms of geophysical boundaries...but in terms of new political and legal boundaries that surpass those of the state.').

[8] For example, total U.S. merchandise trade by truck between the U.S. and Canada increased by 113% from 1993 to 2002 and between the U.S. and Mexico, by 319%. *See* Bureau of Transportation Statistics, *located at* http://www.bts.gov/cgi-bin/breadcrumbs/PrintVersion.cgi?date=27150819.

parties have attempted to find commonalities among their policies rather than purely establish identical regulations or laws.[9] For example, since 2001, regional integration has extended into the energy sector through increased cooperation in setting efficiency and labelling standards under the North American Energy Working Group (NAEWG).[10] Increased investment through cooperative alliances and joint ventures has also contributed to stronger ties among the NAFTA partners.[11]

Parochialism generally has a negative connotation for supporters of free trade. Nonetheless, at some level, free trade may itself strengthen internal pressures to establish parochialism through powerful domestic networks. Such networks may form because of a perceived need among network members that if united, they may fight against 'outsiders' who want to dominate them.[12] However counterintuitive it seems, parochial interests are a part of the global structure. Therefore, in teaching international trade law, one should strive to help students understand the relevant parochial interests and the political and economic forces that drive them.

I. Domestic Parochialism

The effect that parochialism has on compliance with international trade agreements lends itself to inquiry into what drives parochial attitudes. The social sciences teach us that parochialism generally arises from the tendency for people to favor groups in which they are members, at the expense of outsiders and even their individual interests. Professors Schwartz-Shea and Simmons describe this tendency as one flowing from a perceived 'self-interest' that in aiding the group that includes themselves, they will promote their individual interests.[13] Jonathan Baron identifies this 'self-interest' as a 'self-interest illusion', which explains why individuals are more willing to sacrifice individual interests for those of certain groups but not for larger-encompassing groups.[14] He explains that a sense of altruism drives parochial attitudes—that individuals may find affinity with groups to which they identify

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[9] *See* Ronald D. Knutson and Rene F. Ochoa, *Convergence, Harmonization* and *Compatibility under NAFTA: A 2003 Status Report, available at* http://www.farmfoundation.org/farmpolicy/knutson-ochoa.pdf. (last visited Feb. 1, 2007) (distinguishing convergence from harmonization by explaining that convergence requires 'commonality of policy' rather than the implementation of uniform programs or regulations through harmonization).

[10] Stephen Weil and Laura Van Wie McGrory, *Regional Cooperation in Energy Efficiency Standard-Setting and Labeling in North America, available at* http://www.osti.gov/bridge/servlets/purl/ 824274-0MHxDS/native/824274.pdf. (last visited Feb. 2, 2007).

[11] *See* David Sparling and Roberta Cook, *Strategic Alliances and Joint Ventures under NAFTA: Concepts and Evidence* (stating that strategic alliances and joint ventures are the 'new international business norm'), *available at*, http://www.agecon.ucdavis.edu/aredepart/facultydocs/Cook/ rankfoodii/june25final.pdf. (last visited Feb. 1, 2007).

[12] *See generally infra* section I.

[13] See Schwartz-Shea, P. & Simmons, R.T., *Egoism, Parochialism* and *Universalism*, RATIONALITY AND SOCIETY, Vol. 3, No. 1, 106-132 (Jan. 1991).

[14] *See* Jonathan Baron, *Parochialism as a Result of Cognitive Biases*, Oct. 1, 2005 at 3, *available at* http://www.econ.ku.dk/tyran/Workshop%20BPE/Baron.pdf. (last visited Feb. 1, 2007).

ethnically, culturally, religiously or even politically. As a result, powerful networks may arise domestically. Professors Samuel Bowles and Herbert Gintis define two levels of parochialism in network formations:

1. more obvious network formation based on perceived common traditions in ethnicity, cultural values, politics and religion; and
2. one based on underlying economic advantages within the 'problem solving capacities of networks.'[15]

Members may identify with such powerful networks because of these common traditions or advantages. In this context, parochial attitudes may result from a lack of memory that in fact origins have been pluralist in nature.[16]

The power of these networks remains puzzling in a world of increased globalization. These powerful networks resist integration with other networks, especially those outside their geographical borders. One reason for this phenomenon may be that such networks, though insular, may 'solve economic problems that are resistant to market or state-based solutions.'[17] Despite the more obvious cultural, religious, or political affinities that members of such networks seem to share, there is a recognizable economic advantage to remaining insular and loyal to the network. However we choose to characterize parochialism, it permeates movements at the domestic level which resist globalization at the multilateral and even regional levels. For the purposes of this paper, this attitude is characterized as *domestic parochialism*. In discussing parochialism in this context, the focus is on individual attitudes and the way they translate into the larger national scale. There are obvious limitations to applying observations made originally on individuals to a nation consisting of a multitude of special interest groups. However, a full discussion of these limitations is beyond the scope of this paper.

Free trade agreements challenge the power of such networks. In particular, the lowering of tariff and non-tariff barriers forces nations to become less protectionist and to suspend their parochial attitudes. While eliminating economic protectionism may be at the core of free trade, trade agreements do not guarantee it even if the national will to become a member of a larger, global community is present. The concept of national treatment, for example, as required under Article III of GATT or in

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[15] Bowles and Gintis, *Persistent Parochialism*, at 2 (stating that '[m]embers, of course, do not normally express their identification with networks in terms of their economic advantages. Rather, they typically invoke religious faith, ethnic purity, or personal loyalty. These sentiments often support exclusion or shunning of outsiders.') . The authors explain that among 'the problem-solving capacities of networks are the powerful contractual enforcement mechanisms made possible by small-scale interactions, notably effective punishing of those who fail to keep promises, facilitated by close social ties, frequent and variegated interactions and the availability of low cost information concerning one's trading partners.' *Ibid*.

[16] H. Patrick Glenn, *Transnational Legal Theory and Practice Essay*, 29 FORDHAM INT'L L. J. 457 (2006).

[17] Bowles and Gintis, *supra* note 15 at 3.

various chapters of the NAFTA is a principle directed at combating protectionism at its core.[18] However, distinguishing between national treatment violations and domestic regulatory measures can be problematic for international trade adjudicatory bodies. Regulatory measures, even if found to be legitimate because of a public purpose, may be protectionist in nature and in turn serve parochial interests.

II. Regionalism, Hybridization and Larger Problem-Solving Networks

Economic integration through regionalism may help propel the emergence of new and hybrid cultures.[19] Hybridization, as characterized by Jadish Bhagwati, generates cultural, social and economic alliances which can help form larger regional networks.[20] Furthermore, hybridization can create hybrid legal cultures. This can occur, for example, through assimilation of different legal norms and procedural mechanisms. Also, jurisdictional overlaps may emerge when different legal regimes have jurisdiction over a common issue. For example, NAFTA allows disputes arising both under NAFTA and the WTO to be brought under either jurisdiction at the discretion of the involved parties.[21] In the context of the NAFTA partners, a *NAFTA parochialism* may be the source of power within a multilateral framework.[22]

a. *NAFTA Parochialism*

Assuming the existence of different well-established domestic networks, the question remains of how to coordinate and reconcile the various interests they espouse. The challenge this presents can lead to more division and differentiation among the networks. For some international lawyers, harmonization may be one solution. However, harmonization attempts to supplant local norms with universal ones and, in turn, has a hegemonic effect which can just fuel local networks in their resistance to

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[18] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 *amended by* General Agreement on Tariffs and Trade-The Uruguay Round: Agreement Establishing the World Trade Organization, Dec. 15, 1993, 33 I.L.M. 13 (1994) [hereinafter GATT], art, III. *See generally* 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, app. 1, 33 I.L.M. 1125 (1994). *See also* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 296–456, 605–800 (1993) [hereinafter NAFTA], arts. 1102, 1202, 1405, 1703.

[19] Jagdish Bhagwati, IN DEFENSE OF GLOBALIZATION at 107 (describing various anti-globalization forces which the author terms as 'global pessimists' and opining that 'economic globalization is a culturally enriching process.').

[20] *Ibid.* at 109 (illustrating examples of cultural 'hybridization' resulting from globalization).

[21] *See e.g.* NAFTA, *supra* note 21, art. 2005. *See also* Berman, *Global Legal Pluralism*, *supra* note 5, at 41 (discussing jurisdictional overlaps).

[22] *See* Patrick Glenn, *Conflicting Laws*, *supra* note 7, at 1791 (2001) (distinguishing the NAFTA experience form the European Union and characterizing the member states of NAFTA as 'internal common markets').

integrate regionally or globally.[23] For the NAFTA partners, harmonization may not necessarily resolve their cultural, political, economic and legal differences. Perhaps resolving these differences is not the goal at all. Another approach could be one in which parties may draw on their commonalities to create institutions that work toward addressing shared interests. In this way, such institutions would implement procedural and normative mechanisms that would embrace the pluralist nature of their shared common space.[24]

Despite their differences, NAFTA partners do share some historical and political characteristics. They are all federalist in nature even if the distribution of power and authority may vary from country to country.[25] Each recognizes the political independence of their internal states while recognizing that the power of the states is limited for the common good of the nation, especially in terms of commerce. For example, in the United States, the dormant commerce clause limits the power of the states in interstate commerce.[26] However, the states retain their power in other areas. Mexico, on the other hand, places much political authority in the national legislature and its national administrative agencies.[27] Canada has perhaps the most decentralized system of the three NAFTA member states.[28] Commerce power of the Canadian federal government, for example, is much narrower than in the United States. Canada, as a nation, has attempted to become more centralized as well.[29]

All three also share some historical experiences. They were once colonies of European colonialism that, despite periods of royal or dictatorial dominance, eventually developed into republics and not kingdoms. They even have occupied and fought over the same territory at different points in history. For example, the 1848 Treaty of Guadalupe Hidalgo ceded to the U.S. certain Mexican territories that today include the states of Colorado, Arizona, New Mexico, California, Nevada, Utah and Wyoming. While each nation has developed distinctively, they share some common traditions that, if fostered, can help form the basis of a quilt of hybridization. In enhancing these common threads, such hybridization can lead to the development of a

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[23] *See* Berman, *Global Legal Pluralism*, *supra* note 5, at 28 (describing harmonization as failing to meet the realities of diversity among societies and as potentially being hegemonic).

[24] *Ibid.*

[25] *See* Mark A. Drumbl, *Amalgam in the Americas*, *supra* note 3, at 1062-1072 (1998) (describing generally the differences in political structures and legal systems between the three member states of NAFTA).

[26] *See generally* Gibbons v. Ogden 22 U.S. 1, 203 (1824); Wilson v. Black-Bird Creek Marsh Co., 27 U.S. 245 (1829); Cooley v. Board of Wardens, 53 U.S. 299 (1851); DiSanto v. Pennsylvania, 273 U.S. 34 (1927); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) .

[27] *See* Drumbl, *Amalam in the Americas*, supra note 3, at 1062-1072. For more on the Mexican legal and political system, *see generally* Steve Zamora (with Cossio, Pereznieto, Roldán and López), MEXICAN LAW, Oxford University Press, 2004.

[28] *See* Drumbl, *Amalam in the Americas*, supra note 3, at 1072.

[29] *See generally*, Martha A. Field, *The Differing Federalism of Canada and the United States*. 55 LAW AND CONTEMPORARY PROBLEMS 107 (comparing federalism in the United States and Canada).

new common tradition that surpasses parochial interests, without necessarily replacing them and in which parochial networks may form alliances. That is, domestic parochialism may be replaced by a *NAFTA parochialism*.

Defining the parameters of regionalism *vis a vis* the multilateral trade regime is not easy. Trade distortions could emerge as a result of too much emphasis on regional interests or political alliances and these could certainly lead to detrimental effects for the global community more generally. After all, one of the reasons for implementing the GATT was to avoid another World War primarily caused by powerful political military alliances.[30] Regional strength should only exist within a strong multilateral system. In the context of trade, this relationship is continually being tested through WTO decisions that implicate regional partners without clear recognition of the regional issues at play. [31] For example, there are jurisdictional overlaps in the adjudication of disputes concerning antidumping and countervailing duty measures as well as alleged national treatment violations.[32] In *Mexico—Tax Measures on Soft Drinks and other Beverages*, for example, the WTO panel and later the appellate body decided that Mexico's tax on soda bottlers using high fructose corn syrup rather than sugar was protectionist.[33] This same issue has been considered in a Chapter 11 foreign investment NAFTA claim by the US investor affected by the tax.[34] Though the issue has not yet been resolved by the NAFTA arbitration tribunal, NAFTA Chapter 11 tribunals have in the past deferred to WTO decisions regarding national treatment violations under Article III of GATT.[35]

More recently, however, the Chapter 11 NAFTA tribunal in *Methanex Corporation v. Government of the United States* dealt with a California regulation that, because of alleged health and environmental risks, banned the use of methanol in

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[30] *See* JOHN H. JACKSON, THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS 21 (2000) (stating that the goals behind the GATT agreement included 'the prevention of war and the establishment of a just system of economic relations' as well as 'the economic benefits that might derive from international trade and economic stability') . *See also* Colin Picker, *Regional Trade Agreements v. The WTO: A Proposal For Reform Of Article XXIV To Counter This Institutional Threat*, 26 U. Pa. J. Int'l. Econ. L. 267, 280 (2005) (discussing interwar concerns regarding regionalism).

[31] *See* Elizabeth Trujillo, *Mission Possible: Reciprocal Deference Between Domestic Regulatory Structures and the WTO*, 40 CORNELL INT'L L. J. 201 (2007), *also available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933447.

[32] For a discussion of jurisdictional overlaps among domestic, NAFTA and WTO regimes, see Elizabeth Trujillo, *Defining Jurisdictional Overlaps in the Midst of Regionalism* (draft available with author).

[33] *See* Mexico-Tax Measures on Soft Drinks and other Beverages, WT/DS308/4, June 11, 2004 and WT/DS308/R, October 7, 2005 [hereinafter *Mexico—Tax Measures*] . *See also* Trujillo, *Mission Possible, supra* note 31.

[34] *See* Corn Products International v. Government of the United Mexican States, Request for Institution of Arbitration Proceedings, Oct. 28, 2003 [hereinafter *Corn Products*].

[35] *See* Trujillo, *Mission Possible, supra* note 31, part III for a discussion of NAFTA Chapter 11 decisions discussing WTO adjudication of national treatment violations.

reformulated gasoline. Here, the Chapter 11 tribunal clearly stated that NAFTA tribunals are not required to look to WTO panel decisions as precedent for their own decisions.[36] Determining which regulatory measures are legitimate (and therefore not in violation of commitments under GATT) is a challenge for international trade adjudicatory bodies. Regulatory measures aimed at placating domestic parochial attitudes can masquerade as legitimate and nonprotectionist. Therefore, creating larger capacity networks that incorporate the economic advantages to globalization is important at the domestic level.

b. *Reconciling Pluralist Interests*

Professor Patrick Glenn distinguishes between legal systems exclusive to the nation state and legal traditions that are more encompassing and 'transcend state law.'[37] He explains that '[s]tates of immediately cognate traditions may bind together in some supranational form, in an effort to catch up to their own, constitutive traditions.'[38] Hybridization through regionalism offers an opportunity for new common traditions to emerge, pluralist in nature, but unified in a common economic interest.[39]

Professor Paul Schiff Berman envisions a world of hybrid legal spaces in which pluralism serves as a means of managing, rather than eliminating or supplanting, hybridity.[40] He explains that 'normative conflict among multiple, overlapping legal systems is unavoidable' and can lead to alternative forms of conflict resolution and change.[41] Embracing hybridization as an essential part of international law challenges traditional views of state sovereignty and diminishes the power of internal networks. From this perspective, the goal of international law is no longer defining its parameters as a separate legal space, but rather finding procedural and, in some instances, normative mechanisms of managing and coordinating various legal norms and institutions. For example, NAFTA itself contains trade requirements such

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[36] *See* Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits, Aug. 9, 2005, Part III, ch. B, ¶ 37, *available at* http://www.state.gov/documents/organization/51052.pdf. [hereinafter *Methanex*] . *See also* Trujillo, *Mission Possible, supra* note 31, at parts III & IV (discussing the tendency of NAFTA tribunals to defer to WTO decisions and the interesting complexities that these jurisdictional overlaps present. This article also reflects on the impact of *Methanex* in future NAFTA tribunals and their decisions *vis à vis* similar WTO decisions).

[37] Patrick Glenn, *Symposium on Continuing Progress in Internationalizing Legal Education*, *supra* note 4, at 69 (stating that '[t]he notion of a legal tradition is one which transcends state law, but there is no accepted or likely-to-be accepted language of the "multi-traditional" or "pan-traditional".') . *See generally*, H. Patrick Glenn, LEGAL TRADITIONS OF THE WORLD, *supra* note 6, at ch's 1 and 2.

[38] *See* H. Patrick Glenn, LEGAL TRADITIONS OF THE WORLD, *supra* note 6, at 49.

[39] *See* Patrick Glenn, *Conflicting Laws*, *supra* note 7, at 1789 (2001) (explaining that regionalization is an important factor in the elimination of physical, political and legal borders because 'we define the new regions not so much in terms of geophysical boundaries...but in terms of new political and legal boundaries that surpass those of the state.').

[40] Berman, *Global Legal Pluralism*, *supra* note 5, at 8.

[41] *See ibid.*

as national treatment which could be adjudicated in different legal regimes such as in the case of *Corn Products International v. United Mexican States* and the WTO case *Mexico-Tax Measures.* The various legal regimes under NAFTA may overlap with domestic regimes as well, such as in *Loewen Group, Inc. and Raymond Loewen v. United States*, where a NAFTA Chapter 11 tribunal addressed a Mississippi court decision regarding a Canadian investor in that state.[42] At times legal regimes adjudicating the same cases may arrive at different decisions. A domestic court or agency may rule in a different manner than a NAFTA tribunal as may a WTO panel, as in the Softwood Lumber cases.[43] Such jurisdictional overlap is becoming commonplace. Pluralism embraces such jurisdictional hybridization and allows for a 'dialectical approach' to resolving international disputes.[44]

Professor Ruti Teitel, in examining approaches to comparative constitutional law, expresses concern that the traditional functionalist approach to comparative inquiry fails to resolve modern practical problems arising from hybridization.[45] Rather, a dialogical inquiry is preferable in this context because of its potential for generating 'cosmopolitan effects that mat well transcend any individual state.'[46]

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[42] Loewen Group, Inc. and Raymond Loewen v. United States, Award on Merits (NAFTA Ch. 11 Arb. Trib., June 26, 2003) (dismissing the claims on its merits because claimants failed to show no remedy under U.S. municipal law).

[43] *See generally*, *In re Certain Softwood Lumber Products from Canada*, Final Affirmative Countervailing Duty Determination, USA-CDA-2002-1904-03 (NAFTA Ch. 19 Binational [U.S.-Can.] Panel Aug. 13, 2003, June 7, 2004, Dec. 1, 2004, May 23, 2005, Oct. 5, 2005, & Mar. 17, 2006), *In re Certain Softwood Lumber Products from Canada*, Final Affirmative Antidumping Determination, USA-CDA-2002-1904-02 (NAFTA Ch. 19 Binational [U.S.-Can.] Panel July 17, 2003, Mar. 5, 2004, & June 9, 2005), *In re Certain Softwood Lumber Products from Canada*, Final Affirmative Threat of Injury Determination, USA-CDA-2002-1904-07 (NAFTA Ch. 19 Binational [U.S.-Can.] Panel Sept. 5, 2003, Apr. 19, 2004, & Aug. 31, 2004) and *In re Certain Softwood Lumber Products from Canada*, Order, ECC-2004-1904-01 USA (NAFTA Ch. 19 Extraordinary Challenge Comm. Aug. 10, 2005). *See also*, Appellate Body Report, United States--Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, Recourse by Canada to Article 21.5, WT/DS257/AB/RW, para. 96 (Dec. 5, 2005). For a discussion of the Softwood lumber case and the potential conflicts between the NAFTA and the WTO regimes, see generally *International Decision: Softwood Lumber Dispute (2001-2006)*, 100 AM. J. INT'L LAW 664 (2006).

