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KEVIN-PAUL DEVEAU AND USMAN SHEIKH*

Several years ago, a small group of students, characterized by a keen interest in international affairs, sat around a table and debated the merits of founding another journal at the University of Toronto. The task before them was challenging but necessary, they agreed.

Despite the burgeoning scholarship on the interplay between international law and international relations, the two disciplines—however common their subject matter—still lacked a common forum for discussion. So, the *Journal of International Law & International Relations* was established to promote critical, informed, and interdisciplinary debate on the intersection of international law and international relations and to provide a forum for contributions from Canada and abroad on matters of current concern in international affairs in general and on issues of particular interest to Canada.

We would like to thank everyone who contributed to the founding of the *JILIR*. In particular, our thanks to Professor Karen Knop, who offered support and encouragement in the initial stages of the *JILIR* project. Dean Ron Daniels and Assistant Dean Lois Chiang were also instrumental in founding the *Journal* by offering the financial and the logistical support of the University of Toronto Faculty of Law. At the Munk Centre for International Studies, the contributions of Joan Golding and Professor Ron Deibert were invaluable. Professor Jutta Brunnée stands alone for her singular contribution to the founding of the *JILIR*—her guidance, her leadership, and her energies gave the project direction.

As regards this inaugural issue, we thank the students of the Munk Centre and Faculty of Law who contributed their time and efforts to publishing the *Journal*. The students on the masthead merit particular note for their diligence and dedication this last year, as do the incoming Editors-in-Chief, Ioana Bala and Paul Martin, who have helped us with the production and publication of this issue.

Finally, of course, our sincere thanks to our contributors.

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* Editors-in-Chief, Volume 1
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Foreword

JUTTA BRUNNÉE*

In the late 1980s and early 1990s, Kenneth Abbott wrote some of the touchstone pieces for the renewed engagement between the disciplines of international law and international relations. As he notes in his contribution to this inaugural issue of the *Journal of International Law & International Relations* (*JILIR*), the 'joint discipline' that he thought fifteen years or so ago might emerge has not actually taken shape. But, undoubtedly, there has been an increasingly rich spectrum of engagement—debates, collaboration, mutual critiques—between the two disciplines. What is striking, however, is that the greatest efforts at engagement with the other discipline appear to have been made in the international law literature. In his piece, Ken Abbott refers to many of the central articles written in this vein, and highlights the many benefits that international law scholars, teachers, students and practitioners can derive from international relations theory. However, with notable exceptions, it is not clear that there is quite as much interest in international law on the international relations side, be it in scholarly writing or in teaching.[1] To be sure, international law does figure in the international relations literature. But, as Jan Klabbers and Gerry Simpson observe in their contributions, international law is often submerged in the broad realm of 'norms and regimes', even in the writings of scholars who are inclined to say that such norms and regimes 'matter' in shaping international affairs. It appears that Martha Finnemore's important question—'Are legal norms distinctive?'[2]—has not been of deep interest to the wider international relations community; nor does it seem to have been answered by international lawyers in a manner that would have caused broad segments of the international relations community to take note.

The *JILIR*, then, presents an opportunity. Its editors hope that it can provide a bridge between the two disciplines that will be crossed in both directions, and in a number of ways. As this inaugural issue

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* Professor of Law and Metcalf Chair in Environmental Law, University of Toronto
Faculty Advisor, *Journal of International Law & International Relations*.

1 This observation does not claim to be empirically grounded. Some studies have been conducted, however. For example, a recent study of American textbooks concludes that '[i]nternational law is marginalized in the books that introduce the majority of U.S. university and college students to International Relations as a field of study.' See B. Welling Hall, 'The Standing of International Law in Undergraduate IR Texts' (2003) 4 International Studies Perspectives 145.

2 Martha Finnemore, 'Are Legal Norms Distinctive?' (2000) 32 N.Y.U. J. Int'l L. & Pol. 699.

illustrates, the *JILIR* aims to offer a platform for articles that grapple with the strengths and weaknesses and, as some would have it, dangers of interdisciplinary engagement. It also hopes to provide a venue for pieces that practice interdisciplinarity, something that, as Jan Klabbers points out, is relatively harder to find than pieces *about* interdisciplinarity. Finally, and not least, the *JILIR* is intended by its editors as a forum for international law scholars who wish to expose their work to an international relations readership, and *vice versa*. The contributions to this inaugural issue cover the full spectrum of these approaches. Part One is focused on the theoretical background to the engagement between international law and international relations. The balance of the volume is organized around issue areas, focusing on environment, trade, human rights and security issues, respectively.

The authors in Part One of the issue were asked by the editors to comment on what has been achieved through the interdisciplinary dialogue of the last ten to fifteen years. Abbott, Klabbers and Simpson – three international lawyers—reflect on interdisciplinarity as such, from different theoretical vantage points and with varying degrees of enthusiasm. By contrast, the contribution by Shirley Scott, an international relations scholar, is an interdisciplinary inquiry. Her reflection on the relationship between international law and world politics leads her to posit that, aside from a legal obligation to comply with international law, there exists a political obligation to do so.

For Part Two, authors were asked whether, since the 1992 Rio Earth Summit, mega-conference diplomacy and multilateral environmental agreements had retained their central role in international environmental governance and law, or whether the tide had shifted to other approaches. Elizabeth DeSombre's contribution sketches out a number of reasons why, as she puts it, '[i]nternational environmental cooperation is hard and is getting harder.' Although she nonetheless believes that multilateral agreements will remain important to problem-solving, she also points to a growing array of alternative approaches. Both Christopher Joyner and Ken Conca explore such alternatives. For Joyner, while increasing emphasis has been placed upon various kinds of public-private partnerships, these entail their own array of problems. Thus, multilateral arrangements will remain central to addressing international environmental concerns. Conca sees two trends: fading enthusiasm for conference diplomacy and regime building, and a rise in efforts to frame global problems not as 'commons' issues to be resolved by states but as human rights issues pursued by individuals. Conca posits that this shifting frame of reference may provide new impetus for global environmental institution building. Finally, Steven Bernstein's focus is on the legitimacy challenge posed by global environmental governance. In exploring theoretical conceptions of legitimacy in international law and international relations and sociology, Bernstein finds a shift in the focus of writing on legitimacy.

Whereas earlier literature had been preoccupied with legitimacy as a potential source of compliance, the focus now appears to be on legitimacy as central to authority and governance—an important shift, as he explains.

Part Three offers different perspectives on international trade and economic governance, and globalization. Like environmental relations, international economic relations are an area of 'complex interdependence' and, according to many international relations scholars, particularly fertile ground for legal and institutional development.[3] Whereas the environmental field is governed through a large number of agreements and institutions, the economic realm has seen the emergence of a World Trade Organization (WTO) in 1995 and a significant focus on binding dispute settlement. Steve Charnovitz's article traces out the key features and trends marking the WTO upon its tenth anniversary. Against this backdrop, the article explores an 'optimistic' and a 'pessimistic' scenario for the future of the WTO. Charnovitz's concerns, and his suggestions for improvements, resonate with many of the observations offered in a recent WTO-commissioned report on the future of the organization.[4] Charnovitz concludes, however, that the WTO of 2020 is unlikely to be significantly different than it is today. Jeffrey Dunoff considers one facet of the debate about the evolution and reform of the WTO – the debate over constitutionalism. Dunoff reads the promotion of constitutionalism as driven by an impulse to minimize world trade politics. For Dunoff, a turn away from politics, and the transparency and participation that it entails, is 'precisely *not* what the WTO needs.' Michael Trebilcock's article also considers the role of the WTO, but his interest is in the larger debate about globalization. While public concern about international trade and international trade governance signal that the field has become a matter of 'high politics', Trebilcock argues that claims against globalization—six of which he examines in detail—are largely unfounded. Lastly, Sylvia Ostry's contribution reflects on the changing 'geography' of global trade and different modes of economic integration. As WTO membership has grown and developing countries have become more active players, the consensus-based negotiation process has become more complex. As a result, Ostry argues, large players, such as the United States and the European Union, have sought bilateral and regional channels for arrangements on matters such as investment or intellectual property rights.

Human rights issues, like environment, trade and security, are

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[3] Robert O. Keohane & Joseph S. Nye, *Power and Interdependence: World Politics in Transition* (Boston: Little, Brown, 1977).

[4] Peter Sutherland *et al.*, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (World Trade Organization: Geneva, 2005).

among the mainstays of the international law and international relations literatures. However, in this volume, the editors sought to offer a slightly different perspective on the topic. The focus of Part Four is not on *inter*national processes but on *trans*national circulation of human rights norms and, specifically, those relating to same sex partnerships. Kenneth Norrie's essay traces the evolution of jurisprudence on same-sex partnerships and marriage in different jurisdictions. He highlights the cross-fertilization that has occurred over the last fifteen years or so between developments in different jurisdictions, including in European countries, North America, New Zealand, and South Africa. Courts and legislatures have taken notice of decisions in other jurisdictions and complainants have learned to weave developments in other jurisdictions into an increasingly strong web of arguments for equal treatment of same-sex couples. Jonathan Goldberg-Hiller explores some of the dynamics underlying these developments, focusing on the interplay between transnational judicial dialogue and concerns over national sovereignty in the United States. What is revealed is a process of international norm building and norm diffusion that is not the inter-state process upon which international lawyers and international relations scholars focus much of their attention. This process is driven by individuals, through legal challenges in national courts, and reinforced or even propelled forward through parallel developments in other jurisdictions. Goldberg-Hiller's article illustrates how non-state actors and social movements shape global legal developments through activities that crack open the 'billiard ball' image of the sovereign state. Evan Gerstmann too explores the tensions between these developments and state sovereignty. Courts in all countries have struggled to find a proper place for developments in international law or foreign law in domestic legal orders. A particularly charged debate has been underway in the United States. Gerstmann shows how especially the same sex partnership debate has galvanized the conservative resistance to international sources (and defense of American 'popular sovereignty') and to liberal openness to examining local practices in the light of international ones.

Finally, Part Five delves into one of the areas of 'high politics' in which international law is often said to be a bit player, or even outright irrelevant: international security and use of force. If security issues create a challenging environment for international law, in the cauldron that is the Middle East the challenge is relentlessly fuelled. Against this backdrop, the editors asked authors to reflect on the International Court of Justice's *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Michael Bell, a former Canadian Ambassador to Israel, canvasses the historical, political and factual background against which the Advisory Opinion must be appreciated. He paints a compelling picture of both the concerns that animated the Israeli decision to build the wall and its

disruptive impact on Palestinian lives. His contribution highlights the complexity of the issues in which the 'separation barrier' is entrenched. Frédéric Mégret analyzes the main legal issues around which the Advisory Opinion revolves: self-determination, self-defense and humanitarian law. He reflects on the Court's success in handling these issues against the backdrop of three interwoven 'stories.' These stories concern the ambition to see international relations governed by law, including the role of the World Court itself; the struggle of the Middle East to grapple with the legacy of colonialism and the 'shocks' of nationalism, modernization and globalization; and the continued meaning of 'walls, barriers and barricades' in a globalized world that is assumed by many to have done away with borders. For Mégret, the Court's analysis of the legal situation fails to grapple adequately with any of the three stories. Moshe Hirsch is somewhat more optimistic in his assessment. He too considers the legal ground covered by the Advisory Opinion. But his main interest is in examining the opinion's likely impact on Israel's future policy through the lenses of three broad streams of international relations theory: realism, liberal theory and constructivism. His article vividly illustrates how theoretical frameworks and their background assumptions shape an observer's image of international law, and of the role that an opinion of World Court can play in a given context. His analysis of the Advisory Opinion through the three sets of theoretical lenses leads Hirsch to conclude that 'the prospects for compliance … are modest for the short range and more significant over the medium and long ranges.' Finally, Ed Morgan's preoccupation is also with frameworks, lenses and stories. Using the Western movie *The Wild Bunch* as a lens, he focuses in on international law as a supplier of norms and narratives through which to read reality. For Morgan, international law carries the seeds of both destruction and reproduction in the many contradictory frames that it is attempting to reconcile. The pattern is one of betrayal: 'the principle of self-determination could always be betrayed for the sovereignty reasons, or statehood and self-defense could be betrayed for the cause of liberation.' Nonetheless, Morgan concludes: 'The ultimate betrayal, of course, would be the abandonment of both sets of ideals altogether. As with international law, it is society's complexities that give it momentum.'

As this overview of the contents of *JILIR*'s inaugural issue should have demonstrated, the reader will find a wide range of richly textured perspectives on issues of current interest. This first issue is a fitting start for a journal that promises to occupy an important place in the literature on international law and international relations.

Toward a Richer Institutionalism for International Law and Policy

KENNETH W. ABBOTT*

INTRODUCTION: IR-IL AND THE LAWYER'S SOCIAL ROLE

In 1992, early in the renaissance of scholarship at the junction of international relations theory (IR) and international law (IL), I suggested that the coming years might see 'the emergence of a new joint discipline' like that which had already emerged in law and economics.[1] It is probably fair to say that a true joint discipline does not yet exist and may never come into being. Yet the appearance of this *Journal*—a valuable and timely addition to the intellectual landscape—highlights the remarkable interdisciplinary progress made in little more than fifteen years.

Review articles have charted steady growth in publications applying IR-IL approaches by authors from both disciplines.[2] IR-IL is recognized as an international law 'method', or at least a framework for analyzing the workings of the international legal system.[3] Interdisciplinary teams combine methodologies to tackle complex issues,[4] and a growing number of scholars are trained in both

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* Elizabeth Froehling Horner Professor of Law and Commerce, Northwestern University School of Law. As of January 2006, Professor of Law and Global Studies and Willard H. Pedrick Distinguished Research Scholar, Arizona State University

1 Kenneth W. Abbott, 'Elements of a Joint Discipline' (1992) 86 Am. Soc'y Int'l L. Proc. 167. As pointed out at the time, there remains a significant 'two cultures' problem because of the differing approaches of most law and political science scholars. Remarks by Oran R. Young, *ibid*. at 172. And far fewer scholars participate in IL-IR than in law and economics.

2 Anne-Marie Slaughter *et al.*, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92 Am. J. Int'l L. 367.

3 See 'The Methods of International Law' (symposium) (1999) 93 Am. J. Int'l L., reprinted as Steven R. Ratner & Anne-Marie Slaughter, eds., *The Methods of International Law* (Washington, DC: American Society of International Law, 2004).

4 See e.g. Andrew T. Guzman & Beth A. Simmons, 'Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes' (Paper presented to the Roundtable on Interdisciplinary Approaches to International Law, Vanderbilt Law School, 2004), online: <http://www.repositories.cdlib.org/bple/alacde/5/>; Mark A. Pollack & Gregory C. Shaffer, 'Transatlantic Governance in Historical and Theoretical Perspective', in Pollack & Shaffer, eds., *Transatlantic Governance in the Global Economy* 3 (Lanham, Md.: Rowman & Littlefield, 2001); Kenneth W. Abbott & Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 Int'l Org. 421.

disciplines.[5] Law schools and political science departments offer courses explicitly on IR-IL or drawing on its ideas, and a book designed for law school classes is devoted to the IR-IL interface.[6]

The appeal of the interdisciplinary approach for lawyers and legal scholars is clear. Although IR is not well suited to resolving doctrinal questions,[7] it remains of value even for the international lawyer *qua* lawyer. As Anne-Marie Slaughter argues, integrating IR and IL 'can make international lawyers better lawyers': the diverse theoretical perspectives of IR help them to recognize the (often unspoken) assumptions that underlie their own and others' legal arguments, readings of texts and doctrines, and prescriptions, and to use distinct theoretical visions to generate responses and alternative proposals.[8]

Interdisciplinarity is of even greater value in the international lawyer's broader social role as policy maker,[9] or more fancifully perhaps as architect of global governance. Here IR helps lawyers and other policy makers to analyze social problems in theoretically informed ways and develop a wide range of ameliorative responses.[10] As Robert Keohane said of similar research in his presidential address to the International Studies Association, 'we … seek knowledge in order to

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5 Anne-Marie Slaughter is the paradigm case; others include Richard Steinberg and Kal Raustiala. We autodidacts are envious.

6 Oona A. Hathaway & Harold Hongju Koh, eds., *Foundations of International Law and Politics* (New York: Foundation Press, 2005).

7 The families of IR theory do, however, lead to an emphasis on different doctrinal sources and modes of interpretation. See Kenneth W. Abbott, 'International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts' (1999) 93 Am. J. Int'l L. 361. For a thoughtful discussion of the positivist method in IL, see Bruno Simma & Andreas L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 Am. J. Int'l L. 302.

8 Anne-Marie Slaughter, 'International Law and International Relations' (2000) 285 Rec. des Cours 12 at 26.

9 In addressing policy formulation, as in other respects, modern IR-IL draws on the policy-oriented jurisprudence of the New Haven School. For a recent summary, see Siegfried Wiessner & Andrew R. Willard, 'Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflicts: Toward a World Public Order of Human Dignity' (1999) 93 Am. J. Int'l L. 316. For a discussion of differences between the traditional New Haven approach and theories discussed here, see Abbott, 'International Relations Theory', *supra* note 7 at 362.

10 For valuable discussions of the difficulties and successes of lawyers and other policy makers in addressing such problems, see P.J. Simmons & Chantal de Jonge Oudraat, eds., *Managing Global Issues: Lessons Learned* (Washington, DC: Carnegie Endowment for International Peace, 2001).

improve the quality of human action.'[11]

In 1992 I outlined several intellectual tasks for which IR theory is especially helpful.[12] These include theoretically informed description, explanation and prediction, normative analysis, and finally the instrumental task of institutional design: constructing 'law-based options for the future.'[13] Designing effective institutions, broadly defined, is increasingly recognized not only as an urgent task in today's world, but also as perhaps the lawyer's 'most important creative role.'[14] It is also an exceedingly difficult task: even suboptimal institutions are resistant to change; politicians favor short-term solutions; inherited conceptions of appropriate form limit innovation; and unanticipated consequences are routine.[15] In these circumstances, an intellectual framework that helps policy makers identify and assess an array of imaginative options is of tremendous value.

In this article, I discuss how the theoretical approaches of IR can enhance the work of international lawyers and other architects of global governance. To increase the power of IR for that purpose, I argue that the IR theory known as institutionalism should be enriched by the incorporation of insights from other approaches. Institutionalist theory provides a natural analytical framework for policy makers. Yet an enhanced institutionalism would better encompass the increasingly complex architecture of global governance and provide more powerful support for institutional design.

The article proceeds as follows. Section I summarizes the leading schools of IR theory. Section II examines how adherents of these approaches have framed them as competitors in a zero-sum 'paradigm war'. The section then contrasts recent scholarship that explores compatibilities among theoretical approaches. Section III

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11 Robert O. Keohane, 'International Institutions: Two Approaches' (1998) 32 Int'l Stud. Q. 379.

12 Abbott, 'Elements of a Joint Discipline', *supra* note 1 at 168-72.

13 See Steven R. Ratner & Anne-Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 Am. J. Int'l L. 291 at 292.

14 Jeffrey L. Dunoff & Joel P. Trachtman, 'The Law and Economics of Humanitarian Law Violations in Internal Conflicts' (1999) 93 Am. J. Int'l L. 394 at 395. See also Slaughter, 'International Law and International Relations', *supra* note 2 at 217-24; Ronald B. Mitchell, 'Regime Design Matters: Intentional Oil Pollution and Treaty Compliance' (1994) 48 Int'l Org. 425. For a rationalist analysis of variables leading to major institutional design choices, see Barbara Koremenos, Charles Lipson & Duncan Snidal, eds., 'The Rational Design of International Institutions' (2001) 55 Int'l Org.

15 See Paul Pierson, 'The Limits of Design: Explaining Institutional Origins and Change' (2000) 13 Governance: An International Journal of Policy and Administration 475.

provides an impressionistic empirical rationale for these bridge-building efforts by describing the complex governance arrangements that characterize several significant issue areas. It argues that one cannot even properly describe such arrangements, much less explain or design them, without an enhanced theoretical framework like that suggested here. Section IV explores how an enriched institutionalist theory might be created.

I THE THEORETICAL PERSPECTIVES OF IR

IR is famously divided among competing theoretical paradigms. This greatly complicates the field,[16] but enriches it as well: the very multiplicity of approaches helps scholars identify alternative legal arguments and responses to social problems. The paradigms or families of IR theory direct our attention (variously) to two main features of international life: the *actors* whose decisions and conduct shape outcomes, and the *factors and processes* that cause, influence, or constitute decisions, actions and outcomes, from war, to cooperation, to compliance (or noncompliance) with legal rules.

I will only briefly summarize the major schools of IR theory here. Conventionally, these are identified as realism, institutionalism, liberalism and constructivism.[17] The first three of these generally share a rationalist methodology. They assume that actors behave purposively, pursuing their interests and goals through calculated choices and means-ends rationality, subject to any limitations on their decision-making capacity and any external constraints.[18] Decisions are governed by a 'logic of consequences,'[19] which means that efforts to change actors' behaviour for private or social gain must modify incentives or other determinants of consequences. Constructivist theory, in contrast, reflects a different mode of inquiry, methodology, and understanding of the

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16 See Abbott, 'International Relations Theory', *supra* note 7 at 364.

17 *Ibid*. at 364-8. Slaughter divides the schools somewhat differently, presenting three categories—realism, institutionalism and liberalism—each with a dominant rationalist version and a constructivist version or critique. Slaughter, 'International Law and International Relations', *supra* note 8 at 30-51.

18 See Duncan Snidal, 'Rational Choice and International Relations' in Walter Carlsnaes *et al*., eds., *Handbook of International Relations* (London: Sage, 2002). Rationalist theories generally view actors as egoistic, pursuing their own utility or payoffs even at the expense of others. However, rationalist theories can accommodate altruism and other non-egoistic goals to a considerable extent, if not completely. See *ibid*.; Kenneth W. Abbott & Duncan Snidal, 'Values and Interests: International Legalization in the Fight Against Corruption' (2002) 31:1 (Part 2) J. Legal Stud. S141.

19 See James G. March & Johan P. Olsen, *Rediscovering Institutions* (New York: Free Press, 1989).

social world and the motivations of actors. I discuss these differences further below.

Realist theory has long been dominant in IR. It views states as the principal actors in world politics.[20] Realism is a prototypical rationalist theory: states pursue security and survival as their primary goals; they interact in conditions of anarchy and thus self-help is their only dependable strategy. Under these conditions, differences in state power—and distributions of power such as the bipolar pattern of the Cold War years and the current unipolar pattern—explain most important outcomes. States may cooperate and make legal commitments, but the powerful set the terms of cooperation, and the influence of institutions depends wholly on the underlying power realities.

Institutionalist theory comes in many varieties.[21] I refer here to 'neoliberal institutionalism,' the 'most well-developed literature on international institutions.'[22] Institutionalist theory also focuses predominantly on states. However, it does so as a simplifying assumption, recognizing that states are legal fictions, or as a way to respond to realists on their own terms.[23] The theory clearly incorporates international institutions as well as states, and it can accommodate other actors as well.[24] Institutionalism is predominantly rationalist. States pursue many interests, not just power or security; goals such as prosperity, clean air and freedom from disease can only be achieved through cooperation. Scholars in this tradition identify conditions that impede beneficial cooperation, such as uncertainty and free-rider problems, and analyze how institutions can help overcome them, for example by disseminating information, assuring states that others are cooperating, and monitoring behaviour to reduce the incentive to cheat. Through mechanisms like these, institutions can affect behaviour independent of power.

Liberal theory has often been identified with normative arguments for international cooperation and law. But liberalism has in recent years been remade as a positive IR theory.[25] In this approach, as

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20 A focus on states is not an inherent feature of rationalist theory, but a substantive assumption based on observation of international politics. See Snidal, 'Rational Choice', *supra* note 18.

21 See Peter A. Hall & Rosemary C.R. Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44 Pol. Stud. 936.

22 Jon C. Pevehouse, 'Democracy from the Outside-In? International Organizations and Democratization' (2002) 56 Int'l Org. 515 at 518.

23 See e.g. Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton, NJ: Princeton University Press, 1984) at 66-7.

24 See Snidal, 'Rational Choice', *supra* note 18.

25 See e.g. Anne-Marie Slaughter, 'International Law in a World of Liberal

in theories of pluralism and public choice, the central actors are individuals, business firms, non-governmental organizations (NGOs) and other non-state actors (NSAs), who pursue their interests—or their values—primarily in domestic politics. In Andrew Moravcsik's influential formulation, the demands of private actors (rather than objective conditions) determine state preferences. States then act on the international plane to further their preferences as in realism or institutionalism.[26] By opening the 'black box' of the state, liberal scholars are able to focus, *inter alia*, on: (*a*) the effects of different domestic governance structures, especially democracy; (*b*) the actions of government agencies and officials, which increasingly cooperate below the level of 'the state;'[27] and (*c*) interactions between international and domestic politics.[28] Transnational liberals highlight NSA activities across states and in international forums.[29] The growth of international NGOs has stimulated extensive research in this area.[30]

Constructivist theory reflects different understandings.[31] In this view, actors do not have objective identities or interests. Instead, the identities, interests and many other attributes of 'states', 'institutions', 'agencies' and 'NSA's'—indeed most interesting features of the world—are 'constructed' in the form of shared subjective understandings. Material attributes may be relevant, but what those characteristics mean in practice is the product of ideas. This perspective reflects the broad theoretical paradigm known as sociological institutionalism,[32] in which

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States' (1995) 6 Eur. J. Int'l L. 503.

26 See Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51 Int'l Org. 513.

27 See Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004).

28 An example is 'second image reversed' scholarship, which examines the influence of international factors on domestic politics. See Peter A. Gourevitch, 'The Second Image Reversed: International Sources of Domestic Politics' (1978) 32 Int'l Org. 881; Pevehouse, *supra* note 22.

29 See e.g. Robert O. Keohane & Joseph Nye, *Power and Interdependence: World Politics in Transition* (Boston: Little, Brown, 1977); Thomas Risse-Kappen, ed., *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions* (New York: Cambridge University Press, 1995).

30 Valuable review articles include Thomas Risse, 'Transnational Actors and World Politics' in *Handbook of International Relations*, *supra* note 18 at 255; Richard Price, 'Transnational Civil Society and Advocacy in World Politics' (2003) 55 World Pol. 579.

31 See James Fearon & Alexander Wendt, 'Rationalism vs. Constructivism: A Skeptical View' in *Handbook on International Relations*, *supra* note 18 at 52.

32 See Hall & Taylor, *supra* note 21; Martha Finnemore, *National Interests in International Society* (Ithaca, NY: Cornell University Press, 1996) at 14-22;

social 'structures', especially ideational structures of 'meaning and social value,'[33] are prior to and more influential than actors or 'agents'.

Constructivism also reflects a strong critical orientation, as its adherents seek to problematize features that others take for granted. For example, Alexander Wendt responds to realists that the demands of anarchy are not inherent, but have been intersubjectively constructed and learned.[34] States can modify them by creating new understandings, as in the Western European 'security community.'[35] Similarly, Michael Barnett and Raymond Duvall argue that 'power' is not limited to coercive influence wielded by states and other actors, but includes logically prior social processes that constitute actors with differential capacities.[36]

Since actors are merely the products of structures, in the constructivist view, they have less freedom of action than rationalists assume.[37] In particular, actors are rarely free to pursue means-ends rationality. Instead, they behave in conformity with the identities, values and norms to which they have been socialized and which they have internalized. Rather than calculating, then, actors deliberate as to what actions would be consistent with their values and identities,[38] using a 'logic of appropriateness.' Legal and social norms are influential, but less because they regulate behaviour than because they constitute identities and preferences.[39]

Arguments based on the logic of appropriateness are static—they relate to points at which actors' identities and preferences are

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Philip M. Nichols, 'Forgotten Linkages—Historical Institutionalism and Sociological Institutionalism and Analysis of the World Trade Organization' (1998) 19 U. Penn. J. Int'l Econ. L. 461 at 482-7.

33 Finnemore, *supra* note 32 at 2.

34 See Alexander Wendt, 'Anarchy Is What States Make of It' (1992) 46 Int'l Org. 391.

35 See Emanuel Adler & Michael Barnett, eds., *Security Communities* (New York: Cambridge University Press, 1998).

36 Michael Barnett & Raymond Duvall, 'Power in International Relations' (2005) 59 Int'l Org. 39.

37 The contrast is with the 'methodological individualism' of rationalist theory. See Jeffrey T. Checkel, 'Why Comply? Social Learning and European Identity Change' (2001) 55 Int'l Org. 553.

38 See e.g. Frank Schimmelfennig, 'The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union' (2001) 55 Int'l Org. 47; Andrew Hurrell, 'International Society and the Study of Regimes: A Reflective Approach' in Robert J. Beck *et al.*, eds., *International Rules: Approaches from International Law and International Relations* (New York: Oxford University Press, 1999) 206-24.

39 John Gerard Ruggie, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge' (1998) 52 Int'l Org. 855 at 871-4.

fixed.[40] But constructivists are also interested in the dynamic construction of identities and preferences, the ways in which these attributes can be modified through social interaction. This process-oriented analysis, discussed further below, is necessarily more actor-centered. As a result, it is more compatible with rationalist explanations.

II THEORETICAL EXCLUSIVITY AND THE DEMANDS OF POLICY

IR scholarship has tended to treat these four families of theory as mutually exclusive and competitive. A common approach is to test hypotheses derived from two or more paradigms to see which provides the superior explanation of a set of data. Most IR scholars are closely identified with one approach and assert it as foundational— 'the *real* … world order.'[41] Scholars likewise tend to focus on substantive areas in which their preferred approach has traction.[42] Criticism of other approaches is common.

Mark Pollack and Gregory Shaffer make this point somewhat differently.[43] They note that the major theories' focus on different types of actors constitutes distinct 'images' of international governance: (*a*) an interstate or intergovernmental image (with realist, institutionalist and liberal versions);[44] (*b*) a transgovernmental image focusing on cooperation among national agencies below the state (liberal); and (*c*) a transnational image focusing on activities of NSAs (liberal). Again, scholars treat these as exclusive and identify with a particular image.[45]

Recent liberal scholarship has devoted more attention to

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40 See Checkel, *supra* note 37.

41 Cf. Anne-Marie Slaughter, 'The Real New World Order' (1997) 76 For. Aff. 183 [italics added].

42 For example, realists focus on security; institutionalists on trade and environment; and constructivists and many liberals on human rights. Perhaps more likely, scholars choose an approach that has traction in areas in which they are interested. Either way, scholarship tends to sort by issue area as well as approach.

43 See Pollack & Shaffer, *supra* note 4.

44 Liberal theory is intergovernmental to the extent that it views states—or heads of government—as interacting internationally to further preferences established in domestic politics. Domestic and interstate influences can also run in the other direction, as in 'second image reversed' scholarship, *supra* note 28, and can interact, as in Robert Putnam's metaphor of the 'two-level game.' See Robert D. Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (1988) 42 Int'l Org. 427 .

45 An extreme example is the largely fruitless debate over displacement of the state by civil society. See e.g. Samir Amin, *Capitalism in the Age of Globalization* (Atlantic Highlands, NJ: Zed Books, 1997); Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge: Cambridge University Press, 1996).

interactions across levels, especially between civil society and the state. But these are largely of one kind: efforts by NGOs and social movements to influence states.[46] At a given level, moreover, scholars tend to focus on a single type of actor: for example, most transnational scholars study NGOs, advocacy networks, and social movements,[47] and some study business,[48] but few combine the two. (A prominent exception is the literature on epistemic communities, knowledge-based networks of scientists and other individuals based in governments, international organizations (IOs) and private institutions.[49])

It should be obvious from the summaries above, however, that the actors and the causal or constitutive factors highlighted by each theoretical approach are merely parts of a larger, more complex whole.[50] Each theoretical paradigm sets aside – by assumption – actors and influences that are manifestly significant in international governance, yet still asserts its exclusive and foundational character. This exclusivity is problematic for policy makers, who lack the luxury of choosing theoretical sides.

Policy specialists increasingly call for multifaceted governance strategies that involve multiple, complementary actor types and strategies. For example, Wolfgang Reinicke notes the incongruence between economic globalization and the policy problems it creates and governance mechanisms based on the territorial state. He calls for a process of 'global public policy' that can decouple elements of the 'operational aspects of internal sovereignty' from the governments of

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46 This literature focuses on the tactics of civil society campaigns and conditions for their success. See Risse, 'Transnational Actors', *supra* note 30, and Price, 'Transnational Civil Society', *supra* note 30.

47 See e.g. Margaret E. Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998).

48 E.g. Virginia Haufler, *A Public Role for the Private Sector* (Washington, DC: Carnegie Endowment for International Peace, 2001); A. Claire Cutler *et al*., eds., *Private Authority and International Affairs* (Albany, NY: State University of New York Press, 1999).

49 See Peter Haas, ed., *Knowledge, Power, and International Policy Coordination* (special issue) (1992) 46 Int'l Org. Some scholars also study other governance networks that include state and non-state participants. See e.g. R.A.W. Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity, and Accountability* (Buckingham, Philadephia: Open University Press, 1997); James N. Rosenau & Ernst-Otto Czempiel, eds., *Governance Without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992); Thomas G. Weiss & Leon Gordenker, eds., *NGOs, the UN, and Global Governance* (Boulder, Colo.: Lynne Rienner, 1996).

50 An apt, though pessimistic, metaphor might be the parable of the blind men, each of whom attempted to describe an elephant while touching only one part of its body.

territorial states and assign them to the actors best able to exercise them: IOs, national government agencies, epistemic communities, NSAs or others as appropriate. [51]

More recently, in two massive studies, Inge Kaul and her colleagues at the United Nations Development Program call for similar innovations to improve the production of global public goods.[52] They identify not only a 'jurisdiction gap' between global problems and territorial states, but also a 'participation gap' between NSAs and inter-state institutions. Echoing Reinicke, Kaul and colleagues recommend 'strategic horizontal management' of global issues, especially through partnerships that bring together government, business and civil society to implement international norms.[53]

Is it intellectually feasible, then, to draw on multiple theoretical perspectives for policy formulation and institutional design—in particular, to enrich institutionalist theory with insights from other schools? Two difficulties stand out. First, especially for rationalists, the aim of theory is to simplify reality by highlighting particular variables and processes for testing. Other methodological concerns, such as the demands of formal modeling and a commitment to explanatory parsimony, are also thought to justify a narrow focus.[54] To what extent can rationalist institutionalism be enriched without destroying it? Second, there exist deep ontological or epistemological differences

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51 Wolfgang H. Reinicke, *Global Public Policy: Governing Without Government?* (Washington, DC: Brookings Institution Press, 1998) at 64-5 (incongruence of economic and political 'geography'), 85-90 (global public policy).

52 Inge Kaul *et al.*, eds., *Global Public Goods: International Cooperation in the 21st Century* (New York: Oxford University Press, 1999); Inge Kaul *et al.*, eds., *Providing Global Public Goods: Managing Globalization* (New York: Oxford University Press, 2003).

53 Kaul *et al.*, 'Introduction' in Kaul *et al.*, eds., *Global Public Goods*, *supra* note 52 at xix, xxvi (jurisdiction and participation gaps); Kaul *et al.*, 'How to Improve the Provision of Global Public Goods', in Kaul *et al.*, eds., *Providing Global Public Goods*, *supra* note 52 at 21, 50 (strategic horizontal management). Other analysts and scholars also support such arrangements, although they remain poorly understood. See e.g. Michael Edwards & Simon Zadek, 'Governing the Provision of Global Public Goods: The Role and Legitimacy of Nonstate Actors' in *Providing Global Public Goods*, *supra* note 52 at 200; Jasmin Enayati & Minu Hemmati, *Multi-Stakeholder Processes: Examples, Principles and Strategies: UNED Workshop Report* (2001), online: <http://www.unedforum.org/practice/ msp/workshop.pdf>; Jane Nelson & Simon Zadek, *Partnership Alchemy: New Social Partnerships in Europe* (Copenhagen, The Copenhagen Centre, 2000), online: The Copenhagen Centre <http://www.copenhagencentre.org/graphics/ CopenhagenCentre/publications/partnership_alchemy.pdf>; Weiss & Gordenker, *supra* note 49.

54 See Snidal, 'Rational Choice', *supra* note 18.

between at least some formulations of rationalist and constructivist theory, suggesting that cross-fertilization will be difficult.[55]

On both points, however, recent scholarship is encouraging. As to rationalist theory, Duncan Snidal emphasizes the virtues of modeling and parsimony, yet concludes that for many purposes rationalists can and should selectively modify their assumptions to take account of insights from other approaches.[56] Rationalist theory can (and often does) incorporate NSAs, altruistic and non-material goals, communication, and beliefs and other collective, subjective features, typically as constraints. It has begun to address learning, although it can still do more to explore specific mechanisms of learning so as to better explain processes of change. The most difficult challenge is incorporating the possibility of preference change highlighted by constructivists: since preferences cannot be directly observed, explanations based on preference change are difficult to test and may become tautological. Even here, however, Snidal suggests ways to concretize the problem, for example by examining the changing influence of domestic NSAs as sources of preferences.[57]

As to the inconsistencies of rationalism and constructivism, James Fearon and Alexander Wendt argue persuasively that the difficulties are overstated.[58] Both approaches treat ideas as significant (although they are more central to constructivism). Both emphasize elements of structure and of agency (although with a different balance). In the real world, actors sometimes choose by calculating the consequences of their actions, at other times by following the dictates of their identities and values. Actors sometimes observe norms because of their regulative qualities, at other times because they have internalized them. In short, if one views rationalism and constructivism as pragmatic analytical tools, rather than as contending metaphysics, they are not incompatible.

Indeed, Fearon and Wendt see rationalism and constructivism as valuable complements, which bring different aspects of social life into focus. They urge scholars (and *a fortiori* policy makers) to cross the rationalist-constructivist boundary whenever doing so seems fruitful.

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55 The principal ontological difference relates to acceptance of the primacy of agents (who may create social structures) or of structures (which constitute agents). While rationalists are generally in accord in terms of epistemology, constructivists debate the ability to know and thus the enterprise of social science. While this debate is less frequently joined between rationalists and constructivists, it puts at least some of them at odds. See Fearon & Wendt, *supra* note 31.

56 See Snidal, 'Rational Choice', *supra* note 18

57 Because of the complexities involved, these approaches require a 'soft' rationalist approach rather than formal modeling.

58 See Fearon & Wendt, *supra* note 31.

Given our limited understanding of international behaviour, they argue, it would be foolish to exclude any useful approach on *a priori* grounds: we will not 'help the planet by structuring IR as a battle of paradigms.'[59]

Other recent works exhibit a similar interest in the compatibilities among theoretical approaches. Barnett and Duval identify several conceptions of power: some are attributes of actors expressed in concrete interactions, others the result of social processes that constitute actors with particular capacities.[60] These conceptions cut across the schools of IR theory. For example, they suggest that power is not the exclusive preserve of realists, or of states: NSAs and IOs can wield 'compulsory' power, and their power can be based on normative and symbolic techniques like 'shaming' as well as material influences. Barnett and Duval conclude that there is no good reason to exclude any of these conceptions *a priori*.

Jeffrey Checkel associates himself with a particular branch of constructivist theory, but explicitly seeks to 'move away from an "either/or," "gladiator" style of analysis …to a "both/and" perspective.'[61] He observes that compliance with international norms plainly involves both instrumental choice and social learning, and proposes a synthetic approach to compliance emphasizing 'argumentative persuasion,' a process that involves actors and institutions but takes seriously the possibility of preference change through deliberation and social interaction.[62]

Frank Schimmelfennig finds that the European Union (EU) offered membership to certain Eastern European states not because of intergovernmental bargaining, but because the candidates were shown to have adopted European values and norms.[63] Schimmelfennig expressly combines arguments from constructivism and rationalism. He posits that states and other actors are often weakly socialized to prevailing norms and standards of legitimacy,[64] and so give in to material interests. In these circumstances, advocates can use 'rhetorical action'—the strategic deployment of normative arguments—to shame

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59 *Ibid*. at 52.

60 See Barnett & Duval, *supra* note 36.

61 Checkel, *supra* note 37 at 581.

62 Other influential works espousing versions of 'argumentative persuasion' include Neta C. Crawford, *Argument and Change in World Politics: Ethics, Decolonization, and Humanitarian Intervention* (New York: Cambridge University Press, 2002); Thomas Risse, '"Let's Argue!": Communicative Action in World Politics' (2000) 54 Int'l Org. 1.

63 Schimmelfennig, *supra* note 38.

64 On conceptions of legitimacy, see Morris Zelditch, Jr., 'Theories of Legitimacy' in John T. Jost & Brenda Major, eds.,*The Psychology of Legitimacy* (Cambridge: Cambridge University Press, 2001).

them into compliance. Checkel and Schimmelfennig adopt different views of the role of argument and rhetoric, one more deliberative and social (closer to constructivism), the other more strategic (closer to rationalism). But both figure in the operations of international institutions.

Wayne Sandholz and Mark Gray, analyzing the impact of international integration on domestic corruption, argue that actors are motivated both by the desire to enhance their well-being and by the desire to act in appropriate or justifiable ways.[65] Economic and normative rationality are thus complementary: individuals routinely reason about utility and norms simultaneously, and consider both in making choices, although the interactions between them remain poorly understood.

In sum, IR scholars have begun to move decisively beyond 'paradigm war.' While there remains much to be done to fully clarify the interactions among theoretical approaches, this development opens dramatic possibilities for architects of global governance.

III COMPLEX INSTITUTIONS IN INTERNATIONAL GOVERNANCE

Complex institutional arrangements are now prominent in global governance. These involve a range of actors, from IOs to NSAs, often in combination; a range of actor motivations, from the material to the normative; and a range of causal and constitutive governance mechanisms, from material incentives to normative persuasion. It is difficult for narrowly defined, exclusive analytical approaches even to describe these arrangements in a theoretically informed way, let alone to explain and predict their operations or to assess and deploy them in response to social problems. I do not attempt a systematic survey of institutional innovations here, but present several significant examples. These provide a strong if impressionistic empirical rationale for theoretical bridge building.

One dramatic recent example is the international response to the Indian Ocean tsunami of December 2004. An early warning system, operated through the Intergovernmental Oceanographic Commission of UNESCO, had been in place in the Pacific for 40 years, but none was operative in the Indian Ocean. A few treaties aim to facilitate disaster relief, although there remains a 'yawning gap' in the law of this field.[66] Still, IOs helped lead the international response: the United Nations (UN) coordinated relief efforts after the first few days, and specialized

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[65] Wayne Sandholz & Mark M. Gray, 'International Integration and National Corruption' (2003) 57 Int'l Org. 761.

[66] See David P. Fidler, 'ASIL Insight: The Indian Ocean Tsunami and International Law' (January 2005), online: American Society of International Law <http://www.asil.org/insights.htm#2005>.

agencies including the World Food Program and World Health Organization (WHO) began to work in their areas of competence.[67]

State agencies also played major roles. Military units provided logistic support. Foreign assistance programs like the US Agency for International Development contributed financial resources and conducted relief operations.[68] In addition, dozens of humanitarian NGOs helped supply food, water, medical care and other human needs; many state agencies and IOs channelled their contributions through NGOs.[69] Individuals, firms and other NSAs provided extraordinary donations of money, goods and services.[70]

Relief activity is typically rooted in humanitarian or altruistic values and identities, although self-interest certainly plays a role. What is more, while relief efforts concentrate on mundane operational tasks, they are suffused with norms and values, relating to the priorities of human needs, equality and human rights. Participants often see promoting those norms as part of their role.

Many international health programs likewise combine all three of Pollack and Shaffer's images of governance, and most are suffused with norms and values as well as interests. The Global Fund to Fight AIDS, Tuberculosis and Malaria was created in 2001, after the UN

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67 For information on UN activities, see online: <http://www.un.org/apps/news/infocusRel.asp?infocusID=102&Body=tsunami&Body1>.

68 For information on US Agency for International Development (USAID) activities, see online: <http://www.usaid.gov/locations/asia_near_east/tsunami/>.

69 For example, the USAID worked closely with local and international NGOs in the course of its relief efforts. Its periodic 'fact sheets' reporting on these efforts summarize the amounts of USAID assistance channeled through 'implementing partners' such as CARE, Church World Service, Mercy Corps and other NGOs. These reports also solicited public donations to 'humanitarian organizations that are conducting relief operations', and included internet links to such organizations. See e.g. USAID, 'Indian Ocean—Earthquake and Tsunamis' Fact Sheet #30 (2 February 2005), online: <http://www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/countries/indian_ocean/fy2005/indianocean_et_fs30_02-02-2005.pdf>. For a discussion by the current Administrator of USAID of NGO interactions with state agencies and IOs in humanitarian emergencies, see Andrew S. Natsios, 'NGOs and the United Nations System in Complex Humanitarian Emergencies: Conflict or Cooperation' in Weiss & Gordenker, *NGOs, the UN and Global Governance*, *supra* note 49 at 67.

70 To cite just one example, the United States Fund for UNICEF notes that it received 'the greatest outpouring of support in the history' of the Fund for the Agency's work in response to the tsunami. See online: United States Fund for UNICEF <http://www.unicefusa.org/site/pp.asp?c=duLRI8O0H&b=277164>.

General Assembly endorsed a proposal from Secretary General Kofi Annan at its Special Session on HIV/AIDS.[71] The Fund is a financial mechanism providing grants for national programs to combat the three most lethal communicable diseases. It is structured as a partnership, with a Board that includes representatives of donor and recipient governments, IOs such as WHO, the World Bank, and the Joint UN Program on HIV/AIDS (UNAIDS), Northern and Southern NGOs, philanthropic foundations, businesses, and persons living with the diseases. The Fund derives most of its resources from government contributions, but also receives significant private donations.

The Fund promotes parallel forms of collaboration in recipient countries. Country Coordinating Mechanisms (CCMs) submit proposals and supervise grant implementation. CCMs typically include representatives of the health professions, NGOs and the private sector as well as government; representatives of development IOs sometimes participate. CCMs nominate 'principal recipients' to carry out Fund-supported programs, and these may be public or private entities. Business firms further participate in 'co-investment' schemes, expanding prevention and treatment for employees and their dependents while Fund-supported programs assist surrounding communities.[72]

In sum, in the Global Fund, states, IOs, government agencies and NSAs do not function as distinct categories: all four actor groups support the Fund, govern it, and carry out its programs. Moreover, while the Fund is a technical instrument, it is instinct with norms and values: those of the actors that created and govern it and those implicit in the programs and institutional structures it supports. These include norms of community and participation as well as humanitarian and public health values. The Fund advances these norms through the 'consequences' of its grants and conveys their 'appropriateness' through its structures, guidelines and decisions, as well as through argument and persuasion.

The world's largest public health program, the Global Polio Eradication Initiative, is also spearheaded by organizations from all three levels of governance: WHO[73] and UNICEF;[74] the US Centers for Disease Control and Prevention, which provide technical expertise, staff and financial support;[75] and Rotary International, a voluntary service

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71 See online: The Global Fund to Fight AIDS, Tuberculosis and Malaria <www.theglobalfund.org>.

72 Co-investment was negotiated among the Fund, the ILO, and the Global Business Coalition on HIV/AIDS, *ibid*.

73 See online: Global Polio Eradication Initiative <http://www.polioeradication.org>.

74 See online: UNICEF <http://www.unicef.org/immunization/index_polio.html>.

75 See online: Centers for Disease Control and Prevention

NGO that is donating hundreds of millions of dollars, supplying volunteers and advocating for public and private support.[76] Similarly, early participants in the Medicines for Malaria Venture (MMV)[77]—created to speed development of antimalarial drugs—included the WHO[78] and the World Bank, the Swiss Agency for Development and Cooperation, and the International Federation of Pharmaceutical Manufacturers Associations and Rockefeller Foundation. MMV likewise receives financial support from IOs, governments and NSAs, including the Bill and Melinda Gates Foundation and several corporations.[79]

Complex institutional forms also figure in many areas of international rule making. One example is standard setting for business on issues such as labour rights and environmental protection.[80] In addition to traditional legal methods such as treaties and legislation, business standards are promulgated and supervised by IOs such as the OECD and UN, business firms and industry associations, NGOs and, most interestingly, multi-stakeholder groups that bring together firms and NGOs, sometimes with government or IO participation. Most of these bodies lack authority to issue legally binding rules, promulgating instead what my co-authors and I term 'privatized soft law.'[81] Like more diffuse norms of corporate social responsibility, these standards combine ethical considerations (appropriateness) with the prospect of commercial

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<http://www.cdc.gov/programs/global04.htm>.

76 See online: Rotary International: Polio Plus <http://www.rotary.org/foundation/polioplus>. Rotary estimates that by the conclusion of the Initiative it will have contributed some $600 million.

77 See online: Medicines for Malaria Venture <http://www.mmv.org>.

78 See online: Roll Back Malaria <http://rbm.who.int>. The WHO Roll Back Malaria program is itself organized around partnerships.

79 The Gates Foundation is a major contributor to many public health programs, and is sometimes accorded a governance role on a par with public bodies. For example, it has a permanent seat on the Board of the Global Alliance for Vaccines and Immunization (GAVI), along with four IOs. Online: Global Alliance for Vaccines & Immunization <http://www.vaccinealliance.org>.

80 This discussion draws on a collaborative research project with Duncan Snidal and Sonya Sceats. See Kenneth W. Abbott & Duncan Snidal, 'The International Standards Process: Setting and Applying Global Business Norms' in Peter Nobel, ed., *International Standards and the Law* (Berne: Staempfli, 2005); and Kenneth W. Abbott, Sonya Sceats & Duncan Snidal, 'The Governance Triangle: States, Firms, NGOs and Global Business Standards' (Paper prepared for Roundtable on Interdisciplinary Approaches to International Law, Vanderbilt University Law School, November 12-13, 2004) [unpublished].

81 Abbott, Sceats & Snidal, *supra* note 80 at note 16.

advantage (consequences).[82]

The UN Global Compact (UNGC) enlists business firms and other organizations to implement voluntarily treaty norms originally drafted for states.[83] The Office of the Secretary-General and the UN agencies responsible for the relevant treaties govern the UNGC, with input from a multi-stakeholder Advisory Council. Participating firms are expected to commit to UNGC principles, make them a part of their corporate strategy and culture, report publicly on their implementation, and advocate them to others. The UNGC eschews any suggestion of coercive enforcement, instead providing opportunities for firms to share experiences, engage in dialogue with NGOs, and form local partnerships. In short, it relies mainly on the logic of appropriateness.[84] Yet Barnett and Duvall see the UNGC as exercising three types of power that cross the boundaries of standard theories: compulsory power as NGOs 'shame' participating firms, institutional power as the UNGC empowers NGOs to comment on firm performance, and productive power as participation constitutes a new kind of actor: the socially responsible corporation.[85]

The Global Reporting Initiative (GRI) grew out of the Council for Environmentally Responsible Economies (CERES),[86] a group of NGOs and socially responsible investors that issued voluntary standards on environmental practices and public reporting following the Exxon Valdez oil spill. CERES launched GRI, in cooperation with the UN Environment Program, to strengthen its reporting system.[87] GRI promulgates guidelines and indicators with which firms can report on their social, economic and environmental impacts. (The UNGC urges participants to follow GRI guidelines.) Its Board includes individuals from business, labour, NGOs, government, and the UN Environment Program. A Stakeholder Council selects and advises the Board. GRI receives financial support from participating firms, foundations, project fees and other sources.

Complex institutions like these have arisen for several reasons.

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82 See Abbott & Snidal, 'International Standards Process', *supra* note 80 at 7. For a discussion of the 'business case for CSR', see online: Business for Social Responsibility <http://www.bsr.org/Meta/About/index.cfm>.

83 See online: UN Global Compact <http://www.unglobalcompact.org>.

84 This befits an institution largely designed by a constructivist scholar, John Ruggie, while serving as Assistant Secretary General and strategic advisor to Kofi Annan. See John G. Ruggie, 'The Theory and Practice of Learning Networks: Corporate Social Responsibility and the Global Compact' (2002) 5 J. Corp. Citizenship 27.

85 Barnett & Duvall, *supra* note 36.

86 See online: Ceres <http://www.ceres.org>.

87 GRI became independent in 2002. See online: Global Reporting Initiative <http://www.globalreporting.org>.

First, traditional approaches have proven insufficient: in addition to the 'jurisdiction gap' between states and global problems, states exhibit wide disparities in capacity and legitimacy. Furthermore the costs of negotiating and implementing treaties are high, and many IOs remain underfunded and weak. Second, many global issues have become very broadly defined: examples include 'sustainable development,' 'human development' and even 'health,' which the WHO defines as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.'[88] Institutions that hope to address such issues must combine traditionally distinct disciplines. Third, as already noted, issue areas like disaster relief, health, CSR and development are saturated with norms and values. Advocates demand responses that are legitimate and fair, reflect prevailing norms, and minimize the 'participation gap'. I discuss the implications of these points below.

IV TOWARD A RICHER INSTITUTIONALISM

In the abstract, institutionalism would seem to provide a natural framework for lawyers and other policy makers seeking innovative responses to global problems. After all, the whole panoply of cooperative arrangements—including formal IOs[89] like the WHO, transgovernmental forums like the Basel Committee on Banking Supervision,[90] epistemic communities, and multi-stakeholder schemes like the Global Fund—are in social science terms all 'institutions'. So too are legal rules, 'soft law' and other norms.[91]

As a theory, however, institutionalism has painted itself—and been painted by critics—into a corner. It has become associated solely with interactions among states, and so is condemned for ignoring the NSAs, transgovernmental forums and multi-stakeholder arrangements so prominent on the world stage. Further, it has become associated solely with a rationalist-functionalist account of behaviour, and so is condemned for ignoring the norms and values that drive many international actions and the subjective mechanisms of influence

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88 *Constitution of the World Health Organization*, preamble, online: World Health Organization <http://w3.whosea.org/EN/Section898/Section1441.htm>.

89 For a discussion of the functions of such institutions, see Kenneth W. Abbott & Duncan Snidal, 'Why States Act Through Formal International Organizations' (1998) 42 J. Confl. Resolution 3.

90 See online: Bank for International Settlements <http://www.bis.org/bcbs>.

91 Principles, norms and rules constitute three of the four elements in the canonical definition of 'regime' in institutionalist theory. See Stephen D. Krasner, 'Regimes and the Limits of Realism: Regimes as Autonomous Variables' in Stephen D. Krasner, ed., *International Regimes* (Ithaca, NY: Cornell University Press, 1983).

embodied in institutions like the UNGC.

To cite just a few examples of this criticism, Oona Hathaway and Harold Koh observe that to legal scholars in the 'fairness' and 'legal process' traditions, as to constructivists, institutionalism overlooks 'the persuasive power of legitimate legal obligations' and the influence of ideas and norms.[92] Martha Finnemore and Stephen Toope argue that an institutionalist conception of legalization cannot take account of 'the practices, beliefs and traditions of societies,' 'the interaction of overlapping state and nonstate normative systems,' 'legitimacy' or 'normativity.'[93] Andrew Hurrell argues that institutionalism ignores significant causal factors not based on interests, such as a sense of community and a perception of injustice.[94] And Richard Shell argues that organizations following an institutionalist 'regime management model' face problems of 'long-range stability, distributive fairness, and procedural justice.'[95]

International politics are clearly richer than the arid realm these (somewhat exaggerated) accounts identify with institutionalism. Duncan Snidal and I argue elsewhere that this is notably true of international law.[96] Law (like many other norms and institutions) is sought by multiple actors: states, to be sure, but also government agencies, IOs and NSAs of widely varying character, including business firms, labour unions, NGOs, epistemic communities, ethnic groups, churches and so on. These actors are motivated not only by self-interest, but also by values and principled beliefs. They pursue law through normative persuasion, rational argument and bargaining, depending on the audiences they address. They view law both as an instantiation of values and norms and as an instrumental tool. And law affects behaviour both by modifying 'consequences' or incentives (such as positive and negative sanctions, which depend on power, and the concrete effects of domestic and international reputation) and by invoking considerations of 'appropriateness' (such as persuasion, socialization, law-abiding identity, the subjective effects of reputation, and internalization through legal processes).[97]

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92 Hathaway & Koh, *supra* note 6 at 111.

93 Martha Finnemore & Stephen J. Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics' (2001) 55 Int'l Org. 743 at 749, 750.

94 See Hurrell, 'International Society', *supra* note 38, at 210-15, 224.

95 Richard Shell, 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization' (1995) 44 Duke L.J. 829 at 907.

96 See Abbott & Snidal, 'Values and Interests', *supra* note 18; 'Hard and Soft Law in International Governance', *supra* note 4.

97 On internalization through legal process, see Harold Hongju Koh, 'Why Do Nations Obey?' (1997) 106 Yale L.J. 2599; 'Bringing International Law Home' (1998) 35 Houston L. Rev. 623. For a discussion of the role of soft law, and the 'normative intermediaries' that invoke it, in avoiding ethnic

What is needed, then, is a richer institutionalism: one that brings to bear liberal insights into the role of NSAs, government agencies and domestic politics, constructivist insights into the role of values, norms and identities, and processes such as shaming, persuasion and socialization, and realist (and other)[98] insights into the role of power. As noted above, in many scholarly contexts concern for parsimony or the demands of formal modeling will still justify the use of spare, discrete theories. In other scholarly contexts and in the realm of policy, however, a more expansive approach is desirable.

An enriched institutionalism should remain fundamentally actor-centered and purposive in orientation. The institutions of most concern to international lawyers and policy makers are purposive creations,[99] although they frequently have unanticipated effects. Some are the products of conscious, centralized design, as with the Global Fund and UNGC, while others are the result of decentralized but purposive assertions of authority by actors intent on advancing their interests and values by any means available, as with the disaster relief regime. Managing such arrangements and attempting to improve them likewise require purposive action.

Which elements of theory could be incorporated into a purposive institutionalist framework without doing violence either to itself or to the original approaches? A precise answer is impossible, as the relevant research remains at an early stage. The difficulties are clearly greatest in the case of constructivism. As an initial cut at this problem, consider two classes of constructivist insights that can be visualized as occupying the ends of a spectrum: one class would be relatively easy to encompass in an expanded institutionalism, the other much more difficult (as the metaphor of the spectrum suggests, other insights might fall in between).

As to the first, constructivist scholars are devoting increased attention to actor-centered processes of norm creation and diffusion that unfold before norms have been fully internalized. For example, Martha Finnemore and Kathryn Sikkink posit a 'life cycle' of norms, which begins as norm entrepreneurs, typically NSAs, use techniques of persuasion to enlist states as norm supporters. Those 'early adopter' states help enlist others until a tipping point is reached, and eventually the norms are widely internalized. In describing this process, Finnemore

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conflict, see Steven R. Ratner, 'Does International Law Matter in Preventing Ethnic Conflict?' (2000) 32 N.Y.U.J. Int'l L. & Pol. 591.

98 See Barnett & Duvall, *supra* note 36.

99 Where this is not the case, as arguably with the *opinio juris* component of customary IL, other approaches must be brought to bear.

and Sikkink even speak of 'strategic' social construction.[100] Similar strategies figure in Schimmelfennig's analysis of rhetorical action within the EU and Barnett and Duvall's interpretation of the powers of the UNGC.

Processes like these may involve persuasion, socialization and internalization, constituting actors with new understandings of their identities and interests. Yet they may also entail coercion in the form of shaming and political pressure, causing some actors to modify their behaviour for purely instrumental reasons. Institutions such as the EU, the UN and human rights bodies are prominent platforms for advocates and forums for persuasion in these strategies. What is more, international institutions themselves actively rely on these strategies, as the example of the UNGC suggests. Whether one likes it or not,[101] the insights of strategic social construction could readily be incorporated into an expanded institutionalist framework, and would provide a far richer understanding of the activities of institutions.

As to the second class of constructivist insights, consider John Ruggie's formulation of the 'constructivist challenge' to rationalism.[102] Ruggie notes that constructivism is concerned with questions such as how states acquired their identity in the international system and how the identities of particular states change due to historical events. He urges consideration of constitutive factors such as 'world views,' 'civilizational constructs, cultural factors' and rules defining broad social practices such as state systems and international orders.[103] Similarly, Finnemore urges attention to the full 'international social structure of which [states] are a part,' including cultural practices, philosophical principles and social values.[104]

Deep social factors like these operate over periods of historical time longer than most institutions, and certainly most policy makers, can readily address. In addition, many of these concepts are extremely broad and difficult to operationalize. While undoubtedly significant, influences of this sort are less relevant to the institutionalist project, and difficult to accommodate in an institutionalist framework. Indeed, it would seem difficult for any theory to address them systematically.

In creating an enhanced institutionalism, one lesson of

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100 See Martha Finnemore & Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 Int'l Org. 887 at 910-11.

101 Checkel, *supra* note 37 at 557-9, criticizes analyses like that of Finnemore and Sikkink for their consistency with 'thin rationalism', arguing that constructivism provides little independent value.

102 *Supra* note 39.

103 *Ibid*. at 863-4, 866-7, 871.

104 Martha Finnemore, *National Interests in International Society* (Ithaca, NY: Cornell University Press, 1996) at 2.

constructivism might be that (at least some) norms, values, identities and understandings—and changes in those elements—are important parts of the structural context within which actors pursue their goals. The context of cooperation, in other words, extends beyond the standard institutionalist focus on patterns of interests. Broad social understandings may be relevant: for example, international society is now far more amenable to NSA participation than in the past. Specific norms may be even more relevant: Finnemore describes how poverty alleviation came to dominate development policy,[105] while Snidal and I have described how corruption came to be seen as a barrier to development.[106] For advocates in these issue areas, prior norms were part of the problem, while new understandings made institutional action possible. Influential norms and understandings can be introduced into the context of cooperation with only a modest loss of parsimony.

A second lesson might be that actors often rely on subjective and normative strategies in interactions related to institutions. Constructivist scholars such as Finnemore and Sikkink recognize that norm entrepreneurs engage in purposive activity to spread or instantiate values and to encourage compliance with norms; the techniques of strategic social construction are subjective.[107] To influence audiences responsive to ethical considerations, they select and frame issues to resonate with prevailing norms, appeal to accepted moral principles, and engage in other forms of normative persuasion. (Self-interested actors use similar strategies to appeal to these groups.) Once norms are in place, they use techniques like shaming to encourage implementation. Advocates may rely on these strategies because of their normative commitment or because of their comparative advantage in using them. To influence self-interested actors, of course, norm entrepreneurs must deal with incentives. Even here, however, their politics may be distinctive.[108]

A third lesson might be that international institutions themselves embody subjective and normative meaning, and rely on subjective and normative strategies in their operations. For example, the architects of the UNGC were careful to select highly legitimate norms. They extracted the UNGC principles from instruments that are visible and widely respected and were adopted in broadly representative processes, including the Universal Declaration of Human Rights and

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105 *Ibid*. at 89-127.

106 Abbott & Snidal, 'Values and Interests', *supra* note 18 at S158-S160.

107 See e.g. Finnemore, *National Interests*, *supra* note 104; Finnemore & Sikkink, 'International Norm Dynamics', *supra* note 100; Keck & Sikkink, *supra* note 47; Audie Klotz, *Norms in International Relations: The Struggle Against Apartheid* (Ithaca, NY: Cornell University Press, 1995).

108 See Abbott & Snidal, 'Values and Interests', *supra* note 18 at S147-S150.

the ILO Declaration on Fundamental Principles and Rights at Work (itself drawn from widely ratified ILO conventions). The institution clearly applied the lessons of legitimacy theorists like Thomas Franck.[109]

The UNGC was also designed to utilize subjective techniques to diffuse its principles among firms: 'it promotes public commitments to international norms; internalization in corporate policies, culture and daily business operations; socialization through dialogue with peers and stakeholders; and learning through exchanges of experiences, partnerships and networks.'[110] The governance structures of the Global Fund and its Country Coordinating Mechanisms likewise instantiate norms of participation and socialize actors to them. As Finnemore argues, international institutions can 'teach' norms to states and other actors, even instructing them in what they should want; some are 'active teachers with well-defined lesson plans for their pupils.'[111] Jon Pevehouse similarly observes that regional organizations promote democratic transitions through processes of socialization as well as classic institutionalist techniques like tying the hands of national leaders.[112]

Institutionalism can also learn important lessons from liberal theory, and with fewer intellectual difficulties. These lessons can be applied at the same three stages of analysis: the context of cooperation, the strategies of actors, and the techniques of institutions. [113] However, Moravcsik's widely cited formulation of liberalism may not be the most fruitful for this purpose, as it confines the activities of NSAs to domestic politics.[114] Approaches that also address transnational activities may be more helpful.

A first lesson of liberal theory might be that NSAs (like values and norms) are integral parts of the context of cooperation. NSAs are often the moving force behind international cooperation.[115] Individuals can be successful norm entrepreneurs: examples include Henry Dunant

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109 See Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990).

110 Abbott, Sceats & Snidal, *supra* note 80 at n. 58.

111 Finnemore, *National Interests*, *supra* note 104 at 12.

112 Pevehouse, *supra* note 22.

113 Space precludes full consideration of incorporating realist insights; however, they too would apply at the same three points. For example, power relationships are important elements of the context of cooperation; powerful states use various strategies, some more subtle than others, to shape institutions; and the rules and governance of institutions are carefully designed to accommodate powerful states, take advantage of their power and constrain them.

114 See Moravcsik, 'Taking Preferences Seriously', *supra* note 26.

115 NSAs also oppose many institutional developments.

for the laws of war and the Red Cross,[116] and Rafael Lemkin for the prohibition of genocide.[117] NGOs spearhead developments in human rights and many other issue areas. Epistemic communities define environmental problems, place them on political agendas and propose solutions. Business groups champion rules on trade, intellectual property and other economic activities. The existence, organization, resources, access and public appeal of these groups strongly influence cooperation. As Barnett and Duvall suggest, these actors are all invested with power. Domestic politics and governance are also relevant. Democracy, regulatory and judicial independence, rules regarding international agreements, rights afforded civil society and similar internal attributes of states help to determine the success and form of international cooperation.

A second lesson might be that NSAs use a wide range of political strategies to promote (and resist) international cooperation; these often involve or complement international institutions. I earlier discussed subjective strategies employed at the formation and implementation stages, systematized in formulations like Finnemore and Sikkink's life cycle of norms. Scholars in this tradition emphasize the importance of organizational platforms for advocates. NSAs often use IOs for this purpose, even when their normal agendas are more limited. The governance structures and norms of IOs, including access for NSAs and sources of influence on states, influence the nature and success of such strategies.[118]

Of special interest from a liberal perspective are strategies that link international and domestic politics. For example, Margaret Keck and Kathryn Sikkink posit a 'boomerang model,' in which local NSAs unable to vindicate rights at home first engage a transnational NSA coalition. The coalition publicizes the offending state's behaviour and promotes action by other states and IOs with leverage. Those actors then pressure the offending state's government.[119] Thomas Risse and Sikkink expand this model to explore dynamic domestic-transnational-international linkages.[120]

A final lesson might be that NSAs play significant roles in international institutions, as participants in those institutions, as targets

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116 See Finnemore, *National Interests*, *supra* note 104 at 73-82.

117 See Keck & Sikkink, *supra* note 47 at 81-2, 87-8.

118 See Finnemore & Sikkink, *supra* note 100 at 899-901.

119 See Keck & Sikkink, *supra* note 47 at 12-13.

120 Thomas Risse & Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse *et al.*, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999) 1 at 17-35.

of institutional strategies, both normative and operational (as in the Global Fund), and as authors of parallel and complementary strategies (that is, as international institutions in their own right). The subject of NSA participation in international regimes, in particular, has already given rise to an enormous literature. Some of this literature is positive, much of it is normative.[121]

One can think about both the positive and normative aspects of NSA participation in terms of the earlier discussion of the emergence of complex institutional forms. I suggested three main reasons for this development: (*1*) the 'jurisdiction gap' and other deficiencies of state and inter-state action; (*2*) the broad interdisciplinary definition of many international issues; and (*3*) the 'participation gap' and other demands for legitimacy, fairness and consistency with prevailing norms. I would argue that NSA participation is expanding to provide the competencies needed to address these problems.[122]

'Competencies' has a decidedly rationalist tone, but I mean it to include normative attributes. To be sure, material and instrumental competencies are essential in areas like disaster relief, health and even standard setting: these include expertise, organizational authority, administrative skill and resources. But normative or value-based traits are also important. Normative competencies include commitment to relevant norms (both perceived commitment, as a basis for legitimacy and trust, and actual commitment, to sustain participation), and familiarity with the subtleties and interplay of norms, independence and powers of persuasion. Obviously states, IOs, NGOs, business firms, and other NSAs possess these attributes in varying degrees. Actors with particular competencies will seek to use them to deal with problems, while actors engaged in institutional design will seek to incorporate them through expanded participation.

CONCLUSION

This article has not spelled out precisely what a more expansive institutionalist theory would look like, let alone actually created one. I have merely tried to indicate why such an approach would be valuable and what some of its elements might be. Perhaps most important, I have tried to indicate that developing such an approach is a practicable goal. The theoretical exclusivity and competitiveness that has characterized IR and IR-IL scholarship would suggest that such an enterprise is futile, and in many contexts scholars will indeed be best served by exploiting distinctions among spare theoretical models. Yet in other contexts,

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121 See e.g. Shell, *supra* note 95 (arguing for a 'trade stakeholders model' of WTO governance).

122 I have developed the concept of actor competencies in collaboration with Sceats and Snidal. See Abbott, Sceats & Snidal, *supra* note 80 (discussing the competencies needed in business standards institutions).

notably policy-making and institutional design, these conclusions do not hold. In those settings, theoretical exclusivity should not be the exclusive way to proceed.

The Relative Autonomy of International Law or The Forgotten Politics of Interdisciplinarity

JAN KLABBERS*

I

It goes without saying (but probably needs to be said) that the Foreign Office lawyer preparing a draft declaration on, say, the right to development, should have some understanding of development theory: she would be well-advised to know that there are various theories, not easily reconcilable with each other, on how development is best to be achieved. By the same token, it goes without saying (but might need to be said) that the practicing trade lawyer who does not have a grasp of the basic economics of international trade might not be best-placed to advise her clients. Likewise, it goes without saying (but perhaps needs to be said) that the practitioner at a Ministry of Defence contemplating whether or not to treat prisoners of war decently would enhance the quality of her decisions if she were to have an understanding of such things as game theory and reciprocity.

It is, in other words, reasonably self-evident that practitioners, in order to do their jobs properly, ought to have a basic understanding of the various academic disciplines and sub-disciplines surrounding their own discipline proper, be it general international law, trade law, humanitarian law, or any other branch of law. It can also safely be postulated that the same applies to academics: the academic human rights lawyer can, no doubt, learn a thing or two from such disciplines as political theory or social anthropology; the academic trade lawyer, likewise, can learn a thing or two from economics; the environmental law professor would naturally benefit from familiarity with environmental studies. In short, to be broad-minded will generally be an asset, both in legal practice and in academia.[1]

II

It is a different thing, however, to consider more full-fledged interdisciplinary projects, be it law and economics, law and history, law and ethics, or the relationship between international law and

* Professor of International Organizations Law, University of Helsinki. This article is partly the result of many years of discussions with my colleagues at the University of Helsinki, in particular Martti Koskenniemi and Jarna Petman. Still, the usual disclaimer applies.

1 It is no coincidence (on the anecdotal level) that all four members of the close-knit circle of doctoral students of which I was a member in the early 1990s in Amsterdam had completed a master's degree in a discipline additional to law: one holds a degree in economics, one in philology, and one in philosophy, while my own background is in political science.

international relations,[2] so often advocated yet so rarely productively engaged in.[3] This is different for a variety of reasons, chief among them perhaps the circumstance that academics are supposed to specialize in, well, specialist knowledge, insight, and understanding. The academic international lawyer, after all, is paid to teach and research international law; she is not paid to teach and research international relations, or contemporary history, or Economics 101. And while the best international lawyers will have a working knowledge of neighbouring disciplines including international relations theory, they should guard against the risk of doing merely history, or economics, or ethics, or international relations, under a thin veneer of international law.

But there are more fundamental considerations that at least should cast some doubt on the received wisdom of advocating interdisciplinarity, both in general and with particular reference to international relations scholarship. In what follows, I will discuss a few of these, without claiming to be exhaustive, comprehensive, or even representative, let alone nuanced. My main point will be that somehow, appeals for interdisciplinarity, however laudable in the abstract, carry a serious risk of reproducing, or even strengthening, existing power configurations. For that reason alone, international lawyers should jealously guard the relative autonomy of their discipline. That is not to say that interdisciplinarity is flawed at the root; but it is to say that international lawyers should not immediately heed to the siren song of interdisciplinarity, for the simple reason that it will not always and automatically enable them to come to a better understanding of international law.

III

Calls for interdisciplinarity between disciplines A and B usually assume

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[2] I will deliberately refrain from using the capitals IR, if only to prevent the unwarranted reification of what is, in reality, a rather incoherent, heterogenous body of scholarship. It will be clear that I will not address international political events, so there can be no confusion between the everyday use of international relations (as in Denmark engages in international relations with quite a few other states) and its more academic use.

[3] The usual citations on this point are not products of interdisciplinarity as such, but rather appeals to conduct such research. See e.g. Anne-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 Am. J. Int'l L. 205; Kenneth W. Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers' (1989) 14 Yale J. Int'l L. 335. An overview of interdisciplinary research, broadly defined, is provided by Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92 Am. J. Int'l L. 367.

that both A and B (or at least one of them) are fully knowable and, what is more, rather homogeneous. To take an example: the lawyer calling for a more seriously 'historical' approach[4] often presumes that historians are unanimous as to the tools and methods of their trade; yet nothing could be further from the truth. Like lawyers, historians too have their debates on how best to conduct research, on whether it is possible to derive general conclusions from particular instances, and in particular on whether it is possible (let alone plausible) to speak of historical laws.[5] Interdisciplinarity often, in other words, presumes a flat, one-dimensional vision of the discipline-to-relate-with, yet such a one-dimensional view will rarely, if ever, be persuasive. And if such a flattened view is too blunt, then the question arises which particular historical method one ought to be interested in; and that, in turn, would mean that the lawyer would immerse herself into something of a *Historikerstreit* (I know, the term is more loaded than its use here suggests) which it might be difficult to get out of, and which will inevitably distract the lawyer from whatever it was that she was trying to achieve.[6]

This applies to all attempts at interdisciplinarity: law and history, law and economics, law and whatever. And it also applies to taking international relations on board. Doing so is bound to remain fruitless unless one opts for a specific version of international relations thought: the Realist? Idealist? Constructivist? Critical Realist? Neoliberal Institutionalist? Republican Institutionalist? Functionalist? Neo-functionalist?[7] In fact, there are about as many versions of interna-

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4 The relationship between history and international law is increasingly being scrutinized, both in the form of monographs and in the form of academic conferences. An example of the latter, in which I was fortunate enough to participate, was the conference on Time, History, and International Law, organized by Matthew Craven and Malgosia Fitzmaurice at the University of London on 1 October 2004. Small bits and pieces of the discussion are reflected in this article.

5 This is precisely, of course, why Foucault could have such an impact, proposing an entirely new way of conducting historical research. See Michel Foucault, *The Archaeology of Knowledge*, trans. by Sheridan Smith (London: Routledge Classics, 2002). A brief but useful overview of the various schools of thought is Keith Jenkins, *Re-thinking History* (London: Routledge, 2003).

6 Incidentally, the insight that historians too have their theoretical and methodological battles dates back to at least the late nineteenth century. For a brief discussion, see Paul Franco, *Michael Oakeshott: An Introduction* (New Haven: Yale University Press, 2004) at 27-29. It was also at the heart of Pieter Geyl's biting collection of essays, mostly written in the 1940s and 1950s, *Debates with Historians*, where he takes issue in particular with the broad and sweeping views of the likes of Toynbee (London: Fontana, 1962).

7 His (understandable) reluctance to make a choice among these is, to me, one of the reasons why Michael Byers' acclaimed study *Custom, Power and the*

tional relations scholarship as there are international relations scholars and, as will be discussed below, this is quite problematic.

That said, often calls for interdisciplinarity are premised on singling out a more or less realist version of international relations scholarship as the ideal companion, probably on the basis of the unarticulated thought that at least the realists know how the world works, how power politics operate, and how statesmen think.[8] If the law (or rather, the lawyer) has the aspiration to be taken seriously, it (or she) should aim to gain a foothold in this realist mode of thinking. Law will only be taken seriously if statesmen take it seriously, and they won't do so unless the law is made attractive to them, as something they can use as they see fit.[9] The culmination point hereof is perhaps Joel Trachtman's finding that the binding force of international law should simply be made subject to negotiations: law is about as binding as states can agree upon.[10]

Thus regarded, pleas for interdisciplinarity are often pleas for a single, and rather limited, apparition of interdisciplinarity, and therewith become (however unwittingly perhaps) the subjects of power politics themselves, with law being put to the service of those who field the strongest negotiators. And those are usually, of course, the strongest states.

Power of Rules: International Relations and Customary International Law (Cambridge: Cambridge University Press, 1999) is less than fully satisfactory. See in more detail my review of Byers in (1999) 10 Finnish Yearbook of International Law 451.

8 As David Kennedy puts it, international relations experts nurse 'a distinctly internationalist understanding of the national interest.' See David Kennedy, 'The Disciplines of International Law and Policy' (1999) 12 Leiden J. Int'l L. 9 at 103. Lest Kennedy (and I) be misunderstood, the keywords here are 'national interest'.

9 After all, the lawyer has to respond to the pivotal charge that the law only provides 'false promises', as Mearsheimer memorably put it. Thus, realism provides the proverbial 'hard case': if the lawyer can overcome realist objections, she can overcome any objections. See John J. Mearsheimer, 'The False Promise of International Institutions' (1994/95) 19 International Security 5.

10 See Joel Trachtman, 'Bananas, Direct Effect and Compliance' (1999) 10 Eur. J. Int'l L. 655 at 677: what matters is that decision-makers are allowed the 'flexibility to design instruments with the right amount of binding effect for political circumstances.' An earlier, much-heralded contribution from an international relations scholar writing in a similar vein is Charles Lipson, 'Why Are Some International Agreements Informal?' (1991) 45 Int'l Org. 495. I take issue with such views in Jan Klabbers, *The Concept of Treaty in International Law* (The Hague: Kluwer, 1996).

IV

There is a second way in which interdisciplinarity can be seen to strengthen existing power relations, and that is by the way it may strengthen untenable, but politically expedient, assumptions. The key example here is probably the use of game theory in order to explain the law of treaties, as undertaken a few years ago by John Setear.[11] Not only did this result in, as Michael Byers helpfully put it, taking the law out of international law[12]—that alone would have been bad enough—but what is worse is that such a game theory approach ends up perpetuating the idea that treaties are, really, nothing but contracts between sovereign states, and therewith ends up not just ignoring much of present-day international law, but actually turning back the clock. The contractual perspective, after all, is the only understanding upon which a game-theoretic approach can possibly work: it works on the assumption that states are unitary actors that engage in rational decision-making with a keen eye to maximizing their individual interests.

Yet, as many international lawyers might testify, the more difficult problems (or interesting challenges, if you will) in the law of treaties stem precisely from the sort of situation where the contractual perspective has been cast aside as unworkable, or as being unable to do justice (quite literally so) to public order concerns—a problem already noted in 1930 by Lord McNair.[13] Reservations to treaties are but one example (although, ironically, here the contractual perspective may have its uses[14]); others would be the notion of material breach[15] or the 'interim obligation' between signature and ratification, or between

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11 See John Setear, 'An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law' (1996) 37 Harv. Int'l L.J. 139. Some of the same type of thinking underlies Goodman's analysis of reservations as being subject to negotiations and intense bargaining. See Ryan Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent' (2002) 96 Am. J. Int'l L. 531.

12 See Michael Byers, 'Taking the Law out of International Law: A Critique of the "Iterative Perspective"' (1997) 38 Harv. Int'l L.J. 201.

13 See Arnold Duncan McNair, 'The Functions and Differing Legal Character of Treaties' reproduced in Arnold Duncan McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961) 739.

14 See Jan Klabbers, 'On Human Rights Treaties, Contractual Conceptions and Reservations' in Ineta Ziemele, ed., *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Leiden: Martinus Nijhoff, 2004) 149.

15 See David Hutchinson's classic article, 'Solidarity and Breaches of Multilateral Treaties' (1988) 59 Brit. Y.B. Int'l L. 151.

ratification and entry into force[16]—the list is not exhaustive.

All this is not to say that game theory is never illuminating; Robert Axelrod's treatment of the trench warfare of World War I, for example, provides a powerful explanation of the behaviour of soldiers engaged in combat, albeit in a highly specific set of circumstances.[17] The point is, however, that there is the risk that by relying on game theory, the baby is thrown out with the bathwater. The thing to explain in the law of treaties these days, many would suggest, is how treaties can function on the basis of something other than blunt state interests, and, more normatively, how treaties can come to serve the international public interest. While there is sufficient reason to be critical of such enterprises as well (whose interest, after all, will the international public interest come to stand for?), applying game theory to the law of treaties is at best a failed exercise in understanding the law of treaties, and at worst a politically retrograde step, perpetuating the idea that international law serves the (narrowly defined) interests of states and states alone.

And it is not just game theory work on the law of treaties that suffers from this problem. One can also think of recent attempts to somehow rethink customary international law through game theory.[18] This too results in static (not to say retrograde) work, strengthening assumptions of yesteryear and firmly locating law-making in the international community as the prerogative of states, and states alone: other actors (think civil society, think even international organizations) do not fit the model, and are thus radically excluded.

In short, game theory generally may have its uses in limited settings (illustrating the logic behind an arms race in which no more than two actors are involved, perhaps), but would seem to be fundamentally incapable of handling complexity. When applied to the making of international law, it tends to reproduce, and therewith strengthen, a very classical model of international law, a model that many would discard as being out of date or at least undesirable, insisting as it does on states being the only relevant actors. And stronger states are bound to benefit more from this bolstering of sovereignty and statehood than their weaker counterparts.

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16 On this, see Jan Klabbers, 'How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent' (2001) 34 Vand. J. Transnat'l L. 283.

17 See Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984).

18 See e.g. Jack L. Goldsmith & Eric A. Posner, 'A Theory of Customary International Law' (1999) 66 U. Chi. L. Rev. 1113.

V

The third problem with interdisciplinarity, already touched upon, is that it often implies, to put it somewhat impolitely perhaps, a selling out: the lawyer will have to become attractive to the realist, and will only become attractive if the realist can take the lawyer's words and insert them into a realist worldview. And that, in turn, can only happen if the lawyer subjects herself to her neighbouring discipline, suggesting, for example, that the binding force of the law is dependent on what states themselves want.[19]

The tragedy of it all is perhaps precisely the eagerness with which the lawyer is willing to abdicate: the desire to be taken seriously by the powers that be is an almost natural by-product of international legal training. The international lawyer grows up—academically, that is—with a serious inferiority complex: international law is often said to be neither law (and thus inferior to domestic law) nor influential (and thus inferior to the policy sciences). It might be the case, in Louis Henkin's deservedly famous phrase, that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time,'[20] but there is always the nagging suspicion that states do so not out of respect for the law, but simply because it is often enough expedient to adhere to the law. The will to overcome this inferiority complex helps explain the immense popularity of conceptually implausible, but politically convenient notions such as soft law: not softer than most of international law, yet sensitive to the wishes of our political masters.[21]

What lawyers should do, of course, instead of bowing to the demands of a coy and flirtatious realism, is play hard to get. Lawyers, academic lawyers at least, should refuse to give up the 'simplifying rigor'[22] that characterizes law, and should be ready to defend its values

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19 Note in this connection that the notion of legalization, as used in the Summer 2000 issue of the journal International Organization, seems to treat law as a policy option among policy options. That is a far cry from the lawyerly creed that wherever there is a society, there will be law. See Judith Goldstein *et al.*, eds., *Special Issue: Legalization and World Politics* (2000) 54 Int'l Org.

20 See Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd ed. (New York: Columbia University Press, 1979) at 47.

21 While I would be perfectly willing to accept that many states engage in soft law, I am not convinced that it is conceptually feasible, nor politically desirable. Moreover, courts are not in the habit of applying it either, at least not as soft law. See my 'The Redundancy of Soft Law' (1996) 65 Nordic J. Int'l L. 167, and 'The Undesirability of Soft Law' (1998) 67 Nordic J. Int'l L. 381.

22 This is arguably the most useful insight of Weil's seminal piece: that law is at its most useful when holding on to its simplifying rigor. Otherwise, it becomes indistinguishable from politics or morality. See Prosper Weil, 'Towards

and its modesty, its purity, if you will, with a wink and a nod to Kelsen. The main challenge for the lawyer is not so much, on this score, to aim at influencing behaviour; rather it is to cherish and preserve the relative autonomy of the law, for a law that has lost its autonomy ceases to be law.

VI

Many of the pitfalls sketched above apply equally to all attempts to hook up international law with some other discipline, be it history, economics, or international relations. Still, as suggested earlier, with respect to international relations, there is a separate, additional problem with interdisciplinarity, and that is the circumstance that international relations, as a discipline, does not exist and cannot exist, and that its most enlightened practitioners are fully aware of this (without of course, understandably, telling anyone).[23]

In the mid-1950s, Hannah Arendt could write that international affairs still contained the most pure version of politics, because the sympathies and enmities amongst states were not always reducible to simple material interests.[24] Where Arendt generally deplored the way politics had become tainted with concern for social and economic issues (therewith becoming interest-based politics rather than politics in the sense of people debating competing visions of the good life unhindered by their own interests[25]), international relations were still more or less pure politics. As a result, it seemed justifiable to have a separate

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Relative Normativity in International Law?' (1983) 77 Am. J. Int'l L. 413. Politics and morality, of course, are precisely the two prisms (with morality disguised as legitimacy) often utilized to gauge international behaviour, with law falling through the crack. See Robert O. Keohane, 'International Relations and International Law: Two Optics' (1997) 38 Harv. Int'l L.J. 487. And for an incisive critique of legitimacy, see Martti Koskenniemi, 'Legitimacy, Rights, and Ideology: Notes Towards a Critique of the New Moral Internationalism' (2003) 7 Associations: Journal for Legal and Social Theory 349.

23 An indication is that some are aiming to connect international developments to domestic concerns. For an example, see Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 Int'l Org. 217.

24 See Hannah Arendt, 'What is Freedom?' reproduced in Hannah Arendt, *Between Past and Future* (London: Penguin, 1993) at 155: 'Only foreign affairs, because the relationships between nations still harbor hostilities and sympathies which cannot be reduced to economic factors, seem to be left as a purely political domain.'

25 It is no coincidence that Rawls would later use a hypothetical veil of ignorance to conceptualize politics in a similar manner: as soon as concrete interests enter the picture, politics ceases to be concerned with the good life and collapses into power struggles. See John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1973) esp. 136-42.

academic discipline for the study of this peculiar form of politics.

Those days are, we may well presume, over: in a globalized world, it has become increasingly clear that social and economic processes, and indeed political processes even in a purer, Arendtian definition of politics, do not stop at national boundaries. This is where it becomes clear that there is a big void (call it a black hole, if you will) at the very heart of the discipline of international relations. It is precisely the awareness that there is no such thing as international relations that plagues the discipline and makes its value as a source of information and understanding about what is happening in the world rather limited, and it is this black hole that renders the discipline subject to a multitude of methodological squabbles.

It may be anecdotal evidence, but I have noticed that whenever I wish to learn something about the world around me, no matter how international the topic, I rarely grasp for international relations scholarship.[26] If I want to find out what goes on, I read Bauman, Beck, Sennett, or other sociologists. If I wish to think about making the world a better place, I read political theory: Arendt, Habermas, Oakeshott, or others. The main (only?) reason I have for reading international relations scholarship is when I am asked to write about it. This body of work does little to help my understanding of the world around me; all it does is help my understanding of the various methodological quibbles its practitioners engage in. There is no such thing as international relations in isolation from general political, social, or economic processes;[27] there cannot be such a discipline (not anymore, at any rate), and least of all should lawyers be persuaded to try and find their way through the methodological debates. For if it does not help our understanding of the world around us, why bother?

VII

That is not to say, of course, that nothing good comes out of scholarship studying international political processes. It is not uncommon for authors working in the field to provide some useful insights in the chapters that are wedged in between the methodological or semi-theoretical ones at the beginning and the end. Thus, Gary Bass's *Stay the*

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[26] This does not just apply to me. It is also highly visible in German international law scholarship (and probably does not stop there). On German scholarship, see my review of Ulla Hingst 'Auswirkungen der Globalisierung auf das Recht der völkerrechtlichen Verträge' (2003) 16 Leiden J. Int'l L. 201.

[27] Which is not to say that political science itself would be beyond debate. For a useful analysis of some of its ailments, see Ian Shapiro, 'Problems, Methods, and Theories in the Study of Politics, Or What's Wrong With Political Science and What To Do About It' (2002) 30 Political Theory 596.

Hand of Vengeance[28] is a useful overview of the development of war crimes tribunals, although it does little to support its liberal thesis—in fact, most of his analysis suggests that the liberal thesis cannot be upheld except as an article of faith. Downright excellent is Susan Sell's treatment of how the World Trade Organization came to occupy itself with intellectual property rights:[29] the book makes clear how politics came to influence the development of the law not by using substantive issues to score methodological points, but by doing actual, sensible, research and, most importantly, by taking the legal bits seriously.