[44] *See* Berman, *Global Legal Pluralism*, *supra* note 5, at 32-33 (stating that 'a pluralist approach understands that interactions between various tribunals and regulatory authorities are more likely to take on a dialectical quality that is neither direct hierarchical review traditionally undertaken by appellate judges, nor simply the dialogue that often occurs under the doctrine of comity.').

[45] Ruti Teitel, *Comparative Constitutional Law in a Global Age*, Book Review of COMPARATIVE CONSTITUTIONALISM: Cases and Materials, eds. Norman Dorsen, Michel Rosenfeld András Sajó & Suzanne Baer (2003), 117 HARV. L. REV. 2570, 2584-2586. In reviewing a book on Comparative Constitutionalism by Michel Rosenfeld András Sajó & Suzanne Baer, the author compares the functionalist and neofunctionalist approaches in comparative constitutionalism to a more modern, the 'dialogical approach.' The author explains that the dialogical approach allows for theories on comparative constitutionalism 'as a dynamic interpretative and discursive practice.' *Ibid*.

[46] *Ibid.* at 2586-2587.

In a similar way, there is no consensus on whether the WTO has institutionalized universal normative standards for dealing with issues of international trade. It is even less clear if in fact the WTO panels are establishing universal norms of trade law for the international economic community.[47] Perhaps at one level, the GATT sets the floor for norms accepted in international trade, both multilaterally and regionally. Principles of national treatment, most-favoured nation treatment and market access are examples of such normative standards. The adjudicatory bodies of the WTO and the NAFTA, for example, grapple with these principles and make their decisions based on standards of international law and the Covered Agreements of the WTO.[48] However, many of the problems dealing with these principles arise within the domestic context of government measures such as regulation or even deregulation. Within these contexts, the role of the WTO as a regulatory model setting trade norms is questioned.[49] In this role, the WTO may disassociate problems from their domestic or regional context much in the same way that a neofunctionalist approach to comparative constitutionalism 'abstracts problems from their particular contexts to arrive at a constitutionalism hardly identifiable with politics or place.'[50] Because of the need for domestic regimes to enforce the decisions of adjudicatory bodies in free trade agreements, WTO panels and regional tribunals cannot entirely disassociate international issues from their domestic or regional contexts if their decisions are to have real clout. A dialogical approach may help to resolve disputes arising in different jurisdictional regimes and encourage dispute resolution bodies to inform each other on related issues.[51]

III. The Classroom Exchange Promotes Hybridization

What does hybridization through regionalism say about cross-border legal education and, more specifically, for the future of NAFTA lawyers? It is the axis around which any course in NAFTA may encourage a dialogue among participants whose countries

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[47] *See* Berman, *Global Legal Pluralism*, *supra* note 5, at 26 (discussing universalism); *See also* Trujillo, *Mission Possible*, *supra* note 31.

[48] 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, app. 1, 33 I.L.M. 1125 (1994).

[49] *See generally*, John O. McGinnis and Mark L. Movsesian, *Commentary: The World Trade Constitution*, 114 HARV. L. REV. 511 (2001) (describing regulatory model and distinguishing it from the antidiscrimination model). *See also* Trujillo, *Mission Possible* at section II.b (comparing the regulatory and the antidiscriminatory models of the WTO.

[50] *See* Teitel, *Comparative Constitutional Law in a Global Age*, *supra* note 45, at 2577 (specifically discussing the casebook, COMPARATIVE CONSTITUTIONALISM, as applying a neofunctionalist perspective to comparative constitutional law). The author goes on to state that 'the functionalist approach to the definitional query is to abstract constitutional problems from their contexts. This approach does not pay adequate attention to the extent to which constitutional problems are informed by politics and culture.' *See ibid.* at 2578.

[51] *See also* Berman, *Global Legal Pluralism*, *supra* note 5, at 13 (citing Robert Ahdieh in explaining that a dialogical relationship among domestic and international tribunals may help 'develop a joint jurisprudence partly in tandem and partly in tension with each other.').

are different and yet are trading partners. A classroom consisting of U.S., Mexican and Canadian students is a good forum for inculcating a sense that they are members of a larger problem-solving capacity network, larger than the domestic or local one to which they may be accustomed.

Though this paper focuses primarily on my own experience in developing a transnational course, it also expresses some more general reflections regarding cross-border legal education. In setting up the framework of a transnational NAFTA course, I worked with my Mexican colleague, Professor Gabriel Cavazos from the ITESM who was teaching a NAFTA course in the LL.M. Program in International Trade Law (*el Instituto Tecnológico de Monterrey, Maestría en Derecho Comercial Internacional*) in Monterrey, Mexico. First, we outlined the objectives of such a course. The objective was to provide something that our students would not be able to get in a more traditional NAFTA course. We identified a few key points:

1. Students should achieve a basic understanding of the basic principles of international trade law more generally and of NAFTA more specifically and how these principles pertained to and affected their own local parochial interests and the interests of their future clients.[52]

2. Student should learn basic differences in the political structures and legal systems of their counterparts. But they should also understand where commonalities are, to the extent they exist, including historical, political and economic ones.

3. Finally, students should experience first hand 'an exchange' to help them see for themselves where there are differences and where they may draw on their commonalities. We chose a simulated arbitration as a joint exercise. We used *Corn Products* because it allowed students to work together with an unresolved Chapter 11 NAFTA investor-state arbitration case that also contained issues being adjudicated before a WTO panel. This allowed us to raise many issues pertaining to protectionism more generally and jurisdictional overlaps between the NAFTA and the WTO dispute resolution bodies and their regimes.

Some of the more practical questions we needed to address related to methodology and collaboration more generally, the 'exchange' that should occur and the role of technology. In teaching transnationally, collaboration first begins with the willingness of the professors as well as that of their institutions. In our case, there had already been some ongoing negotiations between our universities regarding the possibilities for establishing joint programs and faculty exchanges for collaborative research. At the very minimum, the backdrop for such a course should be one characterized by what John Sexton calls a 'minimalist model' in which the faculty

[52] Interestingly, in my experience with this course, students have been primarily from Michigan, Ontario and Nuevo Leon—all regions deeply affected by the implementation of NAFTA . Many of the students had experienced first hand these affects.

members and the institutions themselves act independently, while collaborating under 'an umbrella entity' which facilitates the exchange.[53]

Second, we had to consider what exactly we were exchanging through this course.[54] To the extent that a transnational course is based on an exchange of legal skills and cultural perspectives to resolve common problems, we also needed to find ways of drawing on our commonalities in order to achieve a cohesive educational experience for our students.[55] This began with the professors sharing outlines and syllabi of the course as if each were to teach it independently of the other. We integrated these into one course syllabus that we then adapted for our own class. Naturally, one of the most obvious obstacles to overcome in such an exchange is the language barrier. In our case, this was a moot point since we had the good fortune that the Mexican LL.M. students as well as Professor Cavazos were fluent in English.[56] However, the students manifested their linguistic differences in other ways—through syntax and interpretation of legal issues and even in differing analytical approaches to the relevant international law.

Differences in methodological teaching approaches also had to be considered. Whereas U.S. legal education focuses primarily on interactive learning such as the Socratic method or problem-solving approach, Mexican law schools tend to show a preference for lectures rather than cooperative learning (though in some schools like ITESM, other methods are being used as well).[57] Professor Cavazos and I decided that each professor should teach in his or her preferred way the basic principles of NAFTA, but we coordinated the scheduling of the topics being taught, the book being used and outside reading materials. We invited a guest lecturer from the department of economics and business administration from ITESM for the first videoconference session who lectured on the effects of NAFTA on Mexico. This allowed the UDM students to understand more clearly the impact of NAFTA on our Mexican counterparts.[58]

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[53] *See* Sexton, *The Academic Calling: To Global Common Enterprise*, *supra* note 1, at 405.

[54] *See generally* Margaret Y.K. Woo, Reflections on International Legal Education and Exchanges, 51 J. Legal Educ. 449 (2001) (discussing the essence of international legal education and exchange).

[55] *See ibid.* at 451 (stating that 'exchanges' in the context of international education consists not only of exchanges within substantive law areas, but also an exchange of skills, values and the cultures within the differing legal systems).

[56] Although the author is also fluent in Spanish and some of the American students spoke Spanish as well, the joint portions of the course were conducted in English. Also, the ITESM students were graduates students studying in the LL.M. program for International Trade ITESM.

[57] *See* Woo, *supra* note 54, at 453 (discussing different teaching methodologies, some based on a passive approach and others on active learning). *See also* Drumbl, *Amalgam in the Americas*, *supra* note 3, at 1079-1099 (comparing the education systems of Canada, the US and Mexico) . Several professors at the ITESM were also educated in the U.S. and that influence can be felt in a gradual shift in the traditional Mexican teaching methods.

[58] We did not have a Canadian or U.S. lecturer, but such participation would be useful in the future.

Third, we had to consider the role of technology in bridging not only geographical distances, but also language barriers. By characterizing our course as a *web-based course,* we could facilitate the exchange among the students at both schools and use it as a supplement to learning in the classroom. It was also a means for teaching foreign students while teaching our own.[59] We used the web to communicate with students as if they were all in one classroom. Through video-conferencing, students from both schools presented mock oral arguments on the *Corn Products* investor-state case to a simulated tribunal, consisting of students from both schools. In this way, all participants could appreciate the different styles of advocacy presented by lawyers from the continental and common law traditions.[60] For example, the Mexican students had a more formalist reading of the NAFTA and WTO treaties as normative instruments. In contrast, the tendency of the U.S students was to attempt to look at precedent, despite the lack of formal *stare decisis* in this area.

In using a simulated arbitration, comparative inquiries can be useful not only for understanding the similarities and differences among legal systems, but also as a backdrop for deciding which aspects of different legal traditions to adopt in resolving the many different problems arising under international trade law. An exercise in the arbitration process offers an opportunity to engage in a dialogical approach to WTO and NAFTA jurisprudence rather than a functionalist one.[61] Ruti Teitel describes the functionalist approach in the constitutional law context as presuming a "normative constitutional vision across societies"[62] whereas a dialogical discourse allows for a dynamic interpretative that focuses on the judicial processes and interpretation and may draw from various sources of law.[63]

In a similar way, adjudicatory practices of the WTO panels and NAFTA Chapter 11, 19 and 20 tribunals, for example, can be viewed as dynamic and evolving, finding their authority both in normative standards of international trade law, to the extent they exist, and in a more fluid multilateral system that amasses several legal traditions and political cultures.[64]

IV. Lessons Regarding Educational Exchanges and Parochialism

In conclusion, several lessons emerged from this legal educational exchange. First, it appears that whether the NAFTA arbitration fosters a functionalist approach or a

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[59] *See* Ruth Buchanan and Sundhya Pahuja, *Using the Web to Facilitate Active Learning: A Trans-Pacific Seminar on Globalization and the Law*, 53 J.LEGAL EDUC. 578 (2003) (discussing the different ways that the Internet may be used to facilitate teaching).

[60] *See* Drumbl, *Amalgam in the Americas*, supra note 3, at 1062-1072 (describing differences in the civil law approaches and the common law approaches in all three countries).

[61] Ruti Teitel, *Comparative Constitutional Law in a Global Age, supra* note 45, at 2584-2586 .

[62] *Ibid.* at 2576.

[63] *Ibid.* at 2584-2586. Professor Teitel states that the dialogical perspective "theoriz[es] comparative constitutionalism as a dynamic interpretive and discursive practice." *Ibid* at 2584-2585.

[64] *Ibid.* at 2585 . *See also supra* section IIb.

dialogical one to resolving international trade issues depends, at some level, on the legal tradition of the interpreter. That is, a civil lawyer may tend to deal with a legal problem from a different perspective than that of a common law attorney. During our simulated arbitration, it was notable that the Mexican students tackled the alleged violations first by using literal treaty interpretations of the NAFTA treaty itself as well as the WTO agreements rather than prior disputes. They focused on the 'correct' understanding of the relevant provisions governing the alleged violations. On the other hand, the U.S. students would begin with the facts themselves, using the rule of law as the guide to better understand relevant facts as they pertained to the relevant provisions.[65] The UDM students looked to prior NAFTA Chapter 11 cases and even WTO decisions in trying to find the best interpretation of the NAFTA provisions, despite being aware that there are no formal *stare decisis* in this context. This illustrates one of the big differences between the two legal systems – the role of the judiciary. In Mexico, the primary sources of law do not include case law and the legislatures and national agencies have a more authoritative role in creating new law than the courts do. By contrast, the role of the U.S. judiciary is much more pronounced; courts can set precedent and create new law.[66] Interestingly, as the discussions among the students from both schools developed over time, the Mexican students also began to look to precedent. The UDM students, on the other hand, began trying to understand the 'plain meaning' of the relevant provisions of NAFTA and were concerned about the arbitrators creating expansive interpretations that were beyond their scope.

Second, despite the occasional comment regarding general disillusionment with compliance in international agreements, the students treated each other with respect. Their willingness to learn from one another was evident. This willingness and interest to learn from their foreign counterparts ultimately created a forum for healthy discourse. No one side dominated the discussion and no one legal tradition supplanted the other. The students even recognized moments of differences in legal approaches and adapted their own way of thinking to better understand their counterparts. In this way, the simulated arbitration was dynamic and pluralist in nature, leaving room for multiple interpretations.

Finally, there were lessons about the effect of parochial attitudes on international adjudicatory processes. We saw that it is important for us as international lawyers and educators to recognize not only that parochialism exists, but also that it serves a perceived purpose for those benefiting from being a member of a problem-solving capacity network. In *Mexico—Tax Measures*, for example, the Mexican government argued before the WTO panel and Appellate Body that Mexico

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[65] *See* Drumbl, *Amalgam in the Americas*, *supra* note 3, at 1066-1069 (explaining differences in approaches to legal problems between a common law attorney and a civil law attorney) . Generally speaking, civilian lawyers will as an initial matter focus on the "plain meaning" of the text and interpretation of code provisions are taken out of their historical context and applied according to "the current sense of justice and ...to its purpose." *See ibid.* at 1067.

[66] *Ibid.* at 1066; 1070 . Professor Drumbl emphasizes that the important role of the 'common law judge creates a need for some consistency in how judges exercise their power.' *See ibid.* at 1070.

had a special interest in protecting its sugar industry, especially in the context of a larger sugar dispute between the United States and Mexico. Whether placing a tax on soda bottlers using high fructose corn syrup is the most efficient means of aiding the Mexican sugar industry is arguable and best left to the economists.[67] However, at a more individual level, NAFTA students studying this case, though from different countries, did in fact sympathize with Mexico and the challenges of adapting a traditionally protected sugar industry, deeply drenched in local politics, to free market principles. They understood first hand the difficulties of transitioning regulated markets and adapting them for free trade as well as the challenges for foreign investors in those markets. Students were able to set aside their own parochial attitudes and perceptions of their counterparts and debate common issues arising out of a shared sphere of regionalism.

Such an exercise presents an opportunity for creating a shift in parochialism paradigms, one from domestic parochialism to one that incorporates several regional exchange networks and may help to generate a new common tradition.[68] This new common tradition may be one that invokes cultural, political and economic ties, leading to hybridization. In doing this, domestic parochialism will be only one part of a quilt consisting of a patchwork of parochial interests. Such regional parochialism should not be the basis for diverging from the multilateral regime, but rather, should

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[67] *See e.g.* Alan Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 UNIV. CHI. L. REV. 1 (1999) . *See generally*, Anne O. Kreuger, ECONOMIC POLICIES AT CROSS PURPOSES: THE UNITED STATES AND DEVELOPING COUNTRIES at 251.

[68] *See also* Steve Zamora, *NAFTA and the Harmonization of Domestic Legal Systems*, *supra* note 3, at 401 (explaining that NAFTA creates not only economic ties but also 'brings three disparate societies into closer contact' through 'formal and informal transactions between citizens of the NAFTA countries' in a phenomenon he describes as the 'NAFTA exercise.').

ground itself within the multilateral framework. Strengthening and defining this framework is also necessary. However, at a more individual level, students of NAFTA participating in a joint course, though from different countries, can in fact set aside their own parochial attitudes and participate in shared hybrid regional space. In doing so, legal education can play an important role in helping to engender a new common tradition for all parties involved.

The Protection of Freshwater in Armed Conflict

NIKOLAI JORGENSEN*

I. INTRODUCTION

1.1 Outline of the Problem

Experts fear that in the next century, fresh water[1] will become a highly contested resource. Fresh water is already becoming scarce in some parts of the world.[2] Some people fear that new wars over fresh water are likely to occur.[3] Optimists argue that such fears are born out of myths: they maintain that the free market will resolve problems of water scarcity and that, conceivably, states will not wage war over such resources, but rather seek to settle

* University of Amsterdam, masters graduate 2005-2006. The author wishes to thank Jann K. Kleffner and Catherine M. Brölmann for helping and believing in the project of writing this article, Jean-Vergain from the ICRC in Geneva for giving a more practical insight to the water challenges that the ICRC faces in time of armed conflict, and to all the editors in the University of Toronto who have contributed to producing a more solid article.

[1] 'Water with less than 0.5 parts per thousand dissolved salts.' The Groundwater Foundation: Groundwater Glossary, online: The Groundwater Foundation <http://www.groundwater.org/gi/gwglossary.html>.

[2] Stephen McCaffrey, *The Law of International Watercourses* (OUP, New York 2003) 6;

Frank R. Rijsberman, 'Water Scarcity: Fact or Fiction?' International Water Management Institute, online: <http://www.cropscience.org.au/icsc2004/plenary/1/1994_rijsbermanf.htm> at Figure 1.

[3] Peter Gleick, 'Water and Conflict: Water and International Security', (Summer 1993) 18(1) International Security 79; Peter H. Gleick, Peter Yolles, Haleh Hatami, 'Water, War & Peace in the Middle East' (April 1994) 36(3) Environment 6 at 15; Aaron T. Wolf, 'Criteria for Equitable Allocations: The Heart of International Water Conflict', (1999) 23 (1) Natural Resources Forum 3; Nils Petter Gleiditsch, 'Armed Conflict and the Environment: A Critique of the Literature', (1998) 35(3) Journal of Peace Research 381.

disputes peacefully.[4] Historically, however, fighting over fresh water as a strategic resource is not a particularly new phenomenon.[5]

Aside from being the object of the dispute, fresh water can be used as an element of military tactics in armed conflicts. The armed conflicts can also affect fresh water, causing severe harm to civilians and the environment. In an attempt to draw attention to this aspect of armed conflicts, experts gathered at a symposium in Montreux in 1994 asserted that, in armed conflicts, the lack of clean, fresh water killed just as many people as bullets and bombs.[6] More recently, the conflict in Lebanon between Israel and Hezbollah caused severe damage to the civilian freshwater supply. The bombings targeted the electrical generators, which in turn affected the output of the water network.[7] Moreover, targeted bombing of the bridges inadvertently broke the water network running under the bridges.[8] Lebanon is by no means an individual case in modern conflicts: other contemporary conflicts have also caused damage to the civilian freshwater supply.[10]

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[4] Tony Allan, 'Avoiding War Over Natural Resources' in *Forum: Water and War* (Geneva: ICRC publication, 1998) 14; Aaron T. Wolf, Annika Kramer, Alexander Carius, and Geoffrey D. Dabelko, 'Managing Water Conflict and Cooperation', online: <http://www.transboundarywaters.orst.edu/publications/wolf_sow_2005.pdf>; Hans Petter Wollebæk Toset, Nils Petter Gleditsch, Havard Hegre, 'Shared Rivers and Interstate Conflict' (2000) 19 Political Geography 971 at 993; Thomas Homer Dixon, 'The Myth of Global Water War', in *Forum: Water and War* (Geneva: ICRC publication, 1998) 10; Günther Baechler, 'Violence Through Environmental Discrimination' in *Forum: Water and War* (Geneva: ICRC publication, 1998) 20; J. W. Dellapenna, 'Treaties as Instruments for Managing Internationally-Shared Water Resources: Restricted Sovereignty vs. Community of Property' (1994) 26 Case W. Res. J. Int'l L. 27.

[5] Peter Gleick, 'Water Conflict Chronology' Pacific Institute for Studies in Development, Environment, and Security (2004), online: <http://www.worldwater.org/conflictchronology. html>; Peter H. Gleick, Peter Yolles, Haleh Hatami, 'Water, War & Peace in the Middle East' (April 1994) 36(3) Environment 6 at 10.

[6] Water in Armed Conflicts: 'International Symposium on Water in Armed Conflicts', Montreux, November 21-23, ICRC News, November 24, 1994, in Marco Sassòli, Antoine de Bouvier, *How Does Law Protect in War? Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law* (Geneva: ICRC publication, 1999) at 458-460.

[7] Interview by the ICRC with Yves Etienne, in charge of the ICRC's Assistance Division, 'What struck me was the extraordinary solidarity among the people', online: < http://www.icrc.org/Web/Eng/siteeng0.nsf/html/interview-lebanon-260906>.

[8] *Ibid*.

[10] The bombing of the Pancevo chemical factory in the Kosovo conflict (1999) caused severe pollution to the Danube. The bombing of the electrical facilities in the recent Iraq conflict also caused deterioration of public health. *See* Frederick M. Lorentz, 'Protecting Fresh Water Facilities Under International Law' (2003) 1 UNESCO Technical documents in hydrology PC→CP series 4.

In armed conflicts, international humanitarian law is the specific branch of law (*lex specialis*) that is applicable. The International Criminal Tribunal for the Former Yugoslavia stated in an authoritative judgment that

> ...an *armed conflict* exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State...[11]

Numerous challenges face the proponents of international humanitarian law, most of which have already been subject to vehement debate. Fresh water, on the other hand, has perhaps not received its due attention. When the body of rules in international humanitarian law is considered, an explicit and consolidated document on the norms of fresh water is non-existent.[12] Recent interpretations and developments in international human-rights law and international environmental law – fields of general international law (*lex generalis*) – are increasingly referring to fresh water.

1.2 Scope and Aim of the Study

The aim of this study is to build on the previous studies on the protection of fresh water in armed conflicts and update them.[13] Théo Boutruche clearly identified a lack of a comprehensive and clear approach in relation to fresh water in armed conflicts, a lack of norms in non-international armed conflicts and a lack of protection of fresh water for its value relating to the environment.[14] This study will reiterate and clarify the primary norms applicable to fresh water in armed conflicts in international humanitarian law. Building on

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[11] *Prosecutor v. Tadic*, IT-94-1, ICTY Appeals Chamber (1999) 38 I.L.M. 1518 at para. 70; Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 [emphasis added].

[12] Ameur Zemmali 'The Protection of Water in Times of Armed Conflict' (1995) 308 International Review of the Red Cross 550; Théo Boutruche, 'Le Statut de l'Eau en Droit International Humanitaire' (2000) 840 Revue Internationale de la Croix-Rouge 887; Marco Sassòli, Antoine de Bouvier, *How Does Law Protect in War? Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law* (Geneva: ICRC publication, 1999) at 458-460; Mara Tignino, 'Reflections on the Legal Regime of Water During Armed Conflicts', online: <http://www.afes-press.de/pdf/Hague/Tignino_LegalRegime_Water.pdf>; W. Remans 'Water and War' (1995) 1 Humanitäres Völkerrecht: Informationsschriften 4.

[13] Rupesh Mishra, 'Preserving the Flow: Legal Protection of Water in Times of Armed Conflict' (2007) 37 Environmental Law Reporter 10297; Théo Boutruche, 'Le Statut de l'Eau en Droit International Humanitaire' (2000) 840 Revue Internationale de la Croix-Rouge 887; Ameur Zemmali, 'The Protection of Water in Times of Armed Conflict' (1995) 308 International Review of the Red Cross 550; Mara Tignino, 'Reflections on the Legal Regime of Water During Armed Conflicts' [online]. Available at: http://www.afes-press.de/pdf/Hague/Tignino_LegalRegime_ Water.pdf (last accessed 08/05/2007); W. Remans 'Water and War' (1995) 1 Humanitäres Völkerrecht: Informationsschriften 4.

[14] Boutruche, *supra* note 11.

Boutruche's proposition, this study will identify the lack of environmental norms in international humanitarian law and provide up-to-date insight on this debate. Adding to this identified *lacunae* in the law, this study will consider whether two other bodies of international law – international environmental law and international human rights law – may be applicable in armed conflicts and can add primary norms with respect to fresh water. Such a perspective can be found to a limited extent in Maria Tignino's article, but this study carries it further.

The study also considers briefly how the International Committee of the Red Cross (ICRC) positively contributes to the provision of fresh water in times of armed conflict. This builds on Ameur Zemmali's article that considers the importance of the ICRC with respect to fresh water.[15] What this study adds is more up-to-date insight on the matter.

By focusing on the primary norms of international law concerning fresh water in armed conflicts, this study will not consider the secondary norms and the debate on enforcement of the primary norms.[16] This subject has been debated at length by many able scholars. This study will confine itself to international and non-international armed conflicts on land, thus excluding naval warfare[17] and the law governing occupied territories.[18]

1.3 Plan and Method

To support the more comprehensive approach taken in this study, part II considers relevant elements of international relations and the possibility of bridging different fields of international law.

In part III, the study will describe and interpret the primary norms of international humanitarian law relating to fresh water. Most critics of international humanitarian law argue in favour of more legal interpretation to improve the compliance of states with international humanitarian law.[19] Treaty interpretation is authoritatively

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[15] Ameur Zemmali, 'The Protection of Water in Times of Armed Conflict' (1995) 308 International Review of the Red Cross 550.

[16] This distinction was made by Hart: primary norms are rules that govern conduct and secondary norms are a framework for the creation, alteration, or extinction of primary rules, as well as their enforcement and implementation. *See* H. L .A. Hart, *The Concept of Law*, 2nd ed. (Oxford: OUP, 1994). *See* particularly pages 79-100.

[17] Naval warfare triggers a greater body of law, and further, does not deal with fresh water to the same extent as land-based warfare. *See* 'San Remo Manual on International Law Applicable to Armed Conflicts at Sea' in Adam Roberts, Richard Guelff, *Documents on the Laws of War*, 3rd ed. (Oxford: OUP, 2005) 573; United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

[18] The law of occupied territories is a complex body of law and should be the object of a separate study.

[19] David Wippman, 'Introduction: Do New Wars Call for New Laws?' in Matthew Evangelista ed., *New Wars, New Laws?* (New York: Transnational Publishers, 2005) 1 at 13.

embodied in The Vienna Convention on the Law of Treaties of 1969 (VCLT).[21] The most relevant conventions for the purpose of this study are the four Geneva Conventions and their two additional protocols.[22] In cases of textual ambiguity, the study will consult the Commentaries for reference to the preparatory work of the conventions.[23] The study will

[21] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 United Nations Treaty Series 331 [VCLT]. The method of interpretation of treaties in the VCLT 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*" VCLT, art. 31(1). If the meaning is still unclear, an interpreter must consult the *preparatory work* to the treaty, which is a record of State practice that must be consulted as a secondary means of interpretation (VCLT, art. 32). These rules of interpretation constitute rules customary international law. Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: CUP, 2000) 186; *Libya v. Chad* [1994] ICJ Rep 6 at 21-22 (para. 41). See for a clear step by step approach to the application of the rules of interpretation in articles 31 and 32 of the VCLT in the *Kasikili/Sedudu Island* case, [1999] ICJ Rep 1045 at 1060 onwards (paras. 20 onwards).

[22] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (adopted 12 August 1949, entered into force 21 October 1950) 75 U.N.T.S. 31 (GC I), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea* (adopted 12 August 1949, entered into force 21 October 1950) 75 U.N.T.S. 85 (GC II), *Geneva Convention Relative to the Treatment of Prisoners of War* (adopted 12 August 1949, entered into force 21 October 1950) 75 U.N.T.S. 135 (GC III), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (adopted 12 August 1949, entered into force 21 October 1950) 75 U.N.T.S. 287 (GC IV); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entry into force December 1978) 1125 U.N.T.S. 3 (PROTOCOL I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 U.N.T.S. 609 (PROTOCOL II).

[23] Jean Pictet ed., *Commentary I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (*Geneva: International Committee of the Red Cross, 1952); Jean Pictet ed., *Commentary II Geneva Convention for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea (*Geneva: International Committee of the Red Cross, 1960); Jean Pictet ed., *Commentary III Geneva Convention Relative to the Treatment of Prisoners of War (*Geneva: International Committee of the Red Cross, 1960); Jean Pictet ed., *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (*Geneva: International Committee of the Red Cross, 1958); Claude Pilloud, Jean de Preux, Bruno Zimmermann, Philippe Eberlin, Hans-Peter Gasser and Claude Wenger, Sylvie-Stoyanka Junod, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC publication, 1987).

distinguish between the law applicable in international armed conflicts and non-international conflicts wherever necessary.[24] The analysis will also differentiate between treaty and customary law.[25] This is in part because not all states are party to Additional Protocol I.[26] Furthermore, non-international armed conflicts have fewer treaty rules in Additional Protocol II and in Common article 3 to the Geneva Conventions than in international armed conflicts, but certain customary rules, may apply and extend them. The study will use the Customary Study of the ICRC, with the caveat that not all the rules stated within are in fact settled custom: the drafters may have been ambitious on purpose to develop the law.[27]

In part IV, the study will first consider the possible application of international environmental law in armed conflicts. Further, if possible, the study will consider the primary norms in international environmental law, notably international water law, that could complement the existing norms of international humanitarian law. Second, part IV will consider the possible application of international human rights law. If possible, the study will further consider the possible existence of a human right to water and the utility of such a right. The analysis will examine treaty and customary law in both cases.

To conclude, the study's findings will be evaluated and a course for the future will be suggested.

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[24] Definition of an international armed conflict: '[...] all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.'

→ GC I/II/III/IV: 2.

Non-international armed conflicts are not defined; simply they are all the conflicts that are 'not of an international character'.

→GC I/II/III/IV: 3.

Note the threshold requirement between an internal disturbance and non-international conflict: 'This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.'

-PROTOCOL II: 1 (2).

In practice, the distinction between these situations is far from clear cut, but it is important for the purpose of this study to distinguish between international and non-international armed conflicts, as different bodies of law apply to each situation.

[25] How customary international law arises and crystallizes is an intricate subject that is outside the scope of this study. Nonetheless, what is important to this study is that rules of customary international law are unwritten rules comprised of two elements: State practice and the belief by the States that such practice is legally binding. For a starting point on the subject of customary international law *see*: Peter MACALISTER-SMITH, *Encyclopedia of International Law – Volume I* (Elsevier Science Publishers, Amsterdam, 1992) 898-905.

[26] Two of the more important states are not parties to the treaty: the USA and Iraq.

[27] Jean-Marie Henckaerts, 'Study on Customary International Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (2005) 857 International Review of the Red Cross 175 at 197.

II. Sources of International Law

The comprehensive perspective taken in this study necessitates an emphasis on the impact of international relations in the development of the law in this field. This study considers three important fields of international law for their primary norms on fresh water namely: (*a*) international humanitarian law, (*b*) international human rights law and (*c*) international environmental law. The reason for taking a more comprehensive approach to the issue of the protection of fresh water in armed conflicts is simple: the state-centric paradigm in international law is still a strong reality. States do not take lightly to undertaking new obligations and creating consensus is not a simple matter either.

This is particularly true for the two most important sources of international law, namely: treaty law and customary international law.[28] Treaties are binding agreements between states and they bind only the state parties to the agreement, unless the agreement has become declaratory of customary international law. Customary international law is a combination of state practice and *opinio juris* – the belief that such practice is binding. It is in practice difficult to identify custom.[29] In practice, this means that only the obligations that are declaratory of customary international law bind them.

States are not the only creators in the international legal order. International organizations like the UN, NGOs and scholars have an important role in developing and clarifying existing law. In many cases, this takes the form of what has been referred to as 'soft law' – policy documents with no legal force until states start to either create treaties based on those documents, or acquiesce to them by practice. They can also act to counteract the power of states in the international legal order.[30] In times of armed conflict, this is particularly important because political pressure is sometimes the only means preventing the primary norms of international humanitarian law from being mere paper tigers. A more comprehensive approach to studying norms applicable in times of armed conflicts is necessary in the context of this study. Thus, the weaknesses in the primary norms applicable to fresh water in armed conflicts that this study may identify could be amended more rapidly by developments in the fields of international environmental law and international human rights law. Developments promoted by international organizations and NGOs can significantly contribute to this trend. This may accelerate a legal response to the problems concerning fresh water in armed conflict.

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[28] See Statute of the International Court of Justice, art. 38 (1) [ICJ Statute]: treaties and customary law are primary sources of international law. General principles are too, but too date, they have not been identified by international courts.

[29] Michael Byers, *Custom, Power and the Power of Rules* (Cambridge: CUP, 1999) at 129-146. Michael Akehurst, 'Custom as a Source of International Law' (1974-1975) 47 BYIL 1.

[30] Sanctions by the UN Security Council under Chapter VII are a good example of this, provided that the more powerful States do not veto the possible sanctions.

However, the contemporary proliferation of sources of international law has led to a debate on its possible implications. The ILC is currently debating this issue under the general heading of 'fragmentation of international law.'[31] Fragmentation discusses the effect of the diversification of international law into different specialized fields of law and special legal regimes, and it questions what impact this has on the general system of international law. Bruno Simma portrays the topic of fragmentation of international law in a positive light.[32] This study cannot provide a definite answer to whether or not this trend is positive. Instead, this study will examine the fields of international law and attempt to examine how they can influence each other, not only through treaties and custom, but also through policy documents, in times of armed conflict.

In sum, international relations and international law in the context of this study necessitates a holistic approach to create consensus and build on existing developments within the different fields of international law, which may or may not be applicable in times of armed conflict.

III. Relevant Primary Norms of International Humanitarian Law Pertaining to Fresh Water

The lack of a consolidated section or indeed, an explicit provision on fresh water in the primary norms of humanitarian law begs the question of what the legal status of fresh water is in international humanitarian law. The following analysis will interpret the provisions relating to fresh water in international humanitarian law.

As clearly expounded by the previous studies,[33] international humanitarian law fetters the discretion of the military in armed conflicts with respect to fresh water. Before examining the norms embodied in the treaties, it is useful to know that there are certain principles that apply in all circumstances in international humanitarian law, as matter of customary international law. The main principles of law applicable are the principles of *military necessity* and *humanity*. The principle of military necessity allows the military discretion to achieve legitimate military aims and the principle of humanity[34] protects the

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[31] Micheal J. Matheson, 'The Fifty-Seventh Session of the International Law Commission' (2006) 100 (2) A.J.I.L. 416 at 422.

[32] Bruno Simma, 'Fragmentation in a Positive Light' (2004) 25 Mich. J. Int'l L. 845.

[33] Théo Boutruche, 'Le Statut de l'Eau en Droit International Humanitaire' (2000) 840 Revue Internationale de la Croix-Rouge 887; Ameur Zemmali, 'The Protection of Water in Times of Armed Conflict' (1995) 308 International Review of the Red Cross 550; Mara Tignino, 'Reflections on the Legal Regime of Water During Armed Conflicts', online: <http://www.afes-press.de/pdf/Hague/Tignino_LegalRegime_Water.pdf>; W. Remans 'Water and War' (1995) 1 Humanitäres Völkerrecht: Informationsschriften 4.

[34] '(...) civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.' The above, known as the Martens clause, was already considered a standard part of customary law when it was incorporated in art. 1 (para. 2), of Additional Protocol I of

weak parties in an armed conflict. From these main principles, corollary principles ensue: (*a*) *proportionality*: according to the principle of proportionality, the time and place of the attack and the military advantage anticipated, on the one hand, must balance against the potential loss of human life amongst the civilian population and to civilian objects; (*b*) *discrimination*: the principle of discrimination obliges the military and combatants to make the distinction between civilians and combatants and between military and civilian targets; (*c*) *precaution*: the precautionary principle is part of the proportionality principle and obliges the military to minimize human losses by taking advance precautions when militarily possible; and (*d*) *prohibition of unnecessary suffering*: the principle of unnecessary suffering prohibits means and methods of warfare designed to inflict unnecessary suffering on the victims. All of the above-mentioned principles underlie humanitarian law.

3.1 Fresh Water: a Civilian Object?

Civilian objects benefit from a general immunity from attack in armed conflict. This is because of their dissociation from the legitimate aim of war, which is to achieve victory over the enemy. The first question that arises in relation to fresh water is whether it qualifies as a civilian object, thus benefiting from the *prima facie* immunity of attack in armed conflicts.[35] This question does not relate to the discussion of fresh water as enemy property as that is more pertinent to occupied territories in which property law is more relevant.[36] Furthermore, the distinction between public and private property only becomes important once the armed conflict has ended.[37]

In international humanitarian law, the definition of civilian objectives is negative: they are, as a matter of treaty law, applicable to international conflicts[38] and custom to non-international conflicts,[39] 'all objects that are *not* military'. As the definition of civilian objectives is dependant upon the definition of military objects, the latter definition is of cardinal importance. Protocol I of the Geneva Conventions was the first international treaty to provide a definition of the term 'military objective', although some attempts at

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1977. Martens and Rousseau together established the principles of humanity. *See* 'Principles', International Institute of Humanitarian Law, online: <http://web.iihl.org/site/6191/default. aspx>.

[35] As aptly put by Marco Sassòli, Antoine de Bouvier, *How Does Law Protect in War? Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law* (Geneva ICRC publication, 1999) 458 at 459.

[36] Gamal Abouali, 'Natural Resources Under Occupation: The Status of the Palestinian Water Under International Law' (1998) 10 Pace Int'l L. Rev. 411.

[37] 1907 Hague Regulations, art. 23 (g) in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts*, 3rd ed. (Leiden: Martinus Nijhoff Publisher, 1988) at 78.

[38] PROTOCOL I: 52 (1).

[39] Jean Marie Henckaerts and Louise Doswald-Beck with contributions by Caroline Alvermann, Knut Dörmann and Baptiste Rolle, *Customary International Humanitarian Law Volume I: Rules* (Cambridge: CUP, 2005) at 32-34 (rule 9).

creating a definition had previously been undertaken.[40] Protocol I states that military objectives are 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'.[41] This definition is not only treaty-based in international armed conflicts but also forms part of customary law.[42] The definition of 'military object' is applicable as a matter of customary international law in non-international armed conflicts.[43] In principle then, fresh water appears to be a civilian object benefiting from a general immunity from attack in armed conflict.

However, humanitarian law does allow for derogation from this general rule if the civilian object is used for military purposes.[44] This is where the law is more unclear, particularly in modern day warfare. These 'dual-use' objects have been the subject of academic debate. The consideration of whether or not the civilian object becomes targetable rests upon whether it is effectively contributing to the conflict and whether it offers a 'definite military advantage'. An assessment of what constitutes a *definite* military advantage is problematic. State practice is unsettled and remains unclear on whether one has to consider the attack as whole in order to assess whether it is constitutes a military advantage or whether the military commander has the necessary discretion under the circumstances.[45] As Michael Schmitt points out, the ICRC construes the term 'definite' narrowly, whereas for instance, the United States takes a more liberal stance.[46] Yoram Dinstein argues that Protocol I should provide a non-exhaustive list of military objects in the definition because examples would serve as a better guideline.[47] Such guidance would serve the military commander who faces many challenging situations on the battlefield in which the assessment of what constitutes a *definite* military advantage is less than clear.[48] Once a dual-use object does offer an *effective contribution* to the armed conflict as well as a

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[40] Dieter Fleck, 'Strategic Bombing and the Definition of Military Objectives' (1997) 27 Israel Yearbook on Human Rights 41 at 43-47.