For this is a curious aspect of the call for interdisciplinarity: lawyers are asked to take international relations seriously, while the international relations people refuse, more often than not, to dig into legal thought. A fairly representative illustration is Andrew Linklater's heralded study *The Transformation of Political Community*,[30] which in effect aims to re-conceptualize international law but without consulting the work of international lawyers to any great extent. Typically, international law, however central to his study, is treated as an afterthought, with his knowledge and understanding of it being traceable to a few outdated textbooks. As a result, his rendition of international law, characterized by an almost absolute sovereignty, is a rendition few international lawyers would recognize, which also means that much of his argument boils down to fighting straw men: trying to overcome an incarnation of international law that does not have much support to begin with.

And this attitude is fairly typical. The typical international relations study, no matter how closely bordering on international law, will list but a handful of legal studies. Usually, these are either the classics (Grotius, of course, Vattel and Pufendorf to a lesser extent) or some standard textbook in an old edition (an early edition of Oppenheim's, or at best the 1963 edition of Brierly's), thus raising the suspicion that the international relations scholar has merely browsed the bookshelf of an uncle or grandfather who may have read law once upon a time—forty or sixty years ago. As a result, much international relations scholarship is singularly ill-informed when it comes to matters of international law, and tends to assume that international law today is really still as it was in 1928, or 1944 or, why not, 1648. The whole world has changed, so it seems, except international law.[31] If nothing else, this

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28 See Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000).

29 See Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003).

30 See Andrew Linklater, *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (Cambridge: Polity Press, 1998).

31 It is not just international relations scholars who labour under this

seriously underestimates, and therewith undermines, the emancipatory potential of international law.[32]

VIII

All this is not to suggest that there is no value in interdisciplinarity, for there is. As noted at the outset, the practicing lawyer who is unaware of neighbouring disciplines is bound to do a bad job, from whichever perspective. And the same applies to the academic: the international lawyer who engages in political naivety or silliness is not doing good academic work—even though the technicalities may be supremely crafted. But it is doubtful whether interdisciplinary research can be properly done by bringing two or more people from the neighbouring disciplines together. As the saying goes, few good things have ever come out of committees. What might just work, though, is to stimulate interdisciplinary cross-fertilization by means of joint seminars, interdisciplinary discussion groups, and that sort of thing.

The best work in international law tends to be individual work that is well-informed about neighbouring disciplines, and would be readable and understandable to those neighbouring disciplines, and perhaps even contribute something to those disciplines, without however losing its distinctively legal character. Good scholarship often is good precisely because it takes insights from elsewhere on board while retaining its own disciplinary character.[33] The lawyer should not strive to 'practice social science without license,' for the result is usually disastrous. Instead, the international lawyer has quite a bit going for her. It is the lawyer's unique selling point to have an understanding of the language in which international affairs are conducted (the language of law and legal argument); for that reason alone it is inexcusable that international relations scholars, as a group, tend to ignore legal studies.[34] What is worse yet is that trying to get the lawyer to part with

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misapprehension: it also affects others writing about international law from neighbouring disciplines. A useful illustration is provided by the constitutional theorist Neil Walker, 'Flexibility Within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe' in Gráinne de Búrca & Joanne Scott, eds., *Constitutional Change in the EU: From Uniformity to Flexibility?* (Oxford: Hart, 2000) 9.

32 For an illuminating demonstration of this emancipatory potential, see Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002).

33 A good example (if starting from the other end, so to speak: a literary theorist taking on law) is the work done by Stanley Fish on interpretation, fruitfully combining literary studies with law. See e.g. Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Oxford: Clarendon Press, 1989).

34 So do economists, but then again, they usually do not advocate

this unique knowledge and submit to international relations theorizing is bound to result in obfuscation. In the end, then, the lawyer can justifiably ask political science's most popular question: who gets what, when, and how out of interdisciplinarity?

POST-SCRIPT

If I counted correctly, the above article has benefited from the attention of no less than four reviewers: two (at least) internal ones, and two external reviewers. Many of their useful comments have been incorporated, to the extent possible or practicable, in the above. But one comment calls for separate attention.

This has to do, somehow, with defining what interdisciplinarity stands for. The point is made that while my critique of mainstream interdisciplinarity is generally well-founded (if, understandably given the format, a bit on the surface), I tend to ignore the work of others working outside the mainstream, and those others would cover in particular many names associated with critical legal studies.

The simple truth is that I never thought of the work of, say, David Kennedy, Anne Orford, Tony Anghie, or Hilary Charlesworth as interdisciplinary, at least not interdisciplinary in the sense of self-consciously trying to build a bridge between distinct disciplines. Tony Anghie, as far as I can tell, is not trying to create a new discipline (post-colonial socio-legal historical studies would, after all, be quite a mouthful, and may not even be an accurate description of his work at any rate), nor aiming to forge close connections between history and law or post-colonialists and lawyers, but simply using insights from elsewhere (from history to however one pigeonholes the writings of Edward Said and others) in what remains distinctly legal work. Hilary Charlesworth may well be Derrida-inspired, but is nonetheless (and fortunately) still capable of doing excellent legal work—recognizably legal work. And the same holds true, mutatis mutandis, of Nathaniel Berman, Karen Knop, Karen Engle, Susan Marks, James Thuo Gathii, and others.

In short, I would agree with the reviewers that those they mentioned often do excellent work—it just never occurred to me that it would somehow not be 'legal' but something else. Indeed, to my mind, works like this demonstrate the 'good scholarship' I refer to above, work that is 'good precisely because it takes insights from elsewhere on board while retaining its legal character.'[35]

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interdisciplinarity with international lawyers to begin with. Historians, by contrast, tend to take their international law seriously; more seriously, at any rate, than international relations scholars.

[35] On a personal note, this may well be the first time that I quote my own words.

Why then do I feel the need to somehow respond? It struck me, upon seeing those names, that if their work is to be considered as interdisciplinary (which I would be reluctant to accept), then this signifies not just the potential of interdisciplinary work (engaged in by individuals, mind you, not by committees), but also the limits of interdisciplinarity. And it once again underlines what may well be my central point: that interdisciplinarity is a politically charged activity in itself.

Many of those critical international lawyers mentioned above make a point of studying the links between law and power, and more in particular how law comes to structure power. There is nothing wrong with this, obviously (and as noted, I have the highest regard for much of the work done in this 'counter-hegemonic' tradition), but it does have its limits. To refer to this sort of work as interdisciplinary is to highlight its political nature, and that is once again to somehow succumb to the position that political science is, somehow, more insightful than the science of law. Why not accept the circumstance that Martti Koskenniemi, David Kennedy, Susan Marks, Karen Knop, and Gerry Simpson are lawyers, studying legal arguments, and addressing audiences made up, predominantly, of lawyers? Why this need to somehow elevate their work beyond the legal? Why this urge to have it represent something else than good legal work?

There is a second pertinent observation here: to the extent that lawyers end up doing political science, they also end up reflecting the limits of political science. The main limit then is that, like the mainstream, they are somehow conceptualizing politics as being about power, and power alone. They may be inspired by Foucault rather than Waltz or Easton, but still: their focus rests squarely on power, and it rests squarely on power because the analysis of power is how political science (also in its Foucauldian guise) tends to see its main task.[36]

Yet, there is more to politics than the somewhat vulgar 'who gets what, when, how' question. Politics is not just about power and about distributing values; it is also about figuring out which values are (or could be, or should be) of importance to begin with.[37] Taking on board a conception of interdisciplinarity as reaching its peak in critical legal studies on power is to ignore, perhaps undermine, more normative work—or more overtly normative work perhaps.

Perhaps it is time for the lawyer to embrace the circumstance

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It feels a bit awkward, but seems justified under the circumstances.

[36] A useful collection (in Dutch) is Meindert Fennema & Ries van der Wouden, eds., *Het politicologen-debat: wat is politiek?* (Amsterdam: Van Gennep, 1982).

[37] Which, of course, is not to say that the analysis of power is not interesting, or useless, or whatever—indeed, the present piece belies that position at any rate.

that there are many ways of doing legal work, and that there is no reason to be ashamed of being an international lawyer. This is what I wanted to convey when celebrating the relative autonomy of international law: while the good lawyer has an open mind to influences and insights coming from other disciplines, it would be a mistake to give up the law's own discipline and submit to others. And as much as it is not for Anne-Marie Slaughter to set my research agenda (dual or otherwise) and define interdisciplinarity, neither would I entrust any other individual with that task: for to define what interdisciplinarity stands for is to exercise power.

Identifying the Source and Nature of a State's Political Obligation Towards International Law

SHIRLEY V. SCOTT*

It is not 'new' to be interested in the relationship between international law and its political context. It is not even 'new' to theorize connections between the two—consider Abram Chayes's 1974 functionalist analysis of the role of international law in the Cuban Missile Crisis,[1] or the work of the New Haven scholars. In seeking to respond to the query as to what I thought had been achieved through the interdisciplinary dialogue of the last ten to fifteen years, I have avoided the temptation to summarize the history of inter-disciplinary scholarship or to offer a panoramic overview of recent publications in the field. I have instead taken as my stepping-off point literature in key mainstream journals of both disciplines written on the 'core' issue of the 2003 invasion of Iraq. If interdisciplinary enquiry has really 'gotten somewhere' over the last ten to fifteen years, it is here, at the heart of each discipline, that its presence should be making an impact.

A mere glance through several mainstream journals, including *The International and Comparative Law Quarterly* and the *European Journal of International Relations*, suffices to demonstrate that linking politics and law is an accepted mainstream activity in both disciplines (though this is less apparent in the policy-oriented *Foreign Affairs*). The military action against Iraq has been widely recognized as constituting 'one of the few events of the UN Charter period holding the potential for fundamental transformation, or possibly even destruction, of the system of law governing the use of force that had evolved during the twentieth century.'[2] The basic legal question posed by the use of force against Iraq has therefore been that as to the impact, if any, of the United States-led military action on the specific content of the law of the use of force. Precisely because those lawyers undertaking black-letter, positivist, international legal analysis are not, by definition, investigating political context,[3] however, the vast majority of writings linking the politics with

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* Senior Lecturer in International Relations, University of New South Wales (Sydney).

1 Abram Chayes, *The Cuban Missile Crisis* (London: Oxford University Press, 1974).

2 Lori Fisler Damrosch & Bernard H. Oxman, 'Editor's Introduction', *Agora: Future Implications of the Iraq Conflict* (2003) 97 Am. J. Int'l L. 553 at 553.

3 As encapsulated in Vaughan Lowe's comment that lawyers must 'explain what was the reason for using force against Iraq. Not the elusive motive—oil, or whatever has been the motive for invading Iraq … but the reason, which, if translated into a norm with legal force would become the justification which might be invoked in future by the US, the UK, or any other State in similar circumstances.' 'The Iraq Crisis: What Now?' (2003)

the law are in fact attempting to answer a political question regarding international law and the use of force against Iraq. The core political question regarding international law and Iraq has been that as to the effect of the military action on the future authority of the international legal system as a whole.

Recent theoretical literature on the political operation of international law, some written by lawyers and some by political scientists, can mostly be placed in the category of 'middle-range theorizing'. That is, it has offered a generalized explanation of one aspect or dimension of the international law-world politics relationship, such as that as to why states comply with 'normative structures' or 'alliances' or how to enhance their propensity to do so,[4] as opposed to developing a 'grand' theory of the relationship between international law and world politics as a whole. What is even more notable about recent interdisciplinary writing is, however, its diversity, causing me to ponder whether there is any sense in which those of us interested in the political functioning of international law can be said to share a common purpose. At the risk of being overly simplistic, but also to use my available word limit to be at least a little controversial, I have decided to answer in the affirmative—to say that yes, underpinning our various explorations, we could be said to be embarked on a common quest. After briefly outlining what I believe that quest to be, and my reasons, I will go on to offer my own perspective on the elusive goal of that quest.

I WHAT IS IT WE ARE SEEKING TO EXPLAIN THROUGH INTERDISCIPLINARY ENQUIRY?

If those practicing public international law or those undertaking black-letter scholarly analysis did not assume a normative role for international law they would no doubt come to find their work futile. Such lawyers are, more obviously on some occasions than on others, 'doing' international politics. Those attempting interdisciplinary analysis of the political operation of international law are, on the other hand, 'analyzing' international politics. They also tend to assume a normative role for international law. If one did not believe that international law functions normatively in world politics, why would one bother attempting to explain the nature of that role? Or why, for example, would one bother to advocate changes to legal institutions and

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52 Int'l & Comp. L.Q. 859 at 861.

4 For some recent International Relations contributions, though ones minimizing use of the 'l' word, see Brett Ashley Leeds, 'Alliance Reliability in Times of War: Explaining State Decisions to Violate Treaties' (2003) 57 Int'l Org. 801; and Antje Wiener, 'Contested Compliance: Interventions on the Normative Structure of World Politics' (2004) 10 European Journal of International Relations 189.

structures so as to shore up international law against pressure to weaken its limitations or resort to war?[5]

I would like to propose, firstly, that those of us engaged in drawing scholarly links between international law and politics share a belief that there is a normative role for international law, and secondly, that as a consequence of our belief in a normative role for international law, we sense a political obligation on the part of states towards international law. We may not all have thought of it in those terms, we may not have identified the source or defined the nature of that political obligation, and not all our writing points directly towards that goal, but explicating that obligation is the logical end point of our endeavours.

There is little doubt that a state is under a *legal* obligation to comply with international law. What is law, after all, but a system of rules, principles, norms, and concepts specifying the rights and obligations of its subjects? Certainly, those who act, as opposed to speculate, in international affairs—judges, diplomats, and statesmen—unhesitatingly assume the existence of such an obligation.[6] Because international law draws strength from the logical coherence of its system of thought, the source of the legal obligation to comply with international law must necessarily be located within the system of international law, not of international politics.[7] One of the most fundamental questions asked within the jurisprudence of international law is that of the source of the obligation to comply. Within a modern positivist framework the source of the binding quality of legal rules is the consent of states themselves.[8] Consent underpins and provides coherence to the mass of rules, principles, and concepts of international law as a whole, providing a foundation for sources jurisprudence.[9]

What I am suggesting is that a state may also be under a distinct *political* obligation towards international law. That obligation would appear to be broader than the legal obligation; it would include 'respecting' and 'supporting' the system rather than just compliance per se. Indeed, while compliance may be at the root of a state's legal obligation, the indeterminacy of international law means that compliance cannot also constitute the political obligation: it would not

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5 Jutta Brunnée & Stephen J. Toope, 'The Use of Force: International Law After Iraq' (2004) 53 Int'l & Comp. L.Q. 785.

6 H. Lauterpacht & C.H.M. Waldock, eds., *The Basis of Obligation in International Law and other Papers by the Late James Leslie Brierly* (Oxford: Clarendon, 1958) at 19.

7 See Christian Reus-Smit, 'Politics and International Legal Obligation' (2003) 9 European Journal of International Relations 591.

8 P.E. Corbett, 'The Consent of States and the Sources of the Law of Nations' (1925) 6 Brit. Y.B. Int'l L. 20.

9 Alternatives have been proffered. See the list in Oscar Schachter, 'Towards a Theory of International Obligation' (1968) 8 Va. J. Int'l L. 300.

be sufficiently clear-cut as to whether the obligation had or had not been upheld. While a state may sometimes get away uncensored (other than by some international lawyers) with actions that do not meet its legal obligation to comply, state behaviour and rhetoric that fails to meet the political obligation—especially that relating to questions of high political moment—is likely to invite general condemnation. This political obligation of a state in relation to international law may thus be recognizable primarily by the effects of its not having been upheld.

The United States has, for example, faced widespread criticism for actions that are not necessarily illegal. Take the American decision to withdraw from the *ABM Treaty* or to not ratify the *Statute of the International Criminal Court*, or the selective attitude of the United States towards international human rights law. If criticism of the actions or inactions of the United States in relation to international law that are not necessarily questions of compliance came only from those who were advocates of human rights, or the environment, or arms control, it might be that such criticism did not assume any particular obligation of the United States towards international law. Even strongly voiced warnings that the American 'attitude' towards international law is damaging the international legal system could be interpreted as political support in favour of particular causes, whether human rights, the environment, or arms control. But the voices warning of United States-inflicted damage to international law as a system have in recent years been so vociferous and so widespread as to suggest that there may be a perceived political obligation of a state towards international law in addition to the straightforward legal obligation to comply, and that the United States has been in breach of that obligation.

The last five years has witnessed three uses of force on the part of the United States and its allies whose legality has been the subject of considerable debate. While in strict positivist terms the majority of international lawyers did not consider legal the use of force against the Federal Republic of Yugoslavia during the Kosovo crisis, the apparent moral rectitude of the objectives of the NATO states largely excused the borderline legality of the bombing, at least amongst international lawyers in the NATO states. Afghanistan stretched the window of self-defence but the horrors of '9/11' and the extensiveness of the Coalition support pre-empted most criticism. To some, such as Anne-Marie Slaughter, then president of the American Society of International Law, it at first appeared as if Iraq might fit the pattern of possible legitimacy despite dubious legality.[10] One year later, however, mainstream scholarly opinion, even in the United States, had turned decidedly

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[10] See Anne-Marie Slaughter, 'An American Vision of International Law?' (2003) 97 Am. Soc'y Int'l L. Proc. 125.

against both the legality and the legitimacy of the American invasion of Iraq.[11]

A sceptic might suggest that the hardening of opinion against the legality of the invasion was due primarily to ongoing resistance in Iraq. But continuing violence in Afghanistan had not impacted on the regard in which that use of force was held; nor has there been a comparable revisionist interpretation of Kosovo. It would seem that other events relating to the occupation of Iraq may have impacted on the perceived legitimacy of the initial use of force, in particular the failure to find weapons of mass destruction, the obvious economic benefits received by American individuals and corporations from the occupation, and revelations of prisoner abuse. These did not in any direct way impact retrospectively on the legality of the initial invasion, pointing to the fact that opinion may have turned so squarely against the use of force not only because of a recalculation of whether it had been 'legal' but because of what had been revealed during this episode about the political treatment of international law. I want to suggest that while, depending on one's legal opinion, the initial use of force broke a legal obligation towards international law, it was subsequent American rhetoric and behaviour that failed to meet the political obligation of the United States towards international law.

II IDENTIFYING THE SOURCE OF THE POLITICAL OBLIGATION TOWARDS INTERNATIONAL LAW

Those in the broad realist family of scholarship do not, of course, think that international law counts for much in terms of sheer political weight. From a realist perspective the obligation of a state's rulers is to look after the interests of the state, defined in terms of increasing relative power and security. Indeed, this political obligation might on occasion require a decision-maker to breach or forego support for the system of international law if this were required in order to uphold the 'national interest'. Realism is unlikely to offer us much help in defining the nature of a political obligation towards international law.

What might broadly be classified as liberal approaches to international law maintain, on the other hand, that law is capable of enhancing peaceful relations between states—so long as states comply with their legal obligations. Thus, a liberal would generally share with a legal positivist the belief in the core obligation of a state to comply with international law, with the rationale that if all states were always to do so, the world would be a better and more peaceful place. Writers have offered various explanations as to why states generally comply with international law—often talking in terms such as reciprocity, mutual

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[11] Anne-Marie Slaughter, 'Reflecting on the War in Iraq One Year Later' *Newsletter of the American Society of International Law* (March/April 2004) 2.

obligation, shared expectations, or even self-interest. And yet, in struggling to define the *source* of what in this article I am referring to as a political obligation towards international law, we have no explicit theorization of the *nature* of an obligation towards international law broader than that of the legal obligation to comply.

The fact that critics of the American 'attitude' towards international law warn that the United States is damaging international law suggests that the political obligation of states towards international law may be related to the source of the political power of international law. That is, it is when a state is acting so as to weaken international law that it meets with such intense criticism. Not only do the realist and liberal traditions of IR theory not identify and define a political obligation towards international law, but they do not even define the source of the political influence of international law.

III INTERNATIONAL LAW AS IDEOLOGY

A theorization of international law as ideology (ILI), as I have developed it over the last decade, is an interdisciplinary account of the role of international law in world politics that locates the power of international law in an interrelated set of assumptions regarding the nature of international law.[12] The theory is eclectic in that it does not draw on any single theorist but on the work of several sociopolitical theorists who use the term 'ideology' to refer to an idea or small set of interrelated ideas integral to the distribution of power in a particular sociopolitical order. ILI draws on the proposition that within every sociopolitical structure of power there is one principle or small set of interrelated principles, which can be referred to as an ideology, integral to the distribution of power. That set of ideas plays a key role within that sociopolitical structure, stabilizing the set of power relations, defining who is a member of that sociopolitical order, and why those who are not are not.

ILI posits that international law derives its political power from the ideology of international law, the core idea of which is that international law is ultimately distinguishable from, and superior to, politics. This image of international law is conveyed by legal positivist writing, which eschews arguments based on philosophy, theology, science, or morality in favour of an argument founded on the contents of the formal sources of international law. According to ILI, the ideology of international law includes several other assumptions about the nature of international law, none of which is wholly true, but all of

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[12] I first outlined and justified the theory in Shirley V. Scott, 'International Law as Ideology: Theorizing the Relationship between International Law and International Politics' (1994) 5 Eur. J. Int'l L. 313.

which contain a considerable amount of truth:

- International law is ultimately distinguishable from, and superior to, mere politics.
- It is possible to distinguish objectively between legal and illegal action.
- The rules of international law are compulsory.
- International law is politically neutral or universal in the sense that it treats all states equally.
- International law precedes policy.
- International law is (virtually) self-contained.
- It is possible to apply the rules of law objectively so as to settle a dispute between states.
- International law can deal with any issue that arises between states.

ILI draws on Anthony Giddens' theory of structuration to account for the relationship between structure and agency.[13] As with all ideologies, the ideology of international law is continually reinforced by rhetoric that assumes the ideology to be true. International lawyers uphold the ideology by giving it practical expression. The notion that there is a virtually autonomous set of rules that actors must obey underpins legal discourse. It is assumed that, even if the law on a particular point is not yet hard and fast, it will be so soon. It is not only the international lawyers themselves, but states in their political discourse, which uphold the ideology; indeed, they are required to in order to participate in the international community. This is easiest to do where the relevant law is clear-cut and strongly supports one's preferred policy choices.

According to ILI, the ideology is a source of political power on which political actors can draw in advancing their own interests in that arena. This can be done through closely associating one's preferred policies with the ideology. The ideology is upheld most strongly where the actions and rhetoric of a state make it difficult to discern a discrepancy between the ideology and reality. Where it can be seen that there are limits to the truth of the ideology—that, for example, international law treats some better than others or that there are gaps in international law—the ideology is being only weakly upheld if at all. An actor that wishes to draw on the ideology of international law to advance its interests must therefore engage in discourse that aligns its preferred policies as closely as possible with international law's source of political power. It is vital here, though, that the distinction is made between compliance and upholding the ideology. I do *not* claim that it is

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[13] Anthony Giddens, *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis* (Berkeley: University of California Press, 1979).

to the political advantage of a state to always comply with international law. It is, however, possible to uphold the ideology of international law even where one's actions might most readily be construed as 'illegal,'[14] by, for example, emphasizing the illegality of another state's actions in comparison with one's own, so upholding the image of the dichotomous legal/illegal divide as well as that of the obligation to comply. The ideology can be drawn on to improve one's political position by placing another state in a position such that if it is to uphold the ideology it must act as one wants it to.

In references to foreign policy decision-making, the ideology gives rise to what can be dubbed the 'rule-book' image of international law, according to which:

> A decision-maker faced with a decision as to how to act calls in the legal adviser. The legal adviser then consults the relevant page in this large volume, reads what it says must be done, and advises the decision-maker accordingly. The decision-maker should, of course, do as their advisers tell them to, and, if they do, the State will have 'complied' with international law.[15]

Policy-makers uphold the ideology of international law in references to their decision-making by conveying an image of international law as able to dictate policy. Of course, in practice, while legal considerations may contribute to a foreign policy decision on an issue of high politics, they are also often brought into play after the decision or its implementation, as justification for an action that had not been dictated by international law.

In identifying the ideology of international law we have located not only the source of the political power of international law but also the source of a state's political obligation towards international law. This approach suggests that international law is not weakened by non-compliance per se but by references to international law that, singly or in conjunction with actions, advertise the extent to which the image of international law conveyed by the ideology fails to match reality. This provides us with a theoretical basis on which to assess the impact of the military action against Iraq on the political sway of international law or to assess the prudence for the American national interest of the conduct of American policy regarding Iraq. It suggests that the choice for

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[14] S.V. Scott & R. Withana-Arachchi, 'The Relevance of International Law for Foreign Policy Decision-Making when National Security is at Stake: Lessons from the Cuban Missile Crisis' (2004) 3 Chinese J. Int'l L. 163.

[15] Shirley Scott, 'Beyond "Compliance": Reconceiving the International Law-Foreign Policy Dynamic' (1998) 19 Aust. Y.B.I.L. 35 at 37.

American decision-makers was not simply to invade or not to invade, but how best to go about implementing—in terms of international legal rhetoric—its chosen course of action.

IV International Law as Ideology and the American-Led Use of Force against Iraq

I have necessarily given only the most brief of introductions to my 'grand theory' of the overall relationship of international law to world politics. But even this may permit us to view the politics of the invasion of Iraq and its significance for international law in a new light.

It was always going to be difficult for the American administration to convey the image of international law as determining policy when referring to its decision to invade Iraq. The relevant international law on the use of force is quite clear-cut and, as Vaughan Lowe had pointed out prior to the use of force, offered no precedent for invading a country in order to bring about regime change.[16] When the American administration nevertheless wanted to push ahead with its desired invasion, government officials were able to build up a case for using force that upheld the principles of the ideology of international law by emphasizing illegal behaviour on the part of Iraq, and implying the legality of the United States' own behaviour as well as suggesting that it was international law that was dictating American policy. In a press briefing of 5 September 2002, Secretary Colin Powell commented:

> Inspections will be an issue, but they are not the primary issue. The primary issue is how do we get Iraq to comply with its obligations under these various UN resolutions. ... We cannot allow the international community to be thwarted in this effort to require Iraq to comply with the obligations it entered into at the end of the Gulf War and for a number of years thereafter.[17]

United States rhetoric had long contrasted the relationship of Iraq with international law to that of the United States. In a speech to the 55th United Nations General Assembly in 2000, Madeleine Albright had commented, for example:

> … we must also stand up to the campaign launched by Baghdad against the UN's authority and international law.

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16 A. Vaughan Lowe, cited in Danny Lee, 'Are Bush and Blair breaking the law?' *The Times [London]* (25 February 2003).

17 United States Embassy, Tokyo, Japan, Press Briefing, 'Text: Powell Says Iraq's Non-compliance with UN Rulings Concerns All' (5 September 2002), online: United States Embassy, Tokyo, Japan <http://japan.usembassy.gov/e/p/tp-se1651.html >.

> … we must also defend the integrity of this institution [the UN], our security, and international law.[18]

The Bush Administration thus continued what had long been an American theme: that it was defending the international legal system—and the United Nations—from an Iraqi challenge. While it might have been thought that a coalition invasion without Security Council authorization was a challenge to the United Nations and international law, Bush emphasized that it was Iraq that was posing the challenge. According to Bush, '[w]e'll see whether or not the United Nations will be the United Nations or the League of Nations when it comes to dealing with this man who for 11 years has thumbed his nose at resolution after resolution after resolution after resolution.'[19]

Many international lawyers did not accept the legality of the Coalition use of force,[20] but, as was to become apparent, they were in any case arguing against a decoy; international law had not been the real determinant of American policy. As the months went by, it became blatantly clear that key members of the American administration had long wanted to 'get' Iraq and that 9/11 had merely provided them with a pretext.[21] American failure to live up to its legal obligation had caused many international lawyers to protest, but it was when American rhetoric so clearly revealed the discrepancy between the image of international law as able to determine policy and American decision-making leading up to the invasion that opposition even to the original claim of legality for the invasion hardened. This was epitomized by United Nations Secretary-General Kofi Anan's change from earlier emphasizing the importance of the United Nations to his straightforward acceptance of an interviewer's wording that the war had been 'illegal.'[22]

Revelations of Abu Ghraib prisoner abuse detracted from the

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18 Madeline K. Albright, 'Speech' (Speech to the 55th UN General Assembly, United Nations, New York, 12 September 2000), online: US Mission to the UN <http://www.un.int/usa/00_124.htm>.

19 Wendy Ross, 'Bush: UN Must Support New Policy on Inspections in Iraq, or Become Irrelevant' *US Department of State, Office of International Information Programs* (3 October 2002), online: United States Mission to the European Union <http://www.useu.be/Categories/GlobalAffairs/Oct0302BushIraqUN Inspections.html>.

20 Sean D. Murphy, 'Use of Military Force to Disarm Iraq' (2003) 97 Am. J. Int'l L. 419 at 428.

21 See, *inter alia*, Richard A. Clarke, *Against All Enemies: Inside America's War on Terror* (New York: Free Press, 2004).

22 'Iraq War Illegal, says Annan' *BBC News World Edition* (16 September 2004), online: BBC <http://news.bbc.co.uk/2/hi/middle_east/3661134.stm>.

image of international law as compulsory and from the contrast between the United States as international law-compliant and Iraq as international law-defiant, thereby further weakening the United States' upholding of the ideology of international law.[23] The treatment of international law by the United States defied observers to continue viewing international law as an absolute, apolitical standard of behaviour from which Iraq had departed, instead exposing international law as inextricably and messily mixed up with politics and thereby weakening the ideology of international law. While American human rights abuses in Iraq may not have been on the same scale as those perpetrated under the Hussein regime, the stark contrast between Iraqi illegality and American legality had been muddied. The United States may have earlier broken its legal obligation, but it was when it also failed so dramatically in its political obligation towards international law that the wisdom of its course of action was so widely called into question.

CONCLUSIONS

In this article I have sought a point of convergence in the varied interdisciplinary work currently underway. This has led me to advance the view that our common quest is to better understand the political obligation of a state towards international law. Identifying such an obligation has arguably long been a goal of those writing on the politics of international law even if they have not conceptualized their task in these exact terms. Focus has hitherto been on compliance and the political motivation behind such compliance.

Iraq has provided us with a case study of the interaction of international law and high politics. The lessons one learns from that case study necessarily reflect one's theoretical understanding of the political operation of international law. While for some scholars Iraq confirmed the demise of the United Nations Charter-based international law on the use of force;[24] I have suggested that from the perspective of a theorization of international law as ideology, Iraq illustrates the political obligation of a state towards international law by illuminating what happens when a state fails to meet that obligation.

Strident and increasingly widespread criticism of the legality of the 2003 invasion of Iraq is not fully explicable by the highly dubious legality of the action because previous uses of force of equally dubious

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23 Olivier Ambler, *'International Law as Ideology' and US Foreign Policy Objectives* (MA(IR) Research Project, U.N.S.W. School of Politics and International Relations, December 2004) [unpublished].

24 See e.g. discussion in 'Agora: Future Implications of the Iraq Conflict' (2003) 97 Am. J. Int'l L.; and I. Johnstone, 'US-UN Relations after Iraq: The End of the World (Order) As We Know It?' (2004) 15 Eur. J. Int'l L. 813.

legality had not provoked the same degree of criticism and because its questionable legality had been apparent long before the invasion took place. This suggests to me that the increasing strength of the criticism of the American attitude towards international law in relation to Iraq was about more than 'legality' or 'compliance' per se. I have posited the view that a state's political obligation towards international law requires a state to uphold through its words and actions a certain image of international law from which international law derives its power. Where that obligation is not met, the state in question can expect to meet with censure because the idea of international law is integral to the international political order and because it is a source of power to which all states have some degree of access. It is because the source of the political obligation is also the source of the political sway of international law that, when the United States fails to meet its political obligation, there are calls that the United States is damaging the system of international law.

This can help us to understand the reaction to other American actions, such as its withdrawal from the *ABM Treaty*. So many international lawyers and observers were so indignant at what was a perfectly legal move on the part of the United States. From an ILI perspective we can see that the American emphasis on the treaty as out-dated detracted from the image of international law as timeless, so prompting criticism of the United States' move. While on one level we all know that law is temporally relative, it is vital to a legal system that it be perceived as virtually timeless in order to increase the sense in which international law appears as an apolitical standard. The ongoing tension between the image and reality of international law is thus at the heart of the political functioning of the system of international law.

Duelling Agendas: International Relations and International Law (Again)

GERRY SIMPSON*

On a sunlit summer's day in the Chiltern Hills, five men are seen running towards the same spot in the middle of a field. The object of their attention is a hot-air balloon containing a small boy. The boy's uncle (the balloon's pilot) is holding onto the balloon's ropes in an increasingly frantic attempt to prevent the balloon and boy from being swept into the sky. The (now) six men then engage in a collective effort to bring the balloon under control but this becomes difficult as the wind picks up and the problems of collective action emerge. With each new gust of wind the dilemma becomes more acute. The balloon is lifted higher and higher off the ground, and, yet, it does seem as if the six men might just command the weight and strength to hold down the balloon. But no one is entirely sure. Who is the first to let go? No one is sure of that either but someone releases the rope and tumbles onto the ground. The balloon rises a little higher. Another man lets the rope go and drops to the ground. In the end, there is one man, Dr John Logan, hanging on to the rope of a rising balloon. He begins climbing up the rope (now high in the sky), but this is to no avail. The first Chapter of Ian McEwan's novel, *Enduring Love*,[1] ends with Logan dropping to the ground from a great height.

> We watched him drop. You could see the acceleration. … He fell as he had hung, a stiff little black stick. I've never seen such a terrible thing as that falling man.[2]

Logan is the victim of a community without a leader. There are no rules, at least none specific enough to allow predictability, no norms, at least none determinate enough to guide collective behaviour, and no laws except the unforgiving laws of nature. Who can blame the others for letting go? Who can fail to blame the others for letting go?

I want to think about Logan in this short article on international law's fraught relations with the 'political'. Is Logan the Amazon Rainforest or the Arctic ice-caps or the prohibition on the use of force: he should be saved but he cannot be saved—not in this society, not at this moment in human history? Is it the case that international

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* Reader in Public International Law, London School of Economics; Senior Fellow, University of Melbourne Law Faculty. Thanks to Neville Sorab (for assistance with research), Nick Wheeler (for conversations across the IR/IL divide) and Linda Reavley (who, twenty years ago, introduced me to Ian McEwan's work).

1 Ian McEwan, *Enduring Love* (New York: Anchor Books, 1998).

2 *Ibid*. at 17.

law can get people to the scene of the accident but cannot quite mandate effective action when they are there? This, of course, is the classic collective action dilemma but instead of re-examining it directly, I want to uncover some of the myths about international law that have emerged from this image of cooperation and defection. Logan's death is foretold, as it were, by the weakness of the normative structure within which the men collaborate. For many observers, international law's failures can be understood in the same way: a perpetually falling man and failing law. Logan's death occurs because the norms that might have proved capable of binding the rescuers together are weak and under-elaborated, and because the laws that do concretise community operate largely in the sphere of the everyday and not the realm of the exceptional.

This article makes some preliminary moves in the direction of disturbing this image as it is applied to international law. In particular, I want to explore three fantasies about international law. In the first, international law is viewed as essentially peripheral and metaphysical. The norms elaborated are imaginary or impractical. The prescription is a dose of realism (or functionalism). This image of international law I draw from Hans Morgenthau's critique of positivism published in international law's flagship journal, *The American Journal of International Law*, in 1944. It is an image that relies on an unsustainable vision of international law as somehow 'truly' contextual but at the same time super-normative. The second fantasy revolves around another popular trope in International Relations (IR) scholarship. Here, international law is articulated as two fields masquerading as one. There is real international law (concrete, functional, determinate) on one hand, and the projections and aspirations of optimistic scholars or hubristic international organizations on the other. This division, though, cannot work because it assumes the existence of technocratic spaces where the work of law can be done unmediated by the political, and political spaces where law must, by definition be absent. Neither of these spaces exists. The third image is that of international law as a one-off mechanism for constraining reluctant sovereigns. I suggest, in the end, that this fantasy, too, gets in the way of our understandings of international law. In Ian McEwan's novel the moment of collaboration followed by defection is a minor part of the plot. Instead, the breach of convention—the release of the ropes—can only be properly understood in the way it subsequently 'constitutes' the characters of the novel.

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> The pilot was shouting instructions at us, but too frantically, and no-one was listening. He had been struggling too long, and now he was exhausted ….[3]

In 1940, Hans Morgenthau published his famous critique of international law's foundations in positivism.[4] Morgenthau's classical realism manifested itself as an impatience with international lawyers, and their impractical and untested schemes for imposing international order on a reluctant world. Morgenthau indicted Public International Law on three principal grounds: it was divorced from the social and political context within which it purported to operate; it obscured and denied its foundations in metaphysical premises; and it over-stated the stability and readability of legal norms. The instructions were being shouted, to be sure, but no one was listening, least of all political scientists.[5] This lawyer's legalism, as I have argued elsewhere, was regarded as naïve, dangerous, and morally dubious.[6] It resulted in the application of principles that threatened the very existence of those states relying on such principles.[7] It encouraged total war by applying standards of guilt, justice and culpability to the conduct of war.[8] It was a vain attempt to extend the 'social sympathies of individuals' from the national to the international level.[9] For George Kennan even the buildings of the era were implicated. The Department of State was described as 'a quaint old place, with its law-office atmosphere.'[10] By the end of World War II international relations scholars and many foreign policy analysts were convinced that the post-war order was to be

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3 *Ibid*. at 10.

4 Hans Morgenthau, 'Positivism, Functionalism and International Law' (1940) 34 Am. J. Int'l L. 260.

5 In fact, by this time, not many international lawyers were listening either. Morgenthau was beating on a dead horse. See Georg Schwarzenberger, 'The Rule of Law and the Disintegration of the International Society' (1939) 33 Am. J. Int'l L. 56; J.L. Brierly, 'The Shortcomings of International Law' (1924) 5 Brit. Y.B. Int'l L. 4; W. Eric Beckett, 'International Law in England' (1939) 55 L.Q. Rev. 257.

6 Gerry Simpson, 'The Situation on the International Legal Theory Front' (2000) 11 Eur. J. Int'l L. 439.

7 See Hans Morgenthau's claim that the legalistic solutions favoured in the dispute over Finland in 1939 might have led to a general war between a Franco-British alliance and a Soviet-German coalition in Hans Morgenthau, *Politics Among Nations*, 5th ed. (New York: Knopf, 1978) at 12-13.

8 George Kennan, *American Diplomacy, 1900-1950* (Chicago: University of Chicago Press, 1951) at 101.

9 Reinhold Niebuhr, *Moral Man and Immoral Society: A Study in Ethics and Politics* (New York: Scribner, 1932) at 92.

10 *Supra* note 8 at 92.

carved using the tools of realism.[11]

But Morgenthau's prescriptions are curious. He calls international lawyers to engage in three tasks. First, there is to be a greater recourse to ethico-normative principles. These, according to Morgenthau, anchor the system, and they are to be the subject of legal enquiry. To be sure, this is a 'dangerously uncertain procedure,' but such principles are discoverable in the 'general moral ideas underlying the international law of a certain time, a certain civilisation, or *even, a certain nation.*'[12] Second, there is to be a focus on 'actual juridic experience' or what the law actually is rather than what it should be. This is a call to the actual experience of states rather than the normative projections of international law scholars.[13] In particular, Morgenthau demands an accounting of the socio-economic context within which international lawyers work. Positivists, according to Morgenthau, cannot and will not see that treaties, rules, norms and so on must be (and are) interpreted in the light of changing historical circumstances. Morgenthau points to three phases in the life of *The Treaty of Locarno* or the impact of developments in international relations on the meaning of Article 16 of *The League of Nations Covenant* as evidence of law's permeability. Third, Morgenthau argues, positivists fetishize the written text, regarding it as superior to 'experience'. Yes, positivists have custom but this is a theoretically incoherent panacea. The mysticism of customary international law is no substitute for the hard realities of practice and function. By the time Morgenthau was writing, international lawyers ought, perhaps, to have been exhausted. They had shouted their way through the inter-war period but the time was ripe for a new discipline of realistic international study. Utopia was out of fashion, and with it much of international law.

This picture of the post-war period has attained the status of truth partly because of Morgenthau and his fellow realists and partly because everyone agreed that the League of Nations (with which international law was somehow bound up) had been an abject failure. But international lawyers have not recognised this picture, and for a number of important reasons. Indeed, the peculiar aspect of Morgenthau's broadside is that it is directed at an unspecified target: a group of international lawyers who are not named and who, it might be said, have been conjured into existence by Morgenthau. He does quote

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[11] In fact, although post-war United States foreign policy was made in the image of the realists, the international order created at San Francisco was an amalgam of legalism and realism. See Anne-Marie Slaughter, 'The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations' (1994) 4 Transnat'l L. & Contemp. Probs. 377.

[12] *Supra* note 4 at 268 [italics added].

[13] *Ibid*. at 284.

extensively from international law scholarship but almost all of the writers referred to (Brierly, Lauterpacht, Jessup, Hudson, Friedman) seem to support Morgenthau's 'functionalism'. Many agreed that validity was largely determined by efficacy and that social forces determined or, at least, influenced the content and interpretation of law. Indeed, Morgenthau, far from wounding some international law orthodoxy, is simply describing two of the traditions that came to dominate the post-war era: the legal positivism of people like Kelsen who were concerned to locate law in the practice of states, and the policy-oriented sociological jurisprudence of scholars like McDougal who implemented a research strategy designed to accommodate the cultural and the social. The pilot, as it turns out, was simply restating the terms of the discipline.

Even the legal-utopians, the obvious target of the critique, were far from vanquished.[14] E.H. Carr was right (even though this is not what he is remembered for) to argue that that no social system could exist in the absence of normative structures and that, therefore, realism was not (nearly) enough. The *Charter of the United Nations*, by the standards of any other era, was a monumental effort to tame anarchy through law. It tied the hands of the Great Powers by fixing the rules on the use of force both procedurally and substantively. Yes, the Great Powers could act unilaterally, but only if they could make a clear case for self-defence under Article 51 of the *Charter of the United Nations*, and yes, they could act collectively, as they had done, in a previous age, in repelling Napoleon or carving up Africa, but only if they secured the votes in the Security Council (including those of non-permanent members). Morgenthau's functionalism, instead of undermining international law, has simply produced another elaboration of its reliance on 'ideals and things.'[15] Functionalism, it turns out, is the same old amalgam of 'actual experience', ethical projection, institutional constraint and Great Power particularism that marks international law's internal structures. There is no resolution only further argument.

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I didn't know, nor have I ever discovered, who let go first. I'm not prepared to accept that it was me. But

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[14] A key inter-war utopian is Philip Noel-Baker, the LSE Professor and author of *The League of Nations at Work* (London: Nisbet, 1926). Legalist-Utopians flourished during the post-war era too, albeit in different incarnations. See e.g. Grenville Clark & Louis Sohn, *World Peace Through World Law* (Cambridge, Mass.: Harvard University Press, 1958).

[15] James Boyle 'Ideals and Things: International Legal Scholarship and the Prison-House of Language' (1985) 26 Harv. Int'l L.J. 327.

> everyone claims not to have been first. What is certain is that if we had not broken ranks, our collective weight would have brought the balloon down to earth ... there was a deeper covenant, ancient and automatic, written in our nature. Cooperation … [b]ut letting go was in our nature too. This is our mammalian conflict: what to give to others and what to keep for yourself.[16]

This summer, I spoke at a meeting of former Heads of State in Vienna and Salzburg. After I had presented on the question of intervention, one of the participants, a former Cabinet rank member in the Carter Administration, commended me on an 'interesting' paper before going on to assert that there was no such thing as international law. Of course, such a criticism is hardly new to international lawyers who have to live with such ontological sallies on a weekly basis. My response was fairly standard, too: international law ought to be judged by its successes as well as its failures; it was more than simply enforcement; the system remained inchoate and, in some ways, primitive; municipal law, the gold standard, turned out not to glisten as brightly as we might hope; and, finally, weren't there powerful new international legal norms in existence now that would have been regarded as impossible whimsy in the time of Morgenthau? I used the international economic order as an example of the latter. My interlocutor replied that indeed there were international norms (as with some IR scholars he could not quite bring himself to use the word 'law') in some areas such as economics or civil aviation but that in spheres such as the use of force or human rights what we had were unenforceable aspirations.

This dual image of international law has played a powerful role in constituting the way in which IR has approached Public International Law (PIL) over the years. This idea goes back, at least, to Morgenthau, again, who contrasted 'two obviously different types of international law.' One international law (functional international law) was based on the 'deeper covenants' of cooperation or 'permanent or stable interests' while the other was transient, fluctuating and barely juridical.[17] This duality was reflected, too, in the notion of the *jus necessarium,* and, according to Morgenthau, in the distinction between territorial and extra-territorial rules. These two fields required two sciences and two methodologies. This distinction is there, too in the implicit contrast between high politics (force, dispute resolution, arms control) and low politics (economics, maritime resource allocation), and in the contrast made in the functionalist literature between quasi-law and real law. Recent writing has also embodied something of this. Robert Jackson,

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[16] McEwan, *supra* note 1 at 15.

[17] *Supra* note 4 at 278.

with greater conceptual clarity, distinguishes the norms arising out of classical international law (rules intended to buttress sovereignty and the pluriverse of states) and a more recent 'declaratory' tradition in which ideals are transformed into legal norms.[18] The classical mode encompasses the standard rules of international engagement, for example the laws of war, the right to make treaties, the immunities of diplomats and title to territory, while the declaratory mode (Morgenthau's political international law) includes trading rules designed to alleviate inequalities between states, laws prohibiting gender discrimination, rules requiring that democracy be a condition for membership of international bodies and laws invoking a common heritage of humankind (common ownership of the sea-bed, for example). These are all given the kiss of death—they are described as 'worthy and humane'—before being consigned to the category of aspiration.

According to the dual image of international law, 'political law' is *opportunistic*, like the product of a temporary confluence of circumstances or a response to an immediate situation (treaties in this category are those that purport to stabilize temporary alliances and friendships or put in place regimes 'preparatory to close political ties'); it is *indeterminate* (subject to 'contradictory interpretations');[19] and it is *aspirational* (it fails to reflect the realities of the inter-state order).[20]

Neither this distinction, nor the particular ways in which it is understood, survive close examination. The mammalian conflict, what we give to others and what we keep for ourselves, is everywhere in law and politics. The Charter of the United Nations, bruised in various encounters with the Great Powers, remains a key foundation of the international legal and political order and yet was, of course, also an 'opportunistic' response to a particular and immediate situation (the consequences of German aggression in 1939). Indeed, it is difficult to see how international norms could develop at all if this was a test for their legitimacy. International society, largely, is the product of post-trauma constitutional architectures from Westphalia to Vienna to San Francisco. Indeed, Morgenthau himself calls on us to understand the relationship between underlying social factors and the rules of international law. Meanwhile, the indeterminacy of international law's constitutive forms of argument has by now been well established.[21] It is

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18 Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press, 2000) at 122-30.

19 Morgenthau, *supra* note 4 at 279.

20 Jackson, *supra* note 18 at 123-4.

21 For a discussion see Andreas Paulus, 'Towards Renewal or Decline of International Law?' (2001) 14 Leiden J. Int'l L. 727.

no longer possible to go back to a position whereby we regard some rules as having some pre-interpretive essence. The desire to cleanse international law of aspiration is a venerable project of legal positivists, of course. But even Morgenthau could not maintain this animus toward naturalism. Towards the end of his essay, he seems to embrace a variant of the very normativity he rejects. Functional international law, it seems, would have to embody two distinct fields of operation: the laws as derived from the *mores* and practices of a particular existing order, and the norms drawn from the ends towards which that order is working. But these latter norms look awfully like the very norms proposed by the inter-war utopians he disparages and the aspirational category described by Jackson.

In general, it has become difficult to distinguish between pristine legal rules (the product of innocent interaction), and those forged in post-war environments or those that are aspirational or indeterminate. Such distinctions require a repudiation of much of what someone like Morgenthau seems to stand for and a return to the very formalism he rejects. But this will not work either. After all, even technical norms, like all norms, will consist of a combination of indeterminate readings of the present and deeply contentious prescriptions for the future.

This whole problem is illustrated by Morgenthau's categorisation of norms. For example, the very categories he insists we see as innocent and apolitical are those that go to the heart of sovereignty, and have been the subject of intense dispute. Extradition, territorial jurisdiction, and maritime law have each given rise to quite serious conflict in recent years. The indeterminacy of international law on the law of the sea will be familiar to anyone who has perused the World Court's docket over the past three decades. Indeed, so indeterminate is the law in some areas that the Court has had to rely on equity (*Gulf of Maine*) or equitable principles (*North-Sea Continental Shelf*) to resolve competing claims. Extradition, too, has excited enormous amounts of interest in recent years where both decisions to extradite (*Re Pinochet*) and refusals to extradite (*Soering v. United Kingdom*) have given rise to claims of policisation.[22] Questions of territorial jurisdiction, meanwhile, go the very heart of inter-state relations and attempts by states extend that jurisdiction over non-nationals or state officials have led to fundamental conflicts about the future development of the law (*Arrest Warrant Case*, *Guatemalan Genocide Case* (Spain)).[23]

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[22] *Re Pinochet*, [1998] H.L.J. No. 52, online: <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm>; *Soering v. United Kingdom* (1989), 11 E.H.R.R. 439.

[23] *Decision of the Spanish Supreme Court concerning the Guatemala Genocide Case*, [25 February 2003] 327/2003, online: <http://www.derechos.org/nizkor/

The assumption that international law can be divided into rules that are secure and certain, and those that are idealist projections, is found, too, in Jackson's dualism, which seems to rely on a distinction between rules that arise from state practice (the classical tradition) and those that are the product of non-state aspirations to improve the substance of international order (the declaratory approach). But the international legal rules placed in each category hardly bear this out. Is it really the case that the laws of war and the obligation to obey the terms of treaties are norms that states-people 'were usually prepared to recognise and observe in their relations'?[24] In fact, the practices related to these norms have been subject to serious dispute. The laws of war have been every bit as indeterminate as other political or aspirational laws (such as human rights). Chris Jochnick and Roger Normand have written on the open-textured nature of much international humanitarian law and the deference to politics at its heart in the military necessity rule.[25] Treaty law, too, though it appears to be under-girded by the *pacta sunt servanda* super-norm, is subject to all sorts of conditioning norms (*rebus sic stantibus*, coercion), which have the effect of rendering at least some treaty obligations unstable. On the other hand, it is not at all clear why laws on gender discrimination, or the collectivisation of the sea-bed, or those rules of trade favouring weaker economies should be regarded as quasi-law. These are, often, fairly explicit prohibitions attracting high degrees of compliance (the Law of the Sea) or are norms with almost universal support embodied in treaties (Human Rights Law) or are norms subject to continual legitimation through adjudicatory procedures (International Economic Law). Why is the obligation to comply with treaties a foundational norm of the classical tradition while the obligation to comply with human rights norms is merely a matter for the worthy and humane? This does not make structural sense. Meanwhile, the norm of democratic governance (or promotion of democracy), which Jackson casts into the weaker, aspirational category, is both remarkably robust[26] and far from novel.[27]

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guatemala/doc/stsgtm.html>.

24 Jackson, *supra* note 18 at 122.

25 Chris af Jochnick & Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 Harv. Int'l L.J. 49.

26 Thomas M. Franck, 'The Emerging Right to Democratic Governance' (1992) 86 Am. J. Int'l L. 46.

27 Gerry Simpson, *Great Powers and Outlaw States* (Cambridge: Cambridge University Press, 2004). These various spheres of law are composed of bundles of norms in which defection and cooperation vie for primacy. As Franck has shown (in *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990)), law does not fall into rigidly demarcated categories of 'soft' and 'hard' but instead operates along a spectrum of legitimacy.

Most of all, this concern to distinguish 'real' international law from international political morality proceeds from a view of law that is now unsustainable. International law, as we shall see in the final section, is not enforced in entirely transparent manner. In this sense, it is not entirely unlike domestic law.[28] When Western states, in the name of promoting safety, began to criminalise certain practices on the factory floor (for example *The Factories Act 1961*), this did not result in widespread prosecutions, nor was there a lack of enforcement. Instead, bargaining and reform occurred in the shadow of the law using a variety of techniques encompassing threat and persuasion, and often resulting in self-enforcement. Laws criminalizing insider trading are only rarely enforced because of problems related to proof and political will. Traffic violations are enforced on an extraordinarily ad hoc and sometimes arbitrary fashion. It would be unusual (and not particularly useful) to describe these laws as political or quasi-laws. The attempt to discern an apolitical law promises a return to the very abstracted legalism that Morgenthau seems so keen to rid us of. Ultimately, the protean, and occasionally recondite, nature of law simply cannot be captured by these crude mechanisms of distinction. Instead, the normative universe, like that of the political, is an endless negotiation between holding on and letting go.

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> We were running towards a catastrophe, which itself was a kind of furnace in whose heat identities and fates would buckle into new shapes. At the base of the balloon was a boy, and by the basket, clinging to a rope, was a man in need of help.[29]

McEwan's novel is not about what happens in the balloon on the day. It does not concern the one-off mechanisms of permission and constraint that guide the protagonists at the foot of the balloon. Instead, the action continues 'at home' where identity is buckled into shape. What do the protagonists 'do' with their guilty behaviour? How do they adjust their beliefs as a consequence of the events of that day? The moment of collaboration/defection is not the essence of international law but the fantasy of punishment and enforcement continues to dog international law's public image.

From the onset of the Iraq crisis of 2003, this fantasy emerged as two familiar models for understanding the law/politics nexus. The

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[28] There are other respects in which the two legal orders are quite different, of course.

[29] McEwan, *supra* note 1 at 3.

standard realist response to the war concerned the apparent failure of international law to restrain the hegemons. Despite the effort of international lawyers, the plain prohibitions of the *Charter of the United Nations*, and the extensive jurisprudence declaring the *ultra vires* nature of regime change, the United States-United Kingdom coalition nonetheless invaded Iraq.[30] They did so in the pursuit of a belief that their interests demanded it. For the Bush Administration, it was a case of 'go find me a way', for Blair's Government it was the imperative of sustaining the 'special relationship' and bridging a widening gulf between Europe and the United States. Either way, there were legitimate security concerns that simply had to prevail (and *ought to* have prevailed) over international law.[31] As Plato put it, why choose the crudities of law over the intelligence of leaders?

Meanwhile, from the perspective of a fairly unreflective legalism, the decision to go to war demanded a response from law. On one hand this led to an embrace of, what Judith Shklar called 'tribunality'.[32] There were demands that Bush and Blair be held to account in criminal trials. Wasn't this what the establishment of the International Criminal Court had promised? And wasn't the International Criminal Court the consummation of a process begun during the inter-war period where international political life would be overseen by an extensive network of judicial and quasi-judicial organs (this was the legalism against which IR had reacted after 1940)? Failing that, the United States and the United Kingdom had to be held to account either by judicial bodies (attempts were made[33]) or through sanctioning mechanisms available at the international level. When none of this came to pass, the legalists begin to despair of international law itself. This legalist model, then, is self-destructive. Since the United States is not constrained by law, or because law can be interpreted ('manipulated') to suit the Great Powers, or because the International Criminal Court does not have jurisdiction over President Bush and

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30 For the definitive statement on regime change in international law see *Case concerning Miltary Activities in and against Nicaragua (Nicaragua v. U.S.A.)*, Judgment of 26 November 1984 (Admissibility), [1984] I.C.J. Rep. 392, and Judgment of 27 June 1986 (Merits), [1986] I.C.J. Rep. 14, online: <http://www.icj-cij.org/icjwww/icases/inus/inusframe.htm>.

31 For discussion in relation to Kosovo, see Michael J. Glennon, *Limits of Law, Prerogatives of Power* (New York: Palgrave, 2001).

32 Judith Shklar, *Legalism* (Cambridge, Mass: Harvard University Press, 1964).

33 In two cases, *Doe v. Bush*, 322 F.3d 109 (1st Cir. 2003), and *CND v. Blair*, [2002] E.W.C.H. 2759, online: <http://www.courtservice.gov.uk/judgmentsfiles/j1458/cnd_v_prime_minister.htm>, heard in United States and United Kingdom courts respectively, the judiciary declined to adjudicate the matters, regarding them as non-justiciable political matters.

Prime Minister Blair, the law must be irrelevant (as the realists warned us) or weighed in favour of the powerful (as the legal purists have always suspected).

Realists and legalists, then, share a particular orthodoxy about law drawn from a model of legality that no longer commands much support among those who have studied the varieties of law at the domestic, regional and international levels. In other words, the stand-off between IR and PIL occurred because the dominant camp in each group *shared* a view of the law. What the Iraq imbroglio has demonstrated is that this image of law needs to be subject to serious inquiry. In particular, we need to accept the existence of something we might characterise as *modest normativity*. International law works in mysterious ways.[34] The United States and the United Kingdom, for example, were not constrained (in the strong sense) from making war on Iraq in 2003, and yet there was law and, most of all, there was the promise of law *and* constraint. Where was it? This is certainly not the place to catalogue law's presence before, during and after the Iraq crisis. But law was a powerful language through which argument was made and remade, butted and rebutted. The illegality of the war provoked mass protests, and may have contributed to the fall of at least one governing party (in Spain). Law shaped the way in which the debate about international society and the use of force was conducted. The Blair Government worked hard on a lengthy legitimacy strategy part of which required a full commitment to arguing a legal case. Admiral Boyce, then Chief of Defence Staff, was so worried about the ambiguous nature of the legal advice prior to war that he insisted on a clear legal mandate before committing ground forces to war.[35] As Boyce stated in March 2004: 'I required a piece of paper saying it was lawful … [i]f that caused them to go back saying we need our advice tightened up then I don't know.'[36] The United States' failure to do likewise may have its costs in international credibility, operational legitimacy and a degradation in other forms of legal constraint. And international law on the use of force came home. International law was relied upon by the defendants in various criminal prosecutions brought in the United Kingdom against those who committed criminal acts in order to oppose the war. The prosecution of Katherine Gun under the *Official Secrets Act* case was dropped after Ms Gun's lawyers demanded to see the Attorney

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34 See e.g. Dinah Shelton, ed., *Commitment and Compliance* (Oxford: Oxford University Press, 2003); Christian Reus-Smit, 'The Politics of International Law' in Christian Reus-Smit, ed., *The Politics of International Law* (Cambridge: Cambridge University Press, 2004) 14.

35 *The Guardian* (1 March 2004) 4.

36 Sarah Hall & Richard Norton-Taylor, 'Pressure on Blair increases over legality of going to war' *Guardian Weekly* (11-17 March 2004) 9.

General's full, unpublished advice to the Prime Minster.[37] When the Prime Minister of the United Kingdom said, as he was quoted as saying in the *CND v. Blair* case, '[w]e always act in accordance with international law,'[38] he created a series of expectations about the war, and about the role of law in international affairs. The *Sunday Telegraph* in an editorial disparaging international law as marginal reasoned that '[i]f a solid majority of the British people can be persuaded that the war was right and just, then Mr Blair's problems will be at an end.'[39] But it is hard, as the Prime Minister has discovered, to persuade people that illegal wars are just and right.

International law, in the end, is enforced in all sorts of ways. It is 'a kind of furnace' and many 'identities and fates' are shaped and buckled by it. For example, perhaps, the Prime Minister is now viewed as no longer a plausible multilateralist but a misadventurer willing to spurn international institutions. Meanwhile, the United States may have finally lost its claim to be the guardian of the San Francisco Consensus.

Wars are the outcome of arguments, armies move by the force of ideas. And law is a powerful idea. It is the power of this idea that ought to provide the inspiration for collaborative work between international lawyers and IR scholars.[40]

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> Mostly, we are good when it makes sense. A good society is one that makes sense of being good.[41]

The idea of embracing a less illusioned (and less disillusioned) and more nuanced picture of the operation of global law represents perhaps the most fruitful possibility for intellectual exchange between the two disciplines. But this will require an earthbound critique of the fantastic; represented in our obsessions by the notion that utopia is out there and we are back here, or that law must be either political or cleansed of politics, or that punishment and enforcement are either present or absent here and now, or not at all.

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37 Richard Norton-Taylor & Ewen MacAskill, 'Spy Case casts fresh doubt on war legality' *The Guardian* (26 February 2004) 1; see also 'Casualties of Terror' *The Guardian* (26 February 2004), online: Guardian Unlimited <http://www.guardian.co.uk/Iraq/Story/0,,1156637,00.html>.

38 U.K., H.C., *Official Report*, col 482 WA (14 March 2003).

39 'A legal fiction', Editorial, *Sunday Telegraph* (29 February 2004) 24.

40 For some examples of this sort of work, see Reus-Smit, *supra* note 34.

41 McEwan, *supra* note 1 at 16.

The Evolution of International Environmental Cooperation

ELIZABETH R. DESOMBRE*

International environmental cooperation is a relatively new endeavor, appearing in a currently recognizable form within the last century, and becoming a major part of international relations only in the last three or four decades. During its brief history, the issues on which states have cooperated pertaining to the environment have shifted, as have the characteristics of the cooperative institutions established to address them. Some of these changes have come about because over time the environmental problems being addressed internationally have become more complex, both environmentally and politically. International environmental agreements, unlike some other areas of public international law, bind states, but for compliance require behaviour change primarily by private substate actors. The incentive structure in the agreements for these substate actors can thus have implications for how they are implemented. These incentive structures in collective self-regulation have changed from early agreements in which those substate actors whose behaviours needed to change directly benefited from their actions to protect a resource, to one in which the regulated industry gains little inherent advantage from being regulated. The time lag between activities that have environmental impacts and the manifestation of harm has increased as well (and, conversely, the time between taking action to protect the environment and the beneficial effects of that action has increased). Both these issues relate to a change in types of uncertainty underlying global environmental problems. Other changes in the nature of the environmental problems being regulated have led to an increasing degree of influence on the part of developing countries in international environmental agreements. Despite this increased complexity, multilateral environmental agreements have continued to be a powerful tool for mitigating difficult environmental problems.

I ISSUES AND INCENTIVES

The types of environmental issues addressed internationally have changed over time, and with them the incentive structure of actors whose behaviours need to change to mitigate the environmental problem in question. The first substantive international environmental agreements reflected efforts to manage shared resources in a sustainable manner, primarily water and wildlife. The early wildlife treaties generally addressed animal species that migrated from one state to

* Frost Associate Professor of Environmental Studies and Associate Professor of Political Science, Wellesley College.

another (or existed in a shared geographic space like the oceans). They had in common an effort to manage a shared resource so that it could continue to be harvested over time. Though the terminology would have been different at the time, this approach reflects what we now think of as sustainable use. The 1911 *Convention for the Preservation and Protection of Fur Seals* is one of the earliest examples of this type of treaty; the 1946 *International Convention for the Regulation of Whaling* (ICRW) (preceded by two other whaling treaties in the 1930s) is another. Most international fisheries agreements, negotiated in a period that began roughly in the 1950s, also fit into this category.[1]

Resource management agreements can be, compared with other international environmental agreements, relatively easier to reach, because the actors that are regulated benefit directly from the regulation itself. As the preamble to the 1946 ICRW puts it, whale stocks 'are susceptible of natural increases if whaling is properly regulated, and … increases in the size of whale stocks will permit increases in the number of whales which may be captured without endangering these natural resources.'[2] Whales, when left to their own devices, make more whales. If whalers can regulate whale catches so as to allow this to happen, their livelihood will be perpetually assured. Whaling states benefit, and whalers—the actual actors whose behaviour is impacted by the regulations—benefit if regulation works.

Despite this fortuitous incentive structure, agreement on even these issues can be difficult to reach for a number of reasons, most of which come down to the possibility that some states will want to free ride on the cooperative agreements. Each state would prefer, especially in an issue of sustaining a resource, that cooperative efforts limit the use of the resource so that it will exist indefinitely. But even better for a given state would be if all other states refrained from (for example) whaling so that the harm to the whale populations is kept within reason, but that it, itself, continue to catch as many whales as it can. Because this preference structure should hold for each state (or even for individual actors within the state), the danger always exists that someone will try to exercise this option. More importantly, because all states are aware of this incentive structure, they know it is possible that others will try to free ride on international cooperative agreements. If others do, they would be foolish themselves to uphold the agreement, and thus the entire process of cooperation can unravel. It is for this

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1 M.J. Peterson, 'International Fisheries Management' in Peter M. Haas, Robert O. Keohane & Marc A. Levy, eds., *Institutions for the Earth* (Cambridge, Mass.: MIT Press, 1993) 249.

2 *International Convention for the Regulation of Whaling*, 2 December 1946, 161 U.N.T.S. 72, T.I.A.S. 1849 (entered into force 10 November 1948), preamble.

reason that monitoring strategies are generally included in such agreements. These monitoring provisions, even for resource agreements, have become stricter over time. Many fisheries agreements now require observers on board vessels to make sure that the catches recorded are accurate, and some fisheries agreements require satellite tracking of vessels. In fact, the types of monitoring provisions included in resource management agreements are generally more intrusive than in other issue areas. This may be possible because those who are regulated benefit directly from the regulations themselves as long as everyone upholds them. They may therefore be more willing under these circumstances to agree to intrusive monitoring provisions.

When we move to other areas of environmental cooperation, the direct benefit to the regulated actors diminishes. While it may be the case that states as a whole benefit from clean air or an intact ozone layer, the power plant operators, automobile manufacturers, or industrial users of chlorofluorocarbons (CFCs) do not themselves gain from environmental improvement that results from the restrictions placed on their activity. And while there may be some industries (in the case of water quality, for instance) that benefit from the clean water used as an input, these are rarely the industries whose behaviour is polluting the water in the first place.

The important implication of the move to regulating activities where those whose behaviour needs to change do not directly benefit from the environmental improvement it brings is that the actors to be regulated are likely to be more resistant to this change. We see this in the general resistance on the part of most industry (most notably in the United States) to serious action on climate change. Moreover, the need to appease industrial actors, who generally have political influence, has led to some of the forms of environmental regulation that Steven Bernstein elsewhere characterizes as 'the compromise of liberal environmentalism.'[3] Mechanisms like tradable emissions permits and privatization of resources are ways to either try to fit existing incentive structures into the resource management model in which actors benefit from protection policies, or simply to make the actions taken less painful for the industrial actors who have the political clout to be able to prevent action altogether.

An interesting implication of this observation is that regulations crafted to give non-environmental advantages to regulated industry can thereby avoid political difficulties that come from opposition from some business actors. An industry that already meets standards to protect a given environmental resource (whether through domestic regulations or

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[3] Steven Bernstein, *The Compromise of Liberal Environmentalism* (New York: Columbia University Press, 2001).

because of how it has chosen to do business) may benefit competitively from international environmental regulations. Because there is generally at least an initial cost to producing in a way that protects the environment, internationally competing industries that already meet a standard may gain from requiring others to meet that standard as well. In this case it is not that those regulated benefit intrinsically from the regulation, but that they benefit from those regulations relative to others who have not previously met them.[4] Support may also come from businesses that make the things that would be used to respond to the environmental problem. This dynamic further supports the advantages of regulations that provide benefits to those who are regulated, but also has strong implications for the types of regulations that are chosen, as suggested above.

II TIME HORIZONS

Even those who agree to participate in international cooperative arrangements face a disconnect between short run and long run incentives. Environmental issues feature a lag between when actions that could harm the environment begin and when the environmental damage they cause can be discerned; conversely there is also likely to be a lag between actions taken to protect the environment and a noticeable environmental improvement. One of the important trends in international environmental regulation is that this time lag is much longer for the types of environmental issues currently addressed than it was for earlier international environmental problems. This is not accidental; environmental problems with a short time lag are easier to address than those with a longer one, and thus provided easier initial opportunities for cooperation.

This disjunction between time of action and impacts is true of almost all environmental issues, even the early resource conservation agreements, and has important consequences. While it may be true that if a resource is adequately protected the actors will all be able to continue to make use of the resource indefinitely, planning for this end may require sacrifice in the short run—a restriction in fishing this year so that fish will be around next year or ten years from now. The tradeoff may be worthwhile, but can be hard to make if the need for the resource right now trumps any long term planning. Fishers who will not be able to make payments on their fishing vessels if they do not make enough money fishing this year may not be around to benefit from the long-term health of the fish stocks. Developing states whose primary concerns are

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[4] Kenneth A. Oye & James H. Maxwell, 'Self-Interest and Environmental Management' in Robert O. Keohane & Elinor Ostrom, eds., *Local Commons and Global Interdependence: Heterogeneity and Cooperation in Two Domains* (London: Sage Publications, 1995) 191.

meeting the basic needs of their populations may care less about the long run health of ecosystems than the present use of resources to keep their people alive, and may be unwilling or unable to bear a short term cost for a long term gain. How much actors value the future compared to the present is called a discount rate, and it has been demonstrated that actors with a high discount rate (those who value gains in the present much more highly than gains in the future) will be less likely to protect a resource even with the collective long-term benefits that environmental protection can provide.[5]

Even a short time lag increases uncertainty: if you catch this fish today, it is yours. If you leave it in the ocean until next year, it (and perhaps several others) will be yours, as long as the cooperative efforts put into place to make all actors restrict their fishing have succeeded. Actors discount the future not only because of what they could do with the resource, or the money it brings, in the present, but because of the uncertainty about whether the promised resource will exist in the future. And given the uncertainty discussed above about whether others will indeed restrict their behaviour, doing so yourself in the short run can be risky—you bear a certain current cost for an uncertain future benefit.

This discount rate becomes much steeper as the benefits from environmental protection come further and further into the future. If we have not yet begun to feel the problems from climate change, and changing our behaviour now might make things better a century into the future, assuming everyone else goes along with restrictions as well, it can be difficult to accept costly behaviour change in the present. For many of the most pressing international environmental issues currently requiring international cooperation, the primary benefits of cooperation will appear decades or, more likely, centuries hence. This issue then also intersects with the question of advantages of regulation discussed above, as the actual people who benefit from environmental actions taken today may not yet have been born. Philosophical debates about the role of future generations in decisions to protect the environment abound; from a political perspective, however, those who do not yet exist have little political clout.

III THE MANY FACES OF UNCERTAINTY

An important characteristic of most international environmental problems about which international agreements are made is uncertainty, but what it is we are uncertain about has changed across issues in ways that characterize different eras of international environmental policy

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[5] J. Samuel Barkin & George E. Shambaugh, eds., *Anarchy and the Environment: The International Relations of Common Pool Resources* (Albany: SUNY Press, 1999).

making. Several aspects of uncertainty have already been discussed in this article: the uncertainty about whether other actors who have agreed to cooperate in protecting an environmental resource will do so, and the related uncertainty about whether, over time, a protected resource will indeed bring advantageous results to those who have undertaken measures to protect it. But there is a more central underlying uncertainty that frames environmental issues, about what causes the problems and what the environmental impact will be of various behavioural changes.

In the early resource agreements this uncertainty was about what a sustainable level of use would be (and, to a lesser extent, what level of resource use was already taking place). Most resource agreements created scientific committees to take information about the current level of resource use and recommend levels that would be sustainable. Later pollution issues featured uncertainty about the cause of the problem itself. For example, acidification of Scandinavian lakes was an environmental problem, but its cause was uncertain, since at the time it seemed implausible that pollutants could travel far enough to be coming from the United Kingdom or elsewhere in Europe.[6] Here again, research conducted by scientific bodies created as an essential part of international cooperation was able to ascertain the causes (and, in the case of acid rain, long-range transport) of pollution. Knowing the sustainable level of harvest or the transport mechanisms of pollutants does not solve all the political problems that underlie efforts to protect environmental resources; indeed, they can occasionally create new ones. (For instance, one reason states may have been willing to agree on a moratorium on mining in Antarctica, under the Environmental Protocol to the Antarctic Treaty, may have been continued uncertainty over whether, or where, valuable minerals are accessible). But resolution of uncertainty does avoid the important question about whether behaviours would have to change at all to protect the environment.

More recent environmental problems face a different type of uncertainty: about the very existence of the problem, or the impacts it might have. Beginning with the issue of ozone depletion in the 1980s, we have moved to environmental problems that are hypothesized before they are experienced. Ozone depletion is an excellent example of this type of problem. Research in the 1970s gave reason to suspect that CFCs could, in the presence of sunlight, destroy ozone molecules; other research indicated that CFCs were sufficiently stable that they could perhaps travel as far as the ozone layer. This led to international cooperative efforts to conduct scientific research into whether these substances were travelling that far, and what their effect would be.

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[6] Marc A. Levy, 'European Acid Rain: The Power of Tote-Board Diplomacy' in Haas *et al.*, *supra* note 1 at 75.

When international negotiations to address the potential problem of ozone depletion began, there was only limited evidence of any human impact on the ozone layer; the Antarctic ozone 'hole' (in reality a systematic thinning of the ozone layer over Antarctica) was only discovered as the Vienna Convention was being negotiated in 1985, and its human-induced causes remained unclear until after the agreement was completed.[7]

Climate change faces similar issues of uncertainty. Though the basic mechanisms linking increased human emissions of greenhouse gases and the global climate system are well understood, there are a number of factors about which there is legitimate uncertainty. What is the role of clouds? How do aerosols, increasing from some of the same activities that produce greenhouse gases (such as soot from power plants), impact temperature? More important is simply the fact the results of climate change have not yet been unambiguously felt. There is scientific agreement that the average global temperature has increased by small amounts and the sea level has risen a bit, both as predicted.[8] But there is no smoking gun: neither have the impacts been strongly felt nor can any specific impact on its own be traceable to human impact on the climate system. Those who will be harmed by having to change their activities to prevent climate change know who they are and what the impact will be, but those who will benefit from mitigation have not yet clearly felt effects that can directly and unambiguously be traceable to climate change. From a political perspective, it is easy to understand why addressing this problem is difficult.

Moreover, in the ozone depletion and climate change examples, the long time horizons of these issues that make addressing them difficult in the present are the very reasons that they must be addressed before evidence of the problem is clear: because there is such a long time period between action taken and effects seen, waiting until the problems manifest themselves more clearly risks beginning to address a problem when it is too late to have the desired impact. These issues, and other recent ones such as persistent organic pollutants, are much harder to address than previous environmental issues because of the types of uncertainty they represent, but are especially important to address precisely for these reasons.

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7 Edward A. Parson, *Protecting the Ozone Layer: Science and Strategy* (Oxford: Oxford University Press, 2003).

8 James J. McCarthy *et al.*, eds., *Contribution of Working Group II to the Third Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2001).

IV THE ROLE OF DEVELOPING STATES

Another important trend in international environmental cooperation is the changing role of developing states. Initially these states were more or less ignored in the process of international policymaking. But it became clear that on some issues their participation, whether or not they had contributed to the creation of the problem or were particularly impacted by it, was essential to environmental protection internationally. At the same time, because their future behaviours would have such an important impact on global environmental conditions, they gained bargaining power on some international environmental issues greater than they generally have in world politics. This dynamic has led to international mechanisms by which industrialized states compensate developing states for their environmental activities in a way that helps protect the environmental resources in question. When the incentives line up, everyone gains: developing states gain the ability to protect the environment without negatively impacting their development goals (and, perhaps, even contributing to them), and developed states gain the international cooperation they need to address environmental problems that affect them. The changing role of developing states is itself due to changes in the nature of environmental problems addressed. Most are problems of development, and impact the global commons. That means states remaining outside of the cooperative process have the ability to negate environmental improvements made by those who participate,[9] and the relevant activities are sufficiently broadly related to industrialization that any developing state can have an impact on the environmental issue.

An important turning point for the role of developing states was negotiation of the international agreements to protect the ozone layer. Developing states, led by China and India, did not initially ratify the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, arguing that it would preclude development options that to them were of a higher priority than protection of the ozone layer. Their credible threat to stay outside of the agreement and develop while using substances prohibited within it resulted in the creation of the Montreal Protocol Multilateral Fund. Under this agreement, developed states give money to meet the full 'incremental costs' of developing countries in complying with the agreement; after its creation all the major developing countries joined the Montreal Protocol.[10] All major global environmental agreements negotiated since then have contained such

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9 Barkin and Shambaugh, *supra* note 5.

10 Elizabeth R. DeSombre & Joanne Kauffman, 'The Montreal Protocol Multilateral Fund: Partial Success Story' in Robert O. Keohane & Marc A. Levy, eds., *Institutions for Environmental Aid* (Cambridge, Mass.: MIT Press, 1996) at 89.

funding mechanisms, some of them via the Global Environment Facility (GEF), a similar funding mechanism with a broader mandate. It now covers funding for climate change, loss of biodiversity, ozone depletion, issues of transboundary water resources, persistent organic pollutants, and land degradation.

Also notable is the structure of decision-making under these mechanisms. In most international institutions that provide economic assistance voting is pegged to contributions, so that donors have the greatest degree of influence over how the funding is used, with recipients hardly able to influence prioritization of funding. From the beginning the negotiations to set up the Montreal Protocol Multilateral Fund focused on how its decisions would be made, with developing countries refusing to participate unless their concerns were assuaged. They successfully lobbied for the creation of a new institution with a decision-making body composed of seven donor and seven recipient countries with rotating terms. Projects are approved by 'double majority' voting, in which any decision not taken by consensus requires a two-thirds majority, which must include a majority of states in both blocs.[11] Even in the GEF decisions are made by consensus in a Council with split representation: sixteen developing states, fourteen industrialized states, and two states with economies in transition.[12]

At the same time, the influence of developing countries in international environmental cooperation has limits, often influenced by the structure of the issues addressed. Developing countries have traditionally had a high degree of influence when their participation was needed to address global environmental issues of particular concern to the industrialized states. But when the concern rests with the developing states and the problem either is not transboundary or does not particularly impact industrialized states, that influence wanes. Some of the starkest environmental problems facing people in developing countries involve things like access to clean water, indoor air pollution, and sanitation. An illustrative example is the negotiation over the 1994 *United Nations Convention to Combat Desertification*. On most of the contentious issues in the creation of this agreement—whether the problem would be identified as global, whether the convention would address the socio-economic causes of desertification, and whether a funding mechanism requiring new and additional aid transfers from developed to developing states would be created—the developing states did not get what they wanted.[13]

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11 *Ibid*.

12 Global Environment Facility, 'Council', online: <http://www.gefweb.org/participants/Council/council.html>.

13 Pamela Chasek, *Earth Negotiations* (New York: United Nations University

In the broader scheme of things, the general principle that richer states should help poorer states pursue environmental protection, and the related idea that developing states should initially have more lenient obligations in international agreements, are rapidly becoming accepted norms. In this way, the normative role of developing principles of customary international law (in this case the idea of 'common but differentiated responsibilities') clearly has effects that take international policymaking beyond naked self-interest. Indeed, even the desertification difficulties, described above, have been mitigated by the recent inclusion of desertification in the focal areas of the GEF.[14] As the interconnectedness of economic and environmental issues, and the global aspects of even local environmental problems, become clearer, and the norm about special consideration for developing countries generally expands, this trend will likely increase. This norm has its own complications, however. It is, in many ways, a fair way to deal with the responsibility that industrialized states bear for their contributions to existing environmental degradation. But it also makes environmental agreements more costly for developed states that are already, because of the increasing complexities addressed above, facing more difficult decisions about whether to cooperate internationally on environmental protection.

V MULTILATERAL ENVIRONMENTAL AGREEMENTS

What of the international environmental agreements themselves? Do they have any independent effect, once negotiated? When making an argument about the incentive structures that underlie and shape international environmental cooperation it is easy to lose sight of the effect of agreements themselves. One the one hand, it could be argued that treaties are simply the outcomes of the process of negotiation, codifying the results of the political jockeying that preceded them. But in the area of international environmental politics, the agreements that get adopted are rarely the end product, but instead create the framework and the process that guide responses to the environmental problem in question.

The increasing propensity to first create framework conventions, in which states agree on principles, set up a process for decision-making and find ways to increase and make use of scientific research to decrease some kinds of uncertainty about the extent or effects of the environmental problem, is one manifestation of this

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Press, 2001).

[14] United Nations Convention to Combat Desertification, Press Release, 'GEF Assembly endorses demands made in Agadez' (26 October 2002), online: <http://www.unccd.int/publicinfo/pressrel/showpressrel.php?pr=press26_10_02>.

process. These conventions are later followed by negotiation, within the framework they set out, of protocols in which the specific abatement measures are elaborated. The initial characterization of the framework convention matters. A number of substantive protocols—those pertaining to European acid rain, to ozone depletion, and to climate change, to name just a few—would have been impossible to negotiate without the new scientific information created, or interpreted, within the information gathering processes in their framework conventions. In addition, agreement in principle on the problem and a basic desire to address it can be essential in the process of cooperation; once states have agreed to address a problem it may become normatively harder to refuse to participate in specific measures that are aimed at ameliorating the problem.

Other types of environmental agreements have different structures that fulfill similar functions in allowing for the evolution of obligations: many resource management agreements, such as those regulating fisheries, set up commissions that make annual decisions about levels of harvest. In these cases, the process these agreements create is what is directly responsible for the changing obligations. Treaties that identify endangered species to be protected, or that specify chemicals that cannot be used or substances that cannot be dumped in the ocean, listed in an Appendix or Annex, follow a similar regulatory model in which the agreement itself outlines a process for changing obligations. These agreements are thus less the end point of a negotiation than the elaboration of the process through which continual negotiation will take place over time.

While strong enforcement mechanisms are rare in international environmental agreements, additional aspects increase the likelihood that states will live up to the agreements they create. Reporting requirements make it easier to determine when states are not doing what they have agreed to do, and increasingly intrusive types of monitoring (such as mandating observers on fishing vessels) have been created within existing agreements. Since the mutual benefits from cooperation accrue only if others live up to their obligations, reassurance that they are likely to do so increases willingness to participate.

Moreover, across international agreements, the processes, and often the norms that underlie them, gain further acceptance and become adopted elsewhere. The principle of common but differentiated responsibilities (especially the aspects calling for developed countries to take environmental action first, and to provide assistance to developing countries in meeting their obligations) has developed across international environmental agreements to the point where it is almost automatically included when a negotiation process begins. The expanding use of the precautionary principle is another example. The role of international agreements in helping to codify and expand these

norms exists apart from their focus on addressing a specific environmental problem.

CONCLUSIONS

International environmental cooperation is hard and is getting harder. Characteristics of the problems to be addressed, both environmentally and politically, make many of the current environmental issues more difficult to address than was true of earlier efforts at international environmental cooperation. But a number of the processes and approaches created to address environmental problems previously can help the process of doing so now, as the world turns to problems with more difficult incentive structures, longer time horizons, greater uncertainty, and a need to involve all states in cooperative solutions.

Some reassurance can be taken from the largely successful international efforts to protect the ozone layer, which evinces several of the more difficult conditions for multilateral environmental cooperation addressed here: the regulated actors did not benefit from the protection of the resource, the time between action taken and environmental improvement was long, and the problem needed to be addressed before the process or its effects were fully understood. Some states, whose participation was essential, were not especially concerned about this environmental problem relative to others they faced. The success of the international agreements to protect the ozone layer came from working within the framework laid out here. Affected industries in some of the major states were already regulated, thanks in part to action from non-governmental actors. These industrial actors were therefore willing to agree to international regulation because it evened the economic playing field with their competitors.[15] Similarly, developing states were able to organize and advocate for economic assistance to meet the requirements of the agreements as a condition for joining. This process proved valuable for all parties concerned, since ozone depletion could be successfully mitigated collectively, developing states would not have to compromise their development goals in order to do so, and all states would eventually benefit from the protection of the ozone layer.

This success story provides some cautions as well, however. Because of an effort to work within existing incentive structures, or to modify them such that the major actors would be willing to take action on this issue, the approaches used were not radical. On the one hand, moderate fixes—substituting a chemical that does not deplete the ozone layer for one that does—do not provide the dramatic change in the

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[15] Elizabeth R. DeSombre, *Domestic Sources of International Environmental Policy: Industry, Environmentalists, and U.S. Power* (Cambridge, Mass.: MIT Press, 2000) at 94.

human relationship to the environment that would be the most beneficial route to environmental protection. On the other hand, such a radical change is unlikely to happen, since states are the ones to negotiate international agreements and few states have shown a willingness to radically rethink the economic structure that can underlie environmental problems. Given the difficulty of the modest but useful forms of international environmental cooperation outlined here, many have chosen to push for the possible over the ideal.

Additional trends, examined in this *Journal* by others, also bear watching. The increasing role of non-governmental actors, both environmental activists and businesses, is likely to have broad impacts on the direction of multilateral environmental cooperation. New forms of cooperation—the move to public-private partnerships or non-binding agreements—are also becoming more prominent. But states remain central actors in international environmental cooperation, and many of the concerns expressed about the modest outcomes possible with multilateral environmental agreements would apply to these mechanisms as well.

The experience of multilateral environmental cooperation thus far should nevertheless leave us feeling relatively optimistic. As outlined here, the environmental problems faced globally have become more complicated, in incentive structures, time horizons, and uncertainty, and have necessitated new mechanisms for involving developing states. Despite this increasing degree of difficulty, states have moved forward with increasingly substantive agreements for addressing global environmental problems. By integrating research into mechanisms of cooperation, including monitoring to ensure that states live up to their obligations and thus diminish some of the difficulties of increasing time horizons, providing compensation to developing states for changing their environmental behaviours, and generally working to line up the incentive structures of various actors, multilateral environmental agreements have managed to mitigate difficult environmental problems, and can continue to tackle the new ones that will inevitably arise.

Rethinking International Environmental Regimes: What Role for Partnership Coalitions?

CHRISTOPHER C. JOYNER*

I INTRODUCTION

Governments create international agreements to deal with environmental, economic, technological, and legal problems that they cannot solve by themselves. In the absence of a supranational government, governments of states realize that they need new rules, multilateral institutions, and governance structures to promote cooperation, prevent and resolve conflicts, and facilitate information sharing between like-minded parties. This strategy is particularly evident in the establishment over the past four decades of several international regulatory regimes for the protection and management of certain environmental conditions of worldwide concern.

The direction and success of that strategy warrants rethinking early in the twenty-first century. A number of questions are now apparent: Is the creation of multilateral protection regimes, while unquestionably necessary, really sufficient to control environmental problems on a global basis? Has the tide shifted from mega-conference diplomacy and reliance on multilateral environmental agreements towards implementing more localized, domestic initiatives of environmental regulation, in particular, the resort to forming like-minded group coalitions (such as partnerships) to work in concert on remedies for environmental problems affecting an area or a region? If such considerations are lacking, has the time arrived for a shift in international strategy that aims to enhance the prospects for implementing more effective management of the environment at the local level? While today salient, these thoughts seem to remain more political contemplation than legal fact, more theoretical rumination than actual conduct.

This article addresses these queries by clarifying the nature of partnership coalitions within the mix of solutions that special regimes might use for managing the global environment. The second section sets out the nature of the regimes that are available as multilateral regulatory mechanisms for effecting environmental protection and management. In this regard, Section III addresses the notion of partnerships—or like-minded coalitions of groups—as instruments for implementing these regimes at the sub-national level. In doing so, the analysis treats both the advantages of resorting to partnerships for regime implementation at the local level, as well as the encumbrances they bring as pieces of the

* Professor of Government and Foreign Service and Director of the Institute for International Law and Politics, Georgetown University.

global regulatory puzzle. Finally, the article concludes by assessing the place of partnerships as a practical means for implementing those regimes already in place.

II THE NATURE OF INTERNATIONAL ENVIRONMENTAL REGIMES

Theoretical Observations

During the past half-century, international strategies for managing protection and conservation of the global environment were enacted through the promulgation of multilateral regimes. These environmental regimes are specially designed and purposefully implemented through processes of interstate negotiation and adoption. Governments confront a situation in which complex transnational problems arise (or might arise) that a single state or small group of states cannot resolve on their own. A broader, more extensive web of international obligations is deemed necessary. International associations are then created through legal obligation to generate sets of rules and standards aimed at producing desired conditions or outcomes that individual governments are incapable of attaining on their own. These international environmental regimes provide particular ways and means for regularizing the conduct amongst their participants, usually governments of states. Put tersely, an international regime provides for mutually interdependent sets of norms, rules, principles, values, and policy-making procedures that governments of states come to agree upon and abide by in managing a particular issue-area affecting world affairs, in this case, the quality of the Earth's environment.[1]

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[1] The presence of norms is essential for the foundation of an international regime. A norm here means an authoritative rule or goal-value that defines a generally shared standard of acceptable or unacceptable behavior for the international community. Norms relate to the powers, rights, and duties of the individual state, which aid in identifying expected roles and anticipated conduct from others in the international system. Importantly, norms may be embodied in formal rules (i.e. explicit norms) or presented as informal understandings (i.e. implicit norms). In either event, norms prescribe desirable social goals for the international community and set the means that are acceptable for achieving them. Norms, in short, carry moral and ethical imperatives. They indicate the right thing to do, the sense of 'oughtness' in state conduct in international relations.

Rules are operational regulations or specific maxims adopted to govern an individual state's conduct. Rules order the practice and procedure of states in their international relations. Rules, which are regulations having the force of law, are framed and adopted explicitly for governing a body's conduct and that of its members. Rules, established by some authority, tend to lack moral or ethical connotations and are followed more for reasons of expedience than for reasons of morality.