[41] PROTOCOL I: 52 (2) [emphasis added].

[42] Jean Marie Henckaerts and Louise Doswald-Beck with contributions by Caroline Alvermann, Knut Dörmann and Baptiste Rolle, *Customary International Humanitarian Law Volume I: Rules* (Cambridge: CUP, 2005) at 29-32 (rule 8).

[43] *Ibid*.

[44] PROTOCOL I: 52 (2).

[45] Jean Marie Henckaerts and Louise Doswald-Beck with contributions by Caroline Alvermann, Knut Dörmann and Baptiste Rolle, *Customary International Humanitarian Law Volume I: Rules* (Cambridge: CUP, 2005) at 191-233.

[46] Michael Schmitt, 'War and the Environment: Fault lines in the Prescriptive Landscape' (1999) 37 Archiv des Völkerrechts 25 at 40.

[47] Yoram Dinstein, 'Legitimate Military Objectives Under the Current Jus in Bello' (2001) 31 Israel Yearbook on Human Rights 1 at 3.

[48] *Ibid*. at 4.

definite military advantage, proportionality applies to determine whether possible incidental collateral civilian losses are excessive compared to the military advantage. If civilian losses are excessive, the military commander must refrain from action.

In relation to fresh water, the question is whether there are circumstances under which it can be a dual-use object. The situations in which fresh water in itself can become a military object are rare. However, an example of this might be a small well serving only the military purposes of a rebel group near a town that could benefit from the use of the well. The poisoning of wells is prohibited,[49] but the opposing military group might be able to seal the well to bring about rapid surrender with less blood shed. Another example might be the damming of a river used only for military transport and not subject to a specific treaty regime. More likely, however, is the collateral damage of the fresh water network in armed conflict as a result of the dual-use exception. Bridges often have water pipelines beneath them and are often bombed applying the dual-use equation. Power stations are also subject to attack, vitally affecting the civilian population in the cases where fresh water provision is dependant on power for ground water extraction.

In sum, practice remains unclear and academic debate ongoing is highlighting the failures of the principle of discrimination in relation to modern day warfare.[50] Some scholars have suggested solutions with the hope that the law will adapt soon.[51] Fresh water itself is in most cases likely to be considered a civilian object as provided under the general legal norms of international humanitarian law, thus leaving it immune from attack. However, military discretion allows for incidental damage to the fresh water network, as long as it is limited in dimension. For fresh water, the prohibition on starvation does limit this type of damage to the fresh water network, but still leaves an unacceptable amount of discretion to the military with respect to this resource.[52] This is a significant problem because many conflicts take place in regions where fresh water is a limited resource. This weakness in the primary norms only becomes apparent with practice.

3.2 Objects Indispensable to Survival: Fresh Water Installations and Supplies

Beyond the general distinction between civilian and military objectives that protects civilian objects, certain objects benefit from additional protection: namely objects

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[49] 1907 Hague Convention IV, Annex: Regulations Respecting the Laws and Customs of War on Land, article 23(a) in Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 3rd ed. (Oxford: OUP, 2003) 73 at 77.

[50] Gabriel Swiney, 'Saving Lives: The Principle of Distinction and the Realities of Modern War' (2005) 39(3) Int'l Law. 733; Eric Jaworski, ' "Military Necessity" and "Civilian Immunity": Where Is the Balance? ' (2003) 2 Chinese Journal of International Law 175; Henry Shue and David Wippman, 'Limiting the Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions' (2002) 35 Cornell Int'l L. J. 559.

[51] Swiney, *ibid*. at 756-758.

[52] See section 3.3.1 'Prohibition on Starvation' below.

indispensable to survival. In both international and non-international armed conflicts, the attack, destruction, removal and rendering useless of objects 'indispensable for the survival of the population', is prohibited as a matter of treaty law[53] and customary law.[54]

'Drinking-water installations' are included in this prohibition.[55] The term 'installation' is ambiguous, which makes it difficult to ascertain what drinking-installations benefit from the legal protection of the prohibition on the destruction of objects indispensable to human survival. 'Installation' means 'a mechanical apparatus that is set up or put in position for use.'[56] *Prima facie*, it is unclear what the term 'drinking water installations' means. Consulting the *preparatory work* of Protocol I does not shed any light upon this apparent ambiguity either. Practice seems to indicate that the term does not include smallest elements of the fresh water network, but only the largest entities in so far as they are vital to prevent starvation of the civilian population, both by lack of fresh water itself and lack of fresh water for agriculture.[57]

A further semantic difficulty arises with the terms 'attack, destroy, remove and render useless'. They are comprehensive but are ambiguous because an interpretation of them can be either broad or limited. The *preparatory work* makes clear that a broad interpretation of the terms is the correct one because the use of the terms 'attack, destroy, remove and render useless' are intended to cover all possibilities.[58]

Paragraph 3 of article 54 of Protocol I allows an exception to this general immunity of 'objects indispensable to survival', where those objects are used by the adverse party solely for sustenance of the military support or in direct military support. This exception is construed strictly to provide maximal protection to the civilians dependant on fresh water. Thus, it is likely that in practice, only short-term temporary drinking installations conceived only for military purposes do not fall under this definition. A further protection of these installations is the prohibition of military reprisals on fresh water installations and irrigation works.[59]

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[53] PROTOCOL I: 54, PROTOCOL II: 14.

[54] Jean Marie Henckaerts and Louise Doswald-Beck with contributions by Caroline Alvermann, Knut Dörmann and Baptiste Rolle, *Customary International Humanitarian Law Volume I: Rules* (CUP, Cambridge 2005) at 189-193 (rule 54).

[55] PROTOCOL I: 54 (2).

[56] William Little, H.W. Fowler and Jessie Coulson, *The Shorter Oxford English Dictionary: Volume I* (Oxford: Clarendon Press, 1973) at 1084.

[57] Interview by the ICRC with Yves Etienne, in charge of the ICRC's Assisstance Division, 'What struck me was the extraordinary solidarity among the people', online: <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/interview-lebanon-260906>.

[58] Claude Pilloud, Jean de Preux, Bruno Zimmermann, Philippe Eberlin, Hans-Peter Gasser and Claude Wenger, Sylvie-Stoyanka Junod, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC publication, 1987) at 655 (para. 2101).

[59] PROTOCOL I: 54 (4).

In sum, Boutrouche rightly identifies the prohibition on 'the attack of objects indispensable to human survival' as essential to the protection of fresh water in armed conflicts because the exception for military necessity is very limited.[60]

The prohibition on the use of poison as a means and method of warfare reinforces the protection of drinking-water installations. In humanitarian law, the means and methods of warfare are techniques used to overcome the opposing party. This prohibition is applicable to both international and non-international armed conflicts as a matter of treaty law and custom.[61] The initial treaty prohibition in the 1925 Geneva Protocol for the Prohibition of Poisonous Gases and Bacteriological Methods of Warfare has been supplemented by many other treaties.[62] The Protocol's prohibition on poison covers the use of bacteria and other pathogens, as well as conventional poison to destroy wells.[63]

3.3 Means and Methods of Warfare

Fresh water can be used as a defensive or offensive weapon in armed conflicts.[64] Practice demonstrates that the use of fresh water as a means and method of warfare is highly effective and can cause great human losses.[65] Certain rules of humanitarian law limit the use of such methods. The focus of the next subsections will be on fresh water as an element of means and methods of warfare.

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[60] Théo Boutruche, 'Le Statut de l'Eau en Droit International Humanitaire' (2000) 840 Revue internationale de la Croix-Rouge 887.

[61] Protocol for the Prohibition of Poisonous Gases and Bacteriological Methods of Warfare (adopted 17 June 1925, entered into force 8 February 1928), in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts*, 3rd ed. (Leiden: Martinus Nijhoff Publisher, 1988) at 105-123. See also the official statement by Jacques Forster, vice-president of the International Committee of the Red Cross 'Preventing the Use of Biological and Chemical Weapons: 80 Years on', Speech delivered by Jacques Forster, vice-president of the ICRC during the International seminar on the Biological and Chemical Weapons Threat, on the occasion of the 80th anniversary of the 1925 Geneva Protocol prohibiting asphyxiating, poisonous or other gases and bacteriological methods of warfare, online: <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList515/8A0FFCE21E3DC9 EAC125701A0036527B>; Jean Marie Henckaerts and Louise Doswald-Beck with contributions by Caroline Alvermann, Knut Dörmann and Baptiste Rolle, *Customary International Humanitarian Law Volume I: Rules* (Cambridge: CUP, 2005) at 251 (rule 72).

[62] Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 3rd ed. (Oxford: OUP 2000) at 155-158 (preparatory note on the 1925 Geneva Protocol).

[63] Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts*, 3rd ed. (Leiden: Martinus Nijhoff Publisher, 1988) at 107.

[64] W. Remans 'Water and War' (1995) 1 Humanitäres Völkerrecht: Informationsschriften 4 at 7-8.

[65] Peter Gleick, 'Water Conflict Chronology' Pacific Institute for Studies in Development, Environment, and Security (2004), online: http://www.worldwater.org/conflictchronology.pdf

3.3.1 Prohibition on Starvation

Within the prohibition on 'the destruction of objects indispensable to human survival', a corollary prohibition ensues: the prohibition on 'starvation as a means and method of warfare.'[67] t is applicable in international and non-international armed conflicts and is a rule of both treaty law[68] and customary law.[69] The prohibition on starvation also covers starvation by attack, destruction, removal and rendering useless covers fresh-water installations and supplies and irrigation works.[70] In international armed conflicts, a duty to evacuate civilians, who could be vitally affected, results directly from the prohibition on starvation.[71] Consequently, this prohibition extends the protection of fresh water resources in armed conflicts.

3.3.2 Attack of Dams and Dykes

Breaking dams and dykes can be a defensive or offensive method of warfare.[72] International humanitarian treaty law and customary rules prohibit the attack on 'works and installations containing dangerous forces.'[73] The definition in Protocol I explicitly states that 'installations containing dangerous forces' are dams, dykes and nuclear power plants. This applies as a matter of treaty and customary law.[74] Moreover, the prohibition against reprisals also applies to dams and dykes.[75] For the latter, the presumption is that they are civilian unless they become military objectives.[76] Consequently, they benefit from the general immunity of attacks provided to civilian objects.[77]

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[67] See above section 2.2 'Objects Indispensable to Survival: Freshwater Installations and Supplies'.

[68] PROTOCOL I: 54 (1), PROTOCOL II: 14.

[69] Jean Marie Henckaerts and Louise Doswald-Beck with contributions by Caroline Alvermann, Knut Dörmann and Baptiste Rolle, *Customary International Humanitarian Law Volume I: Rules* (Cambridge: CUP, 2005) at 186-189 (rule 53).

[70] PROTOCOL I: 54, PROTOCOL II: 14.

[71] GC IV: 17; Claude Pilloud, Jean de Preux, Bruno Zimmermann, Philippe Eberlin, Hans-Peter Gasser and Claude Wenger, Sylvie-Stoyanka Junod, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva ICRC publication, 1987) at 654 (para. 2096).

[72] W. Remans 'Water and War' (1995) 1 Humanitäres Völkerrecht: Informationsschriften 4, 7-8.

[73] PROTOCOL I: 56, PROTOCOL II: 15; Jean Marie Henckaerts and Louise Doswald-Beck with contributions by Caroline Alvermann, Knut Dörmann and Baptiste Rolle, *Customary International Humanitarian Law Volume I: Rules* (Cambridge: CUP, 2005) at 139-142 (rule 42).

[74] PROTOCOL I: 56, PROTOCOL II: 15; Henckaerts, *ibid.*

[75] PROTOCOL I: 56 (4).

[76] PROTOCOL I: 56 (1). Jean Marie Henckaerts and Louise Doswald-Beck with contributions by Caroline Alvermann, Knut Dörmann and Baptiste Rolle, *Customary International Humanitarian Law Volume I: Rules* (Cambridge: CUP, 2005) at 139-142 (rule 42).

[77] See above section 3.1 'Fresh Water: a civilian object?'

If dams and dykes become military objectives, they can only be destroyed if they their destruction does not provoke the release of dangerous forces causing 'consequent *severe* losses among the civilian population.'[78] The ordinary meaning of the term 'severe' is ambiguous because it is difficult to quantify. The *preparatory work* provides that 'severe' is to be interpreted as equivalent to 'important' or 'heavy' and the concept thereof must be applied in good faith and as a matter of common sense, on the basis of objective elements, such as the proximity of inhabited areas, the density of the population and the lie of the land.[79] It is likely that in most circumstances, the destruction of a dam or a dyke would have a devastating effect on the civilian population. This prohibition can also protect the civilian population from the armed forces on its territory using dams and dykes as a defensive weapon.[80]

In international armed conflicts, the prohibition on attack of 'works and installations containing dangerous forces' obliges parties to the conflict to avoid locating military objectives close to dams, dykes and nuclear power plants.[81] In relation to dams and dykes, the full extent of the obligation cannot be clearly understood by ordinary interpretation of the words in the treaty. The *preparatory work* explains that preventive measures in relation to dams and dykes include the emptying of reservoirs in the case of freshwater-related installations.[82] In non-international armed conflicts, the military precautionary principle might oblige the parties in the same way with respect to dams and dykes.[83]. This may however be stretching the general obligations within customary international humanitarian law. Further, treaty law applicable to international armed conflicts protects objects near works and installations containing dangerous forces because an attack on such objects might have unexpected side effects.[84] The Customary Study by the ICRC claims that this rule applies as a matter of customary law to non-international

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[78] PROTOCOL I: 56 (1), PROTOCOL II: 15, and Jean Marie Henckaerts and Louise Doswald-Beck with contributions by Caroline Alvermann, Knut Dörmann and Baptiste Rolle, *Customary International Humanitarian Law Volume I: Rules* (Cambridge: CUP, 2005) at 139 (rule 42) [emphasis added].

[79] Claude Pilloud, Jean de Preux, Bruno Zimmermann, Philippe Eberlin, Hans-Peter Gasser and Claude Wenger, Sylvie-Stoyanka Junod, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC publication, 1987) at 669-670 (para. 2154), 1463 (para. 4821).

[80] For instance, in 1938, the Chinese authorities breached the dykes of the Yellow River near Chang-Chow to stop the Japanese troops, resulting in extensive losses and widespread damage.

[81] PROTOCOL I: 56 (5).

[82] Claude Pilloud, Jean de Preux, Bruno Zimmermann, Philippe Eberlin, Hans-Peter Gasser and Claude Wenger, Sylvie-Stoyanka Junod, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC publication, 1987) at 674 (para. 2176).

[83] PROTOCOL I: 57.

[84] PROTOCOL I: 56 (1).

and international armed conflicts.[85] However, this appears to be a somewhat stretched assertion. Nonetheless, it may become settled practice in the future.

Protocol I and customary international law are silent as to what level of command is required to make the decision to set aside the immunity of the dams and dykes when dams and dykes satisfy the condition of being military objectives. The *preparatory work* states that where the human interests are high, the persons at the highest military level must take the decision to destroy or otherwise disable such a dam or dyke.[86] Protocol I also states that there is a possibility of creating special agreements[87] for the protection and marking of dams.[88]

3.3.3 Access to Fresh Water

The prohibition on use of mines and booby traps should indirectly ensure safe access to water in armed conflicts.[89] This prohibition is applicable as a matter of treaty law and customary law applicable to both international and non-international conflicts.[90] Practice in asymmetrical warfare has, however, tended to provide a different answer to this matter[91].

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[85] Jean Marie Henckaerts and Louise Doswald-Beck with contributions by Caroline Alvermann, Knut Dörmann and Baptiste Rolle, *Customary International Humanitarian Law Volume I: Rules* (CUP, Cambridge 2005) at 139 (rule 42).

[86] Claude Pilloud, Jean de Preux, Bruno Zimmermann, Philippe Eberlin, Hans-Peter Gasser and Claude Wenger, Sylvie-Stoyanka Junod, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC publication, 1987) at 670 (para. 2159).

[87] PROTOCOL I: 56 (6).

[88] PROTOCOL I: 56 (7).

[89] See Ameur Zemmali, 'Dying for Water' in ed., *Forum: War and Water* (Geneva: ICRC publication, 1998) at 31-35.

[90] 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: Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps or other Devices (adopted 10 October 1980, entered into force 2 December 1983) 1342 U.N.T.S. 137; Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps or other Devices (adopted 3 May 1966, entered into force 3 December 1998) Review Conference doc. CCW/CONF.I/14 dated 1 May 1996. Jean Marie Henckaerts and Louise Doswald-Beck with contributions by Caroline Alvermann, Knut Dörmann and Baptiste Rolle, *Customary International Humanitarian Law Volume I: Rules* (Cambridge: CUP, 2005) at 278-286 (rules 80-83).

[91] A proof of this is that mines are still used despite bans in international humanitarian law'. See Robin Geiß 'Asymmetric conflict structures' (2006) 864 International Review of the Red Cross 757, 762, online: <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/review-864-p757? open document>

A solution could be to create neutral zones around water-sources to protect access to fresh water.[92] It could serve a valuable purpose in addition to the previously established general prohibition on the destruction of objects indispensable for the human survival.[93] However, such an agreement is unlikely to take place in practice because neutral zones are rarely created. This highlights the discrepancy that sometimes exists in the primary framework and practice.

3.4 Protection of the Environment

The most important legal developments protecting the environment in times of armed conflict only date back to the Vietnam War.[94] Since then, the issue of the extent of the protection of the environment has been the subject of intense debate.[95]

This part of the study will analyze the protection of fresh water in light of the explicit protection of the environment in international humanitarian law. Most studies conclude that the protection of the environment in times of armed conflict under international humanitarian law is flawed.[96] This part will examine these provisions and highlight the critique they have been subject to and link it to the discussion on the protection of fresh water resources in armed conflicts.

Peter Richards and Michael Schmitt identify two main conventions relating to the protection of the environment, namely: Additional Protocol I to the Geneva Conventions and the ENMOD convention.[97]

The provisions in Additional Protocol I relating to the environment apply specifically to situations of international armed conflict. Further, they are not considered declaratory of customary law, and therefore concern only the state parties to the

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[92] GC I: 23; GC IV: 14, 15; PROTOCOL I: 59, 60. Jean Marie Henckaerts and Louise Doswald-Beck with contributions by Caroline Alvermann, Knut Dörmann and Baptiste Rolle, *Customary International Humanitarian Law Volume I: Rules* (Cambridge: CUP, 2005) at 118-126 (rules 35-37).

[93] See above section 2.2 'Objects Indispensable to Survival: Fresh Water Installations and Supplies'.

[94] For an outline of the history of the development of environmental protection in warfare *see*: Karen Hulme, *War Torn Environment: Interpreting the Legal Threshold* (Leiden: Martinus Nijhoff Publications, 2004) at 3-16.

[95]Some of the more recent publications include: Michael Schmitt, 'Humanitarian Law and the Environment' (2003) 28(3) Denv. J. Int'l L. & Pol'y 265; Peter Richards and Martin Schmitt, 'Mars Meets Mother Nature: Protecting the Environment During Armed Conflict' (2002) 28 Stetson L. Rev. 1047; Jay E. Austin, Carl E. Bruch, eds., *The Environmental Consequences of War* (Cambridge: CUP, 2000); Michael N. Schmitt, 'War and the Environment: Fault Lines in the Prescriptive Landscape', (1999) 37 Archiv des Völkerrechts 25.

[96] Schmitt, *ibid*. at 67; Adam Roberts, 'The Law of War and Environmental Damage', in Jay E. Austin, Carl E. Bruch, eds., *The Environmental Consequences of War* (Cambridge: CUP, 2000) 67.

[97] Peter Richards and Martin Schmitt, 'Mars Meets Mother Nature: Protecting the Environment During Armed Conflict' (2002) 28 Stetson L. Rev. 1047 at 1061.

convention.[98] This is noteworthy because Michael Schmitt points out that some of the more important military powers are not parties to this convention: the United States, Iraq and Iran.[99] Two provisions in this convention specifically protect the environment: article 35 (3) of Protocol I and article 55 (1) of Protocol I.

Article 35 (3) prohibits the use of means and methods of warfare which are intended or expected to cause 'widespread, long-term and severe damage to the natural environment.' Article 55 (1) of Protocol I states that in warfare care shall be taken to protect the natural environment against 'widespread, long-term and severe damage.' This prohibition includes the use of means and methods of warfare intended or expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.[100]

The first question is whether fresh water falls within the definition of 'natural environment' in both these provisions. The *preparatory work* gives an indication of the intentions of the drafters of the treaty: it means, in the widest sense possible, 'the biological environment in which a population is living.'[101] This interpretation applies to article 55(1), but it is consistent with treaty interpretation to consider that it applies to article 35 (3).[102] Therefore, these provisions also protect fresh water in every form in nature. Further, the protection of human health included in article 55(1) includes congenital defects, degenerations and deformities.[103]

The real issue and problem relating to the protection afforded by these provisions relates to the cumulative requirement of 'widespread, long-term and severe' damage to the environment.[104] Not only is this a high threshold, as most commentators have agreed, but

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[98] Michael N. Schmitt, 'War and the Environment: Fault Lines in the Prescriptive Landscape' in Jay E. Austin, Carl E. Bruch, eds., *The Environmental Consequences of War* (Cambridge: CUP, 2000) 87 at 93.

[99] *Ibid*.

[100] Neutral zones are an ancient concept dating back to when armed conflict was conducted in confined areas and parties could agree on areas to label 'neutral'. Parties to a conflict in modern warfare are unlikely to agree to creating such zones

[101] Claude Pilloud, Jean de Preux, Bruno Zimmermann, Philippe Eberlin, Hans-Peter Gasser and Claude Wenger, Sylvie-Stoyanka Junod, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC publication, 1987) at 411-412, paras. 1444, 2126.

[102] Additional Protocol I, art.55(1).

[103] Claude Pilloud, Jean de Preux, Bruno Zimmermann, Philippe Eberlin, Hans-Peter Gasser and Claude Wenger, Sylvie-Stoyanka Junod, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC publication, Geneva 1987) 663-664, para 2135.

[104] Claude Pilloud, Jean de Preux, Bruno Zimmermann, Philippe Eberlin, Hans-Peter Gasser and Claude Wenger, Sylvie-Stoyanka Junod, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC publication, 1987) at 418, para 1457.

there is no clear definition of the terms 'widespread' and 'severe'.[105] 'Long-term' was understood to mean a period measured in decades, but even this definition is far from clear.[106] In addition to these definitional difficulties, the cumulative requirement makes the threshold of this provision high because each and every element must be satisfied in order to ensure the protection of the environment.

The next question that arises is how the two articles differ. Michael Schmitt analyzes the difference and points out that article 35(3) protects the environment for a value in itself, whereas article 55(1) protects the environment for its value to the health and survival of the population.[107] Schmitt also points out that the 'care language in article 55(1) may add an additional standard of applying equally to the attacker and the defender.'[108] He also points out that this question is unresolved.[109] Article 55(2) adds a further prohibition on the attack of the environment by way of reprisals.

In sum, the protection of fresh water under article 55 of Protocol I is broader than under article 35(3): the cumulative requirement of 'widespread, long-term and severe' environmental damage is more limited because it is linked to the protection of the civilian population. The combined protection of fresh water by the protection of the environment under articles 35(3) and 55(1) of Protocol I appears to be weak because its triggering threshold is high. The threshold is high because of a cumulative requirement and the lack of a clear definition of the terms 'widespread', 'severe' and 'long-term'. This leaves it to the practice by states and parties to the armed conflict to provide an interpretation of the terms. States and parties to the conflict are likely to interpret those terms narrowly rather than broadly.

Fresh water can be an element of an environmental modification technique. An example of this type of environmental modification was used in the Vietnam War by the U.S. military to enhance the rain along the Ho Chi Minh Trail.[110] The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification

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[105] Michael Schmitt, 'Humanitarian Law and the Environment' (2003) 28(3) Denv. J. Int'l L. & Pol'y 265 at 277; Michael N. Schmitt, 'War and the Environment: Fault Lines in the Prescriptive Landscape' in Jay E. Austin, Carl E. Bruch, eds., *The Environmental Consequences of War* (Cambridge: CUP, 2000) 87 at 105.

[106] *Ibid.*

[107] Martin Schmitt, 'Humanitarian Law and the Environment' (2003) 28(3) Denv. J. Int'l L. Pol'y 265 at 276-277.

[108] *Ibid*, at 277.

[109] *Ibid.*

[110] Daniel Bodansky 'May We Engineer the Climate?' (1996) 33 Climatic Change 309 at 311; Lawrence Juda 'Negotiating a Treaty on Environmental Modification Warfare: The Convention on Environmental Warfare and Its Impact Upon Arms Control Negotiations' (1978) 32 (4) International Organization 975 at 976.

Techniques[111] (ENMOD) was intended to legally regulate the use of weapons that modify the environment in an extensive manner. The Convention does not reflect customary law. For that reason, it binds only states party to the Convention.[112]

The Convention states that the state parties should not engage in the 'military use or any other hostile use' of environmental modification techniques for achieving 'widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.'[113] Note the contrast with the same terms used in articles 35(3) and 55(1) of Protocol I: the requirement is disjunctive and not cumulative. This means that it is enough for the damage to be qualified as either 'widespread', 'long-lasting' or 'severe', thus lowering the threshold of application significantly. With respect to fresh water, ENMOD combines the terms 'hydrosphere' and 'lithosphere', which are comprehensive enough to include fresh water in all its natural forms.[114] The term 'environmental modification techniques' interpreted in light of the context and object and purpose of the treaty mean, broadly, techniques for the creation of phenomena such as earthquakes, tsunamis, cyclones and tornadoes.[115]

The ENMOD Convention does not state whether it is applicable to both international and non-international conflicts. Instead, the ENMOD Convention states that it applies to 'military or other hostile use.' ENMOD therefore seems to have a slightly greater remit than the Geneva Conventions and their protocols to situations falling below the threshold of an internal armed conflict.

Significant uncertainties were identified in the negotiation of the treaty text as to the terms 'hostile use' and 'widespread or long-lasting or severe effects'.[116] The participants considered that the term 'hostile' was ambiguous[117] and the term 'widespread and long-lasting and severe effects' was open to subjective interpretations.[118] The term 'hostile' is

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[111] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (adopted 2 September 1976, entered into force 18 May 1977) 1108 U.N.T.S. 151 [ENMOD].

[112] There are 72 parties to the treaty. Status of the ENMOD Convention on the UN treaty database, online: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXVI/treaty1.asp>.

[113] ENMOD Convention, art. 1(1).

[114] ENMOD Convention, art. 2; Hydrosphere: 'The fresh waters of the earth's surface collectively', 'lithosphere - a term (corresponding to atmosphere and hydrosphere) used by some to designate the crust of the earth; in mod. use, usu. Applied to the crust and the upper part of the mantle; formerly also used for the crust together with the whole interior portion of the earth, or the crust together with the entire mantle', *The Oxford English Dictionary*, online: http://www.oed.com.

[115] ENMOD Convention, art. 2.

[116] Lawrence Juda 'Negotiating a Treaty on Environmental Modification Warfare: The Convention on Environmental Warfare and its impact upon arms control negotiations' (1978) 32 (4) International Organization 975 at 980-984.

[117] *Ibid*, at 980.

[118] *Ibid*, at 983.

ambiguous because it can be interpreted both broadly and narrowly. If the term 'hostile' is interpreted broadly, the threshold is lowered for the treaty application. If on the other hand the term 'hostile' is interpreted narrowly, to define circumstances of a grave nature, the threshold is made higher as some incidents of hostility may not be included. The terms 'widespread, long-term or severe effects' can be interpreted subjectively because they are open-ended in relation to their quantification. The first meeting of the Conference of the Committee of Disarmament provided an indication of what the terms 'widespread', 'long-lasting' and 'severe' in the ENMOD treaty mean:

(a) 'widespread': encompassing an area on the scale of several hundred square kilometres.
(b) 'long-lasting': lasting for a period of months, or approximately a season.
(c) 'severe': involving serious or significant disruption or harm to human life, natural and economic resources or other assets.[120]

One of the problems with this clarification is that the threshold of the disjunctive prohibition in ENMOD becomes higher.[121] Using the above indication, small-scale use of environmental modification could potentially be used without contravening the Convention.

Mitigating this, beyond the written law of the Convention, the *principle of discrimination* continues to apply. It could conceivably prohibit the use of environmental modification techniques in most circumstances. In the same way as a mine does not distinguish between whether it is killing a civilian or a troop, a tropical storm provoked by the military would not be able to distinguish between a civilian and a troop, thus violating the principle of discrimination. However, the protection provided by the principle of discrimination against environmental modification techniques is significantly weaker because it is less specific and does not contribute to an awareness of such means and methods of warfare.

In sum, ENMOD encounters similar problems with the terms 'widespread or long-lasting or severe effects' as in Protocol I. The possibility of subjectively interpreting the terms and the lack of an authoritative definition of them makes for a weak primary norm.

Although this study does not consider secondary norms, norms of enforcement, the Rome Statute of the International Criminal Court must be considered because its

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[120] Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 3rd ed. (Oxford: OUP, 2000) at 407 (preparatory note on the ENMOD convention).

[121] Lawrence Juda, 'Negotiating a Treaty on Environmental Modification Warfare: The Convention on Environmental Warfare and its Impact upon Arms Control Negotiations' (1978) 32 (4) International Organization 975 at 990.

adoption may in fact alter the primary rule identified in articles 35(3) and 55(1) of Protocol I on the prohibition on the attack of the environment that causes 'widespread, long-lasting and severe' damage. The Rome Statute also includes a balancing of this damage against the military advantage gained – the proportionality principle. Schmitt points out the novelty and advantage of this new approach.[122] Thus far, this approach has not been fully endorsed by the international community.

In non-international armed conflicts, no conventional rule on the *protection* of the environment exists. Instead, customary international humanitarian law applicable to non-international armed conflicts provides a general prohibition on the *attack* of the environment.[123] The more detailed rules on: *(a)* the prohibition on means and methods of warfare, (*b*) precaution in relation to the environment in armed conflicts and, *(c)* the prevention of such methods expected to cause 'widespread, long-term and severe damage to the natural environment' are only arguably part of customary law.[124] This distinction from international armed conflicts leaves the environment more susceptible to legal damage caused by the armed conflict.

To conclude, the combined provisions in Protocol I and ENMOD protect the environment and fresh water from direct attack but fail to adequately take into account collateral damage to the environment in situations of international armed conflicts. There are also significant definitional uncertainties that leave the relevant provisions open to diverging interpretations by states and parties to the armed conflict. The Rome Statute is a step in the right direction because instead of just setting an upper limit of damage to the environment, it engages a more subtle balancing act. However, this approach has not yet become a customary norm. Finally, the protection of the environment in non-international armed conflicts is minimal.

3.5 Humanitarian Assistance

Humanitarian assistance in times of peace is crucial,[125] especially in natural disasters such as the tsunami in Thailand in December 2004. This is distinguishable from equally important humanitarian aid in times of armed conflict, which relates to this study.[126]

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[122] Michael Schmitt, 'Humanitarian Law and the Environment' (2003) 28(3) Denv. J. Int'l L. Pol'y 265 at 282-284.

[123] Jean Marie Henckaerts and Louise Doswald-Beck with contributions by Caroline Alvermann, Knut Dörmann and Baptiste Rolle, *Customary International Humanitarian Law Volume I: Rules* (Cambridge: CUP, 2005) at 143-146 (rule 43).

[124] *Ibid*. at 147-158 (rules 44, 45).

[125] As recognised by the UNGA in Resolution 131 (1988) GAOR 43rd Session (UN Doc.A/RES/43/131) and Resolution 100 (1990) GAOR 45th Session (UN Doc.A/RES/45/100) on Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations.

[126] Yoram Dinstein, 'Les Conséquences Juridiques des Atteintes au Droit à l'Assistance Humanitaire' in ed., *Le Droit à l'Assistance Humanitaire: Actes du Colloque International Organisé par l'UNESCO* (Paris: UNESCO, 1996) 39.

Is fresh water an integral part of humanitarian assistance? Providing 'basic needs' to the weaker parties in the conflict is the primary function of humanitarian assistance.[127] As one of the most basic needs to humans, fresh water is clearly an integral part of humanitarian assistance in both international and non-international armed conflicts. The declaration of the San Remo Guiding Principles on the Right to Humanitarian Assistance, which is 'soft-law', is further support for that position: principle 9 of the declaration recognizes the importance of fresh water in humanitarian aid.[128]

Fresh water, as an element of humanitarian assistance, is valuable to the civilian population, the wounded, the sick, the shipwrecked and prisoners of war. Three primary norms enable the provision of such assistance: *(a)* the primary norms relating to humanitarian assistance to a needy population, *(b)* the specific protection of prisoners and (*c*) the specific protection of humanitarian relief personnel.

With respect to the general civilian population, the wounded and the shipwrecked in times of armed conflict, some claim that there is a right to humanitarian assistance in all circumstances, even above and beyond state consent.[129] According to Dinstein, such claims are an oversimplified version of the legal and political reality.[130] His contention relies on a literal interpretation of the law and contemporary practice in armed conflicts. The so-called *droit d'ingérence* has been the subject of great scholarly and interstate debate since Mario Bettati published his treatise on the subject.[131] The *droit d'ingérence* is the right or duty to intervene in a state's affairs where the civilian population is in need. Although it is a laudable position to take, it does not exist in treaty law and current practice by states is ad hoc and does not reflect this position. The question is then, do states have any obligations concerning humanitarian assistance in times of armed conflict? The customary law study conducted for the ICRC by leading scholars in the field of international humanitarian law concludes in rule 55 of the study that 'parties must allow and facilitate rapid and

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[127] David P. Forsythe, 'The International Committee of the Red Cross and Humanitarian Assistance – a Policy Analysis' (1996) 314 International Review of the Red Cross 512.

[128] The San Remo Guiding Principles on the Right to Humanitarian Assistance is not a declarative statement of the state of international humanitarian law, but rather a useful tool in promoting the right to humanitarian assistance. See American Society of International Law Comment, online: <http://www.lawschool.cornell.edu/library/asil/5qatar.htm>; 'XIXth Round table on current humanitarian problems of International Humanitarian Law: Conflict prevention - the humanitarian perspective, San Remo, 29 August - 2 September 1994' (1995) 306 International Review of the Red Cross 347 at paras 22-23.

[129] 'Guiding Principles on the Right to Humanitarian Assistance', International Institute of Humanitarian Law, San Remo, Italy, Sept. 1994, online: <http://web.iihl.org/iihl/Album/GUIDING PRINCIPLES.doc>; Ruth Abril Stoffels, 'Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps' (2004) 855 International Review of the Red Cross 515 at 518.

[130] Yoram Dinstein, 'The Right to Humanitarian Assistance' (2000) 53(4) Naval War College Review 77.

[131] Mario Bettati, *Le Droit d'Ingérence: Mutation de l'Ordre International* (Paris : Editions Odile Jacob, 1996).

unimpeded passage of humanitarian relief', provided that it is impartial and conducted without any adverse distinction.[132] Rule 55 is subject to the right of control of the parties to the conflict, but not their consent.[133] This advocated customary rule stands in contrast to the position in treaty law. In practice, in case of an acute need for provision of fresh water to a civilian population that cannot be satisfied by the parties to the armed conflict, there is arguably a right for humanitarian aid societies to disregard the state consent. No mention is made in the conventional law for a right to offer services: relief societies, national societies and other international non-governmental organisations have all argued that the state has a direct obligation to accept humanitarian aid that is implicit.[134] Despite this apparent flaw, it is clear from treaty law that a state cannot arbitrarily refuse humanitarian aid.[135] Once consent by the state has been obtained, the relief societies have the *right* to provide humanitarian assistance.[136]

A further obligation upon states in international armed conflicts and non-international armed conflicts, as a matter of treaty law and custom, is a duty upon states not parties to the conflict to facilitate humanitarian assistance.[137] In this guise, states could, for instance, act through the UN Security Council to generate practice that would lead to

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[132] Jean Marie Henckaerts and Louise Doswald-Beck with contributions by Caroline Alvermann, Knut Dörmann and Baptiste Rolle, *Customary International Humanitarian Law Volume I: Rules* (Cambridge: CUP, 2005) at 193-200 (rule 55).

[133] *Ibid*.

[134] See for proof of this, International armed conflicts: Protocol I Article 70, GC I/II/II/IV: 9/9/9/10. Non-international armed conflicts: GC I/II/III/IV: 3. Both: Principle 5 of the San Remo Guiding Principles on the Right to Humanitarian Assistance.

[135] Dietrich Schindler, 'Le Droit à l'Assistance Humanitaire: Droit et/ou Obligation?' in ed., *Le Droit à l'Assistance Humanitaire: Actes du Colloque International Organisé par l'UNESCO*, Paris 23-27 january 1995, 37-38; UNGA Resolution 131 (1988) GAOR 43rd Session, (UN Doc.A/RES/43/131); UNGA Resolution 100 (1990) GAOR 45th Session (UN Doc.A/RES/45/100); abandoning victims constitutes a threat to human life, Principles 3,5,6 of the San Remo Guiding Principles on the Right to Humanitarian Assistance; Claude Pilloud, Jean de Preux, Bruno Zimmermann, Philippe Eberlin, Hans-Peter Gasser and Claude Wenger, Sylvie-Stoyanka Junod, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC publication, 1987) at 1479, para. 4885; PROTOCOL II: 18(2).

[136] International armed conflicts: GCI: 27; GC III: 72, 73; GC IV: 59-63; PROTOCOL I: 64, 70 and 81 Non-international armed conflicts: PROTOCOL II: 5 (1c), 18(2). Both: UNGA Resolution 182 (1991) GAOR 46th Session, (UN Doc.A/RES/46/182)-annex I 3; *Paramilitary Activities In and Against Nicaragua* [1986 merits] ICJ Rep 14, para 242.

[137] GC IV, arts. 23, 108-111 – free passage of goods; PROTOCOL I: 70 (2), 70(3) – free passage of goods; UNGA Resolution 131 (1988) GAOR 43rd Session (UN Doc.A/RES/43/131); UNGA Resolution 100 (1990) GAOR 43rd Session, (UN Doc.A/RES/45/100).; UNGA Resolution 182 (1991) GAOR 46th Session (UN Doc.A/RES/46/182); Principles 7 and 10 of the San Remo Guiding Principles on the Right to Humanitarian Assistance; Jean Marie Henckaerts and Louise Doswald-Beck with contributions by Caroline Alvermann, Knut Dörmann and Baptiste Rolle, *Customary International Humanitarian Law Volume I: Rules* (Cambridge: CUP, 2005) at 200 (rule 56).

the creation of a new customary rule making it compulsory in armed conflicts to facilitate humanitarian assistance.

In addition to the general protection of the civilian population, the wounded and the shipwrecked, the prisoners of war are a specific category of persons dependant on humanitarian assistance in armed conflicts. In international conflicts, as a matter of treaty law, the ICRC and other non-governmental organizations may undertake the protection and relief of prisoners of war, subject to state consent.[138] According to the Customary Study of the ICRC, this has changed: a customary rule now *compels* the State to grant the ICRC access to all persons deprived of their liberty on a regular basis.[139] In this case, the ICRC appears to be trying to develop customary law rather than identifying it. However, in international conflicts, the parties to the conflict having detained persons must hold medical inspections at least once a month, as a matter of treaty law.[140] The medical inspections may serve to identify diseases contracted through contaminated drinking fresh water, thus contributing to ensure an adequate quality of drinking fresh water.