Principles refer to fundamental tenets or truths that are generally believed and serve as a guide for state conduct. Principles supply for states

Two rationales stand out for creating regimes to manage the international environment. First, some goals may be better attained if sought broadly through cooperation among several governments. Second, the purposeful coordination of intergovernmental activities can be facilitated through obligatory normative institutions. Regimes can be viewed as social creatures that generate normative guidelines for their member governments. That is to say, international regimes represent efforts to make more predictable and controllable the activities of states and their nationals in affecting areas of the global commons. Securing greater international certainty allows environmental regimes to enhance stability and promote order among states. It seems reasonable to expect that greater predictability for state actions arises in relationships among governments that interact more frequently with each other.

An environmental regime can influence government participants through socialization and role enactment. Governments learn shared values and norms, which are then perpetuated through policy actions by responsible members of the regime. The regime gains normative cohesion as moral norms based on shared values become ingrained within governments. The extent of regime cohesion is fixed mainly by the extent to which national interests are common to the participant governments.

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the rules for international intercourse; that is, a code of conduct. When used as the basis of state behavior, principles can evolve into comprehensive and fundamental law. Principles widely adhered to may become fundamental truths and hence, accepted legal doctrine.

An international value inculcates something worthy of esteem for its own sake, something that possesses intrinsic worth and the quality of being desirable by the international community. An international value reflects some generally accepted judgment of what is desirable or undesirable in the life of states. In short, international values reflect international principles, standards or qualities that are considered desirable in the international relations among states. Values are moral conditions to be pursued or avoided.

Finally, the adequate availability and effective operation of policy-making procedures are vital for an international regime to function and adapt to changing international conditions and circumstances. Such procedures include the ways and means for conducting interstate affairs. Policy-making procedures fix established modes of acting and set patterns for conducting international affairs and directing the course of adopted policies for the regime. On the construction of regimes, see generally Oran R. Young, *Resource Regimes: Natural Resources and Social Institutions* (Berkeley: University of California Press, 1982) at 20; *Compliance and Public Authority* (Washington, D.C.: Resources for the Future, 1979); and 'International Regimes: Problems of Concept Formation' (1980) 32 World Politics 331 at 331-5.

A government conforms to an environmental regime by complying with its rules. At times, certain rules might not be liked, especially by a government that did little to shape them, or might feel unduly affected by them. Still, as a participant regime player, a government inherits certain obligatory norms as rules of the game. By agreeing to join a particular multilateral instrument, a government voluntarily opts to subscribe to and obey the ways and means of that accord. This process involves implementation by that government into its domestic law and policy the legally binding obligations to abide by normative tenets of the regime. For most governments most of the time, it remains preferable to live by a regime's rules than to engage in deviant behavior and antagonize other governments party to that regulatory system.

III CONFERENCE DIPLOMACY AND REGIME CREATION

International response to the need to manage the Earth's environment has been significant, but piecemeal and ad hoc. Over the past five decades, governments established through conference diplomacy a series of distinct, sophisticated regimes to regulate their national activities in the global commons—the oceans, the Antarctic, and the atmosphere—as well as various multilateral regimes for dealing with transnational environmental concerns about living resources. With respect to the oceans and the south polar-region, efforts to regulate state activities evolved into highly institutionalized regimes that incorporate strongly-rooted norms and overlapping multilateral agreements. In the case of atmospheric and living resource agreements, governance regimes are also defined by multilateral legal instruments, but are less developed. In all four areas, regime development was driven by technological change and the shared perception that anthropomorphic activities and conditions threatened that environmental area. Similarly, for all these issue-areas of environmental concern, active involvement by powerful states with advanced technologies was essential for regime formation and growth. The converse was also true. In seeking remedies for each commons region or environmental issue, the abdication of leadership by powerful governments frustrated or impeded regime development or change, even if advocated and supported by the majority of other governments.

Construction of international environmental regimes was stimulated over the past four decades through intensive international conference diplomacy. Beginning in 1972 with the Stockholm Conference on the Human Environment, a series of major United Nations-sponsored international conferences convened to discuss problems critically and formulate action plans to remedy vital

environmental issues.[2] Of these, the Stockholm Conference that convened from 5–16 June 1972 was the most critical, since it served to concentrate worldwide recognition of the need to address issues affecting the health of the planet.[3]

Twenty years after Stockholm, the United Nations Conference on Environment and Development (UNCED) convened in June 1992 in Rio de Janeiro to spur on governments to rethink economic development and find ways to halt the destruction of irreplaceable natural resources and the pollution of the planet.[4] While not meeting all of its goals, UNCED made three notable strides in promoting international environmental legal rules. First, the Conference adopted the 1992 *Convention on Biological Diversity*;[5] second, the 1992 *United Nations Framework Convention on Climate Change* (UNFCCC)[6] was

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2 In late 1973, the Third United Nations Conference on the Law of the Sea began its preparatory deliberations in New York, and its substantive negotiating sessions continued until late 1982; in 1974 the World Population Conference convened in Bucharest, Romania and a World Food Conference convened in Rome. In 1976, the first Conference on the Status of Women convened in Mexico City, and the first Conference on Human Settlements convened in Vancouver, Canada; in 1977, the World Conference on Water convened in Mar del Plata, Argentina; in 1977, the Conference on Desertification convened in Nairobi, Kenya; and in 1979, the Conference on Science and Technology convened in Vienna, Austria.

3 This global gathering, to address the condition of the world environment, attracted 113 states and 13 United Nations specialized agencies as participants. Participant governments agreed by acclamation on the *Declaration on the Human Environment*, a non-binding document that articulates a set of twenty-six principles intended to guide future activities affecting the environment, including, *inter alia*, human rights, natural resource management, institutional arrangements, and economic development. While the Stockholm Declaration does not codify these principles as legal obligations, it does set constructive precedents that facilitate the emergence of environmental legal rules. Thus, the Stockholm Declaration served as a catalyst for creating new international environmental regimes. See Louis B. Sohn, 'The Stockholm Declaration on the Human Environment' (1973) 14 Harv. Int'l L.J. 423 at 423-89.

4 The attendance at UNCED was truly impressive. More than 100 heads of state attended and some 178 states sent official representatives. In addition, more than 1000 non-governmental organizations were present, as were some 10,000 journalists. The Rio Summit sought to create strategies that might facilitate the integration of environment and development with the consideration of present and future global conditions.

5 5 June 1992, 1760 U.N.T.S. 79, 31 I.L.M. 818 (entered into force 29 December 1993, 189 states are party to the Convention in April 2005).

6 9 May 1992, 1771 U.N.T.S. 107, 31 I.L.M. 849 (entered into force 21 March 1994, 190 states are party to the Convention in April 2005) [UNFCCC]. The Kyoto Protocol implements the UNFCCC. *Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol*, 11

completed; and third, the Conference drafted and adopted by consensus *Agenda 21*, an 800-page document that outlines a common international approach to major environmental and developmental priorities at the close of the twentieth century.[7] *Agenda 21* presents a blueprint for state action that both builds on existing laws and serves to initiate new ones.

The Oceans

Among the commons, the world ocean or, more accurately, the high seas, is best known. Ocean space covers some seventy per cent of the Earth's surface and serves as a main conduit for international trade and commerce, as well as a storehouse of food, mineral, and energy resources, the potential of which is not fully realized. Yet, given its vastness, the ocean is used by humans as a global sink for disposing of waste materials. Such pollution of the seas occurs by intentional land-based discharge of effluents into rivers that empty into the sea, or rise into the atmosphere, and eventually precipitate out over ocean areas. Marine pollution also occurs by intentional dumping or accidental spillage of substances, often oil, by ocean-going vessels. Accordingly, since 1960, international agreements have divided ocean space into special legal zones and designated jurisdiction over various activities affecting the health of the high seas, including shipping, fishing, dumping, transporting toxic wastes, mining the deep seabed, and vessel-source pollution.[8] International agreements for regulating high seas activities were negotiated by special United Nations conferences, as well as by ad hoc multilateral arrangements. Even so, governance regimes to manage the high seas and its resources were slow to develop, largely because various states' economic interests in exploiting high seas resources produced only a patchwork of rules, principles and treaty law, while leaving serious problems of jurisdiction unresolved.[9]

The 1982 *United Nations Convention on the Law of the Sea*

December 1997, 37 I.L.M. 22 (entered into force 16 February 2005, 146 states are party to the Protocol in April 2005).

7 *Report of the United Nations Conference on Environment and Development: Agenda 21*, UN Doc. A/CONF. 151/26 (Vols. I, II, III).

8 Chief among these were the 1982 *United Nations Convention on the Law of the Sea* [UNCLOS], the 1972 *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* [*London Dumping Convention*] and the 1973/78 *International Convention for the Prevention of Pollution from Ships*. See *infra* notes 10, 11.

9 See generally *The Ocean Our Future: Report of the Independent World Commission on the Oceans* (Cambridge: Cambridge University Press, 1998); Anne Platt McGinn, *Safeguarding the Health of Oceans*, Worldwatch Paper No. 145 (Washington, D.C.: Worldwatch Institute, March 1999); and Elisabeth Mann Borgese, *The Oceanic Circle: Governing the Seas as a Global Resource* (Tokyo: United Nations University Press, 1998).

(UNCLOS) supplies the contemporary framework regime for managing the world's oceans.[10] Finally, linked to the UNCLOS are a number of sub-regimes created in response to various maritime needs and problems. Particular consideration focused on the need for special regimes to manage fisheries and other living resources in the high seas, the regulation of which was only generally provided for in the UNCLOS.[11] In October 1995 the Food and Agriculture Organization of

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[10] 10 December 1982, UN Doc. A/CONF. 62/122, 21 I.L.M. 1261, reprinted in *The Law of the Sea: United Nations Convention on the Law of the Sea with Index and Final Act of the Third United Nations Conference on the Law of the Sea* (Sales No. E.83.V5, 1982) (entered into force 16 November 1994, 148 states are party to the Convention in April 2005). The 440 provisions of the UNCLOS incorporate generally accepted norms—variously identified as rules, standards, regulations, procedures and practices—relating to the use of ocean space. New legal concepts are established for 12-mile territorial seas, 200-mile exclusive economic zones, and the high seas. UNCLOS creates an International Seabed Authority as a special institution for regulating deep ocean mining for seabed minerals. In addition, new rights and duties are set out for transit passage through international straits and archipelagoes, as well as for state responsibilities regarding flag state control over ships, rights and duties of vessels on the high seas, and the universal duty to conserve resources and to prevent pollution. See Bernard H. Oxman, 'Law of the Sea' in Christopher C. Joyner, ed., *The United Nations and International Law* (Cambridge: Cambridge University Press, 1997) 309 at 309-35.

[11] The key institution for overseeing international shipping and navigation through the oceans is a specialized agency of the United Nations, the International Maritime Organization (IMO). The IMO sets standards for world shipping and works to ensure the effectiveness of vessel safety and navigation standards. For contemporary information on the structure and functions of IMO, see online: IMO Homepage <http://www.imo.org>.

Since 1960, IMO has negotiated more than forty obligatory conventions and protocols dealing with the efficiency of maritime services, safety standards, and marine environmental protection. The most prominent among these IMO-sponsored agreements set rules against the dumping of wastes by ocean-going vessels, establish safety standards for commercial traffic, and prohibit the hijacking of ships at sea. See *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 29 December 1972, 1046 U.N.T.S. 120, 26 U.S.T. 2403, T.I.A.S. 8165 (entered into force 30 August 1975); *International Convention for the Prevention of Pollution from Ships*, 2 November 1973, IMCO Doc. MP/CPNF.WP.35 (1973), 12 I.L.M. 1319, and *Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships*, 17 February 1978, IMCO Doc. TSSP/CONF/11 (1978), 17 I.L.M. 546 (entered into force 2 October 1983); *International Convention for the Safety of Life at Sea*, 1 November 1974, 1184 U.N.T.S. 2, T.I.A.S. 9700, 14 I.L.M. 959 (entered into force 25 May 1980); *Convention on the International Regulations for Preventing Collisions at Sea*, 20 October 1972, 28 U.S.T 3459, T.I.A.S. 8587 (entered into force 15 July 1977); and the *Convention on the*

the United Nations (FAO) elaborated a non-binding *Code of Conduct for Responsible Fisheries*, which sets out international principles and standards of conduct with a view to ensuring the effective conservation, management, and development of aquatic living resources.[12] Separate but integral to ocean resource management are two special regimes that oversee conservation of whales and seals.[13]

Suppression of Unlawful Acts Threatening the Safety of Maritime Navigation, 10 March 1988, 1678 U.N.T.S. 221 (entered into force 1 March 1992).

IMO also contributes to the raft of non-binding norms, especially in its promulgation of important international codes. Exemplary among these is the *International Maritime Dangerous Goods Code*, 26 July 1988, IMO Doc. MSC/Cr. 497 [IMDG Code]. The IMDG Code has been constantly updated and amended in order to keep pace with changing technologies and developments in both the international shipping and chemical industries, with special attention to the classification of dangerous goods, as well as labelling, marking, packaging, and documentation requirements.

Finally, IMO has sponsored conventions that deal with problems particular to various regions, principally by promoting anti-pollution norms and conservation measures among littoral states. These regional conventions cover the following areas of the ocean commons: the Black Sea, Mediterranean Sea, Persian/Arabian Gulf, West African coast, North-East Pacific, South-East Pacific, Red Sea and Gulf of Aden, Caribbean Sea, East African region, and South-West Pacific. See Christopher C. Joyner, 'Biodiversity in the Marine Environment: Resource Implications for the Law of the Sea' (1995) 28 Vand. J. Transnat'l L. 635 at 672-9, and Peter H. Sand, *Marine Environmental Law in the United Nations Environmental Programme* (1988).

Outside the United Nations system, other special regional seas agreements have been negotiated for the North Sea, the Baltic Sea, and the circumpolar Antarctic waters.

[12] See FAO Fisheries Department, *Code of Conduct for Responsible Fisheries*, online: <http://www.fao.org/fi/agreem/codecond/ficonde.asp>. To implement the Code, FAO prepared a series of technical guidelines involving issues such as fishery operations, the precautionary principle, coastal management, inland fisheries, responsible fish usage, and aquaculture. FAO also promotes institution-building in the form of eleven regional fishery bodies, among them the General Fisheries Council for the Mediterranean, the Indian Ocean Tuna Commission, the Asia-Pacific Fisheries Commission, the South Western Indian Ocean Fisheries Commission, and the South Pacific Fisheries Commission. FAO remains the principal global institution responsible for compiling statistics on fishery resources, and its Committee on Fisheries examines and recommends strategies to governments and its regional fisheries organizations.

[13] In 1946, motivated by the long history of overexploitation of whales, the International Whaling Commission was established by the *International Convention for the Regulation of Whaling*, 161 U.N.T.S. 72, T.I.A.S. 1849 (entered into force 10 November 1948). The Commission sets quotas for its members regulating how many whales can be taken, and has adopted voluntary moratoria for member states that aim to prevent the taking of

Antarctica

The continent of Antarctica, surrounded by the Southern Ocean, has an area of 5.4 million square miles, about the size of the United States and Mexico combined. Following the success of the International Geophysical Year in 1957/58, those states whose scientists had cooperated in that project agreed that preserving international cooperation in the region was necessary and appropriate, and that territorial disputes should be set aside to further that goal.[14] To that end, in 1959 twelve governments negotiated the *Antarctic Treaty*, which entered into force in 1961.[15] The *Antarctic Treaty* regime stands today as an unprecedented example of conservation and research values overcoming national interests and forging sophisticated cooperation in scientific research and environmental protection.

Concerns over conservation and environmental protection, however, made necessary new rules to regulate activities in the region. These new worries, combined with the successful experience of

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certain whale species altogether. In 1994 the IWC established a long-term ban on whale-taking—in effect, a global whale sanctuary—south of 40° south latitude. Nonetheless, Norway and Iceland opted out of the ban, and Japan persists in taking whales for 'scientific' purposes.

The conservation of seals in the high seas has also received particular management attention. Largely stemming from concerns about overexploitation of seals in southern polar waters, a special regime in the *Convention on the Conservation of Antarctic Seals*, 1 June 1972, T.I.A.S. 8826, 11 I.L.M. 251 (entered into force 11 March 1978), was negotiated in 1972 among interested governments. Six species of seals were specifically protected, as commercial harvesting of seals south of 60° south latitude was prohibited for the states party, which include those nations most engaged in sealing operations throughout the nineteenth and twentieth centuries, including Canada, Japan, Norway, Russia, the United States, and the United Kingdom.

[14] Seven countries—Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom—claim territory in the Antarctic, and three of these claims conflict with one another. These states plus Belgium, Japan, South Africa, the Soviet Union, and the United States were involved in the 1957/58 International Geophysical Year and were the first parties to the 1959 *Antarctic Treaty*.

[15] 1 December 1959, 402 U.N.T.S. 71, 12 U.S.T. 794, T.I.A.S. 4780 (entered into force 23 June 1961, 45 states are party to the Treaty in April 2005). The Treaty totally demilitarizes the continent and pledges peaceful uses only of the treaty area, which includes the circumpolar ocean space south of 60° south latitude. Nuclear explosions and disposal of radioactive wastes are prohibited there. Parties are free to engage in scientific investigation, exchange, and international cooperation, and have the right to unannounced inspection of other countries' stations and facilities on and around the continent. Thus, security and science comprise the core values of this multilateral agreement.

cooperation lent by the 1959 agreement, facilitated the *Antarctic Treaty*'s evolution into a sophisticated commons regime that protects flora and fauna on land, seals and finfish in the circumpolar waters and in the region, and the Antarctic environment generally.[16] Even so, the *Antarctic Treaty* regime still confronts serious environmental issues today, namely the need to supervise and regulate increasing ship-borne tourism visiting the area; the continued serious depletion of fisheries in circumpolar seas; and the persistent global warming that is melting the icecap and causing massive calving of ice from the continent's shelf areas.[17]

The Atmosphere

Life could not exist without the Earth's atmosphere since it provides virtually limitless sources of oxygen, carbon dioxide and nitrogen essential for both plants and animals.[18] Three specific human threats

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[16] The initial step was the adoption in 1964 of certain agreed measures by the *Antarctic Treaty* parties to protect flora and fauna in the region. *Agreed Measures for the Conservation of Antarctic Flora and Fauna*, Recommendations III-VIII, 13 June 1964, 17 U.S.T. 996, 998, T.I.A.S. 6058 (1965), modified 24 U.S.T. 1802, T.I.A.S. 7693 (1973) (entered into force 1 November 1982). The *Convention for the Conservation of Antarctic Seals* was negotiated in 1972, and was followed in 1980 by the negotiation of a special international instrument aimed at the conservation of living marine resources, especially krill, within the Antarctic Convergence Zone. See *Convention on the Conservation of Antarctic Living Marine Resources*, 20 May 1980, 33 U.S.T. 3476, T.I.A.S. 10240 (entered into force 7 April 1982). Throughout the 1980s, negotiations proceeded on an Antarctic minerals agreement and, although completed in 1988, the mineral treaty's entry into force was blocked the next year by concerns over the implications it posed for the environment. See *Convention on the Regulation of Antarctic Mineral Resource Activities*, 2 June 1988, Doc. AMR/SCM/88/78, 27 I.L.M. 859 (not in force). In 1991, an environmental protection protocol that provided a more comprehensive approach for regulating activities potentially harmful to the circumpolar environment was negotiated for the *Antarctic Treaty* (*Protocol on Environmental Protection to the Antarctic Treaty*, Eleventh Special Consultative Party Meeting, 4 October 1991, Doc. XI ATSCM/2/21 (entered into force 14 January 1998)).

[17] See generally Christopher C. Joyner, *Governing the Frozen Commons: The Antarctic Regime and Environmental Protection* (Columbia, SC: University of South Carolina Press, 1998) at 220-58.

[18] The atmosphere also provides water needed for life and dissipates, through its circumglobal reach, many of the waste products of biological life and human industries. The atmosphere transmits the radiation from the sun that is essential for photosynthesis. At the same time it shields the Earth from ultraviolet radiation as well as from cosmic rays and meteors that shower down upon the planet from space. Moreover, the atmosphere acts as a blanket to maintain a higher temperature on Earth than would otherwise exist, and also moderates the planet's climate, warming the polar regions and cooling tropical areas. The atmosphere is essential for communications. Air readily transmits sound and electromagnetic (light

affecting international airspace led to the development of three principal regimes for that commons' management. The legal principle underpinning each regime is state responsibility to do no harm; the activities occurring within one state's national jurisdiction or control should not cause damage to the environment of other states or to areas beyond the limits of national jurisdiction.[19]

The first threat manifests itself in the stratosphere, and concerns the human-induced chemical changes that affect solar radiation penetrating the upper atmosphere, commonly known today as the hole in the ozone layer.[20] In reaction to growing quantities of scientific information and popular concern about this threat, the *Vienna Convention for the Protection of the Ozone Layer* was negotiated in 1985 and the 1987 Montreal Protocol set out a schedule for the progressive phase-out of chlorofluorocarbons (CFCs).[21] The Montreal Protocol furnished

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and radio) waves, and an electro-conductive layer in the upper atmosphere reflects radio waves, thus permitting communication beyond the horizon. See Marvin S. Soroos, *The Changing Atmosphere: The Quest for Global Environmental Security* (Columbia, SC: University of South Carolina Press, 1997).

19 Importantly, this reflects the cardinal notion of international environmental law found in Principle 21 of the 1972 *Declaration of the United Nations Conference on the Human Environment*, 16 June 1972, UN Doc. A/CONF. 48/14/REV.1, 11 I.L.M. 1416.

20 The release of chlorofluorocarbons (CFCs) that find their way into the upper atmosphere and react photochemically has resulted in substantial ozone reduction, thus allowing greater exposure of the Earth's surface to more intense ultraviolet radiation.

21 22 March 1985, 26 I.L.M. 1516 (1987) (entered into force 22 September 1988). The Vienna Convention does not contain specifics on how to combat ozone depletion. Instead, the Convention is a framework instrument that provides the basis for more substantive future action by confirming the existence of a serious worldwide problem, and calls for information exchange, monitoring and research. As such, the Vienna Convention allowed for quick acknowledgment of a problem by a large number of states, even while the implications for state policies were still being debated. The instrument that implements the general principles in the Vienna Convention is the *Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 26 I.L.M. 1541 (entered into force 1 January 1989). The key to the Montreal Protocol's flexible development and enforcement rests in its institutional provisions. The powers enjoyed by the meeting of states party are unique. Once efforts to reach a consensus have been exhausted, certain decisions may be taken by a two-thirds majority that will bind all members of the Protocol, including those that voted against the decision. Such decisions must be supported by a balance between developed and developing states. Second, the Protocol provides for a formal noncompliance procedure through which an implementation committee hears complaints and reports to the meeting of states party, which makes a decision on the most appropriate action. One measure of

an important precedent for rapid, positive remedial action to address a pressing problem of commons preservation.

A second atmospheric threat is global climate change. In 1995, the United Nations Intergovernmental Panel on Climate Change issued its second report, which asserted that notable increases in carbon dioxide emissions had occurred since 1750, likely leading to greater concentrations of CO_2 over the course of the next century.[22] It is now known that human activities, most importantly deforestation and the burning of fossil fuels such as coal, oil and natural gas, alter the atmosphere's composition and contribute to climate change, potentially having a serious impact on the condition of the Earth.[23] The international response to the threat of global warming came in the UNFCCC, adopted at the Rio Summit in 1992,[24] and later augmented

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the Vienna Convention/Montreal Protocol's success is that the Convention in January 2005 has 190 parties, including Russia, the United States, the United Kingdom, Germany, and the EEC. Substantial progress on the level of global adherence suggests that the Protocol will probably be even more effective.

22 Intergovernmental Panel on Climate Change, *Climate Change, 1995: Second Assessment* (Cambridge: Cambridge University Press, 1996).

23 The results of global warming could cause glaciers and polar ice caps to melt, thus raising sea levels and threatening islands and low-lying coastal areas. Other likely effects include shifts in regional rain patterns and agricultural zones, leading to famines and population displacements. See generally John R. Justus & Susan R. Fletcher, '89005: Global Climate Change' *CRS Issue Brief for Congress* (13 August 2001), online: <http://cnie.org/NLE/CRSreports/Climate/clim-2.cfm>; and G.O.P. Obasi, 'The Atmosphere: Global Commons to Protect' *Our Planet* 7.5 (February 1996), online: <http://www.ourplanet.com/imgversn/75/obasi.html>.

24 *Supra* note 6. This instrument establishes a framework for international action and a process for agreement on policy action. The action plan in the UNFCCC, while notable, suffered from being more a pledge to principles than a hard, legally binding obligation on parties. Moreover, the growing scientific consensus over global warming made it apparent that major greenhouse gas producers like the United States and Japan would not meet their voluntary stabilization targets by 2000. The upshot was the negotiation in December 1997 of a special protocol in Kyoto, Japan, that commits industrialized countries to legally binding reductions in greenhouse gas emissions of an average of 6-8 per cent below 1990 levels between the years 2008-12. The UNFCCC commits governments to voluntary reductions of greenhouse gases, or other actions such as enhancing greenhouse gas sinks (areas of the Earth's surface such as tropical forests that absorb these gases). These actions were aimed mainly at developed countries by requiring them to stabilize their emissions of greenhouse gases at 1990 levels by the year 2000. Industrialized countries are also expected to render fiscal and technological assistance to economically developing countries in order to facilitate the latter's control

and reinforced by its Kyoto Protocol, completed in 2001.[25]

A third major problem for managing the atmosphere is that air space allows substances to be carried across borders. The air serves as a medium for many forms of pollutants, though since the 1970s much attention has focused on the transnational acid rain generated by the burning of fossil fuels. An early attempt to redress acid rain pollution is the 1979 *Convention on Long-Range Transboundary Air Pollution*, which remains the only major multilateral agreement devoted to the regulation and control of transborder air pollution.[26]

Living Resources

Environmental conventions aim to preserve and protect the existence and habitats of various species thought to be endangered or at risk. These agreements are broad in scope, ranging from the protection of individual species, as in the Polar Bears Convention,[27] the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*

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of indigenous greenhouse gases. All parties are encouraged to share information about sources and sinks of greenhouse gases and what measures are being taken to control any local emissions of those gases.

25 *Supra* note 6. The Kyoto Protocol underlined the critical rift between the United States and developing countries over the 'meaningful participation' of developing countries in the Protocol. The Group of 77 and the Association of Small Island States proposed that if industrialized countries reduced CO_2 emissions to thirty-five per cent below 1990 levels, then developing countries would be exempt from any emissions reductions. The United States insists, before ratifying the instrument, that developing countries make meaningful commitments to the Protocol by becoming subject to binding emissions targets. In contrast to the Montreal Protocol, the Kyoto regime's effectiveness is hobbled by a split between developed and developing states.

26 13 November 1979, 1302 U.N.T.S. 217, 18 I.L.M. 1442 (entered into force 16 March 1983, 49 states are party to the Convention in April 2005*)*. The instrument deliberately does not deal with state liability for air pollution damage. Nor are there tangible commitments to require specific reductions in air pollution in the treaty. Parties are pledged instead to broad principles and objectives for pollution control policy, in very weak language. There are provisions on notification and consultation in cases of significant risk, but no multilateral tools of implementation or enforcement are institutionalized or required. In effect, the 1979 agreement contains an elastic obligation not to pollute the atmosphere. Since 1984, eight protocols to the Convention have been negotiated that deal with financing monitoring programs, as well as reducing emissions of sulphur, nitrogen oxides, and volatile organic compounds and curtailing pollution by heavy metals, persistent organic pollutants, and ground level ozone.

27 *Agreement on the Conservation of Polar Bears*, 15 November 1973, 27 U.S.T 3918, T.I.A.S. 8409 (entered into force 26 May 1976). Parties to the Agreement include Canada, Denmark, Norway, the Soviet Union (now Russia), and the United States.

(CITES),[28] the UNESCO World Heritage Convention,[29] and the *Convention on the Conservation of Migratory Species of Wild Animals* (Bonn),[30] to the protection of whole ecosystems, as in the *Convention on Biological Diversity*[31] and the Ramsar Convention on Wetlands.[32] All these instruments strive to protect species and ecosystems. Important also is the United Nations Convention to Combat Desertification,[33] the

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[28] 3 March 1973, 993 U.N.T.S. 243, 27 U.S.T. 1087, T.I.A.S. 8249 (entered into force 1 July 1975, 167 states are party to the Convention in April 2005) [CITES]. The Convention operates through a national import/export permit system, in combination with an international management system. The permit system is keyed to regulating trade in species as enumerated in three appendices: Those threatened with extinction (Appendix I); those possibly facing extinction if their trade is not governed (Appendix II); and those facing over-exploitation in some countries (Appendix III).

The Convention is criticized for the non-binding character of its conference resolutions, and loopholes that allow governments to take special exemptions to trade in endangered species listed in the appendices. Nevertheless, CITES contributes substantially to world environmental law by providing a global mechanism that regulates the trade in specified species and underscores the need to protect endangered species. The fact remains that the success or failure of CITES, like any international agreement, rests on the governments now contracted to the Convention and how willing they are to implement and enforce its provisions. The Convention now covers more than 800 species categorized as seriously endangered; 5,000 species of animals and 28,000 species of plants are protected by CITES on its threatened species list. See online: The CITES Species <http://www.cites.org/ eng/disc/species.shtml>.

[29] *Convention Concerning the Protection of the World Cultural and National Heritage*, 16 November 1972, 1037 U.N.T.S. 151 (entered into force 17 December 1975).

[30] 23 June 1979, 19 I.L.M. 15 (1980) (entered into force 1 November 1983).

[31] *Supra* note 5.

[32] *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, 3 February 1971, 996 U.N.T.S. 243, 11 I.L.M. 969 (entered into force 21 December 1975). This is the first major global wildlife convention that protects habitat, particularly wetlands, from human destruction. Governments are obligated to designate on a national list wetlands in their state for protection, and they meet every three years to review policies, activities, and plans. Though the Convention contains no strict enforcement or oversight provisions, it spotlights the need for wetlands protection and permits international monitoring of protected areas by Convention secretariat officials conducting on-site visits. As of April 2005, 144 states were contracting parties to the Ramsar Convention, with some 1422 sites covering 124 million hectares on its protected list. See online: The Ramsar Convention on Wetlands <http://www.ramsar.org>.

[33] *Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa,* 14 October 1994, 1954 U.N.T.S. 3, 33 I.L.M. 1328 (entered into force 26 December 1996, 191 states are party to the Convention in April 2005).

chief aim of which is to counter spreading desert and mitigate the effects of drought, particularly in Africa.

Finally, also associated with environmental regimes are special conventions concerned with chemical and hazardous wastes, the overriding objective of which is the protection of human health and the environment.[34] Relatedly, the 1992 *Convention on Biological Diversity* serves as a framework agreement that treats biological diversity in a comprehensive fashion by addressing biological and genetic resources, access to and transfers of biotechnology, and the provision of financial resources.[35]

IV PARTNERSHIPS AS REGIME IMPLEMENTATION DEVICES

The foregoing clearly suggests that international environmental regimes are intended to tackle particular global environmental problems. But the extent to which the multilateral agreements establishing these regimes can effectively attend to local causes and domestic environmental impacts of such problems remains murky. It is true that grand concerns such as transboundary air and ocean pollution, ozone depletion, and global warming are addressed legally through the formation of regimes. Yet scant attention is given to the harmful toll these environmental problems exact on local societies, such as sustaining access to affordable energy supplies, ensuring access to potable drinking water, facilitating reduction in child mortality rates, fostering reduction of poverty, and promoting sustainable bases for agricultural production. If these global regimes are to be implemented and made relevant at the local level,

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[34] Such protection is to be accomplished by controlling trade in selected dangerous chemicals through informed consent, such as in the Rotterdam *Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, 11 September 1998, UN Doc. UNEP/FAO/PIC/CONF/5, 38 I.L.M. 1 (entered into force 24 February 2004, 88 states are party to the Convention in April 2005). Also included are phasing-out, reducing, and restricting the production and use of certain chemicals, such as by the Stockholm *Convention on Persistent Organic Pollutants*, 22 May 2001, UN Doc. UNEP/POPS/CONF/2, 40 I.L.M. 532 (entered into force 17 May 2004, 97 states are party to the Convention in April 2005), and reducing the production of hazardous wastes and their transboundary movements, as provided for in the Basel *Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, 22 March 1989, 1673 U.N.T.S. 57, 28 I.L.M. 649 (entered into force 5 May 1992, 165 states are party to the Convention in April 2005).

[35] The *Convention on Biological Diversity* provides for monitoring biological diversity, promotion of national plans and strategies to protect biological diversity, and submission by parties of reports that inventory plant and animal species, evaluate implementation of convention measures, and assess the effectiveness of national programs. See *supra* note 5, and online: The Convention on Biological Diversity <http://www.biodiv.org>.

specific means for their linkage and implementation must be found.

One innovative means for linking and implementing international environmental regimes to sub-national problems is the notion of public-private partnerships, or in United Nations parlance, 'Type II outcomes'. This concept of partnership, which originated from the 2002 World Summit on Sustainable Development (WSSD), involves the creation of voluntary, non-negotiated, multi-stakeholder, multilateral, collaborative enterprises.[36] Partnerships entail coalitions drawn from governments, international organizations, non-governmental organizations, private corporations and civil society, as opposed to politically-negotiated agreements and commitments (Type I agreements). These coalitions of like-minded groups are supposed to contribute by linking the intergovernmental objectives set out at the Rio Summit in 1992 in Agenda 21[37] (the United Nations blueprint for addressing environmental issues affecting sustainable development) to implementation at the local levels. It is important to realize, though, that partnerships are supposed to act as implementation devices; they are not intended as substitutes for legally-binding intergovernmental commitments.[38]

Several serious global environmental problems—including pollution of the oceans, stratospheric ozone depletion, and global climate change—are inherently transnational in both cause and impact. The perceived transboundary impacts of these problems are so great that they motivated governments to cooperate in mobilizing their diplomatic

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[36] See *Toward Global Partnerships*, GA Res. 215, UN GAOR, 55th Sess., UN Doc. A/RES/55/215 (21 December 2000); *Toward Global Partnerships*, GA Res. 76, UN GAOR, 56th Sess., UN Doc. A/RES/56/76 (11 December 2001); and *Toward Global Partnerships*, GA Res. 129, UN GAOR, 58th Sess., UN Doc. A/RES/58/129 (19 February 2004). See also Jan Kara & Diane Quarless, 'Explanatory Note by the Vice-Chairs: Guiding Principles for Partnerships for Sustainable Development' PrepCom IV Bali (7 June 2002), online: <http://www.johannesburgsummit.org/html/documents/prepcom4docs/balidocuments/annex_partnership.pdf>.

[37] *Supra* note 7, and online: Agenda 21 <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm>. See also 'Partnerships/Initiatives to strengthen the implementation of Agenda 21', online: <http://www.johannesburgsummmit.org/html/sustainable_dev/type2_part.html/partnerships2_form.doc>.

[38] See UN DESA Division for Sustainable Development, World Summit on Sustainable Development, 'Plan of Implementation of the World Summit on Sustainable Development', online: <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf>; and UN DESA Division for Sustainable Development, 'Partnerships for Sustainable Development', online: <http://www.un.org/esa/sustdev/partnerships/partnerships.htm>.

wherewithal into negotiating and adopting special international conventions aimed at regulating each respective harmful activity. The upshot was the creation of special regimes to deal with these commons areas. That development appears may be fine. The critical point remains, though, the extent to which partnership coalitions can make a real difference in implementing or improving the efficacy of concomitant policy duties emanating from these various environmental regimes.

Partnerships

How They Operate

How do partnerships operate? These arrangements are connected to international networks of expertise and funding. Partnerships can, at least theoretically, assemble a coalition of partners from a worldwide pool of like-minded environmentally protective organizations, public and private, national and international. The great advantage of partnerships is that they focus worldwide resources on particular environmental goals, although an ancillary aim involves shifting emphasis from global legal commitments to more intense local projects. Moreover, the notion of partnership, especially when applied to land-based environmental concerns, permits greater clarity with respect to which groups must be included within the coalition in order to redress more effectively a particular environmental problem or project. A critical contribution made by partnerships is to disaggregate general worldwide goals into specific local projects by mobilizing resources to take remedial or preventative action. Likewise, conjoining ad hoc groups and international organizations into partnerships permits their disparate activities to be coordinated and more directly focused through a multilateral process on specific environmental and developmental issues.

One can consider, for example, the Critical Ecosystems Partnership Fund, which has as joint initiative donor partners Conservation International, the Global Environment Facility of the World Bank, UNDP, UNEP, the Government of Japan, the MacArthur Foundation, and the World Bank. Twenty-six 'hotspots' have been identified for biodiversity protection.[39] At least $125 million has been raised to provide strategic assistance to non-governmental organizations, community groups and other civil society partners to help safeguard the Earth's biodiversity 'hotspots,' which are the

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[39] The twenty-six 'hotspots' include Bolivia, Sierra Leone, Liberia, Côte d'Ivoire, Ecuador, Madagascar, Armenia, South Africa, Kenya, Namibia, Guinea, Azerbaijan, Ghana, Russian Federation, Indonesia, Costa Rica, Panama, Georgia, Togo, Brazil, Peru, China, Philippines, Iran, Colombia, and Nicaragua.

biologically richest yet most threatened places on Earth. Among these are the Cape Floristic Region (South Africa), the Guinean Forests of West Africa, Succulent Karoo (in Namibia and South Africa), the mountains of Southwest China, and the Chocó-Darién-Western Ecuador (in Colombia and Ecuador).

Types of Partnerships

There are a number of different forms that partnerships may take. Networked partnerships, for example, appear capable of accomplishing certain objectives that can contribute towards the amelioration of global environmental crises. For one, networked partnerships can generate cooperative enterprise amongst organizations. Such collaborative relationships can transcend boundaries between the public and private sectors, as well as between groups and national governments. It also seems plausible that if designed in an interdependent manner, multi-sectored networks could reflect the changing roles and relative resources of various transnational actors in attempting to solve global problems.

Multidimensional group partnerships also enjoy advantages of flexibility. The groups comprising partnerships come in various types and levels of organizational ability, and they are often equipped with less organizational constraints than the individual national governments might have. Partnerships can evolve and adapt in response to successes and failures through cooperative processes with their member organizations, as well as with governments.

Exemplifying this kind of partnership initiative is the Global Ocean Data Assimilation Experiment (GODAE).[40] This effort began in 1997, with the aim of establishing a long-term global ocean observing system for monitoring the ocean, particularly to allow for better predictions on climate and climate change, as well as on ship routing and fisheries information. This partnership involves the participation of seven countries, two United Nations agencies, and three other groups.[41] According to official sources, the partnership is being implemented in eleven places worldwide.[42] GODAE is meant to be an autonomous,

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[40] See online: The Global Ocean Data Assimilation Experiment <http://www.bom.gov.au/GODAE/>.

[41] With Australia as the lead government, Canada, Japan, France, Norway, the United States, and the United Kingdom are also participating, in league with three groups—the Committee on Earth Observing Satellites, the Global Climate Observing System (Switzerland), and the Global Ocean Observing System—as well as two United Nations agencies, the International Oceanographic Commission/UNESCO and the World Metrological Organization.

[42] These include Norway, the United States, France, Australia, China, European Community, the United Kingdom, New Caledonia, Japan, Canada, and Fiji. Partners for Sustainable Development, Global Ocean

self-supporting initiative funded principally through the agencies represented on the 'Patrons Group,' including the IOC/UNESCO, WMO, and certain governments.[43] Yet, while the Patrons Group is supposed to coordinate agency sponsorship among the partner nations, no funds have been indicated for this purpose as of early 2005.

Factors Required for Success

It seems clear that partnerships created for implementing rules and norms for various environmental regimes aim to assemble diverse groups of stakeholders having disparate needs and capabilities. Even so, to attain success in building cooperative bases for effecting regime norms, all partnerships must embrace and be committed to at least three fundamental objectives. First, all stakeholders must share in a mutuality of interests and benefits for the partnership contributing to the successful operation of a regime. Second, all stakeholders must support a shared sense of purpose in the regime's management. And, third, all stakeholders must work to foster respect for one another to ensure continued participation by all other partners. A separate thematic partnership group on 'Means of Implementation' highlights these concerns.

Constructing Partnerships

The availability of partnerships for 'localizing' environmental regimes will not just happen. Partnerships must be thoughtfully designed and consummated through an iterative process. Construction of a partnership proceeds through a series of steps. Indeed, all partnerships require a catalyzing or organizing principle that furnishes the basis for collaborative action. In the case of environmentally-related partnerships, such a catalytic premise often emerges in the nature of the particular environmental regime.

A preliminary step in partnership creation usually involves a dialogue amongst interested parties. This discourse seeks to ferret out salient policy issues that facilitate arranging the partnership. Such a dialogue procedure might be initiated by a core partner, or through multilateral consensus on an environmental issue requiring remedy. The directorship role played by a leading actor, presumably the government of a powerful state, seems critical to determining the success of the partnership. This pre-eminent partner must work to maintain continuity

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Data Assimilation Experiment (GODAE) (lasted updated 24 December 2003), online: <http://webapps01.un.org/dsd/partnerships/public/partnerships/227.html#targets_progress>.

43 See online: Global Ocean Data Assimilation Experiment—Targets and Progress <http://webapps01.un.org/dsd/partnerships/public/partnerships/227.html#targets_progress>.

in the dialogue process, as well as to recruit other potentially viable partnership members and to sustain the continued engagement of other partnership members.

Once the need for a partnership is realized and agreed upon, the second step involves devising a strategy for making it operational. The structural elements for creating partnerships entail process-oriented considerations that involve the initiation, growth, implementation and maturation of coalition actions to bring about the success of the environmental regime. Toward this end, the goals of the partnership must be formulated. When a partnership is being contemplated, stakeholders must participate in a collaborative process to determine the purposes and objectives of the partnership coalition, as well as the particular roles and responsibilities of its members. Critical here is consultation among the different actors to determine priorities and means for balancing the views and needs among stakeholders, donors, participant institutions, and technical groups. From this goal-setting process, an action plan for regime implementation should emerge among the partners.

A third stage involves mobilizing resources that can furnish the financial, institutional and human capacities required to implement the partnership arrangement. Clearly, this stage remains vital for the overall success of a partnership, as well as for purposefully affecting the efficacy of an international environmental regime. In this respect, partnerships presuppose that stakeholders will accept their roles. Moreover, partners must go on to follow the agreed upon blueprint for action that would implement an environmental regime. Hence, partnership operations entail dynamic processes that amount to 'works in progress' toward fulfilling anticipated objectives for regime implementation.

A fourth stage is the need to monitor a partnership arrangement's progress and appraise its results. Once agreed upon and launched, a partnership's stakeholders must devise means for reviewing and evaluating its operations and strategies. Tracking both near and long-term results remains critical to whether a partnership can successfully evolve. Monitoring allows policy modifications in the partnership to be made and permits tasks and responsibilities of various partners to be further refined in light of the coalition's strengths and weaknesses. Similarly, such scrutiny can permit assessment of how effectively the partners are fulfilling the group's objectives to facilitate implementing the rules, norms and principles associated with a particular environmental regime.[44]

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[44] See *A Guide for Potential Partnerships on Energy for Sustainable Development*, UN DESAOR, Background Paper No. 3, UN Doc. DESA/DSD/PC4/BP3 (June 2002) at 21-3.

The forging of partnerships among stakeholders could constitute a key component for action agendas for implementing international environmental regimes. At the Johannesburg Summit in 2002, the essential focus of partnerships fell on stakeholders—especially the major groups associated with the Commission on Sustainable Development—as facilitators of sustainable development. In the case of international environmental regimes, the focus of this article falls on the use of partnerships as implementers of these regimes.[45]

Stakeholders may be categorized as national, regional or international actors. Within the national category of actors, potential partners might include governments, domestic authorities, local and state businesses and industries, corporations, financial institutions, and local and national non-governmental organizations. Regional actors include regional banks, research institutions, and industrial groups. Counted among international actors are United Nations institutions and agencies, multilateral financing organizations, multinational corporations, intergovernmental groups, and global non-governmental organizations.[46] A 2004 report by the United Nations Secretary-General inventoried thematic categories of partnerships (totaling 277). Of the thirty-five diverse themes identified for partnership arrangements, at least fifteen directly impact on international environmental regimes. Among these are formally registered partnership groups created to address air pollution (nine), biodiversity (twenty-five), chemicals (three), climate change (fifteen), desertification (five), drought (four), energy for sustainable development (thirty-seven), forests (twelve), land (twenty), marine resources (ten), oceans and seas (twenty-five), sustainable development in a globalizing world (twenty-four), transport (six), waste management (five), and water (thirty-six). As indicated by the numbers in parentheses, each of these thematic areas attracted several registered partners.[47]

Critique: Positive Considerations

Promotion of Pluralism

Partnerships carry the advantages of pluralism and diversity among

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45 See UN ESCOR, *Accreditation of non-governmental organizations and other groups for the World Summit on Sustainable Development*, UN Doc. E/CN.17/2002/PC.2/16 (22 January 2002), online: <http://daccessdds.un.org/doc/UNDOC/GEN/N02/225/30/IMG/N022OpenElement2530.pdf>.

46 *Supra* note 44 at 3.

47 *Partnerships for Sustainable Development: Report of the Secretary-General*, UN ESC CSDOR, 12th Sess., UN Doc. E/CN.17/2004/16 (10 February 2004) at 17.

their memberships. Such group networks also draw greater strength through larger numbers, as the weaker members can piggyback on the assets of stronger partners. This arrangement presumably can facilitate more discussion and debate over various environmental issues, which thereby permits a looser, less aggressive setting for problem-solving deliberation. In addition, partnership initiatives tend to be voluntary, and aim to complement negotiated outcomes of conference action plans by proffering means for genuine commitment to implement goals in an action program. A notable example of this is the International Coral Reef Action Network, established in the year 2000, as a collaborative effort working to halt and reverse the decline in health of the world's coral reefs. The United Kingdom is the lead government, with the Seychelles and France also participating. Numerous non-governmental and government groups are partners, as are a number of United Nations groups.[48] Of a $25 million target, at least $8.5 million has been raised to support this partnership in protecting the offshore coral reefs of twenty-seven territorial entities.[49] These vital ecosystems shelter a vast amount of marine biodiversity and sustain millions of people through fishing, tourism and protection from erosion and storm surges.

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[48] Among these groups are the Coral Reef Alliance, Marine Aquarium Council, McCann-Erickson, Reef Check, the Disney Wildlife Conservation Fund, the Global Environment Facility, the Nature Conservancy, the Richard and Rhoda Goldman Fund, the World Bank, US Agency for International Development, World Resources Institute, UN Fund for International Partnerships, and World Wide Fund for Nature (United States); Australian Institute of Marine Science and Global Coral Reef Monitoring Network (Australia); the ICLARM—World Fish Center (Malaysia); International Hotel & Restaurant Association (France); and the World Travel & Tourism Council (UK). Among the United Nations groups are the UN Environmental Programme's Division of Technology, Industry, & Economics, Caribbean Regional Coordinating Unit, East African Regional Coordinating Unit, the World Conservation Monitoring Center, and the United Nations Foundation (Partnerships for Sustainable Development—CSD Database (December 24, 2003), online: <http://webapps01.un.org/dsd/partnerships/public/partnerships/129.html>).

[49] These are: Cuba, Colombia, Samoa, Jamaica, Fiji, Cambodia, Sri Lanka, Marshall Islands, Solomon Islands, Honduras, American Samoa, Mexico, Madagascar, Haiti, Seychelles, Belize, Malaysia, Viet Nam, Guatemala, Thailand, Nicaragua, Indonesia, Saint Lucia, China, Kenya, Dominican Republic, and Trinidad and Tobago (Partnerships for Sustainable Development—CSD Database (December 24, 2003), online: <http://webapps01.un.org/dsd/partnerships/public/partnerships/129.html>).

Conveyors of Cooperation

As demonstrated in the above partnership arrangements, cooperation among governments, businesses, social groups, and international organizations is essential for critical environmental challenges to be successfully addressed. As a consequence, forging new partnerships among all stakeholders entails a key component of the action agenda. For the process of partnerships to function cooperatively, considerable support must be forthcoming from governments, non-governmental organizations, and the international community. Moreover, for public-private partnerships to be successfully created, the private sector must be actively involved as a strategic partner in building strong alliances to implement specific initiatives and to attract sources of expertise, financing and experience.

Clarifiers of Shared Goals

Partnerships among stakeholders are guided by strong motivation and incentives for working together in order to achieve shared goals. The motivation for partnerships stems from various considerations, among them the realization that the private sector and civil society must play special roles in fighting poverty, improving health and sanitation, reducing inequities and creating employment opportunities. In efforts to implement multilateral regimes for addressing environmental concerns, partnerships facilitate certain benefits, including improvements in quality of life (health, water, sanitation, education), improvements in worldwide environmental quality, expanded markets for services, increased access to technologies, enhanced capacity to address critical environmental issues, potential technological innovation, increased regional and international cooperation, increased roles for private and civil society sectors, and increased opportunities for institutional reforms.

Coordinators of Shared Frameworks

The development of certain partnerships in the absence of any broader contextual framework suggests that partnerships might be created in isolation from each other, absent benefits of information exchange and coordination of mission objectives. Even so, it seems reasonable that a more effective way of coordinating such diverse partnerships would be to agree upon a shared framework, linked together by common key elements. Absent such a common framework, individual partnership initiatives could result in overlap and duplication of effort by participant groups as well as unexpected limitations placed on resource allocations by stakeholders. It seems reasonable to expect that the creation of a partnership may help bridge gaps between multilateral agreements and facets of the environmental problems that they seek to manage. Active participation in these arrangements may be fostered by a desire to improve simultaneously the environmental conditions for both the local and international milieus. Even so, the failure of a single state,

especially a great economic power, to participate as a stakeholder or supporter of the coalition, can frustrate or impede the ability of such partnerships to solve global problems effectively.

Critique: Negative Considerations

Untested Instruments

Use of partnerships as instruments for environmental regime implementation is not a panacea. These groupings do not provide automatic solutions to technological crises. In this regard, it is critical to realize that partnerships embody political priorities and objectives. It seems reasonable to expect that partnership conditions require some kind of democratic control and power-sharing capability. Importantly, these are processes and styles that have not yet been adequately addressed by government officials and environmental planners. Moreover, partnerships do not operate naturally; they must be made to work. This process will not be easy, largely because partnerships must be made to form an interdependent network of institutional innovations to address particular environmental problems. That plain fact today indicates that partnerships are not able to develop solutions for all environmental problems, nor can they implement effective universal global environmental governance for international institutions.

Agents of Disequilibria

Partnerships might produce imbalances of power within civil society. Partnerships seek to bring together governmental agencies and small rural communities, as well as multinational corporations and local non-governmental organizations. By doing so, these arrangements might invite larger, more powerful government or economic agencies to co-opt or overshadow the smaller local partners. A second concern rests in the possibility that resort to partnerships might be used by governments and transnational enterprises to illustrate progress in sustainable development, while actually diverting attention from other harmful environmental activities. Such a problem could be aggravated if a United Nations agency, such as the Secretariat, were to endorse such projects, thereby creating a false sense of legitimacy. Such flaunting of a United Nations body might alleviate pressure on governments to follow through with their binding commitments pledged in the initial international environmental agreement.

Still another unresolved question pertains to finances. Will partnerships become a successful mechanism for fundraising to deal with local environmental problems, or will these arrangements amount to little more than a drain on domestic and international fiscal resources? Viewed another way, if funds are not immediately available for these partnership activities, might monies be drawn from other accounts or redirected from other environmental restoration projects? The answers to these queries are not yet clear. Indeed, several

partnerships found on the United Nations Commission on Sustainable Development's list of initiatives indicate valuable intentions, but cite no viable funding sources available. For example, those partnerships for Capacity Building for Environment and Natural Resources Management in the Caribbean,[50] Caribbean Adaptation to Climate Change and Sea Level Rise,[51] the Global Conservation Trust,[52] and the Partnership for Principle 10[53] do not enumerate any funding providers or revenues raised.

Lack of Transparency

It is true that the partnership concept's application to environmental protection regimes engenders great appeal, particularly among advocates of a sustainable development philosophy. Even so, this notion merits caution. If effectively applied, partnerships can generate considerable global resources for mitigating international environmental problems, while involving a range of international and domestic actors from both the public and private sectors. Recent experience suggests, however, that resort to partnerships remains hamstrung by serious impediments, most notably in areas of transparency and follow-through to commitment. Consideration of certain factors by the originators of various partnerships might contribute to alleviating these deficiencies. For example, if the notion of partnership were viewed as a kind of laboratory for experimenting with environmental protection projects, then new approaches might be found for managing and conserving the environment. Such experimentation can yield results, which produce

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50 This partnership seeks to further advance graduate education concerning environment and natural resources management. See online: Capacity Building for Environment and Natural Resources Management in the Caribbean <http://webapps01.un.org/dsd/partnerships/public/partnerships/154.html>.

51 This partnership aims to enable increased understanding and capacity by the region's population to respond to climate change, climate variability, and sea level rise. See online: Caribbean Adaptation to Climate Change and Sea Level Rise <http://webapps01.un.org/dsd/partnerships/public/partnerships/154.html>.

52 The Global Conservation Trust is a public-private partnership the goal of which is to establish an endowment fund to provide permanent funding for the conservation of plant genetic resources for food and agriculture around the world. See online: Global Conservation Trust <http://webapps01.un.org/dsd/partnerships/public/partnerships/42.html>.

53 See online: Partnership for Principle 10 <http://webapps01.un.org/dsd/partnerships/public/partnerships/219.html>. The Partnership for Principle 10 seeks to improve national public participation systems to ensure access to information, public participation, and justice in decision-making that affects the environment. Improved public access to information, participation, and justice in decision-making makes decisions more fair, legitimate, and sustainable.

lessons learned that can be applied to future endeavors aimed at sharing information about protecting the environment at the local, regional, and international levels. Such a didactic system could generate partnerships in which various groups share their experiences, explain their approaches, and display the results and implications they pose in general for the partnership concept.

Aligned with the notion of partnership is the concept of the adaptive management system that a number of multilateral environmental agreements incorporate as concomitants to framework instruments. Prominent examples include the 1994 *Implementation Agreement to the United Nations Law of the Sea Convention* and the 1995 *Straddling Stocks Convention* for oceans management, the Montreal Protocol for treating ozone depletion, the Kyoto Protocol for global warming, and the eight special protocols negotiated under the European Transboundary Air Pollution accord that deal with specific aspects of air pollution control. Such adaptive management systems require that parties to a regime publicly issue periodic assessments of relevant developments in science, technology, law, and economics that might impact upon the efficacy of partnerships accomplishing their environmental protection and management objectives. Not all partnerships might approve of such reporting requirements or critical assessments.

Lack of Accountability

One serious defect that weakens international respect for partnerships is the lack of accountability attached to their operation. Non-governmental organizations and developing countries are apprehensive that partnerships might create the illusion of progress, thereby giving corporations and governments favorable publicity without producing tangible results toward sustainable development. The rhetoric of corporate and state activities might exaggerate the reality of the partnership's remedial accomplishments. The catch-22 here is that corporations and governments of developed states are similarly concerned that such fears could generate a perceived need for more onerous regulation, which would disadvantage their political, economic, and technological interests.

Accountability within a partnership association involves not just the governments of states and the private sector, but must also attach to all players in a partnership arrangement. Clearly, the incentive to participate in a partnership coalition depends on a player's perception of what gains or losses in reputation might be incurred by doing so. While no system of accountability has yet been universally agreed upon, a reasonable inference suggests that partnerships should be acceptable to all stakeholders in the coalition—governments, corporations, non-governmental organizations, patrons, the media, intergovernmental organizations, epistemic communities, and the public in general. If such

broad acceptance is found wanting, the chances for a partnership's success are correspondingly diminished.[54]

The accountability of a partnership also depends on its transparency. If environmental partnerships are to be rewarded or sanctioned, their activities must be known. The accountability of a partnership depends on its reputation, which in turn depends on the accessibility of information about its activities. For the most part, no guarantee of transparency is presently incorporated into the partnership mix. Reporting systems and monitoring mechanisms are neither universal nor mandatory for all partnerships. As a consequence, new ways must be institutionalized for reporting to the public on activities and progress by partnerships. In addition, new means must be devised for following and gauging a partnership's accomplishments.

Lack of Private Sector Participation

Still another worry about partnerships concerns the dearth of private sector participation in their activities.[55] Given their immense economic power, technological wherewithal, and scientific knowledge, corporations hold great potential as leading partnership players within environmental regimes. Corporate enthusiasm for partnerships, however, has waned, probably because the partnership process poses unpredictable regulatory consequences. Corporations are more strongly attracted to joining a partnership if profits from the enterprise appear likely. The uncertain regulatory and investment climates surrounding partnerships and their creation, however, tend to dissuade corporate participation. For corporate behavior, greater transparency equates with the prospect of inheriting greater accountability, and greater uncertainty equates with accepting greater risk to investment. Concern over the possibility that this scenario might occur tended to dissuade Western

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[54] At times damage to an actor's reputation can produce economic effects, thereby impairing a firm's sales or making it more difficult for an organization to obtain financial backing. These impacts, which are especially salient for multinational corporations that depend on respectability to generate business, also apply to non-governmental organizations and national agencies involved in transnational activities. Such forms of accountability reward good behavior by transnational enterprises and provide mechanisms that can sanction undesirable behavior. See Robert O. Keohane & Joseph S. Nye, 'Democracy, Accountability, and Global Governance', Harvard Research Group Working Paper on International Relations, online: <http://www.ksg.harvard.edu/ prg/nye/ggajune.pdf>.

[55] Perusal of the official United Nations partnership website clearly reveals the predominance of governments, United Nations agencies, and non-governmental organizations listed as participants in partnerships, while private sector involvement remains relatively scant. See Partnerships for Sustainable Development, *supra* note 38.

corporate participation in the deep seabed mining regime contained in the 1982 *United Nations Law of the Sea Convention*. Taken in tandem, these conditions seem bound to cause corporations to rethink the balance between the costs and rewards of participation.

Lack of Grassroots Participation

Partnerships are touted as a means of connecting the outcomes of conference diplomacy with real people living in real places. It is often presumed that the energy for stimulating the process and progress of partnerships flows from grassroots sources. In practice, however, most partnership activity is fuelled by prosperous, developed governments, influential non-governmental organizations, intergovernmental organizations, and multinational corporations, not grassroots involvement. Nearly three-fourths of government-led partnerships created thus far come from six states—Australia, France, Indonesia, the United States, Italy and Japan. Of the 190 states represented in Johannesburg, only a few of the richest and largest governments have since taken on an active role in promoting the creation of new partnerships. Most non-governmental organizations are western organizations, and small businesses—which are more familiar with local development and environmental issues—are noticeably absent from leadership roles.

The prospects for intense partnership activity at the grassroots level, especially for local land-based environmental regimes, would appear greater if carried out by small businesses, local communities, and small non-governmental organizations. This, however, has not been the situation. Governments and international organizations have tended not to inform local governments and smaller associations about the possibilities of participating in partnerships. At the same time, the lack of financial and human resources has tended to dissuade grassroots involvement. Consequently, even a greater burden falls on rich governments, wealthy organizations, and powerful corporations to support the participation of their less affluent partners. Here again, the prospects for poorer partners to participate at local levels of environmental regime development are diminished.

Economic incentives loom large in the calculus of partnership formation. The world is marked by a conflict between urgent priorities and limited resources. As a result, priorities in issue-areas (for example, energy development, biodiversity, technology transfer, and forest conservation) must be set for environmental partnerships. Unfortunately, partnership formation has not responded to urgent priorities in the areas of sub-national environmental protection and conservation. The actions of governments, non-governmental organizations, and multinational corporations suggest that partnership creation is more aligned with the capabilities of rich states and donor organizations than with the economic and environmental needs of less

affluent countries.

Not all is favorable about the partnerships proposal. Much debate arises over whether this new development is positive. Concern among non-governmental organizations focuses on whether the partnership concept, which carries new binding commitments for players, might entice governments to shirk their responsibility in supporting national policies aimed at more sustainable development. In this regard, such relationships might lessen pressure on rich, technologically-advanced states to provide more resources for developmental priorities in the economies of developing countries. This argument suggests that the partnership approach might undercut formal institutional processes made legally obligatory in multilateral regimes, thereby fostering extensive privatization schemes within the United Nations.

Possibility of 'Greenwash'

The strategy of partnerships might also allow multinational corporations to dodge their spotty environmental records—that is, to promote 'greenwashing' by appearing to uphold environmental principles without offering commitment to their policy substance. Such greenwashing might be used to manipulate the public perception of corporate behavior, as well as to disperse public pressure to impose obligatory rules for environmental protection and preservation. The upshot is that the corporate promotion of partnerships could engender the privatization of efforts to implement regulations that implement environmental standards, thereby insulating corporate agents from legal directives that mandate responsible reform.

Lack of Conceptual Clarity

One serious deficiency in the WSSD debate was the inability to define clearly the partnership concept. No generally agreed upon, comprehensive understanding emerged about what results could be expected from the partnership strategy, nor were specific roles clearly spelled out for potential partnership players. Moreover, it remained unclear how 'Type II' outcomes should be linked to formal intergovernmental processes created by the nexus of binding commitments contained in the numerous multilateral instruments and legal principles that today comprise established environmental regimes. The problem is obvious: two processes—one across state borders, the other within states—coexisted, but they did so without substantive interaction, integration or even speculation on how they might be made more complementary. Various facets of environmental governance were touted as being networked, even though there were no established rules or procedures that might contribute to their effective collaboration.

A lack of conceptual clarity for partnerships still remains. The 298 partnerships listed on the WSSD website represent such a broad

range of organizations, procedural rules, and goals that comparisons among them are difficult.[56] Thus the problem emerges that partnerships are being created without serious forethought being given about to whom they are accountable, what conduct is ethically permissible, or how efficient they are as transnational mechanisms, all of which adds to the difficulty of assessing their potential, and limitations.[57]

V CONCLUSION

That legal regimes have been fashioned for internationally managing activities in the oceans, Antarctica, atmosphere, and space highlights a critical realization by governments that no state or group of states can satisfactorily deal with these global problems alone. If human threats to global common areas are to be seriously redressed, or at least curbed, a concerted international effort is required. There is greater international safety in numbers, when the behavior of all parties is guided by the same set of rules and guidelines. Thus, only through such common legal means can these threats to the commons be minimized.

The key lesson for success, however, lies not in the need to negotiate sufficient rules or attract enough state parties. Rather, the critical factor remains the ability to galvanize the requisite political will of governments to adhere to rules and laws already created for various global commons regimes. This ability to influence the political will of governments depends on the extent to which officials perceive these regimes as enhancing their states' national interests, at costs that seem fair and not disadvantageous when compared to those associated with being outside the regime. Governments must be willing to comply with and enforce these regulatory regimes in order to counter humanity's abuse of the oceans, polar regions, and atmosphere. This ambitious challenge must be met if an acceptable quality of life on our planet is to be preserved and protected for future generations. The creation of multinational, multi-group partnerships can contribute to that end, but it will not be sufficient. These groups depend on active participation and financial support by governments, which in combination might weaken

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[56] *Ibid.*

[57] On 27 February 2004, the Secretariat for the United Nations Commission on Sustainable Development launched a new online database of partnerships for sustainable development. See online: Partnerships for Sustainable Development—CSD Database <http://webapps01.un.org/dsd/partnerships/public/browse.do>. This interactive database contains information based on voluntary self-reports from partnerships initiated in the context of the 2002 World Summit on Sustainable Development and aims to increased sharing of experience and knowledge on the implementation of sustainable development.

the role that private groups can afford to take in striving to protect the Earth's environment.

The tide has not shifted away from multilateral conference diplomacy in the search for multilateral solutions to transnational environmental problems. Resort to multilateral negotiation to create regimes still is viewed as the most practical international means for bringing governments together to address environmental issues of mutual concern. At the same time, opportunities for multilateral collaboration allow governments to exercise their sovereign prerogatives in seeking ways and means to manage and protect the global environment.

The partnership notion elaborated in 2002 at Johannesburg concentrates on associations that can be dedicated to promoting environmental protection and conservation, as well as sustainable development. The aim is to disaggregate general international legal goals into specific national and local policy commitments. Whereas an international agreement will bind participating governments into finding solutions for particular environmental problems, the creation of spin-off partnership arrangements strives to produce local solutions for local environmental problems that contribute to and exacerbate the general environmental concern.

In a grand sense, the creation of sub-national partnerships appears consonant with the goal of managing through legally-created regimes a particular environmental problem or region. Bringing together numerous governments, international agencies, sub-national groups, and private sector parties that might act in concert to foster policies and activities for environmental protection and management seems desirable, particularly at the national level. Yet, fostering transnational partnerships poses multiple difficulties, not only in terms of logistics but also with respect to philosophies. Partnerships may assist in bridging gaps between multilateral regime agreements and the principal local problems they seek to remedy. In sum, partnerships may aspire to spark non-governmental and private sector participation in implementing international environmental regimes. Serious obstacles, however, impede the reality of this happening effectively. Scant financing for partnerships is available from new sources. Most is allocated from governments and less than one per cent from the private sector. Concern over partnerships also persists because these coalitions are seen as possibly reducing pressure on governments to fulfill legal commitments made in the construction of a regime. In any event, until all major participants—governments, intergovernmental organizations, non-governmental organizations, and multinational corporations—invest more resources in partnership coalitions, their role in redressing environmental problems will remain more passive than active in effect and their impacts more ancillary than revolutionary in scope.

Environmental Governance After Johannesburg: From Stalled Legalization to Environmental Human Rights?

KEN CONCA*

INTRODUCTION: SORTING OUT THE UNCED LEGACY

More than a decade after its occurrence, the 1992 UN Conference on Environment and Development (UNCED) stands as the high water mark in efforts to negotiate a cooperative international framework for environmental governance. UNCED was organized around what I have referred to elsewhere as the 'grand strategy' of liberal international environmentalism: efforts to create issue-specific, functional, international regulatory regimes on environmental problems, embedded in a broader context of interstate diplomacy seeking to achieve a 'global bargain' on environment-development issues.[1]

To be sure, rancorous debate marked both the preparations for UNCED and the meeting itself in Rio de Janeiro. Negotiations on the climate change and biodiversity regimes proved highly contentious; an initiative on the world's forests unraveled entirely; development advocates decried the reluctance of the rich nations to commit additional funds; environmentalists pointed to the failure to entertain questions related to over-consumption and multinational corporate behaviour.[2] Yet despite these controversies and limitations, the UNCED process produced a framework convention on climate change, a convention on biodiversity and an ambitious 'Agenda 21' action plan on a wide array of sustainable-development issues.[3] Contrasting the event with its predecessor, the 1972 Stockholm Conference on the Human Environment, Richard Sandbrook of the International Institute for Environment and Development suggested that UNCED represented 'A mammoth step forward as politicians come to understand that the issues do not just concern plants and animals, but life itself … Rio not only marked the beginning of a new era but a triumph for that small

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* Associate Professor of Government and Politics, University of Maryland, and Director of the Harrison Program on the Future Global Agenda.

1 See Ken Conca, *Governing Water: Contentious Transnational Politics and Global Institution Building* (Cambridge, Mass.: MIT Press, 2006).

2 For a critical perspective on UNCED, see Partha Chatterjee & Matthias Finger, *The Earth Brokers: Power, Politics and World Development* (London: Routledge, 1994).

3 For a range of perspectives on the Earth Summit, see Ken Conca & Geoff Dabelko, 'The Earth Summit: Reflections on an Ambiguous Event' in Conca & Dabelko, eds., *Green Planet Blues: Environmental Politics from Stockholm to Kyoto*, 2nd ed. (Boulder, Colo.: Westview Press, 1998) at 161-67.

band of campaigners who set out at Stockholm.'[4]

A little more than a decade later, however, it is apparent that any UNCED-related momentum in interstate environmental diplomacy has largely run its course. Multilateral regime formation on pressing environmental issues has stalled on most fronts. Follow-through on Agenda 21 has been tepid and inconsistent. North-South bargaining on environment-development issues has effectively collapsed. The United Nations Environment Programme (UNEP) observed in its 2002 *Global Environment Outlook* that

> The environment is still at the periphery of socio-economic development. Poverty and excessive consumption ... continue to put enormous pressure on the environment. The unfortunate result is that sustainable development remains largely theoretical for the majority of the world's population of more than 6000 million people. The level of awareness and action has not been commensurate with the state of the global environment today; it continues to deteriorate.[5]

When the 2002 World Summit on Sustainable Development (WSSD) convened in Johannesburg to assess progress in the decade since Rio, environmental concerns had been pushed so far to the margins of interstate diplomacy that many environmental activists ruefully dubbed the event 'Rio Minus Ten'.[6] The International Institute for Sustainable Development summarized the lack of momentum from Rio to Johannesburg: 'The world and summit weary felt that this anniversary would be held because it was scheduled, not because it was the result of an organic inspiration to meet.'[7]

There are more optimistic perspectives on UNCED's legacy, particularly those stressing its role as a catalyst for civil-society networking, social movement mobilization, and transnational advocacy. Such effects were not explicitly part of the official Rio model, which essentially understood 'civil society' as a residual category for tripartite

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4 Richard Sandbrook, 'From Stockholm to Rio' in *Earth Summit '92: The United Nations Conference on Environment and Development* (London: Regency Press, 1992) at 16, cited in Conca & Dabelko, 'The Earth Summit', *supra* note 3 at 163.

5 United Nations Environment Programme, *Global Environment Outlook 3* (London: Earthscan, 2002) at xx.

6 See for example Larry A. Swatuk, 'Rio Minus Ten: The Political Economy of Environmental Degradation' (2002) 14 Europ. J. Devel. Res. 264.

7 International Institute for Sustainable Development, 'Summary of the World Summit on Sustainable Development: 26 August-4 September 2002' (2005) 22 Earth Negotiations Bulletin 1 at 16, online: <http://www.iisd.ca/vol22/ enb2251e.html>.

corporatist bargaining with states and corporations. But the Global Forum gathering of citizens' groups, NGOs, and social movements, which occurred in parallel with UNCED, was an unprecedented gathering of a quite heterogeneous array of actors, establishing a precedent for subsequent global conferences. Karin Bäckstrand and Michael Saward suggest that the Commission on Sustainable Development (CSD), formed in the wake of UNCED, has been 'pioneering in its effort to open up, extend and institutionalize procedures for stakeholder and major group participation.'[8] They argue that, its limitations notwithstanding, the 2002 Johannesburg summit extended this process, 'exemplifying new deliberative stakeholder practices with general democratic potential at the global level.'[9] This view of UNCED as normative-network catalyst is consistent with a recent survey of international environmental experts, who identified the principal UNCED legacy as a set of indirect effects related to agenda-setting, issue framing, and network building.[10]

These two very different interpretations of UNCED's legacy relate to two conceptually distinct pathways by which actors may seek to build stronger and more effective global environmental governance, which I will refer to as progressive legalization and norm inscription. As discussed below, progressive legalization refers to bargaining processes that yield greater obligation, precision, and delegation of environmental commitments, while norm inscription refers to more contentious politicking that promotes the construction, dissemination and embedding of prescriptive and proscriptive rules and roles related to environmental protection. Although the two paths are certainly not mutually exclusive, we have very little understanding of how they may intersect or interact, in part due to their distinct theoretical origins. The legalization literature has a predominantly state-centered focus, although allowing a role for nonstate actors in nipping at the heels of the states they seek to herd into cooperation. More fundamentally, legalization is centered in cooperative bargaining theory and dominated

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8 Karin Bäckstrand & Michael Saward, 'Democratizing Global Environmental Governance? Stakeholder Democracy at the World Summit for Sustainable Development' (Paper for presentation at the Fifth Pan-European Conference on International Relations, The Hague, 9–11 September 2004) [unpublished] at 15. See also Minu Hemmati, *Multi-Stakeholder Processes for Governance and Sustainability: Beyond Deadlock and Conflict* (London: Earthscan, 2002). On historical challenges faced by NGOs within the UN System see Ken Conca, 'Greening the United Nations: Environmental Organizations and the U.N. System' (1995) 16 Third World Q. 441.

9 Bäckstrand & Saward, *supra* note 8 at 2.

10 See Adil Najam, 'Unraveling of the Rio Bargain' (2002) 21 Polit. Life Sci. 46 at 46-50.

by a conception of global environmental politics as a tragedy of the commons. The literature on normative advocacy, in contrast, has been influenced most strongly by theories of contentious politics and social movements. It takes the authoritative character and constitutive role of nonstate actors far more seriously. But it has focused primarily on the effects of contention on specific states and a handful of intergovernmental organizations such as the World Bank, with far less to say about any institution-building effects that may follow in the wake of those discrete normative struggles.

This article examines the interplay of these two conceptually distinct processes in the post-Rio era, arguing that as legalization strategies have faltered, transnational contentious politics has emerged as the primary source of global institution building for environmental governance. I pay particular attention to a specific point of convergence between contention and institution building, resulting from the rise of combined environmental and human-rights activism and advocacy. I interpret the rise of environmental human rights as not only a source of normative pressure on governments but also as an increasingly important arena of international legal-institutional development.

I PROGRESSIVE LEGALIZATION OF THE RIO STRATEGY: CONCEPTUAL, INSTITUTIONAL AND POLITICAL LIMITS

The growing momentum for global environmental governance in the period leading up to the 1992 Earth Summit involved both conceptual and institutional developments. Conceptually, the key shift was the idea of sustainability, championed by the Brundtland Commission report *Our Common Future*[11] and given a more tangible expression by the massive Agenda 21 action plan agreed to at UNCED. Institutionally, key developments included the successful negotiation of global conventions on ozone-layer protection, climate change and biological diversity, the establishment of a funding mechanism in the form of the Global Environment Facility (GEF), and the creation of the UN Commission on Sustainable Development to monitor progress in the implementation of the Earth Summit blueprint.[12]

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[11] World Commission on Environment and Development, *Our Common Future* (New York: Oxford University Press, 1987).

[12] UNCED's charge was 'To ensure effective follow-up to the Conference, as well as to enhance international cooperation and rationalize the intergovernmental decision-making capacity for the integration of environment and development issues and to examine the progress of the implementation of Agenda 21 at the national, regional and international levels.' See *Institutional arrangements to follow up the United Nations Conference on Environment and Development,* GA Res. 191 (XLVII), UN GAOR, 47th Sess., UN Doc. A/RES/47/191 (1992) at para. 2.

To some extent, the stalling of momentum in the wake of UNCED can be attributed in a straightforward manner to the pace and scope of world events. Rio-era optimism, while certainly not universal, was fed by several trends: the end of the Cold War; the seemingly broad consensus that environmental concerns and development needs could be married in the form of 'sustainable development'; and the powerful demonstration effect of diplomatic achievements, most notably a successful set of international accords on protecting the Earth's stratospheric ozone layer. Simply put, today's world of economic globalization, American unilateralism, and contentious North-South disputes around trade and investment rules provides far less fertile ground for liberal international environmentalism's grand strategy.

More specifically, the failure to sustain the UNCED process in the wake of the Rio summit has its roots in both the conceptual and institutional dimensions of the earlier UNCED-era momentum. Conceptually, the idea of sustainability has proved to be exceedingly malleable, to the point of providing little concrete guidance for policy change and substantial space to justify business as usual.[13] The political concept also wore poorly: the UNCED-era notion of cooperative interstate environmental governance, rooted in regime-based functionalism, has shown itself to be poorly suited to a world political economy marked by globalization, deepening economic integration, and forms of trans-state political power that remained at the margins of Rio's interstate conceptual design.[14] Similarly, the blueprint laid down in Agenda 21 conceived of sustainability essentially as a matter of developing national policy frameworks supplemented by international aid and expertise—a conceptual map that largely failed to account for the cascading effects of deepening globalization. Along similar lines, Peter Haas has suggested that two trends—'the growing complexity of a globalizing world' and 'the diffusion of political authority'—undercut the functionality of national sovereignty as a foundation for joint action on global collective-goods problems.[15]

Institutionally, the effort to weave a fabric of global environmental governance one regime-strand at a time has faltered. A 2002 review of 'core environmental conventions and related agreements of global significance' conducted by the UNEP identified only five such agreements in the period since 1996, as opposed to 16 in the UNCED

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13 On the ambiguities of sustainability, see Tim O'Riordan & Heather Voisey, eds., *The Transition to Sustainability* (London: Earthscan, 1998).

14 See Ken Conca, 'Beyond the Earth Summit Framework' (2002) 21 Politics and the Life Sciences 53 at 53-5.

15 Peter M. Haas, 'Addressing the Global Governance Deficit' (2004) 4 Global Environ. Politics 1 at 2.

era of 1990-5.[16] One problem has been the resistance of important states. The United States—which played a leadership role on an earlier generation of international agreements ranging from the 1973 *Convention on International Trade in Endangered Species of Wild Fauna and Flora* [CITES] to the breakthrough 1987 *Montreal Protocol on Substances that Deplete the Ozone Layer*—withdrew from the Kyoto Protocol to the climate regime; fought efforts to strengthen the 1989 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*; and has failed to ratify the 1992 *Convention on Biological Diversity*, the 1998 *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, the 2000 *Cartagena Protocol on Biosafety*, and the 2001 *Stockholom Convention on Persistent Organic Pollutants*. In other cases, resistance has been more broadly multilateral. The UN General Assembly approved a global framework convention on shared watercourses in 1997, but many key river-basin states such as Egypt, India, Pakistan, Turkey and China either abstained from the process or opposed it outright, and only a handful of governments have seen fit to ratify the agreement.[17]

The effort to craft and deepen issue-specific regulatory regimes also encountered important incompatibilities with more fundamentally embedded—and increasingly neoliberal—global regimes governing international trade, finance and investment.[18] Scholars have debated whether trade-sanctioning regimes such as CITES or the 1987 Montreal Protocol on ozone-layer depletion face the threat of a serious challenge from the World Trade Organization (WTO). There is little doubt, however that the deepening and widening of trade liberalization has chilled the prospect of creating new environmental regimes that manipulate trade against the grain of neoliberalism (much in the same manner that structural adjustment pressures have complicated the development of stronger environmental regulations at the national

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[16] United Nations Environment Programme, 'Multilateral Environmental Agreements: A Summary' (background paper for the First Meeting of the Open-Ended Intergovernmental Group of Ministers or Their Representatives on International Environmental Governance, New York, 18 April 2001), UN Doc. UNEP/IGM/1/INF/1 (2001).

[17] *Convention on the Law of the Non-Navigational Uses of International Watercourses,* 11 April 1997, UN Doc. A/51/869.

[18] Konrad von Moltke, 'Institutional Interactions: The Structure of Regimes for Trade and the Environment' in Oran R. Young, ed., *Global Governance: Drawing Insights from the Environmental Experience* (Cambridge, Mass.: MIT Press, 1997). See also Ken Conca, 'Environmental Change and the Deep Structure of World Politics' in Ronnie D. Lipschutz & Ken Conca, eds., *The State and Social Power in Global Environmental Politics* (New York: Columbia University Press, 1993).

level).[19]

The UN system has also faltered in its efforts to develop effective institutional arrangements.[20] Secretariats for environmental regimes are dispersed, yielding poor coordination. Many different institutions have some form of functional responsibility on environmental matters, creating serious gaps and overlaps, a dysfunctional competition for scarce resources, and a fragmented environmental voice in critical settings such as trade negotiations. The UNEP, although playing an important role in specific instances, has neither the capacity nor the mandate to catalyze system-wide coherence. Calls for the formation of a World Environment Organization, which reflect these concerns about institutional strength and coherence, have made almost no headway.[21]

Finally, the UNCED process has stalled at the level of global bargaining. Although much of the attention on UNCED has centered on its conceptual and micro-institutional underpinnings, it can also be read as a broad political bargain between North and South that embedded specific soft-law principles. As Adil Najam has argued, four specific soft-law principles were at the heart of the Rio compromise: sustainability, additionality, common but differentiated responsibility, and the 'polluter pays' principle.[22] Sustainability was a key element of the bargain in that it offered a way to break the deadlock over Southern governments' fears that Northern environmental concerns were an obstacle to development. A commitment to additionality, or the promise of additional development assistance rather than the redirection of existing resources, was essential to bring wary Southern governments to the table. The principle of common but differentiated responsibility—enshrined most famously in the 1992 climate agreement—bridged the gap between the global-commons conceptual framework dominating the Earth Summit and the obvious differences among states in responsibility for, and responsive capacity to, global environmental ills. The polluter-pays principle also offered the possibility of compromise, as a staple of environmentalism that also resonated with the growing neoliberal gestalt on marketization and efficiency enhancement.

Najam suggests that the post-Rio loss of momentum is tied centrally to the failure of these soft-law principles to take root:

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19 Ken Conca, 'The WTO and the Undermining of Global Environmental Governance' (2000) 7 Rev. Intl. Polit. Economy 484.

20 On UN environmental mechanisms, see Haas, *supra* note 15.

21 On the debate over a World Environment Organization, see the discussion forum in (2001) 1 Global Environmental Politics.

22 Najam, *supra* note 10.

> Much of the attention since UNCED has focused on the failure of the North to deliver the "goodies" that had been promised or implied at Rio — such as additional resources, technology transfers, and capacity building. Indeed, the inability of the North to fulfill these commitments has been a major contributor to the growing sense of malaise. However, the erosion of the conceptual building blocks of the Rio Bargain is an even more telling indictment of the fast deteriorating state of North-South relations. As the concept of sustainable development loses its policy edge, and as the key principles of additionality, common but differentiated responsibility, and polluter-pays are steadily eroded with each new [multilateral environmental agreement], the developing countries have a diminishing interest in staying engaged in these processes. These issues defined the *raison d'être* for the South's engagement in global environmental negotiations.[23]

As suggested above, sustainability, although a useful conceptual guide and rhetorical device, has proven too ambiguous and fluid a concept to anchor serious institution building. The principle of additionality was quickly undercut by the actions of the main donor states. US resistance to the climate regime, which has been cloaked rhetorically in concerns about the "free riding" of less developed countries, dealt a severe blow to the notion of common but differentiated responsibility. The polluter-pays principle is problematized by globalization: who exactly is the polluter in a world marked by an increasingly global logic and organization of production, in which commodity chains snake in and out of the territory of nominally sovereign entities on the path from production to consumption?[24]

II BEYOND JOHANNESBURG: FROM LEGALIZATION TO TRANSNATIONAL CONTENTION

Scholars have identified the concept of legalization as an important bridge across the conceptual gap between international law and international relations (IR) theory. Legalization has been defined in terms of three criteria: 'The degree to which rules are obligatory, the precision of those rules, and the delegation of some functions of

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[23] *Ibid*. at 49.

[24] Ken Conca, 'Consumption and Environment in a Global Economy' (2001) 1 Global Environ. Politics 53. See also Thomas Princen, Michael Maniates & Ken Conca, eds., *Confronting Consumption* (Cambridge, Mass.: MIT Press, 2002).

interpretation, monitoring and implementation to a third party.'[25] For those who view soft law as a stepping-stone to harder law—meaning stronger obligation, greater precision, and more extensive delegation—then the post-Rio trajectory of global environmental governance post-Rio has been marked by stalled legalization.

Scholars of a more classical IR orientation have suggested, however, that soft-law development can also be understood as an explicit choice in favour of a specific institutional form. Rather than a pale shadow of hard law, soft law can be viewed in term of advantages such as greater adaptability in the face of uncertainty or a lesser impingement upon sovereignty.[26] From this conceptual vantage point, the post-Rio trajectory can be read not as fading momentum for progressive legalization but, rather, as a more deliberate choice. In this view, states—particularly the strong states that provide global institutions—have preferred maximum flexibility and minimum binding in this domain; non-state advocacy pressures have not been sufficiently powerful to change this preference. Obligation is limited, precision is lacking, and delegation is minimal because the specific perceived interests (environmental or otherwise) of the most powerful actors are better served that way.

Despite their differences, these contrasting perspectives on legalization share an important premise when applied to the domain of global environmental governance: that global environmental politics is a large-scale expression of Hardin's tragedy of the commons.[27] Just as each rational cowherd, unconstrained by property rights or the state, saw merit in sneaking a few more cows onto the commons, so too with states: they reap individual benefits that greatly complicate cooperation, and they are reluctant to shoulder the costs of providing public goods with benefits they can only partially capture. These incentives inhibit the realization of cooperative gains and, as a result, rational unit-level behaviour adds up to an inferior outcome at the system level.[28] A more optimistic spin on this model suggests that, under certain circumstances, self-organizing cooperation is possible without Hardin's extreme solutions of privatization or the coercive hand of a supra-level

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25 Judith Goldstein *et al.*, 'Introduction: Legalization and World Politics' (2000) 54 Int'l Org. 385 at 387.

26 Kenneth W. Abbott & Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 Int'l Org. 421.

27 Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243.

28 Robert O. Keohane & Elinor Ostrom, eds., *Local Commons and Global Interdependence: Heterogeneity and Cooperation in Two Domains* (London: Sage, 1995); Peter M. Haas, Robert O. Keohane & Marc A. Levy, *Institutions for the Earth: Sources of Effective International Environmental Protection* (Cambridge, Mass.: MIT Press, 1993).

regulatory authority.[29] Yet whether conceptual optimism or pessimism prevails, global environmental governance is understood as a set of bargained rules about behaviour, with the character of the bargaining generating institutionalized cooperation to a greater or lesser extent. Non-state actors may wield knowledge-power, set agendas, and create political pressures, but ultimately it is the explicit efforts of states to bargain their way to cooperation on collective problems such as climate change, biodiversity loss, and ozone-layer damage that are the source of institutionalization.

There is ample evidence of this process at work—and, in the post-Rio period, even more evidence of its failure to work. Yet even as formal cooperation has stalled, surprisingly little attention has been paid to political contentiousness and extra-institutional political behaviour as important sources of institutional development, norm inscription, and various gradations of 'soft' international law. This is particularly surprising when one considers that, historically, the rise of serious environmental action at the domestic level has invariably been marked by contention and social conflict. This has been the case in instances as diverse as the state's response to toxic horrors in a rapidly industrializing Japan of the 1960s, nuclear politics in Cold War Germany of the 1980s, rainforest preservation in post-authoritarian Brazil of the 1990s, or controversies over watershed management in contemporary China. Given the newness of the environment as an explicitly recognized problem-set and issue-domain, such struggles have more often than not played out in the absence of a well-established institutional and policy framework at the national level. In this sense, environmental politics viewed in a dynamic, historical perspective soften the classical distinction between the domestic polity as a zone of rule-governed order and the international sphere as a zone of anarchy.

With the flagging of the post-Rio interstate cooperative dynamic, more contentious, extra-institutional processes have arguably moved to the forefront of international institutionalization as well. Central to this process has been the convergence between movements for environmental protection and human rights.

III THE RISE OF ENVIRONMENTAL HUMAN RIGHTS

The environmental and human rights movements are probably the most frequently cited and extensively studied manifestations of activism in world politics. They are often characterized summarily, even conflated,

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[29] Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990); Nives Dolšak & Elinor Ostrom, *The Commons in the New Millennium: Challenges and Adaptation* (Cambridge, Mass.: MIT Press, 2003).

as 'liberal' advocacy. Historically, however, the two have been distinct enterprises with separate trajectories of development and frequent moments of tension. The possibility that environmental protection initiatives may have negative ramifications for human rights is well known, in part given the roots of some strands of environmentalism in a wilderness model that presupposes the radical separateness of the human and natural spheres of existence. Nancy Peluso coined the phrase 'coercing conservation' to describe a large family of cases in which international environmentalism has steamrolled local community rights—often with the blessing of international environmental law as codified in interstate agreements such as CITES or the International Tropical Timber Agreement.[30] As Joanne Bauer has pointed out, such cases combine procedural and substantive rights violations:

> Procedurally, inadequate inclusion of affected peoples in policy processes that both define and implement 'public interest' results in undermining the right to livelihood and corresponding subsistence rights … A fair resolution demands a recognition that both sets of values matter and must be incorporated into the policy solutions better than they have in the past.[31]

A classic example is the conflict over the Lacandon Selva in southern Mexico, where land struggles around the Montes Azules Biosphere Reserve have pitted poor settlers against state authorities and international environmentalists.[32]

Such tensions notwithstanding, the past decade or two has seen a strong and growing synergy between environmental activism and human-rights advocacy. One reason for this is the obvious fact that large-scale environmental destruction—the clearing of forests, draining of wetlands, conversion of coastal zones, or damming of waterways—can also yield an impressive array of procedural and substantive human rights abuses. In substantive terms, these transformations of localized landscapes have dramatic livelihood ramifications for communities living off of local renewable resources. And where local communities lack the ability to exercise well-established procedural rights (in other words, almost everywhere), dramatic violations of procedural rights are also common. For example, the World Commission on Dams estimates

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30 Nancy Peluso, 'Coercing Conservation' in Ronnie D. Lipschutz & Ken Conca, eds., *The State and Social Power in Global Environmental Politics* (New York: Columbia University Press, 1993).