The protection of humanitarian relief personnel and objects according to treaty law is an aid to the provision of fresh water in armed conflicts.[141] It provides an essential safeguard for the provision of fresh water as a basic part of humanitarian assistance[142] because it also implicitly protects water engineers.[143]

The role of aid societies such as the ICRC in the provision of fresh water is crucial in times of armed conflict. The ICRC movement is the combination of the ICRC and the International Federation made up by the Red Cross' national societies.[144] The principles of neutrality and impartiality with respect to the parties to the conflict have been at the forefront of the ICRC movement's mission[145] and are essential to the provision of any

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[138] GC III: 9.

[139] Jean Marie Henckaerts and Louise Doswald-Beck with contributions by Caroline Alvermann, Knut Dörmann and Baptiste Rolle, *Customary International Humanitarian Law Volume I: Rules* (Cambridge: CUP, 2005) at 442-443 (rule 124 (a)).

[140] GC III: 31.

[141] For an extensive discussion of the treaty framework protecting humanitarian relief personnel see: 'Respect for and Protection of the Personnel of Humanitarian Organizations' (1998) Preparatory Document Drafted by the International Committee of the Red Cross for the First Periodical Meeting on International Humanitarian Law Geneva, 19 - 23 January, online: <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList308/DB15DE6F48E92F31C1256B66005BC2C7>.

[142] Isabelle Bourgeois, 'Water, Even More Precious than Oil' (Geneva: ICRC News, 23/05/2003), online: <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList322/590CE368B6F9DD95C1256D2F00570395>.

[143] W. Remans 'Water and War' (1995) 1 Humanitäres Völkerrecht: Informationsschriften 4 at 13.

[144] 'The Movement Defined', Red Cross, online: <http://www.redcross.int/en/history/ movement.asp>.

[145]The Seville Agreement on 'The Agreement on the Organization of the International Activities on the Components of the International Red Cross and Red Crescent Movement', article 3, online:

humanitarian aid.[146] Under the auspices of the Water and Habitat Unit, the ICRC has a core role concerning the provision of fresh water in armed conflicts.[147] The role of the Fresh Water and Habitat Unit is to 'assure that victims of war have access to fresh water for drinking and for domestic use, and to preserve the habitat that protects the population against environmental hazards.'[148] The Water and Habitat Unit has expertise with the provision of fresh water in armed conflicts. It had, in 2006, water and sanitation programmes in 42 countries world-wide.[149] It contributes to reconstructing destroyed infrastructure during the war[150] and building new infrastructure, such as new wells.[151] The Water and Habitat Commission is also involved in post-war activities and natural disaster relief. As one of the main actors, the ICRC has an important role to play, but is not the only one.[152]

In sum, humanitarian assistance, to a certain extent, mitigates the shortcomings of the primary norms protecting fresh water in armed conflict. The Water and Habitat Unit of the ICRC has a key role in this respect. It provides for the reconstruction of the water network in armed conflicts and immediate response to civilian water needs. There are challenges to the provision of humanitarian assistance are not unique to the discussion on the provision of fresh water.

3.6 Conclusion

The sum of the links currently protecting the primary norms of fresh water in times of armed conflict covers essential elements, but also has openings for military necessity that are onerous for a precious resource like fresh water. This stems from the lack of a specific approach to water, problems with respect to the protection of the water network because

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<http://www.redcross.int/en/history/sevillepart1.asp>; Jean Pictet, 'The Fundamental Principles of the Red Cross: Commentary' (Geneva: Henri Dunant Institute, 1979).

[146] The emphasis upon 'an impartial humanitarian body' in common article 3 to the Geneva Conventions for non-international conflicts, articles 10/11/12 GC IV, 9/10//11 GC III, 9/10/11 GC II and 9/10/11 of GC I for international armed conflicts demonstrates this.

[147] See e.g. ICRC, Press Release, 'World Water Day: ICRC Supplies 11 Million People' (21 March 2006).

[148] ICRC Activities, 'Water and Habitat: Presentation' (21-03-2006), online: <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jq9u?opendocument>.

[149] ICRC Activities, 'Map of the Current ICRC Water and Sanitation Programmes Around the World' (20 March 2006), online: <http://www.icrc.org/Web/eng/siteeng0.nsf/html/assistance_water_map>.

[150] Interview by the ICRC with Yves Etienne, in charge of the ICRC's Assisstance Division, 'What struck me was the extraordinary solidarity among the people'. online: <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/interview-lebanon-260906>.

[151] ICRC Stories from the field, 'Chad: a Lifeline of Clean Water' (19 March 2007), online: <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/chad-stories-200307>.

[152] David P. Forsythe, 'The International Committee of the Red Cross and Humanitarian Assistance – a Policy Analysis' (1996) 314 International Review of the Red Cross 512.

the dual-use exception and clear difficulties with respect to the protection of the environment in armed conflicts.

In practice, the Water and Habitat Commission of the ICRC contributes to mitigate the weaknesses in the primary norm framework with respect to the emergencies in armed conflict. However, for the long-term environmental impact, damage may be irreversible.

IV. Other Sources of Law in Times of Armed Conflict

Part IV will consider two specific parts of the general body of international law: international environmental law and international human rights law. The purpose of this is to evaluate the extent to which the primary norms of the *lex generalis* on fresh water serve to complement the *lex specialis* of international humanitarian law.

4.1 International Environmental Law

International environmental law's primary purpose is to prevent human damage to the environment in peacetime. This begs the question as to whether it remains applicable in times of armed conflict. The object of this discussion is to examine the extent to which current legal developments of primary norms on fresh water in international environmental law can complement the less specific norms in international humanitarian law.[153]

4.1.1 Application in Armed Conflicts

Silja Vöneky has discussed the subject of whether peacetime environmental law remains applicable in international armed conflicts.[154] She argues that 'the argument that international humanitarian law prevails over peacetime environmental law as *lex specialis* is no longer valid.'[155] She supports this argument with the assertion that it depends on the treaty in question. She identifies five categories of treaties that remain applicable in armed conflicts: (*a*) treaties that expressly provide for continuance during war; *(b)* treaties that are compatible with the continuance of war; *(c)* treaties creating an international regime or status; *(d)* human rights treaties; (*e*) *jus cogens* rules and obligations *erga omnes*.[156]

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[153] See above section 3.4 'Protection of the Environment'.

[154] Silja Vöneky, 'Peacetime Environmental Law as a Basis of State Responsibility for Environmental Damage Caused by War' in Jay E. Austin, Carl E. Bruch, eds., *The Environmental Consequences of War* (Cambridge: CUP, 2000) 190 [Vönecky Peacetime]; Silja Vöneky, 'A New Shield for the Environment: Peacetime Treaties as Legal Restraints of Wartime Damage', (2000) 9(1) R.E.C.I.E.L. 20 [Vönecky Shield].

[155] Vönecky Shield, *ibid*. at 21; Vönecky Peacetime at 198.

[156] Silja Vöneky, 'A New Shield for the Environment: Peacetime Treaties as Legal Restraints of Wartime Damage', R.E.C.I.E.L. 9(1) (2000) 20 at 22.

[158] *See* VCLT : Article 26 – pacta sunt servanda, arts. 38 and 43 objective treaty regimes, art. 53 jus cogens and art. 19 (c) human rights treaties. More generally on treaties and war – art. 73..

This reasoning is solidly anchored in basic rules of modern treaty doctrine: adherence to the principle of *pacta sunt servanda*, the creation of objective treaty regimes, the special case of human rights treaties, and *jus cogens* rules and obligations *erga omnes*.[158] The category of treaties creating an international regime or status is the most intriguing one as regards the protection of the environment in armed conflicts. Certain treaties clearly have a 'common interest' for the international community and apply during armed conflicts such as the UNCLOS, the Antarctic treaties, the Convention on Climate Change.[159] However, treaties protecting shared natural resources must be considered in terms of whether they protect merely national interests or a 'common interest' of the international community.[160]

To conclude therefore, the relationship between international humanitarian law and international environmental law is more nuanced than one of *lex specialis* and *lex generalis*. One must acknowledge the freedom of parties to conclude agreements that remain applicable in war. Furthermore, the emergence of treaties that serve the 'common interest' of the international community do not rescind in armed conflict.

4.1.2 International Water Law in Armed Conflicts

International water law at a bilateral or regional interstate level, has existed for centuries. However, in the past century, the international community is starting to realize the importance of the development of a 'common interest' approach to the legal regulation of the water resource. At present, various stakeholders are focusing on fresh water in peacetime.[161] International humanitarian law has significant restriction on the protection of the environment to allow for military discretion.[162] In practice, this means that a military commander has to balance up environmental treaty obligations with his duty to fight the enemy. This is the 'sliding-scale' between environmental protection and military necessity.[163] The consideration of the fresh water primary norms of international

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[159] Silja Vöneky, 'Peacetime Environmental Law as a Basis of State Responsibility for Environmental Damage Caused by War' in Jay E. Austin, Carl E. Bruch, eds., *The Environmental Consequences of War* (Cambridge: CUP, 2000) 190 at 225; Silja Vöneky, 'A New Shield for the Environment: Peacetime Treaties as Legal Restraints of Wartime Damage', R.E.C.I.E.L. 9(1) (2000) 20 at 32.

[160] *Ibid*.

[161] Twenty-three UN bodies are scrutinizing water in all its aspects. UN Secretary-General, 'Report of the Secretary-General on the Status of preparations for the International Year of Freshwater, 2003', UN Doc.A/57/132 (2002) at para. 9, online: <http://www.un.org/esa/sustdev/sdissues/water/SGreportIYFW2003.pdf>; the International Law Association; ICRC Water and Habitat Commission; World Water Forum, The International Water Academy (Oslo); Environmental Law Institute, to name a few.

[162] See above section 3.4 'Protection of the Environment'.

[163] Captain John P. Quinn and Richard T. Evans, and Lieutenant Commander Michael J. Boock, 'United States Navy Development of Operational Environmental Doctrine' in Jay E. Austin, Carl E. Bruch, eds., *The Environmental Consequences of War* (CUP, Cambridge 2000) 156 at 164.

humanitarian law demonstrates that the military commander has more obligations with respect to fresh water than to the rest of the environment: (*a*) the protection of fresh water as a civilian object, *(b)* fresh water installations and supplies, (*c*) the protection of dams and dykes and *(d)* environmental modification techniques. However, the aforementioned analysis also evidenced an inherently short-term anthropocentric approach in international humanitarian law. Considering the problems with fresh water today, it is clear that a long-term approach is necessary: an 'intergenerational' approach that recognizes the 'common interest' that the international community has in fresh water. This part will consider both and examine which primary treaty norms on fresh water in international water law could effectively complete the primary norms of international humanitarian law. The analysis will include bilateral[164] and regional interstate treaties[165] and multilateral treaties.

Bilateral treaties can remain applicable in armed conflicts if they provide for it or if they create an objective treaty regime. Without having examined all bilateral water treaties, it is unlikely that bilateral treaties will satisfy Silja Vöneky's criteria of 'common interest' to water. Bilateral treaties focus on national interests in the fresh water. In Steven McCaffrey's study on the law of international watercourses, the case of the Colorado River Treaty is illustrative. The treaty concerns mainly the apportionment of the river and not the preservation for future generations.[166]

In the case of regional treaties, the matter becomes more complex. It seems that some regional treaties do take into account a 'common interest' of humankind in the water resource. The Rhine treaty regime is a good example of a regional regime that has transcended the 'national interest' paradigm to produce an extensive environmental protection of the water resource.[167] The Rhine regime is rather exceptional – many other regional regimes, such as for instance the Nile,[168] the Parana River,[169] and the Jordan River,[170] still confine themselves to national interests.

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[164] See Transborder Freshwater Dispute Database, 'International Freshwater Treaties Database', online: <http://www.transboundarywaters.orst.edu/projects/internationalDB.html>.

[165] See e.g. Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 Establishing a Framework for Community Action in the Field of Water Policy (2000) 43 Official Journal of the European Communities 327. The Declaration and Treaty establishing the Southern African Development Community (SADC) (1993) 32 I.L.M. 116.

[166] Stephen McCaffrey, *The Law of International Watercourses* (New York: OUP, 2003) at 286-293.

[167] André Nollkaemper, 'The River Rhine: from Equal Apportionement to Ecosystem Protection' 5 (1996) R.E.C.I.E.L. 152.

[168] Stephen McCaffrey, *The Law of International Watercourses* (New York: OUP, 2003) at 233-247.

[169] *Ibid*. at 267.

[170] *Ibid*. at 267-275.

One of the most significant attempts to regulate water is the UN framework Convention on Non-Navigational Uses of International Watercourses of 1997.[171] Its aim was to be global in scope. The convention has been the object of an unresolved academic debate.[172] So far, the treaty has been a diplomatic failure – it has not yet entered into force.[173] However, in the event that it does, it may prove to be influential in humanitarian law, in so far as it could create an objective treaty regime.

The scope of the Convention encompasses the non-navigational uses of the watercourse related to the uses of the water: *(a)* its protection, (*b*) preservation and, *(c)* management.[174] The term 'watercourse' is defined broadly to include more than just rivers.[175] Further, an 'international watercourse' is a watercourse situated in several states.[176] A 'watercourse state' is also defined broadly to include not just territorial attachment to the watercourse, but also regional interest in the watercourse.[177]

Relevant to the present discussion, the UN Convention on Non-Navigational Uses of International Watercourses provides in article 7 that states 'shall take all appropriate measures to prevent the causing of significant harm to other watercourse States', when using watercourses on their own territory.[178] If significant harm ensues, there is a duty to use 'all appropriate measures' to restore the situation prior to the damage or mitigate the damage and provide compensation where it is necessary'.[179] Comparing this to the equivalent protection of the environment in humanitarian law, the peacetime protection in the UN Convention is broader, because the threshold is higher in humanitarian law.[180] The

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[171] Convention on the Law of the Non-navigational Uses of International Watercourses, UN Doc. A/51/869 Adopted by GA Resolution A/RES/51/229 of 21 May 1997.

[172] See e.g. Patricia Wouters, 'The Legal Response to International Water Conflicts: The UN Watercourses Convention and Beyond' (2000) 42 GYIL 293; André Nollkaemper, 'The Contribution of the International Law Commission to International Water Law: Does it Reverse the Flight from Substance' (1996) 27 NYIL 39; Panel on the Non-navigational Uses of International Watercourses in *Contemporary International Law Issues: Opportunities at a Time of Momentous Change* (Dordrecht: Martinus Nijhoff Publishers, 1994) 378-397.

[173] It has only attracted 16 signatories and 14 parties, which is not enough for it to enter into force: 35 parties are a minimum requirement (article 36(1)). See Status of the UN Convention on Non-navigational uses of Watercourses on the UN Treaty Database, online: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXVII/treaty43.asp?>

[174] Convention on the Law of the Non-navigational Uses of International Watercourses, UN Doc. A/51/869 Adopted by GA Resolution A/RES/51/229 of 21 May 1997, art 1.

[175] *Ibid*. at art 2 (a).

[176] *Ibid*. at art 2 (b).

[177] *Ibid*. at art 2 (c).

[178] *Ibid. at* art 7 (1).

[179] *Ibid*. at art 7 (2).

[180] See above section 2.4 'Protection of the Environment'.

'harm' principle also forms part of customary international law and it may even include prior notification concerning harm to other States.[182] Article 9 on the exchange of data and information may be valuable. As demonstrated earlier with respect to the human right to fresh water in armed conflicts, information is crucial for the provision of humanitarian aid in armed conflicts.[183] Paragraph 2 states that if information is not readily available, the provision of information is not necessary[184]. Article 31 further adds to this exception: the provision of information need not be made where there are vital interests of national defence or security interests at stake[185]. These exceptions conform to the principle of military necessity that gives discretion to the military if necessary. Hence, exchange of data and information on fresh water would become a reality if the convention comes into force, provided that there is no conflict with the principle of military necessity. Article 26 on water installations does not add any substance to the existing norms in international humanitarian law identified in the previous discussion.[186] The Convention also covers water management by 'planning the sustainable development of the water course and providing for the implementation of any plans adopted' and 'otherwise promoting the rational and optimal utilization, protection and control of the watercourse.'[187] The management also entails co-operation on the flow of the river.[188] The only problem with this management system is that it is dependant upon some of the most controversial provisions of the convention, namely: the principle of equitable and reasonable utilization[189] and the obligation not to create significant harm.[190] Notwithstanding this controversy, the idea of having water management in armed conflicts is indeed crucial. This has been pointed out by Francois Grunewald in one of the earlier studies conducted by

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[182] *Trail Smelter Arbitration* (1938/1941) 3 RIAA 1905; *Legality of the Threat or Use of Nuclear Weapons* [1996] I.C.J. Rep. 226 at para. 29; *Lac Lanoux Arbitration (France v. Spain)* [English Translation] (1961) 24 I.L.R. 101; Stephen McCaffrey, *The Law of International Watercourses* (New York: OUP, 2003) at 231.

[183] See below section 4.2.2 'A Human Right to Fresh Water in Armed Conflicts?'.

[184] UN Convention on Non-Navigational Uses of International Watercourses Adopted by UNGA Resolution 229 (1996) GAOR 51st Session (UN Doc. A /51/L.52 and Add.1) art.9(2).

[185] Ibid. at art.31.

[186] See above section 3.2 'Objects Indispensable to Survival: Fresh Water Installations and Supplies'.

[187] Convention on the Law of the Non-navigational Uses of International Watercourses, UN Doc. A/51/869 Adopted by GA Resolution A/RES/51/229 of 21 May 1997, art. 24.

[188] *Ibid*. at art. 25.

[189] *Ibid*. at arts. 5 and 6.

[190] *Ibid*. at. art. 7.

the ICRC on the subject of war and water.[191] He argues that armed conflicts often accentuate pre-existing freshwater problems and that therefore management of the resources becomes particularly important in armed conflicts[192]. However, a solution must be found that satisfies all states using the water resource in question. Article 29 of the UN Convention on Non-Navigational Uses of International Watercourses further provides that it is '*without prejudice* to the applicable rules relating to the protection of freshwater installations in international humanitarian law.'[194] Conversely, article 8 on the general obligation to co-operate is not relevant to the present discussion because it is more important for peacetime prevention of armed conflicts. Many provisions and mechanisms appear to depend on co-operation.[194] Since an armed conflict is in essence the breakdown of co-operation, it is difficult to see how these provisions will remain effective in armed conflicts. They may also be limited by the discretion accorded to the military in armed conflicts in relation to the environment.[195]

Among the most recent academic discussions on water-law is the publication in 2004 of the 'Berlin Rules on Water Resources'[196] by the International Law Association.[197] The Berlin Rules review international water law for both peacetime and armed conflicts.[198] One of the weaknesses of these rules, as elaborated in a dissenting opinion by eminent scholars,[199] is that the study fails to distinguish between existing and non-existing law.[200] Most of the rules are however declaratory of the existing rules of customary international

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[191] François Grunewald, 'Water, Food, and Man' in *Forum: War and Water* (Geneva: ICRC publication, 1998) 38-43.

[192] *Ibid.*

[194] See *Ibid.* at arts. 21, 22, 23, 28, 30.

[195] See above section 3.4 'Protection of the Environment'.

[196] 'Berlin Rules on Water Resources' International Law Association Report of the Seventy-First Conference (Berlin: International Law Association, 2004).

[197] The International Law Association is a non-governmental organisation with consultative status with a number of UN specialized agencies and has as a goal to 'the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law'. International Law Association: 'History of the ILA', online: <http://www.ila-hq.org/html/layout_about.htm>.

[198] Joseph Dellapenna, 'The Berlin Rules on Water Resources: The New Paradigm for International Water Law', statement at the Proceedings of the 2006 World Environmental and Water Resouces Congress, May 21-25, 2006, Omaha, Nebraska, online: <http://www.ualg,pt/5cigpa/es/comunicacoes.php?letra=I-%20J>.

[199] Those scholars aided in the creation of the 'Berlin Rules'.

[200] Dissenting opinion by Slavko Bogdanovic, Charles Bourne, Stefano Burchi and Patricia Wouters. 'Berlin Rules on Water Resources' International Law Association Report of the Seventy-First Conference (Berlin, International Law Association, 2004).

law.[201] Although the Berlin Rules do not extend the primary norms applicable to fresh water in armed conflicts, they contribute to raising awareness. The protection of fresh water facilities was also discussed at the Third World Water Forum.[202] This Conference was convened by the World Water Council – another NGO with similar objectives albeit in a more limited perspective: water only.[203] Aside from raising awareness, these declarations indicate the possibility of the different fields of international law both influencing and complementing each other.

To conclude, it is clear that some international environmental treaties still apply in armed conflicts. International water law is developing treaties that could apply in conflicts if the parties have already agreed to do so – which is not a novelty – but also treaties that serve the common interest could remain applicable in times of armed conflict. This could have a significant impact in providing additional standards in relation to fresh water in times of armed conflict, such as water management or water quality. However, as demonstrated in the example of the UN Convention on the Non-Navigational Uses of International Watercourses, the international community has not yet been able to develop multilateral international water treaties that serve the common interest of the international community. Many treaties still concern the apportionment of the water resource.

4.2 International Human Rights Law

The first question that comes to mind when considering international human rights in the context of armed conflicts is whether such laws are applicable and if so, how? Central to this question is the relation between international humanitarian law and international human rights law.

Independent of whether international human rights apply, the next question relating to the present study is: is there a 'human right' to fresh water? The answer to that question will be based on interpretation of international human rights treaties.

Finally, the relation between international human-rights law and international humanitarian law will determine how a human right to fresh water, whether it exists or not, can influence the primary norms on freshwater in international humanitarian law.

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[201] Joseph Dellapenna, 'The Berlin Rules on Water Resources: The New Paradigm for International Water Law', statement at the Proceedings of the 2006 World Environmental and Water Resources Congress, May 21-25, 2006, Omaha, Nebraska, online: <http://www.ualg,pt/5cigpa/es/comunicacoes.php?letra=I-%20J>.

[202] Frederick M. Lorentz, 'Protecting Fresh Water Facilities Under International Law' (2003) 1 UNESCO Technical documents in hydrology PC→CP series.

[203] World Water Council, 'About Us' online: <http://www.worldwatercouncil.org/index.php?id=92&L=0>.

4.2.1 Application in Armed Conflicts

Numerous scholars have debated the relation between human rights and international humanitarian law[204] and an increasingly greater body of case law has dealt with this issue.[205] Underlying this debate are the similarities between the two bodies of law. Ultimately, it is a question of which body will prevail in the event of an overlap of the two. Some academics advocate a convergence between the two bodies of law, others claim the clash between them and, finally, some view the two bodies as complementary in their overlap.

The position adopted by most scholars and increasingly NGOs as well, and indeed the better position to adopt, is that the relation between international human rights law and international humanitarian law is a relation between *lex generalis* and *lex specialis*.[206]

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[204] Theodor Meron, "Chapter 1: The Humanization of the Law of War' in Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff Publishers, 2006) 1; Heike Krieger, 'A Conflict of Norms: the Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) 11(2) J. Confl. & Sec. L. 265; William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechenya' (2005) 16 E.J.I.L. 741; Micheal J. Dennis, 'Application of Human Rights Extraterritorially in Times of Armed Conflict and Occupation' (2005) 99 A.J.I.L. 119; Theodor Meron 'How do Human Rights Humanize the Law of War?' in Morten Bergsmo, ed., *Human Rights and Criminal Justice for the Downtrodden: Essays in honour of Asbjörn Eide* (Leiden: Martinus Nijhoff Publishers, 2003); Asbjörn Eide 'The Laws of War and Human Rights: Differences and Convergences' in Christophe Swinarski, ed., *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Geneva: International Committee of the Red Cross, 1984) 675; Georges Perrin, 'La Nécessité et les Dangers du Jus Cogens' in Christophe Swinarski, ed., *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Geneva: International Committee of the Red Cross, 1984) at 751; A.H. Robertson, 'Humanitarian Law and Human rights' in Christophe Swinarski, ed., *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Geneva: International Committee of the Red Cross, 1984) 793; Hans-Joachim Heintze, 'The European Court of Human Rights and the Implementation of Human Rights Standards During Armed Conflicts' (2002) 45 GYIL 60; L. Doswald-Beck, S. Vité, 'International Humanitarian Law and Human Rights Law' (1993) 293 International Review of the Red Cross 94; M.J. Peterson, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument' (1983) 77 AJIL 589; Dietrich Schindler, 'Human Rights and Humanitarian Law: the Interrelationship of the Laws' (1982) 31 Am. U. L. Rev. 935; G.I.A.D. Draper, 'The Relationship Between the Human Rights Regime and the Law of Armed Conflicts' (1971) 1 Israel Yearbook on Human Rights 191 (an interesting historical opinion).

[205] *Isayeva v Russia*, App. No. 57950/00, ECtHR, judgment of 24 February 2005 at para. 191; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] I.C.J. Rep. 131; *Bankovic and Others v. Belgium and 16 Other Contracting Parties Also Parties to the North Atlantic Treaty* (App no 52207/99) (2002) 41 I.L.M. 517; *Prosecutor v Furundzija*, judgment, IT-95-17/1-T, 10 December 1998, paras 134 ff; *Ergi v. Turkey* (App no 23818/94) ECHR 1998-IV 1751 at paras. 79, 81,86; *Legality of the Threat or Use of Nuclear Weapons* [1996] I.C.J. Rep. 226.

[206] See official statement by the President of the International Committee of the Red Cross, Jakob Kellenberger 'Protection Through Complementarity of the Law', online: <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5rfgaz?opendocument>. See also Karima Bennoune on the approach by

This position is referred to as the 'complementarist view'.[207] It maintains that the principle of *lex specialis derogat lex generali* applies, that is, the specific law prevails in a conflict between general law and specific law. Where the *lex specialis* remains silent, this view asserts that the *lex generalis* forms a good complementary source of law. The rationale behind the principle is that the specific law is generally better adapted to deal with the situation than the general law.[208]

A couple of Advisory Opinions of the ICJ are important in this context. In the cases of the *Legality of the Threat or Use of Nuclear Weapons*[209] and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[210] the ICJ considered the inter-relation between international humanitarian law and international human rights treaties in armed conflicts. In the *Legality of the Threat or Use of Nuclear Weapons* case,[211] the Court observed that the International Covenant of Civil and Political Rights[212] did not cease to apply in times of war except by the derogations operable under article 4.[213] Further, the court held that the definition of those derogations was, in armed conflicts, dictated by international humanitarian law. [214] Thus, the decision made clear, and rightly so, that the *lex specialis* of international humanitarian law governs

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NGOs to human rights and humanitarian law: 'Toward a Human Rights Approach to Armed Conflict: Iraq 2003', (2004) 11 U.C. Davis J. Int'l L. & Pol'y 171 at 216-219.

[207] A.H. Robertson, 'Humanitarian Law and Human rights' in Christophe Swinarski, ed., *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet* (ICRC Martinus Nijhoff Publishers, 1984 Geneva) 793 at 801; 'International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence' (2003) ICRC Report, online: <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5ubcvx?opendocument>; Hans-Joachim Heintze, 'On the Relationship Between Human Rights Law Protection and International Humanitarian Law' (2004) 856 International Review of the Red Cross 789; Robert Kolb, 'The Relationship Between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions' (1998) 324 International Review of the Red Cross 409.

[208] Martin Koskiniemmi, 'Fragmentation of International Law: Topic (a): The Function and Scope of the Lex Specialis Rule and the Question of 'Self-Contained Regimes': an Outline', prepared for the Study Group on Fragmentation of International Law of the International Law Commission, online: <http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf> at para 2.2.

[209] [1996] I.C.J. Rep. 226.

[210] [2004] I.C.J. Rep. 131.

[211] [1996] I.C.J. Rep. 226.

[212] International Covenant of Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407.

[213] *Legality of the Threat or Use of Nuclear Weapons* [1996] I.C.J. Rep. 226 at para. 25.

[214] *Ibid*. at para. 25.

armed conflicts, but that it can be complemented by the *lex generalis* of international human rights.[215]

In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case,[216] the Court again had to consider the relationship between international humanitarian law and international human rights law. The Court upheld its position in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*. But it went even further by holding that 'the protection offered by human rights conventions does not cease in case of armed conflicts', save through the effect of provisions for derogation like the one found in article 4 of the International Covenant on Civil and Political Rights.[217] Hence, there are some matters covered by both international humanitarian law and international human rights law concurrently, other matters will be covered by only one of the two bodies of law.[218]

To conclude, the relationship between international human rights law and international humanitarian law in armed conflicts is one between *lex generalis* and *lex specialis*: human rights remain applicable in armed conflicts, but only bind in so far as they add something to the applicable primary norms of international humanitarian law.

4.2.2 A Human Right to Fresh Water in Armed Conflicts?

While various states may recognize a right to water, only a few do so regularly. Hence, it does not yet constitute a rule of customary law.[219] However, it is difficult to conceive how some human rights could exist without a human right to water.[220] This raises the question of whether or not the human right to water can be implied from human rights treaties or from international water law treaties. It also raises the question of the legal content of the human right to water. Everybody has an interest in water, but asserting that a *legal* right exists is an altogether different matter. A human right to water would entail that governments would have an obligation to provide safe drinking water to their population. How far could such a duty extend? In relation to armed conflict, whether a human right to water exists or not, the question is whether such a right could add something to the already

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[215] Christopher Greenwood, 'The Advisory Opinion on Nuclear Weapons and the Contribution of the International Court to International Humanitarian Law' (1997) 316 International Review of the Red Cross 65.

[216] [2004] I.C.J. Rep. 131.

[217] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 131 at para. 106.

[218] Susan C. Breau, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Advisory Opinion, 9 July 2004' (2005) 54 I.C.L.Q. 1003, 1010.

[219] Steven C. McCaffrey, 'The Human Right to Water' in: Brown Weiss, Boisson de Chazournes and Bernasconi-Osterwalder, *Fresh Water and International Economic law* (Oxford: OUP, 2005) at 93-115.

[220] *Ibid*.

extensive framework of international humanitarian law. [221] A human right to fresh water may further reinforce or elaborate the provisions in international humanitarian law.

Steven McCaffrey has already discussed the existence of a human right to water with a critical eye.[222] His starting point is the human rights treaties: the Universal Declaration of Human Rights of 1948,[223] the International Convenant on Civil and Political Rights (ICCPR)[224] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[225] He examines whether or not the right to water can be implied from the right to health and well-being,[226] the right to an adequate standard of living,[227] and the right to life.[228] He discards the right to life as a base for an implicit right to water because the Human Rights Committee appear to exclude a right to subsistence in the right to life and commentators argue that including a right to water is more appropriate under the ICESCR'. Instead, McCaffrey argues that the right to water could be more aptly implied from the right to health and well-being and the right to an adequate standard of living in articles 11 and 12 of the ICESCR. McCaffrey also finds positive regional developments that demonstrate a trend towards a human right to water in the African Commission on Human and People's Rights, in the Inter-American Commission on Human Rights and in Europe.[229] He also finds evidence of such a trend in: (*a*) the mention of the 'special regard' to 'the requirements of human needs' in the 1997 UN Convention on Non-Navigational Uses of International Watercourses; and (*b*) the 1999 Protocol on Water and Health to the 1992 ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes, that provides that parties must take 'all appropriate measures for the

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[221] See above part III 'Relevant Primary Norms of International Humanitarian Law Pertaining to Fresh Water'.

[222] Steven C. McCaffrey, 'The Human Right to Water' in Brown Weiss, Boisson de Chazournes and Bernasconi-Osterwalder, eds., *Fresh Water and International Economic law* (Oxford: OUP, 2005) 93.

[223] Universal Declaration of Human Rights Adopted and proclaimed by the United Nations General Assembly Resolution 217 (III) (1948) GAOR 3rd Session.

[224] International Covenant on Civil and Political Rights (Adopted 16 December 1966, entered into force 3 January 1976) 999 U.N.T.S. 171 (ICCPR).

[225] International Covenant on Economic, Social and Cultural Rights (Adopted 16 December 1966, entered into force 3 January 1976) 993 U.N.T.S..

[226] Universal Declaration of Human Rights Adopted and proclaimed by the United Nations General Assembly Resolution 217 (III) (1948) GAOR 3rd Session, art 25; International Covenant on Economic, Social and Cultural Rights (Adopted 16 December 1966, entered into force 3 January 1976) 993 U.N.T.S. 3 (ICESR), art 11.

[227] International Covenant on Economic, Social and Cultural Rights (Adopted 16 December 1966, entered into force 3 January 1976) 993 U.N.T.S. 3, art. 12 [ICESR].

[228] International Covenant on Civil and Political Rights (Adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171, art 6 [ICCPR].

[229] See for the European position: Henri Smets, 'The Right to Water as a Human right' (2000) 30(5) Envtl. Pol'y & L. 248 at 249.

purpose of ensuring... adequate supplies of wholesome drinking water' and 'shall pursue the aims of... access to drinking water for everyone....'[230] The final agreement that McCaffrey highlights is the special Water Charter of the Senegal River that claims a 'fundamental human right to healthful water.' He notes that this is a 'vanguard' position because it imposes not only a right to water, but also a right to 'healthful' water.

The General Assembly of the UN (UNGA) has also tried to influence the development of international law towards an explicit right to water by recognizing the right to clean, fresh water as a fundamental human right in its Resolution on the Right to Development.[231]

In sum, the position in treaty law is clear: there is as of yet, no collective, explicit human right to water. However, the trend towards such a right is positive. An implicit right appears to exist, but because state practice is not consistent yet, this right has no value.

Another problematic aspect of recognizing a human right to water is the extent of the definition of its legal content. Legal development has been attempted under the auspices of ICESCR. The UN Committee on Economic, Social and Cultural Rights (ESC) is established under the framework of the UN Economic and Social Council (ECOSOC) and is in charge of monitoring the implementation of the ICESCR.[232] The ESC recently held, in General Comment 15, that a right to water exists based on articles 11 and 12 of the ICESCR on the right to adequate housing and right to a reasonable standard of health.[233] A General Comment is an instrument of clarification of the normative content of the ICESCR and is of non-legally binding nature.[234] However, Magdalena Sepúlva argues that a General Comment may have considerable authority, because the Committee's approach to interpretation, through the General Comments, enjoys a considerable degree of legitimacy.[235]

When one examines the normative content of General Comment 15 on the right to water, one can see that it goes further than the humanitarian framework in two respects: (*a*) it lays down a general obligation concerning freshwater quality[236] and *(b)* it lays down a

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[230] Online: <http://www.unece.org/env/water/text/text.htm>.

[231] UNGA Resolution 175 (1999) GAOR 54th Session (UN Doc.A/RES/54/175) at para 12(a).

[232] Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerpen: Intersentia, 2003) at 11. See also for more information about the Committee: *Human Rights: THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, Fact Sheet no.16* (Geneva: UN Centre for Human Rights, 1996).

[233] General Comment No. 15 on the Right to Water was adopted by the UN Committee on Economic, Social and Cultural Rights at its twenty-ninth Session in November 2002 (UN Doc. E/C.12/2002/11).

[234] Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerpen: Intersentia, 2003) at 91.

[235] *Ibid*. at 111.

[236] General Comment No. 15 on the Right to Water (2002) ECOSOC 29th session (UN Doc. E/C.12/2002/11) at para. 12(b).

broad obligation as to 'accessibility' of water.[237] If one compares this attempt to create a human right through state practice with the primary norms of international humanitarian law, creating a clear standard concerning freshwater quality is a novel introduction. It goes beyond the prohibition on rendering water unfit for use, as discussed in the above section on humanitarian norms.[238] This approach differs from international humanitarian law, because it deals with fresh water as an element, rather than a corollary for subsistence of civilians. The General Comment also introduces standards of 'accessibility' to water, both physically[239] and economically,[240] as well as access to water-related information,[241] as parts of the right to water. For the ICRC, information concerning the location of the persons in need of water is a crucial link to the provision of fresh water in armed conflicts.[242] Thus making the provision of such information a legal standard would greatly improve the rapid response to water scarcity among persons in need in armed conflicts. With respect to the persons covered by the General Comment, the UN Committee on Economic, Social and Cultural Rights makes explicit reference to internally displaced persons, refugees, prisoners and detainees, and the provision of protection of their right to fresh water.[244] This appears to be a confirmation of the existing provision in humanitarian law for prisoners of war. The General Comment also includes a reference to the obligations binding on State parties, to the ICESCR, under international humanitarian law.[245] Finally, the UN Committee on Economic, Social and Cultural Rights also calls upon states,[246] and many NGOs and international organizations, including the International Red Cross Movement,[247] to apply the right to fresh water.

II TO CONCLUDE, MANY OF THE PRIMARY NORMS IN INTERNATIONAL HUMAN RIGHTS LAW COULD IMPLY AND HENCE DEVELOP A HUMAN RIGHT TO WATER. HOWEVER, THE PRESENT POSITION IN INTERNATIONAL LAW IS THAT THERE IS NO HUMAN RIGHT TO WATER. THE ATTEMPT OF ELABORATING THE

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[237] *Ibid*. at para. 12(c).

[238] Specifically see above section 3.2 'Objects Indispensable to Survival: Fresh Water Installations and Supplies'.

[239] See above section 3.3.3 'Access to Fresh Water'.

[240] General Comment No. 15 on the Right to Water (2002) ECOSOC 29th session (UN Doc. E/C.12/2002/11) at para. 12(c)(ii).

[241] *Ibid*. at para. 12 (c) (iv).

[242] Interview with Jean Vergain, Head of Sector, Water and Habitat, Hydrogeologist M.Sc, Assistance Division, ICRC Geneva (Geneva 16 May 2006).

[244] General Comment No. 15 on the Right to Water (2002) ECOSOC 29th session (UN Doc. E/C.12/2002/11) at para. 60.

[245] *Ibid*. at para. 22.

[246] *Ibid*. at paras. 17-38.

[247] *Ibid*. at para. 60.

CONTENT OF A *HUMAN RIGHT TO WATER* AS INTERPRETED IN GENERAL COMMENT 15 IS NOT YET A LEGAL OBLIGATION AND APPEARS TO BE OVERLY AMBITIOUS.[248] NONETHELESS, AS DEMONSTRATED, ITS CONTENT IS INNOVATIVE AND SHOULD BE DEVELOPED BECAUSE THE NORMS WOULD IMPROVE THE PRIMARY NORMS APPLICABLE TO FRESH WATER IN ARMED CONFLICTS. THUS FAR, AN IMPLICIT RIGHT TO FRESH WATER BASED ON HUMAN RIGHTS OBLIGATIONS OR ENVIRONMENTAL LAW OBLIGATIONS CANNOT COMPLEMENT THE PRIMARY NORMS IN INTERNATIONAL HUMANITARIAN LAW.

V. Conclusion

The interpretation of the primary norms of humanitarian law applicable to fresh water has identified an extensive framework of primary norms. The difficulty is that they are not always clear or in a consolidated form. This study has therefore attempted to clarify the existing norms in humanitarian law applicable to fresh water and to consolidate them logically. The interpretation of the primary norms has also identified significant weaknesses in the protection of the environment.

This study has also demonstrated how international human rights law and international environmental law remain applicable even in armed conflicts. The study has also demonstrated how these two bodies of law can contribute to significant development, by creating primary norms that deal with fresh water more specifically than the general framework of international humanitarian law.

To conclude, this study is a tool for dissemination of the law applicable to fresh water in armed conflicts and a starting point for understanding how the law on fresh water in armed conflicts can be improved. The Water and Habitat Commission of the ICRC should promote more dissemination in this field. More legal developments must be made, either from within international humanitarian law or alternatively in the fields of international human rights and international environmental law. Whether a 'fresh water conflict' will break out or not, fresh water remains vital in armed conflicts and its protection should be clearly identified and acknowledged.

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[248] Stephen Tully, 'A Human Right to Access Water? A Critique of General Comment No. 15' (2005) 23(2) NQHR 63.