31 Joanne Bauer, 'Commentary on "The conflict between rights and environmentalism"' (2004) 2 Human Rights Dialogue 19.

32 Bill Weinberg, 'Mexico: Lacandon Selva Conflict Grows' (2003) 36 NACLA Report on the Americas 26.

that some 40 to 80 million people have been relocated to make way for dam projects—many of them forcibly, and most of them with little or no voice or compensation.[33]

At a minimum, environmental human rights coalitions emerge around the recognition that environmental activists are prime targets for human-rights abuses. A good example is the joint initiative of the Sierra Club and Amnesty International on 'Defending Environmental Defenders'.[34] More broadly, as western environmental organizations embraced increasingly international agendas in the 1980s and gained increasing contact with the diverse environmental agendas of people across the global South, some have relinquished the wilderness model and grown increasingly comfortable with the language of grassroots development, community stewardship, and human rights as a language of environmentalism. Such groups have been met by the growing emphasis on community rights and socioeconomic rights within human-rights advocacy, making potentially powerful new coalitions possible. Network-based organizational forms of transnational and global advocacy such as the Rainforest Action Network, the International Rivers Network, and the Pesticide Action Network represent one prototypical expression of this phenomenon, although looser, episodic coalitions are also common.[35]

Environmental human rights coalitions have emerged most strongly around precisely the set of global environmental problems pushed into the background by UNCED's framework of interstate bargaining on global-commons problems. They typically emerge around complex socio-ecological systems such as forests, rivers, coastlines, and other landscapes, for which we have seen the global proliferation of site-specific conflicts. Rather than being understood as common-pool resources of the sort conceived in Hardin's stylized tragedy, their politics is better grasped in terms of simultaneous multiple meanings. These systems are, at once, foundations of local livelihood and culture, critical ecosystems, and extractable commodities with transnational market value (be it a stand of timber, fresh water, a fishery, or an eco-

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[33] World Commission on Dams, *Dams and Development: A New Framework for Decision-Making. The Report of the World Commission on Dams* (London: Earthscan, 2000).

[34] See online: Sierra Club <http://www.sierraclub.org/human-rights/amnesty/>. See also Folabi K. Olagbaju & Stephen Mills, 'Defending Environmental Defenders' (2004) 2:11 Human Rights Dialogue 32.

[35] On the distinction between networks and coalitions, see Sanjeev Khagram, James V. Riker & Kathryn Sikkink, eds., *Restructuring World Politics: Transnational Social Movements, Networks, and Norms* (Minneapolis: University of Minnesota Press, 2002).

tourist's landscape). As different actors try to make these frequently incompatible meanings real, they become engaged in complex authority struggles that have proven difficult to stabilize through either domestic political processes or interstate bargaining.

The simultaneous rise of environmental human rights advocacy and the flagging of the Rio model of environmental diplomacy suggest an important possibility: these contentious political episodes may be supplanting interstate bargaining as the primary motive force behind the further institutionalization of some form of global environmental governance. The potential political influence of advocacy networks has been an important emergent theme in IR scholarship.[36] I have argued elsewhere that this literature has paid far more attention to the origins, workings, and episode-specific effects of these networks than to their long-term implications for institutionalization.[37] Moreover, where that question has been examined, processes of norm institutionalization are typically juxtaposed against, rather than integrated with, the legalization perspective sketched previously. For example, Ellen Lutz and Kathryn Sikkink show that legalization, while not irrelevant, has hardly been central to the notable trajectory of norm-governed human rights improvements in Latin America during the 1990s.[38]

Yet the injection of the environment/human rights synergy directly into international law is beginning to happen, through the interactive activities of intergovernmental organizations and transnational activism. Water provides a revealing example. In 2002 the UN Committee on Economic, Social and Cultural Rights adopted a General Comment declaring that access to water is 'a human right and a public commodity fundamental to life and health.'[39] Specifically,

> The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights ... Water should be treated as a social and cultural good, and not primarily

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36 Margaret Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998); Khagram, Riker & Sikkink, *supra* note 35.

37 Conca, *Governing Water*, *supra* note 1; Ken Conca, 'Old States in New Bottles? The Hybridization of Authority in Global Environmental Governance' in John Barry & Robyn Eckersley, eds., *The State and the Global Ecological Crisis* (Cambridge, Mass.: MIT Press) [forthcoming in 2005].

38 Ellen L. Lutz & Kathryn Sikkink, 'International Human Rights Law and Practice in Latin America' (2000) 54 Int'l Org. 633.

39 'United Nations: Access to Water Enshrined As A Human Right' *South North Development Monitor* 5245 (29 November 2002).

> as an economic good ... Water, and water facilities and services, must be affordable for all.[40]

The comment was based on an interpretation of the International Covenant on Economic, Social and Cultural Rights, even though the ICESCR does not mention water explicitly.

As Peter Gleick has pointed out, there has long been a basis in international law, covenants, and declarations for recognizing a human right to water, primarily as 'an implicit part of the right to food, health, human well-being and life.'[41] The means of realizing that right was understood historically to come from interstate cooperation, development assistance, and technical progress in harnessing water resources. In contrast, the recent pulse of activity around a human right to water employs a framework stressing transnational stakeholder dialogue rather than interstate diplomacy, and an acknowledgement of the role of water in the cultures and livelihoods of distinct communities such as indigenous peoples.[42] Rather than conceiving of water as a national resource, it is understood as a collective social and cultural good, on the scale of individuals, households, and communities. These aspects of the new right-to-water frame can be traced directly to contentious social activism against large dam projects and water privatization schemes.[43] The 2002 UN declaration adopted a foundational frame of water rights activism when it stressed that '[w]ater should be treated as a social and cultural good, and not primarily as an economic commodity.'[44]

Some of the activities of norm entrepreneurs are captured through social movement theory and network-based perspectives on transnational activism.[45] Others, however, blur the line between theoretical perspectives on norm inscription and progressive legalization. For example, operating in parallel to the more explicitly contentious and extra-institutional movements on water have been a series of transnational parliamentary initiatives, rooted primarily in green parties and other national political organizations. The primary

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40 *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: The Right To Water*, UN CESCR, 2003, UN Doc. E/C.12/2002/11 (2003).

41 Peter H. Gleick, 'The Human Right to Water' (1998) 1 Water Policy 487 at 490.

42 *Substantive Issues, supra* note 40 at 3-4.

43 Conca, *Governing Water*, *supra* note 1 at c. 6, 7.

44 *Supra* note 40.

45 The term 'norm entrepreneur' is from Martha Finnemore & Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 Int'l Org. 887.

stimulus to this activity has been the rise of a neoliberal agenda of water privatization. In 1998 the Committee for a World Water Contract (a group of prominent international individuals led by former president of Portugal, Mario Soares) issued a Water Manifesto calling for recognition of water as 'an inalienable individual and collective right.'[46] The group also proposed negotiations for a World Water Treaty that would bolster water rights in the face of growing commercialization—and which would be conducted not via standard interstate diplomacy but rather through a transnational network linking national parliaments. European green parties have also become active on the issue: Greens in the European Parliament used the 2000 P-7 summit (a symbolic counter-gathering to the G-7 meeting) to oppose water privatization as a human rights violation.

Another intriguing example is the growing momentum behind the idea of holding governments accountable for climate change as a human rights violation. In a case that is expected to appear before the Inter-American Commission on Human Rights, the Inuit Circumpolar Conference (ICC) is preparing to argue that 'the erosion and potential destruction of the Inuit way of life brought about by climate change resulting from emission of greenhouse gases amounts to a violation of the fundamental human rights of Inuit.'[47] According to Sheila Watt-Cloutier of the ICC, 'Inuit believe there is sufficient evidence to demonstrate that the failure to take remedial action by those nations most responsible for the problem does constitute a violation of their human rights — specifically the rights to life, health, culture, means of subsistence, and property.'[48] The basis for this petition is the Arctic Council's *Arctic Climate Impact Assessment* which forecasts devastating impacts on the Inuit way of life ranging from human health effects and food insecurity to more extreme weather conditions and resource-related cultural impacts.[49] The gains from prior cases involving the impact of deforestation, extractive industries and land conversion on indigenous peoples including the Awas Tingni (Nicaragua), Huaorani (Ecuador), and Yanomami (Brazil-Venezuela border region) have set the stage.[50]

The Inuit initiative is telling on several levels. Rather than

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46 Global Committee for the Water Contract, *The Water Manifesto: The Right to Life* (Lisbon: Global Committee for the Water Contract, 1998).

47 Sheila Watt-Clouthier, 'Climate Change and Human Rights' (2004) 2:11 Human Rights Dialogue 10.

48 *Ibid.*

49 See Susan Joy Hassol, *Artic Climate Impact Assessment: Impacts of a Warming Arctic* (Cambridge: Cambridge University Press, 2004).

50 Jorge Daniel Taillant, 'A Nascent Agenda for the Americas' (2004) 2:11 Human Rights Dialogue 28.

framing climate change as a Hardinesque problem of the global commons, the emphasis is on specific community-level impacts in a particular historical, economic and cultural context. Rather than crafting a technical-functional problem frame of the sort that typically infuses interstate regime bargaining, the Inuit case rests on an interesting analytic synthesis of universalized climate science and localized, highly context-specific ways of knowing rooted in an indigenous knowledge system; much of the evidence is derived from Inuit observations and understandings of ongoing changes to the Arctic environment. And rather than flowing from cooperative interstate bargaining to allocate the costs of responding to a shared problem, the interstate machinery of the Organization of American States is instead being pulled along in the wake of these contentious challenges, with a series of resolutions to study the link between the environment and human rights and identify opportunities to harmonize their interaction.[51]

IV HUMAN RIGHTS, ENVIRONMENT, AND NEOLIBERALISM

One important question that needs further study is the relationship between the two trends sketched here, the decline of the Rio paradigm and the rise of contentious transnational environmental activism as an institution-building force. Is it just coincidence that emergent controversies around local livelihood-and-rights struggles have come to the forefront as Rio's diplomacy for sustainability has waned? Here we must confront two alternate explanations for the linkage. One obvious possibility is that the palpable lack of momentum for Rio-style bargaining is feeding a new radicalism in environmental advocacy. In this view, actors who have grown frustrated with the slow pace of states in taking action for sustainability have adopted more contentious approaches, at a time when the communications revolution and post-Cold War political openings have made it easier to organize and advocate across borders.

There is also a very different explanation, suggesting that environmental human rights advocacy is not an expression of opposition so much as a disciplining of it. Balakrishnan Rajagopal has argued that mainstream human-rights discourse resonates with important elements of neoliberalism. As a result, the emergence of human rights as the predominant discourse of resistance to the 'violence of development' has rendered the resistance of grassroots groups outside the neoliberal paradigm less visible to both scholars and liberal activists.[52] In a similar vein, a rights-based discourse of

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[51] OAS, General Assembly, *Resolution: Human Rights and Environment*, AG/RES. 1819 (XXXI-O/01) (2001). See also Taillant, *supra* note 50.

[52] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University

environmentalism could be read as an expression of global neoliberalism.

For movements tagged frequently with accusations of elitism and western liberal bias, the possibility must be taken seriously. Yet actors seeking to reconcile environmental protection with neoliberal conceptions need not do so through the subtle channel of human rights activism. The post-UNCED era has seen a rise of an avowedly pro-market environmentalism, replete with tradable pollution permits, public-private partnerships, voluntary compliance, and market-based regulatory mechanisms such as nonstate-based product certification.[53] Indeed, these trends were a large part of the disquiet that many environmentalists felt over the 2002 Johannesburg summit. In this context, my sense is that environmental human rights coalitions have flourished more in opposition to these tendencies than in consonance with them. Whatever the consequences of their actions, the actors engaged in pressing these claims in the water and climate controversies discussed previously understand themselves to be opposing, rather than reinforcing, these tendencies. Thus, anti-privatization activists in the water issue-arena have emphasized water rights explicitly in opposition to commodification, and with the recognition that rights are socio-cultural properties of communities and not simply economic properties of individuals.[54]

Nor are the synergies between environmental activism and human rights advocacy always straightforward and easily tapped, as some models of neoliberal hegemony tend to imply. After dabbling with the trend toward integrated conservation-and-development initiatives throughout the 1990s, several of the largest conservation NGOs have been moving away from alliances with local communities and indigenous peoples in recent years—sparking tensions between these organizations and some of their progressive funders, to say nothing of on-the-ground conflicts with local communities.[55] Moreover, while a human-rights agenda may be insufficiently ecologically focused for these environmentalists, it may be insufficiently politicized for some others. As Jeffery Atik points out, there can be a significant difference between

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Press, 2003).

53 See for example Jennifer Clapp, 'The privatization of global environmental governance: ISO 14000 and the developing world' (1998) 4 Global Governance 295. On product certification, see Benjamin Cashore, Deanna Newsom & Graeme Auld, *Governing Through Markets: Forest Certification and the Emergence of Non-State Authority* (New Haven, Conn.: Yale University Press, 2004).

54 Conca, *Governing Water*, *supra* note 1 at c. 7.

55 See Mac Chapin, 'A Challenge to Conservationists' (2004) 17 World Watch 17.

the minimum standard inherent in the idea of environmental rights and the emphasis on distributional equity and disproportionate burden that infuses most environmental-justice activism.[56]

In other words, contentious politics are not limited to the external dealings of environmental human rights activism. The specific undercurrents, intended consequences, and unintended effects of environmental human rights advocacy deserve careful study. But it would be a mistake to dismiss the trend as little more than a manifestation of the neoliberal colonization of activist imagination.

CONCLUSION

Environmental human rights alliances have been central to the transnationalization of contentious environmental politics. They amplify the grievances that spring from the environmental damage inflicted on local communities around the world and frame them as specific manifestations of a larger pattern. For a growing array of environmental issues of international significance, these acts of transnational contention appear to be the central arena from which increasingly institutionalized forms of global environmental governance will emerge. Thus, despite the stalling of momentum for interstate environmental diplomacy, there have been important evolutionary trends in the political and legal foundations of global environmental governance since UNCED—including trends that differ fundamentally from the blueprint laid down at Rio. Driven by a new geopolitical and economic context, a new generation of environmental challenges, and the changing foundations of authority in world politics, the global interstate cooperative framework envisioned at Rio is being transcended by more complex patterns of institutional development, grounded in political contention and transnational linkages.

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[56] Jeffery Atik, 'Commentary on 'The relationship between environmental rights and environmental injustice' (2004) 2:11 Human Rights Dialogue 26.

Legitimacy in Global Environmental Governance

STEVEN BERNSTEIN*

Writing in 1999, Daniel Bodansky predicted that the question of legitimacy would 'emerge from the shadows and become a central issue in international environmental law.'[1] Specifically, Bodansky worried that as authority over environmental policy moved increasingly from domestic to international settings, perceptions that decision-making processes are 'insufficiently democratic' would increase. Such concerns were already simmering in other arenas of global governance. Jürgen Habermas, for example, used similar language nearly ten years earlier in anticipating a legitimacy problem in Europe, commenting that, 'the democratic processes constituted at the level of the nation-state lag hopelessly behind the economic integration taking place at a supranational level.'[2] Both authors, in different ways, worried that the reconfiguration of political authority might not keep pace or adapt appropriately to globalizing pressures. Few topics could be more appropriate for the inaugural issue of a journal devoted to the intersection of International Relations (IR) and International Law (IL).

Whereas Bodansky in 1999 could cite only a handful of works that addressed legitimacy in global governance, as one author recently put it, 'currently there is hardly an essay on international or global governance that does not at least mention the issue of legitimacy.'[3] Still,

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* Associate Professor, Department of Political Science, University of Toronto.

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1 Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 Am. J. Int'l L. 596 at 596

2 Jürgen Habermas, 'Citizenship and National Identity', reprinted as Appendix II in Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. by W. Rehg. (Cambridge, Mass.: MIT Press, 1996) 491 at 491.

3 Jens Steffek, 'Why IR Needs Legitimacy: A Rejoinder' (2004) 10 European Journal of International Relations 485 at 485. Examples of recent works include Jean-Marc Coicaud & Veijo Heiskanen, eds., *The Legitimacy of International Organizations* (Tokyo: The United Nations University Press, 2001); Roger B. Porter *et al.*, eds., *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium* (Washington: Brookings Institution Press, 2001); Jens Steffek, 'The Legitimation of International Governance: A Discourse Approach' (2003) 9 European Journal of International Relations 249; Ian Hurd, 'Legitimacy and Authority in

passing references far outnumber systematic treatments. Empirical applications are even more rare. Moreover, existing scholarship on legitimacy draws on diverse disciplinary literatures in political science and philosophy, law, and sociology, which has produced confusion over its meaning and dynamics. This article attempts to sort through different conceptions of legitimacy and evaluate how contemporary environmental governance stacks up to these notions. Ultimately, it proposes that the overall legitimacy of global environmental governance is a consequence of the joint appearance of components emphasized in these different conceptions, but inadequately identified in any alone.

It might seem ironic to focus on environmental governance as a site of legitimacy problems. No equivalent to the 'Battle of Seattle'—the massive public protests at the 1999 World Trade Organization (WTO) Ministerial that became a watershed for public challenges to the legitimacy of international economic institutions—has ever confronted global environmental institutions. They seem largely immune from the protests dogging not only the WTO, but virtually every significant organization or initiative identified with the economic globalization agenda. Moreover, while environmental governance by no means achieves a democratic or deliberative ideal, it is among the most transparent, participatory, and accessible realms of global governance to state and non-state actors alike. It has also generally been responsive to justice and equity concerns—values sometimes linked to notions of legitimacy—especially when compared to other domains of global governance. Global environmental norms, institutions and agreements, especially in the post-Rio Summit (1992) era, often entrench differential obligations and recognize differential capacities of developed and developing countries. They also frequently attempt to combine global concerns with local decision-making and accountability, where activities are focused.

Part of the reason legitimacy concerns have increased despite these conditions is a widespread belief that global environmental governance remains weak, lacks authority, and is unable to make

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International Politics' (1999) 53 Int'l Org. 379; Benjamin Cashore, 'Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority' (2002) 14 Governance 502. Older treatments are rare, although a broad survey of work that directly discusses legitimacy would include Henry Kissinger, *A World Restored* (New York: Gosset Dunlap, 1964); Inis Claude, Jr., 'Collective Legitimization as a Political Function of the United Nations' (1966) 20 Int'l Org. 367; Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990); Abram Chayes & Antonia H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass.: Harvard University Press, 1995).

significant inroads into solving many of the problems for which institutions and agreements have been established.[4] This suggests greater legitimacy is needed to establish more extensive, enforceable, and effective environmental action at the global level. At the same time, many scholars and activists argue that ostensibly non-environmental institutions such as the WTO or World Bank, which nonetheless play a significant role in international environmental governance, pay insufficient attention to environmental concerns or subordinate them to the goals of open markets, corporate freedom, efficiency and economic growth. Environmental protection and sustainable development thus join human rights, labour rights, and poverty reduction, as unmet goals driving the broader legitimacy challenge to international liberalism and the global governance institutions established to promote and maintain it.[5]

I will argue that a focus on legitimacy can help to understand and address these dilemmas. However, legitimacy must be examined not only from the common perspective of democratic theory, but also from legal and sociological perspectives that may diverge from the democratic normative ideal. Whereas these different conceptions of legitimacy can sometimes push in contradictory directions, the key to legitimate governance is in their convergence. After defining legitimacy, I identify principled, legal, and sociological notions of legitimacy and evaluate environmental governance in light of these notions.[6] I conclude with some observations on what integration of these conceptions of legitimacy might entail and implications for the legitimacy challenge ahead.

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4 One could cite dozens of works on the inadequacies of efforts to address global environmental problems, failures of global environmental governance, and the need for reform. For an overview of these arguments focused specifically on governance, see James Gustave Speth, 'The Global Environmental Agenda: Origins and Prospects' in Daniel C. Esty & Maria H. Ivanova, eds., *Global Environmental Governance: Options & Opportunities* (New Haven: Yale School of Forestry & Environmental Studies, 2002) 11 and other contributions to that volume; Frank Biermann & Steffen Bauer, eds., *A World Environment Organization: Solution or Threat for Effective International Environmental Governance* (Aldershot, UK: Ashgate, 2005).

5 John G. Ruggie, 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 Int'l Org. 357; Steven Bernstein & Louis W. Pauly, eds., *Global Governance: Towards a New Grand Compromise?* (Albany: SUNY Press) [forthcoming].

6 For a detailed discussion and defence of these conceptions of legitimacy, see Steven Bernstein, 'The Elusive Basis of Legitimacy in Global Governance: Three Conceptions' (Globalization and Autonomy working paper series, Institute for Globalization and the Human Condition, McMaster University, 2004).

I LEGITIMACY AND WHY IT MATTERS

Legitimacy can be defined as the acceptance and justification of shared rule by a community. This definition self-consciously combines an empirical measure of legitimacy (acceptance of a rule or institution as authoritative) and a normative argument concerning whether the authority possesses legitimacy (providing reasons that justify it). It therefore eschews the traditional dividing line in political science writing on the topic between a Weberian social scientific approach and a Habermasean position that a belief in legitimacy is assumed to have an 'immanent relation to truth.'[7] As a practical matter in global governance, this conceptual distinction is untenable. Arguments about why actors *should* accept a decision or rule as authoritative (as opposed to because they are coerced) necessarily include possible reasons why the decision *is* accepted, and vice-versa. That being said, particular conceptions of legitimacy invoked by global governance scholars entail trade-offs in the leverage they provide for normative or positive projects, as will be seen below.

Beyond definitions, the new legitimacy concerns need to be placed in the context of the ongoing debate over the reconfiguration of global authority.[8] The question of authority beyond the state is not especially new. Since the emergence of the 'regimes' literature in the 1980s, IR scholars have asked how, given formal anarchy, institutions gain 'authority' to create obligations on community members to adhere to their rules or norms. Legitimacy is one logical answer, whether the community consists only of states, or includes firms, civil society groups, local populations or sub-state actors who may be involved in rule-making or who might be affected by decisions. Yet, IR scholars until very recently largely ignored legitimacy, assuming instead that states—the nearly exclusive focus of regime theory although not of the newer global governance scholarship—largely obeyed commands out of self-interest, fear, or incentives from more powerful actors.

Whether or not legitimacy was always necessary for international stability and patterned behaviour,[9] the extended scope and reach of contemporary 'global governance' has made that need much

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7 Jürgen Habermas, *Legitimation Crisis*, trans. Thomas McCarthey (Boston, Mass.: Beacon Press, 1973) at 97. Bodansky, *supra* note 1, and Steffek (2003), *supra* note 3, make much more of this distinction.

8 Miles Kahler & David Lake, eds., *Governance in a Global Economy: Political Authority in Transition* (Princeton, NJ: Princeton University Press, 2003); Edgar Grande & Louis W. Pauly, *Complex Sovereignty and the Foundations of Global Governance* (Toronto: University of Toronto Press, 2005).

9 For arguments that it was, see especially Kissinger, *supra* note 3; Claude, *supra* note 3.

more visible. This need is apparent not only within international organizations (such as the UN, IMF, WTO, or World Bank), but also within hybrid, private, and networked forms of governance that include varying mixes of non-state actors. Many of these governance nodes until recently existed on the fringes of consciousness, except among a few select elites. Others, especially of the hybrid and non-state variety, are only now emerging. These developments create a situation not unlike the legitimacy problems described by Habermas following the expansion of post-war welfare states into more and more areas of economic and social life, in order to maintain economic performance. That expansion, 'enhance[d] the visibility of the conventional and political dimension of social life and encourage[d] citizens to ask the state to legitimize the particular conventions supported by its action.'[10] Similarly, legitimacy demands on international institutions increase to the degree they appear authoritative to ordinary citizens who view them as the institutional embodiment of globalization. Hence, civil society looks to these institutions to provide social justice, equity, or other broad societal values, including ecological integrity, not just functional goals such as financial stability.[11]

Even since the events of 11 September 2001, when the 'anti-globalization' movement appears in retreat, legitimacy pressures in global governance have not abated, nor are governance institutions less 'visible'. For instance, developing countries, which are now better integrated into the world economy than ever before, are demanding with renewed vigor changes in the structure of international institutions to more equitably represent their needs and concerns. Pressure also continues to mount, especially from non-state actors, to make institutions more accountable to domestic populations and transnational civil societies, as well as to increase transparency and access to participatory mechanisms for all affected actors.

Under these conditions, the question of legitimacy concerns who is entitled to make rules and how authority itself is generated—a significant departure from an earlier and much narrower emphasis in IR and IL on legitimacy as a mode of compliance.[12] That earlier literature tended to juxtapose legitimacy to interests or fear of 'punishment' as sources of compliance.[13] The new focus on governance, in contrast,

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10 William Connolly, 'Introduction: Legitimacy and Modernity' in W. Connolly, ed., *Legitimacy and the State* (Oxford: Basil Blackwell, 1984) 1 at 13, commenting on Habermas's, *Legitimation Crisis*, *supra* note 7.

11 Richard Devetak & Richard Higgott, 'Justice Unbound: Globalization, States, and the Transfer of the Social Bond' (1999) 75 International Affairs 483.

12 Franck, *supra* note 3; Hurd, *supra* note 3.

13 Hurd, *ibid.* at 379.

highlights that legitimacy is intimately connected to power and political community. Max Weber, in his seminal writings on the topic, focused especially on how legitimacy justifies authority and domination,[14] a point not lost on an earlier generation of IR scholars who viewed legitimacy as making rulers 'more secure in the possession of power and more successful in its exercise.'[15] Legitimacy can also be a source of power, enabling some policies or practices while proscribing others.[16] In terms of community, legitimacy always rests on shared acceptance of rules and rule by affected communities and on justificatory norms recognized by the relevant community. However, defining who is a member of a relevant community, on what basis community identification must rest, and to what degree shared norms of appropriateness must be present to achieve legitimacy are all subjects of debate.

Perhaps the most important reason the newer legitimacy agenda applies to environmental governance is that it throws traditional notions of the international community into question by increasingly targeting or affecting non-state actors, whether firms whose production is affected by chemical bans, emission limits or campaigns for corporate responsibility; fishers whose catch is monitored or limited by fisheries regimes; or local communities affected by decisions of an international financing institution such a the Global Environmental Facility (GEF). Under these conditions, traditional sovereign state diplomacy and consent may be an inadequate source of legitimacy. Moreover, international legitimacy may no longer be easily divorced from justice, as some legal scholars have argued it should be.[17] If '[t]here are no settled social bonds [community] in an age of globalization' and therefore 'the Westphalian "givens" of justice [as a concern within states

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[14] Guenther Roth & Claus Wittich, eds., *Max Weber: Economy and Society* (Berkeley: University of California Press, 1978) at 953.

[15] Claude, *supra* note 3 at 368.

[16] A more radical position is that legitimating discourses are a form of productive power, producing subjectivity by defining identities and practices. Michel Foucault's notion of governmentality comes closest to capturing this process. See M. Foucault, 'Governmentality' in Graham Burchell, Colin Gordon & Peter Miller, eds., *The Foucault Effect: Studies in Governmentality* (London: Harvester Wheatsheaf, 1991) 87. On productive power compared to other conceptions of power in global governance, see Michael Barnett & Raymond Duvall, eds., *Power and Global Governance* (Cambridge: Cambridge University Press, 2004).

[17] Franck, *supra* note 3 at 208-9; Bodansky, *supra* note 1. Interestingly, Franck subsequently acknowledged that an emerging global community means the value of fairness applies in international law and institutions (*Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995)).

but not beyond] no longer pertain,'[18] meeting conditions of democratic legitimacy beyond the state is at least hypothetically possible.

II A Principled Conception: Legitimacy as Democracy

A focus on democratic legitimacy tends to dominate the new literature on legitimacy in global governance. As alluded to already, concerns over globalization are now commonly expressed in terms of justice and democracy by utilizing the rationale that institutions of global governance are usurping domestic democratic institutions. Two conclusions follow. Either international institutions should become more democratic—a view expressed most commonly by cosmopolitans[19]—or state governments must be protected from usurpation—a position most strongly expressed by conservative nationalists such as the 'new sovereigntists' in the United States.[20] The latter position rests on a philosophical claim that global governance can only be of peoples, i.e. governance of a community of states whose representatives can engage in rule making, but the legitimacy of those rules ultimately must rest on domestic constitutional order.[21]

In both cases, legitimacy requires democracy because it is the central principle in contemporary politics that justifies authority.[22] However, there is little indication on the horizon of truly democratic institutions at regional, let alone global scales when even the highly institutionalized European Union continues to struggle with a 'democratic deficit.' Cosmopolitan proposals for participatory mechanisms, including referendums and elected representative institutions such as People's Assemblies or a Global Parliament that can hold global regulatory institutions accountable or ensure the protection of local autonomy and individual rights,[23] appear even less likely outside the European context in the short to medium term, even when

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18 Devetak & Higgott, *supra* note 11 at 484.

19 Most notably, David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford: Stanford University Press, 1995).

20 For example, Jeremy Rabkin, *Why Sovereignty Matters* (Washington: AEI Press, 1998). For a summary of their views, see John G. Ruggie, 'American Exceptionalism, Exemptionalism and Global Governance', in Michael Ignatieff, ed., *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005) 304.

21 John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999).

22 Held, *supra* note 19 at 1.

23 E.g. Held, *supra* note 19 at 267-286; Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2001) at 265-75; Esref Aksu & Joseph A. Camilleri, eds., *Democratizing Global Governance* (New York: Palgrave, 2002).

they include principles such as 'subsidiarity'.[24]

Given these practical limitations, actual proposals in environmental governance for institutional reform have not generally included a democratic assembly. For example, discussions around a 2003 French proposal to the United Nations (UN) General Assembly for a new UN Environment Organization (UNEO)—the only initiative for a global environmental organization actually tabled—have so far focused instead on coordinating and strengthening existing agreements, compliance systems, and organizations with an environmental mandate, or improving responsiveness to developing countries. The thrust of the proposal is toward turning the United Nations Environment Programme (UNEP) into a UN specialized agency rather than radical democratic reform, centralization or legal reform along the lines of the WTO. Even this modest proposal has generated limited political momentum, is strongly opposed by the United States, and received no mention in the High-level Panel report on UN reform released in December 2004.[25] Although supporters argue a universal membership UNEO is needed precisely for legitimacy reasons—as put by German Environment Minister Jürgen Tritten, 'the legitimacy of decision-making processes is a key point and therefore all UN Member States should effectively be given the same rights'[26]—any move in that direction has been resisted. States could not even agree at the 2005 UNEP Governing Council meeting whether the Council should be expanded to include universal membership, with the EU strongly in favor and the United States' and developing country governments opposed.[27]

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[24] The principle, most notably institutionalized in the European Union, envisions central authority being subsidiary to local authority in the absence of a compelling case for the contrary. Cosmopolitan proposals thus usually argue for multiple, non-hierarchical, and overlapping authorities at various scalar levels, with decision-making following democratic norms at all levels.

[25] International Institute for Sustainable Development, 'Summary of the Eighth Special Session of the UNEP Governing Council/Global Ministerial Environment Forum: 29-31 March 2004' 16:35 *Earth Negotiations Bulletin*; United Nations, *A More Secure World: Our Shared Responsibility: Report of the Secretary-General's High-level Panel on Threats, Challenges and Change*, UN Doc. A/59/565 (2004), online: United Nations <http://www.un.org/secureworld/>.

[26] German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, Press Statement, 'Trittin Calls for a UN Environment Organization' (15 March 2004), online: Bundesministerium für Umwelt <http://www.bmu.de/english/press/pm/5669.php>.

[27] International Institute for Sustainable Development, 'Summary of the 23rd Session of the UNEP Governing Council/Global Ministerial Environment Forum: 21-25 February 2005' 16:47 *Earth Negotiations Bulletin*.

In the absence of radical cosmopolitan reform, many scholars argue that democratic legitimacy can nonetheless be improved with relaxed requirements for full-fledged deliberative and democratic mechanisms. Thus, they focus on the elements of legitimacy in democratic theory, such as accountability, transparency, access to participation, deliberation and, sometimes, fairness. As opposed to direct accountability to publics through elections, proposals are increasingly rooted in deliberative models of legitimation based on Habermas' theory of communicative action, where legitimacy ideally requires that decisions rest on 'good arguments' made under conditions in which free and equal autonomous actors can challenge validity claims, seek a reasoned communicative consensus about their understandings of the situation and justifications for norms guiding their action, and are open to being persuaded.[28] IR scholars generally recognize that such 'ideal speech' situations are unlikely to obtain in international negotiations or forums, but nonetheless suggest that when argumentation occurs in situations approximating these conditions, such as when participants of different capabilities refrain from coercion or pulling rank, it can serve as a source of legitimacy.[29] Whether arguments and justifications occur between state representatives, members of transnational organizations or individual citizens, legitimacy requires a situation where persuasion is possible and common understanding is the goal.[30] Another variant of particular relevance to emerging forms of environmental governance, is 'stakeholder' democracy, 'centered … on new participatory deliberative practices' among stakeholders that include not only governments, but civil society groups, local communities and businesses.[31]

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28 Jürgen Habermas, *Theory of Communicative Action*, vol. 1 and 2, trans. by Thomas McCarthy (Boston: Beacon Press, 1981 and 1987). On deliberative democracy generally, including formulations critical of Habermas, see Seyla Benhabib, ed., *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press, 1996).

29 Thomas Risse, '"Let's Argue!": Communicative Action in World Politics' (2000) 54 Int'l Org. 1.

30 Interpretations of Habermas and deliberative democracy more generally disagree whether consensus is required for legitimacy, or whether there is scope for difference or 'agreeing to disagree'. However, adjudicating that debate is beyond the scope here. For a good discussion, see Simone Chambers, *Reasonable Democracy: Jürgen Habermas and the Politics of Discourse* (Ithaca, NY: Cornell University Press, 1996) at 155-72; Benhabib, *supra* note 28.

31 Karin Bäckstrand & Michael Saward, 'Democratizing Global Environmental Governance? Stakeholder Democracy at the World Summit for Sustainable Development' (Paper presented to the Fifth Pan-European Conference on International Relations, The Hague, 9–11 September 2004); Nancy Vallejo & Pierre Hauselmann, Governance and Multi-stakeholder

Given wide disagreement in this literature on precise criteria of legitimacy, the evaluation below assesses environmental governance across the full range of criteria identified above. By most measures, although varied across institutions and agreements and generally stronger in participation and transparency than deliberation, environmental governance fares relatively well.

Peter Haas, for example, citing the increasing role of scientists in national decision-making and in treaty advisory bodies as well as the proliferation of environmental non-governmental organizations (NGOs), has argued that states, though still the primary locus of authority, 'are increasingly accountable to domestic and transnational constituencies.'[32] Moreover, delegations to multilateral negotiations frequently include members of civil society and the business community. Moreover, these non-state actors sometimes serve as important sources of expertise, especially for developing countries with limited diplomatic and technical resources. NGOs also play formal and informal roles in monitoring and implementation. Transnational corporations have also significantly increased their participation and political organization in a variety of environmental governance forums.[33]

More broadly, international environmental institutions have frequently been leaders in providing non-state actors access to information and participation. Both the 1972 UN Conference on the Human Environment in Stockholm and the 1992 UN Conference on Environment and Development in Rio de Janeiro were breakthrough events for NGO participation in their times. The Stockholm conference originated the idea of a parallel NGO forum, which attracted some 400 groups, and has since become a regular feature of such events.[34] At Rio, 1420 accredited NGOs, about one-third from the South, participated in the official proceedings as a result of the Secretariat's unprecedented decision to relax accreditation rules to allow non-ECOSOC NGOs to

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Processes (Winnipeg: International Institute for Sustainable Development, 2004).

32 Peter M. Haas, 'Social Constructivism and the Evolution of Multilateral Environmental Governance' in Aseem Prakash & Jeffrey A. Hart, eds., *Globalization and Governance* (London: Routledge, 1999) 103.

33 Mikoto Usui, 'The Private Business Sector in Global Environmental Diplomacy' in Norichika Kanie & Peter M. Haas, eds., *Emerging Forces in Global Environmental Governance* (Tokyo: United Nations University Press, 2004) 216.

34 *Report of the United Nations Conference on the Human Environment*, UN Doc. A/CONF.48/14/REV.1 (1972); Satoko Mori, 'Institutionalization of NGO Involvement in Policy Functions for Global Environmental Governance' in Kanie & Haas, *supra* note 33 at 159.

participate (another 11,000 participated in the parallel Global Forum).[35] Again, the relaxed rules became the norm for subsequent world conferences.

The 2002 World Summit on Sustainable Development (WSSD) in Johannesburg marked a further innovation, multi-stakeholder deliberation and public-private partnership agreements. While it did not invent these concepts, it did much to promote the idea then emerging that environmental governance should not be limited to inter-state agreements. Stakeholders ought to be engaged, not only by informing inter-governmental decisions, but also through collaborative ventures, especially focusing on the implementation of sustainable development.[36] While innovations outside of WSSD also included voluntary measures in the corporate sector and non-state governance,[37] WSSD particularly promoted public-private partnerships or what became known as type II agreements. Some 300 of these partnerships were identified before or at the Johannesburg Summit.[38] WSSD also included 'multi-stakeholder' dialogues as an integral part of the preparatory process and the summit itself. The dialogues promoted deliberations among the nine 'major groups' identified by Agenda 21, reflecting various segments of society, and government officials. Although states never relinquished their sole authority to make decisions, these innovations can be read as an opportunity for 'stakeholder democracy' that moves beyond mere participation to 'collaboration' and truer 'deliberation' among states, business, and civil society.[39]

Multi-stakeholder dialogues had already been part of the Commission on Sustainable Development's regular sessions since 1998, and in 2002 UNEP's Governing Council (GC) institutionalized a Global Civil Society Forum (endorsing an initiative started two years earlier) in conjunction with meetings of the GC and Global Ministerial Environment Forum (GMEF).[40] In 2004, 206 civil society

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35 *Ibid*. at 159, 173, n. 3; Peter M. Haas, Marc A. Levy & Edward A Parson, 'Appraising the Earth Summit: How Should We Judge UNCED's Success?' (1992) 34:8 Environment 6 at 32.

36 Bäckstrand & Saward, *supra* note 31.

37 See Steven Bernstein & Benjamin Cashore, 'The Two-Level Logic of Non-State Global Governance' [under review] for distinctions among these types of governance.

38 Peter Doran, Briefing Paper, 'World Summit on Sustainable Development: An Assessment for IISD' (Winnipeg: International Institute for Sustainable Development, 2002).

39 Bäckstrand & Saward, *supra* note 31 at 5, 13.

40 The GMEF is a ministerial level meeting of Governing Council members. UNEP, 'Engaging Civil Society in the Governing Council/Global Ministerial Environment Forum' (background document for the regional meetings in preparation of the sixth Global Civil Society Forum, 14

representatives from forty countries attended the Forum, while 126 representatives from about sixty countries attended in 2005. Whereas representatives of civil society elected in regional meetings drafted the civil society statement forwarded to the GC/GMEF, any accredited organization can submit written inputs into working documents in the lead-up to the GC/GMEF meetings, receive working documents at the same time as government representatives, comment on these drafts, and have the comments circulated to governments before they meet to finalize the documents. They can also comment on the final documents.

Environmental governance seems even to make a difference for democratic reform in development finance institutions, where change has otherwise been more difficult. The most notable example is the Global Environmental Facility (GEF), a cooperative venture between UNEP, United Nations Development Program (UNDP), and the World Bank, established in 1991 to be the primary channel for multilateral aid for environmental protection in developing countries. A comparative study that assessed democratization in global governance according to a model of deliberative democracy identified the GEF as 'perhaps the most inclusive and open international organization.'[41] The study's authors note that Southern states' suspicions over environmental 'conditionality' gave way to stronger support after a series of reforms, including a balance of donor and recipient countries in its governing council (although there is still a slight bias towards wealthier countries and affirmative votes require a majority of members and contributors), increased transparency, and direct participation by NGOs through formal consultations. As evidence of its increased legitimacy, membership grew from twenty-nine states in the pilot phase (1991–4) to over 173 members by 2002. Where critics still maintain that actual practices have not lived up to the deliberative ideal, the GEF 'has adopted and implemented democratic procedures virtually unmatched in global politics.'[42]

In addition to these organizational reforms, global environmental norms and treaties support ongoing improvements in public participation and transparency. For example, Rio Declaration Principle 10 asserts that 'environmental issues are best handled with the participation of all concerned citizens, at the relevant level' and promotes access to information, participation in decision-making, and access to judicial and administrative proceedings at the national level. While only soft law, many states have adopted its spirit. The 1998

October 2004). See also UNEP's 'Resources for Civil Society', online: <http://www.unep.org/DPDL/ civil_society/GCSF/index.asp>.

41 Roger A. Payne & Nayef H. Samhat, *Democratizing Global Politics* (Albany, NY: SUNY Press, 2004) at 7.

42 *Ibid*. at 98.

Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which came into force in 2001, takes up its provisions formally. Negotiated under the auspices of the UN Economic Commission for Europe, it includes provisions for transparency and participation at the international as well as national levels. Subsequently, the EU adopted implementing directives on access to environmental information and public participation (directive 2003/4/EC), with a 2005 deadline for national implementation. In 2003, parties to the convention adopted a *Protocol on Pollutant Release and Transfer Registers* to create publicly available national inventories of pollution releases from industrial and other sources.

In line with these norms, multilateral environmental negotiations are already remarkably open and transparent. Although practices vary across environmental agreements, detailed information about most negotiations and side meetings is readily available to broader publics, most notably through a non-governmental reporting service run by the International Institute for Sustainable Development, the *Earth Negotiations Bulletin*. Owing to its access and the quality of its reporting, official delegates rely on it as much as NGOs and academics.

These examples suggest that environmental governance stacks up extremely well by most criteria of democratic legitimacy, especially in comparison with economic and security institutions, many of which have weighted voting and much less access for non-state actors. Yet, a sense that legitimacy problems remain in environmental governance reveals limitations of a conception of legitimacy based solely on a democratic or deliberative justificatory discourse.

One problem concerns a possible legitimacy-effectiveness trade-off. Greater participation, whether of larger groups of states or NGOs, can slow down decision-making, make consensus more difficult, and generally increase the challenge of collective action. The assumption that participation leads to influence or meaningful deliberation can also be questioned. If innovations such as stakeholder dialogues provide little influence on government-to-government negotiations, do they really increase legitimacy? Many participants at WSSD, for example, saw their limited impact as a 'disappointment', and as 'more monologues than dialogues' because of limited participation by high-level officials.[43] However, the legitimacy-effectiveness trade-off may be overblown if 'efficient' decision-making lacks support from relevant groups of actors.

Problems of political community and the difficulty in establishing a *demos* (a popular unit that exercises political rights) beyond the state, pose a potentially more significant limitation on

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[43] Bäckstrand & Saward, *supra* note 31 at 17.

democratic legitimacy.[44] Who or what constitutes a political community is a major point of contention in political philosophy, although most literature agrees that communities exist by virtue of a shared identity and communication. The debate is most advanced in Europe, where political institutions with significant authority appear to be moving ahead of a *demos*. One response is that for limited and functional authority, such as that currently demanded in environmental governance, simple recognition of a shared fate may generate sufficient trust and willingness to sacrifice to support the requisite authority for governance.[45] To demand some notion of peoplehood or strong emotional bond is too high a standard for the type of authority being sought.

The problem is exacerbated, however, by unresolved tensions between the community of states and broader transnational society. Global environmental governance is well advanced in recognizing that its legitimacy increasingly rests on authority being granted by the broader communities it addresses beyond state governments. Still, the direction of reform to address these demands has provoked the ire of 'new sovereigntists'. Whatever the merits of the charges,[46] their concerns are best understood from the perspective of legal legitimacy.

III LEGAL LEGITIMACY

Legitimacy gets surprisingly short-shrift in the IL scholarship, which perhaps accounts for the caricature of international lawyers as tending 'simply to translate legitimacy as *legality*.'[47] It does not help that recent attempts to create dialogue among IR and IL scholars have focused on analyzing and explaining 'legalization' in world politics,[48] a discussion almost completely devoid of whether the trend toward institutionalization of legal constraints is legitimate.[49]

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44 For example, see Lars-Erik Cederman, 'Nationalism and Bounded Integration. What it Would Take to Construct a European Demos' (2001) 7 European Journal of International Relations 139 at 144.

45 E.g. Melissa S. Williams, 'On Peoples and Constitutions, Sovereignty and Citizenship' (Paper presented to the American Political Science Association annual meeting, Chicago, 2–4 September 2004)[unpublished].

46 There is good reason to be suspicious of their agenda, which targets environmental and human rights NGOs and treaties such as the *Kyoto Protocol*, but has no problem with international rules that protect multinational corporations. Ruggie, *supra* note 20 at 30.

47 Claude, *supra* note 3 at 368.

48 Judith Goldstein *et al.*, 'Introduction: Legalization and World Politics' (2000) 54 Int'l Org. 385.

49 Martha Finnemore & Stephen Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics' (2001) 55 Int'l Org. 743.

This relative neglect started to change in response to the same real world legitimacy challenges that motivated political scientists, leading some IL scholars back to the question of on what basis law can be justified as legitimate. The dominant answer to the question of 'legal legitimacy' is some variant of legal process. Unlike most principled conceptions, which appeal to notions of truth or justice, 'legal legitimacy' supports a sharp dividing line between what is just and what is legitimate. As Bodansky explains, legal legitimacy does not concern whether a decision is unjust, misguided or 'correct'; rather, it 'reflects more general support for a regime, which makes subjects willing to substitute the regime's decisions for their own evaluation of a situation.'[50]

International legal scholars identify state consent as the basis of obligation. Analyses of legitimacy thus focus on the nature of consent and its distance or removal from the particular rule in question. Bodansky, for example, differentiates 'specific consent' such as ratifying a treaty from 'general consent' such as ratifying the *Charter of the United Nations*, which 'creates institutions with quasi-legislative and adjudicatory authority.'[51] The move toward general consent and constitutionalism[52] is one potential source of legitimacy problems if the connection between consent and the rule or institution becomes distanced or obscured, an argument made most vociferously today in regard to the WTO's dispute resolution process.[53] The problem of consent is also linked to notions of 'legality'. Legality is potentially violated when a treaty body, group of experts such as scientists

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50 Bodansky, *supra* note 1 at 602.

51 *Ibid*. at 604.

52 Legalization blends into constitutionalism when rules define obligation 'as an attribute that incorporates general rules, procedures, and discourse of international law', which invokes what H.L.A Hart identified as secondary rules of a legal system (Kenneth Abbott *et al.*, 'The Concept of Legalization' (2000) 54 Int'l Org. 401 at 403). Whereas primary rules are regulative, obligating to do or refrain from certain actions, secondary rules are 'about rules;' they 'confer powers' to create or change primary rules (H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 79). As constitutionalization progresses, those rules appear further removed from their original source of legitimacy in state consent and more deeply institutionalized.

53 Robert Howse & Kalypso Nicolaïdis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far' in Roger B. Porter *et al.*, eds., *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium* (Washington: Brookings Institution Press, 2001) 227. For an argument that the WTO is not constitutionalizing, see Jeffrey L. Dunoff, 'Constitutionalism's Conceits' (Paper presented to a conference on Changing Patterns of Authority in the Global Political Economy, Tubingen, Germany, 16 October 2004).

empowered by a treaty (as is the case in the whaling and Antarctic regimes), or even a representative body of state delegates, makes a decision that appears to go beyond the mandate given them by the statute to which states consented.[54] Thus, whereas expertise and rational science (as defined by the rules of the institution in question) have been recognized as possible sources of legitimacy rooted in a Weberian conception of legal-rational authority—a source of legitimacy also emphasized in a newer literature on international administrative law owing to science's presumed ability to 'deliver good results'[55]—legality poses a limit on its legitimating power.

At the same time, there is pressure to move away from specific consent *for* legitimacy reasons, because the pressures of globalization raise questions about whether states can *legitimately* consent to policies that increasingly affect not simply their behaviour vis-à-vis other states, but also directly affect domestic policies, local communities or corporate activities. While some forms of participatory reform, including some already noted, may help shorten or thicken the long 'chains of delegation' that threaten legitimacy under such conditions,[56] it seems unlikely that any reforms that leave even general state consent as a centerpiece of legitimacy can overcome the more fundamental problem of international authority: there is no legitimate basis for states to actually transfer (as opposed to delegate) authority in any tradition of liberal democratic thought.[57] The very notion of state consent engages domestic political processes such as ratification, which is the case in virtually all multilateral environmental agreements (MEAs).

Part of the difficulty in resolving these dilemmas may be rooted in dominant understandings of the normative foundations of international law. While a detailed discussion of competing schools of thought in international legal philosophy is beyond the scope here, one intriguing alternative has been applied to address the problem of

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54 Bodansky, *supra* note 1 at 605.

55 Daniel C. Esty, 'Towards Good Global Governance: The Role of Administrative Law' (draft, 19 May 2005) [forthcoming] at 35-6; see also Steffek, The Legitimation of International Governance, s*upra* note 3.

56 Robert O. Keohane & Joseph S. Nye, Jr,. 'The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy' in Porter, *supra* note 53 at 276.

57 Unlike social contract theory as it developed to legitimize government authority in the state, no political philosophy recognizes the legitimacy of a process where states give over their authority comparable to individuals entering a contract to give up (authorize) sovereignty to a ruler (Thomas Hobbes, *Leviathan*, ed. by C.B. McPherson (London: Penguin, 1968) at 187), or to self-legislation, following Rousseau and Kant. Thus cosmopolitan democracy proposals must always appeal back to individuals, which creates a conundrum for IL rooted in state consent.

legitimacy in international environmental law. Drawing on the legal theory of Lon Fuller, Jutta Brunnée and Stephen Toope have proposed an 'interactional' theory of international law that emphasizes law's 'internal morality' based on criteria such as avoidance of contradiction, generality, and congruence with underlying rules. Legitimacy also depends on 'cooperation between the governing and the governed' rooted in social practices and conventions among actors.[58] Such cooperation and interaction between actors, within the context of norms and institutions they have created, makes rules understandable, creates stable expectations, and 'thick' acceptance of norms. Thus, instead of holding legitimacy as a yardstick to measure or critique international law, this approach in effect redefines law as legitimacy: 'the stronger the adherence to the criteria, the more legitimate and, thus, the more persuasive and influential—the more legal—are rules likely to be.'[59]

In international environmental law, Brunnée argues that Conferences of the Parties (COPs), which are regular negotiations of the parties to MEAs, offer a possible forum for resolving legitimacy dilemmas around consent by embodying conditions conducive to the 'interactional' processes; that is, parties are engaged in a process both guided by the norms of the MEA and that reproduce and possibly modify the MEA.[60] In some respects, COPs may take on characteristics of legislatures. For example, their decisions may be binding on states, as is the case with 'adjustments' of ozone depleting potential on substances already subject to the Montreal Protocol. Other COPs have been charged with elaborating rules and provisions of an agreement, such as the Framework Convention on Climate Change COP in regard to mechanisms under the Kyoto Protocol.[61] A key point is that they do not operate strictly under general *or* specific consent. Arguably, formal consent will be less necessary under conditions where 'procedural and substantive expectations can develop, and factual as well as normative understandings can grow' leading to shared understandings. To the degree COP processes mirror those identified by interactional scholars, rules gain legitimacy with or without formal consent, and take on characteristics of bindingness.[62] Some of these procedural requirements link back to deliberative conditions noted earlier (for example, treatment of parties as equals, transparency to affected actors), but this perspective

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58 Jutta Brunnée & Stephen Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39 Colum. J. Transnat'l L. 19 at 49-53, 66.

59 Jutta Brunnée, 'COPing with Consent: Law-making Under Multilateral Environmental Agreements' (2002) 15 Leiden J. Int'l L. 1 at 46.

60 *Ibid.*

61 *Ibid*. at 23.

62 *Ibid*. at 39.

also stresses interactions with the broader community, both explicitly in terms of transparency but also more implicitly in terms of linking to shared norms. Thus, interactional legal theory takes on a sociological flavour.

This understanding of legitimacy has the advantage of overcoming the tendency of traditional notions of legal legitimacy to strictly focus on the rule or principle in question and deviations from it, not on underlying social purposes or the substance of rules that link those rules to other institutions or norms in society. Strict legal legitimacy ignores the possibility that the substance of rules frequently reflects what John Ruggie has called legitimate social purposes, or the purposes which institutions legitimately may pursue.[63] Sociological conceptions similarly root legitimacy in shared understandings and goals of a community. Still, critics may argue that an interactionist characterization obscures structural power in the creation and effectiveness of international legal rules. A sociological conception allows more explicit attention to this possibility, although it is open to the opposite criticism, that it still lacks a link to 'internal morality' or 'truth,' and thus may not provide a sufficient justification for authority.

IV A SOCIOLOGICAL CONCEPTION OF LEGITIMACY

From a sociological perspective, legitimacy is rooted in a collective audience's shared belief, independent of particular observers, that 'the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.'[64] Legitimization involves institutionalization of formal and informal rules or practices that become authoritative or understood to obligate by members addressed, whether or not they choose to comply. A sociological conception turns attention to the substance of rules, or the values and goals promoted. To be legitimate, rules and institutions must be compatible or institutionally adaptable to existing institutionalized rules and norms already accepted by a society. This understanding of legitimacy derives primarily from the literature in organizational sociology, the new institutionalism, and its uptake in the constructivist IR literature.[65] It should therefore not be confused with a simple empirical measure of a community's support for, acceptance of, or belief in an institution or rule, although that might be one indicator of legitimacy according to this view.

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63 Ruggie, *supra* note 5 at 382.

64 Marck C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20 Academy of Management Review 571 at 574.

65 *Ibid*.; Martha Finnemore, 'Norms, Culture, and World Politics: Insights from Sociology's Institutionalism' (1996) 50 Int'l Org. 325.

Extrapolating these insights to the problem of governance, the rules in question define authority relationships and empower actors and institutions that participate in those relationships and construct governing institutions through their interactions. These practices in turn become institutionalized (or accepted) as 'appropriate' by the community in an ongoing process of legitimization and de-legitimization. Thus, there is a constant interaction of rules with the social purposes and goals of relevant audiences. Legitimacy therefore depends on the historically contingent values, goals, and practices of the relevant society. In terms of global governance, different audiences of state, global civil society, or marketplace actors may share different criteria or weightings of 'input' (procedural), 'output' (performance, efficiency), or more traditional notions of 'substantive' (values of justice and fairness) legitimacy.[66]

By putting a spotlight on the problem of community or relevant audiences, a sociological conception of legitimacy highlights the cosmopolitan argument that the boundaries of states and political communities may no longer coincide. An appropriate research strategy, then, is to identify political communities wherever they form, whether in professional or technical networks, relevant marketplaces, or the traditionally demarcated 'international society' of diplomats and state officials, and ask on what bases legitimacy within those communities rests.

From this perspective, legitimacy problems in global environmental governance arise not owing necessarily to a lack of democracy or the distance between state consent and new rules, but owing to tensions within the normative environment that environmental governance insufficiently navigates. For example, emerging norms and soft law around the creation of a 'global public domain'—or realm of social policies at the global level to moderate global liberalism—have focused attention on the need to moderate or 'embed' liberalism in broader societal values at the global level.[67] Such values may include environmental concerns, human rights, labour rights, and the social and material needs of the 'losers' or marginalized under globalization. In this context, what I have elsewhere labelled the 'compromise of liberal environmentalism' institutionalized since the 1992 Rio conference, which has premised environmental governance on embedding the

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66 The input/output distinction comes from Fritz Scharpf, but it tends to ignore other substantive values that may produce legitimacy. Fritz W. Scharpf, 'Economic Integration, Democracy and the Welfare State' (1997) 4 Journal of European Public Policy 18.

67 John G. Ruggie, 'Reconstituting the Global Public Domain: Issues, Actors, and Practices' (2004) 10 European Journal of International Relations 499.

environment in liberal markets, now faces legitimacy problems.[68]

This compromise originally fit very well with underlying shifts in the international economy and associated neoliberal normative environment reflected in economic and social policies, especially in the late 1980s and 1990s. That institutional environment has gradually started to shift, ironically owing in part to a sense that the environmental side of the equation of sustainable development had been buried under the shift to liberal environmentalism. The original framers of sustainable development were sensitive to the need to combine ecological sustainability with Southern concerns over economic growth, and saw multilateralism as a way to cushion the effects of liberalism and guide global policy. But, they failed to anticipate how forces of global economic integration, the hegemony of neoliberal economic orthodoxy, and the failures of aid-driven development policy would militate against global multilateral management and interventionist policies. Their failure is understandable in light of underlying structural changes associated with globalization, wherein the strength of norms that reinforce the global market have become a powerful legitimating force in their own right, even if their sustainability is questionable.

The immediate effects on environmental governance were to promote market mechanisms, policies on privatizing global commons and the creation of private property rights over resources rather than to attempt centralized management, and to promote the idea, most notably stated in Principle 12 of the Rio Declaration, that free trade and environmental protection were perfectly compatible. That principle states in part that, 'States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation.'[69]

The 2002 WSSD further reinforced global liberalism, the importance of the private sector, and the declining emphasis on multilateral management, reflecting underlying structural conditions of freer and accelerated transaction flows, globalizing markets and the fragmentation of political authority. Rio provided the normative foundations for environmental governance to adapt to such conditions. Thus, environmentalists should not have been surprised that a number of Northern delegations went to great lengths to ensure that the Johannesburg Declaration and Plan of Implementation, the two

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[68] Steven Bernstein, *The Compromise of Liberal Environmentalism* (New York: Columbia University Press, 2001).

[69] *Rio Declaration on Environment and Development*, 12 August 1992, in *Report of the United Nations Conference on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. 1) at Annex 1.

negotiated texts produced by the conference, did not contradict or undermine existing trade agreements.[70] Such arguments simply reinforced Rio Principle 12 which, following the Earth Summit, began to serve a legitimating function for major trade agreements, including the WTO.[71]

The WSSD endorsement and promotion of public-private partnerships for sustainable development is also perfectly consistent with these underlying normative shifts. Partnerships work under the assumption that combining the resources, skills, and commitment of non-state actors with the authority of states will succeed where state action has not. While such projects appear to be the pinnacle of sustainable development—combining economic, environmental and social goals and usually involving community stakeholders and NGO input— skeptics worry that their success depends on the goodwill and voluntary participation of the private sector. Notably, partnerships were not only opposed by many NGOs critical of the 'privatization' of environmental governance and fearful that it let states off the hook in imposing binding regulation, but also by a coalition of Southern states who worried that partnerships would lead to less aid and technology transfer for sustainable development.[72]

Arguably, the ultimate aim of partnerships is to embed the marketplace in broader social and environmental goals. Thus, the engagement of the corporate sector at WSSD should be read as part of the larger response to globalization within the UN system, especially in development policy. The Global Compact, in which the corporate sector is directly enlisted to sign onto an abridged version of environmental principles derived from the Rio Declaration (along with labour, human rights, and anti-corruption principles) is yet another example of this trend. Ideally, partnerships and the Global Compact also aim to respond to demands for greater corporate responsibility and accountability. Yet,

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70 Paul Wapner, 'World Summit on Sustainable Development: Toward a Post-Jo'burg Environmentalism' (2003) 3 Global Environmental Politics 1; James Gustave Speth, 'Perspectives on the Johannesburg Summit' (2003) 45 Environment 24.

71 For example, see World Trade Organization, *Decision on Trade and the Environment* (15 April 1994), adopted by ministers at the meeting of the Uruguay Round Trade Negotiations Committee in Marrakech, online: WTO <http://www.wto.org/english/tratop_e/envir_e/issu5_e.htm ref>.

72 Melanie Steiner, 'NGO Reflections on the World Summit: Rio + 10 or Rio – 10?' (2003) 12 RECEIL 33; Jan Martin Witte, Charloote Streck & Thorsten Benner, 'The Road From Johannesburg: What Future for Partnerships in Global Environmental Governance?' in Witte, Streck & Benner, eds., *Progress or Peril? Partnerships and Networks in Global Environmental Governance* (Washington, DC: Global Public Policy Institute, 2003) 59 at 60.

the WSSD made much less progress in these areas, which lends some support to the skeptics' view.

Not content with leaving corporate engagement to governments or international institutions, some nongovernmental groups have opted to directly target firms in the global marketplace through the creation of non-state governance schemes. The most common are 'certification' governance systems, where products, processes, or services get 'certified' as meeting specific standards of sustainability established by the scheme, and sometimes get a label so buyers can identify products or services that meet those standards. Such systems arose partly in response to the lack of progress in multilateral negotiations, but also because NGOs worried about the limitations of voluntary codes of conduct, self-regulation, or learning networks, even when backed by the United Nations. Their most unique feature is that their authority derives from their manipulation of global markets independently of states, leading Benjamin Cashore to label them 'non-state, market-driven (NSMD) governance.'[73] A small but accelerating number of such schemes have started to operate at the transnational level over the last ten to fifteen years as demands for governance of the global marketplace increase. They currently cover aspects of forestry, food security and production, labour standards, tourism, fisheries, and human rights. Others are in development in the energy/electricity and mining sectors. Most include specific performance criteria and employ systems of third-party verification and regular auditing and monitoring of compliance in which firms must participate to maintain 'certified' status. They also frequently have governance structures that include representation from corporations, broader civil society, and affected local communities. To the degree they exhibit the above characteristics, they can be considered 'governance' systems with significant authority as opposed to strictly voluntary or self-regulatory schemes.[74]

Such schemes take advantage not only of globalizing markets, but also the spread and influence of global consciousness and civil society organizations to create pressures on companies to participate. In practice, they attempt to combine elements of stakeholder democracy and accountability legitimated by such shifts with the power of the marketplace to create legitimate authority independent of international agreements among states. They thus offer a good example of an innovative form of governance that arose in large part owing to legitimacy and performance limitations in traditional forms of inter-state governance.

While by no means a panacea (NSMD is unlikely to become

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[73] Cashore, *supra* note 3.

[74] Bernstein & Cashore, *supra* note 37.

the dominant form of environmental governance), these governance systems show promise in responding to legitimacy concerns from both a principled and sociological perspective. First, NSMD is well positioned to achieve a high standard of stakeholder democracy relative to other governance experiments. For example, the Forest Stewardship Council, which certifies forest products, created environmental, social and economic decision-making chambers, each with equal voting weight, to ensure business interests would not dominate decision-making. The dominance of business interests is a potentially serious drawback to public-private partnerships, voluntary codes including on corporate social responsibility, and even to traditional inter-state governance. In NSMD systems, decision-making is frequently designed to force different stakeholder groups to engage and deliberate, and many develop specific standards at the local level with community involvement rather than through top-down processes.

As Karin Bäckstrand and Michael Saward argue, in the absence of electoral and representative legislative processes, processes that systematically involve stakeholders' range of voices and perspectives create 'ownership' of outcomes, and can 'draw upon principles protecting the vulnerable.'[75] Whereas other forms of standard-setting tend to favour expert-driven decision-making as a source of legitimacy (a move towards international administrative law), both legal and principled conceptions of legitimacy suggest that absent transparency and accountability, such processes risk legitimacy problems. Thus NSMD may have a legitimacy advantage among the full range of relevant communities over the business-dominated International Organization for Standardization (ISO), for example, unless it reforms to be more inclusive and responsive to stakeholders.

From a sociological perspective, NSMD governance systems are clearly enabled by the existing normative environment, both in terms of the shift to liberal environmentalism and the elevation of the global marketplace as an arena for governance, as well as in terms of emerging norms of a global public domain that favour some form of deliberative democracy. Under such circumstances, such systems may even succeed where states could not, as has arguably been the case in attempts to promote global sustainable forest management.[76]

Nonetheless, non-state governance networks are never

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75 Bäckstrand & Saward, *supra* note 31 at 6.

76 Steven Bernstein & Benjamin Cashore, 'Non-State Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention?' in John Kirton & Michael Trebilcock, eds., *Hard Choices, Soft Law: Combining Trade, Environment, and Social Cohesion in Global Governance* (London: Ashgate Press, 2004) 33.

completely dis-embedded from wider economic, social and political systems. For example, an attempt to build legitimate governance of sustainable forestry through a transnational network of producers (forest companies) and consumers (retailers and consumers of forest products) must not only generate legitimacy among those parties, but also must navigate existing rules of international trade legitimated through inter-state processes as well as regulatory and social environments of nation-states in which companies operate. In this regard, the tension generated by liberal environmentalism becomes apparent when the Committee on Trade and the Environment of the WTO, for example, is unable to make progress on issues such as labeling and certification, let alone on how to reconcile in practice environmental measures with trade norms based on non-discrimination.

Neither are NSMD systems dis-embedded from wider publics that any governance scheme may affect, which means they must either be included in the network or some other mechanism of accountability must be developed. Ultimately, a sociological perspective suggests various notions of legitimacy may be at least somewhat interdependent when applied to the practice of global governance, since there is an ongoing dynamic of legitimation and delegitimation as norms and institutions vie for legitimacy within the wider institutional contexts in which global politics and authority relations play out.

CONCLUSION: PROSPECTS FOR CONVERGENCE?

Despite the analytic distinctions made above, the conceptual traditions of legitimacy identified are not mutually exclusive. Indeed, considerable borrowing across fields occurs in the literature, with each conception offering some insight into what legitimacy in global governance requires. Still, I conclude on a cautionary note that it is unlikely that a universal formula to satisfy all legitimacy concerns will emerge. This conclusion is contrary to the tendency to develop abstract criteria of legitimacy for global governance, usually derived exclusively from the democratic legitimacy literature. Rather, insights from the sociological perspective suggest that criteria of legitimacy ultimately are contingent on historical understandings at play and the shared norms of the particular community or communities granting authority. In practice in global governance, these reflect components identified in each conception, but appropriate responses to contemporary legitimacy challenges are conditioned by a variety of contextual factors, discussed below. I highlight four points in this regard.

First, the best way to view the relevance and importance of principled conceptions of legitimacy is through a sociological lens. Whatever the merits of normative arguments on democratic legitimacy, there is an indisputable general normative trend to democratize global governance. Examples range from demands for democratic reform and

greater public accountability (whether to states and/or broader affected publics) of international institutions, to calls for 'stakeholder democracy' and 'deliberation'. The relevant point here, which also resonates with the interactionist legal literature, is that these values stem from the communities directly involved and/or affected by global governance, as well as emerging norms of a 'global public domain.' The rationale is also linked to the argument that transparency, participation, accountability in rule-making, and adequate resources to enable participation produce a sense of 'ownership', which links decision-making and outcomes of a governance scheme to the communities that authorize it, and over which it is granted authority.[77] For example, a study of perceptions of legitimacy of the ISO 14000 environmental standards found a strong direct correlation among developing country delegates between involvement in the creation of the standards and their legitimacy.[78] As long as the institutionalization of such norms persists, legitimacy, as a practical matter, will depend on responding to democratic pressures.

Second, the nature and location of political community conditions democratic pressures. The legal legitimacy literature best highlights the general tension created when globalizing pressures create demands that governing authority and decision-making be opened up to wider groups of actors, because its starting point is the existing 'constitutional' order where states have legal status and international law is rooted in state consent. Thus, the tension regarding who participates reflects not only a possible trade-off between effectiveness and participation, as is sometimes portrayed, but also an evaluation of the conditions in which legitimacy would demand that decisions be opened up to wider groups of actors. The simple response is that when decisions directly address or affect actors other than states, which is increasingly the case as the reach and scope of global governance expands, affected communities ought to have access. The practical dilemma remains, however, of whether states can adequately and legitimately represent such groups or who else could, and whether involvement in policy processes or deliberation should translate into actual decision-making authority. This is one question where different conceptions of legitimacy show little sign of convergence. What is clear is that to the degree inter-state processes appear not to reflect the values of relevant communities, alternative forms of governance that are more

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77 Ngaire Woods, 'Good Governance in International Organizations' (1999) 5 Global Governance 39; Susan Summers Raines, 'Perceptions of Legitimacy in International Environmental Management Standards: The Participation Gap' (2003) 3 Global Environmental Politics 47; Bäckstrand & Saward, *supra* note 31.

78 Raines, *supra* note 77.

inclusive are emerging.

Still, even innovative forms of governance such as NSMD systems face significant challenges of political community.[79] Unlike self-regulatory networks where businesses, technical experts, and governments likely share common norms and goals such as efficiency and profitability, relevant audiences of NSMD systems differ significantly in terms of identities (producers, consumers, environmentalists), geographic location, and interests. Consensus may even be lacking on what constitutes either procedural or substantive legitimacy. If they are to succeed, institutionalized learning processes and community building are necessary within the governing institutions. Thus, the problem of community may be as daunting, if not more so, than in traditional international governance. The one advantage is potentially greater access of those directly affected to interact with the governance system.

A third point concerns the need for greater attention to the substance of governance in understanding legitimacy problems. In the case of the environment, evaluations of legitimacy historically have been based not only environmental performance, but also the linking of environment with other goals that are highly valued, especially development goals. Presumably, increased participation and influence of developing countries in international environmental negotiations reinforced the legitimacy of institutions that reflected these developments. When these dynamics combined with the broader normative shifts toward neoliberalism, it created legitimacy for what I labelled 'liberal environmentalism.' The contemporary legitimacy challenge, however, stems in part from the very success of liberal environmentalism, if governing arrangements have gone too far towards elevating the normative status of markets, in effect subordinating environmental purposes to economic goals, even within ostensibly environmental institutions. Moreover, if there is indeed some resilience to the idea that global liberal markets need to be embedded in societal purposes, which my cursory application of a sociological conception of legitimacy to the current context of global governance suggests, then the legitimating normative foundation of environmental governance is fragile unless more substantial inroads can be made in economic institutions, not only through voluntary initiatives such as the Global Compact. The discussion of the global challenge to international liberalism also aimed to highlight that societal norms and values inform what 'outputs'—environmental, economic performance, and so on—or combination thereof are deemed as legitimate. This finding clearly has

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[79] See Bernstein & Cashore, *supra* note 37, for a fuller discussion of challenges that face NSMD governance.

implications for the broader legitimacy problems facing the WTO and other international economic institutions.

Fourth, power cannot be absent in any governance equation. This turns attention back to the balance between states and markets, and whether newer forms of private or hybrid authority can manage that balance absent the public authority of states. For example, many NGOs remain highly suspicious of ever truly reconciling ecological goals with the marketplace. Thus, while the new initiatives promise to be responsive to principled conceptions of legitimacy in terms of inclusiveness, a critical assessment is required of whether the shift towards public-private partnerships and market-based governance systems in practice privileges the market over alternative bases of governance, biases (without good reasons) governance towards market mechanisms and voluntary initiatives over regulatory instruments, or gives corporate voices a disproportionate say in policy development and implementation at the expense of state representatives and public participation.[80] If WSSD is any indication, there is reason for concern. Private sector interests reportedly had 'very strong behind-the-scenes influence' and managed to prevent any strong language on corporate accountability in the Plan of Implementation.[81] Similarly, scholars have noted the largely superficial impact of UNEP's participatory reforms, though laudatory in terms of principled legitimacy, in moving it from an intergovernmental to a more supranational organization and, moreover, its relative inefficacy and failure to become the primary forum for international environmental policymaking.[82] Ultimately, as Erika Sasser found in a recent study on non-state governance (and there is no reason to believe these findings would not extend to state-led governance), most NGOs will not be ready to grant full legitimacy to a governance system until the on-the-ground effects are shown to improve environmental or social integrity.[83]

The question of power highlights that legitimacy ultimately concerns political authority. It, in turn, results from the meshing of power, legitimacy, and community. Deliberation may be fine as a normative goal, but if deliberative processes cannot produce authoritative outcomes owing to a lack of buy-in from relevant actors

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80 Harris Gleckman, 'Balancing TNCs, the States, and the International System in Global Environmental Governance: A Critical Perspective' in Kanie & Haas, *supra* note 33 at 203.

81 Steiner, *supra* note 67 at 36.

82 Esty, s*upra* note 55 at 99.

83 Erika Sasser, 'The Certification Solution: NGO Promotion of Private, Voluntary Self-Regulation' (Paper prepared for presentation to the 74th Annual Meeting of the Canadian Political Science Association, Toronto, Ontario, 29–31 May 2002).

with power resources, the exercise may be empty. Compromises are thus likely necessary between a deliberative ideal and forms of governance acceptable to major states from North and South for legitimate *governance* to emerge.

The World Trade Organization in 2020

STEVE CHARNOVITZ*

The inauguration of a new international journal and the commencement of the second decade of the World Trade Organization (WTO) together provide an opportunity to reflect on the WTO's legacy and its future. Government policies are always experiments, as Jan Tumlir explained.[1] To date, the experiment of the WTO has achieved success beyond the expectation of many observers. What lies ahead? The leading international trade law casebook admits that '[i]t is hard to tell what may happen in the future.'[2] Still, we should try to discern the horizon as part of our efforts to improve future conditions in international economic governance.[3]

This article proceeds in three parts. Part I examines the trends and tensions influencing the WTO today. Part II offers two scenarios for the WTO circa the year 2020.[4] I start with a pessimistic scenario and then present an optimistic scenario as seen from the future. Part III concludes with a forecast and some recommendations.

I THE WTO OF 2005: KEY FEATURES AND TRENDS

The WTO today stands as a central institution of international law and international economic relations. This status might not be so surprising

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* George Washington University Law School, Washington, D.C. The author wishes to thank two anonymous referees for helpful comments.

1 Jan Tumlir, *Economic Policy as a Constitutional Problem*, Occasional Paper 70 (London: Institute of Economic Affairs, 1984) at 18.

2 John H. Jackson, William J. Davey & Alan O. Sykes, Jr., eds., *Legal Problems of International Economic Relations*, 4th ed. (St. Paul, Minn.: West Group, 2002) at 231.

3 See Harold D. Lasswell & Myres S. McDougal, *Jurisprudence for a Free Society* (The Hague: Kluwer Law International, 1992) at 973-1031. A recent example of the thoughtful use of scenarios in international governance is *Mapping the Global Future*, Report of the (US) National Intelligence Council's 2020 Project (December 2004), online: National Intelligence Council <http://www.cia.gov/nic/NIC_2020_project.html> (presenting four scenarios). See also Rubens Ricupero, 'UNCTAD Past and Present: Our Next Forty Years' (12th Raúl Prebisch Lecture, 2004), online: UNCTAD <http://www.unctad.org/Templates/Page.asp?intItemID=3268&lang=1>.

4 The year 2020 requires a fifteen-year projection, which is one and one-half times the current life of the WTO. Coincidentally, the year 2020 was the point chosen by governmental leaders of the Asia-Pacific Economic Cooperation forum for achieving 'free and open trade and investment' in the region. See Vinod K. Aggarwal, 'Economics: International Trade' in P.J. Simmons & Chantal de Jonge Oudraat, eds., *Managing Global Issues: Lessons Learned* (Washington, DC: Carnegie Endowment for International Peace, 2001) 234 at 244.

to the officials who drafted the Charter of the International Trade Organization (ITO) in 1946–8.[5] Yet the successful transformation of the *General Agreement on Tariffs and Trade* (GATT) into the WTO was surely not the expectation of the trade mavens of the 1970s and early 1980s.[6] The creation of an effective and respected WTO was hardly inevitable.[7] That it happened shows a triumph of an internationalist legal vision and effective political leadership.

More so perhaps than any other international organization, the WTO is an institution of international law. Other functional international organizations, like the World Health Organization and the United Nations (UN) Security Council, have often seemed detached from a judicial system. Of the major international organizations, only the WTO regularly carries out both negotiation and adjudication.

The *Marrakesh Agreement Establishing the World Trade Organization* states that the organization 'shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements ... [and] "a forum for further negotiations" concerning their "multilateral trade relations" ....'[8] Some negotiations were ongoing when the WTO came into force in 1995 and others have occurred since then.[9] The current Doha Round negotiation began in 2001, and has no formal deadline.

Independent adjudication in the WTO is carried out by panels, the Appellate Body, and arbitrators. The Appellate Body may be the most creative legal achievement of the Uruguay Round.[10] Nowhere else

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5 See Michael Hart, ed., *Also Present at the Creation: Dana Wilgress and the United Nations Conference on Trade and Employment at Havana* (Ottawa: Centre for Trade Policy and Law, 1995); Simon Reisman, 'The Birth of a World Trading System: ITO and GATT' in Orin Kirshner, ed., *The Bretton Woods—GATT System: Retrospect and Prospect After Fifty Years* (Armonk, N.Y.: M.E. Sharpe, 1996) at 82.

6 See e.g. Thomas R. Graham, 'Revolution in Trade Politics' (1979) 36 Foreign Policy 49 at 49 (positing that the postwar trade system is dying).

7 Michael Hart, *What's Next: Canada, the Global Economy and the New Trade Policy* (Ottawa: Centre for Trade Policy and Law, 1994) at 44.

8 *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 33 I.L.M. 1125 (entered into force 1 January 1995), art. III:2 [WTO Agreement].

9 Several WTO provisions mandate negotiations. For example, the *General Agreement on Trade in Services* [GATS], arts. X:1, XIII:2, XIX:1; the *Agreement on Agriculture*, art. 20; the *Agreement on Rules of Origin*, art. 9; the *Agreement on Trade-Related Investment Measures* [TRIMs Agreement], art. 9.

10 See Debra P. Steger, 'Improvements and Reforms of the WTO Appellate Body' in Federico Ortino & Ernst-Ulrich Petersmann, eds., *The WTO Dispute Settlement System: 1995-2003* (The Hague: Kluwer Law International, 2004) 41; Claus-Dieter Ehlermann, 'Experiences from the WTO Appellate

in the multilateral system is there a formalized second-level judicial review of state-to-state disputes.

The negotiation and enforcement of rules brings inevitable tension between WTO politics and law.[11] One can see this in the discourse within the trading system, particularly the cherished belief that the WTO is simultaneously 'member-driven' and 'rule-based'. Yet on the whole, the WTO so far has effectively managed the changing hydraulic pressures of an international organization composed of numerous nations each animated by its own domestic political process.

The WTO's Scope

The WTO's remit is to govern restrictions affecting transborder trade. With trade so pervasive, the WTO has an extensive scope.[12] In addition to national trade policies, such as antidumping duties, the WTO also supervises domestic policies that affect trade in goods or services[13]—particularly, a government's use of taxes, regulations, and standards to correct market failure. Using government subsidies as a first-best instrument to address market failure is covered by several WTO agreements.[14] Using government subsidies to promote equity and social

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Body' (2003) 38 Tex. Int'l L. J. 469 at 474.

11 The duality also brings synergies. The fact that rules are enforced may make it easier to negotiate new rules if governments think that their own commitments will be reciprocated. The opposite is also true. Enforceable rules may hinder the negotiation of illusory promises.

12 Roy MacLaren, 'The Geo-political Changes during the 1980s and their Influence on the GATT' in Jagdish Bhagwati & Mathias Hirsch, eds., *The Uruguay Round and Beyond: Essays in Honour of Arthur Dunkel* (Ann Arbor, Mich.: University of Michigan Press, 1998) 181 at 187.

13 See e.g. GATS, art. 1.1 (stating that the GATS applies to measures 'affecting trade in services'); *Agreement on the Application of Sanitary and Phytosanitary Measures* [SPS Agreement], art. 1.1 (stating that the SPS Agreement applies to measures that may, directly or indirectly, affect international trade); *General Agreement on Tariffs and Trade* [GATT], art. III:4 (requiring national treatment for measures affecting internal sale, offering for sale, purchase, transportation, distribution, or use). The WTO has authority to adopt disciplines for particular sectors. See e.g. World Trade Organization, Council for Trade in Services, *Disciplines on Domestic Regulation in the Accountancy Sector*, S/L/64 (17 December 1998), online: World Trade Organization <http://www.wto.org/english/tratop_e/serv_e/sl64.doc>.

14 See *Agreement on Agriculture*, *supra* note 9; *Agreement on Subsidies and Countervailing Measures* [SCM Agreement]. Originally, the SCM Agreement made certain subsidies non-actionable, such as assistance to disadvantaged regions (SCM Agreement, art. 8.2(b)). The non-actionable status was provided for only five years, however, and the WTO Members did not authorize renewal.

justice within a country is also covered by WTO rules.[15] For example in the *United States—Byrd Amendment* case, a United States law providing a direct payment to certain companies in an import-injured industry was ruled a violation of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement).[16] This ruling may haunt future governmental efforts to provide adjustment assistance.

No one doubts that WTO rules and their administration can have real impact. As one keen trade policy analysis recently noted, 'WTO decisions can so often affect domestic regulations, destroy jobs, and create new industries.'[17] The deregulatory aspirations of the WTO can be seen in the names of some of its various administrative entities, such as the Working Party on Domestic Regulation and the Committee on Trade in Financial Services.

The impact of WTO rules increased during the organization's first ten years as a result of technological developments. For example, the internet enabled more services to be reliably delivered electronically across borders.[18] Biotechnology and software development have spawned new opportunities for patents and copyrights. Expedited delivery services have enabled outsourcing of services and greater trade in products.

The legislative clout of the WTO comes not only through the indirect application of its rules but also in the dynamic way in which the WTO interpenetrates other regimes. Two forms of interaction should be noted. One is the enforcement of non-trade law by the WTO and the other is the incorporation of WTO rules into other treaties. The enforcement of non-trade norms comes in the provisions of the WTO Agreement that either incorporate provisions from other treaties or require the use of current or future international standards.[19] An

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15 WTO rules do not generally inhibit government policies to promote equity, but there are some points of tension. See e.g. 'The Impact of WTO Rules on the Pursuit of Gender Equality' in Ana-Nga Tran-Nguyen & Americo Bevigilia Zampetti, eds., *Trade and Gender. Opportunities and Challenges for Developing Countries* (New York: United Nations, 2004), UN Sales No.: E.04.II.D.28, UN Doc. UNCTAD/ EDM/2004/2, c. 9.

16 *United States—Continued Dumping and Offset Subsidy Act of 2000* (2003), WT/DS217,234/AB/R (Appellate Body Report). The subsidy was also ruled a violation of the GATT and the *Agreement on Implementation of Article VI of the GATT* [Antidumping Agreement].

17 Bruce Stokes, 'U.N., World Bank, WTO: Reform Them All' *National Journal* (22 January 2005) 220.

18 In a recent WTO dispute decision, the United States was found to be violating the GATS because of the United States criminal laws banning remote gambling ('US Reprimanded by WTO Ruling on Antigua's Online Betting Industry' *Canada Newswire* (10 November 2004)).

19 The enforcement of non-trade law occurs in the *Agreement on Trade-Related*

incorporation of WTO rules or norms into other areas of international law has sometimes occurred, and one can expect that to happen more frequently in the years ahead.[20]

Another way in which the WTO has gained legislative clout is through the maneuver of directing governments to confer rights on foreign nationals that owing to a sense of fairness will likely also be conferred on domestic persons.[21] That is what has happened with the *Agreement on Trade Related Aspects of Intellectual Property* (TRIPS Agreement), which addresses, *inter alia*, patents, copyrights, and trademarks. Although the obligations for intellectual property rights in the TRIPS Agreement extend solely to nationals of other WTO Members,[22] governments have supplemented their obligations by

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Aspects of Intellectual Property Rights [TRIPS Agreement], arts. 2.1, 9.1, 22.2, 35. The enforcement of certain international soft law occurs in the Agreement on Agriculture, *supra* note 9 art. 10.4. Mandating the use of international standards occurs in the *Agreement on Technical Barriers to Trade* [TBT Agreement], arts. 2.4, 11.2; SPS Agreement, arts. 3.1, 3.4, 3.5; GATS, art. VII:5; GATS *Annex on Telecommunications*, para. 7(a); GATT, *supra* note 13 art. XXXVIII:2(e).

20 For example, see *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, 28 July 1994, 33 ILM 1309 (entered into force 28 July 1996), Annex, s. 6, para. 1(b) (referring to the GATT and superseding agreements); *Inter-American Convention for the Protection and Conservation of Sea Turtles*, 1 December 1996, S. Treaty Doc. 105-48, (entered into force 2 May 2001), art. XV. On the latter, see Takako Morita, 'Marine Sea Turtles and Shrimp Trawling: Interplay Between the U.S. Courts and the WTO Panels and Its Effect on the World Shrimp Industry' (2004) 10 Hastings W-Nw. J. Envtl. L. & Pol'y 209.

21 This induced impact of a treaty has interesting historical roots. After a Franco-Swiss trade treaty in 1864 that conferred certain rights on French traders who were Jews, the Swiss government conferred the same rights on Swiss Jewish traders (Jean Baneth, 'Comment on the Paper by Gary P. Sampson' in Anne O. Krueger, ed., *The WTO as an International Organization* (Chicago, Ill.: University of Chicago Press, 1998) 271 at 274). By contrast, the grant of arbitration rights to foreign investors in the *North American Free Trade Agreement* has not led to accompanying action to extend similar rights to domestic investors suffering a similar injustice. See *North American Free Trade Agreement*, 17 December 1992, 32 I.L.M. 605 (entered into force 1 January 1994), art. 1116(1) [NAFTA], for the investment arbitration provision.

22 TRIPS Agreement, art. 1.3. The point was noted by the panel in the *India—Patents* case (*India—Patent Protection for Pharmaceutical and Agricultural Chemical Products* (1998), WT/DS50/R at paras. 7.21, 7.42 (Panel Report) (adopted as modified by the Appellate Body 16 January 1998)). Commentators often make the exaggerated claim that TRIPS establishes common minimum international standards in the form of domestic rights of nationals. See e.g. Andrew G. Brown, *Reluctant Partners: A History of*

granting analogous rights to domestic citizens for patents, industrial designs, copyrights, and trademarks. The TRIPS Agreement, in effect, turned the traditional national treatment principle on its head by inducing a political dynamic in which domestic persons would inevitably gain the same rights that were being extended to foreign nationals. In doing so, the TRIPS Agreement fomented one of modern history's greatest transfers of wealth from the public domain into private hands.[23]

WTO Dispute Settlement

WTO rules matter because they are enforced in a strong dispute settlement system.[24] Unlike the International Court of Justice (ICJ) with its contested jurisdictional phase, the WTO panels have automatic and compulsory jurisdiction.[25] A panel's oral hearings and then release of its report typically occur within about a year, which is a rapid timetable for international adjudication. The decision of the panel may be appealed to the Standing Appellate Body, which usually decides its cases within sixty to ninety days. After a panel issues its report or, if there is an appeal, the Appellate Body issues its report, the report is then adopted by the Dispute Settlement Body (DSB), and a losing defendant government is expected to carry out the decision, which may involve repealing or withdrawing a measure that violates WTO rules. As of early 2005, about eighty-seven per cent of adopted panel reports had found a violation.[26]

Multilateral Trade Cooperation 1850–2000 (Ann Arbor, Mich.: University of Michigan Press, 2003) at 163.

[23] I have not seen any estimates of the amount of private sector wealth to be accumulated under the TRIPS Agreement as compared to, say, the value of privatization provided through the *US Homestead Act* of 1862. Although giving away public land does not increase the quantity of land, the grant of intellectual property rights may increase the quantity of innovation. This dynamic effect would make a comparative calculation difficult.

[24] Gregory C. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Washington, DC: Brookings Institution Press, 2003) at 2-3. Not all commentators agree. For example, a recent book contends that the terms of the WTO dispute settlement system 'reveal its hapless legal status and inevitable convergence with prevalent, mercantile philosophies' (Ronald Charles Wolf, *Trade, Aid, and Arbitrate: The Globalization of Western Law* (Aldershot: Ashgate, 2004) at 196).

[25] See *Understanding on Rules and Procedures Governing the Settlement of Disputes* [DSU], arts. 6.1, 7.1. This advantage of avoiding arguments over jurisdiction will diminish in the future because the Appellate Body has affirmed that jurisdiction can be contested. See Appellate Body Report, *United States—Anti-Dumping Act of 1916*, WT/DS136,162/AB/R (adopted 26 September 2000), para. 54, n. 30.

[26] See online: Worldtradelaw.net <http://www.worldtradelaw.net/

If the scofflaw government does not comply, then the complaining governments may impose trade sanctions.[27] For example, in *European Communities—Hormones*, Canada and the United States have imposed trade sanctions against Europe since 1999 because the Communities refused to alter their domestic standard for meat safety.[28] The WTO's system of rapid adjudication followed by the imposition of sanctions, when needed, does not exist anywhere else in the multilateral system.[29]

The WTO dispute system is in tension with politics in several ways. One is that the judicial functions of the WTO are carried out more quickly and smoothly than the legislative functions. In the first ten years of the WTO, eighty-two disputes reached a final decision.[30] In contrast, the output from new trade negotiations over the same time period has been meagre. Furthermore, no use has been made of the 'authority to adopt interpretations' granted to the WTO Ministerial Conference and General Council.[31] This situation has led to concerns about an imbalance between WTO politics and adjudication. Another problem is that the use or threat of trade sanctions puts pressure on governments to comply with WTO decisions even when a government has to bend normal legislative processes. For example, following a threat of sanctions by Europe and Japan, the United States Congress moved to eliminate the contested 1916 Act by inserting the repeal during a meeting of a House-Senate conference, closed to the public, even though the repeal had not been included in either the House or

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dsc/database/violationcount.asp>.

27 Edmund B. Fitzgerald, *Globalizing Customer Solutions* (Westport, Conn.: Praeger, 2000) at 91; George Soros, *On Globalization* (New York: Public Affairs, 2002) at 35.

28 See Lori M. Wallach, 'Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards' (2002) 50 U. Kan. L. Rev. 823 at 843-5; see also Michael Trebilcock & Julie Soloway, 'International Trade Policy and Domestic Food Safety Regulation: The Case for Substantial Deference by the WTO Dispute Settlement Body under the SPS Agreement' in Daniel L.M. Kennedy & James D. Southwick, eds., *The Political Economy of International Trade Law: Essays in Honour of Robert E. Hudec* (Cambridge: Cambridge University Press, 2002) 537 at 557.

29 James Bacchus, 'Groping Toward Grotius: The WTO and the International Rule of Law' in James Bacchus, ed., *Trade and Freedom* (London: Cameron May, 2004) 451 at 463.