THE UN: A SITUATION REPORT

BENJAMIN ZAWACKI*

The Parliament of Man: The United Nations and the Quest for World Government. Paul Kennedy. Allen Lane/Penquin; 2006; 290 pages; $26.95; and
The Best Intentions: Kofi Annan and the UN in the Era of US World Power. James Traub. Farrar, Straus and Giroux; 2006; 419 pages; $26.00.

Questions of the United Nations' 'relevance' in the 21st century officially became fair game during President Bush's September 2002 speech to the body's General Assembly in the contentious run-up to the Iraq War and grew to a crescendo in 2005 with publication of the organization's plans for reform. Yet, as a new Secretary-General of the United Nations takes the helm following the tumultuous and certainly historic decade of Kofi Annan, these questions – and their answers – have hardly been exhausted and the successes, failures and future of the organization remain the subject of animated debate. Two recent books seek to both reflect and contribute to the discussion and together constitute an authoritative, albeit greatly imbalanced, insight into the UN's standing and status as it enters its 62nd year.

Paul Kennedy's *The Parliament of Man: The United Nations and the Quest for World Government*, is the clear lightweight in both substance and style. A seemingly ambitious work, titled as it is after a line in Alfred Tennyson's famous 'Locksley Hall' and divided into three parts on the body's origins, evolution and future, its length is glaringly insufficient, while only its first part, itself a mere 48 pages, stands up to scrutiny. This part is, however, as solid an overview of the UN's intellectual and political origins as one will find, beginning in the 19th century and including a lucid analysis of how the failure of the League of Nations and the utterly determinative Second World War led to and influenced the UN's formation. Indeed, the almost total extent to which the organization's structure and composition, numerous purposes and – with the benefit of hindsight – inherent limitations were the product of a World War II political and economic paradigm is a fact that today's pundits and critics would do well to remember.

Not only was the Security Council created by and for its permanent five 'victorious' Allied nations, but the notoriously contentious veto power invested in them was

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introduced as the only way to keep the US and USSR – defeaters of, in the Charter's words, the 'enemy states' of Germany and Japan – on-board. National and economic security were not only paramount concerns (with human rights and development secondary and relegated to the General Assembly), but vote distribution in the IMF and World Bank was heavily weighted in favour of the capitalist nations best placed to resurrect global markets in the aftermath of the war. Most UN agencies (UNICEF, the Food and Agricultural Organization, etc), seen in the light of post-war 'reconstruction', were not envisaged as having long life-spans. Peacekeeping, probably the issue most often identified with the UN today, was, in the wake of a war fought between rather than within states, not envisaged at all. And who takes the time to consider that, due to firm official acceptance of colonialism in 1945, there were only a wieldy 50 member states in the first General Assembly (compared to the then-inconceivable and often unwieldy 192 by 2006)?

It is when Kennedy, a Professor of History at Yale, moves beyond this historical perspective and into the chapters on various UN operations and initiatives, however, that his work begins to founder. Affording far too little space for this ambitious number of 'many UNs', he resorts to descriptions and explanations so brief and/or general as to be either quantitatively inadequate or conclusory. In claiming, for example, that many of the UN's human rights interventions have been successful, he asks, 'Could one conceive of a political settlement in Namibia or Mozambique without the world organization?' Yet his entire previous treatment of the matter (three chapters earlier no less) is simply that '[a] transition assistance group (UNTAG) successfully supervised Namibia's move to independence. With internal peace also coming to Mozambique, the Security Council could establish observers there (ONUMOZ) as the democratic process began.'

Moreover, Kennedy compounds the situation by increasingly choosing to 'cover' an entire subject area, the UN's humanitarian and development agendas for example, with one or more case-studies – themselves tending toward brevity and lack of analysis – on an individual agency or operation. He does on occasion draw some interesting insights: the Universal Declaration of Human Rights was adopted unanimously in 1948 when nearly three-quarters of the UN's present members were either non-existent or disenfranchised; the IMF's failure in Mexico in 1982 is analogous to Peacekeeping's failures the following decade in Somalia, Bosnia and Rwanda. Yet, the sum of these parts remains disproportionately small to the scope of these chapters. The last, potentially the book's most interesting for its focus on the relationship between non-governmental organizations and the UN, also miscarries as the author gets buried in the details of the media's international networks and the like, while his point, not entirely clear to begin with, gets lost.

The book's final part on the reform of the UN and its future challenges is particularly disappointing, not least because it signals yet further and untenable 'mission creep' in the book's scope, but also in view of Kennedy's qualifications to expound upon this subject, having served on an international commission in 1995 designed for the same purpose. Other than taking on an optimistic tone and coming out firmly in the 'still relevant' camp in the debate on the UN's role in international cooperation and

troubleshooting, this part is rambling in its speculation and non-committal and cliché-riddled in its conclusions. One almost wonders whether it was drafted by a student assistant, rather than by an author with the experience and expertise at Kennedy's disposal. And even more so than in the book's previous chapters, the prose is often awkwardly unsophisticated: 'In all these dimensions of our lives, we must indeed all hang together or, most assuredly, we will hang separately... Would Russia agree to a Japanese veto? Hmm.'

Thus, on its own, *The Parliament of Man* – save for its excellent first part – is at best a weak outline of the UN's past, present and future. As an opening act, however, which at least identifies most elements and aspects of the UN, it does at least prepare the reader for the more narrowly focused and forcefully written headliner.

James Traub's *The Best Intentions: Kofi Annan and the UN in the Era of American World Power* assumes a place among the very best of the many books on humanitarianism (broadly defined) that have lined the shelves in recent years and that it sometimes recalls: William Shawcross's *Deliver Us from Evil*, David Rieff's *A Bed for the Night*, Linda Polman's *We Did Nothing*.[1] Biography of an outgoing Secretary-General, history of modern peacekeeping operations and analysis of the UN-US relationship in equal and seamlessly woven parts – the book presents a fair and balanced account of the record on these subjects while still managing – nearly always through a dispassionate but deftly sequenced presentation of facts – to pull no punches. Such clearly demands that the author draw upon his professionalism and expertise as a journalist for *The New York Times Magazine*, for, as he freely confesses, he 'likes' both Annan and the UN. What emerges is less an overall conclusion – the nature of which, beyond a clear echoing (if for different reasons) of Richard Holbrooke's view that the UN is 'flawed but indispensable' – would be difficult to guess, than a series of individual multi-part and/or mixed verdicts. Annan is generally acquitted, though is a much-diminished figure by the book's final pages; peacekeeping is generally convicted; the UN-US relationship is left essentially undecided.

Between summer 2004 and fall 2005, Traub had unprecedented, if not unfettered, access to Annan in New York and in his missions abroad, both as quiet public observer and private conversationalist. Literally and figuratively, they covered a lot of ground. Traub uses the Gulf War of 1991 as his point of departure, expressly to show the favorable context in which Annan's appointment as Assistant Secretary-General for Peacekeeping Operations the following year took place, as the 'planets in the UN system were perfectly aligned' for the successful Charter-based intervention in Iraq. Implicitly, Traub book-ends his work with Iraq and paints a contrast between a war in which

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[1] William Shawcross, *Deliver Us From Evil: Peacekeepers, Warlords, and a World of Endless Conflict* (New York: Simon & Schuster, 2000); David Rieff, *A Bed for the Night: Humanitarianism in Crisis* (New York: Simon & Schuster, 2002); Linda Polman, *We Did Nothing: Why the Truth Doesn't Always Come Out When the UN Goes in* (London: Viking, 2003).

President George H.W. Bush ardently sought UN support and approval and the one in 2003 that so divided the UN and the current President Bush.

The rest of the book leaves nothing of any importance from Annan's agendas in Peacekeeping and as Secretary-General unaddressed and does so through a narrative that is at once chronological, coherent and creative. It is also riddled – thanks to Traub's privileged perspective – with the sort of anecdotes that allows the book to be a bridge between the strictly academic and the popular; its prose is intellectual and serious but readily accessible. The accounts of Annan's controversial diplomacy with Saddam Hussein in Iraq (bizarre), Senator Jesse Helms' visit to the UN (amusing), the death of 22 UN staff in Baghdad (harrowing) and the tense all-night negotiations on UN reform (edifying) come to mind. The several chapters on the Oil-for-Food scandal, in addition to containing many useful anecdotes (relating to Annan's son Kojo, among others), are almost assuredly the most accurate, balanced and complete retelling of the drama yet and so constitute, perhaps even more so than the rest of the book, a unique contribution to the discourse on UN management and reform.

The book – like Annan himself – is at once at its strongest and weakest in the passages on 'the responsibility to protect', a doctrine holding that sovereign states have such a responsibility toward their citizens and that in the event states refuse or fail to accept it, the responsibility shifts to the international community. While Annan expressed almost no public regret over his weak Peacekeeping leadership during the genocide in Rwanda in 1994, he began advocating this 'responsibility to protect' in a speech in the spring of 1998 in the context of Milosevic's Kosovo, a year before NATO began its bombing campaign there. Two things are clear (and presented as such by Traub): First, that Annan countenanced armed intervention by the international community as an acceptable means of exercising this responsibility, but that, second, such intervention could only be made legitimate by a Security Council resolution. Also made clear by Traub is that, as the bombing got underway without such a resolution, Annan changed his mind; he supported the intervention and even saw it as legitimate, pursuant not to the UN Charter but to the Universal Declaration of Human Rights.

However, as Annan again shifted back, finally settling on a circular position of wanting it both ways – the UN's legitimacy resting on the responsibility to protect, with that responsibility's legitimacy resting with the UN – Traub's account becomes far less comprehensive than it might have been, asking the reader to connect the dots among various events and developments. Such a task requires some rereading. Yet, if this section captures Annan in both his inspiring moral leadership and his characteristic indecision, it is exceptional to Traub's otherwise clear account.

It also serves as an introduction to the chapters on the responsibility to protect's most recent application: Darfur. That genocide in western Sudan was occurring at the time of the book's writing and continues to the present day, gives these chapters an eerie relevance. It also leaves the reader wondering – to no fault of Traub – whether this most important piece of Annan's legacy will be brought to bear in the wake of his departure and in a context all too reminiscent of Bosnia, Rwanda and Kosovo.

While Traub joins Kennedy in taking the view that the UN remains every bit as relevant today as it was upon its founding, perhaps he would prefer to withhold his final judgment until more time affords both a deeper perspective on Annan's efforts and an end-game in Darfur. What is sure is the relevance – and excellence – of *The Best Intentions*, the second of two unequal parts to a mixed situation report for the UN at the end of the Kofi Annan era.

ON *THE LIMITS OF INTERNATIONAL LAW* – A REVIEW

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Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005) Pp. 262. $29.95. ISBN 0-19-516839-9

In *The Limits of International Law*, Jack Goldsmith (Harvard Law School) and Eric Posner (University of Chicago Law School) use rational choice theory to study international law. Rational choice theory assumes that human behaviour is guided by instrumental reason. Accordingly, individuals (but also collective entities) always pursue what they believe to be in their own best interest. While traditionally an economic theory, rational choice theory has become increasingly prevalent in other social sciences. Goldsmith and Posner are the first to comprehensively apply rational choice models to state behaviour and international law. Predictably, and as the title suggests, their conclusions are quite sobering to many 'internationalists': international law is a product of states pursuing their interests on the international stage; it has no independent valence and exerts no exogenous influence on state behaviour. In other words, states are never pulled into compliance with international law if such compliance is contrary to state interests.

Goldsmith and Posner start with three basic assumptions. First, although collectives, states are unitary actors who arrange themselves to act like agent. Second, states have predefined sets of interests. While the authors recognize that states are composed of various institutions and individuals, all with different roles, political ideologies, loyalties, and interests, they contend that a state with well-ordered political institutions makes decisions based upon identifiable preferences about outcomes. The third assumption is that, like individuals, states act rationally to achieve these interests: 'it is uncontroversial that state action on the international plane has a largely instrumental component... [and] rational choice theory provides useful models for explaining instrumental behavior.'[2]

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[2] Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005) at 7.

The first part of *Limits* examines customary international law through the lens of rational choice theory, arguing that it is best modelled as behavioural regularities that emerge when states pursue their interests on the international stage. Four models, *coincidence of interest*, *coercion*, *cooperation* and *coordination*, capture these behavioural regularities. *Coincidence of interest* occurs when each of two states obtains a private advantage from a particular action that happens to be the same action taken by the other state, and neither state's move depends on the move of the other state. *Coercion* occurs when a powerful state or group of states with similar interests force other less-powerful states to engage in actions that serve the interests of the first state or states. *Cooperation* occurs when states achieve the optimal outcome of a bilateral prisoner's dilemma. They achieve this outcome when they know what counts as cooperation and what counts as cheating, when they have sufficiently low discount rates, when the game continues indefinitely, and when the payoffs from defection are not too high relative to the payoffs from cooperation. *Coordination* also occurs as the result of repeated play in a bilateral prisoner's dilemma, when there is a coincidence of interest but each state's move depends on the move of the other state.

Goldsmith and Posner examine the evolution of four major customary international legal regimes: the free ships, free goods principle; the breadth of the territorial sea; ambassadorial immunity; and the exemption of coastal fishing vessels from the laws of prize. They argue that historically, states have only created and complied with customary law when it has been beneficial or convenient for them to do so. Rather than following an exogenous rule in these cases, states have acted in their self-interest, and their behaviour has changed as their interests have changed. While we may observe a pattern of adherence to a particular customary international law, they claim that this compliance is usually explained by one or a combination of *coincidence of interest*, *coercion*, *cooperation* or *coordination*, not by a sense of legal obligation or internalized legal values. Goldsmih and Posner use the *Paquette Habana* case (1900), a leading U.S. Supreme Court opinion on customary international law, to demonstrate that 'the famous customary international law analysis...is riddled with errors characteristic of the mainstream approach to customary international law.'[3]

The second part of *Limits* evaluates the role of treaties and non-legal agreements in international law, again rejecting the conventional wisdom that legalization creates a special normative obligation for states. The authors maintain that even legalized international agreements such as treaties cannot pull states toward compliance contrary to their interests. Rather, when a state decides whether or not it will comply with an international treaty, it conducts a simple cost benefit analysis, choosing to comply only when it is less costly than beneficial to do so. Goldsmith and Posner argue that state action with regards to treaties reflects models of *coercion* and *coordination of interest*. 'States enter into treaties or refrain from violating them because they fear retaliation from the

[3] Jack L. Goldsmith & Eric A. Posner, s*upra* note *2* at 67.

other state or some kind of reputational loss, or because they fear a failure of coordination.'[4]

To support their theory, the authors examine prominent treaty regimes governing human rights and international trade. They conclude that 'human rights law fades into the background,' as liberal states 'will pressure human rights abusers regardless of whether they are signatories to a treaty,' when conditions are right, and 'will tolerate human rights abuses in other states regardless of whether they are signatories to a treaty,' when conditions are not right.[5]. As for international trade law, they claim that 'GATT/WTO has worked as well as it has because states are willing to retaliate...if trading partners violate their obligations,' and that consequently, 'powerful states will in general have more freedom of action than weaker states.'[6]

The final section of *Limits* discusses the role of legal or moral rhetoric in international law. While the use of the rhetoric of international law may indicate an internalization of its principles and thus pose a challenge to their theory, the authors argue that just because states use the language of international law does not mean that they feel compelled to comply with it or will comply with it. 'States provide moral justifications for their actions no matter how transparently self-interested their actions are. Their legal or moral justifications cleave to their interests, and so when interests change, so do the rationalizations.'[7] According to the authors, states use moralistic and legalistic rhetoric to influence speculation about their preferences to clarify their own actions and to protest the actions of other states.

The final section also preempts critiques of an alleged moral obligation to comply with international law, and of cosmopolitanism, the theory that states should act internationally on the basis of global, rather than state welfare. In response to the first criticism, Goldsmith and Posner argue that it is difficult to prove that legal obligations have a moral basis and that this is especially the case in international law, which lacks consent or democratic participation to justify obedience. They refute cosmopolitanism by stating that, 'the cosmopolitan argument must be bounded by institutional and moral constraints that arise in the domestic-democratic sphere.'[8] States are not organized to achieve altruistic goals and the varying preferences of their citizens constrain them.

If controversial in the economic field, rational choice theory is even more contentious in other social sciences. In international legal circles, *Limits* has been both praised and reviled. For example, Edward Swaine applauds the authors' use of a single approach to explain all of state behaviour on the international plane, claiming that *Limits*

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[4] Jack L. Goldsmith & Eric A. Posner, s*upra* note 2 at 90.

[5] *Ibid.* at 134.

[6] *Ibid.* at 162.

[7] *Ibid.* at 169.

[8] *Ibid.* at 205.

provides a focus that is lacking in most theories of international law.[9] However, he criticizes the theory's oversimplifying assumptions and the authors' exclusion of any preference for complying with international law from the set of state interests from which they draw their analyses. Paul Schiff Berman, in a more negative review, says Goldsmith and Posner do little to advance the discussion of how international law affects state behavior. [10] He argues that it is senseless to measure the efficacy of international law by how effectively it prevents a state from doing that which it has already decided to do. International law's impact is not found only in the literal obedience to rules, but in the changes it makes to our legal consciousness.

In the present viewer's opinion, a major weakness of *Limits* is that its authors fail to adequately justify their assumptions, which are not uncontroversial in the first place. For example, while they choose the state as the unitary actor in their theory, there is a wealth of literature that focuses on the diminishing role of the state in international affairs.[11] These studies attribute the state's diffusion of power to globalization, technology, an increase in international organizations, multinational corporations, non-governmental organizations and a rising global civil society, among other things. Goldsmith and Posner virtually omit a discussion of international organizations, non-state actors and individuals. Conveniently, most of the evidence the authors use to support their theory comes from the first half of the twentieth century or earlier, before many of these factors had yet come into play. The authors defend their state-centred approach merely by stating that 'international law addresses itself primarily to states.'[11] The justifications for their other – no less controversial – assumptions are equally cursory.

In addition, Goldsmith and Posner discount the influence of reputation in state decision-making, again without adequately defending this decision and exclude a state's desire to comply with international law in their calculation of 'state interest', an exclusion which they admit had a significant effect on their outcome. Goldsmith and Posner are silent about the legal recourse available to states that wish to exit their treaty obligations when a particular treaty no longer serves state interests. Rather, the authors condone blatant violations of international law with the 'phenomenon of international legal change' by arguing that a formal violation of a law may eventually receive applause for the changes it makes to the global order.[12] However, if states can achieve the same effect by withdrawing from a treaty legally, it is difficult to use it as a defence for illegal violations.

Finally, a central flaw of *Limits* is that it equates moral obligation with legal obligation. The end result of Goldsmith and Posner's theory is that states do not have to

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[9] Edward T. Swaine, "Restoring (and Risking) Interest in International Law" (Jan. 2006) 100 Am. J. Int'l L. at 259-266.

[10] Paul Schiff Berman, "Seeing Beyond the Limits of International Law" (2006) 84 Texas Law Review at 1265-1306.

[11] *Supra* note 1 at 5.

[12] *Supra* note 1 at 198.

comply with international law because they have no moral obligation to do so. However, there is no necessary connection between law and morality. A legal obligation can exist even when a moral one does not. Goldsmith and Posner briefly recognize this point when they differentiate between legal obligation in the domestic and international contexts. While they claim that international law, unlike domestic law, lacks consent or democratic participation to justify obedience, this is not entirely the case. When a state ratifies a treaty, it consents to be governed by it. While states may not be morally obligated to comply with treaties they sign, they are legally obligated to do so. Therefore, a constraint on state behaviour exists. Furthermore, Goldsmith and Posner arrive at their conclusion by examining historical patterns and case studies, but noting what states (or people, for that matter) do or have done in the past says nothing about what they should do or have an obligation to do.

Although one may not share the assumptions and conclusions of this highly readable book, *Limits* is an important contribution to the study of international law and to the advancement of the realist perspective of international relations.