30 This figure was derived by counting adopted panel/Appellate Body decisions in original cases, thereby not counting separately the panels created under DSU, art. 21.5. Parallel cases are counted as one and sequential cases are separately counted.

31 See WTO Agreement, art. IX:2.

Senate bills that were slated to be reconciled in the conference.[32]

Another tension is that the ability of the Appellate Body to interpret ambiguous provisions of WTO law has raised concerns about the legitimacy of having those decisions made by judges who are not directly accountable to elected officials.[33] Although the WTO General Council can adopt interpretations that would correct a controversial decision by the Appellate Body, in actuality, the WTO's practice of decision-making by consensus makes such corrective interpretations nearly impossible to achieve.

The Appellate Body has often used its interpretive power to adopt balancing tests for the application of rules. For example, with regard to GATT's public policy exceptions, the Appellate Body held that the 'common' interests or values pursued need to be weighed in conjunction with the effectiveness of the measure in achieving those ends and the trade restrictiveness of the contested measure.[34] Such triple-factor balancing arrogates a great deal of discretion to the Appellate Body. As Richard Steinberg has aptly observed, however, the Appellate Body has significant constraints in its ability to deviate from the expectations of Members.[35]

Another point of tension is that national constitutional rules, in general,[36] cannot excuse a WTO violation. This was demonstrated in

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[32] Christopher S. Rugaber, 'Tariff Bill Delayed in Senate After Several Provisions Added in Conference' (2004) BNA International Trade Reporter 1664. The repeal of the 1916 Act is the only occasion since the advent of the WTO in which the United States has altered a federal law in a manner expected to achieve compliance with an adverse WTO decision. In my view, this repeal had to be achieved through backdoor legislation. The Congress was unlikely to act with public transparency through the normal Congressional processes via the committees of legislative jurisdiction.

[33] See Donald McRae, 'What Is the Future of WTO Dispute Settlement?' (2004) 7 J. Int'l Econ. L. 3 at 13-14.

[34] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* (12 March 2001), WT/DS135/AB/R) at para. 172 (Appellate Body Report) [*Korea—Beef*].

[35] Richard H. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints' (2004) 98 Am. J. Int'l L. 247. Among the constraints that Steinberg points to are a 'veto' by 'powerful members' of candidates to serve on the Appellate Body, the operation of the Appellate Body 'in the shadows of threats to rewrite DSU rules that would weaken it and of possible defiance of its decisions by powerful members', and the ongoing receipt of information by the Appellate Body 'on the preferences of powerful members, helping it to avoid political pitfalls' (*ibid*. at 274).

[36] A few WTO rules do provide deference to national constitutions. See Antidumping Agreement, art. 4.2; SCM Agreement, art. 16.3; GATS, art. VI:2(b); TRIPS Agreement, arts. 42, 46.

Australia—Leather where the WTO directed Australia to take back a subsidy given to a domestic company that was legally granted under Australian law.[37] The complaining government, the United States, would not have the constitutional authority to perform the same confiscation of private property that it was asking Australia to carry out.

The WTO and Other Regimes

Tensions also exist between the WTO and the politics of other international regimes.[38] Because the scope of the WTO is broad and its dispute settlement system robust, the WTO has sometimes exhibited what one keen observer calls a 'superiority complex' in which WTO insiders consider trade law superior to the law of other treaties.[39] This problem might have been reduced if the WTO treaty had provided for more deference to other international regimes, yet the provisions for deference are extremely limited.[40] The problem could also have been reduced if the WTO was pursuing significant cooperation with other international organizations.[41] Unfortunately, WTO efforts for positive coordination are inadequate.[42]

The negative impact of the WTO on regimes in construction may be a more serious problem. The toolbox of instruments to promote international cooperation—such as standards, subsidies, regulations, taxes, and trade controls—can be inhibited by trade rules, thus making it harder to solve transborder and global problems.[43] For example, government policies that discriminate against countries that engage in

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37 *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather* (2000), WT/DS126/R/W (Panel Report).

38 See e.g. Thomas Cottier, 'Trade and Human Rights: A Relationship to Discover' (2002) 5 J. Int'l Econ. L. 111; Gilbert R. Winham, 'International Regime Conflict in Trade and Environment: The Biosafety Protocol and the WTO' (2003) 2 World Trade Review 131.

39 Joost Pauwelyn, 'WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for "Conflict Diamonds"' (2003) 24 Mich. J. Int'l L. 1177.

40 The main provisions for deference are: (*a*) to the International Monetary Fund, GATT, arts. XV:2, XV:4, GATS, art. XI:2; (*b*) to double taxation agreements, GATS, art. XXII:3; (*c*) to the export credit regime of the Organization for Economic Co-operation and Development, SCM Agreement, Annex I, para. k; and (*d*) to various intellectual property treaties, TRIPS Agreement, arts. 4, 5, 70.2.

41 '[E]ffective cooperation' is authorized, if not mandated, in the WTO Agreement, art. V:1.

42 See Jeffrey L. Dunoff, 'The WTO in Transition: Of Constituents, Competence and Coherence' (2001) 33 Geo. Wash. Int'l L. Rev. 979 at 997-9.

43 See Pierre S. Pettigrew, *The New Politics of Confidence*, trans. by Phyllis Aronoff & Howard Scott (Toronto: Stoddard, 1999) at 24-5.

bad environmental behavior may violate various rules of the WTO. That situation occurred in the *United States—Tuna (Dolphin)* and the *United States—Shrimp* disputes in which complaining governments initially refused to regulate the practices of their nationals who were needlessly killing dolphins and sea turtles.[44] The irony in those disputes was that while the GATT and WTO panels did point out the need for more environmentally-friendly fishery policies, the legal holdings were aimed at the United States—the country seeking to prevent the drowning of dolphins and turtles—rather than at the countries that were causing the environmental problems. In the *United States—Shrimp* case, the Appellate Body pontificated that sovereign nations 'should' adopt effective measures to protect endangered species and 'should' act together 'bilaterally, plurilaterally or multilaterally... to protect the environment.'[45] Yet WTO rules do not give any authority to the Appellate Body to ask environmental scofflaw governments to do so.[46]

The WTO is not formally responsible for the environment or for many other matters of international concern. Rather, the WTO is an arena where member governments can negotiate on many matters relating to trade. This limited organizational competence is a defining feature of the WTO treaty and arguably a key reason for the treaty's overall success. On the other hand, the limited purview of the WTO has sometimes undermined public confidence in the institution and been a source of friction with other international regimes.

One characteristic of WTO rules is minimal attention to any transnational consumer interest, the public domain, or the global commons. In part, this orientation stems from the state-centricity of the WTO, which imagines that international trade occurs between an 'exporting Member' and an 'importing Member'.[47] Of course, the reality

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44 *United States—Restrictions on Imports of Tuna* (1991), GATT Doc. DS21/R (September 1991, not adopted), online: Stanford <http://gatt.stanford.edu/page/home>; *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (1998), WT/DS58/AB/R at para. 185 (Appellate Body Report).

45 *Ibid*. Furthermore, the Appellate Body declared that 'the protection and conservation of highly migratory species of sea turtles, that is, the very policy objective of the [United States] measure, demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations' (*ibid*. at para. 168).

46 Several provisions in the WTO call on governments to carry out non-trade negotiations, but none of them pertain to the environment. See e.g. TRIPS Agreement, art. 24.1; TBT Agreement, arts. 2.6, 9.1, 10.7.

47 See e.g. the focus on 'exporting Member' in SCM Agreement, art. 12.1.3; Antidumping Agreement, art. 5.5; TBT Agreement, art. 2.12; and the focus on 'importing Member' in SPS Agreement, art. 4.1; Agreement on Safeguards, art. 7.2; Agreement on Import Licensing Procedures, art. 1.1.

is that trade normally occurs between private economic actors, not between governments.[48] This treaty-based attention to countries as traders reflects a long tradition in thinking about trade and, in the modern era, was perhaps given its greatest boost by the economist David Ricardo who demonstrated the benefits of trade through the lens of territoriality.[49]

Yet by conceiving the world economy as being composed of the trading interests possessed by governments, the WTO's rules often overlook the most basic economic unit, the individual. WTO rules can also overlook the broader interests that states share (for example, public health) rather than discretely possess. Furthermore, when WTO rules do pay attention to the interests of individual economic stakeholders, they may do so in trade-restrictive ways. For example, the Antidumping Agreement calls on governments to permit a domestic industry to apply for antidumping duties.[50]

WTO rules are protective of import-competing companies that may be hurt by trade, but these rules do not give much consideration to improving the trade-readiness of a country or its government. Given that trade has an uneven effect on people and industry, no one should be surprised that trade has a variable impact on development. Even when countries gain income from trade, that gain might not translate into economic development because the derived income may be excessively concentrated and the capital may be exported. The authors of the WTO Agreement recognized this problem to some extent in the treaty's Preamble, which points out the 'need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development'.[51]

Unfortunately, many of the efforts regarding developing

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48 Nevertheless, in its first decision, the Appellate Body described international trade as occurring 'between territorial sovereigns' (*United States—Standards for Reformulated and Conventional Gasoline* (1996), WT/DS2/AB/R at 27 (Appellate Body Report)).

49 David Ricardo, *Principles of Political Economy and Taxation* (Amherst, NY: Prometheus Books, 1996) c. 7 (On Foreign Trade). As Alan Sykes has explained, the theory of comparative advantage predicts that 'nations will tend to specialize in the production of goods in which they have a comparative advantage, exporting them to other nations in exchange for goods in which they lack comparative advantage' (Alan O. Sykes, 'Comparative Advantage and the Normative Economics of International Trade Policy' (1998) 1 J. Int'l Econ. L. 49 at 52-3).

50 See Antidumping Agreement, art. 5.

51 WTO Agreement, preamble.

countries in WTO rules are *negative,* not positive.[52] Such provisions allow WTO member developing countries complete discretion to opt out of concerted market liberalization. Looking back over several decades, two leading trade economists recently reached the sober conclusion that '[t]he history of the GATT and the WTO suggest that, as a factual matter, the multilateral trading system has had very little impact in furthering trade liberalization in developing countries.'[53] Some observers from developing countries might view that as good news, but I do not because developing countries need to liberalize in order to gain the dynamic gains from import competition. The speed and scope of liberalization, of course, should be an open question.

The ongoing Doha Round agenda makes progress in one way by enshrining a commitment to capacity building for developing countries.[54] The period since 2001 is long enough for the WTO's work on capacity building to be evaluated, but I am not aware of any independent evaluation. My guess is that so far, such efforts have been underfunded and poorly targeted.

One pro-development opportunity the WTO has missed is to promote the achievement of the Millennium Development Goals. In September 2000, the United Nations General Assembly adopted the Millennium Declaration, which propounded several important goals and set target dates for some of them.[55] For example, by 2015, the UN proposed to halve the proportion of people who suffer from hunger. This initiative by the UN could have inspired the WTO to undertake efforts to support these global goals when feasible given the WTO's limited functional mandate. Sadly, the WTO did not take any action. The WTO Doha Declaration of November 2001 made no mention of the UN Millennium Goals. Indeed, to my knowledge, the WTO has yet to take a position on the Millennium Goals.

Perhaps some change is in the air however. In early 2005, the WTO's dynamic Director-General Supachai Panitchpakdi took the unusual step of writing a letter to WTO governments about the horrific Asian tsunami in which he said: 'As an important actor in international economic cooperation, the WTO shares part of the responsibility to assist recovery from this disaster.'[56] I applaud Supachai's idea of

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52 For example, *ibid.*, art. XI:2; Agreement on Agriculture, art. 15.2; GATT, art. XXVIII *bis*:3(b).

53 Aaditya Mattoo & Arvind Subramanian, 'The WTO and the Poorest Countries: The Stark Reality' (2004) 3 World Trade Review 385 at 393.

54 Ministerial Declaration, WT/MIN(01)/DEC/1 (20 November 2001), paras. 2, 16, 20, 21, 26- 27, 33, 36, 38-42.

55 *United Nations Millennium Declaration*, GA Res 55/2, UN GAOR, 55th Sess., UN Doc. A/RES/55/2 (2000).

56 'Supachai Urges Members to Mull Trade Policies to Help Tsunami

fructifying a greater sense of a WTO responsibility to the world community.

Joining the Club

The WTO keeps its distance from the UN in many ways,[57] one of which is that there is no norm that WTO membership needs to be universal.[58] The WTO remains an exclusive club and the membership process can take many years. For example, the Russian Federation has been trying to join since 1993. Membership in the WTO is desirable for several reasons.[59] First, the treatment guaranteed in WTO rules applies only to members, and so a non-member may be discriminated against with impunity. Second, only members of the WTO can play a role in crafting new rules. Third, joining the WTO paradoxically strengthens national sovereignty by according a country membership in good standing in an important organization.[60] Fourth, being a WTO member gives a less powerful country some recourse against actions that are hurting it, especially when taken by a more powerful country.[61] Fifth, the market may reward WTO membership by expanding inward foreign investment.

As a result, applicant governments will swallow a lot of indignity to gain entry into the WTO. The best exhibit is China, which accepted several WTO-plus and WTO-minus derogations.[62] The WTO

Sufferers' *WTO News Items* (13 January 2005).

57 Nevertheless, WTO Secretariat officials may secure a UN Laisser-Passer that may expedite trips through airports.

58 Countries may become new WTO members through the accession process. Although the UN has many more members than the WTO, the WTO does have four members who are not member states of the UN—the European Communities, Hong Kong China, Macao China, and Taiwan (Chinese Taipei).

59 One commentator suggests that 'WTO membership is an effective way of importing the rule of law' (Martin Wolf, *Why Globalization Works* (New Haven, NJ: Yale University Press, 2004) at 276).

60 See Abram Chayes & Antonia Handler Chayes, *The New Sovereignty* (Cambridge, Mass.: Harvard University Press, 1995); Jonathan Fried, 'Globalization and International Law—Some Thoughts for States and Citizens' (1997) 23 Queen's L.J. 259 at 270 (suggesting that a treaty freely negotiated and entered into is protection for the true exercise of state sovereignty). See also WTO Secretariat, 'Is Dispute Settlement a Threat to Democracy?', online: WTO <http://www.wto.org/english/tratop_e/serv_e/gats_factfiction12_e.htm> (explaining that the 'surrender of sovereignty' entailed in WTO membership is voluntary).

61 Of course, this recourse only applies to actions that are found to violate WTO rules.

62 WTO-plus provisions are additional obligations above those in the WTO; WTO-minus provisions are reductions in the normal WTO obligations

Agreement places no limits on the terms of accession that the WTO can offer to applicant countries.[63]

If the strong-armed accession tactics involved only China, one might not be concerned because as a large nation with considerable experience in dealing with demands for 'unequal treaties',[64] China surely can fend for itself. But the WTO has also imposed WTO-plus commitments on small and poor countries. For example, when it joined the WTO in October 2004, Cambodia agreed to achieve full implementation of the TRIPS Agreement, including for pharmaceutical products, by the end of 2006.[65] Ordinarily, as a least-developed country, Cambodia would have been entitled to a delay to the end of 2015 for pharmaceutical patents.[66]

II TWO SCENARIOS FOR THE WTO IN 2020

Part II of the article presents two alternative scenarios for the WTO of 2020. The first is a pessimistic vision; the second an optimistic one. Part III of the article suggests a third, more realistic, scenario for the WTO's future.

The Pessimistic Scenario

In a 2020 dystopia, the WTO deteriorates and becomes ineffective. How could this happen? One possibility is that the Doha Round fails to reach fruition,[67] and the pro-trade countries carry out their mutual liberalization efforts in competing fora. The causation could also be reversed: The United States and the European Union might decide to place even more emphasis on the negotiation of bilateral and regional

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specifically with respect to China (Julia Ya Qin, '"WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System' (2003) 37 J. World Trade 483).

63 A government joins 'on terms to be agreed between it and the WTO' (WTO Agreement, art. XII:1).

64 See L.H. Woolsey, 'China's Termination of Unequal Treaties' (1927) 21 Am. J. Int'l L. 289.

65 WTO, *Report on the Working Party on the Accession of Cambodia*, WT/ACC/KHM/21 (15 August 2003) at para 206.

66 TRIPS Agreement, art. 66.1, and the least developed country waiver to the year 2016 discussed in online: WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm>. For a good study of the coercion of Cambodia, see Oxfam International 'Cambodia's Accession to the WTO: How the Law of the Jungle is Applied to One of the World's Poorest Countries'(2003), online: Oxfam <http://www.oxfam.org/eng/pdfs/doc030902_cambodia_accession.pdf>.

67 See Konrad von Moltke, 'The Last Round: The General Agreement on Tariffs and Trade in Light of the Earth Summit' (1993) 23 Envtl. L. 519 (predicting difficult problems for the trading system in the years ahead).

trade agreements and then to give correspondingly less attention to WTO negotiations. Such inattention could lead to WTO negotiation failure. Bilateral agreements are especially attractive to the United States because it can demand more of an individual trading partner, on issues like investment, than it can of the WTO membership. Ironically, the opposition by developing countries to negotiating investment in the multilateral WTO has decreased their leverage on that issue.

A further source of pessimism is the possibility that the WTO fails to reform any of its rules and procedures under review. Such a failure could occur as a consequence of the requirement of consensus decision-making.[68] Changes in the WTO Agreement are most likely to occur in the context of broad trade rounds, which have numerous issues in play. Nevertheless, the governments in the WTO can approve amendments to the WTO Agreement via the provisions in the treaty that provide for decisions to be taken by voting and member 'acceptance'.[69] If WTO members demonstrate an inability to write any new rules, that could lead to serious organizational instability.

Another damaging scenario would be if a major country pulls out of the WTO and this action leads to reciprocal defection by other countries. Under United States law, the Congress votes every five years on whether to disapprove United States membership in the WTO.[70] If the Congress were to move considerably to the political right (or to the left), there could be a retreat from international engagements such as the WTO. United States repulsion to the trading system might be driven by continued losses in WTO disputes.[71] In 2002, for example, the Congress complained about 'the recent pattern of decisions by dispute settlement panels of the WTO and the Appellate Body to impose obligations and restrictions on the use of antidumping, countervailing, and safeguard measures ....'[72] Two years ago, a leading member of the United States trade bar suggested that when a WTO panel reaches a wrong decision in

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68 Consensus is mentioned first as the mode of WTO decision-making (WTO Agreement, art. IX:1). Voting is mentioned next. The word 'consensus' was not mentioned in the GATT.

69 See *ibid.*, art. X. Certain provisions can only be changed through 'acceptance' by all members (*ibid.*, art. X:2). Other provisions can be changed for all members without acceptance by all members (*ibid.*, arts. X:4, X:5).

70 19 USCS s. 3535(b). The template resolution does not purport to require the President to withdraw the United States from the WTO.

71 See Eric A. Posner, 'All Justice, Too, Is Local' *N.Y. Times* (30 December 2004) 23 ('[s]uccessful international organizations either adapt to great power politics or they wither on the vine; it is a choice that the supporters of global justice will soon face').

72 19 USCS s. 3801(b)(3).

a trade remedy case, the United States should 'tell the WTO they simply got it wrong, refuse to implement the recommendation, and accept the consequences.'[73] This is a minority view, however, in the United States. Shortly after he was reelected as President in 2004, George W. Bush stated: 'I think it's important that all nations comply with WTO rulings.'[74]

Many commentators have questioned whether WTO dispute settlement would be able to continue along its initial path. Writing in 2001, Claude Barfield, a highly respected analyst of international trade policy, wrote that the judicialized WTO dispute settlement system 'is substantively and politically unsustainable' because 'there is no real consensus among WTO members on many of the complex regulatory issues that the panels and the Appellate Body will be asked to rule upon.'[75]

In my own view, the pessimistic path is unlikely to materialize. Too many centripetal forces surround the trading system for countries to easily depart from the WTO.[76] If any country could walk out it would be the United States, but that option seems almost inconceivable. In addition, although one can imagine panels and the Appellate Body being more cautious than they have been, I do not foresee any serious unravelling of WTO dispute settlement.

The Optimistic Scenario

The second scenario is rosy optimism. Looking back from the time of 2020, one sees how the WTO became a more successful and respected international organization that met four difficult challenges. These challenges were: (*1*) legitimacy, (*2*) lawmaking, (*3*) justice, and (*4*) a need for more attention to poverty alleviation and development.

1 Legitimacy

The legitimacy crisis[77] faced by the WTO in its early years was overcome through enlightened leadership and the adoption of important

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73 Richard O. Cunningham & Troy H. Cribb, 'Dispute Settlement through the Lens of "Free Flow of Trade"' (2003) 6 J. Int'l Econ. L. 155 at 170.

74 'Exchange with Reporters in Crawford, Texas' *Weekly Compilation of Presidential Documents* (29 November 2004) 2865 at 2866.

75 Claude E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (Washington, DC: AEI Press, 2001) at 7.

76 Donald M. McRae, 'The Contribution of International Trade Law to the Development of International Law' (1996) 260 Rec. des Cours 103 at 231-32.

77 See Jeffrey L. Dunoff, 'The WTO's Legitimacy Crisis: Reflections on the Law and Politics of WTO Dispute Resolution' (2002) 13 Am. Rev. Int'l Arb. 197; Daniel C. Esty, 'The World Trade Organization's Legitimacy Crisis' (2002) 1 World Trade Review 7.

constitutional changes.[78] Although free trade remains unpopular in many countries,[79] the diatribes and street protests against the WTO stopped after the creation of the WTO Parliamentary Assembly in 2007. Even without any formal decision-making authority, the participation of parliamentarians facilitated compromises in WTO negotiations and enhanced public trust of the process and its outcomes.[80]

Catalyzed by nongovernmental organizations in the early 1990s, the new WTO soon moved into the front ranks of international organizations with regard to transparency by instituting an information-rich website. Numerous areas of secrecy remained, yet year by year, the list of restricted document categories was reduced. When the Delhi Round began in 2010, the WTO agreed that all negotiating documents and Secretariat 'Notes' would be posted to the website immediately. The obsolete document formats on the WTO's website were eliminated in 2005 when the WTO outsourced the management of its website to a software consultancy in Bangalore.

The decision to open most WTO meetings to the public was a difficult one. From the beginning, the trading system had operated on the belief that secrecy enabled governments to trade off the interests of some of their import-competing industries for the benefit of their competitive export industries. As the degree of overt protection continued to fall, the diminishing utility of the traditional closed approach became obvious and was replaced by a more deliberative model in which governments sought to formulate and justify outcomes publicly. As some experts predicted,[81] allowing in some sunshine did not impede the fruitfulness of trade negotiations.

The opening of the WTO to participation by civil society organizations was another important move in enhancing the WTO's

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78 See Joel P. Trachtman, 'Changing the Rules. Constitutional Moments of the WTO' (2004) 26:2 Harv. Int'l Rev. 44.

79 In 1824, the British historian Thomas Babington Macaulay remarked that 'free trade, one of the greatest blessings which a government can confer on a people, is in almost every country unpopular' (cited in Douglas A. Irwin, *Free Trade Under Fire* (Princeton, NJ: Princeton University Press, 2002) at 1). The unpopularity of free trade persists.

80 See Ernst-Ulrich Petersmann, 'Challenges to the Legitimacy and Efficiency of the World Trading System: Democratic Governance and Competition Culture in the WTO: Introduction and Summary' (2004) 7 J. Int'l Econ. L. 585. See also Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004) c. 3 (discussing legislators in the international arena).

81 See Julio A. Lacarte, 'Transparency, Public Debate and Participation by NGOs in the WTO: A WTO Perspective' (2004) 7 J. Int'l Econ. L. 683.

perceived legitimacy.[82] Acknowledging its obligation under Article V:2 of the WTO Agreement, the Ministerial Conference agreed at the end of the Doha Round to make appropriate arrangements for consultation and cooperation with non-governmental organizations (NGOs). This reform ensued when developing countries recognized that many international NGOs could serve as effective advocates for the causes of poverty alleviation and sustainable economic growth.

Despite worries in some quarters that a formal NGO role would allow special interests to dominate the WTO, the new opportunities led to a more balanced, refined public debate that considerably reduced the influence of rent-seeking interests in trade policy. After all, powerful private rent-seeking interests had not needed formal access to the GATT during the negotiation of the TRIPS accord in order to influence that process.[83] By opening itself up to more voices, the WTO increased the likelihood that all new initiatives would be thoroughly vetted.

The acceptance of greater transparency and public participation changed the semantics of trade policy as participants increasingly recognized the rights of individual economic operators and social actors in the trading system.[84] Although the WTO treaty refers to the 'right' of Members[85] and the Appellate Body is enamored of identifying rights of Members,[86] the conclusion slowly dawned that the government-centric rights talk was obscuring the true individual rights at stake in international trade.

2 Lawmaking

The difficulties in completing the Doha Round convinced governments that the GATT/WTO practice of decision-making by consensus had to be abandoned, as was foreseen when Article IX:1 of the WTO

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82 Pierre Marc Johnson with Karel Mayrand, 'Beyond Trade: The Case for a Broadened International Governance Agenda' (2000) 1(3) Policy Matters 28, online: IRPP <http://www.irpp.org/pm/archive/ pmvol1no3.pdf>; Kent Jones, *Who's Afraid of the WTO?* (Oxford: Oxford University Press, 2004) at 199.

83 See Jagdish Bhagwati, *In Defense of Globalization* (Oxford: Oxford University Press, 2004) at 182 (discussing the 'harmful lobbying by corporations' on intellectual property protection).

84 See Philip Allott, *The Health of Nations: Society and Law Beyond the State* (Cambridge: Cambridge University Press, 2002) at 420.

85 See e.g. DSU, art. 3.3, SPS Agreement, art. 2.1.

86 See e.g. *United States—Standards for Reformulated and Conventional Gasoline*, *supra* note 48 at 22; *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 44 at para. 156 (pointing to 'substantive treaty rights' such as those in GATT, art. XI:1).

Agreement was written.[87] In seeking to fix the WTO's slow decision-making, the governments recognized the need for designing a mechanism that accomplished the three goals of (*a*) ceasing the exclusion of small countries from decision-making, (*b*) providing a special status for large economies, and (*c*) preventing paralysis. Eventually, the governments saw the wisdom of establishing a WTO Governing Body based partly on the 1919 model of the International Labour Organization in which a certain number of seats are reserved for states of chief economic importance.[88] The remainder of the seats were allocated through a system in which various geographic and income groupings select a government as a representative.[89] A resort to weighted voting was not employed because governments could not agree on how to do the weighting. Among the factors considered were population, domestic gross domestic product (GDP), and trade as a percentage of GDP.

The establishment of the Governing Body made it much easier for the WTO to build support for difficult decisions. The notorious 'green room' practices of decision-making in rump sessions was finally abandoned. To the surprise of many trade cognoscenti, the newly-created WTO Parliamentary Assembly facilitated the process of decision-making in the Governing Body and the Ministerial Conference.

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87 See John H. Jackson, 'The World Trade Organization: Watershed Innovation or Cautious Step Forward?' in John H. Jackson, ed., *The Jurisprudence of the GATT & the WTO: Insights on Treaty Law and Economic Relations* (Cambridge: Cambridge University Press, 2000) 399 at 405-7 (discussing the new provisions to protect sovereignty included in WTO voting provisions).

88 See *Treaty of Versailles*, 28 June 1919, 112 BFSP 1 (entered into force 10 January 1920), art. 393. The ILO model was followed in the International Trade Organization Charter, which reserved seats on the Executive Board for states of 'chief economic importance' (*Havana Charter for an International Trade Organization*, 24 March 1948, Can. T.S. 1948 No. 32 (did not enter in force), art. 78, online: WTO <http://www.wto.org/english/docs_e/legal_e/havana_e.pdf>).

89 A number of thoughtful proposals contributed to the reform. See e.g. Jeffrey J. Schott & Jayashree Watal, 'Decision Making in the WTO' in Schott, ed., *The WTO After Seattle* (Washington, DC: Institute for International Economics, 2000) 283; Sylvia Ostry, 'World Trade Organization: Institutional Design for Better Governance' in Roger B. Porter *et al.*, eds., *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium* (Washington, DC: Brookings, 2001) 361 at 369; Friedl Weiss, 'WTO Decision-Making: Is It Reformable?' in Kennedy & Southwick, *supra* note 28 at 68; Richard Blackhurst & David Hartridge, 'Improving the Capacity of WTO Institutions to Fulfil Their Mandate' (2004) 7 J. Int'l Econ. L. 705 at 708.

3 Justice

Although much criticized in its early years, the Appellate Body survived and received greater respect in the WTO's second decade. When the Appellate Body's name was changed to the International Court of Economic Justice (ICEJ), as had been proposed by Joseph Weiler,[90] the WTO dropped the fig leaf of gaining formal approval of panel decisions by the DSB. Over time, the contributions to trade jurisprudence by the original seven members of the Appellate Body was widely celebrated.[91] After the ICEJ moved to its own building in 2010, busts of the original seven members were installed at the entrance.

In retrospect, one of the most important procedural changes that occurred was taken in the Doha Round when the DSU was amended in order to permit all WTO member governments to observe the oral hearings held by panels and the Appellate Body. This reform reflected an acknowledgement that what happens in dispute settlement is a matter of keen interest to all WTO members, not just the disputing parties. The opening of these meetings to governments fostered a greater judicialization of WTO dispute settlement and made it harder for recalcitrant WTO members to resist the logical next step of opening dispute settlement to observation by the public.

4 Poverty Alleviation and Development

Increased trade facilitates poverty alleviation,[92] but liberalization alone is not sufficient. Governments need sufficient policy space to promote manufacturing, technology, training, education, and other prerequisites of national competitiveness. The capacity of poor countries to trade also has to be increased. Although 'capacity building' had always been a leitmotif of the Doha Round, it was not until the 2005 Hong Kong Ministerial Conference that WTO governments agreed to a substantive plan for making developing countries more trade-ready.

The centerpiece of the new plan was taking seriously the role of technical assistance.[93] Building on the existing provisions for technical

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90 J.H.H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on WTO Dispute Settlement' in Porter *et al.*, *supra* note 89 at 334, 342.

91 See Robert Howse, 'The Legitimacy of the World Trade Organization' in Jean-Marc Coicaud & Veijo Heiskanen, eds., *The Legitimacy of International Organizations* (Tokyo: UN University Press, 2001) 355 at 374-94 (praising Appellate Body jurisprudence); James McCall Smith, 'WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings' (2003) 2 World Trade Review 65.

92 'Making Poverty History' *The Economist* (18 December 2004) 13.

93 See Bernard Hoekman, 'Strengthening the Global Trade Architecture for Development: The Post Doha Agenda' (2002) 1 World Trade Review 23 at 34 (discussing the need for the WTO to place trade issues in the context of

assistance in the WTO Agreement,[94] the Hong Kong Conference agreed that the Director-General should name an Assistance Coordinator in the WTO Secretariat for each developing country WTO member. At the same time that the country desks were established, the Conference approved a doubling of the size of the WTO Secretariat, and gave it more resources for analytical work.[95]

Another important step taken was to elevate 'food security' as a WTO norm[96] while at the same time recognizing that food security can be achieved more readily through trade than through autarky. This was accomplished by the negotiation of a new Agreement to Promote Food Security.

The positive contribution of international standards as an instrument for development was also recognized at Hong Kong, and the Ministerial Conference took requisite action. The Ministerial Conference instructed the Director-General to develop new proposals for promoting international standards, including through a better use of the Standards and Trade Development Facility launched in 2004. When in 2014, the Appellate Body ruled in favor of France in *United States—Widget*s that the United States was required to fully utilize the metric system of measurement, many observers heralded that decision as a seminal triumph of the standardization movement wrought by the WTO.

In retrospect, these developments might not have occurred had not the Hong Kong Conference taken the additional, unprecedented step of inviting private sector participation in the WTO's efforts to promote the synergistic benefits of standards. Inspired by the business leadership in the World Economic Forum, the WTO recognized how valuable private sector involvement could be, especially from developing countries. When development ensues, it does not happen by muscular string-pushing but rather by the establishment of an enabling environment for capital investment and human resource development.

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country assistance strategies).

94 TBT Agreement, art. 11; SPS Agreement, art. 9; TRIPS Agreement, arts. 66.2, 67; GATS, art. XXV:2; GATS Annex on Telecommunications, para. 6; GATT, arts. XXVI:3, XXXVI, XXXVIII:2. See Aaron Cosbey, *Lessons Learned on Trade and Sustainable Development: Distilling Six Years of Knowledge from the Trade Knowledge Network* (Winnipeg: International Institute for Sustainable Development, 2004) at 41.

95 See Jagdish Bhagwati, *Free Trade Today* (Princeton, NJ: Princeton University Press, 2002) at 73-4 (lamenting the 'starvation of the WTO' compared to the 'financial indulgence of the Bretton Woods institutions').

96 See Agreement on Agriculture, arts. 10.4, 12.1(a); Ruosi Zhang, 'Food Security: Food Trade Regime and Food Aid Regime' (2004) 7 J. Int'l Econ. L. 565.

As Gus Speth had pointed out, unscripted, voluntary initiatives have to be part of any successful strategy to achieve good governance for sustainable development.[97]

The decision by the WTO to do more on competition policy did not ensue at Hong Kong but rather at the Delhi Ministerial a few years later.[98] The breakthrough came when governments realized that a lack of adequate antitrust rules was hindering balanced economic growth.[99] To be sure, no government needed the WTO in order to establish better competition rules for its own economy. Of course, that is true for better trade policy too, as that can be achieved unilaterally. Yet as Frieder Roessler famously observed, the essential function of the multilateral trade order is to resolve conflicts of interest within nations and to help governments make better policy.[100] That insight justified bringing more competition rules into the WTO Agreement.

III CONCLUSION

So much for that futuristic trade fantasy. The reality is that the WTO of 2020 will probably not be much different than the WTO of 2005.[101] It will not fall into dystopia, nor blossom into a truly progressive international organization.

Although I am pessimistic that the WTO will be able to achieve much constitutional change by 2020, I am not pessimistic as to the achievement of more trade liberalization at the national level. Back in the mid-1930s when he contemplated the future of world trade, Sir

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97 James Gustave Speth, *Red Sky at Morning: America and the Crisis of Global Environment* (New Haven, NJ: Yale University Press, 2004) at 173.

98 In the early years of the WTO, the consideration of whether legal provisions regarding competition policy should be added to the TRIMs Agreement (see TRIMs Agreement, art. 9) had not led to any proposed amendments.

99 Pierre Sauvé & Americo Beviglia Zampetti, 'Subsidiarity Perspectives on the New Trade Agenda' (2000) 3 J. Int'l Econ. L. 83 at 101-4; Merit E. Janow, 'Operation of the WTO Agreements in the Context of Varying Types of National Regulatory Systems: Public, Private, and Hybrid Public/Private Restraints of Trade: What Role for the WTO?' (2000) 31 Law & Pol'y Int'l Bus. 977 at 979; Marco C.E.J. Bronckers, 'The WTO Reference Paper on Telecommunications: A Model for WTO Competition Law?' in Marco Bronckers & Reinhard Quick, eds., *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (The Hague: Kluwer Law International, 2000) at 371.

100 Frieder Roessler, 'The Constitutional Function of the Multilateral Trade Order' in Frieder Roessler, ed., *The Legal Structure, Functions & Limits of the World Trade Order: A Collection of Essays* (London: Cameron May, 2000) 109.

101 See José Alvarez, 'The WTO as Linkage Machine' (2002) 96 Am. J. Int'l L. 146 at 151-2 (discussing path dependency).

Arthur Salter deemphasized the potential contribution of nascent 'multilateral negotiations', and instead pointed to the need for improvements in domestic policies. As Salter explained, world trade would advance as countries adopted reasonable national policies conceived as a whole in their own interest rather than letting policies ensue through a calculation of political pressures.[102] Economic nationalism, Salter said, was not simply an enemy to slay, but also a force to encourage and educate in order to achieve 'an evolution from within'.[103] Salter's insight remains relevant today in a world of thicker multilateral institutions than he knew.

Citizens, interest groups, and governments should continue to promote free trade not only for its benefits to economic welfare but also for its benefits to peace. As we contemplate the WTO of the twenty-first century, we should recall the wisdom of Lester B. Pearson in his Nobel Lecture of 1957, who, looking back and ahead, said:

> The higher the common man sets his economic goals in this age of mass democracy, the more essential it is to political stability and peace that we trade as freely as possible together, that we reap those great benefits from the division of labor, of each man and each region doing what he and it can do with greatest relative efficiency, which were the economic basis of nineteenth-century thought and policy.[104]

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102 Sir Arthur Salter, *World Trade and Its Future* (London: Oxford University Press, 1936) at 90-2.

103 *Ibid*. at 101.

104 Lester Bowles Pearson, 'The Four Faces of Peace' (Nobel Lecture, 11 December 1957), online: <http://nobelprize.org/peace/laureates/1957/pearson-lecture.html>.

Why Constitutionalism *Now*? Text, Context and the Historical Contingency of Ideas

JEFFREY L. DUNOFF*

INTRODUCTION

I am pleased to contribute to the first issue of the *Journal of International Law & International Relations*. In this short essay, I wish to comment upon the current debate over constitutionalism at the World Trade Organization (WTO), and use this debate to reflect on the interdisciplinary nature of trade law scholarship and some of the current challenges facing international law. To do so, I will review the three leading accounts of WTO constitutionalism found in the legal literature. I will then suggest that these otherwise divergent views of constitutionalism share an impulse to channel or minimize world trade politics. Paradoxically, however, the call for constitutionalism has sparked precisely the sort of politics that it seeks to pre-empt. Hence, one part of this article will be devoted to illustrating the self-defeating nature of the turn to constitutionalism.[1]

But this raises a puzzle: if there is no world trade constitution, and if the calls for such a constitution trigger the very politics that constitutionalism seeks to avoid, why do leading trade scholars continue to debate the WTO's 'constitution'? Exploration of this question will lead us to deeper and more troubling questions about the current status of the discipline of international law, as well as to some reflections on the historical conditions under which IL/IR scholarship is most likely to flourish. In particular, I will discuss the relationship between the scholarly preoccupation with constitutionalism at the WTO and a geopolitical context where the ascendance of realist approaches to international affairs poses serious challenges to international law.

I THE TURN TO CONSTITUTIONALISM

Although international lawyers have long invoked constitutional imagery,[2] constitutional discourse has become more prominent in

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* Visiting Fellow, Lauterpacht Research Centre for International Law, Cambridge University; Charles Klein Professor of Law & Government and Director, Institute for International Law and Public Policy, Temple University Beasley School of Law. I am grateful to Ari Afilalo and Joel Trachtman for thoughtful comments on earlier drafts of this essay.

1 These ideas are drawn from a larger work-in-progress, tentatively titled 'Constitutionalism's Conceits' [unpublished, on file with author].

2 See e.g. Alf Ross, *The Constitution of the United Nations: Analysis of Structure and Function* (New York: Rinehart, 1950); Hersch Lauterpacht, *International Law and Human Rights* (London: Stevens, 1950) at 463 (arguing that, in post-World War II era, human rights are at 'the very centre of the

recent years. The increased salience of this discourse reflects, in part, radical constitutional changes in the former Eastern Bloc states following the end of the Cold War, the increased use of comparative constitutional techniques by various constitutional courts, and the ongoing ratification debates over the treaty establishing a Constitution for Europe.

In recent years, WTO scholarship has also experienced a turn to constitutionalism. It is tempting to locate the constitutional turn in trade scholarship within the context of the broader focus on constitutionalism throughout international law. But there is an immediate and dramatic contrast between the trade context and the other contexts mentioned above: in the WTO, of course, there is no ongoing political process intended to generate a constitutional document, nor any likelihood of such a process in the foreseeable future. There is no constitutional convention, no constitutional drafting process, and no readily identifiable constitutional moment. Immediately, then, we are struck by a puzzle: what do WTO scholars mean when they speak of constitutionalism at the WTO?

Not surprisingly, 'constitutionalism' is a highly contested term that is used in different ways by different authors.[3] Nevertheless, it is possible to characterize the most prominent of this scholarship as falling into one of three different categories. As described below, the most influential trade scholarship understands the WTO constitution to consist of either (1) the WTO's institutional architecture; (2) the privileging of a set of normative commitments; or (3) a process of

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constitution of the world'); Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926) at v.

3 In addition to the authors discussed below, important discussions of constitutionalism at the WTO can be found in Joel P. Trachtman, *The WTO Constitution: Tertiary Rules to Untangle Intertwined Elephants* [unpublished, on file with author]; Tomer Broude, *International Governance in the WTO: Judicial Boundaries and Political Capitulation* (London: Cameron and May, 2004); Richard H. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints' (2004) 98 Am. J. Int'l L. 247; Robert L. Howse & Kalypso Nicolaides, 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?' (2003) 16 Governance 73; Neil Walker, 'The EU and the WTO: Constitutionalism in a New Key' in Grainne De Burca & Joanne Scott, eds., *The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart, 2001); Robert Howse & Kalypso Nicolaidis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far' in Roger B. Porter *et al.*, eds., *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (Washington, DC: Brookings, 2001) at 227; G.E. Evans, *Lawmaking Under the Trade Constitution: A Study in Legislating by the World Trade Organization* (Boston: Kluwer, 2000); John O. McGinnis & Mark L. Movsesian, 'The World Trade Constitution' (2000) 114 Harv. L. Rev. 511.

judicial mediation among conflicting values. Each of these understandings is briefly described below.

The WTO Constitution as Institutional Architecture

The most prominent strand of trade scholarship understands the WTO constitution primarily in institutional terms, and the most prominent advocate of this understanding is John Jackson. Because Jackson's 'constitutional' vision has been ably discussed elsewhere,[4] I will offer here only a brief summary of his arguments.

'Constitutional' arguments run through much of Jackson's scholarship.[5] The most influential version of these arguments appears in *Restructuring the GATT System*, published during the Uruguay Round negotiations. This short book proposes a 'constitutional' status and structure for the international trade system. In part, Jackson justifies a constitutional structure as a practical way to address the General Agreement on Tariffs and Trade (GATT)'s famous 'birth defects', including the 'provisional' nature of GATT obligations; the losing state's ability to veto adverse dispute settlement reports; and the difficulties in modifying GATT rules.

In addition to these characteristically 'pragmatic' arguments,[6] Jackson advances a bold historical-descriptive—and normative—claim: 'To a large degree the history of civilization may be described as a gradual evolution from a power-oriented approach, in the state of nature, towards a rule-oriented approach.'[7] Jackson emphasizes that, in the economic context, only a rule-oriented approach will provide the security and predictability necessary for decentralized international

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4 See e.g. 'A Tribute to John Jackson' (1999) 20 Mich. J. Int'l L. 95.

5 For a sampling, see e.g. John H. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (London: Royal Institute of International Affairs, 1998); John H. Jackson, *Restructuring the GATT System* (London: Royal Institute of International Affairs, 1990); John H. Jackson, *World Trade and the Law of GATT* (Indianapolis: Bobbs-Merril, 1969); John H. Jackson, 'The WTO "Constitution" and Proposed Reform: Seven "Mantras" Revisited' (2001) 4 J. Int'l Econ. L. 67; John H. Jackson, 'The Perils of Globalization and the World Trading System' (2000) 24 Fordham Int'l L.J. 371; John H. Jackson, 'The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results' (1998) 36 Colum. J. Transnat'l L. 157; John Jackson, 'Reflections on Constitutional Changes to the Global Trading System' (1996) 72 Chi.-Kent L. Rev. 511; John H. Jackson, 'The Birth of the GATT-MTN System: A Constitutional Appraisal' (1980) 12 Law & Pol'y Int'l Bus. 21.

6 For an analysis of Jackson's 'pragmatic' style, see Robert L. Howse, 'The House that Jackson Built: Restructuring the GATT System' (1999) 20 Mich. J. Int'l L. 107; David Kennedy, 'The International Style in Postwar Law and Policy' (1994) 1994 Utah L. Rev. 7.

7 Jackson, *Restructuring the GATT System, supra* note 5 at 52.

markets to function.

Jackson argues that this new rule-oriented approach can best occur through a 'constitution' creating a new international organization. Jackson's proposed new trade constitution provides an 'institutional structure' for the trade regime. It addresses 'governance issues' by creating an 'assembly' of all members and a smaller 'executive council,' and provides a 'panel procedure' for dispute settlement.[8] Jackson argues that a successful conclusion of the Uruguay Round talks 'will only reinforce the need' for a trade constitution.[9] Jackson closes this book with a challenge to trade negotiators, asking them whether the emerging trade constitution 'will be carefully thought through or be merely the result of the happenstance of the negotiation endgame?'[10] Jackson's proposals helped spark negotiations over the need for a new trade organization, and delegates involved in the Uruguay Round talks confirm that much of the WTO's innovative and controversial institutional structure owes much to Jackson's writings and advocacy.[11]

The WTO Constitution as Normative Commitment

A second strand of scholarship views constitutionalism as the privileging of a set of normative commitments. Perhaps the most prominent advocate of this position is Professor Ernst-Ulrich Petersmann.[12] For Petersmann, constitutionalism is less an institutional

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8 *Ibid*. at 94-100.

9 *Ibid*. at 103.

10 *Ibid*.

11 Debra P. Steger, 'A Tribute to John Jackson' (1999) 20 Mich. J. Int'l L. 165 at 166 (Canada's Senior Negotiator on the Establishment of the WTO and Dispute Settlement in the Uruguay Round states that '[i]ndeed, he [Jackson] can be credited with having sown the seeds of the idea to establish a World Trade Organization'). See also Debra Steger, 'The World Trade Organization: A New Constitution for the Trading System' in Marco Bronckers & Reinhard Quick, eds., *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (The Hague: Kluwer Law International, 2000) at 135.

12 An incomplete listing of Petersmann's writings on constitutionalism includes: Ernst-Ulrich Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 Eur. J. Int'l L. 621; Ernst-Ulrich Petersmann, 'The WTO Constitution and the Millennium Round' in *New Directions in International Economic Law*, *supra* note 11 at 111; Ernst-Ulrich Petersmann, 'The WTO Constitution and Human Rights' (2000) 3 J. Int'l Econ L. 19; Ernst-Ulrich Petersmann, 'Legal, Economic and Political Objectives of National and International Competition Policies: Constitutional Functions of WTO "Linking Principles" for Trade and Competition' (1999) 34 New Eng. L. Rev. 145; Ernst-Ulrich Petersmann, 'How to Reform the UN System? Constitutionalism, International Law, and International Organizations'

arrangement than a set of normative values that protect against both government overreaching and short-sighted decisions by the population: 'The self-limitation of our freedom of action by rules and the self-imposition of institutional constraints … are rational responses designed to protect us against future risks of our own passions and imperfect rationality.'[13] In this context, Petersmann invokes the familiar story of Ulysses ordering his companions to bind him to the mast when approaching the island of the sirens;[14] constitutions consist of pre-commitments to norms that 'effectively constitute and limit citizen rights and government powers.'[15]

Moreover, Petersmann's most recent writings on constitutionalism suggest that the elevation and protection of fundamental human rights lie at the core of his constitutional vision.[16] More controversially, Petersmann has argued that economic freedoms lie at the heart of fundamental human rights. Following Jan Tumlir, Fredrich Hayek, and others, Petersmann emphasizes the fundamental importance of 'economic freedoms' such as the freedom 'to produce and exchange goods', and argues that 'market freedoms are indispensable' for human autonomy and self-determination.[17] Petersmann repeatedly praises European integration law for 'fully recogniz[ing]' that 'transnational "market freedoms" for movements of goods, services,

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(1997) 10 Leiden J. Int'l L. 421 [Petersmann, 'How to Reform the UN System']; Ernst-Ulrich Petersmann, 'How to Constitutionalize the United Nations? Lessons from the "International Economic Law Revolution"' in Volkmar Gotz, Peter Selmer & Rudiger Wolfrum, eds., *Liber Amicorum Gunther Jaenicke* (1998) at 313 [Petersmann, 'How to Constitutionalize the UN System']; Meinhard Hilf & Ernst-Ulrich Petersomann, eds., *National Constitutions and International Economic Law* (Deventer: Kluwer, 1993); Ernst-Ulrich Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (Fribourg: University of Fribourg Press, 1991).

13 Ernst-Ulrich Petersmann, 'How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?' (1998) 20 Mich. J. Int'l L. 1 at 1 [Petersmann, 'How to Constitutionalize International Law'].

14 *Ibid*.; Ernst-Ulrich Petersmann, 'How to Reform the United Nations: Lessons from the International Economic Law Revolution' (1997-98) 2 UCLA J. Int'l L. & Foreign Aff. 185 at 223; Petersmann, 'How to Reform the UN System', *supra* note 12 at 436. In invoking this image, Petersmann follows Jon Elster's pathbreaking work. See e.g. Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (Cambridge: Cambridge University Press, 1984).

15 Petersmann, 'How to Constitutionalize International Law', *supra* note 13 at 13.

16 Ernst-Ulrich Petersmann, 'Human Rights and the Law of the World Trade Organization' (2003) 37 J. World Trade 241.

17 Petersmann, 'How to Constitutionalize International Law', *supra* note 13 at 17.

persons, capital, and related payments' are judicially enforceable 'transnational citizen rights'[18] and urges the WTO and other international organizations to follow Europe's lead in this regard.

Thus, Petersmann's understanding of constitutionalism can be sharply distinguished from Jackson's. While Petersmann does not ignore institutional issues, his understanding of constitutionalism is centered upon the elevation and protection of certain normative values. Human rights are central to these values, which in Petersmann's understanding should encompass economic rights—including a right to trade.

The WTO Constitution as a Judicial Mediating Device

Perhaps the dominant conception of constitutionalism focuses upon WTO dispute settlement as the engine of constitutionalism. A leading exponent of this view is Professor Deborah Cass, who argues that the WTO's Appellate Body (AB) 'is the dynamic force behind constitution-building by virtue of its capacity to generate constitutional norms and structures during dispute resolution.'[19]

Cass argues that the AB generates constitutional norms through four distinct processes.[20] First, the AB borrows constitutional rules, principles and doctrines from other systems and amalgamates them into the AB's own case law. Second, the AB's decisions 'are constitutive of a new system of law.' That is, through decisions that generate rules on burdens of proof, fact finding and participation by non-state actors, the AB is 'inaugurating a [specific] type of legal system.' Third, the AB is incorporating into its jurisdiction issues traditionally viewed as being within national constitutional processes, such as public health. Finally, Cass argues that the AB 'associates itself with deeper constitutional values' in the ways that it carefully crafts and justifies its decisions. It does so by addressing such background constitutional questions as 'how to design a fair system of law … [and] how policy responsibility will be divided.' In addressing these sorts of issues, Cass argues, the AB associates its jurisprudence with that of other constitutional systems.

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18 *Ibid.*; Ernst-Ulrich Petersmann, 'Theories of Justice, Human Rights, and the Constitution of International Markets' (2003) 37 Loy. L.A. L. Rev. 407.

19 Deborah Z. Cass, 'The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade' (2001) 12 Eur. J. Int'l L. 39 at 42. For another argument that the AB is an agent of constitutional change, see G.E. Evans, 'Confronting the Constitutional Imperative: The Jurisprudence of Intellectual Property in the Supreme Court of the World Trade Organization' [unpublished manuscript, on file with author].

20 Cass, *ibid.* at 51-2.

Cass argues that, taken in the aggregate, the four features she identifies are the mechanisms through which 'the emerging jurisprudence of the WTO is beginning to develop a set of rules and principles that share some of the characteristics of constitutional law; and that this in turn is what contributes to the constitutionalization of international trade law.'[21] Behind the doctrine, Cass argues, is a preoccupation with the sorts of issues that preoccupy constitutional courts: 'questions about the division of powers; ... [of] state sovereignty ... [questions] about how a legal system is constituted, its overall validity, its democratic contours, its very legitimacy.'[22] In short, for Cass, the AB is 'building ... a constitutional system by judicial interpretations emanating from the judicial dispute resolution institution.'[23] Moreover, Cass suggests, these various techniques are often employed to help 'mediate' among conflicting values that are present in the trade system, and hence to resolve issues that WTO members are presumably unable to resolve in WTO negotiating fora.

What Constitution?

To be sure, the short summaries above do not do justice to a rich and nuanced literature.[24] But all of the competing conceptions of constitutionalism confront an inescapable problem: there is no world trade constitution. The WTO texts do not announce themselves to be a world trade 'constitution'; indeed they do not even create a world trade legislature or vest autonomous legislative or regulatory capacity in a WTO body. Moreover, the WTO texts surely do not set out a constitutional system along the lines set out in trade scholarship; they do not contain features commonly associated with the institutional structures of constitutionalism, such as a system of separation of powers or checks and balances; they do not explicitly enshrine a 'right to trade'; and they do not explicitly empower the AB to establish a constitutional system through judicial interpretation. Indeed, despite the development of a rich and complex jurisprudence, WTO dispute settlement reports do not contain even a single reference to a trade constitution, whether understood as institutional architecture, a fundamental right to trade, or the AB's norm-generating capacities.[25] Additionally, many states,

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21 *Ibid*. at 52. Cass is careful not to argue that these four features automatically make a system 'constitutional'. Rather, it is that the AB is generating 'constitutional-like' doctrine and this doctrine is being understood in the literature as constitutional in nature.

22 *Ibid*. at 72.

23 *Ibid*. at 52.

24 For a fuller discussion, see e.g. 'Constitutionalism's Conceits', *supra* note 1; *supra* note 3.

25 This argument is developed at length in 'Constitutionalism's Conceits', *supra* note 1.

including major trading powers such as the United States and the European Union, have refused to give 'direct effect' to WTO treaty obligations, meaning that private parties cannot invoke WTO rules in domestic courts. In short, despite the burgeoning scholarly literature, the WTO does not establish a world trade constitution.

Moreover, the various and diverse uses of the term constitutionalism by different trade scholars raises the question of whether we should even consider the writings on constitutionalism as engaged in a common project: is the term constitutionalism too protean and indeterminate to be of analytic use? Is there a link between the various uses of the term? Most fundamentally, what is gained by the invocation of constitutional discourse?

II CONSTITUTIONALISM AS ANTIDOTE TO TRADE POLITICS

For current purposes, there is another way to understand these three visions of constitutionalism at the WTO: each can be understood as standing in opposition to a broad and inclusive vision of world trade politics. That is, in each of the three leading accounts, we can understand constitutionalism as a mechanism for withdrawing an issue from the battleground of power politics and as a vehicle for resolving otherwise politically destabilizing political disputes through reference to a meta-agreement. This constitutional 'agreement'—whether embodied in institutions, in foundational text, or in judicial doctrine and traditions that gloss the text—can then be used to resolve and pre-empt debate over what would otherwise be controversial issues that threaten the realm of ordinary politics. In short, the constitutionalist move is designed to 'bring[ ] international power politics under the strong arm of the "rule of law."'[26]

Consider again, for example, Jackson's constitutional vision. As noted, Jackson's constitutional gaze is fixed on institutional architecture. This attention is eminently understandable; '[s]tructural design is the basic hardware for constitutional practice, and the most familiar, visible and tangible index of constitutional continuity and change.'[27] However, recall the purpose of this institutional architecture: to introduce a 'rule based' system that will replace the pre-existing 'power based' trade system. Jackson is explicit that, at bottom, the new rules based system is designed as an antidote to the corrupting influence that the exercise of 'power'—that is, politics—has heretofore exerted on international trade politics.[28]

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[26] Broude, *supra* note 3 at 82 (describing and critiquing the constitutionalist move).

[27] Neil Walker, 'After the Constitutional Moment' [forthcoming].

[28] Ironically, Jackson has recently begun to lament the fact that the quest for a

Petersmann similarly understands constitutionalism as a necessary corrective to the pathologies of politics: '[c]onstitutionalism emerged in response to negative experiences with abuses of political power as a means to limit such abuses through rules and institutions.'[29] Or, as Petersmann memorably suggests, constitutionalism's foundational insight is that the central political question is not who shall govern, but rather 'how must laws and political institutions be designed … so that even incompetent rulers and politicians cannot cause too much harm.'[30]

More specifically, Petersmann's arguments about the need to integrate market freedoms into human rights law reflects one very particular—and contested—vision of human rights. There is a much larger debate, or political struggle here, both within and among nations, about the appropriate balance among economic and non-economic policy goals. To constitutionalize one controversial view of that balance is, in effect, to pre-empt that debate and that struggle.

Cass, as well, presents a vision of constitutionalism that can be understood in opposition to politics. Her focus, as we have seen, is on the generation of constitutional norms by the WTO's judicialized dispute resolution process. But to use a highly judicialized process for generating and applying norms is effectively to turn legislative and interpretative powers to a small cadre of Appellate Body members. And while this may be a highly deliberative process, WTO dispute resolution is hardly a site for participatory or democratic politics.

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rule-oriented system may have succeeded too well. He has, with implicit disfavour, compared the AB's essentially unreviewable power with that of national courts whose decisions are subject to legislative overrides (John H. Jackson, 'The Role and Effectiveness of the WTO Dispute Settlement Mechanism' in *Brookings Trade Forum* (Washington, DC: Brookings, 2000) 179 at 200). He notes that, while the GATT's underdeveloped institutional provisions permitted a certain 'ability to evolve through trial and error' the WTO's quite formalized and difficult voting requirements 'seems to place unwarranted limits on this approach.' The resulting inflexibility 'raises the substantial risk of impasse in addressing the problems that the WTO faces' (*ibid*. at 205). See also John H. Jackson, 'International Economic Law: Jurisprudence and Contours' (1999) 93 Am. Soc'y Int'l L. Proc. 98 at 103 ('And one of the problems of the WTO Charter is … [that t]he negotiators were jealous of each other and worried about the impact on sovereignty of this new organization. They were fearful of some of its potential powers. In particular during the last six months of the active negotiation, the negotiators put into the WTO Charter a series of checks and balances and constraints which arguably may have gone a little too far').

29 Ernst-Ulrich Petersmann, 'Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?' (1999) 31 N.Y.U. J. Int'l L. & Pol. 753 at 758.

30 Petersmann, 'How to Reform the UN System', *supra* note 12 at 422.

Thus, a common link between these three otherwise quite different understandings of the WTO's constitution is that, for each of the scholars surveyed, the turn to constitutionalism is that made in the service of a larger turn away from politics. That is, for each of the scholars surveyed, the rise of the WTO as a constitutional entity can be understood as a corrective or replacement for unruly and potentially destructive trade politics.[31] In this sense, the constitutionalists' turn away from politics is consistent with the prescriptive mission of most international law scholarship: 'to replace politics—bad, old-fashioned, violent, nationalist, particularist, rent-seeking politics—with law … .'[32]

However, considering the broad historical trajectory of the trade regime, the turn to constitutionalism can be understood more as a step backwards than a step forwards.[33] As Robert Keohane and Joseph Nye have argued, the original GATT was premised upon a 'club model' of international cooperation.[34] That is, during GATT's early years a relatively small number of economists and diplomats from like-minded states worked quietly to make trade policy without significant public input or oversight, in other words, without much politics:

> The GATT successfully managed a relative insulation from the 'outside' world of international relations and established among its practitioners a closely knit environment revolving around a certain set of shared normative values (of free trade) and shared institutional (and personal) ambitions situated in a matrix of long-term first-name contacts and friendly personal relationships. GATT operatives became a classical 'network' ….[35]

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31 Others have noted the distinction between WTO norms and ordinary politics. See e.g. Laurence R. Helfer, 'Constitutional Analogies in the International Legal System' (2003) 37 Loy. L.A. L. Rev. 193 at 202 ('[a] … characteristic that buttresses WTO's incipient constitutional character is its *de facto* separation of international trade from ordinary domestic politics').

32 David Kennedy, 'When Renewal Repeats: Thinking Against the Box' (1999-2000) 32 N.Y.U. J. Int'l L. & Pol. 335 at 401.

33 For an insightful account of this trajectory, see Robert Howse, 'From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime' (2002) 96 Am. J. Int'l L. 94.

34 Robert O. Keohane & Joseph S. Nye, 'The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy' in *Efficiency, Equity, and Legitimacy*, *supra* note 3 at 264.

35 Joseph H.H. Weiler, The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of Dispute Settlement, in *Efficiency, Equity and Legitimacy, supra* note 3 at 334. For a critique of Weiler's argument, see Jeffrey L. Dunoff, 'The WTO's Legitimacy Crisis: Reflections on the Law and Politics of WTO Dispute Resolution' (2002) 13

The Club Model's 'politics-free zone' lasted for many years because it was successful, in the sense that it oversaw dramatic decreases in tariffs and other trade barriers, and a corresponding increase in global trade and prosperity.

Paradoxically, however, the advantages of the Club Model of trade policy-making contained the seeds of its own destruction. First, increasing trade liberalization caused citizens to be more sensitive to further liberalization.[36] This sensitivity complicated future efforts at liberalization. In addition, the Club Model was not sustainable in a context where developing states and civil society began to demand a greater role in trade negotiations and policy-making.

Today, the WTO is no longer an obscure body dealing with tariffs, but a highly visible component of an emerging regime of global economic governance: 'The days of major agreements being hammered out in Geneva hotels by a trade cognoscenti operating under the radar of public view are gone forever. Whatever the virtues of keeping special interests off balance and out of the way, the closed-door style of negotiations that lies at the heart of the Club Model is no longer workable.'[37] The pressures on the WTO strongly suggest that whatever replaces the old Club Model must be more transparent and participatory. In this sense, the turn to constitutionalism—a turn away from politics—is precisely not what the WTO needs.

The deeper paradox, of course, is that constitutionalism—at least the versions most prominent in trade scholarship—cannot possibly deliver the escape from politics that it promises. Jackson would house trade politics within the WTO's institutional apparatus. Of course, only states can be members of the WTO. But this means that WTO institutions reinscribe the very state-centric political order that many of the most controversial trade disputes put at issue.[38] The most dramatic examples of world trade politics, including the Seattle Ministerial and controversies over access to essential medicines, highlight the ways in which trade politics can no longer be understood simply as inter-state politics—and, more importantly, that in their current configurations the WTO's institutions do not and cannot contain world trade politics.[39]

Am. Rev. Int'l Arb. 197.

36 Jeffrey L. Dunoff, 'The Death of the Trade Regime' (1999) 10 Eur. J. Int'l L.733.

37 Daniel C. Esty, 'The World Trade Organization's Legitimacy Crisis' (2002) 1 World Trade Review 7 at 12.

38 Jeffrey L. Dunoff, 'The WTO in Transition: Of Constituents, Competence and Coherence' (2001) 33 Geo. Wash. Int'l L. Rev. 979.

39 Sylvia Ostry, 'The WTO—In Dire Need of Reform' (2003) 17 Temple Int'l & Comp. L.J. 109. Of course, much the same is true in domestic systems; for example, the US Supreme Court's 'constitutional' decisions in

Indeed, the strength and durability of the legitimacy critique of the WTO suggests the inevitable failure of the WTO's current institutional structure. That is, the structural limitations of this architecture almost guarantee an inadequate foundation of the democratic participation and accountability necessary for the social legitimacy that any effort to constitutionalize the trade system needs to succeed.

As we've seen, Petersmann would enshrine and elevate economic freedoms, including a 'right to trade'. Petersmann argues that, in proper constitutional orders, government restrictions on economic rights, including the right to trade, should be subject to a strict 'necessity' test.[40] As Professors Robert Howse and Philip Alston have shown, this 'necessity' test underscores how significantly Petersmann's vision of constitutionalism privileges economic rights as opposed to other important and competing social interests.[41] In practice such an elevation of economic rights would necessarily limit governments' ability to pursue many non-economic goals, such as environmental protection and other social policies. But WTO efforts to discipline states in areas of social policy—particularly through the dispute settlement process that Cass champions—are precisely what triggers world trade politics, as the response to WTO reports in trade-environment disputes illustrates.

Trade scholars invoke constitutional discourse because of the undoubted power that this discourse has in legal circles. However, the ideological and symbolic power associated with constitutional discourse has prompted powerful responses from those who would counterclaim or deny constitutional authority. Paradoxically, while the turn to constitutionalism can be seen as an effort to close down debate and remove issues from the domain of political contestation, in practice the advocates of constitutionalism have inadvertently triggered a robust and productive normative debate. Jackson's vision of constitutionalism has sparked a growing literature on whether the WTO's institutional structure is or should be considered 'constitutional'.[42] Similarly, Petersmann's efforts to 'constitutionalize' a human right to trade within

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contentious areas such as abortion and affirmative action hardly ended public debate on these contentious issues.

40 Petersmann, 'How to Reform the UN System?', *supra* note 12 at 431.

41 See e.g. Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 Eur. J. Int'l L. 815; Robert Howse, 'Human Rights in the WTO: Whose Rights, What Humanity?' (2002) 13 Eur. J. Int'l L. 651.

42 See e.g. Howse & Nicolaidis, *supra* note 3 at 227; Peter M. Gerhart, 'The Two Constitutional Visions of the World Trade Organization' (2003) 24 U. Pa. J. Int'l Econ. L. 1.

WTO law prompted a vigorous response,[43] and Cass's vision of the AB's constitutional powers joins a large literature debating the norm-generating and constitutional dimensions of WTO dispute resolution.[44] In short, the advocates of constitutionalism have—perhaps inadvertently—helped to fuel a vociferous debate over 'the empirical and normative validity of a vision of the WTO as a constitutional polity'.[45]

III Does the Debate Over Constitutionalism Signal a Maturation of the Field or a Discipline in Crisis

If the analysis above is accurate, we confront an even more difficult puzzle than the ones already discussed: given the problems with constitutional discourse—and that arguments about constitutionalism have been available for years—why are so many scholars *now* preoccupied with debating constitutionalism at the WTO?

There are many possible answers to this question. As the arguments above contradict most recent trade scholarship, it is possible that I am mistaken in claiming that the current trade regime is not properly considered a constitutional entity. From the mainstream perspective, constitutional discourse provides a useful vocabulary with which to understand the WTO's robust and legalistic approach to dispute resolution, innovative enforcement mechanisms, and the superiority of WTO norms over conflicting domestic statutes. More broadly, constitutionalism's advocates argue that the enhanced trade regime is just one instantiation of the broadening and deepening of international legal norms across subject areas, and the turn to constitutionalism should be celebrated as a welcome and, indeed, overdue development in international law.

But what if the critique of constitutionalism presented above is correct? If we flip the conventional wisdom about constitutionalism on its head, should we also question the prevailing orthodoxy concerning the flourishing of international law? In particular, might we entertain the counterintuitive argument that the turn to constitutionalism is less a

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43 See e.g. Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13 Eur. J. Int'l L. 753; Alston, *supra* note 41; Howse, *supra* note 41. For Petersmann's rejoinder, see Ernst-Ulrich Petersmann, 'Taking Human Rights, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston' (2002) 13 Eur. J. Int'l L. 845.

44 See e.g. Claude Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (Washington, DC: AEI Press, 2001); Dunoff, *supra* note 36.

45 Joanne Scott, 'International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO' (2004) 15 Eur. J. Int'l L. 307 at 347-8.

sign of international law's flourishing than a sign of a discipline in crisis?

A constellation of events in the 1980s and 1990s—the end of the Cold War, the fall of the Berlin Wall, the apparent revitalization of the United Nations—gave rise to heady claims about the reality and the promise of international law. The creation of the WTO was just one of many developments that led prominent scholars to declare that international law had finally entered a 'post-ontological' age[46] and proclaim that '[I]nternational legal rules, procedures and organizations are more visible and arguably more effective than at any time since 1945.'[47] In this context, international lawyers occupied themselves with arguments regarding how to manage the welcome albeit potentially problematic proliferation of international norms, institutions and tribunals,[48] and a central jurisprudential task was to determine which of the various theoretical explanations of why nations comply with international law was the most persuasive.[49]

But international law's triumphalist moment quickly faded, and today the discipline faces severe challenges, both from within and without. From within, empirical studies question international law's effectiveness[50] and a revisionist literature attacks international law's

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46 Thomas M. Franck, *Fairness in International law and Institutions* (Oxford: Clarendon Press; New York: Oxford University Press, 1995).

47 Anne-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 Am. J. Int'l L. 205.

48 On the proliferation of international courts and tribunals, see e.g. Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford, New York: Oxford University Press, 2003); Thomas Buergenthal, 'The Proliferation of International Courts and Tribunals: Is It Good or Bad?' (2001) 14 Leiden J. Int'l L. 267; *Symposium Issue: The Proliferation of International Tribunals: Piecing Together the Puzzle* (1999) 31 N.Y.U. J. Int'l L. & Pol. 679; Vaughan Lowe, 'Overlapping Jurisdiction in International Tribunals' (1999) 20 Australian YBIL 191; Jonathan Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 217 Rec. des Cours 101.

49 See e.g. Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass.: Harvard University Press, 1995) (managerial theory of compliance); Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990) (compliance as function of law's legitimacy); Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 Yale L.J. 2599 (transnational legal process explanation for compliance). For an insightful overview of competing compliance theories, see Kal Raustiala & Anne-Marie Slaughter, 'International Law, International Relations, and Compliance' in Walter Carlnaes *et al.*, eds., *The Handbook of International Relations* (London: Sage Publications, 2002).

50 See e.g. Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference' (2002) 111 Yale L.J. 1935. Hathaway's empirical claims about

premises and foundations.[51] From without, realist approaches to international relations, which minimize the importance of international legal norms, seem ascendant. Most pointedly, in recent years the world's hegemon has recently had a rather uneasy relationship with international legal norms and institutions, as illustrated by the refusal to ratify the Kyoto Protocol, the 'unsigning' of the Rome Treaty creating the International Criminal Court, the rejection of the Land Mines and Comprehensive Test Ban Treaties, the repudiation of the ABM treaty, the denigration of the Geneva Conventions and norms against torture, and, perhaps most ominously, the invasion of Iraq and assertion of a doctrine of preventive war that is in considerable tension with conventional understandings of the norms governing the use of force.[52]

In short, today the discipline of international law is under siege. United Nations Secretary General Kofi Annan diplomatically states that, given recent events, international law and institutions face 'a fork in the road' as momentous as that faced in 1945, when the post-War order was built.[53] More pessimistically, Thomas Franck observes that, 'in the new millennium, after a decade's romance with something approximating law-abiding state behavior, the law-based system is once again being dismantled.'[54] Against this backdrop, we should examine whether the scholarly turn to constitutionalism reflects international law's strength and vigour—or precisely the opposite. My thesis is that international lawyers invoke rhetorical tropes, like constitutionalism, out of a sense of disciplinary anxiety and a felt need to invest international legal bodies with the power and authority that domestic

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the relative ineffectiveness of human rights treaties have sparked substantial debate. See e.g. Ryan Goodman & Derek Jinks, 'Measuring the Effects of Human Rights Treaties' (2003) 14 Eur. J. Int'l L. 171; Oona A. Hathaway, 'Testing Conventional Wisdom' (2003) 14 Eur. J. Int'l L. 185.

51 See e.g. Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005); Jack L. Goldsmith & Eric A. Posner, 'A Theory of Customary International Law' (1999) 66 U. Chi. L. Rev. 1113.

52 A large literature addresses the challenges that US hegemony poses to international law. See e.g. Michael Byers & Georg Nolte, eds., *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003); José E. Alvarez, 'Hegemonic International Law Revisited' (2003) 97 Am. J. Int'l L. 873; Henry J. Richardson, III, 'U.S. Hegemony, Race and Oil in Deciding United Nations Security Council Resolution 1441 on Iraq' (2001) 17 Temple International and Comparative Law Journal 27; Detlev F. Vagts, 'Hegemonic International Law' (2001) 95 Am. J. Int'l L. 843

53 Secretary-General's Address to the General Assembly, 23 September 2003, UN GAOR, 58th Sess., 7th mtg., UN Doc. A/58/PV.7 (2003), at 3.

54 Thomas M. Franck, 'What Happens Now? The United Nations After Iraq' (2003) 97 Am. J. Int'l L. 607 at 608.

constitutional mechanisms possess.

Against this backdrop of disciplinary anxiety the trade regime might seem an apt setting within which to offer constitutional arguments. There can be little doubt that '[w]hatever its flaws, the [WTO] is the envy of international lawyers who are more familiar with less efficient and more compliance-resistant legal regimes, including those within the International Labor Organization (ILO), United Nations (UN) human rights bodies, and other adjudicative arrangements such as the World Court or the ad hoc war crimes tribunals.'[55] Hence, if any international legal regime would display the features associated with constitutionalism, it would appear to be the WTO.

Moreover, the current disciplinary anxiety would also explain another curious aspect of WTO scholarship – the excessive attention given to WTO dispute resolution. As I've explained elsewhere, this focus can be extraordinarily misleading, particularly given how few trade disputes actually make their way into the WTO's formalized dispute resolution system, and how much WTO activity—in WTO counsels, committees and elsewhere—goes largely unnoticed and unexamined in trade law scholarship.[56] However, in the face of the realist challenge, WTO dispute settlement has an attribute that international law is always criticized for lacking: effective enforcement mechanisms. WTO dispute resolution thus possesses the allure of an international legal regime with teeth, and hence a simple and compelling answer to realist sceptics who doubt that international law is really 'law'.[57]

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[55] Jose E. Alvarez, 'How Not to Link: Institutional Conundrums of an Expanded Trade Regime' (2001) 7 Widener L. Symp. J. 1 at 1.

[56] Jeffrey L. Dunoff, 'Lotus Eaters: The Varietals Dispute, the SPS Agreement, and WTO Dispute Resolution' in George Bermann & Petros Mavroidis, eds., *Health Regulation in the WTO* (Cambridge: Cambridge University Press) [forthcoming in 2005]

[57] Indeed, a significant body of writings explicitly take up this theme. Consider, for example, the observations of a former member of the WTO's Appellate Body:

> '[I]nternational law remains a primitive legal system.' And no doubt this is how the current status of international law is best described in terms that are familiar to theorists of jurisprudence. … International law might best be described as being, so to speak, out on the legal frontier.
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> And out on the legal frontier, out where the bluebonnets grow, out where the lonesome prairie stretches as far as the eye can see, *out there* is international law. … Out there are the open ranges of lawlessness that are still awaiting the fences of law that alone can secure true freedom. And out there, above the far horizon, shining brightly in the big sky, is the 'lone star' of the WTO
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> No, the WTO is not by any means the *only* star that shines in the

There is yet another reason to suspect that the turn to constitutionalism reflects vulnerability rather than strength. For many years the existence of an international body or institution provided its own justification; today something more is required. This is particularly true in the WTO's case. Since the public protests in Seattle and Cancun it is clear that the trade regime can no longer present itself in technocratic terms without need of popular acceptance.[58] From this perspective, the turn to constitutionalism can be understood as an effort to find a legitimating principle for a system that faces a 'legitimacy crisis' and the explosion of theories of constitutionalism understood as an implicit acknowledgment of both the WTO's power and the lack of a broad popular basis for exercising that power.

IV INTERDISCIPLINARY SCHOLARSHIP AND THE LAUNCH OF IL/IR

The analysis above suggests that scholarly arguments and trends often reflect specific historical contexts. At the founding of this new interdisciplinary journal, it may be appropriate to offer a few thoughts on the historical circumstances in which IL/IR scholarship is most likely to flourish.

Among American legal academics, it is a truism that 'we're all realists now.'[59] I take this claim to mean that much of what was a radical realist assault on the previously dominant form of legal thought—often called formalism—is now accepted as mainstream legal thinking. Legal realism challenged formalist notions that rules generated determinate outcomes to specific legal controversies, and that legal questions could be answered by reference to the inherent nature of

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firmament of international law. And the WTO is not by any means the only star that *must* shine if we hope to shed light on the darkness of all the wide-open spaces that face all those who would free humanity by building the fences of law. But the WTO is, for now, the brightest star. Ours is a time of aggressive unilateralism. Ours is a time of retreat from multilateralism.

Ours is a time when the hopes of all those who march for freedom depend on a renewed internationalism that relies on international law. And, at this time when we are so much in need of increased support for international law, the WTO is a 'lone star.' Often alone among global tribunals, the WTO is proving that international law can work, that international law can be real, and that international law can be upheld. The WTO is offering new and needed proof to the world every day that multilateral approaches to multilateral challenges can result in multilateral successes (James Bacchus, 'Lone Star: The Historic Role of the WTO' (2004) 39 Tex. Int'l L.J. 401 at 406-7).

58 Howse, *supra* note 33.

59 See e.g. Joseph William Singer, 'Legal Realism Now' (1988) 76 Cal. L. Rev. 465. This phrase, of course, refers to legal realism, and not political science realism.

abstract legal categories like 'contract' or 'liberty'. For the realist, '[l]egal principles are not inherent in some universal, timeless logical system; they are social constructs, designed by people in specific historical and social contexts for specific purposes to achieve specific ends.'[60] Hence, the realists helped move policy analysis, interest-balancing and process concerns into academic legal thought. Of course, these contemporary truisms were not always considered truths, and formalism held sway in the legal academy for many decades.

Among international legal academics, at least those trained in American law schools, it is increasingly a truism that 'we're all interdisciplinary scholars now.' That is, most international lawyers would accept the claim that international law is not an autonomous discipline; rather, international law is increasingly understood as a discipline that is itself interdisciplinary. Hence, arguments about the need for international institutions often rest, at least implicitly, on theories regarding the comparative advantages of centralized versus decentralized governance, or rational choice arguments about externalities, transaction costs, focal points or the like. Similarly, it is impossible to explain much of international trade law without implying economic theories of comparative advantage, or game theoretic accounts of prisoner's dilemmas, or public choice accounts of well-concentrated producer interests, or the like; or much of international environmental law without implying an economic theory of market failure, or rational choice theories of public goods and collective action problems, and so on. IR thinking has helped international lawyers become more aware of and more sophisticated about these theories and almost all international lawyers today are conversant with the main schools of IR thought, use IR tools (with greater or lesser sophistication) to explore international legal issues, and address research questions suggested by IR approaches.

Of course, contemporary truisms about international law were not always considered truths, and international law scholarship has gone through many different phases.[61] Prior to World War II, for example, the American international law academy was dominated by the 'positivists' who focused upon formal law and sovereign autonomy. But the war discredited dominant ways of thinking about international law, and a period of disciplinary anxiety and contestation ensued. This disciplinary ferment opened the door to new ways of thinking in and about the discipline, and over the next decade or so pragmatic and functionalist approaches gained currency. By the 1960s, a 'Columbia school' gained ascendancy, focused upon building an international legal

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60 *Ibid*. at 474.

61 For one account of these changes, see Kennedy, *supra* note 32.

order centered upon the United Nations system and a system of norms that could bridge the East-West divide.

But the end of the Cold War brought about a new period of anxiety and contestation. As after World War II, this current period of anxiety and disputation has opened the intellectual space for new methodological and conceptual approaches. Perhaps following larger trends in legal scholarship[62] international legal scholarship in recent years has taken an interdisciplinary turn.[63] In particular, during the early stages of this period, international law 'discovered' international relations theory. Groundbreaking work by Ken Abbott, Anne-Marie Slaughter, and others introduced international lawyers to various strands of rationalist and liberal IR thought.[64] Later works brought constructivist insights into international legal thought.[65]

International legal scholars use IR theory in various ways. In particular, IR insights help legal academics 'to diagnose substantive problems and frame better legal solutions; to explain the structure or function of particular international legal rules or institutions; and to reconceptualize or reframe particular institutions or international law generally.'[66] Stated more generally, IR theory helps international lawyers move from their occasionally excessive focus upon text and usefully contextualize legal phenomena:

> [W]hile lawyers *describe* rules and institutions all the time, we inevitably—often subconsciously—use some intellectual template (frequently a positivist one) to determine which elements of these complex phenomena to emphasize, which to omit. The carefully constructed models of social interaction underlying IR theory remind us to choose these templates carefully, in light of our purpose. More specifically, IR helps us describe legal institutions richly, incorporating the political factors that shape the law: the interests,

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62 See e.g. Richard A. Posner, 'The Decline of Law as an Autonomous Discipline: 1962-1987' (1987) 100 Harv. L. Rev. 761.

63 See e.g. Steven R. Ratner & Anne-Marie Slaughter, eds., *Symposium on Method in International Law* (1999) 93 Am. J. Int'l. L. 291.

64 See e.g. Slaughter Burley, *supra* note 47; Kenneth W. Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers' (1999) 14 Yale J. Int'l L. 335

65 See e.g. Jutta Brunnée & Stephen J. Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39 Colum. J. Transnat'l L. 19.

66 Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92 Am. J. Int'l L. 367 at 369.

> power, and governance structures of states and other actors; the information, ideas and understandings on which they operate; the institutions within which they interact.[67]

Hence, international lawyers have successfully adopted IR approaches in various ways to address diverse problems.[68] International trade scholars, in particular, have been highly receptive to IR methods and insights, and have usefully employed, *inter alia*, game theory, public choice theory, liberal theory, and institutionalist approaches to shed light on various aspects of international economic law. This is one reason to expect IL/IR work to continue, at least in the trade area. More broadly, international legal scholarship is still in a time of deep methodological ferment, exacerbated by the post September 11, 2001 challenges to the discipline. Thus, both internal and external dynamics suggest that this is a particularly opportune time for international lawyers to engage in interdisciplinary work, including IL/IR work.

While mapping out a progressive IL/IR research agenda is well beyond the scope of this short article, we might expect international lawyers to use newly emerging IR insights and approaches to explore many difficult and important issues including, for example, the puzzle of states creating an independent tribunal at the WTO;[69] the contentious debates over the relationship between the WTO and other international

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[67] Kenneth W. Abbott, 'International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts' (1999) 93 Am. J. Int'l L. 361 at 362.

[68] For a sense of the range of applications, see e.g. Peter J. Spiro, 'Disaggregating U.S. Interests in International Law' (2004) 67 Law & Contemp. Probs. 195 (combining liberal and constructivist insights to argue that disaggregated non-state actors will pressure the US to participate more fully in international regimes); Laurence R. Helfer, 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes' (2002) 102 Colum. L. Rev. 1832 (using IR theory to explain the limits of legalization in human rights context); Jutta Brunnée & Stephen J. Toope, 'The Changing Nile Basin Regime: Does Law Matter?' (2002) 43 Harv. Int'l L.J. 105 (applying constructivist insights to explain evolution of legal regime to protect the Nile basin); Steven R. Ratner, 'Does International Law Matter in Preventing Ethnic Conflict?' (2000) 32 N.Y.U. J. Int'l L. & Pol. 591 (using IR theory and negotiation theory to analyse problems of ethnic minorities); Eyal Benvenisti, 'Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law' (1996) 90 Am. J. Int'l L. 384 (freshwater management as collective action problem).

[69] See e.g. Laurence R. Helfer & Anne-Marie Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' 93 Cal. L. Rev. 899; Eric Posner & John Yoo, 'Judicial Independence and International Tribunals' (2005) 93 Cal L. Rev. 1.

legal regimes;[70] the vexing problem of non-state actors at the WTO;[71] the WTO's ongoing legitimacy crisis;[72] non-compliance and the optimal level of compliance with panel and AB decisions[73]—and, perhaps, even the turn to constitutionalism at the WTO.

CONCLUSION

Trade scholars are today preoccupied with the debate over constitutionalism at the WTO. While this phrase is used in many different ways, I've tried to demonstrate that constitutionalism is almost invariably seen as a mechanism to defuse or resolve potentially destabilizing political conflicts. However, constitutionalism cannot preempt or displace political debate on controversial issues. Paradoxically, constitutionalism creates precisely the sort of politics that it seeks to preempt. Hence, one goal of this article has been to demonstrate self-defeating nature of the turn to constitutionalism.

But if the turn to constitutionalism triggers the very world trade politics that constitutionalism seeks to avoid, why do leading trade scholars engage in this debate? Another goal of the article has been to inquire into the conditions that have given rise to the debate over constitutionalism at the WTO. I've suggested that the timing and prominence of this debate may shed light on the current status of the discipline of international law. In short, the turn to constitutionalism may reflect a deep disciplinary anxiety that has been heightened by international events since September 11, 2001. Constitutional discourse may be a defensive reaction by international lawyers who perceive that international law is under severe stress.

Finally, I've outlined some of the ways in which ideas are rooted in particular historical circumstances. International law's current disciplinary ferment—and external challenges—creates the intellectual space for international law scholars to explore interdisciplinary approaches, and to build on the fruitful insights generated by IL/IR scholarship.

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70 See e.g. Andrew T. Guzman, 'Global Governance and the WTO' (2004) 45 Harv. Int'l L.J. 303; John O. McGinnis & Mark L. Movsesian, 'Against Global Governance in the WTO' (2004) 45 Harv. Int'l L. J. 353.

71 See e.g. Steve Charnovitz, 'The WTO and Cosmopolitics' (2004) 7 J. Int'l Econ. L. 675; Jeffrey L. Dunoff, 'The Misguided Debate over NGO Participation at the WTO' (1999) 1 J. Int'l Econ. L. 433.

72 See Robert Howse, 'The Legitimacy of the World Trade Organization' in Jean-Marc Coicaud & Veijo Heiskanen, eds., *The Legitimacy of International Organizations* (Tokyo: UN University Press, 2001) at 355; Dunoff, *supra* note 35; Esty, *supra* note 37.

73 Andrew T. Guzman, 'A Compliance-Based Theory of International Law' (2002) 90 Cal. L. Rev. 1823.

Critiquing the Critics of Economic Globalization

MICHAEL J. TREBILCOCK*

Globalization is the great buzz-word of our times, although it lacks any common or agreed definition. It could mean as many different things as globalization of human rights values through United Nations Declarations and Covenants, the creation of War Crimes Tribunals, the International Criminal Court and the Land Mines Treaty, or the globalization of core labour standards through the International Labour Organization (ILO), or the globalization of environmental values through the Kyoto Protocol, but typically this is not what the so-called anti-globalists have in mind. Rather, they fundamentally object to the process of international trade and investment liberalization (economic globalization) that has occurred in the post-war years as reflected in the following summary numbers: from 1950 to 1999 the average annual growth rate of world real Gross Domestic Product (GDP) was 3.8 per cent; the average annual growth rate in the trade of goods over this period was 6.2 per cent; from 1980 to 1999 the average annual growth rate in the trade of services was 7.0 per cent; from 1982 to 1999 the average annual growth rate in the stock of foreign direct investment (FDI) was 13 per cent.[1]

The public perturbations leading up to and surrounding the Seattle Ministerial meetings of the World Trade Organization (WTO) in late 1999, and subsequent civil disturbances in Washington, Quebec City, and Genoa, confirmed dramatically, unambiguously, and probably irreversibly that trade negotiations and trade disputes have moved out of the quiet and obscure corners of trade diplomacy and become matters of 'high politics'. Despite these disturbances, it is important to bring some measure of rigorous detachment to the evaluation of the criticisms that have been widely and vehemently directed at the WTO, especially by the non-governmental organization community. The WTO and international trade liberalization generally are accused of creating a global monoculture, increasing inequality, harming the environment, health and safety, and human rights, and leading society (undesirably) away from self-sufficiency. Another common allegation is that the WTO is undemocratic and unaccountable and improperly constrains domestic political sovereignty.[2] In this article

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* Professor of Law and Economics, University of Toronto Faculty of Law.

1 WTO, *World Trade Organization Annual Report, 2000* (2000).

2 See, for example, full page advertisements endorsed by more that twenty non-governmental organizations prior to the Seattle Ministerial meetings of the WTO, 'Global Monoculture' *New York Times* (15 November 1999); 'Globalization v. Nature' *New York Times* (22 November 1999); and 'Invisible Government' *New York Times* (29 November 1999).

I will argue that these objections are mostly unfounded.[3] Most of these critiques exhibit two broad themes: they focus both on inherent properties of international trade and on the institutional characteristics of the international trade governance regime.

CLAIM 1: GLOBALIZATION IS LEADING TO A GLOBAL MONOCULTURE

This claim comes in various strands, some more critical than others. Naomi Klein in her book, *No Logo*, argues: 'Despite the embrace of polyethnic imagery, market-driven globalization doesn't want diversity; quite the opposite. Its enemies are national habits, local brands and distinctive regional tastes.'[4]

In an economic vein, Thomas Friedman, in *The Lexus and the Olive Tree*[5] argues that there are no longer any ideological alternatives to free market capitalism, (although pacing of adjustment may vary), if a country wants to achieve higher standards of living. He terms a country's acceptance and application of this ideology the 'Golden Straightjacket' and argues that while the Golden Straightjacket improves a country's prospects for growth and higher average incomes, it also constrains political and economic choice by limiting available options. He notes:

> To fit in the Golden Straightjacket a country must either adopt, or be seen as moving toward, the following golden rules: making the private sector the primary engine of its economic growth, maintaining a low rate of inflation and price stability, shrinking the size of its state bureaucracy, maintaining as close to a balanced budget as possible, if not a surplus, eliminating and lowering tariffs on imported goods, removing restrictions on foreign investment, getting rid of quotas and domestic monopolies, increasing exports, privatizing state-owned industries and utilities, deregulating capital markets, making its currency convertible, opening its industries, stock and bond

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[3] For excellent critiques of many of these objections, see Douglas Irwin, *Free Trade Under Fire* (Princeton: Princeton University Press, 2002); Jagdish Bhagwati, *In Defense of Globalization* (Oxford: Oxford University Press, 2004); Philippe LeGrain, *Open World: The Truth About Globalization* (London: Abacus, 2002); and Martin Wolf, *Why Globalization Works* (New Haven: Yale University Press, 2004).

[4] Naomi Klein, *No Logo: Taking Aim at the Brand Bullies* (Toronto: Vintage Canada, 2000) at 129; see also Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Toronto: Viking Canada, 2004) c. 5.

[5] Thomas L. Friedman, *The Lexus and the Olive Tree* (New York: Anchor Books, 2000) at 103-6.

> markets to direct foreign ownership and investment, deregulating its economy to promote as much domestic competition as possible, opening its banking and telecommunications systems to private ownership and competition and allowing its citizens to choose from an array of competing pension options and foreign-run pension and mutual funds.[6]

Francis Fukuyama in *The End of History*[7] argues apocalyptically that the final triumph of economic and political liberalism is occurring, and while this is generally to be welcomed, he worries that it may presage a material blandness and homogeneity and lack of engagement with great ideas that ideological conflicts in the past have provoked.

In responding to these claims of cultural, social, political and economic homogenization, it must be re-emphasized that it is crucial to the basic economic theory of international trade that comparative advantage results from exploiting *differences*, not similarities, in production. Indeed, international trade enables countries to accentuate rather than minimize their differences by specializing in economic activities where endowments permit a degree of specialization that confers comparative advantages on them relative to other countries, who in turn should pursue a similar strategy of specialization, thus creating the potential for mutually beneficial trade. This is observable not only across countries but also within countries. Largely unconstrained internal trade has not obliterated, but rather accentuated these differences and the different life-styles and community structures associated with them. Largely unconstrained international trade has had, and will have, similar effects on differences among nations. The stringency of the Golden Straightjacket is also greatly exaggerated by Friedman. Capitalist regimes vary greatly from one country to another, for example Japan, Singapore, China, Sweden, Germany, Canada, and the United States.

Second, the claim that diversity is the enemy of efficiency is false. While it may be true that in some industries like fast foods and hotel chains, many consumers want assurances of quality and consistency across multiple locations, in many, perhaps most industries, the most successful competitive strategy is through innovation to differentiate one's products from those of other providers, whether this is in men's and women's fashions, automobiles, consumer durables, or restaurants. Merely mimicking rivals' product offerings and then competing strictly on price and cost (commoditization) is often a recipe

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6 *Ibid.* at 105.

7 Francis Fukuyama, *The End of History and The Last Man* (New York Free Press, 1991).

for economic oblivion, as opposed to offering consumers with distinctive preferences what they want.[8] That corporations could, or want to, homogenize all consumer preferences globally is belied by the huge and proliferating diversity of product and service offerings that one sees in markets all over the world.[9]

Third, as to what exactly the litmus test is for the claim of increasing homogenization of culture is far from clear. *The Economist* argues that brands are not as powerful as Klein suggests. In fact, consumers' brand loyalty has been declining in recent years, and many previously established brands are suffering in terms of both customer loyalty and value.[10] While it may be the case that certain aspects of popular culture such as mass entertainment and mass consumer products have achieved a degree of world-wide consumption appeal, the claim sometimes made that every place is becoming every place else and that there is no point even in leaving home is belied by the most casual observations derived from traveling in various parts of the world, such as Latin America, Africa, the South Pacific, Western Europe, Asia, and Central and Eastern Europe, where cultural, social, and economic differences in both production and consumption remain huge.

Indeed, these differences, in many respects, translate into disparities that are unconscionable in the modern world. As Amartya Sen argues in his recent book, *Development as Freedom*,[11] the basic goals of development can be conceived of in universalistic terms where individual well-being can plausibly be viewed as entailing certain basic freedoms, irrespective of cultural context: freedom to engage in political criticism and association; freedom to engage in market transactions; freedom from the ravages of preventable or curable disease; freedom from the disabling effects of illiteracy and lack of basic education; freedom from extreme material privation. According to Sen, these freedoms have both intrinsic and instrumental values. While obviously different countries and cultures will seek to vindicate these freedoms in different ways, the challenge facing most poor developing countries in the world today is to realize these basic freedoms as most citizens of developed countries have already been privileged to do. More homogeneity of values, especially liberal values, would also seem a small price to pay for avoiding the huge human costs of ethnic and

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8 See William J. Baumol, *The Free-Market Innovation Machine: Analyzing the Growth Miracle of Capitalism* (Princeton: Princeton University Press, 2002).

9 See Philippe LeGrain, *supra* note 3 at 118-31.

10 'Special Report: Who's wearing the trousers? Brands' *The Economist* (8 September 2001).

11 Amartya Sen, *Development as Freedom* (New York: New York Alfred Knopf, 1999).

religious conflicts[12] that, despite Fukuyama's claim, seem, if anything, to be proliferating in many parts of the world. The recognition that not all convergence in values is necessarily detrimental is implicit in the policy advocacy of many critics of globalization, who on the one hand ostensibly oppose the imperialistic expansion of Western cultural influences, while at the same time selectively promoting distinctly homogeneous concepts of universal human rights, labour standards, and environmental protection.

Fourth, the WTO in its rules and trade dispute rulings is not unsympathetic to efforts by countries to protect culturally distinctive activities from foreign competitive encroachment, for example domestic film, television, and magazine industries. Article IV of the General Agreement on Tariffs and Trade (GATT) explicitly allows for quotas on foreign films. In addition, Canada negotiated for itself a more general, qualified exemption for its cultural industries under the Free Trade Agreement and North American Free Trade Agreement (NAFTA). While the WTO Appellate Body in the *Split-Run Periodicals*[13] case struck down features of Canadian policies designed to promote the domestic magazine industry, its decision still leaves open to the Canadian government a wide range of measures to support this and similar culturally sensitive industries—indeed superior mechanisms than those employed in the past, which have focused on subsidizing or protecting national inputs, rather than subsidizing distinctive informational outputs.[14]

Fifth, it is far from clear that government protection through state-imposed trade restrictions is 'better' for culture than exposure to free markets and open economic exchange. Tyler Cowen argues that 'the capitalist market economy is a vital but underappreciated institutional framework for supporting a plurality of coexisting artistic visions.'[15] Standard economic theory would suggest that since culture is

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12 See also Philippe LeGrain, *supra* note 3 at 293-319.

13 *Canada—Certain Measures Concerning Periodicals* (1997), WTO Doc. WT/DS31/AB/R (Appellate Body Report).

14 See Glenn Gottselig, *Canada and Culture: Can Current Cultural Policies be Sustained in the Global Trade Regime?* (LL.M. Thesis, University of Toronto Faculty of Law 1999) [unpublished]; Trevor Knight, 'The Dual Nature of Cultural Products: An Analysis of the World Trade Organization's Decisions Regarding Canadian Periodicals' (1999) 57 U. Toronto Fac. L. Rev. 165; for an argument on extensive cultural exemptions from trade disciplines, see Peter Grant & Chris Wood, *Blockbusters and Trade Wars: Popular Culture in a Globalized World* (Toronto: Douglas & McIntyre, 2004), and review thereof by Frederick Pinto, (2004) 7 J. Int'l Econ. L. 922.

15 Tyler Cowen, *In Praise of Commercial Culture* (London: Harvard University Press, 1998) at 1.

a normal good, demand for it is expected to rise as incomes increase. To the extent that free markets and freer trade promote growth in income levels, one might reasonably expect cultural output to increase. However, Cowen goes beyond this simple interrelation between trade and culture, suggesting that the exchange of ideas engendered by trade is essential to healthy cultural development. Historically there has been at least partial correlation between internationalization of trade and cultural growth. The hundred years before World War I saw tremendous creative output coupled with expanding trade frontiers.[16] By contrast, 'the most prominent period of cultural decline in Western history coincides with a radical shrinking of trade frontiers,' the Dark Ages.[17]

It is unclear whether those opposed to globalization on cultural grounds are motivated by a fear of cultural decline or by a wish for a certain set of cultural characteristics—chosen by them—to remain constant and unchanged. There is a distinction. Fear of cultural decline is belied by the proliferation of artistic expression, preservation of cultural heritage, and consumption of cultural outputs in open economies. On the other hand, it is evident that as societies interact with greater frequency and depth through increased trade ties, their citizens will become exposed to different cultural goods, manners, behaviors, and modes of consumption. In the free-trade version of culture, societies are exposed to heterogeneous cultural practices and individuals are largely free to choose between their existing practices, total acceptance of the new practices, or some hybrid, the last of these being the most likely result. Unless one believes that culture should remain immutable and frozen in time, cultural exchanges of this type should be encouraged. It is true that this implies the loss of certain elements of 'uniqueness' in cases where individuals exposed to new things change their behaviors, but there is no *a priori* reason why this type of change should be discouraged if the parties wish to change. After all, every modern society has been created and transformed by cultural encounters. Making the case that societies should generally be protected from this interaction not only requires a paternalistic assumption that we are better able to decide which cultural characteristics are worthy for consumption, or that individuals are somehow insufficiently equipped to reject cultural goods they do not want, but also flies in the face of our own experience, which one could argue has benefited tremendously from the importation of foreign cultural products throughout our history. The protectionist arguments amount to a modern-day reformulation of Rousseau's dictum, that people must be 'forced to be

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16 Tyler Cowen, *Creative Destruction* (Princeton: Princeton University Press, 2002) at 6.

17 *Ibid.*

free', only now their freedom is from modern international cultural practices, and their reward is a uniqueness that they did not chose. Perhaps tellingly, the most vociferous objections to cultural exchange come from Western activists wishing to protect seemingly vulnerable societies in less developed countries. Naturally, while the benefits of uniqueness to the activist and the tourist may be clear, the costs of remaining 'unique' are borne almost exclusively by the populations which have been denied an opportunity to express their preferences through participation in the global economy and access to the global marketplace of ideas.

Finally, if one was really to avoid the consequences of cosmopolitanism, trade barriers would hardly be enough—there would also be a need for strict censorship laws, exit visas, limits on immigration and ethnic and religious diversity, and other measures aimed at maintaining the insulation of communities from external influences, with highly uncongenial implications for repressiveness, intolerance, and the potential for external conflict. As Sen argues,[18] citizens in developing (and other) countries should be assured of the right to freely choose which traditional cultural values and practices to preserve, which to modify, and which to abandon. This is a freedom that others have no right to deny to them.

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[18] Sen, *supra* note 11, c. 10.

CLAIM 2: TRADE LIBERALIZATION EXACERBATES INEQUALITIES OF WEALTH

Despite what some globalization critics argue, most economists find empirically that open economies tend to grow faster.[19] Indeed, amongst developing countries, it is difficult to identify countries with strong growth records that are not aggressive exporters (and concomitant importers). The table below (drawn from Williamson),[20] illustrates this fact:

TABLE 1: TRADE-POLICY ORIENTATION AND GROWTH RATES IN THE THIRD WORLD, 1963-92

	Average annual rates growth of GDP per capita (%)		
Trade policy orientation	1963-73	1973-85	1980-92
Strongly open to trade	6.9	5.9	6.4
Moderately open	4.9	1.6	2.3
Moderately anti-trade	4.0	1.7	-0.2
Strongly anti-trade	1.6	-0.1	-0.4

Sources and notes: adapted from Lindert and Williamson (2002a: Table 3) based on World Bank data. In all periods the three strongly open economies were Hong Kong, South Korea, and Singapore. The identities of the strongly anti-trade countries changed over time. In 1963-73, they were Argentina, Bangladesh, Burundi, Chile, Dominican Republic, Ethiopia, Ghana, India, Pakistan, Peru, Sri Lanka, Sudan, Tanzania, Turkey, Uruguay, and Zambia. For the two overlapping later periods, the strongly anti-trade countries were the previous sixteen, *plus* Bolivia, Madagascar, and Nigeria, *minus* Chile, Pakistan, Sri Lanka, Turkey, and Uruguay.

Whether trade liberalization exacerbates global income inequalities is more controversial. In a recent survey of the evidence, Williamson reports a dramatic divergence in incomes around the globe over the past two centuries, which has been driven overwhelmingly by the rise of between-nation inequality, not by the rise of inequality within countries, as depicted in the following graph (drawn from

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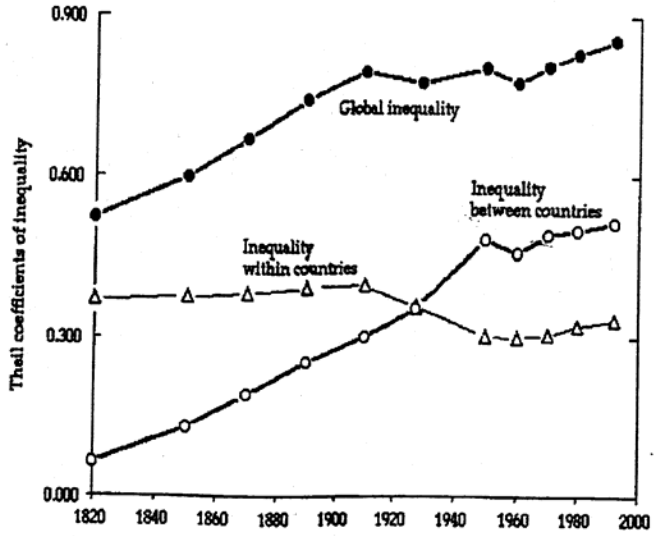
19 See Jeffrey Williamson, 'Winners and Losers over Two Centuries of Globalization' 2002 World Institute for Development Economics Research Annual Lecture (WIDER) at 9, 10; David Dollar & Paul Collier, 'Globalization, Growth and Poverty' (2001), online: The World Bank Group <http://www.worldbank.org/research/growth/Trade5.htm>; Irwin, *supra* note 3, c. 2.

20 Williamson, *supra* note 19*;* see also data reviewed by Arund Panagariya, 'Miracles and Debacles: In Defence of Trade Openness' (2004) 27 World Economy 1149; Wolf, *supra* note 3 at 140-9.

Williamson):[21]

FIGURE 1: GLOBAL INEQUALITY OF INDIVIDUAL INCOMES, 1820-1992



However, if income differences are measured not as differences between average incomes of each country but as the distribution of individual incomes globally, the distribution has narrowed considerably,[22] reflecting the large populations in rapidly growing developing countries such as China and India. One recent study also finds that measured by the benchmark of two dollars a day or less, adjusted for purchasing power, the proportion of the world's population in poverty dropped from fifty-six per cent in 1980 to twenty-three per cent in 2000—about 1.1 billion in 2000 compared to 1.9 billion in 1980.[23]

In the case of developing countries, the outstanding examples of countries that (despite temporary set-backs in the late 1990s) have dramatically increased the average real incomes of citizens (often by factors as large as six or eight) in recent decades have been the so called Asian Tigers, beginning with Japan and followed by countries such as Taiwan, South Korea, Hong Kong, Singapore, Malaysia, and more

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21 Williamson, *supra* note 19 at 2; see also Wolf, *supra* note 3 at 149-57; Francois Bourguignor & Christian Morrison, 'Inequality Among World Citizens' (2002) 92 American Economic Review 727.

22 'Survey of Capitalism and Democracy' *The Economist* (26 June 2003) at 5ff.

23 Surjit Bhalla, *Imagine There's No Country* (Washington, DC: Institute for International Economics, 2002); see also Wolf, *supra* note 3 at 157-66.

recently China, (and to some extent India), all of which have pursued relatively open, export-led growth policies. In contrast, developing countries that have pursued extreme forms of import substitution policies have generally experienced disappointing and, in many cases, disastrous results (including India until recently). These results have been exacerbated by the protectionist policies maintained by most developed countries towards goods of potential export interest to developing countries such as textiles, clothing, footwear, agricultural products, and natural resources. Even today, tariffs and other restrictions on imports from developing countries are substantially higher than for imports from other developed countries. This is not to suggest that open trade and investment policies are sufficient in themselves to launch developing countries on a strong growth trajectory. As Gary Hufbauer and Jeffrey Schott[24] point out, between 1975 and 1990, the dollar value of two-way trade between OECD countries and low-income countries tripled from $59 billion to $200 billion. Yet the per capita income gaps between OECD countries and low-income countries actually increased over this period (from thirty times higher to fifty-eight times higher), reflecting the higher productivity of labour in developed economies.

Clearly, a range of domestic policies other than trade policies that promote higher levels of capital investment, investments in human capital, health care, and infrastructure, as well as quality of governance, are important determinants of growth. Again, many of these policies have been important in the growth record of the high performing East Asian economies. In addition, it is important to note that the benefits of growth in these countries have also been reasonably equitably distributed by virtue of policies of land redistribution, investments in public education, health care, and public housing, and the encouragement of small and medium sized businesses (SMEs).[25] More generally, the empirical evidence suggests that extreme levels of inequality have a negative impact on growth at all stages of development,[26] and that over a large sample of countries and over long time periods the income of the poor rises one-for-one with over-all growth—a relationship that holds in poor countries as well as rich

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[24] Gary Hufbauer & Jeffrey Schott, *NAFTA: An Assessment* (Washington, DC: Institute for International Economics, 1993) at 12, 13.

[25] See Dani Rodrik, *The New Global Economy and Developing Countries: Making Openness Work* (Washington, DC: Overseas Development Council, 1999) [*New Global Economy*]; Michael Trebilcock, 'What Makes Poor Countries Poor? The Role of Institutional Capital in Economic Development' in Edward Buscaglia & Robert Cooter, eds., *The Law and Economics of Development* (London: JAI Press, 1997).

[26] Aghion, *infra* note 29.

countries, in economic crises, and in open trading regimes.[27] It is also important to note that recent studies find empirically that greater economic openness tends to lead to improved quality of domestic governance over time.[28]

In the case of developed countries, it is true that the earnings of low-skilled American workers relative to high-skilled workers have declined in recent years, although most empirical studies show that increased trade with low-wage developing countries may account for at most twenty per cent of this reduction, and most of the increase in the wage gap between skilled and unskilled workers is attributable to technological change and rapidly declining rates of unionization.[29] The returns to highly specialized human capital in an increasingly knowledge-based economy have increased while the demand for much low-skilled labour has been reduced by technological innovation. Moreover, as Paul Krugman[30] and many other economists have pointed out, the growth rate of living standards essentially equals the growth rate of domestic productivity—not productivity relative to competitors, but simply domestic productivity. Even though world trade is larger than ever before, national living standards are overwhelmingly determined by domestic factors rather than competition for world markets. In the case of the United States, exports are only ten per cent of GNP, which means that the United States is still almost ninety per cent an economy that produces goods and services for its own use. To the extent that international trade increases domestic productivity, it will enhance domestic incomes on average. In terms of employment effects, jobs lost in import-impacted sectors will typically be replaced over time by jobs in export-oriented sectors.[31] Thus, international trade has little

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27 See David Dollar & Aart Kraay, 'Growth *is* Good for the Poor' (Working Paper, March 2000), online: The World Bank Group <http://www.worldbank.org/ research/growth/absddolakray.htm>.

28 See e.g. Aymo Brunetti & Beatrice Weder, 'More Open Economies Have Better Governments' Working Paper, University of Saarland Economics Series 9905 (1999).

29 See William Kline, *Trade and Economic Distribution* (Washington, DC: Institute for International Economics, 1997); Dani Rodrik, 'Sense and Nonsense in the Globalization Debate' *Foreign Policy* (Summer 1997) 19 ['Sense and Nonsense']; Dani Rodrik, *Has Globalization Gone Too Far*? (Washington, DC: Institute for International Economics, 1997) [*Globalization*]; Philippe Aghion, 'Inequality and Economic Growth' in Philippe Aghion & Jeffrey Williamson, eds., *Growth, Inequality and Globalization: Theory, History and Policy* (Cambridge: Cambridge University Press, 1998).

30 Paul Krugman, 'Competitiveness: A Dangerous Obsession' in *Pop Internationalism* (Cambridge, Mass.: MIT Press, 1997) c. 1.

31 Irwin, *supra* note 3, c. 3.

to do with declining relative living standards of unskilled workers in the United States; to the extent that it does, an argument needs to be made as to why mostly poor developing countries should be denied the opportunity of utilizing their comparative advantage in low-wage, low-skilled labour by investing in manufacturing sectors that capitalize on this advantage, or indeed in pursuing outsourcing opportunities for higher skilled but relatively lower cost labour (despite current controversies),[32] and in pursuing export-led growth policies, which in turn enable them to buy developed countries' exports. However, in recognizing this comparative advantage, it is important not to exaggerate it. Data show almost a one-to-one relationship between labour productivity and labour costs in manufacturing across a wide range of developed and developing countries.[33] Thus, it is a fallacy to assume that low wages are the driving force behind today's global trade or investment flows. This relationship also explains why internationally most firms are not seeking to relocate to, for example, Bangladesh, despite its low wages, and why most foreign direct investment goes to developed countries and not to developing countries.[34] While international trade theory suggests that international trade will generate a tendency to factor price equalization, this is only true, *inter alia*, after adjusting for differences in factor productivity.[35] Nevertheless, international trade will tend to increase the incomes of workers of given skill categories (adjusting for productivity differences) in developing countries.

Another claim that is often made is that trade and investment liberalization threatens to gut the welfare state[36] that, not coincidentally it is argued, evolved in many developed countries in the post-War decades, along with progressive trade liberalization in order, in part, to provide a cushion for the economic instabilities and risks associated with the latter for many citizens. Now the concern is that with increased capital mobility and increased mobility of highly skilled workers, this social contract may be put in jeopardy as the better endowed firms and individuals in the community exit or threaten to exit in order to avoid the taxes required to underwrite the social programs that are perhaps even more necessary in the present and the future than in the past to cushion shocks to less advantaged citizens, given the increasing speed of

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32 Danielle Goldfarb, 'How Canada Wins from Global Services Outsourcing' *The Economist* (13 November 2004).

33 See Rodrik, 'Sense and Nonsense', *supra* note 29.

34 Wolf, *supra* note 3 at 115.

35 See Paul Brenton, Henry Scott & Peter Sinclair, *International Trade* (Oxford: Oxford University Press, 1997) at 86 *et seq.*

36 See e.g. Noam Chomsky, *Profits Over People: Neoliberalism and Global Order* (New York: Seven Stories Press, 1999).

economic change and the transition costs it entails.[37] While these are legitimate concerns, the facts largely belie the claim that economic globalization has to date had major deleterious effects on the welfare state in most developed countries.[38] Data show social expenditures in fact increasing or at worst remaining constant as a percentage of GNP in most OECD countries, and tax levels rising in most of these countries. In 2000, average general government receipts as a percentage of GDP in the OECD and the G7 exceeded forty per cent, up from 1990.[39] Additionally, data show a dramatic increase in social regulation (environmental, health and safety, human rights, and employment regulation) in most of these countries over the past three decades, in part reflecting the fact that a cleaner environment and greater safety are normal economic goods, the demand for which rises with increasing prosperity, itself in part engendered by greater international trade.[40] Thus, there is no evidence to date of any significant contraction in the scale of the welfare state in most developed countries.

Although the critics' arguments have been largely negated by empirical evidence, it is questionable whether even a finding of empirical correlation would have bolstered their arguments regarding a causal relationship between globalization and domestic income inequality. This is because at a fundamental level globalization is about wealth generation. Producing goods and supplying services across national boundaries allows comparative advantages of trading partners to decrease the overall cost of supplying all parties to a transaction with desired products. However, once the wealth is generated globalization does not necessarily dictate how that wealth is distributed within nations. Although economic conditions may create a predilection for benefiting a particular group (for instance, capital holders may benefit proportionately more if a country specializes in capital-intensive goods, or on the contrary, labor may benefit relatively more if demand for it rises), perhaps the most economically important action of governments has been to redistribute wealth according to broader policy considerations. Consequently, to the extent that a correlation between globalization and inequality existed, it is unclear whether it should be attributed to the causal effects of globalization, or more simply the lack

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37 See Rodrik, *Globalization*, *supra* note 29; Robert Reich, *The Work of Nations* (New York: N.Y. Vintage, 1991) c. 25.

38 See William Watson, *Globalization and the Meaning of Canadian Life* (Toronto: University of Toronto Press, 1998).

39 'Globalisation and its critics' *The Economist* (29 September 2001) 4. See also LeGrain, *supra* note 3 at 161-4.

40 'Survey of the World Economy' *The Economist* (20 September 1997); Michael Trebilcock, 'The Choice of Governing Instrument: A Retrospective' [forthcoming in 2005].

of appropriate redistribution mechanisms at the state level. The same state can globalize with vastly different effects on domestic income inequality, depending on the redistributive mechanisms it employs. The analysis extends to the arguments of the anti-globalization critics regarding the disproportionate costs of globalization borne by certain segments of society. To the extent this is true, as has been argued vehemently by the left in America, the supposed plight of those negatively affected has less to do with globalization than it does with a conscious decision not redistribute the gains from globalization to the affected parties. On the other hand, the experience of a number of the High Performance Asian Economies suggests that government policies to redistribute wealth can markedly decrease levels of inequality. The merits of such policies are, at least to some degree, separate from the issue of whether globalization gives a society more resources with which to make distribution choices, which it undoubtedly does. This is merely a reflection of the fact that globalization is not *Pareto*-efficient (where *everybody* is made better-off), but is *Kaldor-Hicks*-efficient (in that the winners could compensate the losers and still be better off).

In summary, the empirical evidence suggests that open economies tend to grow faster than closed economies; that within-country inequalities have generally not been increasing substantially; that global income inequalities measured on a population basis have been declining; that absolute levels of poverty have been declining sharply measured as a percentage of the world's population and more modestly in terms of absolute numbers (reflecting population growth), but that between-country inequalities have been rising sharply, suggesting that many developing countries have become increasingly marginalized in the international economy (raising important questions of domestic governance and remaining external barriers to their effective participation in global trade and investment).

CLAIM 3: TRADE LIBERALIZATION TRUMPS ENVIRONMENTAL, HEALTH AND SAFETY CONCERNS

There are two strands to the argument that trade liberalization adversely impacts environmental, health and safety concerns. According to the first, growth in international trade generally is harmful to the environment. The second strand asserts that, under the WTO dispute settlement system, trade liberalization takes precedence over environmental, health and safety concerns.

Philippe LeGrain[41] argues that the impact of trade liberalization on the environment depends on the balance of five factors. First, comparative advantage will lead to some countries attracting more

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[41] LeGrain, *supra* note 3 at 243-6.

environmentally damaging industries than others. Second, environmentally friendly technology will become more widely available. Third, economic growth resulting from trade will lead to increased environmental strain unless production methods change. Fourth, demand for a cleaner environment will increase when people become wealthier. Fifth, countries may or may not choose to lower environmental standards to attract foreign investment. Alan Krueger and Gene Grossman[42] find that while growth is initially harmful to the environment, this effect generally begins to reverse itself as countries get richer (the so-called Kuznets curve). Furthermore, evidence suggests that trade liberalization can pay for the damage it causes, because the gains from trade far exceed the cost of paying for or redressing resultant environmental damage.[43] More generally, the empirical evidence suggests that closer economic integration tends to lead to a ratcheting up of environmental and health and safety standards.[44]

Evidence suggests that fears of an environmental 'race to the bottom', whereby environmental standards decline to attract investment, are generally unfounded. David Wheeler[45] examined pollution levels in the United States and China, Brazil, and Mexico, the three developing countries receiving the most foreign direct investment during the 1990s, and found that in each case particulate pollution is declining. He then draws on empirical evidence to show why the 'race to the bottom' has not materialized. Specifically, studies show that pollution control costs are often not high, regardless of a county's income, and consequently do not provide firms with a strong incentive to relocate due to environmental factors. Also, where there is not strong regulation, local communities use other mechanisms, such as negotiation or forms of protest, to ensure that factories meet

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42 Gene M. Grossman & Alan B. Krueger, 'Economic Growth and the Environment' National Bureau of Economic Research, NBER Working Paper W4634 (February 1994), cited in LeGrain, *supra* note 3 at 245. See also Jeffrey A. Frankel & Andrew K. Rose, 'Is Trade Good or Bad for the Environment? Sorting Out the Causality' (NBER Working Paper W9201, September 20 2002), online: <http://ssrn.com/abstract=332245>, which indicates that generally growth hurts the environment at low income levels, helps it at high income levels, and that trade openness accelerates growth.

43 See M.A. Cole, A.I. Rayner & J.M. Bates, 'Trade Liberalization and the Environment: The Case of the Uruguay Round' (1998) 21 World Economy 337, cited in LeGrain, *supra* note 3 at 245-6; see also Irwin, *supra* note 3 at 48-54.

44 David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Cambridge, Mass.: Harvard University Press, 1995).

45 David Wheeler, 'Racing to the Bottom? Foreign Investment and Air Pollution in Developing Countries' (World Bank Policy Research Paper 2524, January 2001).

environmental standards or to extract compensation for environmental degradation. Additional pressure may be brought by environmentally conscious consumers or financial institutions who want to avoid possible liability. Evidence also indicates that investors' reactions to environmental news impact stock value. Consequently, there is a powerful incentive for multinational companies to abide by OECD environmental standards globally. Finally, environmental regulation improves as a country's income increases. Wheeler qualifies his criticism of the 'race to the bottom' theory with three points: severe short-term pollution in some areas is still possible, information asymmetries may prevent effective environmental controls, and it is likely that average pollution intensity (emissions/output) will initially increase as the industrial production in developing countries rises relative to that in developed countries. Wheeler argues that trade sanctions are not the most effective way to avoid or mitigate the impact of these pitfalls because sanctions impact companies that are environmentally friendly as well as those that are not, they put jobs at risk, and many developing countries are incapable of meeting high environmental standards.

Wheeler and some other trade scholars[46] oppose the use of trade sanctions against countries with low environmental standards, in cases where these standards entail cross-border pollution or threaten the global environmental commons. I believe that there is a limited role for such sanctions in internalizing the costs of these externalities and inducing international co-operation on appropriate collective measures and compliance therewith, provided that trade sanctions in this context are not a disguised form of protectionism and do not discriminate among countries where the same conditions prevail (as required by Article XX of the GATT).[47]

In evaluating the claim that trade liberalization trumps environmental, health and safety concerns in the WTO dispute settlement system, it is important to emphasize that only a handful of cases have come before the WTO's Dispute Settlement Body that implicate environmental or health and safety concerns.[48] Furthermore, some of the cases with respect to which critics allege that the WTO disregarded environmental or health and safety concerns actually involved disguised protectionism or gratuitous restrictions on trade. By way of context, it is important to note that by virtue of successive

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46 Jagdish Bhagwati, *Free Trade Today* (Princeton: Princeton University Press, 2002); Irwin, *supra* note 3 at 191-204.

47 See Michael Trebilcock & Robert Howse, *The Regulation of International Trade*, 3rd ed. (London: Routledge, 2005) c. 16 [Trebilcock & Howse].

48 *Ibid.* at cc. 7, 16.

rounds of GATT negotiations, tariffs have now been reduced to zero or trivial proportions in many sectors (down from over forty per cent in 1947 to less than five per cent on average currently), so that remaining barriers to trade are often internal regulatory measures of Member states. The WTO is necessarily seized with the task of determining when a regulation genuinely serves an environmental or heath and safety purpose, or when, on the other hand, it is a disguised restriction on trade where a complainant country formally complains of its adverse trade effects. Julie Soloway, in detailed case studies of informal disputes in these areas in the three NAFTA countries concludes that perhaps as many as twenty-four of the twenty-five cases of environmental or health safety regulation that she studied yielded no consumer welfare benefits but were merely disguised forms of protectionism.[49]Even if this assessment is unduly harsh, it suggests that this is not an imaginary problem.

The *Reformulated Gasoline*[50] case involved regulations under the United States *Clean Air Act* that entailed the progressive removal of pollutants from gasoline but imposed laxer (plant-specific) base starting points on United States gasoline refiners than refiners in Venezuela and Brazil exporting gasoline to the United States. The WTO Appellate Body held that there was no basis for differential treatment. In the *Thai Cigarette*[51] case, a ban on imported cigarettes, not accompanied by any ban on domestically produced cigarettes, was held to be discriminatory and an unjustifiable restriction on trade. In the two *Tuna/Dolphin*[52] cases decided by WTO panels before the creation of the WTO Appellate Body as a result of the Uruguay Round Agreement, the environmental community has more cause for criticism in that the panels ruled on narrow and unjustifiable grounds that an import ban on tuna caught by fishing methods that killed or maimed dolphin was unjustifiable because it was directed to environmental concerns outside the territorial jurisdiction of the United States or was predicated on changing another country's environmental policies. However, critics of the WTO often fail to note that the Appellate Body in the subsequent *Shrimp/Turtles*[53]

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49 Julie Soloway, *Institutional Capacity to Constrain Suboptimal Welfare Outcomes From Trade-Restricting Environmental, Health and Safety Regulation Under NAFTA* (SJD Thesis, University of Toronto Faculty of Law 1999) [unpublished].

50 *United States—Standards for Reformulated and Conventional Gasoline* (1996), WTO Doc. WT/DS2/AB/R (Appellate Body Report).

51 *Thailand—Restrictions on importation of and internal taxes on cigarettes* (1990), WTO Doc. BISD 37S/200 (GATT, Panel Report,)

52 *United States—Prohibition of Imports of Tuna and Tuna Products from Canada* (1982), GATT Doc. L/5198, B.I.S.D. 29S/91; *United States—Restrictions on Imports of Tuna* (1991), GATT Doc. DS21/R, B.I.S.D. 39S/155 (unadopted).

53 *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (1998),

case, in effect, overruled the two panel decisions in the earlier *Tuna/Dolphin* cases and held that there was no territorial constraint on a country adopting environmentally-related trade measures in response to another country's environmental policies (in this case shrimp fishing techniques that killed or maimed a particular species of sea turtle that was an endangered species under the *Convention on International Trade in Endangered Species*, or CITES). However, the United States was found by the Appellate Body to be in breach of its GATT obligations in that it had negotiated exemptions with some foreign countries and not with others from the ban on shrimp imports but there was no rational relationship between these exemptions and whether countries did or did not maintain safeguards against shrimp fishing techniques that endangered sea turtles. Thus, the United States had acted in an arbitrary and discriminatory fashion. The United States later revised its guidelines for certifying shrimp imports and the Appellate Body then found the United States in compliance with WTO and GATT rules.[54]

In the *Beef Hormones*[55] case, the European Union ban on the sale or importation of beef that had been reared on certain growth hormones was struck down both by the panel and the Appellate Body because it was not based on a risk assessment as required by the WTO *Agreement on Sanitary and Phytosanitary Standards* (SPS). Alternatively, if the ban was based on a risk assessment, the available risk assessments at the time that the ban was adopted all indicated that there were no ascertainable risks to human health from this product. Similarly, in the *Japanese Agriculture*[56] case, where imports of various fruits from the United States and elsewhere were banned because of a concern that they could spread disease through codling moth unless they met various stringent border tests, both the panel and the Appellate Body found that these border requirements were based on no risk assessment at all and were thus in violation of the SPS Agreement. In the *Australian Salmon*[57] case, a ban on the importation of fresh, chilled or frozen salmon was found to violate the SPS Agreement both because the ban was based on no risk assessment at all and because, inconsistently, it allowed imports of other kinds of fresh, chilled or frozen fish that presented at least as

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WTO Doc. WT/DS58/AB/R (Appellate Body Report).

54 *United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia* (2001), WTO Doc. WT/DS58/AB/RW (Appellate Body Report).

55 *EC Measures Concerning Meat and Meat Products (Hormones)* (1998), WTO Docs. WT/DS26/AB/R and WT/DS48/AB/R (Appellate Body Report).

56 *Japan—Measures Affecting Agricultural Products* (1999), WTO Doc. WT/DS76/AB/R (Appellate Body Report).

57 *Australia—Measures Affecting Importation of Salmon* (1998), WTO Doc. WT/DS18/AB/R (Appellate Body Report).

high a risk of spreading disease. Finally, in the *French Asbestos*[58] case, a broad asbestos ban including a ban on imports of asbestos and products containing asbestos was upheld by a WTO Panel and the Appellate Body on health and safety grounds.

Thus, with the exception of the two *Tuna/Dolphin* cases (in effect, subsequently overruled by the Appellate Body), all of these decisions by the WTO's Dispute Settlement Body seem to be sensible and restrained, unless one believes that the WTO and its Members should give up entirely on the task of attempting to screen out disguised forms of regulatory protectionism.

The WTO *Trade-Related Intellectual Property Rights Agreement* (TRIPS), as originally negotiated during the Uruguay Round, raises more legitimate concerns relating to the impact of trade rules on health and safety. By requiring all members of the WTO to implement Western standards of Intellectual Property Protection (with some important qualifications), developing countries faced the prospect of paying Western prices for patented drugs (for example, for treatment of AIDS), effectively denying most of their citizens access to these drugs. However, the subsequent Ministerial Declaration at the outset of the Doha Round in November 2001 clarifying the scope of the exceptions to TRIPS, and then an agreement in August 2003 to amend TRIPS to facilitate export of generic drugs to developing countries lacking their own manufacturing capacity, have at least partly redressed these concerns.[59]

CLAIM 4: TRADE LIBERALIZATION ADVERSELY IMPACTS LABOUR STANDARDS AND HUMAN RIGHTS

Some critics of trade liberalization argue that increasing international competition leads to a race to the bottom in terms of human rights and labour standards. However, evidence indicates that trade liberalization generally promotes human rights. Alan Sykes[60] points out that since there is general agreement that trade promotes growth, and human rights are likely income elastic, trade liberalization can provide a country with the means to support human rights. Further, liberalization spreads ideas and may introduce human rights concepts to people who would not otherwise be aware of them Turning to the empirical data, Sykes finds that richer countries have better economic, political, and

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58 *European Communities—Measures Affecting Asbestos and Asbestos-Containing* Products (2001), WTO Doc. WT/DS135/AB/R (Appellate Body Report).

59 See Trebilcock & Howse, *supra* note 47, c. 13.

60 Alan Sykes, 'International Trade and Human Rights: An Economic Perspective' (John M. Olin Law and Economics Working Paper No. 188 (2nd Series), University of Chicago).

civil rights, suggesting 'policies which promote real income growth will also tend to promote human rights across a broad range of concerns.'[61] Although Sykes acknowledges that he only examines correlation, not causation, he empathizes that the available evidence does not suggest that liberal trade adversely impacts human rights on a systemic level. Indeed, more generally, over the past three decades, there has been a large increase in the number of countries that have replaced authoritarian or autocratic regimes with democratic regimes.[62] Similarly, there is no empirical evidence to support the claim that trade liberalization leads to a general ratcheting down of labour standards in either developed or developing countries.[63]

That is not to say that human rights abuses (or violation of core labour standards analogous to human rights)[64] should be ignored based on the argument that some day a poor country will be wealthy enough to uphold human rights on its own. In the case of violations of basic or universal human rights, particularly extreme cases such as war crimes, apartheid, genocide, torture, or forced labour, it seems indefensible to exclude trade sanctions as a possible policy instrument (perhaps under the 'public morals' exception of Article XX of the GATT).[65] In terms of the WTO approach to trade sanctions in such cases, again it is important to ensure that the measures are not discriminatory restrictions on trade or disguised protectionism.[66] In my view, this should not require that countries apply sanctions to all, or none, of the countries engaged in universal human rights violations—this would make the perfect the enemy of the good. The problem of 'under-reach' should be left to organizations other than the WTO, such as the ILO, or United Nations Human Rights committees. However, the WTO should address cases of 'over-reach' where sanctions on one industry and not another seem principally attributable to the fact that the imposing country has an industry to protect in the former case but not in the latter.

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61 *Ibid*. at 8.

62 'Survey on Capitalism and Democracy', *supra* note 22 at 5-6.

63 See Trebilcock & Howse, *supra* note 47, c. 17.

64 For example, the ILO's 1998 *Declaration of Fundamental Principles and Rights at Work* enumerates four core international labour standards which are defined more fully in eight background Covenants that are encorporated by reference, i.e. freedom of association and collective bargaining, the elimination of forced labour, the elimination of child labour, and the elimination of discrimination in employment.

65 See also Lorand Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights' (2002) 36 Journal of World Trade 353; Sarah H. Cleveland, 'Human Rights Sanctions and International Trade: A Theory of Compatibility' (2002) 5 J. Int'l Econ. L. 133.

66 See Trebilcock & Howse, *supra* note 47, c. 17.

CLAIM 5: SELF-SUFFICIENCY IS PREFERABLE TO DEPENDENCY[67]

Proponents of self-sufficiency believe in protecting local production of food staples, arguing that local production supports jobs, builds community, and protects national food security[68] and argue that trade liberalization is putting all these at risk.

There are several responses to this argument. First, what distinguishes food production from other necessities, such as clothing, footwear, pharmaceuticals, automobiles and steel? Second, what distinguishes self-sufficiency at the national level from self-sufficiency at the state, local, or family level? Clearly the United States ought not demand that Texas diversify to produce wine, or that Michigan and Kansas diversify to produce citrus fruit. If each member state of the European Union aspired to be self-sufficient in food, this would fundamentally contradict the entire European economic integration enterprise. Furthermore, few people would advocate family self-sufficiency so that each family produces all its own food (and other requirements), returning us all to members of hunter-gatherer or peasant societies. Third, even adopting a national perspective and focusing on food, it would be surprising if the social pathologies said to be afflicting the agricultural sector are due to international trade. Agriculture has been and remains the most protected bastion in the international economy. Protectionism is the problem, not trade liberalization. The empirical evidence suggests that agricultural protectionism in the United States, Western Europe, and Japan entails average costs of over a thousand dollars per household per year for the countries concerned—a large and regressive hidden 'tax' on ordinary consumers of basic staples.[69] Apart from these costs to consumers, it is agricultural protectionism, not liberalization, that has promoted environmentally damaging excessive mono-cropping and use of fertilizers and irrigation, as most starkly exemplified by the European Union's Common Agricultural Policy, which over the post-war years has turned Europe from the largest importer of temperature zone agricultural products into the second largest exporter, and accounts for nearly half of the European Union budget.[70] Moreover, it is important to remember that

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67 See LeGrain, *supra* note 3 at 211-35.

68 See e.g. Franz Fischler, 'Scrap CAP? Think Twice!' *Wall Street Journal Europe* (20 July 2000); Colin Hines, *Localisation: A Global Manifesto* (London: Earthscan, 2000); Caroline Lucas & Colin Hines, *Stopping the Great Food Swap—Relocalising Europe's Food Supply* (Brussels: The Greens, 2001); all cited in LeGrain, *supra* note 3 at 343.

69 OECD, *Agricultural Policies in OECD Countries: Monitoring and Evaluation, 2001* (2001).

70 'CAP it all—Reforms to the CAP are Not Serious Enough' *The Economist* (28 June 2003).

there are communities and farming families on both sides of the trade equation. For developing countries with a comparative advantage in food production, developed countries' emphasis on self-sufficiency is viewed as an excuse for protectionism that prevents developing countries from fully realizing their growth potential by denying them effective market access for their exports. The case for agricultural protectionism on national security grounds—that we cannot risk being held hostage by potential enemies in war-time for basic necessities of life—is also uncompelling. Greater economic interdependency with respect to essential products is likely to reduce the risk of war—the primary historical rationale for the creation of the European Community. The emphasis on self-sufficiency also fails to recognize that globalization may have the effect of diversifying dependencies, thereby reducing them. Since no country could reasonably supply all of its economic needs domestically, some reliance on foreigners is inevitable. Economic integration can reduce exposure to any one foreign party by facilitating global competition, thereby allowing great diversification in the sourcing of products.

CLAIM 6: THE WTO IS AN UNDEMOCRATIC AND UNACCOUNTABLE FORM OF GLOBAL GOVERNMENT THAT IMPROPERLY CONSTRAINS DOMESTIC POLITICAL SOVEREIGNTY[71]

Every international treaty, whether it pertains to nuclear disarmament or nuclear non-proliferation, land-mines, human rights, war crimes, the law of the sea, or the environment, to the extent that the commitments made by signatory states therein are effectively binding, necessarily constrains domestic political sovereignty. This is the price of a world where nations collectively agree to cooperatively address issues that entail ramifications beyond their exclusive territories. In the case of the WTO, all Member states have voluntarily assumed their obligations, representing the quintessential form of government with the consent of the governed. All member states (now 148) have one vote from the smallest to the largest, and all major decisions are in principle taken on a consensus basis, although I acknowledge that influence has in fact been wielded unequally, especially by members of the Triad (the United States, the European Union, and Japan), for example, through 'Green Room' meetings to close multilateral negotiating rounds. The emergence of an effective group of twenty-one developing countries at the Cancun ministerial meetings of the GATT in September 2003 suggests that this may be changing.

Members have also agreed that in order for these commitments to be effectively enforceable, neutral third parties shall adjudicate

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[71] See also LeGrain, *supra* note 3 at 174-210.

disputes between Members regarding alleged violations of commitments. This process of adjudication initially took the form of diplomatic conciliation but has since evolved increasingly in the direction of formal legal adjudication. The roster of panelists from whom panels are drawn in particular cases must be approved by consensus of all Members. The seven members comprising the Appellate Body constituted as a result of the Uruguay Round to hear appeals from panel decisions must also be approved by consensus of all Members. In the event of a Member state failing to comply with a decision of a panel or Appellate Body, if adopted by the General Council of the WTO, now applying a negative consensus rule (only a consensus of all Members favouring rejection leads to non-adoption), retaliation by the aggrieved party may be authorized by the Council against the non-compliant party in the form of trade sanctions. This system has worked remarkably well over the decades in ensuring a relatively high level of compliance with decisions by panels and more recently the Appellate Body.

However, some criticisms of the WTO's dispute settlement process are warranted.[72] Reflecting perhaps the diplomatic origins of dispute settlement under the GATT, the closed, non-transparent nature of current dispute settlement processes is inconsistent with a fully elaborated international rule of law. In particular, initial and subsequent written submissions of disputing parties should be made publicly available, with exceptions for confidential information, at the time that they are filed with the Dispute Settlement Body (DSB), and the oral hearing component of the process should equally be open to the public with provision for *in camera* hearings for confidential information. In addition, non-governmental parties, including non-governmental organizations, affected business firms, and trade associations, should have limited rights of standing as intervenors or *amicus curiae* in dispute settlement proceedings, as third country governments already do, at least to the extent that they are permitted to file short written submissions and respond briefly to any questions from members of the panel or Appellate Body in the oral proceedings by way of clarifying or elaborating on their written submissions. Permitting private parties to

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[72] See Robert Howse & Kalypso Nicolaidis, 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?' in Marco Verweij & Tim Josling, eds., (2003) 16:1 Governance: Special Issue: Deliberately Democratizing Multilateral Organization 73; Jeffery Atik, 'Democratizing the WTO' (2001) 33 Geo. Wash. Int'l L. Rev. 451, online: <http://ssrn.com/abstract=250331>; J.H.H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (Harvard Jean Monnet Working Paper No. 9/00, Cambridge Mass., 2001), online: Jean Monnet Program http://www.jeanmonnetprogram.org/papers/00/00901.html, especially c.4.

initiate complaints before the WTO Dispute Settlement Body raises a host of much more complex questions, including the capacity of the dispute settlement process to handle a much higher volume of complaints, the potential for strategic abuse of the process by competitors, and the possibility that private firms or trade associations will exploit their ability to challenge domestic environmental and health and safety regulations. Thus, the dispute settlement process should remain, for the present time, a state-driven process, with provision for *amicus* briefs, which are likely to be a particularly important legitimating mechanism in 'trade and' disputes involving major public policy issues.

With respect to the criticism that panelists and Appellate Body members lack expertise or sensitivity in matters relating to environmental, health and safety, labour, and human rights issues, it bears pointing out that the quasi-judicial review role played by the DSB is not markedly different from the judicial review role played by all-purpose courts with respect to specialized agency decisions in domestic administrative law and calls for a similar degree of substantial, but not complete, deference—in effect by requiring some minimum level of rationality in agency decision-making where disparate impacts on foreign suppliers are entailed. The Appellate Body in *Beef Hormones, Shrimp/Turtles*, and *Australian Salmon* has largely adopted this perspective by, for example, recognizing that a respondent need not undertake its own risk assessment but may base its measures on others' risk assessments; by accepting that it is sufficient that the risk assessment is supported by a respectable minority of scientists; and by applying a very narrow consistency requirement across regulations dealing with similar risks. In many respects, the Appellate Body's approach resembles the proportionality test adopted in Canadian Charter jurisprudence. Moreover, under the rules governing the dispute settlement process both in general and in specific contexts such as the SPS Agreement, panels may appoint individual scientific advisors or advisory groups of scientific advisors and have sometimes done so, although they should do so more systematically. In similar vein, panels and the Appellate Body in disputes implicating environmental, health and safety, labour, and human rights issues should be more proactive in seeking the advice of other international agencies with major mandates in these areas, where these exist. Again, WTO Policy Committees, such as the Committee on Trade and the Environment, should be open to submissions by non-governmental organizations and other interested private parties.

Claims that the WTO is undemocratic in the negotiating processes that give rise to trade agreements and obligations should be directed at Member states policy-making processes, not at the WTO as an institution. Here, indeed, there may well be room for improvements. Trade treaties, often negotiated over protracted periods of time and over a very wide range of complex issues, often involve delicate political

trade-offs across issues. Once an agreement has been reached, while ratification or implementation may require legislative action in Member countries, this cannot realistically entail picking and choosing among various elements of the agreement without serious risk of the entire agreement and the negotiating processes that led up to it completely unravelling (as recognized in United States 'fast track' approval processes), rendering ratification or implementation actions an imperfect form of democratic accountability. Thus, in terms of public input into the negotiating positions taken by Member states and revisions to these positions and trade-offs across issues as negotiations proceed, the negotiating positions of Member states in future will need to be more open to public scrutiny and input than in the past. In Canada, in past trade negotiations, a large number of industry-specific advisory groups have been constituted by the Canadian government to advise it during the negotiating process, but these groups are not inclusive of all relevant constituencies. However, negotiations themselves cannot realistically be extended beyond government representatives to a host of non-governmental and private sector actors from all over the world without reducing the process to total functional paralysis. Thus, while representatives of governments should remain the chief negotiators, this should not exempt them from being more pro-active and imaginative in structuring an appropriately inclusive domestic consultative process during negotiations. This imperative also has application to the development of government positions in dispute resolution proceedings and WTO Policy Committee deliberations. But, to restate the principal point, this is not a concern that the WTO as an institution for the most part can resolve, but a concern that interested groups and citizens must resolve within their own political communities. That is to say, democratic decision-making begins at home, not in Geneva.

CONCLUSIONS

In critical respects I would argue that the problem with economic globalization is that it has not gone far enough. Major barriers to trade remain in key sectors of export interest to developing countries such as agriculture and textiles and clothing, and trade remedy actions (antidumping, countervail, and safeguards) have proliferated (often directed at developing countries), in many cases replacing prior tariffs. Indeed, tariffs facing developing country exports to high-income countries are, on average, four times those facing industrial country exports for manufactured goods and much higher again for agricultural products. Agricultural subsidies in developed countries further restrict effective market access by developing countries.[73] Economic estimates

[73] World Bank, *World Development Report (WDR) 2000/2001: Attacking Poverty*

have found that the costs of protection inflicted on developing countries by developed countries negate most or all of the entire value of foreign aid in recent years.[74]

More importantly, in contrast with the data on growth in international trade in goods and services and in foreign direct investment cited at the outset of this paper, the annual growth rate in the number of immigrants worldwide (international movement of people) between 1965 and 2000 was only 1.77 per cent, which does not differ significantly from the rate of growth in world population of approximately 1.72 per cent annually over the same period. In fact, the proportion of the world's population that is made up of migrants has actually decreased since 1965 from 2.4 per cent to 1.97 per cent.[75] Although trade and investment are in some cases substitutes for immigration, in other cases they are complements, thus suggesting that at least in part these contrasts are explicable by reference to the much more restrictive nature of most countries' immigration policies. Bob Hamilton and John Whalley have estimated that the elimination of global restrictions on labor mobility could result in a net doubling of worldwide annual Gross National Product.[76] Less sanguine assumptions result in estimated gains that are still highly significant from the perspective of global economic welfare and far exceed the gains from further trade liberalization.[77] In addition, Hamilton and Whalley report that complete immigration policy liberalization would engender a dramatically fairer distribution of world income.[78] Jeffrey Williamson also finds that the great immigration waves of the past from the Old World to the New World were also associated with dramatic equalizing tendencies.[79] The full efficiency and equity potential of globalization will not be realized until we embrace the so-called 'Fourth Freedom' as strongly as we have embraced the first three freedoms (international movement of goods, services, and capital).[80] The anti-globalists might more constructively re-direct their energies to this politically challenging objective.

(2001) at 180.

74 *Ibid*.

75 International Labour Organization, 'World Migration Tops 120 Million Says ILO: 67 Countries Are Now Major Receivers of Immigrants' (2000), online: <http://www.ilo.org/public/english/bureau/inf/pr/2000.htm>.

76 See Bob Hamilton & John Whalley, 'Efficiency and Distributional Implications of Global Restrictions on Labour Mobility: Calculations and Policy Implications' (1984) 14 Journal of Development Economics 61.

77 'Survey: The Longest Journey' *The Economist* (2 November 2002) 3.

78 See Hamilton & Whalley, *supra* note 77 at 73-4.

79 Williamson, *supra* note 19; see also Wolf, *supra* note 3 at 85-7, 116-17.

80 See Michael Trebilcock, 'The Law and Economics of Immigration Policy' (2003) 5 American Law and Economics Review 271.

When You Come to a Fork in the Road, Take it Reflections on North American Integration: Regional and Multilateral

SYLVIA OSTRY*

INTRODUCTION

The title of this article was coined by the great American philosopher Yogi Berra. There are many roads that lead to greater economic integration or ever-tighter linkages among countries. Globalization is, indeed, an ongoing process of deepening integration fed by trade, financial flows, direct investment, production networks and increasingly by the technological revolution in information and communication. So it is not necessary to choose one route in, for example, trade policy. In the Western Hemisphere bilateral, regional and multilateral policies are all being pursued. Moreover, there are many facets of integration that go beyond economic linkage but we tend to think mainly of trade and investment as primary and pay far less attention to other avenues.

In this article I shall begin with a brief tour d'horizon of the multilateral landscape. This is, of course, a vast and complex subject and I intend to be selective and to highlight the main issues related to hemispheric integration. In doing so it is important to deal with the American strategy of 'competitive liberalization' past and present,[1] as well as the 'new geography' of global trade. I will then seek to explore a different idea or concept of integration and to propose some possible options for extending and deepening the linkages among countries and peoples in this hemisphere.

I DOHA, CANCUN, AND THE NEW GEOGRAPHY

The Uruguay Round marked a fundamental transformation of the multilateral trading system from the shallow integration of the General Agreement on Tariffs and Trade (GATT), with its focus on border barriers and its rules to buffer or interface between international and domestic policy, to a system of deepening integration with a primary focus inside the border on domestic regulatory and legal institutional

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* Distinguished Research Fellow, Munk Centre for International Studies, University of Toronto.

1 The term is used for a policy strategy that employs bilateral or regional agreements to encourage broader or multilateral liberalization. See Sylvia Ostry 'Regional Dominoes and the WTO: Building Blocks or Boomerang?' (Fraser Institute Conference, Toronto, November 1999), online: <http://www.utoronto.ca/cis/ostry.html>. For a recent version see C. Fred Bergsten & Institute for International Economics, *The United States and the World Economy: Foreign Economic Policy for the Next Decade* (Washington, DC: Institute for International Economics, 2005) at 35.

infrastructure

The implicit Grand Bargain that concluded the negotiations—the North to open their markets for agriculture and labour intensive products, especially textiles and clothing to the South, and the South to accept the so-called new issues of trade in services, trade-related intellectual property (TRIPS), and trade-related investment measures (TRIMs)—turned out to be a Bum Deal. Also, as virtually a last minute piece of the deal, the creation of a new institution, the World Trade Organization (WTO), with the strongest dispute settlement mechanism in the history of international law and virtually no executive or legislative authority. Since the WTO consisted of a 'single undertaking' the deal was pretty much take it or leave it for the Southern countries. So they took it but, it's safe to say, without a full comprehension of the profoundly transformative implication of the new system (an incomprehension shared by the Northern negotiators as well, I might add).

There were a number of significant unintended consequences of the Round. The most important was a serious North-South divide in the WTO. While the South is hardly homogenous there is a broad consensus that the system is asymmetric and must be rebalanced. The debacle of Seattle in 1999 ended in a walkout of virtually all developing countries. It's more than symbolic that the outcome of the Doha Ministerial Meeting in 2001 was termed a 'development agenda' and not a round. The main objective of the Doha meeting was to avoid another Seattle. Thus its great success was that it didn't fail. Both the United States and the European Union visited Africa and the Declaration repeatedly refers to technical assistance and capacity-building. Pushed by the successful non-governmental organization campaign about AIDS in Africa the Americans even seemed willing to antagonize Big Pharma. So Doha was unique in its focus on the South and on development.

But Doha included many other agenda items, especially, of course, agriculture. And, at the insistence of the European Union, the so-called Singapore issues of competition policy, investment, government procurement and trade facilitation. The Doha negotiations went nowhere. All deadlines were missed and there was no progress on key issues, especially agriculture. The ambiguous drafting was too clever by half. And that brings us to Cancun in September 2003.

I was at Cancun and when the meeting ended so abruptly I was swept by a strong sense of *déjà vu* all over again. Cancun was a mid-term Ministerial meeting as was Montreal in the Uruguay Round in 1988. On the last morning of the Montreal meeting around six a.m. the bleary-eyed negotiators were waiting for the United States and European Union warriors who had been up all night dealing with agriculture. When they arrived they announced that it was too bad but they hadn't

reached an agreement so we should tidy up the agenda items and finish the *communiqué*. A group of Latin Americans headed by Brazil said 'no': no agriculture, no agreement on anything. It was a moment of shock but was handled with great finesse by announcing that the meeting was adjourned and would be reconvened shortly in Geneva. No big headlines ensued.

In any case my *déjà vu* feeling soon dissipated. The North-South divide had taken a different shape. There appeared to be an axial shift in the political economy of policy-making that would require a fundamental reorientation of the players and the game. Two new coalitions of Southern countries were formed at Cancun. One, termed the G20, led by Brazil and India as well as China (the Big Three) and South Africa included a number of Latin American countries. Its main focus at Cancun was agriculture, catalyzed by an unacceptable draft proposal from the United States and European Union. The G20 seemed an unlikely coalition since it included countries with varying views on economic policy and, indeed, on agriculture. But it didn't collapse under pressure at Cancun and, despite losing members because of American bilateral pressure, it has survived thus far. It appears to be reaching out to the least developed countries (LDCs) to coordinate positions on agriculture and perhaps other issues.[2] And it or its leader, Brazil, has succeeded in challenging the Free Trade Agreement of the Americas to the chagrin of the United States. And India and China are now exploring a free trade agreement as well as a number of other preferential arrangements.

The G20 was very active at the UNCTAD XI meeting at Sao Paulo in June 2004 and, indeed, at that meeting a South-South Round of negotiations was launched under special provisions of the original GATT in which developing countries provide trade preferences for products from other developing countries. This was underlined as another example of the 'new geography' of the trading system by UNCTAD head Rubens Ricupero and the Brazilian president Luiz Inacio Lula da Silva.

Indeed the new geography was evident at Cancun in the formation of another coalition—the G90. This included the poorest developing countries, mainly from Africa. After failing to convince the United States to eliminate cotton subsidies to help the poverty-stricken African exporters and to persuade the European Union to remove the

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[2] G20 Ministerial Meeting, Delhi, 18–19 March 2005. The meeting was attended by the coordinators of the Africa Group, ACP countries, CARICOM, and Least Developed Countries (LDCs). See 'G20 Ministerial Meeting Ends with Declaration' TWN Info Service on WTO and Trade Issues (21 March 2005), online: Third World Network <http://www.twnside.org.sg/title2/ twninfo190.htm>.

Singapore issues from the agenda, the G90 terminated the negotiations. It's important to note that at Cancun non-governmental organizations played a prominent role with respect to the G90. African non-governmental organizations were included in many official delegations and they provided ongoing information as well as research and policy analysis. They had regular briefing sessions from officials and Ministers.[3] As noted earlier, they (plus some Northern non-governmental organizations) could be described as a virtual secretariat launched by the internet. But unfortunately there's not enough information to explore this important development in more depth.[4]

The formation of Southern coalitions will undoubtedly change the dynamics of the Doha negotiations, especially but not only on agriculture. The G20 was actively engaged in the bargaining over a 'framework' agreement (a broad outline with minimal detail), which was agreed by all-night bargaining at the end of July before the 2004 summer break. This allowed the negotiations to start again after the United States election and perhaps be concluded, one hopes, just a year later than the target date set at Doha. But there won't be another Blair House deal by the Big Two that sealed the Uruguay Round without the Big Three and perhaps the G90 as well. Indeed splits between the G90 and other developing countries are being encouraged by the rich countries. The geography certainly makes trade policy more complex! Both the United States and the European Union are using bilateralism and other policy instruments to weaken the G20 and provoke conflict with the G90. And of course the new geography is not confined to trade. A shift in the 'balance of power' is underway and, as was the case in the nineteenth century, the response will spur changes in both domestic and external efforts. But that's another story.[5] Back to trade!

The story of the new geography has just begun and its evolution is fraught with uncertainty. Yet clearly the nice, neat concept of regional integration is getting more messy and more complex. Added to the already existing coalitions in the negotiation of the 'framework' agreement was FIPS or Five Interested Parties of the European Union, the United States, Brazil, India, and Australia (representing the Cairns group). Someone has called this the G5, or Gestalt Group. Is it simply a

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3 Falou Samb, Agency for International Trade Information and Cooperation Senegal, correspondence with the author (February 2004).

4 The author has launched a project with a group of African graduate students to track the role of non-governmental organizations in the trade policy-making process in Africa at both the country and regional level.

5 But one that needs exploring because there is, of course, considerable overlap between high and low policy today. See, for example, 'Charlemagne: The Reds in the West' *The Economist* (15 January 2005) 40, on the 'emerging axis' between China and Europe.

wily means of co-opting the G20 or will it continue to play a significant role in the negotiations? We'll have to wait and see. But whatever else, it's certainly inter-regional. As are the growing partnerships or other relationships between the European Union and LAC (Latin American and the Caribbean), which have been expanding and strengthening since the 1990s. The EU-LAC summit process is described as 'a distinct form of North-South integration,' 'an exercise in political alliance-building,' and an effort to 'encourage the LAC countries to adopt policies that increase social cohesion by reducing poverty and inequality.'[6] So South-South is new but so is a quite new North-South. The point to be made is that the ongoing changes in the political economy of trade policy-making are too complex and uncertain to rely on one paradigm such as the linkage between regional and global trade and investment integration. The concept of competitive liberalization touted by the USTR will likely result in fragmentation not integration. There is an enormous economic and political disparity between the United States and the other Western Hemisphere countries, so bilateral and regional agreements (often including 'WTO plus' versions of, for example, TRIPS and investments) are creating a new and ever-mutating spaghetti bowl. To add to the mass both Mexico and Chile are pursuing a large number of bilateral agreements. The transaction costs for business of the rules of origin included in the agreements are so large that many corporations are choosing to pay non-preferential or MFN tariffs. These ever-proliferating preferential agreements have been strongly criticized in the Report by the Consultative Board to the WTO Director General.[7]

Competitive liberalization is not a new idea by any means. But the form it is taking now differs significantly from that of its earlier phase in the 1980s, which I have called domino policy. The main architect of regional domino policy was the US, which initiated a multi-track policy with the Canada-US Trade Agreement (CUSTA) because the Uruguay Round was stalled by the European Union over agriculture and Brazil and India over the new issues. A major objective for the Americans was to demonstrate to the Europeans that bilateralism was a feasible alternative that would be actively pursued if the foot-dragging at the GATT continued. For Brazil and India and their followers, the implied threat was strongly reinforced by a new 'tough policy' announced by President Reagan in September of 1985 that included support for the little-used section 301 of the 1974 *Trade Act*. CUSTA was

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6 Inter-American Development Bank, *Integration and Trade in the Americas: III EU-LAC Summit: Special Issue on Latin American and Caribbean Economic Relations with the European Union* (Washington, DC: Inter-American Development Bank, May 2004) at 1-3.

7 Peter Sutherland *et al.*, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (Geneva: WTO, January 2005).

the first trade agreement to include trade in services. While it can't be proved it may well have helped add to the internal pressure in Europe to agree to launch the Round. NAFTA, the next domino, built on CUSTA and the Uruguay Round GATS (General Agreement on Trade in Services) and included TRIPS and a very impressive investment regime—the two new issues not achieved in CUSTA. But the next domino—a multilateral agreement on investment to be concluded at the OECD then transferred to the WTO—failed and indeed proved to be a boomerang since investment issues have been kept out of the WTO ever since.

The earlier version of competitive liberalization was primarily directed to extending multilateralism. Since that was the ultimate American target, the European Union had to be part of the end game. But now the entire game involves the European Union. And it's being played by others, especially China in Asia. Fear of an Asian Union led by China and excluding the United States may be exaggerated.[8] Or maybe not. ASEAN plus three (China, Korea, Japan) has been announced.[9] But the main issue is that a *global approach* seems the best strategy no matter how difficult it will be. A global rules-based system is the best alternative when one considers all of the others. It would be very dangerous to eschew the multilateral approach and will be very challenging to devise policy options to facilitate deeper integration not just in the hemisphere but in the global system. That takes us to the other road in the fork.

II INTEGRATION: PROCESS BY PROJECT

The only example of 'deep integration' that exists today is the European Union. The objective was political, driven by the need to forever preclude a repeat of the wars of the twentieth century. The means were economic, such as the creation of a single market and free flow of factors of production. But of course, a great deal more was involved, especially the creation of a range of institutions. And the story has not ended. The deepening and widening process is ongoing. As is the search for a shared concept of community.

In the Western Hemisphere the integration process has been mainly a product of the private sector. Policy has played a minimal role. There are some regional institutions but they also are minimal. It's not clear what the objective is but it is not to build a 'community'. One of

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8 Claude Barfield, 'China, the United States and the Rise of Asian Regionalism' (Paper presented to the Western Economic Association International 79th Annual Conference, Vancouver, 29 June-3 July 2004) [unpublished].

9 See 'Baucus proposes FTAs in Asia to offset Chinese influence' *Inside U.S. Trade* 22:50 (10 December 2004) 15.

the abiding characteristics of the Latin American region is the extremely high inequality in income and health. In a recent Latinobarametro survey *The Economist* reports that seventy-one per cent of respondents think that their country 'is governed for the benefit of a few powerful interests.'[10] The hopes that trade liberalization would ameliorate this were dashed and, in any case, misplaced. Yet most experts agree that inequality and poverty, as well as widespread crime and corruption in many countries, pose a serious threat to the sustainability of democracy. And create serious impediments to domestic and international policy effectiveness. Deep integration requires increased convergence of per capita income to promote social cohesion: catch-up is the aim. Thus while the focus of the Washington Consensus was efficiency—a worthy and necessary objective—the 'second generation' reform has also underlined the importance of dealing with poverty and equity and a growing number of suggest that the serious inequality in Latin America contributes to lower growth.[11] But dealing with these issues is not like macro-economic stabilization. Second generation reform has landed development economics squarely into neo-institutional economics. And the truth must be faced: this is largely *terra incognita*. As a recent book on the subject states: 'Second-generation reforms are a motley crew, encompassing broad reforms of the state, the civil service, and the delivery of public services; of the institutions that create and maintain human capital (e.g., schools and the health care system); and of the environment in which private firms operate (more competition, better regulation, stronger property rights).'[12] That's part of the list. And as the authors note: 'Any economist can tell you that curtailing inflation requires lower money growth' but most are silent on how to reform legal, regulatory and political institutions.[13]

Nonetheless the research on institutions and the link with economic performance in the region has begun. Neo-institutional economics is the vogue. One hopes that it can be encouraged and that the minimalist mathematical model can be resisted. As one expert or innovation has noted 'case studies are data' and the need to pursue a wide range of these will be essential. Benchmarking best practices is

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10 'Democracy's low-level equilibrium' *The Economist* (August 14 2004) 41.

11 See Nancy Birdsall, Augusto de la Torre & Rachel Menezes, *Washington Contentious: Economic Policies for Social Equity in Latin America* (Washington, DC: Carnegie Endowment for International Peace and Inter-Americas Dialogue, 2001), and Pedro-Pablo Kuczynski & John Williamson, eds., *After the Washington Consensus: Restarting Growth and reform in Latin America* (Washington, DC: Institute for International Economics, 2003).

12 Patricio Navia & Andrés Velasco, 'The Politics of Second-Generation Reforms in Latin America' in Kuczynski, *ibid*. at 266.

13 *Ibid*.

usual in the private sector so why not the public sector?

Granted the second generation reform agenda is formidable but it's also necessary for deepening integration. So why not launch the process with some projects? That has already started, as is apparent in the Inter-American Development Bank's *Beyond Borders*.[14] Noting that infrastructure projects have significant network and scale economics, regional infrastructure projects should have had a high priority but did not. That changed when IIRSA (Integration of Regional Infrastructure in South America) was launched in 2002, as was the Puebla-Panama Plan (both with IDB support). Both are complex multinational, multisectoral, and multidisciplinary. Careful monitoring and analysis will yield extremely important insight not only into best practices but the vital link between infrastructure and growth. In rural areas infrastructure is essential if farm productivity is to improve: trade policy is pointless if you can't get your product to the market. As Robert Pastor points out NAFTA made no provision for infrastructure and the resulting delays because of increased traffic 'have raised the transactions costs of regional trade more than the elimination of tariffs has lowered them.'[15]

Regional infrastructure is a project of high priority. But there are many others that could be listed. Thus, for example, the financial crisis of the 1990s underlined the need to reform the capital markets and the banks. And the requirement to develop regional standards for fiscal discipline.[16] The list could be long and experts will have many important proposals. What is needed is an institution for selecting, launching, and evaluating the proposed projects. And a funding mechanism that includes contributions from all the countries in the hemisphere, allocated by an appropriate and mutually agreed formula. And a shared objective of deepening integration. The creation of the 'Convergence Club' in the OECD countries after the Second World War was certainly due to economic factors such as trade, investment, and technology transfer but also depended on what Moses Abramovitz called in his 1986 seminal article 'social capabilities' or what would be called institutions today.[17]

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[14] Inter-American Development Bank, *Beyond Borders: The New Regionalism in Latin America*, (Washington, DC: Inter-American Development Bank, 2002) at 126-44.

[15] Robert A. Pastor, 'North America's Second Decade' *Foreign Affairs* 83:1 (January/February 2004) 127.

[16] John Williamson, 'Summing Up' in Kuczynski, *supra* note 11 at 311-12.

[17] Moses Abramovitz, 'Catching Up, Forging Ahead, and Falling Behind' (1986) 46 Journal of Economic History 385.

CONCLUSION

The issue of deepening integration is complex and multi-faceted. In the Western Hemisphere the main approach has been preferential trade and investment policies. But today's world of ever-changing geography and balance of power requires a global approach. And a policy that recognizes that institutions matter.

Marriage and Civil Partnership for Same-Sex Couples: The International Imperative

KENNETH MCK. NORRIE*

INTRODUCTION

Within the single month of November 2004, Saskatchewan became the latest Canadian province to accept same-sex marriage,[1] South Africa's Supreme Court of Appeal held the limitation of marriage to opposite-sex couples to be unconstitutional,[2] the United Kingdom became the latest European country to introduce civil partnerships as an institution for same-sex couples analogous to marriage,[3] and the government of New Zealand presented a Bill to the New Zealand Parliament to do the same thing in that country.[4] In the 15 years since Denmark became the first country in the world to introduce such an institution[5] most jurisdictions in Western Europe and in Canada, and a handful of states in the United States of America, have followed Denmark's innovation and some[6] have opened up the institution of marriage itself to same-sex couples. The peculiarly North American debate whether civil partnership is a second-rate alternative to marriage as a means of achieving gay and lesbian equality has not been engaged with elsewhere in the world, and it will not be engaged with here. This article intends, rather, to explore the remarkable phenomenon that such a debate is today one of practical reality rather than hypothetical aspiration.

It was not many years ago that the idea that same-sex couples should have their relationships recognized for any purpose, far less the

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* Professor of Law and Head of the Law School, University of Strathclyde, Glasgow, Scotland. Fellow of the Royal Society of Edinburgh, Patron of OUTRight Scotland.

1 *W.(N.) v. Canada (Attorney General)*, 2004 SKQB 434, [2004] S.J. No. 669 (Sask. Q.B).

2 *Fourie and Another v. Minister of Home Affairs and Others,* 2005 (3) S.A. 429 (S.C.A.) [*Fourie*].

3 *Civil Partnership Act 2004* (U.K.), 2004, c. 33.

4 *Civil Union Bill* (N.Z.), No. 149-2, 29 November 2004.

5 For a discussion of the Danish *Registered Partnership Act 1989*, see Linda Neilsen 'Family Rights and the "Registered Partnership" in Denmark' (1990) 4 Int'l J.L. & Fam. 297; Morten Broberg 'The Registered Partnership for Same-Sex Couples in Denmark' (1996) 8 Child & Family Law Quarterly 149.

6 The Netherlands, Belgium and Spain in Europe, Canada and the US state of Massachusetts. The matter is presently before the Constitutional Court of South Africa and under political discussion in Switzerland, Sweden, and Luxembourg.

full range of purposes encompassed within the institution of marriage, was met with uncomprehending resistance by policy-makers, legislators and judges. Until around the mid 1990s courts across the world were reluctant to award custody of children to lesbian mothers because of the perceived harm 'living in the shadow of deviance' would cause.[7] In the United Kingdom, a statute declared in 1988, famously and ungrammatically, that 'homosexuality' was no more than a 'pretended family relationship.'[8] Two years previously, the Supreme Court of the United States of America had upheld the constitutionality of laws criminalizing same-sex sexual activity[9] and a series of earlier United States cases had consistently upheld the heterospecificity of both marriage and other recognized domestic relationships.[10] Yet by the end of the 1990s court challenges in countries across the western world[11] to rules of law excluding same-sex couples from benefits, liabilities, and opportunities afforded opposite-sex couples were becoming increasingly successful, and by the early years of the new century apparently irresistible. Advancement by litigation usually creates no more than an uneven patchwork of rights and liabilities affecting the subject-matter of individual disputes, but the virtual evaporation of judicial ability or willingness to oppose recognition of same-sex relationships has given legislators the confidence to make comprehensive provision for such recognition across the whole gamut of family law. This was, ten years ago, unthinkable to opponents, and a dreamy Utopia for proponents, of gay and lesbian equality. How could this have changed, so rapidly and so universally?

I A DECADE OF ADVANCEMENT

There is no obvious turning point in judicial or legislative attitudes to same-sex relationships, but an important moment in time at which to start our examination was the adoption in May 1996 of the new post-

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7 See for example *J.L.P. v. D.J.P.,* 643 S.W.2d 865 (Missouri App. Ct.1982); *Re P (A Minor)* (1983), 4 F.L.R. 401 (England); *L and L* (1983), F.L.C. 91-353 (Australia); *Early v. Early*,1989 S.L.T. 114 (Scotland); *Bottoms v. Bottoms,* 444 S.E.2d 276 (Virginia App. Ct. 1994); *Van Rooyen v. Van Rooyen*, 1994 (2) S.A. 325 (South Africa).

8 *Local Government Act 1988* (U.K.), s. 28.

9 *Bowers v. Hardwick*, 478 U.S. 186 (1986) [*Bowers*].

10 See *Baker v. Nelson,* 191 N.W.2d 185 (Supreme Court of Minnesota 1971); *Jones v. Hallahan,* 501 S.W.2d 588 (Kentucky App. Ct. 1973); *Singer v. Hara*, 522 P.2d 1187 (Court of Appeals of Washington 1974); *Adams v. Howerton,* 673 F.2d 1036 (9th Cir. 1982); *De Santo v. Barnsley,* 476 A.2d 952 (Pa. Super. 1984).

11 It is very different elsewhere. By 'western world' I mean, for the purposes of this article, North America, Europe, Australasia, and South Africa.

apartheid South African Constitution.[12] It would be no exaggeration to describe this as a milestone in world legal history, for it was the first constitutional or human rights[13] instrument in the world explicitly guaranteeing everyone the right to be free from discrimination on the basis of (*inter alia*) sexual orientation.[14] Elsewhere, at around the same time, judicial interpretation of existing human rights instruments brought sexual orientation within general anti-discrimination rules that had previously ignored the issue. So for example the Supreme Court of Canada[15] held that sexual orientation, though not mentioned in the *Canadian Charter of Rights and Freedoms*, was analogous to those unlawful grounds for discrimination expressly listed in section 15 thereof, and so was equally a prohibited ground. Similarly, in 1999, the European Court of Human Rights held for the first time that sexual orientation was 'intolerable' to the non-discrimination requirements in Article 14 of the *European Convention on Human Rights* even though it was not explicitly mentioned in that article.[16]

One of the earliest (and entirely predictable) consequences of the adoption of the South African Constitution was that the existing (pre-democracy) laws criminalizing male-male sexual activity in South Africa were held to be unconstitutional and were struck down.[17] This decision was explicitly founded on arguments of equality and its underlying concept of human dignity. The same result had earlier been achieved throughout Europe by a different route: the requirement contained in Article 8 of the European Convention to respect individuals' private lives. In *Dudgeon v. United Kingdom*[18] the ban on male-male sexual activity that had been maintained in Northern Ireland[19] was held to breach Article 8 and it is not now possible for a member state of either the European Union (twenty-five states) or the Council of Europe (forty-six states) to maintain such a blanket ban:

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12 *Constitution of the Republic of South Africa 1996*, No. 108 of 1996.

13 Chapter 2 of the Constitution contains a *Bill of Rights*.

14 *Constitution of the Republic of South Africa 1996*, No. 108 of 1996, s. 9(3). For a discussion of the political imperatives that led to the inclusion of this provision in the South African Constitution, see Carl Stychin 'Constituting Sexuality: The Struggle for Sexual Orientation in the South African Bill of Rights' (1996) 23 J. L. & Soc'y 455.

15 *Egan v. Canada*, [1995] 2 S.C.R. 513, (1995), 124 D.L.R. (4th) 609; *Vriend v. Alberta,* [1998] 1 S.C.R. 493, (1998), 156 D.L.R. (4th) 385.

16 *Salgueiro Da Silva Mouta v. Portugal* (2001)*,* 31 E.H.R.R. 1055.

17 *National Coalition for Gay and Lesbian Equality v. Minister of Justice,* [1999] (1) S.A. 6 (S. Afr. Const. Ct.).

18 (1981), 4 E.H.R.R. 149.

19 Having been repealed in England and Wales by the *Sexual Offences Act 1967* and in Scotland by the *Criminal Justice (Scotland) Act 1980.*

applicant member states to either institution are required to repeal any such laws.[20] But founding only on private life was insufficient to ensure equality, and many European countries maintained differential ages of lawful sexual activity. Relying on Article 14 of the *European Convention*, the European Court of Human Rights has more recently held such differential ages to amount to unlawful discrimination.[21] Even the United States of America has now mandated decriminalization and in *Lawrence v. Texas*[22] that country's Supreme Court overruled its own earlier decision in *Bowers v. Hardwick*.[23] The majority in *Lawrence* explicitly located its decision within the context of an emerging worldwide consensus that adults of the same sex have a right to engage with each other in intimate, consensual, sexual activity.[24]

Decriminalization opened the door for relationship recognition, but that has tended to come in stages. Though it did not seem so at the time, claims such as those in *M. v. H.,*[25] where the Supreme Court of Canada was faced with a claim by a woman who had been in a same-sex relationship to access a statute that provided for financial readjustment between ex-partners, were actually quite modest: the applicant was seeking to be treated in the same way as a member of an opposite-sex but *unmarried* couple. Even when the Supreme Court allowed her claim, and federal and provincial legislatures responded with comprehensive law reform, the effect was to put same-sex couples in the position of unmarried couples. This same result followed in the United Kingdom where in *Ghaidan v. Mendoza*[26] the House of Lords held that the phrase normally used in British statutes to identify unmarried conjugal couples (those 'living together as husband and wife') had to be interpreted to include same-sex couples, since that was the only way to make the statute compatible with the non-discrimination provisions of the *European Convention on Human Rights*. Comprehensive legislation has not been enacted, but as in Canada unmarried same-sex couples can now expect to access all United Kingdom statutory rights and responsibilities extended to unmarried

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20 See *Norris v. Ireland* (1988), 13 E.H.R.R. 186; *Modinos v. Cyprus* (1993), 16 E.H.R.R. 485.

21 *S.L. v. Austria* (2003), 37 E.H.R.R. 39; *L. & V. v. Austria*, (39392/98) [2003] E.C.H.R. 20 (9 January 2003); *B.B. v. The United Kingdom*, (53760/00) [2004] E.C.H.R. 64 (10 February 2004); *Woditschka and Wilfling v. Austria*, (69756/01 and 6306/02) (21 October 2004).

22 123 S.Ct. 2472, 539 U.S. 558 (2003).

23 *Supra* note 9.

24 *Supra* note 22 at 2483.

25 [1999] 2 S.C.R. 3, (1999), 171 D.L.R. (4th) 577.

26 [2004] U.K.H.L. 30, [2004] 3 W.L.R. 113 (H.L.).

opposite-sex couples.[27]

More demanding claims are made when same-sex couples seek to be treated in the same way as opposite-sex *married* couples. Originally such claims were made in the context of attempts to access individual marital rights, as typified by claims before the South African courts subsequent to the adoption of the 1996 Constitution. In *National Coalition for Gay and Lesbian Equality v. Minister for Home Affairs*,[28] in order to save the validity of an immigration statute that gave benefits to 'spouses', the words 'or partner, in a permanent same-sex life partnership' were added. This meant that same-sex couples were to be afforded the same protections not of unmarried opposite-sex couples but of married opposite-sex couples. The reasoning in this case has been consistently followed when same-sex couples have sought to access other South African statutes conferring benefits on married couples.[29]

Once it is accepted that for individual purposes same-sex couples should be treated the same way as opposite-sex couples, it becomes difficult to resist the argument that they should be so treated for the whole range of rights and responsibilities bundled together in the hitherto heterosexual relationship of marriage. *Baehr v. Lewin*[30] was the first of the modern series of cases in which a United States court held that the state had to provide convincing reasons why marriage should be limited to opposite-sex couples, and when the state failed to do so[31] the way was open for same-sex marriage in Hawaii, barred only by subsequent constitutional amendment. Nevertheless a 'reciprocal benefits law'[32] was passed giving couples, same-sex and opposite-sex, who register their relationship with the state a wide variety of benefits previously limited to married couples. In *Baker v. Vermont*[33] the Supreme

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27 *M and Langley v. Bradford Metropolitan District Council*, [2004] E.W.C.A. (Civ.) 1343. The argument has been held by the Scottish Court not to work for cases arising before the coming into force of the *Human Rights Act 1998*: *Telfer v. Kellock,* 2004 S.L.T. 1290.

28 [2000] (2) S.A. 1 (S. Afr. Const. Ct.).

29 See for example *Satchwell v. President of the Republic of South Africa,* [2002] (6) S.A. 1 (S. Afr. Const. Ct.) (judicial pensions); *Du Toit v. Minister for Welfare and Population Development*, [2003] (2) S.A. 198 (S. Afr. Const. Ct.) (adoption); *J. v. Director General, Dept. of Home Affairs*, [2003] (5) S.A. 621 (S. Afr. Const. Ct.) (co-parenting status).

30 74 Haw. 530, 852 P.2d 44 (1993). For analysis, see Martin Dupuis 'The Impact of Culture, Society and History on the Legal Process: An Analysis of the Legal Status of Same-Sex Relationships in the United States and Demark' (1995) 9 Int'l J.L. & Fam. 86 at 95-8.

31 *Baehr v. Miike,* 910 P.2d 112 (Haw. 1996).

32 *An Act Relating to Unmarried Couples 1997*, Hawaii Sess. Laws 383.

33 744 A.2d 864 (Vt. 1999).

Court of Vermont held that the legal benefits and protections flowing from marriage are so significant that any exclusion from these benefits must be justified by public concerns of sufficient weight, cogency and authority that the justice of the exclusion cannot seriously be questioned. No such concerns were established and the Court held the marriage statute to be contrary to the Vermont Constitution: this led to the statutory introduction in 2000 of civil unions for same-sex couples.

The years 2003 and 2004 saw a series of cases in North America in which marriage rights were sought not through civil unions, as in Vermont and European countries, but through marriage itself. One of the first of these cases was *Halpern v. Attorney General of Canada*[34] where the Ontario Court of Appeal held that '[d]enying same-sex couples the right to marry perpetuates the … view … that same-sex couples are not capable of forming loving and lasting relationships, and thus same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships.'[35] This approach was followed in Massachusetts in *Goodridge v. Department of Public Health*[36] where the Supreme Judicial Court held that since the *sine qua non* of marriage is the exclusive and permanent commitment of the partners to each other rather than the begetting of children, there was no rational justification to limit it to opposite-sex couples. Similar reasoning was adopted by the Supreme Court of Appeal in South Africa, which was explicitly founded upon both *Halpern* and *Goodridge*.[37]

II SEEKING EXPLANATIONS

Just as the year 1999 saw court cases around the western world permitting same-sex couples to access non-marital conjugal rights, so 2004 has seen a variety of both courts and legislatures permitting same-sex couples to access marital rights, either through civil partnership or marriage. This similarity in timing cannot be accidental. The legislative and political processes in different countries are clearly being informed by, and feeding off, each other. Increased and instantaneous access to developments across the world is without doubt facilitating this but it does not explain why the movement is virtually all one way. I should like to offer four factors, which, taken together, render the developments described above as inevitable and ultimately irresistible.

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34 (2003), 225 D.L.R. (4th) 529 (Ont. C.A.) [*Halpern*]. See also *Hendricks c. Québec (Procureur général)*, [2002] R.J.Q. 2506 (C.S.Q.); *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 225 D.L.R. (4th) 472 (B.C.C.A.); *Dunbar & Edge v. Yukon (Government of) & Canada (Attorney General),* 2004 Y.K.S.C. 54, 14 July 2004 (Yukon Sup. Ct.); *W.(N.)*, *supra* note 1.

35 (2003) 225 D.L.R. (4th) 472 at para. 94.

36 440 Mass. 309 (2003) [*Goodridge*].

37 *Fourie, supra* note 2.

First, decriminalization has been the spark that lit the fuse, sometimes slow burning and sometimes (as in South Africa) extremely fast burning, that leads to the explosion of relationship recognition. For decriminalization removes the primary justification for treating same-sex couples less favourably than opposite-sex couples. The criminal law creates a status of 'criminal' and it is rational and indeed expected that the law will regard those with that status as less valued members of society than those who are entirely 'innocent'. Criminalizing behaviour that is characteristic of same-sex relationships therefore provides a firewall against claims for equal treatment, for the simple (if simplistic) reason that all legal systems, rightly, treat criminals less favourably than non-criminals. But to remove that firewall exposes that less favourable treatment to challenge and obliges those who support it to find other justifications.[38] Indeed, it has been argued[39] that decriminalization is not only an essential first step to the legitimization and ultimate full recognition of same-sex relationships, but that this first step makes the end result inevitable. This argument receives support from the unlikely source of Scalia J's dissenting judgment in *Lawrence*. He says,

> At the end of its opinion … [the majority in the present case] says that the present case 'does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.' … Do not believe it. … Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.[40]

Second, the late 1990s saw a constitutionalization of family law throughout much of the western world at exactly the same time as same-sex relationships were being accepted as falling within the parameters of family law. The importance of this is that constitutionalization provided gay and lesbian people with a mechanism to challenge existing assumptions flowing from the heteronormativity of 'family'. Until sexual orientation was recognized by the Canadian courts, the South African Constitution, and the European Court of Human Rights as an illegitimate ground for discrimination, a human rights analysis in these countries could not be guaranteed.[41] And a human rights analysis, by

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38 This was recognized in the South African Supreme Court of Appeal by Farlam JA in *Fourie, supra* note 2 at para. 120.

39 Kees Waaldijk, 'Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe' (2000) 17 Can. J. Fam. L. 62.

40 *Supra* note 22 at 2497-8.

41 This is apparent in, for example, the House of Lords decision in *Fitzpatrick v. Sterling Housing Association,* [1999] 4 All E.R. 707 (H.L.), which was

definition, requires a rational approach divorced from preconceptions, assumptions, and stereotyping. It is no accident that the least constitutionalized country in the western world, Australia, has been able to resist full relationship recognition more effectively than other countries.[42]

Third and following on from this, the search for rational justification for treating same-sex couples less favourably than opposite-sex couples has proved vain. The poverty of arguments brought forward by those seeking to maintain the existing position is eloquent testimony to their intellectual bankruptcy. The desire to protect marriage, the traditional family, and the proper upbringing of children have all been placed at the forefront of states' defences and while these are all legitimate concerns, the assertion that they justify discrimination has proved easy to dismiss. Neither marriage nor the traditional family is demeaned by extending benefits to same-sex couples that had previously been extended only to married couples. Madame Justice L'Heureux-Dubé put it thus some time ago in *Canada (Attorney General) v. Mossop*, '[i]t is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may equally advance true family values.' [43] Any other view is illogical: seeking to enter marriage is not to undermine it, but is rather to celebrate its importance.

The claim that extending equal benefits to same-sex couples is an attack on opposite-sex couples is in reality a plea to continue to treat opposite-sex couples *better than* same-sex couples, for only their relative and not their absolute position is affected. But such a plea is an assertion of superiority, not a justification for acceding to that plea. Underlying

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decided before the coming into effect of the *U.K. Human Rights Act 1998,* c. 42, and which was, therefore, a traditional and entirely limited exercise in statutory interpretation. The decision, though of great symbolic importance in conferring legitimacy to the concept of same-sex relationships, provided little technical precedent (*stare decisis*) that could be used in later cases. See also *Telfer, supra* note 27.

42 In October 2004 the Federal Parliament (shortly after the re-election of a conservative government) passed the *Marriage Amendment Act 2004* (Cth.), which both defined 'marriage' as a relationship between one man and one woman and purported to prohibit the recognition in Australia of any same-sex marriage validly contracted in another country.

43 [1993] 1 S.C.R. 554 at 634. Similarly the European Court of Human Rights in *Marckx v. Belgium* (1979), 2 E.H.R.R. 330 at para. 40 said this: 'The Court recognises that support and encouragement of the traditional family is in itself legitimate or even praiseworthy. However, in the achievement of this end recourse must not be had to measures whose object or result is, as in the present case, to prejudice the "illegitimate" family'.

the claim may well be the unspoken belief that advantaging opposite-sex relationships will encourage gay people to enter opposite-sex relationships. That may well have been true in a previous age, but it is neither realistic nor acceptable today. The other argument commonly raised is that the state has an interest in the upbringing of children in opposite-sex relationships, which it is assumed is best for children. This argument is illogical (though it is still presented) in jurisdictions that tolerate and even facilitate gay parenting (for example through adoption or formalizing co-parenting arrangements),[44] and even in countries where that is not possible the argument is based on stereotyping and assumptions made in the absence of evidence that children are indeed harmed by being brought up in family surroundings different from the norm.[45] Protection of children from harm is, of course, a legitimate state interest, but courts no longer assume that children are exposed to a higher level of risk of harm simply because the adult who is bringing them up is gay or lesbian. A further argument, put forward most recently in the Supreme Court of Canada[46] was that the legal acceptance of same-sex marriage is the imposition of a dominant social ethos, in itself an interference with the freedom of religious beliefs of those who oppose it. The Supreme Court was witheringly dismissive in response: 'The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another.'[47] If human rights are based on tolerance of differences, a demand to be intolerant has credence only when the difference is harmful to society. And that argument was lost long ago.

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44 In *Baker v. Vermont,* 744 A.2d 864 at 31 (Vt. 1999), Amestoy CJ, the Court pointed out that the state of Vermont allowed adoption by same-sex couples and so 'the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the state argues the marriage laws are designed to secure against.' In *M. v. H.*, *supra* note 25 at para. 92, the Supreme Court of Canada could not understand how the alleged state interest in encouraging children to be brought up by opposite-sex couples could be rationally related to the statute there at issue, which concerned spousal support. In *Fourie, supra* note 2 at para. 17, Cameron JA said that the argument does not work in a country like South Africa, where procreative potential is not a defining characteristic of conjugal relationships. The European Court of Human Rights rejected, in a different context, the notion that marriage is so defined (*Goodwin v. United Kingdom* (2002), 35 E.H.R.R. 18 at para. 98).

45 In *T, Petitioner,* [1997] S.L.T. 724, the Scottish Appeal Court permitted a child to be adopted by a gay man, the judge at first instance being castigated for having refused to do so on the basis of 'his own preconceptions of homosexuality' rather than on any evidence actually presented to the Court.

46 *Reference re Same-Sex Marriage,* [2004] 3 S.C.R. 698.

47 *Ibid.* at para. 46.

Fourth, and not to be underplayed in importance, is the increased social acceptability and, crucially, visibility of gay and lesbian people in all walks of life, even at the highest levels of government. Without this, judges and legislators would have remained comfortable in their ignorance of gay and lesbian people and would have felt more able to justify a refusal to ameliorate their position on moral grounds. Yet moral consensus no longer dictates that gay and lesbian people should remain hidden or that they should be cast out from decent society. This is not to suggest that society has become amoral in its views on family, personal relationships or even the criminal law. Rather, human rights have become the new morality. From a starting point at the intersection of dignity, privacy, and equality, the thinking population accepts the illegitimacy not of same-sex relationships but of homophobia.[48] Virtually everyone in the western world knows either real people or characters from popular culture whose sexual orientation is different from their own. That could not have been said twenty years ago and its contribution to social comfort has played a not insignificant role in shaping the views of policy-makers.

CONCLUSION

Decriminalization of same-sex sexual activity removed the firewall protecting discriminatory laws from rational analysis; constitutionalization of family law provided the mechanism to challenge discriminatory laws by applying that rational analysis; the poverty of argument utilized by those seeking to defend the status quo made the results of many of the cases described above obvious; and the increased social acceptance and visibility of gay and lesbian people made the developments towards full recognition irresistible. While it is true that in the United States constitutional amendments in many states will limit marital benefits to opposite-sex couples[49] these amendments will themselves be open to challenge before the Supreme Court,[50] which has

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[48] This was graphically illustrated in the Autumn of 2004 when the European Parliament (almost without precedent) rejected a nominee to the new European Commission because he expressed the view that homosexuality was a 'sin'.

[49] During the November 2004 presidential election in that country, eleven states sought at the same time popular approval, through so-called 'ballot initiatives', for such constitutional amendments. In Australia (see *supra* note 42) the Federal Parliament amended its definition of marriage to exclude same-sex relationships at around the same time.

[50] The constitutional amendment prohibiting the passing of anti-discrimination laws in favour of gay and lesbian people in Colorado traced its history to a ballot initiative, but that did not prevent the Supreme Court from striking it down (*Romer v. Evans,* 517 U.S. 620 (1996)). For a discussion, see Angus Campbell & Kenneth Norrie, 'Homosexual Rights in

already refused to deal with a challenge to the Massachusetts legislation opening up marriage to same-sex couples.[51] Judicial exposure to same-sex marriage and civil partnership will increase even in resisting jurisdictions through the conflict of laws rules;[52] this will also expose courts to reasoning and juridical policy in other countries and ought, it is suggested, to increase judges' acceptance that there is no danger to social well-being from treating gay and lesbian people as well as anyone else. The danger to social well-being comes from an insistence on maintaining laws discriminating against gay and lesbian people, and the relationships they enter into, when the justifications for doing so have already been rejected in relation to laws discriminating on the grounds of sex and race.

Romer v. Evans: Animus Averted' (1998) 27 Anglo-Am. L. Rev. 285.

51 *Largess v. Supreme Judicial Court of Massachusetts*, No. 04.420 (29 November 2004).

52 See, already, *Rosengarten v. Downes,* 802 A.2d 170 (Conn. App. Ct. 2002); *Cote-Whitacre v. Department of Public Health,* 2004 W.L. 2075557 (Mass. 2004).

Canada is a Blue State: Global Jurisprudence and Domestic Consciousness in American Gay Rights Discourse

JONATHAN GOLDBERG-HILLER*

> Over the past century we have seen many changes in American culture. We have witnessed an explosion of new travel opportunities, access to information and advances in medicine. Certainly social norms have shifted. We have made progress, in the truest sense, such as recognizing the fundamental human rights of all people no matter their color or creed. And we have also made egregious regressions such as legalizing the aborting of unborn children. Even in this advanced age, we must continue to wage battles against injustices. … If we do nothing and allow the courts to re-define marriage, State and Federal governments will soon have little or no authority to ultimately restrain any imaginable form of marital contract between couples and groups of people and even animals.[1]

For conservatives like Rep. Todd Tiahrt of Kansas, the embrace of human rights as a beneficial product of global exchange is endangered by its own siren-like appeal, necessitating a restriction of the international flow of legal ideas. Despite this alarm, American courts and legal culture have often been strict gatekeepers in an emerging scheme of global jurisprudence.[2] On the one hand, American civil rights

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* Chair of the Department of Political Science, University of Hawai'i at Mânoa, Honolulu

1 U.S., *Cong. Rec.*, vol. 150, at E1858 (30 September 2004) (Rep. Todd Tiahrt, Kansas).

2 I use global jurisprudence in this article to differentiate my focus from what Anne-Marie Slaughter (see Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harv. Int'l L.J. 191 at 192) and others have called an emerging, self-conscious 'global community of courts'. The idea of a global community is frequently used to distinguish the exchange of legal ideas from the imperial and colonial integration of jurisprudence, a shift from colonial and imperial monologue to a dialogic community of equal participants in the application of human rights law and 'constitutional cross-fertilization' (the term is Slaughter's). While for some this is a shift in kind from earlier forms of international and global domination, I understand the potential for a continuation of power in other forms, and even a renewed need, in Hannah Buxbaum's words, to 'conform to a standard imposed by the leading powers. In this sense, … courts in some countries might view their task not as joining in the creation of a global community, but rather as obtaining the approval of the states that lead the global community' (Hannah L. Buxbaum, 'From Empire to Globalization ... and Back? A Post-Colonial View of Transjudicialism' (2004) 11 Ind. J.

law and the social movements that have embraced it have been emulated abroad in areas such as disability policy[3] and gay rights, setting the framework for an international human rights law. For example, the legal acknowledgement of same-sex marriage that emerged in Hawaii in 1993[4] was followed avidly by gay rights groups in Taiwan, Europe, Canada and elsewhere, and the first American jurisdiction to permit same-sex marriage (Massachusetts in 2003)[5] was cited as precedent recently by South Africa's Supreme Court of Appeal in its judgment that 'the common law concept of marriage [be] developed to embrace same-sex partners.'[6] Although likely diminishing in international influence due to a conservative infatuation with originalism, a shrinking docket, and a jurisprudential move away from the recognition of group rights,[7] the United States Supreme Court continues to inspire a 'vigorous overseas trade in the Bill of Rights, in international and constitutional litigation involving norms derived from American constitutional law.'[8] At home, one American gay rights organization calls itself the Human Rights Campaign in recognition of this broad appeal to a global form of citizenship.

Global Legal Stud. 183 at 185). In short, global jurisprudence attempts to bring back into the discussion of human rights law a moment of disciplinary power that normalizes identity in addition to the more common attention to a juridical moment of enforcing norms of behavior. In this respect, Cindy Patton has speculated that the interest in promoting gay rights that has infused the DPP in Taiwan should be seen less as progressive and more as a conservative attempt to discipline sexuality, as well as encourage the global flow of money and respect on which Taiwan's precarious sovereignty depends (Cindy Patton, 'Stealth Bombers of Desire: the Globalization of "Alterity" in Emerging Democracies' in Arnaldo Cruz-Malavé & Martin F. Manalansan IV, eds., *Queer Globalizations: Citizenship and the Afterlife of Colonialism* (New York: New York University Press, 2002) at 195). In this article, I draw attention to the ways this conformity associated with the discourse of sovereignty also operates within domestic spheres.

3 Katharina C. Heyer, 'The ADA on the Road: Disability Rights in Germany' (2002) 27 Law & Soc. Inquiry 723.

4 *Baehr v. Lewin,*74 Haw. 530, 852 P.2d 44 (1993).

5 *Goodridge v. Department of Public Health of Massachusetts,* 440 Mass. 309, 798 N.E.2d 941 (2003) [*Goodridge*].

6 *Fourie and Another v. Minister of Home Affairs and Others*,[2004] JOL 13275 at para. 49 (S.C.A.).

7 For a discussion of these and other reasons, see Claire L'Heureux-Dubé, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court' (1998) 34 Tulsa L.J. 15.

8 Anthony Lester, 'The Overseas Trade in the American Bill of Rights' (1988) 88 Colum. L. Rev. 537 at 541. See also Helen Stacy, 'Relational Sovereignty' (2003) 55 Stan. L. Rev. 2029 at 2051ff for a discussion of the ethical obligations attendant upon this influence.

On the other hand, with several notable exceptions (especially in the area of gay rights that I address in this article),[9] American judges 'have proven themselves largely resistant to arguments based on international human rights law.'[10] With a twentieth century domination of international relations as context, American judges frequently have taken the nation as sovereign, and law as a very sign of its sovereignty. For example, the death penalty has quickly lost international favour, and treaties among nations, declarations of the United Nations, and international attempts to avoid extradition to the United States in capital cases isolate the anomaly of American capital punishment jurisprudence.[11] Yet as Austin Sarat suggests, popular and judicial attachments to capital punishment are, possibly, 'the ultimate measure of sovereignty,' and state killing 'necessary to demonstrate that sovereignty can reside in the people.' [12]

In this article I look to similar constructions of popular sovereignty that surround gay rights, and same-sex marriage in particular, in an effort to restrain the flows and harness the political potential of global jurisprudence. As Tiahrt's remarks make clear, what is distinct in these legal and political arenas from that of capital punishment is that this sovereignty is being constructed through an overt

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9 e.g. *Lawrence v. Texas,* 123 S.Ct. 2472 at 2483, 539 U.S. 558 (2003), Kennedy J [*Lawrence*]: 'Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. ... The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries;' *Goodridge*, *supra* note 5 at 313 n. 3 citing *Halpern v. Toronto (City)*, [2003] 172 O.A.C. 276, and *EGALE Canada, Inc. v. Canada (A.G.)* (2003), 13 B.C.L.R. (4th) 1 (C.A.).

10 Reem Bahdi, 'Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts' (2002) 34 Geo. Wash. Int'l L. Rev. 555 at 556. See also L'Heureux-Dubé, *supra* note 7.

11 John Quigley, 'Pressure from Abroad Against Use of Capital Punishment in the United States' (2001) 8 ILSA J. Int'l & Comp. Law 169. Franklin E. Zimring & Gordon Hawkins, *Capital Punishment and the American Agenda* (Cambridge: Cambridge University Press, 1986). See also former United States Supreme Court Justice William Brennan's acknowledgement of this international pressure in his dissent in *Stanford v. Kentucky,* 492 U.S. 361at 384 (1989): 'the choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society.'

12 Austin Sarat, *When the State Kills: Capital Punishment and the American Condition* (Princeton, NJ: Princeton University Press, 2001) at 17; Austin Sarat & Nasser Hussain, 'On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life' (2004) 56 Stan. L. Rev. 1307 at 1313ff. See also Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998).

opposition to judicial authority, a suspicion of prevailing legal reasoning, and a renovation of the proper role for rights. While many of these political narratives are propelled by a fear of global jurisprudence and caution about the human rights language that infuses it, I argue here that the structure of global jurisprudence continues to haunt this new sovereignty language in complex and productive ways, making this area of policy ripe for analysis. What this sovereign framework can tell us about the role of human rights and global jurisprudence for governance of sexuality, the family, and other emergent areas of legal attention is the motivating question for this article.

I SEXUAL GOVERNANCE AND GLOBAL JURISPRUDENCE

In *Bowers v. Hardwick*, decided in 1986, the United States Supreme Court's acceptance of the rights of states to criminalize same-sex sodomy was reinforced by what Burger CJ noted to be the 'ancient roots' of these proscriptions anchored to the bedrock of Western civilization, Judeo-Christian moral and ethical standards, and the inherited common law.[13] This foundation provided authority for a constitutional sovereignty over the regulation of moral behaviour.[14] In 2003, the Court's repudiation of this doctrine in *Lawrence v. Texas* took explicit note of how temporally and spatially limited its earlier reasoning had been. The earlier opinion had overlooked a recent history of liberalization of sodomy laws in England and in the European Court of Human Rights that together challenged the monolithic view of Western civilization that Burger CJ had cited. The Court also cited approvingly an amicus brief from the former United Nations High Commissioner for Human Rights, Mary Robinson, and several allied human rights organizations that urged the Court to 'pay decent respect to these opinions of humankind'[15] and numerous other legal reforms explicitly rejecting the logic of *Bowers*[16] that had been subsequently enacted in countries with commensurable legal traditions. Temporally, the Court's opinion acknowledged that 'American laws targeting same-sex couples did not develop until the last third of the 20th century,'[17] a period that historians and one cited amicus brief noted to be dominated by the domestic reflection of Cold War internationalism that had made gays criminally suspect as threats to national security.[18]

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13 478 U.S. 186 at 192 (1986), Burger CJ, concurrence [*Bowers*].

14 See Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, N.J.: Princeton University Press, 2002) at 175-6.

15 Mary Robinson *et al.*, brief submitted in *Lawrence*, *supra* note 9, at 2.

16 The brief cited twenty-four non-American cases, nine treaties, and five constitutions that bolstered this argument.

17 *Lawrence*, *supra* note 9 at 2479, Kennedy J.

18 Professors of History *et al.*, brief cited *ibid.* at 2478. Stacy Braukman,

This legal reasoning suggests that the imagination of legal sovereignty over some aspects of adult sexuality was already global by the time of *Bowers*: first, 'civilized' nations could be seen to hold divergent opinions on these matters, and, second, the construction of a domestic 'tradition' for regulating these matters had been thoroughly saturated by international events such as the Cold War. This awareness exemplifies the ability of globalization to 'radically [reconfigure] relations among nations, undoing the old center-periphery understanding of world relations'[19] and in so doing melt away or modify the spaces, places, and temporalities through which 'the path of the law'[20] can be seen to unwind.

By calling into question the spatial locations of civilization (seen in some variants of human rights discourse as 'The West against The Rest') that is often taken to presume cultural integrity at the level of the nation state, this jurisprudence of sexual liberty also upsets common assumptions about the homogeneity of culture.[21] As a product of complex global forces, culture is understood to be more dependent upon human choice and political relation, a hybrid of domestic cultural differences based on migration, religious diversity, and international institutions rather than an opaque and tightly bounded 'tradition'. Thus, the *Lawrence* Court acknowledges the broad condemnation of sodomy 'shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family.'[22] However, its assumption of cultural diversity implies that these sources of authority

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'"Nothing Else Matters But Sex": Cold War Narratives of Deviance and the Search for Lesbian Teachers in Florida' (2001) 27 Feminist Studies 553; Robert D. Dean, *Imperial Brotherhood: Gender and the Making of Cold War Foreign Policy* (Amherst: University of Massachusetts Press, 2001); John D'Emilio, 'The Homosexual Menace: The Politics of Sexuality in Cold War America' in Kathy Lee Peiss *et al.*, eds., *Passion and Power: Sexuality in History* (Philadelphia: Temple University Press, 1989) 226; David K. Johnson, *The Lavender Scare: the Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago: University of Chicago Press, 2004). All but Johnson are cited in the brief.

19 Austin Sarat & Thomas R. Kearns, *Human Rights: Concepts, Contests, Contingencies* (Ann Arbor: University of Michigan Press, 2001) at 13.

20 The term is from Mr Justice Benjamin Cardozo who famously saw the fourth dimensional 'path of the law' as a temporal flow in which 'history, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future'(Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1971) at 53).

21 *Supra* note 19 at 15 ff. See also Rosemary Coombe, 'Contingent Articulations' in Austin Sarat & Thomas R. Kearns, eds., *Law in the Domains of Culture* (Ann Arbor: University of Michigan Press, 1998) 21; Sally Merry, 'Legal Pluralism' (1988) 22 Law & Soc'y Rev. 869.

22 *Lawrence, supra* note 9 at 2480, Kennedy J.

are binding only on individuals and do not inform majority obligations: 'For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.'[23]

The loss of criminal sanction, and with it the potential criminalization of gay desire, is not trivial and serves as a profound limitation on political and legal power.[24] Following Foucault and others,[25] these separated powers reveal a common composition of both juridical and disciplinary elements. As Wayne Morgan explains,

> *Juridical* power refers to the enforcement of norms of behaviour and *disciplinary* power refers to the normalizing, production and colonization of forms of identity. As Foucault discussed, legal institutions are often taken to be the paradigm of juridical power: the location of prescription and enforcement. But, increasingly, legal institutions adopt mechanisms of disciplinary power to better *know* and regulate the subject.[26]

By cloaking the body within a veil of privacy, it becomes more difficult to know and regulate homosexual and heterosexual difference through the law. For example, it puts an end to the Cold War mechanism by which some domestic security threats were named and regulated

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23 *Ibid*.

24 Janet Halley has argued that proscriptions against sodomy have reached far into the symbolic and cultural disadvantage that lesbians, gays and queers have been made to suffer. 'The criminalization of sodomy is crucial to the ordering of sexual-orientation identities, particularly to the subordination of homosexual identity and the superordination of heterosexual identity.' Janet E. Halley, 'Reasoning about Sodomy: Act and Identity in and after *Bowers v. Hardwick*' (1993) 79 Va. L. Rev. 1721 at 1731.

25 Michel Foucault, *Discipline and Punish: the Birth of the Prison*, 1st American ed. (New York: Pantheon Books, 1977); Michel Foucault, *The History of Sexuality: An Introduction*, vol. 1 (New York: Vintage Books, 1980). See also Marianne Constable, 'Sovereignty and Governmentality in Modern American Immigration Law' (1993) 13 Studies in Law, Politics and Society 249; Michael Dillon, 'Sovereignty and Governmentality: From the Problematics of the "New World Order" to the Ethical Problematic of the World Order' (1995) 20 Alternatives 323.

26 Wayne Morgan, 'Queering International Human Rights Law' in Carl Stychin & Didi Herman, eds., *Sexuality in the Legal Arena* (London: Athlone Press, 2000) 208 at 212.

through the policing of vice and the proof of criminal conviction.[27] And, to the extent that this domestic limitation of governance is justified by an international human rights regime, it demonstrates the ways in which national boundaries are made more porous through the restriction of disciplinary mechanisms.

However, disciplinary power over the gay subject is not completely eliminated by global jurisprudence as the concurrent controversy over same-sex marriage suggests. Within gay, lesbian and queer social movements there has been a brisk debate over the value of marriage as a political goal, with some eyeing it as a prelude to, or realization of, complete citizenship for sexual minorities[28] and others questioning the heteronormative disciplinary matrix of marriage as well as the forces of conformity that devolve from citizenship itself.[29] While these pressures of conventionality hold a potentially global character, especially where same-sex spousal recognition facilitates the privatization of social insurance and other costs to the benefit of international competitiveness,[30] it has been those conservatives alarmed at the growing prospect of same-sex marriage who have made this linkage to internationalism overt.

The conservative fear of global jurisprudence is linked to the anti-sodomy decision in direct and oblique ways that have magnified the importance of same-sex marriage. Although same-sex marriage is not explicitly invoked in the *Lawrence* Court's refusal to consider majority morality as constitutionally relevant to liberty rights, Scalia J's dissent does intimate a direct relationship, and the Massachusetts High Court cited *Lawrence* nine times in its equal protection argument for same-sex marriage.[31] Political opposition to same-sex marriage predated *Lawrence* and often eclipsed the concern over sodomy;[32] while states were

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27 Johnson, *supra* note 18.

28 Andrew Sullivan, *Virtually Normal: An Argument About Homosexuality*, 1st Vintage Books ed., (New York: Vintage Books, 1996); Evan Wolfson, *Why Marriage Matters: America, Equality, and Gay People's Right to Marry* (New York: Simon & Schuster, 2004).

29 Valerie Lehr, *Queer Family Values: Debunking the Myth of the Nuclear Family* (Philadelphia: Temple University Press, 1999); Michael Warner, *The Trouble With Normal: Sex, Politics and the Ethics of Queer Life* (New York: Free Press, 1999).

30 Susan B. Boyd & Claire F.L. Young, '"From Same-Sex to No Sex"?: Trends Towards Recognition of (Same-Sex) Relationships in Canada' (2003) 1 Seattle J. Soc. Just. 757.

31 Madame Justice O'Connor's concurrence suggests same-sex marriage may not be necessarily implicated in the Court's holding (*Lawrence*, *supra* note 9 at 2488). Mr Justice Scalia in his dissent does make this argument (*Lawrence, supra* note 9 at 2498). See also *Goodridge, supra* note 5.

32 Jonathan Goldberg-Hiller, *The Limits to Union: Same-Sex Marriage and the*

actively repealing their sodomy statutes prior to *Lawrence*, many states and the federal government were busy enacting barriers to same-sex marriage. Nonetheless, Scalia J's dissent and the Massachusetts decision became urtexts for a renewed opposition to human rights and global jurisprudence, which are now implicated in an American understanding of gay rights.[33]

In what follows, I examine several aspects of this renewed conservative opposition to same-sex marriage and gay rights in recent debates of the American Congress.[34] My goal is to explore the ways in which conservative opposition to internationalism attempts to recreate a popular sovereignty dedicated to the preservation of heterosexual entitlements. Since *Lawrence,* these politics have involved a ventured federal constitutional amendment against same-sex marriage championed by President George W. Bush, as well as the enactment of numerous state-wide barriers. The theoretical importance of this conservative sovereign construction reaches to the ways in which it attempts to exploit and resolve a predicament inherent within liberal democracies. As the political philosopher Seyla Benhabib frames this dilemma,

> [M]odern liberal democracies are self-limiting collectivities that at one and the same time constitute the nation as sovereign while proclaiming that sovereignty derives its legitimacy from the nation's adherence to fundamental human rights principles. 'We, the people,' is an inherently conflictual formula, containing in its very articulation the constitutive dilemmas of universal respect for human rights and particularistic sovereignty claims.[35]

Politics of Civil Rights (Ann Arbor: University of Michigan Press, 2002).

[33] See the federal *Defense of Marriage Act* [DOMA] Pub. L. 104-199, 110 Stat. 2419. Since Massachusetts approved same-sex marriage, thirteen states have modified their constitutions to prevent similar developments. Presently, forty-two states have statutory language defining marriage and seventeen states have similar constitutional language. Only seven states have no policy response to same-sex marriage.

[34] I rely upon debates over the *Marriage Protection Amendment* that took place in 2004 for many of the examples that follow. These debates are useful sources for this new oppositional discourse even though the Amendment failed, and was certain of failure at the time of the debates. Because this issue was highly politicized by the support of the President on behalf of his campaign, and because it coincided with eleven state-wide constitutional amendments in states critical to the President's victory, the debates remain a good source for analyzing the central currents and fault-lines in this politics.

[35] *Supra* note 14 at 177. See also Bruce A. Ackerman, *We the People*

What makes this dilemma more problematic in the case of sexual rights is both the conservative necessity to isolate the impact of legal precedent that has supported gay rights on the basis of human rights, and the need to rebuild sovereignty without the disciplinary mechanisms now inhibited by an expanded private sphere. Both the juridical and the disciplinary power of law are thus limited in their utility to these politics.

This formulation of public sovereignty is, therefore, unlike that which emerges around capital punishment that inherently valorizes law and its deployment of the ultimate violence of the state.[36] The lack of this state power invites religious authority, 'traditionalism' of various kinds, and other social languages to step into the breach. I suggest below that it also permits a modification and a valorization of civil and human rights that disciplines the global flow of legal culture.

II A SOVEREIGN INTERNATIONALISM

In April 2004, Rep. Ron Paul of Texas cited the *Lawrence* decision as he introduced in Congress the *American Justice for American Citizens Act* in an effort to curb 'transjudicialism'. This was

> a new legal theory that encourages judges to disregard American law, including the United States Constitution, and base their decisions on foreign law. ... The Constitution was ordained and ratified by the people of the United States to provide a charter of governance in accord with fixed and enduring principles, not to empower federal judges to impose the transnational legal elites' latest theories on the American people. ... [T]he drafters of the Constitution gave Congress the power to regulate the jurisdiction of federal courts precisely so we could intervene when the federal judiciary betrays its responsibility to uphold the Constitution and American law.[37]

Although the Act did not gain significant support, the charge that judicial elites have violated the proper boundaries of American popular

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(Cambridge, Mass.: Belknap Press of Harvard University Press, 1991).

36 Foucault writes, 'For a long time, one of the characteristic privileges of sovereign power was the right to decide life and death. … The right … was in reality the right to *take* life or *let* live. Its symbol, after all, was the sword.' Michel Foucault, *The History of Sexuality: An Introduction*, *supra* note 25 at 135-6.

37 U.S., *Cong. Rec.*, vol. 150, at E512 (2004). Rep. Paul may have been referring to scholarship whose genealogy can be found in Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 U. Rich. L. Rev. 99. See also Bahdi, *supra* note 10.

sovereignty has resonated throughout conservative attempts to limit gay rights.[38]

As the quotation above suggests, these conservative arguments against global jurisprudence engage an ambivalent comprehension of legal and political culture. On the one hand, culture is understood to be pluralist whether projected into an international set of spaces, or domestically where elite judicial culture can be seen to diverge from that of 'the American people'. In its more progressive version, legal pluralism adheres to the notion that civil and human rights are immaterial and flexible; the protection of cultural difference for one group does not unduly impinge on the democratic rights enjoyed by others.[39] Supporters of same-sex marriage have relied upon this understanding of legal pluralism when they voice their incredulity that their right to marry has significant consequence for others.[40]

Mr Justice Scalia's dissent in *Lawrence* gestures towards a very different construction of political and legal culture when he claims that the Court majority has intruded into a 'culture war'[41] over attitudes towards the appropriate public and private norms of sexuality, a sign 'that [it] is impatient of democratic change.'[42] The metaphor of war sharpens the significance of pluralist difference, and the related idea that jurists play a role antagonistic to democracy insinuates that they contribute to this unrest, perhaps as proxies for subversive elites. For this reason, it is common within conservative discourse to hear concern about 'judicial tyranny': 'The question of the future of marriage in

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38 While the Christian right has contributed to this critique of transjudicialism, some have also been quite involved internationally in restricting human and civil rights. See Doris Buss & Didi Herman, *Globalizing Family Values: the Christian Right in International Politics* (Minneapolis: University of Minnesota Press, 2003).

39 See Jonathan Goldberg-Hiller & Neal Milner, 'Rights as Excess: Understanding the Politics of Special Rights' (2003) 28 Law & Soc. Inquiry 1075; Cindy Patton, 'Queer Space/God's Space: Counting Down to the Apocalypse' (1997) 9(2) Rethinking Marxism 1 at 7ff.

40 In a slightly humorous vein, Rep. Barney Frank of Massachusetts responded to a colleague's argument that gay rights threatened 'traditional marriage' by saying, 'I am a gay man and I have presided over the dissolution of none. So I guess I do not feel quite as guilty about assaulting marriage as some of you would like me to feel. I am sorry Rush Limbaugh has been divorced three times, but it ain't my fault; and it is not the fault of any of my friends. That is the issue' (U.S., *Cong. Rec.*, vol. 150, at H7908 (2004)).

41 Mr Justice Scalia had called this a *Kulturkampf* in his dissent in *Romer v. Evans,* 517 U.S. 620 at 636 (1996).

42 *Lawrence, supra* note 9 at 2497.

America has been forced upon us by activist judges …;'[43] 'unelected judges … want to reshape our country, even if they destroy democracy in the process. ... They are attacking the principles of democracy and undermining our republican form of government.'[44] The idea that political majorities are vulnerable, that they are the actual and authentic victims of a gay rights agenda, rhetorically depicts the majority mistreated as the true minority, inverting the rights-based notion of injury and the duty of protection. The accusation that rights claimants are the true oppressor materializes rights while it loosely sutures a plural culture into a more common set of norms reinforced by the rhetoric and activities (such as voting for amendments) of popular sovereignty.[45]

If culture is pluralist in one accounting, it is perhaps contradictorily imagined as unitary through the play of international actors commonly striving for national security. Where global jurisprudence renders national boundaries more fluid and explains this fluidity through the cultural cosmopolitanism of governmental and legal elites, conservative discourse frequently identifies a limited legality as a bulwark of national security. Rejecting same-sex marriage will generate national strength: 'strong families foster strong morals and a strong Nation to go with it,'[46] while giving in to those demanding rights to marry will weaken the union: 'if you destroy marriage as the definition of one man and one woman creating children so that we can transfer our values to those children and they can be raised in an ideal home, this country will go down.'[47] The threat of gay rights provides the context for the claims of national defence that displaces judicial with legislative control of the issue (for example, '*Defense* of Marriage Act', 'Marriage *Protection* Amendment').

This contemporary conservative discourse also has an external side, reimagining rights advances elsewhere as signals warning against the path of national decline. One recent element of this debate in the United States Congress has been a sociological war on Scandinavia and Europe who have enacted same-sex marriage and civil unions. '[T]he experience of our neighbours in Europe has been that when we change the definition of marriage, we begin the decline and ultimately the abolition of marriage as we know it;' '[m]arriage in Scandinavia and in

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43 U.S., *Cong. Rec.*, vol. 150, at H7890 (2004) (Rep. Tom Delay of Texas).

44 U.S., *Cong. Rec.*, vol. 150, at H7915 (2004) (Rep. Ernest Istook of Oklahoma).

45 I have addressed this issue of materialization at further length in *The Limits to Union: Same-Sex Marriage and the Politics of Civil Rights*, *supra* note 32; Goldberg-Hiller & Milner, 'Rights as Excess: Understanding the Politics of Special Rights', *supra* note 39.

46 U.S., *Cong. Rec.*, vol. 150, at H903 (2004) (Rep. Kevin Brady of Texas).

47 U.S., *Cong. Rec.*, vol. 150, at H7924 (2004) (Rep. Delay).

Holland is dying since the advent of same-sex marriage ….'[48] In these and similar comments, the defence of marriage through the opposition to rights and their return through a global jurisprudence eliminates social obstacles to important national projects presumed to follow the sagging statistical curve of marriage rates.

The rhetorical reduction of social change to national identities has several consequences. For one, it contributes to the argument that progressive rights-based social movements and their judicial champions are simply wrong. But it also attempts to make up for this deficit of truth with a realist model of international relations. Here, as Richard Ashley has argued, national sovereignty serves as an epistemological ground:

> The sign of 'sovereignty' betokens a rational identity: a homogeneous and continuous presence that is hierarchically ordered, that has a unique centre of decision presiding over a coherent 'self,' and that is demarcated from, and in opposition to, an external domain of difference and change that resists assimilation to its identical being … [Sovereignty is invoked] as an originary voice, a foundational source of truth and meaning … that makes it possible to discipline the understanding of ambiguous events and impose a distinction … between what can be represented as rational and meaningful (because it can be assimilated to a sovereign principle of interpretation) and what must count as external, dangerous, and anarchic.[49]

'Common sense' reinforces a rational and meaningful national order, and judicial meddling with sexual rights can be opposed on the tautological basis that 'marriage is … what it is;'[50] 'the definition of marriage seems to … the vast majority of the American people, as a matter of common sense and social reality.'[51] This self-evident production of truth also reinforces the ahistorical idea that civilized marriage has always been as it is now. Together, these arguments set the stage for a reformulation of cultural pluralism as an accounting of differences that must be rejected as dangerous and anarchic, or

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48 U.S., *Cong. Rec.*, vol. 150, at H7919, H7912 (2004) (Rep. Mike Pence of Indiana). See also extension of remarks by Rep. Marilyn Musgrave of Colorado, U.S., *Cong. Rec.*, vol. 150, at E1912 (2004).

49 Richard Ashley, 'Untying the Sovereign State: A Double Reading of the Anarchy Problematique' (1988) 17:2 Millennium: Journal of International Studies 227 at 230.

50 U.S., *Cong. Rec.*, vol. 150, at S7871 (2004) (Sen. Wayne Allard of Colorado).

51 U.S., *Cong. Rec.*, vol. 150, at H7890 (2004) (Rep. Delay).

subsumed under the timeless and contour-free truth that 'we are a Christian Nation.'[52] The older notion of *gays* embodying danger and social anarchy is thereby reinforced with a contemporary belief that *gay rights* pose a palpable threat to the nation.

The conservative reformulation of global governance from an emerging model of relational sovereignty in which communicative norms encourage mutual accommodation through jurisprudence[53] to one of realist sovereignty where truth emerges as the expression of national communities guarded by security-minded states helps to deflect judicial authority and the impact of human rights language, but it paradoxically remains cognizant of internationalism in its insistence on popular sovereignty against the infiltrating threat of gay rights. This irony is most visible in the new cartographies that such realism reinvents to explain away internal cultural opposition. If there is a global cold war against alien values externally, so has there become a cold war within.

Federalism is one idiom for advancing this perspective, framing states' traditional authority over marriage as judicial acts of aggression and hostility to the collective when they act for same-sex marriage: 'State court challenges in Massachusetts or Vermont or Maryland may seem well and good to those concerned with the rights of States to determine most matters ... [t]hese challenges, however, have spawned greater disrespect, even contempt, for the will of States than any of us could have predicted.'[54] Even though marriage has been 'federalized' by the *Defense of Marriage Act*, the fear of judicial tyranny impels the need for state-by-state vigilance in the form of state-wide constitutional amendments, as well as a commitment to renewed federal protection. As President Bush framed the need for a federal amendment against same-sex marriage, 'there is no assurance that the Defense of Marriage Act will not itself be struck down by activist courts. ... Furthermore, even if the Defense of Marriage Act is upheld, the law does not protect marriage within any state or city.'[55] The cultural and judicial war between the states is expanded beyond state judiciaries through a popular cartography of more urban, progressive and non-religious 'blue' states opposed to the more spacious rural and God-fearing heartland of

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52 U.S., *Cong. Rec.*, vol. 150, at H7894 (2004) (Rep. Roscoe Bartlett of Maryland).

53 Helen Stacy, 'Relational Sovereignty' (2003) 55 Stan. L. Rev. 2029. See also Iris Marion Young, 'Two Concepts of Self-Determination' in Sarat & Kearns, *supra* note 19.

54 U.S., *Cong. Rec.*, vol. 150, at S7872 (2004) (Sen. Allard).

55 The White House, News Release, 'President Calls for Constitutional Amendment Protecting Marriage' (24 February 2004), online: The White House <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html>.

'red' states.[56] Here, blue areas contain a minority of cosmopolitan elites more aligned with international values. One popular cartoon following the election of 2004 made this stark by mapping blue states into 'The United States of Canada' and red states as 'Jesusland', poking fun at the foreign character of progressive gay rights as well as the religious provincialism of their opponents. A recent *New York Times* headline, 'The Blue-State Nation to the North',[57] says it all: Canada, with its progressive legal culture, is a relevant national aspiration for blue states.

The construct of popular sovereignty entangles opposition to marriage rights for gays and lesbians within this same contradictory consciousness about the sanctity of national integrity (with nation writ as small as necessary) and a global engagement with a rights culture inspired by American developments. The metaphors of cold war—internationally and domestically—deepen the meaning and materialize pluralist division while they raise the spectre of authentic American identities able to resist this international reflection. It is what Thomas Frank has recently called 'the glamour of authenticity, combined with the narcissism of victimhood,'[58] a sense of vulnerable security challenged by a rights culture imagined as foreign and aggressive, that gives these identities their power to cement a new sovereignty. Although this sovereignty is opposed to perceived judicial excess, the narcissism of victimhood also produces a keen sense that rights culture should not be flushed entirely, as rights talk provides one of the most familiar languages of self-recognition. I have argued elsewhere that civil rights provides a set of legal images for legitimating the claim of authentic victimhood by majorities opposed to the rights claims of gays and others.[59] But it is also apparent from the recent debates that human

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[56] This distinction between territorially smaller blue states and the larger red states who voted for George W. Bush in 2000 was likely popularized as a way of legitimating Bush's installation as President without an electoral majority. Popular cartographic images from his 2004 reelection include county by county coding for Presidential vote, demonstrating the small territory of urban areas with progressive inclinations. Progressive attempts to defeat this cartography have suggested the possibility of a singular purple nation. See Jonathan Alter & Andrew Romano, 'The Audacity of Hope' *Newsweek* 145:1 (3 January 2005) 75.

[57] Clifford Krauss, 'The Blue-State Nation to the North' *The New York Times* (13 June 2004) s. 4, 4.

[58] Thomas Frank, *What's the Matter with Kansas?: How Conservatives Won the Heart of America*, 1st ed. (New York: Metropolitan Books, 2004) at 157.

[59] *Supra* note 32; Jonathan Goldberg-Hiller, '"Subjectivity is a Citizen": Representation, Recognition, and the Deconstruction of Civil Rights' (2003) 28 Studies in Law, Politics and Society 139. See also Cindy Patton, 'Tremble, Hetero Swine!' in Michael Warner, ed., *Fear of a Queer Planet: Queer Politics and Social Theory* (Minneapolis: University of Minnesota Press, 1993) at 143.

rights does something similar. As the epigraph to this article reveals, the conservative public commitment to human rights engages a limited universalism while preserving a sense that some forms that these rights take (such as rights to abortion or to same-sex marriage) are excessive and antithetical to the same regime of civilization that has spawned them. This argument raises an important paradox not easy to settle within a growing global jurisprudence: human rights must ultimately preserve self-determination, and that is exactly what is imagined to be at stake for these conservative majorities opposed to gay rights.

III CONSEQUENCES

The American political and social struggles allied against the authority of global jurisprudence are being ironically fought today with a continued global imagination. This imagination rejects the precepts of international and intercultural learning but sustains a nominal commitment to human rights compatible with concerns over the cultural dynamics of national security, the political appeal of popular sovereignty, and an ahistorical concept of international civilization. Sexuality and the family operate as vital mediums for these struggles. As issues that engage gay, lesbian, and queer social movements as well as the aspirations of many middle class women domestically and around the world, they have provided an acceptable site for American judges to acknowledge these broad international pressures and to reaffirm an American-inspired civil rights tradition. As issues that also mobilize a growing conservative base, they provide an opportunity for judicial control of the pace of change (especially in the arena of same-sex marriage), and for a conservative reaction that seeks to isolate judicial authority and choke off progressive legal mobilization.

An emerging popular sovereignty—evident in conservative discourse as well as the politics of anti-rights referenda[60]—that replaces, reforms, or resists the perceived activism of judges has important consequences for the social and political identities around which the disciplinary and juridical components of governmental power can cohere. This conservative discourse seeks to rematerialize rights in order to create new understandings of how rights must 'pay off' to keep the nation strong and competitive, and how industrious and restrained citizens must keep public demands in the forms of new rights or entitlements to a bare minimum. This is a more conservative expression

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[60] According to Barbara Gamble more than twice as many popular referenda were held on gay rights issues (forty-three,1977–93) than on school desegregation and housing during the civil rights movement (eighteen, 1959–89), with the public rejecting rights claims about eighty per cent of the time. Barbara Gamble, 'Putting Civil Rights to a Popular Vote' (1997) 41:1 American Journal of Political Science 245.

of global jurisprudence, one that contrasts itself to a communicative pluralism projected to threaten the viability of national communities, and the heterosexual families that undergird them, through a pervasive attention to individual rights.[61]

The contemporary efforts of conservatives to imagine their own political efforts in contrast with a global commitment to expand individual liberty—however excessive they understand this liberty to be—should inform but not frame either legal analysis of global jurisprudence or progressive human rights politics. Conservatives are wrong when they argue that the judicial cognizance of human rights signals or creates non-governmental liberties; global jurisprudence does not serve as an alternative to national governance as their very own rights talk reveals. Analysis of conservative attempts to create a new meaning for sovereignty underscores the frequently unacknowledged reincorporation of civil and human rights into arguments protecting an authentic American community from the threats of sexual licence. Perhaps unwittingly, conservatives are right that rights are not always a bulwark of protection from state excess as many liberals have claimed,[62] but may serve to channel and reaffirm disciplinary and juridical power.

The point is that human rights discourse can 'assimilate and colonize'[63] as much as it can establish progress and enhance privacy. As a caution for progressives, in 'law's complicity in the policing of desire'[64] it is possible to identify the ways in which human rights law remains somewhat hetero-orthodox. While American courts prevaricate on the issue of same-sex marriage, human rights regimes may

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61 Rep. Musgrave makes this circuitous point in her indictment of the Netherlands, 'America's already significant family vulnerabilities would be pushed beyond the breaking point if Scandinavian-style parental cohabitation spread here. ... [T]he meaning of traditional marriage was transformed every bit as much by the decade-long national movement for gay marriage in Holland as by eventual legal success. That's why the impact of gay marriage on declining Dutch marriage rates and rising out-of-wedlock birthrates begins well before the actual legal changes were instituted. ... [C]ontinued marital decline in Scandinavia and the Netherlands has already provided us with enough evidence to call the wisdom of same-sex marriage into serious doubt' (U.S., *Cong. Rec.*, vol. 150, at E1913-14 (2004)).

62 Philosophically, this liberalism is nicely summed up by Ronald Dworkin's ludic metaphor that 'rights are trumps' protecting individual autonomy from government zeal, though not completely from conceptions of the general and collective good. See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977); Jeremy Waldron, 'Pildes on Dworkin's Theory of Rights' (2000) 29 J. Legal Stud. 301.

63 *Supra* note 26 at 208.

64 *Ibid.*

increasingly look more like recent legal efforts in New Zealand to resolve equal rights claims with a European and American version of civil unions for same-sex couples[65] that placates conservatives by preserving the status of marriage. In the circulation of legal meaning, global jurisprudence may draw upon these developments as precedent for American constitutional interpretations of the marriage question. Whether human rights could ever provide the impetus for rethinking the very terms of debate to include such questions as the role of marriage and family in the creation of political authority is as much a matter of political will as it is of legal meaning.

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[65] *Civil Union Bill* 2004; this law is slated to take effect on 26 April 2005 following the passage of enabling legislation in the Parliament. The text of the bill addresses 'international trends' in Scandinavia, France, Canada, Germany, Belgium, Croatia, United Kingdom, Italy, Switzerland, Spain, and the United States, noting in particular Vermont's civil union law.

We are the World?
What United States Courts Can and Should Learn from the Law and Politics of Other Western Nations

EVAN GERSTMANN*

I A PERCEPTION OF CHANGE

The United States is often perceived as a nation that prefers not only to go its own way, but also to take almost a perverse pride in ignorance of foreign ways and indifference to the opinion of our international peers. Until recently, this perception has certainly extended to America's most powerful court, the Supreme Court of the United States of America. In 2003, for example, an article in *The Legal Times*, referred to the Court as an 'ostrich' that had only just begun to take its head out of the sand.[1] This perception, however, is likely to change over the next several years. In a single seven-day period in 2003, the United States Supreme Court cited international sources, such as foreign laws and documents, in three high-profile cases in which it interpreted the American constitution.

In *Atkins v. Virginia*,[2] the Court cited the brief of the European Union in its decision curtailing American use of the death penalty: 'Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.' A few days later, in a concurring opinion, Ginsburg J referred to the *International Convention on the Elimination of All Forms of Racial Discrimination,* in her concurring opinion in a case deciding the limits of university affirmative action policies: 'The Court's observation that race-conscious programs "must have a logical end point," … accords with the international understanding of the office of affirmative action.'[3]

In what has probably been the most widely remarked upon of the three cases, the Court cited a decision of the European Court of Human Rights (ECHR) when it struck down Texas' law against homosexual sodomy:

> Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who

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* Associate Professor of Political Science, Loyola Marymount University, Los Angeles.

1 Tony Mauro, 'Supreme Court Opening up to World Opinion' *The Legal Times* (7 July 2003) 1 at 8.

2 536 U.S. 304 at 316 n. 21 (2002) [*Atkins*].

3 *Grutter v. Bollinger*, 539 U.S. 306 at 344 (2003) [*Grutter*].

> desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The Court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon* v *United Kingdom*, 45 Eur. Ct. H. R. (1981) P 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.[4]

In the same decision, the *Lawrence v. Texas* Court also cited other cases of the ECHR, as well as the practices of other nations:

> To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon* v *United Kingdom.* See *P. G. & J. H.* v *United Kingdom*, App. No. 00044787/98, P 56 (Eur. Ct. H. R., 25 September 2001); *Modinos* v *Cyprus*, 259 Eur. Ct. H. R. (1993); *Norris* v *Ireland*, 142 Eur. Ct. H.R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary Robinson et al. as *Amici Curiae* 11-12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.[5]

Furthermore, recent remarks by Ginsburg and Breyer JJ, have indicated that the United States Supreme Court will be more attentive to what other nations have to say about legal and policy issues. During oral argument of the affirmative action cases, Ginsburg J asked (presumably rhetorically),

> We're part of a world, and this problem is a global problem. Other countries operating under the same equality norm have confronted it. Our neighbor to the

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4 *Lawrence v. Texas*, 539 U.S. 558 at 573 (2003) [*Lawrence*].

5 *Ibid.* at 576.

> north, Canada, has, the European Union, South Africa, and they have all approved this kind of, they call it positive discrimination. … [T]hey have rejected what you recited as the ills that follow from this. Should we shut that from our view at all or should we consider what judges in other places have said on this subject?[6]

These sorts of remarks have not been confined to the courtroom or to legal opinions. In his 2003 keynote address to the American Society of International Law, Breyer J averred that 'comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights.'[7]

II CRITICISMS OF THE COURT'S USE OF INTERNATIONAL LAW AND NORMS

Thus, a new age of attentiveness to the wider world may be dawning upon the United States, or at least upon its federal courts. Some prominent conservatives have reacted to this possibility with a shrillness bordering on hysteria. Former United States Supreme Court nominee Robert Bork calls the Court's recent references to international sources an 'absurd turn in our jurisprudence'[8] and the opening salvos in 'the transnational culture war.'[9] United States Supreme Court Justice Antonin Scalia expressed similar disgust, calling the Court's discussion of 'these foreign views' meaningless, yet dangerous.[10] For good measure Scalia J quoted his brethren Thomas J's admonition that 'this Court ... should not impose foreign moods, fads, or fashions on Americans.'[11]

Some legal scholars have also criticized the Court's use of international legal sources, albeit with less hyperbole than Bork and Scalia J. Roger Alford warns of several drawbacks to this practice. For one thing, the Court is likely to be highly selective and/or haphazard in

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6 *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003) (transcript of oral argument, available in 2003 U.S. Trans Lexis 27 at 24 (Lexis)).

7 Stephen Breyer, 'Keynote Address' (2003) 97 Am. Soc'y. Int'l. L. Proc. 265 at 265, quoting Ruth Bader Ginsburg & Deborah Jones Merritt, 'Affirmative Action: An International Human Rights Dialogue' (1999) 21 Cardozo L. Rev. 253 at 282.

8 Robert H. Bork, 'Whose Constitution Is It, Anyway?' *National Revue* 55:23 (8 December 2003) 37.

9 Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (Washington, DC: AEI Press, 2003) at 11.

10 *Supra* note 4 at 598.

11 *Ibid.*, quoting *Foster v. Florida,* 537 U.S. 990 (2002), Thomas J concurring in denial of *certiori*.

its use of such sources.[12] For example, Alford notes that while the *Lawrence* Court referred to the law and practices of nations that have progressive policies on legal equality for gay men and lesbians, it ignored the 2002 *World Report* of Human Rights Watch, which noted that '[i]n virtually every country in the world people suffered from *de jure* and *de facto* discrimination based upon their actual or perceived sexual orientation.'[13] Indeed, as Alford points out, the legal picture for gay men and lesbians in much of the world, including many former British colonies, is quite bleak, making it quite difficult to make clear judgments about how the policies of the United States compare to others around the world.[14]

Furthermore, Alford points out that the Court has not articulated a clear theory about why world opinion should not be outweighed by domestic opinion. If Americans or Texans for that matter believe that homosexuality is a sin, then why should it matter if our NATO allies believe differently? Finally, Alford warns that supporters of the Court's engagement with international legal sources best be prepared to take the bitter with the sweet. After all, many other nations are far less protective of such rights as abortion and free speech than are American courts.[15]

Other legal scholars have also warned against reliance by the United States on the judgments of foreign courts. Michael Ramsey argues that 'there is no obvious connection between the U.S. Constitution and foreign court opinions, which address the interpretation of different documents, written in different times and

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12 Roger Alford, Misusing Sources to Interpret the Constitution' (2004) 98 Am. J. Int'l L. 57 at 64 *et seq*.

13 *Ibid*. at 65.

14 See *Ibid*. at 65-6: 'Amnesty International reports that "[i]individuals in all continents and cultures are at risk" of discrimination based on sexual orientation and "many governments at the U.N. have vigorously contested any attempts to address the human rights of lesbian, gay, bisexual and transgender people." One definitive source not cited in any amicus brief paints a bleak picture, indicating that there is "hardly any support for gay and lesbian rights" among the population in 144 countries, that the treatment of homosexuals is far worse in the former British colonies than elsewhere, that a majority in only eleven countries favors equal rights for homosexuals, that only six countries legally protect gays and lesbians against discrimination, and that 74 of the 172 countries surveyed outlaw homosexuality. In short, while the Court is no doubt correct that *Bowers* has been rejected elsewhere in the world, these and similar reports also make clear that the reasoning and holding in *Bowers* has *not* been rejected in much of the civilized world' [citations omitted].

15 *Ibid*. at 67-8.

different countries (and sometimes different languages).'[16] Even before the current heightened attention to this issue, the eminent law professor Frederick Shauer declared that '[o]ne need not slide into unacceptable relativism to acknowledge that perhaps American constitutionalists can perform a great service by helping other countries to understand that constitutional constraints rest on culturally contingent categories.'[17]

These are some serious objections and they should give any thoughtful person, no matter how enthusiastic he or she may be for the results in *Atkins, Grutter,* and *Lawrence*, a pause. All of these objections have some merit. The possible sources of international and comparative legal authority are vast, and the danger that American courts will use such sources haphazardly, selectively, or merely to justify a politically desired result is certainly real. It is probably not a coincidence that Bork and Scalia J, both conservatives, are attacking the use of international sources in three decisions that produced liberal results. It remains to be seen if Ginsburg and Breyer JJ, both liberals, will be open to paring back, for example, American abortion rights based upon international norms. Further, the question of when and how it is appropriate to use international rules and norms to constrain the options of democratic majorities in the United States is, to say the least, under-theorized. Much groundwork would have to be done to begin producing consistent, defensible answers to this question.

III ANSWERING THE CRITICS

So has the United States Supreme Court taken a wrong or even a dangerous turn? Certainly not. Caution is clearly merited, but, in fact, the Court has indeed been quite cautious in dipping its toe into international waters. For one thing, the Court's referencing of international sources is hardly as novel as the current waive of criticism might lead some people to think. Contrary to the stereotype of American ignorance of international practice, the Court actually has a long history of looking to foreign practices when it interprets the Constitution. Long before there was a debate over same-sex marriage, the Supreme Court relied largely upon European norms and laws in rejecting arguments for allowing polygamous marriages (although the comparison was tainted by the racism endemic to the era): 'Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African

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16 Michael D. Ramsey, 'International Materials and Domestic Rights: Reflections on *Atkins* and *Lawrence'* (2004) 98 Am. J. Int'l L. 69 at 73.

17 Frederick Schauer, 'Free Speech and the Cultural Contingency of Constitutional Categories' (1993) 14 Cardozo L. Rev. 865 at 880.

people.'[18] In 1897, the Court relied upon both historical and contemporary international practice to help construe the 13th Amendment of the United States Constitution, and, in 1923, the Court cited international law in support of its interpretation of the Constitution's 18th Amendment banning the manufacture, sale or transportation of 'intoxicating liquors.'[19] More recently, the Court has cited international law and practices in order to help illuminate the murky waters of 'substantive due process.' For example, in *Washington v. Glucksberg*, the Court rejected the argument that substantive due process protects the right of mentally competent people to commit physician-assisted suicide, noting that 'in almost every western democracy it is a crime to assist a suicide.'[20]

Of course, just because the Court has been citing international law and norms for a long time does not mean that doing so is a good idea. What about all the objections to this practice set out above? This article argues that these objections, although serious in nature, are reason for care and caution, not for avoiding international sources altogether. Indeed, this article argues that in the case of *Lawrence v. Texas*, international laws and norms played a crucial and entirely appropriate role. They served two vital functions: (*a*) they helped sweep aside the powerful intuition that condemnation of homosexuality represents a consensus of western values; and (*b*) they helped allay fears of a slippery slope from legalization of homosexual sodomy to legalizing such bugaboos as bestiality, incest and underage sex. To explicate how crucial these two functions are to the equal rights of gay men and lesbians, this article will turn to the legal and political debate currently raging in the United States over same-sex marriage.

IV THE DEBATE OVER SAME-SEX MARRIAGE IN THE UNITED STATES

One of the striking aspects of the debate over same-sex marriage in the United States is that, despite the emotional intensity of many opponents of same-sex unions, the arguments against such marriages are remarkably ill-thought-out. Indeed, I argue elsewhere that they may not even be coherent enough to withstand the Supreme Court's lowest level of constitutional scrutiny, which demands merely that a law be rationally related to a legitimate governmental interest.[21] While space

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18 *Reynolds v. United States*, 98 U.S. 145 at 164 (1878).

19 *Robertson v. Baldwin,* 165 U.S. 275 at 283-6 (1897) at 283-86, and *Cunard S.S. v. Mellon*, 262 U.S. 100 at 122-24 (1923), respectively (both cited in Gerald L. Neuman, 'The Uses of International Law in Constitutional Interpretation' (2004) 98 Am. J. Int'l L. 82 at 84.)

20 521 U.S. 702 at 710 (1997).

21 Evan Gerstmann, *Same-Sex Marriage and The Constitution* (New York: Cambridge University Press, 2004) at 13-40.

concerns do not allow for a discussion of all of the anti-same-sex marriage arguments, this article will address some of the most commonly made arguments: definition, tradition, and religion.

Arguments based on the definition of marriage, tradition, and religion fit in the same general category because each is basically self-contained: marriage should remain exclusively heterosexual because that simply is what marriage is, because that is what marriage has always been, or because the major religious traditions have always understood marriage to be between a man and a woman. These are not consequentialist arguments about what will happen if gays and lesbians are allowed to marry; they are rooted in a particular understanding of how things have always been and how things are.

The argument from definition has been impregnable with the courts ever since same-sex marriage cases began reaching state high courts in the early 1970s. In 1971, the first to hear such a case, the Minnesota Supreme Court, relied upon dictionary definitions. Two years later, in *Jones v. Hallahan*, the Kentucky Supreme Court cited three different dictionary definitions of marriage to show that it has always been understood as a union of man and woman. In 1974, the Court of Appeals of Washington held that the one man, one woman nature of marriage is too obvious to even bother looking at the dictionary:

> Although it appears that the appellate courts of this state until now have not been required to define specifically what constitutes a marriage, it is apparent from a review of cases dealing with legal questions arising out of the marital relationship that the definition of marriage as the legal union of one man and one woman who are otherwise qualified to enter into such a relationship not only is clearly implied from such cases, but also was deemed by the court in each case to be so obvious as not to require recitation.[22]

The Court added, '[w]e need not resort to the quotation of dictionary definitions to establish that "marriage" in the usual and ordinary sense refers to the legal union of one man and one woman.'[23] Legal commentators opposing gay marriage have also emphasized this argument. According to Richard F. Duncan, 'homosexual marriage is an oxymoron. It simply does not exist, because the legal definition of marriage "is that it is a union of a man and woman."'[24]

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22 *Singer v. Hara,* 522 P.2d 1187 at 1191-92 (1974).

23 *Ibid.* at 1192 n. 6.

24 Richard F. Duncan, 'Homosexual Marriage and the Myth of Tolerance: Is Cardinal O'Connor a "Homophobe"?' (1996) 10 Notre Dame J.L. Ethics & Pub. Pol'y 587 at 589.

This is an argument that simply cannot hold water. The definitional argument fails by the very definition of 'definition': definitions are arbitrary. Suppose a mountain is defined as any hill whose peak is at least one thousand feet above sea level. If some geographers were to suggest that we start calling hills over nine hundred feet mountains because hills of this size have more in common geologically with mountains than with smaller hills, we would be surprised if a geographer responded, 'But we can't do that; by definition, a mountain must be over one thousand feet.' Such a response would be seen as irrational. Regarding the argument that marriage is opposite-sex by definition, James Trosino nicely summarizes the problem: it 'amounts to an intellectually unsatisfactory response: marriage is the union of a man and a woman because marriage is the union of a man and a woman.'[25] This is not to say that all definitions are irrational or that the choice of one definition over another is purely a matter of fancy. Clearly, some definitions have greater utility than others for purposes such as ease and clarity of communication, facilitation of scientific research, or because we wish to convey certain values by the way we define words. Nonetheless, arguing that marriage must be heterosexual simply because it is currently defined that way is not a strong argument.

Closely related is the argument about tradition and religion. The belief that exclusively heterosexual marriage is firmly rooted in tradition and religion seems to resonate powerfully with the majority of the American public. Even the generally liberal, pro-gay rights Senator Hillary Rodham Clinton has publicly bowed to this sentiment. In January 2000, she said, '[m]arriage has got historic, religious, and moral content that goes back to the beginning of time, and I think a marriage is as a marriage has always been: between a man and a woman.'[26]

This sort of reliance on tradition and religion is also misplaced. Responding to Senator Clinton's statement that 'marriage has historic, moral and religious content that goes back to the beginning of time', Andrew Sullivan writes,

> [E]ven a cursory historical review reveals this to be fragile. The institution of civil marriage, like most human institutions, has undergone vast changes over the last two millennia. If marriage were the same today as it has been for 2,000 years, it would be possible to marry a twelve-year-old you had never met, to own a wife as property and dispose of her at will, or to

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[25] James Trosino, 'American Wedding: Same-Sex Marriage and the Miscegenation Analogy' (1993) 73 B.U. L. Rev. 93 at 116.

[26] Quoted in Andrew Sullivan, 'State of the Union—Why "Civil Union" Isn't Marriage' *The New Republic* 222 (8 May 2000) 18 at 20.

> imprison a person who married someone of a different race. And it would be impossible to get a divorce.[27]

Indeed, fundamental understandings of the definition of marriage have careened from one extreme to another and everywhere in between in Western culture. At one time, the dominant view of marriage vows in Catholic countries was that 'any private promise (no witnesses needed) was an unbreakable sacrament.'[28] Far from a Western consensus on the meaning of marriage, Protestants and Catholics battled throughout the millennia over the proper definition and status of marriage.[29] To make matters even more complicated, the United States was quite willing to split from its European roots and, in the nineteenth century, to create its own form of marriage: common-law marriage.[30]

As Oliver Wendell Holmes declared in 1897, it is 'revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.'[31] And as Sullivan points out, the institution of marriage has changed enormously over time, mostly in ways that we would consider for the better in terms of equality between the genders. Indeed, one reason the West has assumed that marriage is dual-gendered is that it has traditionally granted men and women such different, and unequal, legal rights within marriage. These differences have been entirely eliminated in almost all the Western world.[32] If the sexist laws that required a woman to occupy the legally inferior role have been eliminated, perhaps the need for exclusively dual-gender marriage has evaporated with it. Western law has always recognized the edict *cessante ratione legis*, *cessat et ipsa lex*: when the reason for a law disappears, so must the law itself.[33] When gays and lesbians plead that the marriage ban is harming them legally, economically and emotionally, society is obligated to explain why this particular aspect of marriage, compulsory heterosexuality, should remain unchanged when so much of marriage has changed drastically.

Nor can religion be a rational basis for the same-sex marriage ban. First of all, not all religions oppose same-sex marriage. Many

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27 *Ibid*.

28 E.J. Graff, 'Marriage *a la mode*' *Boston Globe Magazine* (13 June 1999) 11 at 11.

29 *Ibid*.

30 *Ibid*.

31 Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harv. L. Rev. 457 at 469. Justice Harry Blackmun quoted this passage in his dissent in *Bowers v. Hardwick,* 478 U.S. 186 (1986) at 199.

32 See Gerstmann, *supra* note 21 at c. 3.

33 Cited and translated in Leo Katz, *Bad Acts and Guilty Minds: Conundrums of the Criminal Law* (Chicago: University of Chicago Press, 1987) at 30.

religious groups support it,[34] including the Universal Fellowship of Metropolitan Community Churches, which performs over two thousand same-sex marriage ceremonies a year.[35] If the separation of church and state means anything, it surely means that the state cannot prefer the views of, say, Catholics and Baptists over those of Unitarians and Reform Jews because the former outnumber the latter. Moreover, as Andrew Sullivan points out, '[n]o one is proposing that faith communities be required to change their definitions of marriage … [t]he question at hand is civil marriage and only civil marriage. In a country where church and state are separate, this is no small distinction. Many churches, for example, forbid divorce. But civil divorce is still legal.'[36]

V THE REAL CONCERNS OF OPPONENTS OF SAME-SEX MARRIAGE

As noted above, space does not allow for a discussion of some of the other anti-same-sex marriage arguments, such as concern for how children are raised, but as I demonstrate elsewhere, all of these arguments are surprisingly weak and are often self-contradictory or demonstrably illogical.[37] Why then do the American courts and public find same-sex marriage so objectionable if the most common arguments against such unions are so flawed? I suspect that a major stumbling block for judges, politicians, and the general public is the perception that marriage is *obviously* something that only happens between a man and a woman and anything else is just lawyers' tricks. For heterosexuals who look around and see that only their heterosexual friends are married, what could be easier than the assumption that this is the way that nature intended it? '[W]as there ever any domination which did not appear natural to those who possessed it?' asked the great political thinker John Stuart Mill.[38]

Another major concern for opponents of same-sex marriage is the slippery slope. If gay men and lesbians can get married then why not polygamists and those in incestuous relationships? This potential was very much on Powell J's mind when he declined to join the Supreme Court majority when it held that there was a fundamental right to marry that was violated by laws restricting men from getting married unless they could demonstrate that they were supporting, and would continue to support, the children they already had.[39] He warned that the Court's

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34 See William N. Eskridge, *The Case for Same-Sex Marriage* (New York: Free Press, 1996) at 46-7, appendix.

35 *Ibid*.

36 *Supra* note 26.

37 See Gerstmann, *supra* note 21 at 13-40, 85-111.

38 John Stuart Mill, 'The Subjection of Women' in Alice S. Rossi, ed., *Essays on Sex Equality* (Chicago: University of Chicago Press, 1970) 125 at 137.

39 *Zablocki v. Redhail*, 434 U.S. 374 (1978).

support for a fundamental right to marry could open the door to all three forms of prohibited marriage: 'A "compelling state purpose" inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage and divorce.'[40]

Mr Justice Powell was not alone in these fears. Many opponents of same-sex marriage have expressed concern that if society allows same-sex marriage, it would have to allow polygamy. Numerous Republican congressmen, in addition to noted political commentators William Bennett, George Will, Robert Bork, and William Safire, have made similar arguments.[41] Also, during congressional hearings on the *Defense of Marriage Act*, the analogy between polygamy and same-sex marriage was a dominant theme.[42]

VI THE USE OF INTERNATIONAL LAW AND NORMS IN *LAWRENCE V. TEXAS*

Given the importance of these concerns in the American debate then, we see that the United States Supreme Court's use of international sources in *Lawrence* was a modest and successful corrective that, in and of itself, poses none of the dangers discussed earlier in this article. Explicitly, the use of international laws and norms by the *Lawrence* Court is a powerful rebuttal to the deeply felt intuition of so many Americans that marriage simply must be heterosexual because *everybody* knows it is. The Court did not in any way suggest that the European Court of Human Rights is a source of binding legal authority. The *Lawrence* Court merely pointed out that quite a few nations with whom we share a great deal of history, as well as many legal, religious, and cultural traditions, do not in fact believe that marriage must be heterosexual. Further, the *Lawrence* Court's discussion of the laws and practices of European nations implicitly addresses the slippery slope concerns of so many Americans. If homosexual sodomy is protected in many other countries, none of whom have slid down the slope to legalized bestiality, incest and so forth, then that slope is probably not quite so slick after all.

For gays and lesbians, these two issues—intuitions that heterosexuality is natural and universal, and fears that legal tolerance of homosexuality will inevitably lead to legal tolerance of harmful sexual practices and other harms to society—are the biggest stumbling block to gaining equal rights both politically and legally. Greater awareness of

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40 *Ibid.* at 399.

41 Andrew Sullivan, 'Three's a Crowd: the Polygamy Diversion' *The New Republic* 214:25 (17 June 1996) 10; David L. Chambers, 'Polygamy and Same Sex Marriage' (1997) 26 Hofstra L. Rev. 53.

42 *Ibid*.

international experience can help salve both these concerns. Courts are likely to lead the way for Americans in fostering this awareness for several reasons. First, federal judges are considerably more educated than the average person. Also, a number of justices, including Breyer and Ginsburg, are explicitly interested in the subject. Finally, attention to international practices, for all the dangers discussed earlier in this article, helps the Court engage the very issues just discussed: questions of universality and naturalness, and slippery slope or 'inevitable consequences' issues. As legal scholar Michael Ramsey points out,

> Abstract claims about what 'all' societies do can be tested against evidence of what societies *actually* do; whether societies we otherwise think reflect 'ordered liberty' recognize certain rights may indicate whether those rights are 'implicit' in 'ordered liberty.' Claims of inevitable consequences can be tested against what has actually happened elsewhere: if other societies permit speech or forbid inequalities without grave practical consequences, perhaps the need for regulation is not 'compelling.'[43]

What we see then, is that attention to international law and international experience is ideally suited to help gay men and lesbians confront some of the issues that have had the greatest negative impact upon them, both legally and politically. Reference to the experiences of Europe and the Commonwealth can tell Americans much, for example, about whether marriage is 'obviously' heterosexual or whether allowing gay men and lesbians into the armed forces will inevitably lead to serious moral and recruitment problems.

While the courts are likely to be the first to pay attention to what goes on across oceans and borders, the potential political consequences are enormous as well. As I discuss elsewhere, the legal decisions of federal courts have an important impact upon the political debate over equal rights for gay men and lesbians.[44] So far, that impact has been mostly negative, with the Supreme Court feeding public notions that gay men and lesbians are seeking 'special rights' rather than equal rights.[45] The Court's recent willingness to bring the experience and practices of our sister nations into its jurisprudence has serious potential to broaden the political debate as well. At the time that America's highest elected officials are often openly dismissive of the views and experiences of even our closest allies, the Supreme Court's

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43 Ramsey, *supra* note 16 at 75.

44 Evan Gerstmann, *The Constitutional Underclass: Gays, Lesbians and the Failure of Class-Based Equal Protection* (Chicago: University of Chicago Press, 1999).

45 *Ibid*.

increasing openness to the outside world can be a much-needed and politically influential force.

The West Bank Barrier Debate: Concept, Construction and Consequence

MICHAEL BELL*

Debate over the construction of the West Bank separation barrier has been ongoing and acrimonious since its inception in June 2002, when the Israeli government announced its intention to erect a fence to control strictly Palestinian entry into Israel and thereby impede terrorist activity directed against the citizens of the Jewish state. Strikes by Palestinian terrorists groups, most notably the fundamentalist Hamas and Islamic Jihad, had reached unparalleled levels against the civilian population following the commencement of the Palestinian uprising against Israel, the Al Aqsa Intifada, in the fall of 2000.

The international response to this decision was, for the most part, unsympathetic to Israel, despite the mounting death toll. Legitimate Israeli security concerns were eclipsed by focus on the effect of the barrier on the human rights of Palestinians, whose movement, access to services, and ability to support themselves would be restricted, in some cases severely. Concern also grew that the location of the barrier, for much of its length running inside the West Bank, was designed to prejudge the outcome of peace negotiations between Israel and the Palestinians by creating a territorial *fait accompli*, integrating West Bank areas on the Israeli side of the barrier into the Jewish state. In less circumspect terms, many saw it as a land grab. Hence the barrier's reference to the International Court of Justice (ICJ), which on 9 July 2004 found this military curtain a violation of international law, Israel's security considerations being judged insufficient to justify this construction within occupied territory.

Others are better able to discuss the complexities of the Court's decision. My exposure comes from practical experience as Canada's Ambassador to Israel from 1999 to 2003, years that saw the collapse at Camp David, the launching of the second Palestinian Intifada, the terrorist onslaught, the Israeli reaction, the initial construction of the barrier, and its early consequences on the ground. I will go beyond the ICJ decision to examine the multifaceted influence of the barrier on the security and political landscape of today.

I THE TERROR MOVEMENT AND ISRAELI SECURITY

Barrier construction has been ongoing since 2002 and is largely complete in the north and around Jerusalem. For the most part, it is

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* Former Canadian Ambassador to Israel, the Palestinian territories, Jordan and Egypt. Currently Paul Martin Senior Scholar on International Diplomacy at the University of Windsor and Chair of the International Reconstruction Fund Facility for Iraq.

composed of an electronic fence, supplemented by barbed wire and trenches, on average about seventy meters wide. In some areas, a concrete wall of up to eight metres in height replaces the fence. For the majority of its length, the route runs within the West Bank, the remainder along what is called 'the Green Line.' This latter was the cease-fire line established in 1948 with the end of fighting between Israelis and Arabs, formalized by the armistice agreements in Rhodes the following year. East of the line Jordanian writ ran for nineteen years; to the west was the state of Israel. In the 1967 Six Day War, Israel took control of the West Bank and has since ruled that territory and its Palestinian population, despite numerous efforts to resolve the Israeli/Palestinian conflict under the rubric: 'the exchange of land for peace'. Today most Palestinians, excluding those who continue to reject the very idea of a Jewish state (for instance those in Hamas and Islamic Jihad), see the West Bank, along with the Gaza Strip, as the territorial base of their future state. These two areas together compose twenty-two per cent of the original post World War I British Mandate of Palestine, while the remaining seventy-eight per cent has been Israeli since 1948, following the British withdrawal and the ensuing war between Israelis and Arabs. The population within the entirety of the former British Mandate territory, however, is split virtually evenly between Arabs and Jews.

Following 1967, the territory of the West Bank, in Israeli minds, became a defensive asset, providing what was called 'strategic depth.' On the right of the political spectrum, the West Bank was also vitally important because it had been the centre of the ancient land of Israel and had to be reclaimed. With these interests, the Israeli minimum became a West Bank divided between the Jewish state and any emerging Palestinian entity. This would enable optimum defensive positions and ensure the retention of Jewish religious and historic sites and the majority of Israeli settlements, which came to be located there. These latter were the result of government-sponsored programs moving Jewish settlers to strategically populate the centre of their ancient Biblical state. Settlement throughout the West Bank became official government policy, after the nationalist revisionist Menachem Begin came to power as Prime Minister in 1977. Today, excluding Jerusalem, there are some 200,000 Israelis in the West Bank, living uneasily beside almost 2.5 million Palestinians.

The initial impetus for a separation barrier on the Green Line, and beyond it, came from the Israeli left in the summer of the year 2000, following the collapse of the Oslo Process and the Camp David meetings held between Yasser Arafat, then Israeli Labour Prime Minister Ehud Barak, and the outgoing American President Bill Clinton. One of the barrier proposal's early proponents was the reserve Brigadier General Danny Rothschild, who had, in the early 1990s, run the Israel Defense Forces military administration in the West Bank. As

he was of the Israeli left, his preoccupation was less with territorial acquisition than the seeming impossibility of Israel negotiating disengagement with the Palestinians, when Barak's flexibility had been rejected by Arafat.[1]

In a conversation of some two hours, General Rothschild explained to me the reasons behind his advocacy of a separation barrier. He focused heavily on security questions but he was most emphatic when arguing that, if Israel could not negotiate a border with the Palestinians, one would have to be imposed unilaterally, thereby forcing the creation of a Palestinian state. This would give Israelis the ability to pursue their own destiny without the crippling weight of occupation and the soon to be realized demographic threat of a Palestinian majority ruled over by Israel in the territory stretching from the Jordan River to the Mediterranean.

In the winter of 2002, the barrier concept began to percolate in the public mind, as the toll of Israeli terror victims rose, with fear spreading throughout Israeli cities and towns and the security forces seemingly helpless in coping with the blind commitment of Palestinian extremists, about whom Arafat seemed unwilling or unable to do anything. This change in mood toward the idea of a barrier among Israelis, who were no longer willing to see family and friends killed and maimed, caused a certain ideological discomfort to many on the Israeli right, including Ariel Sharon. While security came first, to accept the construction of a barrier as a means of assuring normality was to jeopardize his and his colleagues long held goal of a Jewish State reaching to the Jordan River. The barrier would divide the ancient land of Israel. In the minds of the followers of the revisionist Zionist Ze'ev Jabotinsky and of the religious nationalists, who believed a greater Israel was their God-given right, such a paradigm shift was traumatic.

Prime Minister Sharon, for his part, was less convinced by the argument of Divine Providence than by his innate pragmatism, coupled with concern that Israel could no longer control a hostile Palestinian population of some four million within its own bosom. He spoke often of the 'painful concessions' Israel would have to make to ensure a stable and predictable environment for his fellow citizens, painful because he had shared the hope for a greater Israel and had done his best to bring it to fruition. His assertions about concessions were therefore treated with considerable skepticism, if not cynicism, not only by Palestinians and other Arabs but by the broader international community and indeed many Israelis themselves.[2]

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1 Discussion with the author, Tel Aviv (Summer 2002).

2 For a particularly scathing dismissal of the Prime Minister's intentions see Baruch Kimmerling, *Politicide: Ariel Sharon's War Against the Palestinians*

The Prime Minister's hesitation to buy into the barrier proposal stemmed from the effect that a decision to build would have on his government and coalition, both of which were unstable and under threat. His reluctance may have also come from his earlier belief that the Kingdom of Jordan, across the river, was the only proper home for a Palestinian state, given that its Palestinian population was already demographically dominant. Yet Sharon, although radical, had sprung from the Labour Zionist movement. That pragmatism is most likely to have facilitated a gradual paradigm shift. By the mid-nineties, the Prime Minister had begun to muse in public about the inevitability of a Palestinian state in the West Bank, about which he subsequently became progressively more transparent. He reluctantly came to accept that a solution to the future of those Palestinians living west of the Jordan River had to be found on that turf, within the West Bank. As he pondered what to do, his commitment to the security of Israelis and a democratic Jewish state meant the triumph of practicality over dogma.

I met Ariel Sharon many times during my most recent tour in Israel, but I understood him best when I heard him address the nation at the annual Holocaust Memorial Day, following his accession to power in 2001. Jews must be self-reliant and realistic in a hostile world the Prime Minister stressed. Israelis could count only on the force they themselves could muster to ensure their own survival; other values must take second place. This *reale politique* is what has dominated the Prime Minister's thinking throughout his career, from his invasion of Egypt during the Yom Kippur war of 1973 to the ill-fated drive to Beirut in 1982. As Prime Minister, this sense of realism has been accompanied, according to many of his critics, by a growing political maturity and wisdom.

Israeli Foreign Ministry statistics[3] contrasting terror actions before and after the barrier's construction lend substance to Israeli claims that the barrier has been effective in dramatically reducing the number of terror incidents. The fourth year of the Intifada, 2004, when construction was well advanced saw a drop of forty-five per cent in the number of Israelis killed: 117 compared to 214 in 2003. There was a similar drop of forty-one per cent in the number of those wounded. In 2003, twelve large scale attacks were successful along the proposed northern route of the fence, resulting in 74 dead and 374 wounded, while in 2004 only two such attacks succeeded resulting in 14 dead and 106 wounded. These figures were also attributable to the increasing effectiveness of the security services generally but Palestinian militants

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(New York: Verso, 2003).

3 Israel Ministry of Foreign Affairs, 'Summary of Terrorist Activity 2004' (5 January 2005), online: <http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2005/Summary%20of%20Terrorist%20Activity%202004>.

tried to overcome the effect of the barrier by moving many of their operations to the southern part of the West Bank, where there had been no construction. Extremists also began to use minors and women exploiting their more innocent appearance, augmented by western dress and hairstyles.

Security considerations aside, sympathetic analysts[4] also argue that the barrier may also have positive political effects by short-circuiting the deadlock on a two state solution, furthering the debate within Israel about the legitimacy of Jewish settlements, providing a new and important incentive for Palestinians to return to the negotiating table and serving as a provisional border, thereby helping the parties focus on final status issues. Ehud Olmert, a longstanding major figure in the governing Likud party has, for instance, begun to argue that all settlements east of the barrier should be evacuated. These we will deal with at greater length, following an examination of the effect of barrier construction on the Palestinians.

II THE BARRIER AND THE PALESTINIAN REALITY

Nowhere has the outcry against the barrier been as strong as when it is seen to affect deleteriously the social and economic position of the Palestinians. As a direct consequence of its routing, there are new restrictions on Palestinian movement. In October 2003 the Israel Defense Forces declared the swath of land between the barrier in the northern section of the West Bank and the Green Line, a closed military zone, to be called the Seam. Today over 100,000 persons in six communities are living in enclaves almost completely hemmed in by the barrier. Qalqiliya used to be a vibrant town of some 41,000 persons, where Israelis from neighboring communities used to visit, shop, and eat, prior to the Intifada's outbreak. Israeli visits necessarily stopped prior to the erection of the barrier but the situation since has become much more severe with the town now cut off from its West Bank hinterland. There has been an exodus of population and many small businesses have closed. The only road in and out is guarded by Israeli checkpoints, with watchtowers and cameras ensuring surveillance.

Palestinian residents of the Seam over the age of 12 require a residence authorization and those who wish to enter or leave require a further permit from the Israeli administration. Not only do they need permission to leave, they require a permit to remain on their land, even if they and their antecedents were born there. West Bankers from outside the Seam require one of twelve purpose-specific documents to

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[4] David Makovsky, 'How to Build a Fence' *Foreign Affairs* 83:2 (March/April 2004) 50.

enter. Farmers have to provide documents indicating the applicant's rights to the land,[5] often a difficult undertaking given the vagaries of Ottoman law under which the property was most likely acquired.

Farmers have difficulty getting to their fields and marketing their produce, although farming is a primary source of income in the Palestinian communities situated along the route, an area that is one of the most fertile in the West Bank. The farming sector therefore has been subject to a dramatic shock in any already difficult economic situation. The barrier, because of the restrictions on movement it imposes, also seriously reduces the access of the rural population to hospitals and other services in nearby cities and affects education because many teachers come from outside the communities in which they work.[6] Social and family ties are hampered. Staying the night in the Seam area, bringing a vehicle and transporting merchandise in, require separate permits. According to the human rights monitoring group B'Tselem, the authorities reject about twenty-five per cent of entry permit applications.[7] There are also complaints that Israeli management of the permit system is problematic, creating further impediments to movement.

According to Palestinian sources, approximately 3,670 acres of land were confiscated and 102,000 olive trees were destroyed in the course of construction in the north.[8] Some farmers allege that building contractors uprooted and stole olive trees, their being of value because, while they take five to ten years to yield an initial crop, they bear fruit for centuries. Within the Seam there is evidence that both homes and commercial premises are being demolished because they were built without permits—for better or worse a common practice among Palestinians, often imposed by cost and bureaucratic red tape. In

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5 *Ibid*

6 For a detailed study concerning the village of Umm ar Rihan see *The Impact of Israel's Separation Barrier on Affected West Bank Communities*: *Report of the Mission to the Humanitarian and Emergency Policy Group and the Local Aid and Co-ordination Committee* (4 May 2003) at 13, online: United Nations Information System on the Questioin of Palestine (UNISPAL) <http://domino.un.org/UNISPAL.NSF/9a798adbf322aff38525617b006d88d7/084e7278b1a3491385256d1d0065bc42/$FILE/Wallreport.pdf>.

7 The Israeli Information Center for Human Rights in the Occupied Territories, *Not All it Seems—Preventing Palestinians Access to Their Lands West of the Separation Barrier in the Tulkarm-Qalqiliya Area* (June 2004) at 10, online: B'Tselem <http://www.btselem.org/Download/200406_Qalqiliya_Tulkarm_Barrier_Eng.pdf>.

8 M. Barghouti *et al.*, *Health and Segregation: the Impact of the Separation Wall on Access to Health Care Services* (Ramallah: Health, Development, Information and Policy Institute, 2004) at 23.

addition there are freezes on local construction.[9]

The barrier situation in East Jerusalem is particularly noteworthy because of the political, symbolic and pure physical weight attached to it. In the eastern part of the city, the barricade consists of a series of distinctly unappealing eight metre concrete walls that run for the most part, but by no means always, along Jerusalem's Israeli-defined municipal boundaries, within which some 200,000 Palestinians live. From my own observation, it is difficult to describe the separation of even Jerusalem Arab neighborhoods within themselves as other than soul destroying. Images of young children twisting themselves through chinks in the barrier to get to and from school leave a strong aftertaste. The great majority of Israelis have never witnessed this situation, nor would they want to, because it would be too uncomfortable, making this a case of willful denial.

An additional 400,000 non and former Jerusalemite Palestinians reside in village communities with twenty kilometres of the city centre and are bound to it by a myriad of economic, social, political and human ties. Arab East Jerusalem has always been the geographic and spiritual focus of their lives. These are examples:

- Some Arab East Jerusalem residents have moved to West Bank suburbs because they could not get permits to build within municipal boundaries.
- Children in the suburbs go to schools in East Jerusalem, a number of which are concentrated in the Old City.
- Young adult Arab Jerusalemites study in the West Bank town of Abu Dis, where Al Quds University is located.
- Suburban residents receive their medical treatment at the Al Moqassad, Augusta Victoria, and Saint John's Ophthalmic hospitals, all of them within the post-1967 Israeli boundaries.
- Many suburban residents work and shop in East Jerusalem.
- In some cases Palestinian areas within the municipal boundaries have been walled off from the rest of the city.
- A recent interpretation of Israeli regulations allows the state to confiscate property in the eastern part of the city, belonging to Palestinians residing outside the wall, although this is under challenge.

Those Palestinians affected by the barrier see the fabric of their life

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[9] Discussions with the author, Ramallah (Winter 2003)

disrupted in a severe and arbitrary way, having to navigate a labyrinthine maze to travel even the shortest distance. Indeed this argument was found to have some merit by Israel's High Court of Justice, to which Palestinians brought their case, in its judgment of 30 June 2004. The High Court instructed the government to re-route the barrier in certain instances along a forty kilometre stretch northwest of Jerusalem, based on the principle of proportionality between security requirements and humanitarian considerations. In one specific instance for example: 'The route disrupts the delicate balance between the obligation of the military commander to preserve security and his obligation to provide for the needs of the local inhabitants. … [The route] injures the local inhabitants in a severe and acute way, while violating their rights under humanitarian international law.'[10] The Court's decision went beyond what the government had anticipated but nevertheless gave 'great weight' to the defence establishment's opinion regarding the necessary route.

The changes prescribed by the High Court were accepted by the government, although this did little to effect broader resolution of the overall quality of life predicament, as the current situation, for example in Jerusalem, makes clear. Nor did the Court's decision significantly mitigate Palestinian or international criticism, reflected in General Assembly resolution L18 of 20 July 2004, which overwhelmingly endorsed the ICJ decision that the very construction of the fence in what was deemed 'occupied territory' constituted a violation of international law. The Palestinians in particular ridiculed the Israeli Court's findings, as at best cosmetic and at worst a cover for a broader political agenda. They took great satisfaction from the symbolism of the ICJ decision, although it brought them no relief.

III THE POLITICAL IMPACT

The High Court asserted that the barrier could not be used to define a political border,[11] underlining what I think was its unspoken concern that routing had been designed to define Israel's ultimate frontiers. The barrier separates the Seam to the west from areas of dense Palestinian habitation to the east. This ensures 'quality of life' settlements, which hold the majority of West Bank settlers, are included on the Israeli side. These particular settlements were developed to populate the West Bank in areas close to the Green Line, to 'thicken' the Israeli presence in the occupied territories adjacent to Israel proper through the construction of bedroom communities, serving Jerusalem, Tel Aviv, and other towns

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[10] *Beit Sourik Village Council v. The Government of Israel, Commander of the IDF Forces in the West Bank* (2004), H.C.J. 2056/04 at para. 60, online: <http://62.90.71.124/eng/home/index.html>.

[11] *Ibid*. at para. 27

along the coast. Housing was made available at considerable cost advantage to comparable structures in Israel itself; mortgages were made hugely attractive; infrastructure and development construction was funded by the state. These inducements ensured the growth of these communities in an attempt to blur the Green Line.

Ariel Sharon was the father of the settlement movement. In his autobiography the Prime Minister makes clear that on becoming Minister of Agriculture in 1977 he devoted himself completely to the settlement movement: 'Over the next four years I managed to establish sixty four settlements in Samaria and Judea,' the biblical names for what is today the West Bank. He lauded those Israelis who moved to these towns, particularly those in the scriptural heartland deep inside Palestinian territory: '… living near places like Shechem or Shiloh or Bethel, with their rich spiritual and historical associations, held a meaning for them that translated into joy as well as into utter determination.'[12] Sharon's commitment, and that of successive Likud governments, has been to establish a Jewish presence throughout the West Bank, sometimes for alleged military purposes, although few argue now that isolated outposts makes any contribution to Israel's defence needs in the twenty-first century. Whether of deemed military value or not, enclaves of whatever kind were meant to create a permanent presence reflecting the Jewish return to their ancient homeland.

In October 2004, the Peace Now movement calculated that building and infrastructure activity continued apace at 474 settlement sites in the West Bank and Gaza, including over fifty where ongoing building reaches beyond already generous municipal boundaries. There were about 3,700 housing units under construction in the occupied territories, while infrastructure was being put in place for more.[13] There is little doubt, within Israel or without, that this is part of a policy to divide the West Bank, with Palestinians ultimately controlling a central core, containing the bulk of their people, divided however into non-contiguous cantons. Critics such as Henry Seigman refer to these envisioned Palestinian cantons as being nothing more than 'Bantustans.'[14] Seigman continues: 'Despite the abuse and violent rhetoric they direct at Sharon, most leaders of the settlement movement understand that Sharon's unilateral disengagement from Gaza is really

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12 Ariel Sharon, *Warrior: The Autobiography of Ariel Sharon* (New York: Touchstone, 2001) at 366

13 Americans for Peace Now, 'Middle East Peace Report' 6:13 (4 October 2004), online: <http://www.peacenow.org/mepr.asp?rid=&scrollaction=4>.

14 Henry Siegman, 'Sharon and the Future of Palestine' *The New York Review of Books*, 51:19 (2 December 2004).

intended to assure Israel's permanent control of the West Bank.'[15] This last observation is in my view somewhat overdrawn but there is no doubt in my mind, after nine years residence in Israel on three separate tours of duty and as a witness to both Intifadas, that a non-contiguous Palestinian entity comprising around fifty per cent of the West Bank is firmly planted in the mind of the present Israeli government. The remainder would be incorporated into Israel proper.

Numerous, albeit necessarily speculative, maps pieced together from various bits of privately and publicly available information project just that. There is no means of verifying definitively where the government sits on precise boundaries at this point, because official decisions have not been made and the government, in any event, has every interest in opaqueness, given the opposition such disclosures would generate, most importantly in the United States. Although the Prime Minister is adamant that Israel must control the West Bank high ground leading east to, and including, the Jordan River embankment, he is less certain about precisely where the barrier would be constructed as it snakes into the West Bank core to protect ideological settlements. But his intent remains clear that some eighty per cent of the settlers will end up on the Israeli side of the barrier.

The barrier's route meanders. When complete it will be more than 600 kilometres long, virtually twice the length of the Green Line because the route is drawn around settlement enclaves so as to include them in Israeli territory. The barrier is said to be one of the largest, if not the largest, and most complex construction projects in Israel's history with an estimated final cost of USD 1.5 billion.[16] It will be the Sharon government's most visible legacy by far, not only as a physical structure but a monument to the Prime Minister's commitment. The settlements and the barrier enjoy a rich complementarity, even as the government downplays the link. According to one of Israel's most respected journalists Aluf Benn: 'Sharon and his cabinet associates know their attempts to downplay the fence's impact ("This is not a political fence"; "It won't influence a future agreement") constitute, in the best case, rhetorical sleight of hand and, in the worse case, public deception. … All future negotiations about the partitioning of Eretz Israel will take the borders demarcated by the fence as a starting point for discussions.'[17]

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15 *Ibid.*

16 Mazal Mualem, 'The Fence starts to look like a frontier' *Ha'aretz* (1 May 2003).

17 Aluf Benn, 'Sharon can sit on the fence no more' *Ha'aretz* (28 September 2003).

IV SUMMING UP

This construction, as seen in retrospect, had an inevitability about it. Given the random and wanton murder of Israelis during the Intifada a defensive barrier was bound to be built because any government has a primary obligation to ensure the security of its citizens. It would have been naïve at best to expect an Israeli government, particularly one on the right, to build strictly along the Green Line as this would be interpreted as a willingness to relinquish all of the West Bank in advance of negotiations. Once a commitment to build within the West Bank had been taken, by the very nature of the enterprise Palestinians were going to suffer, although they might have suffered less given a more sensitive hand. In determining the route it was only logical that final border questions would bear heavily on decision makers. Yet according to Yuval Diskin, the new director of the Shin Bet, Israel's internal security service, who has been intimately involved in security questions throughout the Intifada, security measures alone will not end terrorism. What is needed is a long-term diplomatic process leading to a final status agreement.[18]

One can only hope that the present optimism that pervades the accession of Mahmoud Abbas as President of the Palestinian Authority will create the circumstances where such negotiations, difficult as they will be, commence. For this to happen there will have to be determination, forbearance and concern for the dignity of the other, on all sides. Without this, tragedy will continue to engulf the region, barrier or no barrier.

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[18] Editorial, 'Mr. Shin Bet' *Ha'aretz* (11 February 2005).

A Sacred Trust of Civilization

FRÉDÉRIC MÉGRET*

In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[1] the International Court of Justice (hereinafter, 'the Court' or 'the ICJ') reminds us that Palestine—'certain communities, formerly belonging to the Turkish Empire'—was once a class 'A' mandate entrusted to Great Britain by the League of Nations. The Court also reminds us that the Pact of the League once described 'the well-being and development of … peoples (under mandates) as forming "a sacred trust of civilization."'

The expression is obviously dated, if quaint, but I believe it neatly encapsulates many of the contradictory facets of the problem that the Court was asked to weigh upon: colonization, then and now; moving out of colonization; international institutions; the depth of history; the international community's old and ongoing interest in the area; the special responsibilities that may arise as a result; the idea of *a* trust, but also the larger problem *of* trust; the sacredness of trust, that of civilization, of whatever passes for the civilizing mission; not to mention the sacredness of the many Holy sites that dot the area and, perhaps, the sacredness of human life and rights.

In this article, I want to see the advisory opinion as the latest in a long history of attempts by the international community—as the modern version of what used to be described as civilization—at honouring that trust. What can international law bring to the region? Is international law part of the problem or the solution? How does the opinion reflect on the evolution of international law?

More specifically, I want to argue that the Court's advisory opinion is at the intersection of three 'stories'.

The first story is that of international law, of the century-old ambition of regulating inter-state relations by means of law, and of the purported transmogrification of international law into a law also encompassing a fundamental concern for human rights and well being. Within that story, it stands for a rather late development whereby attempts are being made at increasingly throwing the mantle of law at issues traditionally considered as belonging to high politics. Specifically, the opinion is part of an institution's unfolding story—the ICJ's—from a Court relatively marginalized in the international sphere, to one historically at a stage where it feels emboldened to have the audacity of its ambitions. Within that story, the opinion is part of a discreet subplot:

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* Assistant Professor, Faculty of Law, University of Toronto.

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

that of the growing use of advisory opinions, perhaps as a means by some states and civil society to circumvent the traditional limitations of dispute settlement.

The second story is that of what may broadly be characterized as the evolution of the Middle East from the tutelage of western interference and influence into an area gradually absorbing the shocks of nationalism, modernization, and globalization. Within that story, it is of course about the creation of Israel, the immensely complicated situation that ensued, the right of the Palestinians to have their own state, three wars, an attempt at peace, the temporary failure of that peace process, and the attempts to put it back on track. Within that last story it is more specifically about the intifada, terror attacks, the brutality of maintaining law and order, and, finally, the building of a wall.

The third story is one of walls, fences, barriers, barricades, enclosures, and ramparts. Because our era began with the spectacular collapsing of a wall, we are often tempted to think that ours is a world that has done away with walls. In fact, exactly the opposite may be true. The globalized world is a world that we can only meaningfully call borderless because that borderlesness is in a very real sense defined by walls: gated communities, firewalls, the Mexican-US border, stadium fences, 'fortress Europe', the Green zone, G5 meetings. Walls are part of a very long chain that highlights their role as a permanent feature of territorial politics since ancient times: the Roman *limes* designed to hold back the Barbarians or the Chinese Great wall come to mind. Of course, this wall is not just *any* wall and it is not to be mistaken with a border for example, but it is also part of the overall story of how walls separate and define people.

How the Court would find its way round these three interwoven stories would determine how its success would be evaluated. In this article, I want to concentrate on the issue of merits. This is partly because of space constraints and also simply because once the Court has decided in favour of admissibility the merits of a case become its most significant legacy.

From the outset, it is worth stressing that there was no easy answer to the issues at stake. Not only are we dealing with one of the most protracted and intractable conflicts in the world today, but more importantly for our purposes, we are dealing with very complex and dynamic areas of the law. In addition, we are dealing with highly emotionally charged issues that affect the lives of numerous people and have caused a tremendous amount of suffering on both sides.

In this light, the opinion deserves two types of comments, some relating to process and some relating to outcome.

I THE PROCESS: WERE THE ARGUMENTS ON BOTH SIDES GIVEN A FAIR SCRUTINY?

The assumption is often that the outcome of the Court's opinion—the answer to the question of whether the wall is legal or not—is the most important issue. Process, however, is at least as important as outcome, and what matters is not simply what result the Court arrives at but in what way it does so. That will determine not only the general usefulness of the Court's opinion for international law, but also whether the outcome is credible and legitimate.

In that respect, it is worth saying from the outset that however much one may otherwise agree with the Court's conclusions, the Court has reached these in a way that is sometimes—and I have weighed these words carefully—almost shockingly one-sided. It is not simply that volume-wise the Israeli case occupies comparatively very little place, but that there is no serious legal engagement with the Israeli theses backing the construction of the wall. The Court, in particular, only seems to be aware of what the Israeli argument is indirectly, through the Secretary General's reports.[2] Israel's arguments on the basis of self-defence are treated—and dismissed—in one paragraph.[3]

Politically, part of the blame for this lies in Israel's own refusal to present arguments on the merits. To believe in judicial proceedings at all is to believe that actually presenting arguments and pleading one's case can make a substantial difference. It may be that the Court would have still found the wall illegal, but the mixture of publicity and attention that a defence *in loco* of the Israeli case would have attracted, would have made it more difficult for the Court to do so in as unilateral a manner as it did.

The biggest blame, however, lies in the Court itself. Although the Court was not helped by Israel's failure to present arguments on the substance, the Court was in no way limited to the evidence or arguments presented in Court and could have conducted its own research. Since lack of information was obviously not the issue, the fact that the Israeli position is not seriously discussed is particularly worrying. The inability to take the Israeli argument at its best and tackle it head-on can only weaken the credibility and legitimacy of the Court's opinion. Whatever point the Court was trying to make would have been reinforced by a more thorough treatment of the argument in favour of the wall, if only to better reject that argument.

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2 *Ibid*. at para. 138.

3 *Ibid*. at para. 139.

II THE SUBSTANCE: SELF-DETERMINATION, SELF-DEFENCE, OR HUMAN RIGHTS?

The question that inevitably arises, therefore, is whether the Court might have arrived at a different opinion had these arguments been taken into account seriously and at their best. I cannot reconstruct entirely what the opinion would have been had this been the case. The only thing I can do here is point at some of the big tensions that underlie the opinion and try and see what problems would have arisen had these been brought to light rather than pushed in the background.

One of the great but insufficiently acknowledged issues raised by the request was under what branch of international law it should be analyzed. Was this an issue of the law on the use of force? Of self-defence? Was it about terrorism? Self-determination? Was the applicable law international human rights or the laws of war? Or a mixture of any of the above? My contention is that the Court is often good on the details once it has decided what is the broadly applicable framework, but not very good at articulating how these broad headings relate to each other.

The Wall as an Issue of Self-Determination

One of the issues dominating the Court's reasoning is that of self-determination. I strongly suspect that this is in fact the single most important problem from the point of view of those who requested the Opinion, rather than simply the fate of those Palestinians affected by the wall.

There is no doubt under international law about the Palestinian peoples' right to self-determination. The precise way in which the wall affects that right, however, is a more complex issue. There are two problems with the wall, which are in my opinion insufficiently distinguished by the Court: the way it affects self-determination in the present, and the way it may affect self-determination in the future.

The easiest case is that the wall affects the Palestinian's right to self-determination in the present. It is effectively reducing the hold of the Palestinian Authority—as the embodiment of at least the Palestinian peoples' aspiration to self-determination—on its 'territory' and potentially excluding some Palestinians from that authority. The territory 'behind' the wall does not thereby come under Israeli sovereignty, but it is also certainly less within the control of the Palestinian Authority than the rest of Palestinian territory. Thousands of Palestinians are caught between the Green Line and the wall. More important than the wall itself is the fact that it is accompanied by a change in the legal regime applicable to this portion of Palestinian territory.

However, the most worrying dimension of the wall from the point of view of those who asked the opinion is probably not that. In the

present, the wall is only really making a bad situation (occupation) worse, but since there is arguably very little self-determination going on in the first place, it is unclear that it makes a huge difference. The real problem lies in the way the wall may be affecting prospects for self-determination *in the future*, and specifically the way in which it might be used to create a *fait accompli* to annex Palestinian territory.

This is a tricky issue. Here the Court is asked to pronounce itself on an ongoing, fluid, and evolving situation. On the one hand, Israeli officials assert that the wall is only a temporary device for the purposes of ensuring security. On the other hand, there is a legitimate fear that the wall might turn into a device to capture more territory. Although the Court says that it 'cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudge the future frontier between Israel and Palestine,' it wisely falls short of saying that this is already and effectively what the wall does.[4] To have done so would have involved improper judicial speculation and so the Court's prudence seems welcome. To not do so, however, condemns the law to a certain irrelevance. In effect, this is the question on which much if not all else hangs, and the failure to answer it reveals the law as a curiously bad guide to the fundamental significance of the wall. Law's need for certainties in the present is completely at odds with politics need to take action on the basis of the risks that cast a shadow over the future.

The Wall as an Issue of Self-Defence

The Court deals with the question of self-defence last as if it were a side-issue. The problem is that if a self-defence claim is available, then the entire nature of the case is changed. It is hard to argue that if Israel is in fact exercising a right of self-defence then it cannot build a wall. I fail to see why Madame Judge Higgins is 'unconvinced that non-forcible measures (such as the building of a wall) fall within self-defence under Article 51 of the Charter as that provision is normally understood.'[5] Surely if a State can adopt forcible measures to repel an attack then it should be allowed—indeed encouraged—to use non-forcible measures for the same purpose.

The crucial issue therefore is whether Israel can claim a right of self-defence to protect itself against terrorist attacks. The Court dismisses the possibility on the ground that the attack (if any) is not coming from a state. It is indeed the traditional understanding of Article 51 that it applies predominantly to attacks coming from states. The complexity of the issue here arises because of the ambiguous status of Palestine. I have particular sympathy, however, for what Judge Higgins's described as 'formalism of an unevenhanded sort' and the idea

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4 *Ibid*. at para. 121.

5 Separate Opinion of Judge Higgins, *supra* note 1, at para. 35.

that '… Palestine [is] sufficiently an international entity to be invited to these proceedings, and to benefit from humanitarian law, but not sufficiently an international entity for the prohibition of armed attack on others to be applicable.'[6]

The problem, moreover, is that the Security Council, in its resolutions 1368[4] and 1373[5] adopted in 2001, recognized the possibility that terrorist attacks might trigger an action in self-defence. The Court recognizes this but affirms that the Security Council does not recognize self-defence against territories that a State has control over. Mr Judge Kooijmans tries to argue that the right to self-defence is 'a rule of international law and thus relates to international phenomena,' which the situation at hand presumably is not.[7] But it is not clear how the fact that Israel occupies Palestine makes this less of an international situation—indeed one might think that to describe it as a non-international situation runs counter to some of the other arguments that the Court is trying to make about self-determination and occupation. In the end, it is hard to escape the impression that a 'quasi-international' situation, one involving a state and a quasi-state with a degree of autonomy, might warrant self-defence.

I think that a right to self-defence can nonetheless be excluded in this case, but not on the rather flimsy ground that this is not an international situation. The real problem, I would argue, lies with the tension that exists between a hypothetical right to self-defence in this case and, for example, the laws of occupation (the same argument could be made vis-à-vis human rights). If the laws of occupation are applicable, then these embody their own self-contained regime regarding the use of force. According to the *Hague Regulations* and the *Fourth Geneva Convention*, the occupying power is entitled and even has an obligation to restore law and order. Crucially, however, this means that the occupying power *is entitled to do no more than that*, so that its powers are closer to those of a police force than to a military engaged in active hostilities. The idea that Israel could at once be constrained by its obligation as an occupying power to not exercise force more than to maintain law and order, and unleash force in the exercise of its right to self-defence, thus, is one that is deeply contradictory. My impression is that claiming the right to self-defence in a situation governed by the laws of occupation would be a classic case of using a *jus ad bellum* argument to free oneself of *jus in bello* strictures, and as such blatantly illegal.

The Wall as an Issue of International Humanitarian Law

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6 *Ibid*. at para. 34.

4 UN Doc. S/RES/1368 (2001).

5 UN Doc. S/RES/1373 (2001).

7 Separate Opinion of Judge Kooijmans, *supra* note 1, at para. 35.

and/or International Human Rights

Rather than self-determination or self-defence, the real issue—and the one that forms the bulk of the Court's opinion—seems to be one of violations of international humanitarian law and international human rights. The Court finds that the wall violates both and I do not take issue with its specific findings under each of these headings.

There is a problem, however, with applying the laws of occupation and international human rights simultaneously. It is clear that there is some significant degree of overlap between those two branches of international law so that some of the basic guarantees afforded to protected persons under international humanitarian law substantially overlap with those considered to be non-derogeable rights in major international human rights instruments. This 'convergence' discourse has become the politically correct leitmotiv among many international lawyers. But there should be a difference between saying that international humanitarian and international human rights law share fundamentally common aims, and the further step taken by the Court, which is to uncritically assume that both apply jointly and simultaneously.

It is true that there is a real ambiguity about which body of law is primarily applicable, in particular because of the exceptional duration of the occupation in Palestine. That ambiguity, however, should be dealt with and resolved, not muddled by arguing that both branches of law apply simultaneously.

The problem is that there are more obvious tensions between both bodies of law than the talk about natural 'complementarity' suggests. Because occupation is a fairly exceptional situation, the laws of war grant substantially more leeway to the occupying power than international human rights do to a state in the normal exercise of its sovereignty. Although we have already seen that the responsibility to ensure public order probably allows the occupying state to do significantly less than it would be able to do in the exercise of its right to self-defence in terms of use of force, the *Hague Regulations* and *Fourth Geneva Convention* also implicitly relieve the occupier of some of what would be its obligations if human rights were fully applicable. For example, the laws of occupation require that the occupier take care of the welfare of the occupied territory, not that it guarantee all economic and social rights; the laws of occupation prohibit deportation, they do not impose on the occupier an obligation to guarantee freedom of movement.

Note that this is not simply a 'deficiency' of the laws of war to be remedied whenever useful by applying more 'progressive' human rights provisions to fill the gaps. It is very much a regime willed by the international community to deal with the particular circumstances of occupation.

Conversely, if we are effectively in a situation where human rights are applicable, then I think that human rights should be applicable exclusively and in their entirety, and should not be 'impoverished' or 'downgraded' by simultaneously applying the much less demanding regime of the laws of occupation. In other words, I don't think a State should be allowed to escape its human rights obligations, by arguing that it is merely an occupier. Adding human rights on top of the laws of occupation is therefore a recipe for normative confusion with the occupying state finding itself in the impossible situation of being bound both by the relatively minimalist obligations of the laws of war and the maximalist obligations of international human rights.

The better view, therefore, is that a given situation is either predominantly regulated by the laws of war or by international human rights. The Court quotes with approval its own idea expressed in the *Opinion on the Legality of the Use of Nuclear Weapons* that, at least for the purposes of assessing the scope of certain rights, the laws of war are the *lex specialis* of human rights[8] but never really treats them as such. It would have helped had the Court been much more explicit about which body of law is the principal one applicable, rather than in effect treating each body as interchangeably the *lex specialis* of the other, or as two equals.

The argument for the applicability of the laws of war has to be, quite simply, that the situation in Palestine is effectively one of occupation. It is a pity that the question put to the Court by the General Assembly assumes that this is the case. Notwithstanding, this is not a hugely contentious issue. Israel has long made the somewhat specious contention that Palestine could not be occupied because it was not part of the territory of a 'High Contracting Party' to the Geneva Conventions. The Court refuses to entertain this kind of formalism and simply notes that, in accordance with the laws of war, '… territory is considered occupied when it is actually placed under the authority of the hostile army.'[9] The fact that Israel itself has obliged for a long time by saying that it will *de facto* apply the *Fourth Geneva Convention* (even though it does not strictly consider itself bound by it) is of course helpful.

However, my impression is that the Court could have steered away from the issue of the laws of occupation altogether. The logic of imposing minimal obligations on an occupying power was that, under the *Hague Regulations*, occupation was meant as transitory and short term (at most a year). But a regime designed for the protection of civilians by ensuring that the occupying power does not interfere with

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8 *Supra* note 1 at paras. 105-6.

9 *Ibid*. at para. 78.

the political life of the country on the short term can turn against its beneficiaries if it perpetuates itself and becomes the permanent law of the land. There is a sort of estoppel logic trying to surface behind this: namely, the idea that a State should not be allowed to profit from its own long term illegal occupation by claiming for its benefit the continued applicability of the comparatively less stringent regime.

The real issue, therefore, is whether beyond a certain duration occupations should not cease to be governed by the laws of war altogether and instead, for example, be 'normalized' through the application of international human rights. The Court hints at this when, in arguing for the applicability of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),[10] it notes in passing that the occupation has lasted thirty-seven years but this is the only place in the opinion where it does so and it does not treat it as a decisive argument.

Note, however, that the argument unfolds quite differently depending on whether one is dealing with civil and political rights on the one hand, or economic, social, and cultural ones on the other. Each of these has significantly different repercussions on the way one construes the situation in the territories.

The case that the *International Covenant on Civil and Political Rights* (ICCPR)[11] is applicable is the most compelling. Article 2 of the ICCPR indicates that a State party is bound by it vis-à-vis individuals who are 'subject to its jurisdiction' and occupation arguably involves exercise of jurisdiction. There is a steady stream of cases by the European Court of Human Rights[12] and the Human Rights Committee that confirm that point. Israel clearly exercises jurisdiction over most of the West Bank, and at least over those parts of the territories where it is constructing the wall.

However, comparatively few civil and political rights—freedom of movement is one—are violated in this case and the Court seems to rely primarily on the applicability of the ICESCR. Although there is a progressive case for this, it is also a significantly more contentious proposition than the Court makes it to be. The Court makes clever use of the fact that Israel has, in its report to the Economic and Social Rights Committee, provided statistics on the economic and social rights of settlers in the occupied territories, as evidence that Israel itself has implicitly recognized the applicability of the ICESCR.[13] This at least

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10 GA Res. 2200A (XXI), 21 UN GAOR, Supp. No. 16 at 49, UN Doc. A/6316 (1966) [*ICESCR*].

11 GA Res. 2200A (XXI), 21 UN GAOR, Supp. No. 16 at 52, UN Doc. A/6316 (1966) [*ICCPR*].

12 *Loizidou v. Turkey*, 15318/89 [1996] E.C.H.R. 70 (18 December 1996).

13 *Supra* note 1 at para. 110.

makes the case that the occupying power cannot discriminate between its nationals and other nationals in the territory under occupation.

One aspect of the applicability of economic and social rights to the occupation zone that is uncontentious is that the occupier should refrain from measures deliberately infringing the rights of the population under its jurisdiction. But there is a more insidious danger with considering that the ICESCR is applicable to which the Court, concentrated as it is on a formal analysis of the law devoid of strategic thought about political consequences, is oblivious. In addition to an obligation to abstain from certain behaviour ('negative' obligations), a state bound by the ICESCR also has a 'positive' duty to promote the exercise and enjoyment of the relevant rights. In a paradoxical way, although applicability undeniably increases Israel's burden of obligations, this is also something that could endow Israeli occupation with a certain legitimacy, throw doubts on the proper status of Palestine, and even confuse the allocation of responsibilities between Israel and the Palestinian authority. One can see how Palestinians might not particularly want Israel to take a proactive stance towards the 'progressive realization' of their right to employment or health, simply on account of the fact that these constitute a violation of their right to self-determination in the first place. Even a benevolent occupation will have its strong opponents, and the occupation of Iraq shows that there are numerous ways in which one can think one is benevolent and not be perceived as such. This is a case where, even if international human rights are principally applicable, they should be read 'in light of' the laws of occupation's restrictive thrust, and where the aspiration to enforce rights should not lead to counterproductive results.

What Role for Weighing?

Having said that, one cannot help having the impression that if destruction of property or/and the right to freedom of movement and (mostly) economic and social rights are in the balance on the one hand, and the fight against a dangerous terrorist threat on the other, then some measure of balancing between these two competing goals should at least have been contemplated more actively by the Court. Indeed, this is one area where process (the insufficient taking into account of Israeli arguments) affects substance. Israel cannot claim the existence of a 'public emergency which threatens the life of the nation' in the territories partly because it has never done so in the terms prescribed by the Covenants and partly because it does not recognize the applicability of human rights in the area in the first place. But short of such a 'macro-derogation', Israel can still rely on various micro-limitations contained in the relevant articles. Freedom of movement, for instance, can be

limited 'in order to protect national security or public order.'[14] As to economic and social rights, they may be limited in so far as such limitation is 'for the purpose of promoting the general welfare in a democratic society.'[15]

This should at least have been cause for thought. The Court's reasoning is at its weakest in those passages where it simply dismisses the possibility of a complex balancing act 'on the basis of information available to it'[16] without enlightening us in any way as to its reasoning. Although saying that the construction of the wall is 'for the purpose of promoting the general welfare in a democratic society' would seem a bit far-fetched and indirect, that is only because the context implicitly envisaged by the ICESCR (one, supposedly, of a society at peace happily embarking on a steady course of social improvement) is so starkly different. But perhaps if one can justify negative encroachments on the basis of promoting welfare, then one can justify similar encroachments for the comparatively more urgent goal of dealing with a significant terrorist threat. Again, these issues would have been better argued than virtually ignored.

III Breaking the Wall into its Constituent Elements

But perhaps the real problem with the Court's opinion and the way it ends up being excessively framed in 'either/or' terms is that it puts itself in a difficult situation in the first place by treating the wall as a unit. The Court can be partly forgiven for doing so since this is what Israeli planners themselves (along with much of the media, for example) have been doing. It is also, most crucially, what the General Assembly did, in an interesting case of a question suggesting the answer.

But, as a result, the Court also arguably failed to make the most interesting distinction, that which would have treated certain parts of the wall differently depending on how and why they affected the rights of Palestinians, in relation to how and why they protected Israel from attacks. The key distinction, it is contended, should have been between specific segments of the wall that have a considerable additional impact on Palestinian lives and those that essentially do not change anything to the (admittedly deplorable) situation already in existence.

A wall that would circle a settlement, for example, would not significantly change the existing situation. The effect on self-determination would be the same as if there was no wall. Clearly the Palestinian authority does not exercise any control on the settlements. The Palestinians are already effectively deprived of freedom of

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14 ICCPR, *supra* note 11, article 12.3.

15 ICESCR, *supra* note 10, Article 4.

16 *Supra* note 1 at para. 136.

movement when it comes to these. Indeed, I do not think that the Palestinians particularly resent not being allowed freedom of movement within the settlements insomuch they resent the very existence of the settlements.

The real problem in this case is, again, very much restricted to the illegal occupation. The wall provides nothing but a fairly neutral intervening variable. One might argue that because the settlements are illegal in the first place, then any attempt at protecting them, by a wall or otherwise, is illegal as well. But I don't think international law attaches such a consequence to the illegality of occupation. The illegality of the settlements is one problem, and their protection is another. Just because the settlements are illegal does not make it legal for terrorists to target Israeli civilians. In the same way that it is illegal for Israel to occupy the occupied territories in the first place under general international law, but legal for it to maintain law and order within them under the laws of war, it is legal for Israel to protect the lives of the population in the settlements, even as those are most definitely illegal under international law.

What the above suggests is that that the interesting point about the wall is quite often that it is not a very interesting point at all. If the wall is merely adding a layer of concrete to what is an already illegal settlement, then the problem is not the wall but the settlement. The better issue to have been put before the Court would have been that of the legality of the settlements.

The situation becomes much more difficult when the wall essentially cuts through territory whose status has thereby become changed, such as when the wall becomes a further and distinct element of rampant colonization. In effect, the problem is when the wall, regardless of the fact that it has been adopted on the grounds of security, is already *de facto further* encroaching on the hold of the Palestinian authority, further limiting the Palestinian's freedom of movement and further destroying Palestinian property. In that instance, the case that the wall is illegal will be much stronger because the wall has a considerable net effect on the ground. It would have been helpful to make that distinction.

CONCLUSION

So what of the three 'stories' that I presented in the introduction? Is the Court's Advisory Opinion up to the 'sacred trust of civilization'?

As far as the "international" story is concerned, the Opinion will probably be remembered as a landmark for the Court. It certainly gave the Hague judges a unique opportunity to render an opinion on one of the burning issues of our time. Whether or not that was an opportunity lost for international law, is less clear. As such, the Advisory Opinion is certainly part of a trend whereby the Court is

emboldened to take a stance on issues even in the face of high politics. Some of the relevant questions are explored in depth, but I have also argued that the Court is at times insufficiently sophisticated in how it deals with the tensions that may arise between different branches of the law. The Opinion could have been one of the first great, authoritative and much needed pronouncements in the post 9/11 world on how the demands of fighting against terrorism should be weighed against human rights concerns. By behaving as if terrorism is not really part of the picture, the Court weakens its case and the impact of its Opinion.

When it comes to the second story, that of Palestine, Israel, and the peace process, it is probable that the Advisory Opinion will turn out to have been little more than a drop in an ocean. It is a pronouncement that speaks to legal consciences in a process where lawyers invariably take second seats to politicians, soldiers and diplomats. It is true that the Opinion cannot but have reinforced the camp of those who thought that there are at the very least very significant human rights and humanitarian concerns about a wall that splits families and deprives workers of their livelihood. But the Opinion was largely ignored by Israeli authorites. The decision by the Israeli Supreme Court on the same matter, for example, has had a much more significant impact. In the end, and from a regional perspective, the Opinion should be seen as little more than one of inumerable episodes in which the parties to the conflict have sought to attract or deflect attention for or from their claims.

Finally, what of our third story, that of walls? The Opinion forces us to examine critically the very negative impact that walls can have on the wellbeing of people who are affected by it. However the Opinion does not go far enough in my view in that it fails to explore how walls may also be part of complex political equations in profoundly intractable situations. This fails to take seriously the realist argument that walls may be deplorable generally, but that some walls may simply be a necessary evil. By failing to take on such arguments from *within* the law, the Court leaves it wide open for them to be made outside the law, presumably as the question of whether the law makes any sense in exceptional circumstances, or even whether it should be respected at all when it stands in the way of political priorities that are presented as entailing issues of survival.

So what, finally, of the 'sacred trust of civilization'? These days, civilization is everywhere and nowhere, and certainly not always where one would expect it to be. By the same token, 'civilization', or what used to (and occasionally still does) claim to pass for it, has a huge historical responsibility for the fate of the region. Was bringing international law to bear on this particular issue a service rendered to the area, a good way of 'discharging the trust'? It is important to note that for once international law was not so much imposed from outside

as brought in by those who claimed to suffer locally from its violation. The Court accepted the challenge and its Opinion will at least have served to remind us that, whatever the complexities of the peace process, certain fundamental principles should not be lost sight of. Even if had it been more balanced, however, an ICJ advisory opinion should never be considered remotely the end of the matter.

The fate of the wall is intimately linked to the fate of the peace process, regardless of the opinion of the World Court. It is only if the international community remains deeply convinced of this, that what is left of the trust may one day be upheld.

The Impact of the Advisory Opinion on Israel's Future Policy: International Relations Perspective

MOSHE HIRSCH*

I INTRODUCTION

The recent International Court of Justice (ICJ) advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[1] stirred widespread interest in the international community and in Israel. The Opinion includes judicial statements regarding controversial questions that lie at the heart of the Israeli-Palestinian dispute, such as the legal status of the West Bank and the Palestinians' right of self-determination. Following a brief survey of the central legal rules arising from the Court's Opinion, the article will examine the expected impacts of the Opinion on Israel's future policy regarding the separation barrier's route and the West Bank.

The challenging question posed to scholars of international law and international relations is to what extent Israel will (or will not) comply with the judicial statements included in the Advisory Opinion. The following discussion will address some of the central factors that affect the prospects of compliance. To answer this vital question of compliance, the article will employ three major theories of international relations: the realist, liberal, and constructivist approaches. As elaborated below, each of these theoretical perspectives offers a different conception of international law, and a different set of variables for analyzing the prospects of breach or compliance with international rules. This article suggests that a multifaceted investigation may meaningfully clarify the factors involved in the complex question regarding Israel's future compliance with the Advisory Opinion.

II THE ADVISORY OPINION: PRINCIPAL FINDINGS

In a resolution adopted on 8 December 2003[2] the United Nations General Assembly (GA) decided to request the ICJ 'to urgently render

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* Vice Dean, Faculty of Law; Arnold Brecht Chair in European Law, Faculty of Law and Department of International Relations, Hebrew University of Jerusalem. Principal Research Fellow, Centre for Energy, Petroleum, Mineral Law & Policy, Faculty of Law, University of Dundee. Thanks to Tamar Nevo and Gilad Noam of the Hebrew University Law Faculty for valuable research assistance.

1 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004), Advisory Opinion, [2004] I.C.J. Rep. 131, online: <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>.

2 *Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory,* GA Res. 10/14, UN GAOR, 10th Special Sess., Supp.No.1, UN Doc. A/RES/ES-10/14 (2003).

an advisory opinion on the following question: What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?'[3]

On 9 July 2004, after receiving written statements from forty-nine states and international organizations and after conducting a public hearing, the ICJ issued its Advisory Opinion. The Advisory Opinion consists of three major parts: (*1*) Issues relating to the ICJ jurisdiction and the question of judicial propriety.[4] The Court concluded that it has jurisdiction and decided to comply with the General Assembly's request;[5] (*2*) Issues regarding the legality of the construction of the separation barrier in the territories indicated by the GA;[6] (*3*) Issues relating to the legal consequences of the violations of international law found by the Court.[7] This Section focuses on the second and third parts of the Opinion.

The Legal Status of the Territories Seized by Israel in 1967

The Court noted that the Advisory Opinion concerns only the parts of the separation barrier being built in the territories mentioned in the GA resolution and not the barrier's sections within Israel's territory.[8] The ICJ further noted that the armistice demarcation line that was fixed in 1949 along the West Bank and in Jerusalem, by virtue of the Armistice Agreement between Israel and Jordan (the 'green line'), was apparently of provisional character.[9] Still, the territories occupied by Israel in 1967 ('the occupied territories'), situated east of the green line, including East Jerusalem, are considered occupied territories in which Israel has the status of occupying power under international humanitarian law.[10]

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3 *Ibid*.

4 Advisory Opinion, *supra* note 1 at paras 13-65 (paras 14-42: jurisdiction; paras 43-65: judicial propriety).

5 Judge Buergenthal alone was of the opinion that the Court should have exercised its discretion and declined to render the Opinion. See Advisory Opinion, *supra* note 1, Declaration of Burgenthal J.

6 *Ibid*. at paras. 66-143.

7 *Ibid*. at paras. 144-60.

8 *Ibid*. at para. 67.

9 *Ibid*. at para. 72.

10 This conclusion is largely based on the rules of customary international law (*ibid*. at para. 78) and several UN Security Council resolutions adopted after 1967 (*ibid*. at para. 75).

The Application of International Humanitarian Law

The ICJ stated that the *Regulations Respecting the Laws and Customs of War on Land* annexed to the *Fourth Hague Convention of 1907* (the Hague Regulations) are considered customary law, and thus applicable in the occupied territories.[11] Section III of the Hague Regulations, which concerns 'Military authority over the territory of the hostile State,' is particularly relevant to these territories. The applicability of the 1949 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention) in the occupied territories is a more disputable issue. Israel argued that the Fourth Geneva Convention is not applicable *de jure* to the occupied territories (although it applied the Convention's humanitarian provisions on a *de facto* basis).[12] The Israeli government maintained that the Fourth Geneva Convention was applicable only in occupied territories that were legally held by a High Contracting Party *prior* to the occupation, and that the relevant territory had not previously fallen under legal Jordanian sovereignty.[13] The ICJ rejected this position and stated that as long as territories were occupied over the course of an armed conflict, the prior status of occupied territories is not relevant to the applicability of the Fourth Geneva Convention.[14]

The Application of International Human Rights Conventions

The official Israeli position denies 'that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights ... are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace.'[15] The ICJ found that international human rights law remains in force during times of armed conflict (in parallel to international humanitarian law) and thus

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11 *Ibid*. at para. 89.

12 *Ibid*. at paras. 90 and 93. Although Israel did not refer to substantive legal questions in its written statement to the court (which was limited to issues of jurisdiction and judicial propriety), and did not present oral arguments in the public hearing, the ICJ relied on various sources in which the Israeli official position was expressed, including a report of the Secretary General of the UN regarding the construction of the separation barrier.

13 This legal position is largely based on the language of the second paragraph of common Article 2 of the four Conventions of 12 August 1949 that states that: 'The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.'

14 Advisory Opinion, s*upra* note 1 at para. 101.

15 *Ibid.*, citation from Annex I of the report of the Secretary General.

rejected the Israeli argument.[16] The Court stated that Israel has exercised effective jurisdiction in these territories for over thirty-seven years and concluded that Israel is bound to apply the international human rights conventions that it had ratified[17] to these territories.

The Israeli Settlements in the West Bank and the Separation Barrier's Route

The ICJ noted that '…the route of the wall as fixed by the Israeli Government includes within the "Closed Area" [the area lying between the Green Line and the barrier] … some 80 per cent of the settlers living in the Occupied Palestinian Territory. Moreover, it is apparent … that the wall's sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements.'[18] The Court mentioned Article 49(6) of the Fourth Geneva Convention that provides: 'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.'[19] The Court referred also to Security Council resolutions declaring the illegality of these Israeli settlements.[20] The ICJ concluded that the establishment of Israeli settlements in the occupied territories (including East Jerusalem) constitutes a breach of its obligations under international law.[21]

In light of this conclusion, and the route chosen for the separation barrier, the Court expressed its concern that 'the route of the wall will prejudge the future frontier between Israel and Palestine'[22] and that 'Israel may integrate the settlements and their means of access,'[23] in which case 'it would be tantamount to *de facto* annexation.'[24] Furthermore, the ICJ found that the construction of the separation barrier and its associated regime, by affecting the

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16 *Ibid*. at para. 106.

17 Specifically, the ICJ referred to the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976) [ICCPR]; the *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46, 6 I.L.M. 360 (entered into force January 3, 1976) [ICESCR]; and the *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (entered into force 2 September 1990) [CRC].

18 Advisory Opinion, *supra* note 1 at para. 119.

19 *Ibid*. at para. 120.

20 SC Res. 446 (22 March 1979); SC Res. 452 (20 July 1979), and SC Res. 465 (1 March 1980), mentioned in the Advisory Opinion, *supra* note 1 at para. 120.

21 *Ibid*.

22 *Ibid*. at para. 121.

23 *Ibid*.

24 *Ibid*.

demographic composition of the Occupied Territories, constitute in and of themselves contravention of Article 49(6) of the Fourth Geneva Convention and of the abovementioned Security Council resolutions.[25]

The Palestinian People's Right to Self-Determination

The ICJ observed that 'the existence of a "Palestinian people" is no longer in issue.'[26] The Court then pointed out that as a result of the route chosen for the separation barrier, there is 'a risk of further alterations to the demographic composition of the Occupied Palestinian Territory.'[27] Thus, the ICJ concluded that the construction of the barrier 'severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right.'[28]

Violations of International Humanitarian Law

The ICJ found, according to the information submitted to it, that the destruction or requisition of properties involved in the construction of the separation barrier is carried out in a manner that contravenes the Hague Regulations and the Fourth Geneva Convention.[29] According to the Court's opinion, these illegal activities could not be justified as being absolutely necessary by military exigencies.[30]

Violations of International Human Rights Law

According to information submitted to it, the ICJ found that 'the establishment of a closed area between the Green Line and the wall itself and the creation of enclaves… imposed substantial restrictions on the freedom of movement'[31] of the Palestinian inhabitants, which is guaranteed under Article 12, paragraph 1, of the ICCPR.[32] The Court also noted that the construction of the barrier and its associated regime involve confiscations and destruction of agricultural land;[33] separation between Palestinians and their agricultural lands, water sources and means of subsistence; as well as difficulties to access health services and educational establishments.[34] Hence, the Court concluded that the construction of the barrier and its associated regime impede the exercise

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25 *Ibid*. at para. 122 (see also para. 132).

26 *Ibid*. at para. 118.

27 *Ibid*. at para. 122.

28 *Ibid.*

29 *Ibid*. at para. 132. The Court referred to Articles 46 and 52 of the Hague Regulations and to Article 53 of the Fourth Geneva Convention.

30 *Ibid*. at para. 135.

31 *Ibid*. at para. 133.

32 *Ibid*. at para. 134.

33 *Ibid*. at para. 133.

34 *Ibid*.

by the local population of the right to work, health, education and adequate standard of living as proclaimed in the ICESCR and in the CRC.[35]

The Court found that none of the qualifying clauses or provisions for derogation in the relevant human rights conventions might be invoked by Israel. It stated that it is not convinced that the barrier's route, as chosen by Israel, was necessary to attain its security objectives. Consequently, the Court concluded that the above human rights infringements could not be justified by the requirements of national security or public order.[36]

The Freedom of Access to Holy Places

The ICJ drew attention to the fact that several international instruments relating to the historical territory of Israel / Palestine and the Arab-Israeli conflict contain provisions regarding the need to ensure freedom of access to the holy places and the free exercise of worship.[37] It concluded that Israel is bound to ensure access to the holy places that came under its control during the 1967 War.[38]

Self-Defence and 'Necessity'

The ICJ stated that Israel cannot invoke Article 51 of the *Charter of the United Nations* since the relevant Palestinian attacks are not imputable to a state, as required by Article 51.[39] The Court also stated that Israel could not invoke certain Security Council resolutions that recognize states' right to employ self-defence measures against terrorist attacks.[40] The Court explained that Israel exercises control over the occupied territories and this 'situation is thus different from that contemplated by Security Council resolutions.'[41] Judges Kooijman, Higgins, and Burgental criticized these statements.[42] The Court noted that the invocation of a state of 'necessity' is recognized under customary international law only on an exceptional basis, and it is 'not convinced

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35 *Ibid*. at para. 134.

36 *Ibid*. at paras. 136-7.

37 *Ibid*. at para. 129. The instruments that were mentioned in the Court's Opinion are: the 1878 Treaty of Berlin, the 1922 Mandate for Palestine, the 1947 GA Resolution 181 II (the partition resolution), the 1949 Armistice Agreement between Jordan and Israel, and the 1994 Peace Treaty between Israel.

38 *Ibid*. at para. 149.

39 *Ibid*. at para.139.

40 SC Res. 1368 (12 September 2001), and SC Res. 1373 (28 September 2001).

41 Advisory Opinion, *supra* note 1, at para. 139.

42 Advisory Opinion, *ibid*. Separate Opinion of Higgins J, at paras. 33-5; Separate Opinion of Kooijmans J, at paras. 35-6; Declaration of Buergenthal J, at paras. 5-6.

that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.'[43]

The Legal Consequences for Israel, other States, and the UN

The above findings led the Court to conclude that since the construction of the barrier is contrary to Israel's international obligations, Israel's responsibility is engaged under international law,[44] it is bound to comply with its international obligations,[45] and it must 'cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem.'[46] Furthermore, Israel is bound to dismantle 'those parts of that structure situated within the Occupied Palestinian Territory…'[47], repeal or render ineffective all legislative and regulatory acts adopted with a view to construction of the wall and establishment of its associated regime,[48] and to make reparation for the damage caused to all the natural or legal persons concerned.[49]

The ICJ observed that the above-mentioned violation of the Palestinians' right to self-determination, as well as breaches of international humanitarian law, concern obligations *erga omnes*, and that all states can be held to have a legal interest in their protection.[50] These statements (that were disputed by Kooijmans and Higgins JJ)[51] led the Court to the conclusion that all states are under an obligation 'not to recognize the illegal situation resulting from the construction of the wall' in the territories,[52] 'not to render aid or assistance in maintaining the situation created by such construction,'[53] and 'to see to it that any

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43 *Ibid*. at para. 140.

44 *Ibid*. at para. 147.

45 *Ibid*. at para. 149.

46 *Ibid.* at para. 151.

47 *Ibid.*

48 *Ibid.*

49 *Ibid.* at para. 152.

50 *Ibid.* at para. 155. On the *erga omnes* nature of the obligation to respect the right to self-determination in more details, see *ibid*. at para. 156. On the *erga omnes* nature of obligations under international humanitarian law, see *ibid.* at paras. 157-8.

51 Judge Kooijmans rejected most of the Court's findings regarding the obligations of other states. See *ibid*., Separate Opinion of Kooijmans J, at paras. 37-51. See also Separate Opinion of Higgins J, at paras. 37-9 stating that the obligations of other states in this regard have nothing to do with the definition of certain norms of international law as *erga omnes*.

52 *Ibid.* at para. 159.

53 *Ibid*.

impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.'[54] The ICJ also found that all States Parties to the Fourth Geneva Convention are bound 'to ensure compliance by Israel with international humanitarian law as embodied in that Convention.'[55]

III THE IMPACT OF THE ADVISORY OPINION ON ISRAEL: THE PROSPECTS OF COMPLIANCE

The above Court's judicial statements regarding different aspects of the Israeli presence in the West Bank and the legality of the separation barrier raise the issue of effectiveness. The major question in this context is: to what extent will Israel (or will not) comply with the judicial statements included in the Advisory Opinion? The following discussion addresses only some of the central factors that are likely to influence the prospects of compliance.

Before addressing this challenging question of compliance, it is important to address two preliminary questions. First, from a strictly legal perspective, the underlying character of advisory opinions in general[56] points out that this Opinion does not bind Israel (nor any other state). Still, as elaborated above, the Advisory Opinion includes judicial statements regarding Israel's legal obligations under international law. Thus, the more precise question is *not* whether Israel will comply with the Advisory Opinion, but rather whether it will comply with its legal obligations under international law as stated by the Court in this Opinion? Second, it is clear that the answer to the above question regarding compliance is not necessarily binary: full compliance or complete non-compliance.[57] In light of the legal, factual, and political

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54 *Ibid.*

55 *Ibid.*

56 See, M. Pomerance, 'The Advisory Role of the International Court of Justice and its "Judicial" Character' in A.S. Muller, D. Raic & J.M. Thuranszky, eds., *The International Court of Justice: Its Future Role After Fifty Years* (The Hague: Nijhoff, 1997) 271 at 285 *et seq.*; B. Simma, ed., *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 2002) at 1181-2; S. Rosenne, *The World Court* (Dordrecht: Nijhoff, 1995) at 106-10; M.N. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003) at 1000-1; D. J. Harris, *Cases and Materials on International Law*, 5th ed. (London: Sweet & Maxwell, 1998) at 1035-6; P. Malanczuk, *Akerhurst's Modern Introduction to International Law*, 7th ed. (London: Rutledge, 1997) at 289-90.

57 On the measurement of compliance with international environmental law, see E. Brown-Weiss, 'Rethinking Compliance with International Law' in E. Benvenisti & M. Hirsch, eds., *The Impact of International Law on International Cooperation* (Cambridge: Cambridge University Press, 2004) 134.

context of this case, it is more reasonable to ask to *what extent* Israel will comply with the judicial statements included in this Advisory Opinion?

In fact, significant developments have already taken place in this context since the Advisory Opinion was delivered in July 2004. Israel has already revised the separation barrier's route and significantly reduced the barrier's incursion into the West Bank. The major decision was adopted by the Israeli government on 21 February 2005, and the new path significantly reduces the amount of land on the Israeli side of the border. The previously planned route would have placed fifteen to sixteen per cent of the West Bank on the Israeli side, and the new route narrows that amount about to about seven per cent.[58]

The question of which factors are likely to affect compliance or non-compliance with the ICJ's judicial statements may be analyzed with different international relations theories. Different perspectives lead to different conceptions regarding the nature, goals, and implementation of international legal rules. Each of these approaches also offers a different set of variables for analyzing the prospects for breach or compliance with international norms. Due to space constraints, the following analysis employs only three major theories of international relations: the realist, liberal, and constructivist approaches.[59]

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[58] This decision was adopted simultaneously with the Israeli government's approval of the withdrawal of the Israeli settlers from the Gaza Strip and northern Samaria. See G. Myre, 'Sharon Wins Vote on Pullout from Gaza' *International Herald Tribune* (21 February 2005) A1; A. Benn, 'Government to Okay Key Issues on 'Super Sunday' *Haaretz* (18 February 2005), online: Haaretz.com <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=541832>.

[59] Due to space constraints, the institutionalist approach is not included in this analysis. On this approach in international relations theoretical literature, see R.O. Keohane, 'International Institutions: Two Approaches' (1988) 32 International Studies Quarterly 379; R.O. Keohane & L.L. Martin, 'The Promise of Institutionalist Theory' (1995) 20 International Security 35; A.M. Slaughter, 'International Law and International Relations Theory: a Prospectus' in Benvenisti & Hirsch *supra* note 57 at 25-8.

1 The Realist Approach[60]

The realist approach is widely considered the most influential theoretical tradition in international relations literature. The principal assumptions of the realist school are that the international system is based on nation-states as the principal actors; that states are egoistic and rational (they are interested in maximizing their own interests and seek to attain them through rational decision-making processes); and that international politics is essentially anarchic (lacking an overarching authority) and conflictual (characterized by struggle for power in an anarchic setting). Proponents of the realist stream perceive international law as an instrument whereby states seek to attain their interests (power, wealth, etc.). Facing common tasks that are not easily amenable to unilateral attainment, national decision-makers treat international rules as instruments for fulfilling these common objectives. Under this conception, international law merely reflects the interests of states (particularly the powerful ones) and it may be implemented through the balance of interests and power.

A significant part of the realist analysis of international law is devoted to the subject of compliance. In accordance with the realist approach, compliance with or violation of international norms is dependent upon a comparison of the expected outcomes resulting from these alternative courses of action. Consequently, numerous realist scholars contend that international law has little *independent* impact on state conduct. International rules are just expressions of power relationships, and they are likely to be ignored or changed when these relationships change. Thus, for instance, international treaties generally bind states to what they would have done anyway. The perception of international rules as instruments to solve shared problems has led many scholars to analyze the activities of states in the legal sphere as

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[60] See J.E. Dougherty & R.L. Pfaltzgraff, *Contending Theories of International Relations: A Comprehensive Survey*, 5th ed. (New York: Longman, 1996) at 63-4; S. Burchill & A. Linklater, Theories of International Relations (New York: St. Martin's Press, 1996) at 67-92; B. Frankel, 'Restating the Realist Case' in Frankel, ed., *Realism: Restatement and Renewal* (London: Frank Cass, 1996) ix at xiv-xiv; K. Abbott, 'International Relations Theory, International Law, and The Regime Governing Atrocities in Internal Conflicts' (1999) 93 Am. J. Int'l Law 361 at 364-6; K.W. Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers' (1989) 14 Yale J. Int'l L. 335 at 346-50; A. Arend, 'Do Legal Rules Matter? International Law and International Politics' (1998) 38 Va. J. Int'l L. 107 at 110-18; A.M. Slaughter, *supra* note 59 at 207-9; H. Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 Yale L.J. 2599 at 2622. See also, B.A. Simmons, 'Compliance with International Agreements' (1998) 1 Annual Review of Political Science 75 at 79-80; J.C. Barker, *International Law and International Relations* (London: Continuum, 2000) at 70-9.

'collective action' problems. Consequently, theoretical tools developed in game theory have often been employed by scholars to analyze the prospects of cooperation and compliance in particular international settings.[61]

Realist analysis of the question of compliance with the judicial statements included in the Advisory Opinion attaches particular importance to the prospects of imposing sanctions on Israel in case of non-compliance. The above-mentioned Court's statements regarding the *erga omnes* nature of some of Israel's obligations and the resulting obligations for third states[62] may lay the legal infrastructure for states that are capable of and interested in instituting some sanctions against Israel. The realist approach, however, does not consider such judicial statements as an independent factor and it focuses on the power and interests of key parties to impose such sanctions.

Some concerns regarding the risk of sanctions against Israel have been voiced by Israeli officials and journalists following the Advisory Opinion.[63] In light of the considerable power asymmetry relations between Israel and the Palestinians on the bilateral level, it is more reasonable to explore the prospects of sanctions by central external players in the global arena: the United States and the European Union (EU). The United States certainly has the necessary resources to impose harsh sanctions on Israel. The United States provides Israel significant financial, military and political assistance, and is also Israel's second largest trading partner.[64] The route of the separation barrier has been extensively discussed between Israel and the United States and the latter has expressed its objection to some of the barrier's segments. The principal concerns of the United States were expressed in regard to the deepest incursions into the West Bank territory (and particularly in the area of Ariel). On several occasions, the American Administration threatened that it would deduct the expenses involved in the barrier's construction from the loan guarantees it had extended to Israel.[65]

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61 See e.g. M. Hirsch, 'Game Theory, International Law, and Future Environmental Cooperation in the Middle East' (1999) 27 Den. J. Int'l L. & Pol'y 75; E. Benvenisti, 'Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resource Law' (1996) 90 Am. J. In'tl L. 384.

62 Advisory Opinion, *supra* note 1 at paras. 155-8.

63 See, for instance, Y. Yoaz, 'Attorney General: Hague Fence Ruling may Lead to Sanctions Against Israel' *Haaretz* (20 August 2004), online: Haaretz.com <http://www.haaretzdaily.com/hasen/objects/pages/PrintArticleEn/jhtml?itemNo=466870>.

64 See e.g. WTO Secretariat, 'Trade Policy Review: Israel' (13 August 1999) at para. 10, online: WTO <http://www.wto.org/english/tratop_e/tpr_e/tp_rep_e.htm#bycountry>.

65 On the US position regarding the separation barrier in detail, see K.

Although the United States has resorted to various sanctions against Israel in the past,[66] Israeli decision-makers are well aware that it is highly unlikely that non-compliance with the ICJ's statements will lead to American sanctions.[67]

The EU 'demanded that Israel stops and reverses the construction of the Barrier inside the occupied Palestine territory …, which is in contradiction to the relevant provisions of International law.'[68] The EU is Israel's largest trading partner,[69] and its increasing political influence in the global arena has been manifested, *inter alia*, in the unified vote of its twenty-five members in favour[70] of the General Assembly Resolution demanding Israel to abide with its obligations as pronounced in this Advisory Opinion.[71]

Michael & A. Ramon, *The Building of the Security (Separation) Fence around Jerusalem* (Jerusalem: Jerusalem Institute for Israel Studies) [forthcoming] at c. A, s. F; Y. Folman, *The Story of the Security Fence* (Jerusalem: Carmel, 2004) at 164-70.

66 See e.g. A. Ben-Zvi, *The United States and Israel: The Limits of the Special Relationship* (New York: Columbia University Press, 1993) at 123-37.

67 See e.g. S. Shamir, 'The Target: Sanctions Against Israel' *Haaretz* (19 September 2004) B4. On the US position in that regard, see also W. Hoge, 'Remove the Wall, Israel is told by the UN' *New York Times* (21 July 2004), online: New York Times <http://www.nytimes.com/2004/07/21/international/middleeast/21nati.html?pagewante>; G. Crouch & G. Myre, 'Major Portion of Israeli Fence is Ruled Illegal' *New York Times* (10 July 2004), online: <http://www.nytimes.com/2004/07/21/international/middleeast/10BARR.html?pagewa>.

68 See e.g. EU, Press Release 11105/04, '2597th Council Meeting, General Affairs and External Relations, Brussels, 12–13 July 2004' (12–13 July 2004). On the EU position in that regard, see also Michael & Ramon, *supra* note 65 at c. A, s. F.

69 On the trade relations between Israel and the EU, see M. Hirsch, 'The 1995 Trade Agreement between the European Communities and Israel: Three Unresolved Issues' (1996) 1 European Foreign Affairs Review 87; P. Malanczuck, 'The Legal Framework of the Economic Relations between Israel and the European Union' in A. Kellermann, K. Siehr & T. Einhorm, eds., *Israel Among Nations* (The Hague: Kluwer, 1998) 263; G. Harpaz, 'EU-Israel and the European Neighbourhood Policy: Legal and Economic Implications' (2004) 31 Legal Issues of Economic Integration 257.

70 On the vote of the EU member states and Israel's reaction, see S. Shamir, 'Israel to Sideline EU after UN Vote on Security Fence' *Haaretz* (22 July 2004), online: Haaretz.com <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn. jhtml?itemNo=454469>.

71 *Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, including in and around East Jerusalem*, GA Res. 10248 A/ES-10/L.13/Rev.I, 20 , July 2004, online: Permanent Mission of Israel to the United Nations <http://www.israel-un.org/gen_assembly/pal_issues/res10ess_21jul04.htm>.

The EU has already resorted to some trade measures against Israel[72] in the context of the latter's control over the West Bank and Gaza Strip.[73] The bitter dispute that erupted between these parties related to the question of whether goods produced in the Israeli settlements in the West Bank and Gaza Strip are entitled to the trade benefits provided for in the 1995 trade agreement between Israel and the EU.[74] The EU decided that these products are not eligible for preferential treatment under the 1995 Agreement.[75] The EU is not likely to impose direct economic sanctions against Israel with regard to the ICJ's Opinion but Israel's policy regarding the separation barrier and the occupied territories may affect EU willingness to strengthen its trade relations with Israel.[76] Thus, the realization of Israel's long-term aim to expand and deepen economic cooperation with the EU may be influenced by various political factors, including Israeli policy regarding

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72 On some sanctions (with minor practical effect) imposed by the EC on Israel in 1982, see I. Greilsammer, 'Reflections on the Capability of the European Community to Play an Active Role in an International Crisis: The Case of the Israeli Action in Lebanon' in I. Greilsammer & J.H.H. Weiler, eds., *Europe and Israel: Troubled Neighbors* (Berlin: Gruyter, 1988) 285 at 291-2.

73 On the EU involvement in the Israeli-Palestinians relations, see B. Soetendorp, 'The EU's Involvement in the Israeli-Palestinian Process: The Building of a Visible International Identity' (2002) 7 European Foreign Affairs Review 283-295.

74 For a legal analysis of this dispute, see M. Hirsch, 'Rules of Origin as Trade or Foreign Policy Instruments?: The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip' (2003) 26 Fordham Int'l L.J. 572.

75 See, Notice to Importers 'Imports from Israel into the Community' (2001) Official Journal of the European Communities (2001/C 328/04); EU, Communication from the Commission to the Council and the Eurpoean Parliament, 'Implementation of the Interim Agreement on Trade and Trade-related Matters Between the European Community and Israel' SEC (1998) 695. On the resolution of this dispute, see G. Harpaz, 'The Dispute over the Treatment of Products Exported to the European Union from the Golan Heights, East Jerusalem, the West Bank and the Gaza Strip' (2004) 38 Journal of World Trade 1049.

76 This assessment is reinforced by the EU statements following the Advisory Opinion. Thus, for instance, the EU recently indicated that it intends to offer Israel economic benefits in exchange for relieving the restrictions on the Palestinians. EU officials stated that 'the extent of the EU's economic cooperation with Israel will be equivalent to the extent of Israel's political cooperation with the EU' (Ora Coren, 'EU to Offer Israel Benefits for Easing Palestinians' Lives' *Haaretz* (20 March 2005), online: Haaretz.com <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=554352>). This and other statements issued by the EU since the Advisory Opinion have not included threats of sanctions regarding the implementation of the Court's Opinion by Israel.

the separation barrier and the Palestinians.[77]

To sum up, a realist analysis of the current circumstances indicates that the prospects that the US or the EU will impose sanctions against Israel because of the separation barrier's route are not significant.[78] In the absence of significant and credible threats of sanctions imposed by the major powers, or some other significant inducement to comply, realist analysis indicates that Israel should not be expected to comply with the judicial statements included in the Advisory Opinion. This observation is certainly valid for the short range. [79] As to the medium and long range, Israeli steps regarding the separation barrier and the West Bank may affect EU willingness to expand and deepen its economic relations with Israel. However, the EU position regarding its economic ties with Israel depends on additional and even more important political factors (such as the EU's role in the negotiations between Israel and the Palestinians or a settlement of the dispute between the latter parties).

2 The Liberal Approach[80]

Liberal theory accepts some of the basic assumptions of the realist

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77 Israel's policy regarding the separation barrier and the West Bank may also affect its efforts to become a member of the OECD. On Israel's efforts to join the OECD, see Nechemia Strasler, 'Nethanyu Argues Case to Join OECD' *Haaretz* (4 October 2004), online: Haaretz.com <http://www.haaratez.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=484490>; Nechemia Strasler, 'Nethanyu Pledges: Israel will be a Member of the OECD within Two Years' *Haaretz* (5 October 2004) C-2.

78 Sanctions may be imposed also by the UN Security Council but the current reluctance of the US and EU to resort to sanctions in this context indicates that the prospect for such organized sanctions are not significant.

79 It is important to note that the realist analysis takes into account not only Israel's activities regarding the separation barrier but also other developments in the Middle East and in the global arena that influence the central parties' power and interests. Thus, when these circumstance change, a realist analysis may yield different assessments regarding Israel's compliance with the Opinion.

80 On the liberal approach, see T. Dunne, 'Liberalism' in J. Baylis & S. Smith, eds., *The Globalization of World Politics* (Oxford: Oxford University Press, 1997) at 147; S. Burchill, 'Liberal Internationalism' in S. Burchill & A. Linklater, eds., *Theories of International Relations* (New York: St. Martin's Press, 1996) at 28; A. Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) Int'l Org. 513; Abbott, *supra* note 60 at 366-9; A.M. Burley, 'Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine' (1992) 92 Colum. L. Rev. 1907; A.M. Slaughter, *supra* note 59 at 226-39; A.M. Slaughter, 'International Law in a World of Liberal States' (1995) 6 European Journal of International Relations 503; Dougherty & Pfaltzgraff, *supra* note 60 at 62; Koh, *supra* note 60 at 2617-18, 2633.

approach and generally posits that states act in accordance with their conceptions of national interest. Unlike realists who view international politics as essentially conflictual, liberals assume that peace (and cooperation) is the normal state of affairs, and that war is both unnatural and irrational. Under this conception, wars are created by militaristic and undemocratic governments for their own vested interests. Liberals agree that states act to promote their interests, but they stress that these preferences are shaped in response to the preferences of *domestic groups and individuals* within each state. States and other political institutions represent some subset of domestic society. Thus, the distinctive aspects of the liberal approach are the focus on state-society relations and the view that the fundamental actors in international politics are members of domestic society.

The underlying argument of the liberal approach is that a state's behaviour in the international sphere is significantly influenced by the type of political regime that prevails within it. A significant body of liberal literature explores the links between democratic governance and peaceful relations, and between the rule of law within a state and the prospects of compliance with international norms. Non-liberal governments are seen as the major of causes of international conflicts and insecurity. Liberal states have representative governments, independent and professional judiciaries dedicated to the rule of law, and they secure civil and political rights. The progressive translation of liberal-democratic principles into the international realm is viewed as desirable, as this offers the best prospects for a peaceful world order. The liberal approach, and particularly the neo-liberal institutionalist strand, emphasizes the important role of non-state actors in world politics. It particularly highlights the role of international institutions (both governmental and non-governmental) that increasingly implement functions that states cannot perform alone.

International law is perceived by the liberal approach as a purposive system of law that is designed to attain common ends, such as international justice, peace, democracy, and human rights. Compliance with international law depends to a significant extent on the domestic structure of the relevant state. Generally, relations between liberal states (states within the 'zone of law') are more governed by international law, while relations involving non-liberal states (states within the 'zone of politics') are more prone to be governed by political considerations.

Liberal analysis of the prospects of Israel's compliance with the judicial statements included in the Advisory Opinion focuses on the domestic structure and actors that operate within Israel; both public institutions and interest groups. Liberal investigation emphasizes that Israel is a democratic state, characterized by the rule of law, and an

independent judiciary.[81] These significant factors generally enhance the prospects of compliance with international norms.

The Israeli courts system, and particularly the Supreme Court, is widely viewed as an independent and professional judiciary that is committed to the rule of law.[82] Consequently, the application of international law by Israeli courts is of major importance in regard to Israel's compliance with international rules pronounced by the ICJ in this Opinion. Following the courts of the United Kingdom,[83] Israel's Supreme Court has established that rules of international customary law are automatically incorporated into the municipal legal system, unless they are unambiguously inconsistent with statutes enacted by the Knesset (the Israeli parliament).[84] Non-customary treaties are not accepted into the Israeli legal system unless they are incorporated by legislation.[85] Where Israeli legislation is open to alternative interpretations, domestic courts apply the 'presumption of compatibility' between Israeli and international law, and prefer the interpretation that is consistent with the state's obligations under international law (both treaty and customary law).[86]

The above Israeli jurisprudence regarding the applicability of international customary law in the Israeli legal system, the independent, professional status of the Israeli judiciary, and the significant impact of the ICJ's advisory opinions on the formation of international customary law, indicate that it is likely that the ICJ's statements regarding customary rules will gradually influence Israel's future court decisions. The Court's advisory opinions are of consultative character and they

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81 See e.g. online: Freedom House, Freedom in the World: Israel <http://www.freedomhouse.org/research/freeworld/2004/countryratings/israel.htm>.

82 On the growing public status of Israel's Supreme Court, see G. Barzilai, 'Courts as Hegemonic Institutions: The Israeli Supreme Court in a Comparative Perspective' (1999) 5 Israel Affairs 15.

83 On the United Kingdom's law regarding the application of international law in municipal courts, see Shaw, *supra* note 56, at 128-43.

84 See e.g. *Steinberg v. Attorney General* CA 5/51 (1951), 5 P.D 1061. For a detailed analysis of Israel's jurisprudence on the application of international rules in the Israeli legal system, see R. Lapidoth, 'International Law within the Israel Legal System' (1990) 24 Isr.L.Rev. 451.

85 See e.g. *Custodian of Absentee Property v. Samarah et al*. CA 22/55 (1956), 10 P.D 1825; *Affu et al. v. Commander of the I.D.F Forces in the West Bank* (1988), HCJ 785/87, 845/87, 27/88, 42(2) P.D 4. See also Lapidoth, *supra* note 84 at 459.

86 See e.g. *Sheinbein v. Attorney General* CA 6182/98 (1999), 53(1) P.D 625; *John Doe et al v. Minister of Defence* CFH 7048/97 (2000), 53(1) P.D 721 at 742-3, 768; *Michael Frudenthal v. The State of Israel* CA 11196/02 (2003), 57(6) P.D 40.

generally[87] bind neither the General Assembly nor the involved states.[88] Still, these opinions are often considered as an authoritative statement of the law, and past experience shows that they have considerable impact on the evolution of international law.[89] The influence of these opinions derives from the authoritative role of the Court as the principal judicial organ of the UN, the fact that they are rendered at the end of judicial proceedings,[90] and that the Court is bound in these proceedings by the rules of international law.[91] It is noteworthy that a significant portion of the Advisory Opinion on the separation barrier relates to international customary law (particularly with regard to international humanitarian law) and, as discussed above, such international rules are generally incorporated into the Israeli legal system.

Israel's Supreme Court has already been involved in the delimitation of the barrier's route. In the *Beit Sourik Village* judgment, [92] which had been rendered just nine days prior to the ICJ ruling, the Supreme Court scrutinized the legality of the separation barrier under Israeli and international customary law. While affirming the government's position that the separation barrier's route does not necessarily have to follow the Green Line, [93] the Supreme Court ruled that the Military Commander's authority must be properly balanced

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87 It is possible, however, that the constituent documents of certain international organizations or some other international convention provide that future advisory opinions will bind the relevant parties (compulsive opinions). See Simma, *supra* note 56 at 1181-2, 1188.

88 *Ibid*.; Rosenne, *supra* note 56 at 106-10; Pomerance, supra note 56 at 285 *et seq*., Shaw, *supra* note 56 at 1000-1; Malanczuk, *supra* note 56 at 289-90. See also Advisory Opinion, *supra* note 1 at paras. 60-2.

89 See e.g. Shaw, *supra* note 56 at 1001-4; Pomerance, *supra* note 56 at 289; Harris, *supra* note 56 at 1035-6; M. Shahabuddeen, *Precedent In The World Court* (Cambridge: Cambridge University Press, 1996) at 71.

90 See *Statute of the International Court of Justice*, 26 June 1945, 59 Stat. 1031, T.S. 1945 No. 993, 3 Bevans 1153 (entered in force 24 October 1945) at Article 68.

91 Simma, *supra* note 56 at 1182, 1188; P. Sands & K. Klein, *Bowett's Law Of International Institutions*, 5th ed. (London: Sweet & Maxwell, 2001) at 364; Shaw, *supra* note 56 at 1004-5; Harris, *supra* note 56 at 1035; Malanczuk, *supra* note 56 at 289.

92 *Beit Sourik Village v. The Government of Israel*, HCJ 2056/2004 (2004) [*Beit Sourik Village*], online: <http://62.90.71.124/Files_ENG/04/560/020/a28/04020560.a28.pdf>. On this decision and its relationship with the ICJ's Advisory Opinion, see Y. Shany, 'Capacities and Inadequacies: A Look at the Two Separation Barrier Cases' (2005) 38 Isr.L. Rev. 230.

93 *Beit Sourik Village*, *supra* note 92 at para. 30. The court also ruled that the Military Commander has authority to order the seizure of private land for security purposes, including the construction of the separation barrier (*ibid*. at para. 32).

against the rights, needs and interests of the local population. The Court's influential President, Aharon Barak, pronounced that the essential need to balance Israel's security interests and local Palestinian needs[94] stems from 'both international law and fundamental principles of Israeli administrative law.'[95] Following a careful examination of the barrier's route and its impact on the Palestinian population, the Supreme Court ruled that a considerable portion of the route discussed in this litigation resulted in disproportionate harm to the local population. Consequently, the Supreme Court ruled that 30 of the 40 kilometres in question should be modified in order to avoid unnecessary hardship to the local Palestinian population.[96]

While it is likely that international customary rules pronounced by the ICJ will gradually influence Israeli law and the executive branch's activities, the impact of the Advisory Opinion on Israel's case-law regarding East Jerusalem and the separation barrier therein are expected to be much more modest. The above Israeli legal rule regarding the inapplicability of international customary law in cases of inconsistency with unambiguous domestic statutes is of significance to the ICJ's pronouncements regarding East Jerusalem. The long-standing dispute over the legal status of East Jerusalem is certainly one of the most formidable stumbling blocks to the achievement of a durable peaceful solution to the Israeli-Palestinian conflict. [97] The ICJ's statements regarding the status of East Jerusalem as occupied territory are clearly inconsistent with Israeli legislation that applies Israeli law, jurisdiction and administration to this area.[98] Consequently, the ICJ's

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94 *Ibid*. at paras. 34-5. The Court specifically referred to Regulation 46 of the 1907 Hague Regulations and to Article 27 of The Fourth Geneva Convention.

95 *Ibid*. at para. 39.

96 *Ibid*. at para. 86.

97 For a survey of the various legal positions on the status of Jerusalem under international law, see M. Hirsch, D. Housen-Couriel & R. Lapidoth, *Whither Jerusalem? Proposals and Positions Concerning the Future of Jerusalem* (Dordrecht: Kluwer-Nijhoff, 1995) at 15-21; M. Eisner, 'Jerusalem: An Analysis of Legal Claims and Political Realities' (1994) 12 Wis. Int'l L.J. 221 at 238-60; L. Kletter, 'The Sovereignty of Jerusalem in International Law' (1981) 20 Colum. J. Transnat'l L. 319 at 330-56.

98 See *Law and Administration Ordinance* (Amendment No. 11), Laws of the State of Israel, vol. 21, 5727–1966/7 at 75; *Municipal Ordinance* (Amendment No. 6), Laws of the State of Israel, vol. 21, 5727–1967 at 75-6. Israeli courts that discussed the impact of these enactments on the Israeli law concluded that East Jerusalem constitutes part of the territory of Israel. On these enactments and their interpretation by Israeli courts, see R. Lapidoth, *Commentary on Basic Law Jerusalem Capital of Israel* (Jerusalem: Sacher Institute for Legislative and Comparative Law, the Hebrew University, 1999) at 49-56; Hirsch, Housen-Couriel & Lapidoth, *supra* note

statements regarding the status of East Jerusalem as occupied territory and the separation barrier therein are not expected to be incorporated into the Israeli legal system.[99]

Legal review of the Israeli executive branch is not carried out by the judiciary alone but also by the state's Attorney General. The Attorney General functions as both chief prosecutor and the executive's highest legal officer ('legal advisor to the government'). This officer is institutionally affiliated with the Ministry of Justice, but is not subject to the instructions of the Minister of Justice or the government. The Attorney General's legal opinions bind all governmental ministries.[100] Following the ICJ's Advisory Opinion, the Attorney General urged that the Israeli government 'thoroughly consider' formally applying the Fourth Geneva Convention to the territories seized in 1967.[101] This position seems to deviate from Israel's long-term policy[102] regarding the legal status of these territories under international law.[103]

To sum up, the liberal approach[104] emphasizes that Israel is a democratic state, characterized by the rule of law and an independent judiciary. This factor, together with Israeli courts' jurisprudence regarding the incorporation of international customary law into the domestic legal system, indicate a likelihood that a significant part of the international customary rules pronounced by the Court will gradually be

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97, at 22-4.

99 On the impact of the Advisory Opinion on the future negotiations between Israel and the Palestinians over East Jerusalem, see M. Hirsch, 'The Legal Status of Jerusalem and the International Court of Justice's Advisory Opinion on the Separation Barrier' (2005) 38 Isr. L. Rev. 298.

100 See e.g. E. Gordon, 'How the Government's Attorney Became Its General' *Azure* 5758 (Summer 1998) 75, online: <http://www.azure.org.il/download/magazine/ 1157az4_gordon.pdf>; E. Harnon, *Criminal Procedure in Israel—Some Comparative Aspects, in Comparative Law of Israel and the Middle East* (Washington, DC: Lerner Law Books, 1971) at 657, 661-2.

101 A. Benn, 'AG Urges Sharon to Consider Adopting Geneva Convention' *Haaretz (*24 August 2004), online: Haaretz.com <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=468472>.

102 On this position, see E. Benvenisti, *The International Law of Occupation* (Princeton, NJ: Princeton University Press, 1993) at 109-13.

103 This recommendation of the Attorney General was criticized by the Ministry of Foreign Affairs' Legal Division. See A. Benn, 'Ministry of Foreign Affairs: Legal Advisor Mazuz Overestimates the Impact of the Hauge Ruling' *Haaretz* (23 August 2004) A-10. See also A. Benn, 'Oslo Olives' *Haaretz* (2 September, 2004) 4.

104 The issue of the Court's legitimacy in the Israeli public may also be of relevance for liberal analysis; see Section III(3).

incorporated into the Israeli legal system and affect the executive's activities. Some of the limits to the ICJ's influence are manifested with regard to the legal status of Jerusalem and the separation barrier therein.

3 The Constructivist Approach[105]

Social constructivism emerged in the late 1980s and it largely developed as a critique of the realist tradition in international relations literature. The constructivist approach is largely consistent with the sociological perspective. Wendt posits the constructivist's basic claim that the international system is not composed only of distribution of material capabilities (such as military and economic resources) but is also made of social relationships. The critical components of the international social structure include shared understandings, expectations, and knowledge. This socially constructed structure influences the interests, identity and behaviour of the relevant actors. Unlike the realist approach, social constructivism does not take the parties' interests, preferences and strategies as given. Rather, these important motivations to behaviour are constructed in a socially interactive process.

The social constructivist theory emphasizes the dynamic aspect of social concepts (including interests and preferences). Acceptable social behaviour and values may be changed through a cognitive evolutionary process. Under this approach, decision-makers are motivated by impersonal social factors such as values, norms and cultural practices, rather than by a calculation of material interests. Legal obligations are perceived in this context as social standards of appropriate behaviour that operate in an inter-subjective framework. Thus, state behaviour is subjectively interpreted by other states, and judgment of whether a particular state's conduct constitutes compliance or violation does not involve only an objective assessment but also an

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[105] A. Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999) at 3; Anthony Arend, *supra* note 60 at 125-40; E. Adler, 'Cognitive Evolution: A Dynamic Approach for the Study of International Relations and Their Progress' in E. Adler & B. Crawford, eds., *Progress in Postwar International Relations* (New York: Columbia University Press, 1991) 43; M. Finnemore, *National Interests in International Society* (Ithaca, NY: Cornell University Press, 1996), at 1-13; M. Finnemore & K. Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 Int'l Org. 887; Barker, *supra* note 60 at 82-4; Simmons, *supra* note 60 at 86-8; S. Guzzini, 'A Reconstruction of Constructivism in International Relations' (2000) 6 European Journal of International Relations 147; J. Brunee & S. Toope, 'International Law and Constructivism' (2000) 39 Colum. J. Transnat'l L. 19 at 38-42; V.P. Shannon, 'Norms are What States Make of Them' (2000) 44 International Studies Quarterly 293; F. Schimmelfenning, 'International Socialization in the New Europe: Rational Action in an Institutional Environment' (2000) 6 European Journal of International Relations 109.

inter-subjective appraisal.

States' decision-makers learn the prevailing norms in their group and the expectations of appropriate behaviour through the process of 'socialization'. International socialization refers to the process that is directed toward a state's internalization of the constitutive beliefs, norms, and practices institutionalized in its international environment. International socialization is accomplished through state emulation of other successful states, which are praised for conforming to prevailing norms, or condemned for deviating from them. Occasionally, the 'peer group' exerts its influence by diplomatic measures, economic pressure, or even by social isolation.

Constructivist analysis of the prospects of compliance with the judicial statements included in the Advisory Opinion focuses on the social role of the Court in the international community, its influence in shaping international norms, and the influence of Western states' positions on Israel's long-term policy. The influence of the Court's advisory opinions on the evolution of international law does not derive from formal rules of international law but rather from the Court's social status in the international community. As discussed above,[106] though the ICJ's advisory opinions are not legally binding, they have significant impact on states' behaviour. These decisions often carry moral and political weight, and they affect international public opinion as well as legitimacy. Consequently, the Court's advisory opinions are widely considered as an authoritative statement of the law[107] and they frequently set social standards of appropriate international behaviour. Under the constructivist approach,[108] the ICJ may be perceived as an agent of international socialization.[109]

The solid majority upon which the Advisory Opinion on the separation barrier is based, as well as the Court's reliance on resolutions of international organs, may support the constructivist argument that judicial statements included in the Opinion will influence international public opinion, as well as positions of states and international institutions. Most of the legal statements included in the Opinion rely

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106 See Section III(2).

107 See e.g. Shahabuddeen, *supra* note 89 at 71.

108 On the legitimacy of the ICJ, see T. Broude, 'The Legitimacy of the ICJ's Advisory Competence in the Shadow of the Wall' (2005) 38 Isr. L. Rev. 189. On the normative influence of the ICJ in the international community, see also A. Kacowicz, 'The Normative Dimension of International Relations and the Advisory Opinion of the ICJ on the Separation Barrier' (2005) 38 Isr. L. Rev. 348.

109 On international institutions as 'agents of socialization', see M. Hirsch, 'The Sociology of International Law' (2005) 55 U.T.L.J. 891.

on a majority of fourteen-to-one judges[110] and a significant portion of these pronouncements are supported by the resolutions of the UN Security Council and the General Assembly.

From this perspective, the significance of the Court's declaration that some obligations violated by Israel are of *erga omnes* nature (which are the concern of all states)[111] does not lie in the fact that this statement may induce some states to impose sanctions on Israel but rather in the implicit message of social exclusion that it may convey to the international community.

Sociologists have long shown that individuals' attitudes are significantly affected by the positions and actions of other individuals belonging to their 'reference group'. This group constitutes a point of reference for individual decision-making because the individual attaches special value to the beliefs and behaviour of the members of this group. People need not necessarily have to be members of the group to which they refer.[112] States' policy makers are also affected by international reference groups. Generally, Israel's principal reference group is 'the Western club' that includes the developed states in Western Europe and North America. Cultural and social ties between Israel and the United States, as well as the EU are of major importance for the Israeli public and decision-makers.[113]

This social influence of international reference groups indicates that the position of states belonging to the Western group regarding the recent Advisory Opinion is of significance to Israeli decision makers, even if it is not translated into concrete sanctions. Though numerous Western states expressed significant doubts on whether the barrier's dispute should be brought to the ICJ, virtually all of them either opposed or expressed serious reservations regarding the building of the barrier outside Israel's territory (and particularly with regard to the significant incursions into the West Bank territory).[114] This position was manifested, for instance, in the unanimous vote of the EU—twenty-five member states in favour of the General Assembly resolution demanding

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110 Advisory Opinion, *supra* note 1 at para. 163.

111 *Ibid*. at para. 155.

112 C.M. Renzetti & D.J. Curran, *Living Sociology*, 2nd ed. (Boston: Allyn and Bacon, 2000) at 141-2; N. Abercrombie, S. Hill & B.S. Turner, eds., *The Penguin Dictionary of Sociology*, 4th ed. (London: Penguin, 2000) at 291.

113 On the European-Israeli cultural relations, see E. Ahiram & A. Tovias, 'Introduction' in E. Ahiram & A. Tovias, eds., *Wither EU-Israeli Relations? Common and Divergent Interests* (Frankfurt am Main: Peter Lang, 1995) 1 at 11 *et seq*.

114 For a detailed survey of states' positions regarding the barriers' barrier, see Michael & Ramon, *supra* note 65 at c. A, s. F; Folman, *supra* note 65 at 164-70.

that Israel abide by its obligations as pronounced in the Advisory Opinion.[115] Under the constructivist approach, the opposition to the barrier's route in the West Bank, which is prevalent among the members of Israel's reference group, is likely to affect the positions of Israeli decision makers as well as domestic groups within Israel.

Constructivist analysis of compliance with international decisions depends also on the particular institution's legitimacy within the relevant social group.[116] Some of the ICJ's sweeping pronouncements that seem to ignore or underestimate Israel's security needs decreased the Court's legitimacy vis-à-vis the Israeli public. This is particularly prominent with regard to the Court's statement that Israel is not entitled to invoke its right to self-defence under Article 51 of the *Charter of the United Nations* against terrorist attacks launched from the West Bank,[117] and the Court's pronouncement that *all parts* of the separation barrier in the West Bank are not necessary to attain Israel's security objects.[118] The latter sweeping statement does not follow any investigation of the particular factors involved in any segment of the barrier (for example, the extent of the deviation from the 'green line' or the harm incurred to the local population in a particular area). These sweeping pronouncements undermined the Court's legitimacy and generated alienation toward its Opinion among significant groups[119] in the Israeli public.[120]

On the other hand, the judgment of Israel's Supreme Court in the *Beit Sourik Village* case showed more sensitivity to Israel's security

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115 GA Res. of 20 July 2004, *supra* note 71. The US voted against this Resolution and Canada abstained.

116 Parallel literature in international law and international relations underscores the importance of legitimacy as a factor that intensifies or weakens the sense of obligation towards international norms. See, T.M. Franck, *The Power Of Legitimacy Among Nations* (Oxford: Oxford University Press. 1999) at 3; Simmons, *supra* note 60, at 87-89.

117 Advisory Opinion, *supra* note 1 at para. 139.

118 *Ibid*. at para. 137.

119 The issue of the Court's legitimacy in the Israeli public may also be of relevance for liberal analysis (that focuses on the position of domestic groups).

120 The participation of Elaraby J in the ICJ proceedings also reduced the Advisory Opinion's legitimacy in Israel. Israel sought to disqualify Elaraby J and invoked Article 17(2) of the ICJ Statute, arguing that his participation raises an unacceptable appearance of bias. This request was rejected by the Court. See *Legal Consequences of the Construction of the Wall in the Occupied Territory* (Request for Advisory Opinion), I.C.J. Order (30 January 2004), online: <http://www.icj-cij.org/icjwww/idocket/imwp/imwporder/imwp_iorder_20040130.PDF>. For a criticism of this ruling, see M. Pomerance, 'A Court of "UN Law"' (2005) 38 Isr. L. Rev. 134.

needs and the Israeli government immediately accepted it as a legitimate and binding decision.[121] While the Supreme Court stated that the building of the separation barrier was motivated by security concerns,[122] it also ruled that thirty of the forty kilometres of the barrier's route discussed in this case are illegal under Israeli and international law.[123]

To sum up, constructivist analysis indicates that for the long range, Israel will be significantly influenced by the judicial statements included in the Advisory Opinion. The authoritative status of the ICJ in the international community, its significant influence on the development of international norms and the unfavourable position of Israel's reference group regarding the barrier's route are likely to exert normative pressure on Israel to comply with many of the Court's legal statements. On the other hand, some of the Court's sweeping pronouncements against Israel decreased its legitimacy in the eyes of the Israeli public and reduce the prospects of Israel's compliance with the Advisory Opinion. Overall, it is important to emphasize that the social processes invoked by the constructivist approach are generally undertaken in a slow, gradual, manner.

IV CONCLUSIONS

The preceding sections analyze some of the central factors that are likely to influence Israel's compliance or non-compliance with the legal statements included in the Advisory Opinion. This examination is certainly not exhaustive and additional factors should be taken into account before reaching any definitive conclusion regarding the prospects of compliance with the ICJ Opinion. Still, this analysis traces the broad contours of the major international relations theoretical approaches to the issue of compliance in the separation barrier dispute.

Realist analysis indicates that the prospect of meaningful compliance with the judicial pronouncements included in the Advisory

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[121] See e.g.,the statements issued by Israel's Ministry of Foreign Affairs following the Supreme Court's decision and the ICJ's Advisory Opinion ('Israel's High Court of Justice Ruling on the Anti-Terrorist Fence' (30 June 2004), online: Israel Diplomatic Network <http://securityfence.mfa.gov.il/mfm/web/main/missionhome.asp?MissionID=45187&>; Israel Ministry of Foreign Affairs 'ICJ Advisory Opinion on Israel's Security Fence—Israeli Statement' (9 July 2004), online: Israel Ministry of Foreign Affairs <http://www.mfa.gov.il/mfa/about%20the%20ministry/mfa%20spokesman/2004/>; S. Shamir, 'Sharon to Convene Ministers Sunday to Discuss ICJ Ruling' *Haaretz* (11 July 2004), online: Haaretz.com <http://www.haaretzdaily.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=449631>.

[122] *Beit Sourik Village*, *supra* note 92 at paras. 28-9

[123] *Ibid*. at para. 86.

Opinion is not significant (at least in the short term). The relevant major powers, the United States and EU, are not likely to issue credible threats or impose sanctions against Israel in this context. As for the medium and long range, Israeli steps in this sphere may affect EU willingness to upgrade its economic relations with Israel. The EU position regarding future relations with Israel also depends upon a variety of broader political and economic factors.

Liberal analysis indicates that a significant part of the international customary rules pronounced by the ICJ are likely to be incorporated gradually into the Israeli legal system, and will affect the Israeli executive branch. This approach emphasizes that Israel is a democratic state with a strong and independent judiciary. The fact that the ICJ often has significant influence on the evolution of customary rules, and that Israeli courts and Attorney General often incorporate international customary law into the domestic legal system, enhance the prospects that the customary rules stated by the Court will gradually be accepted by Israel. This conclusion does not apply to the legal status of Jerusalem and the barrier therein.

Constructivist analysis indicates that for the long range, judicial statements included in the Advisory Opinion will significantly influence Israel. The authoritative status of the ICJ in the international community, as well as the positions undertaken by states that belong to Israel's 'reference group', are likely to exert normative pressure on Israel to comply with the Court's legal statements. The ICJ's rejection of Israel's right to self-defence in this context and its sweeping ruling regarding the illegality of all parts of the separation barrier decrease its legitimacy in the eyes of the Israeli public and reduce the prospects of compliance.

The combined results of these analyses indicate that the prospects of compliance with the judicial statements included in the Advisory Opinion are modest for the short range and more significant over the medium and long terms. As for the latter ranges, the two major actors that are likely to enhance the influence of the ICJ's judicial statements in the Israeli legal system are Israel's Supreme Court and the Attorney General. The constructivist approach indicates that the legal standards pronounced by the ICJ in this Opinion will significantly influence these domestic actors. The scant legitimacy of the ICJ among significant groups within the Israeli society, the authoritative status of these two central actors within Israel, and the fact that these actors attach significant importance to international customary law, place them in a unique position to mediate between the international and the domestic legal systems. These factors indicate that a significant portion of the ICJ's judicial statements can be expected to be accepted gradually

by Israel *via* the medium of domestic legal institutions.[124]

> As recently stated by a commentator in the Israeli press:
>
> The state has undergone an upheaval regarding the legal status of the fence in international law. The biggest blow did not come from the Hague but rather from the High Court's ruling on Beit Surik, which disqualified a 30 kilometer section of the fence and dictated humanitarian criteria and the precedence of international law in planning the fence… . The Justice Ministry [with which the Attorney General is institutionally affiliated] took the message to heart and began a detailed examination of every kilometer of the fence, subjecting it to the new rules. But most importantly, the security establishment and the political echelon have internalized the understanding that international law is a central player in this field. [125]

It is important to note that each of the theoretical perspectives discussed above underlines different aspects of the process of compliance with international norms. International law scholars should not necessarily subscribe to a single international relations perspective. As illustrated in this case, frequently, it is only a multifaceted investigation that can meaningfully clarify the various factors that are involved in the complex issue of compliance with international law.

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[124] On the considerable influence of Israel's Supreme Court decisions and the position of the Attorney General on the revised barriers' route (set out in February 2005), see A. Benn, 'Israel's New Frontier' *Haaretz* (25 February 2005) B2.

[125] Y. Yoaz, 'State Readies Opinion on Hague Ruling' *Haaretz* (5 January 2004), online: Haaretz.com <http://www.haaretz.com/hasen/objects/ages/rintArticleEn.jhtml?itemNo=523078>. On the impact of Israel's Supreme Court ruling and its Attorney General on the Israeli government, see Section III(2), *supra*.

The Law of Betrayal in the Wild West Bank

ED MORGAN*

The response by Israel's Foreign Minister to the International Court of Justice's advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[1] has struck a chord that echoes with history. As Silvan Shalom put it,[2] in condemning his state's defences the Court has condemned its own set of legal norms, in the process becoming 'equally guilty of betrayal.'[3] Other commentators, pointing to the failure of the Court to address the catalogue of violence presented in the Israeli submissions,[4] have accused the United Nations of 'a betrayal of its Charter commitment to peace and security.'[5] It is as if in denying Israel's claim to self-defence with respect to the barrier that snakes along the Green Line and through the West Bank,[6] the Court has both sentenced the country to death and sealed its own fate as a normative authority.[7]

Historians, journalists, and other observers of the scene have noted the centrality of betrayal—whether by the British in administering

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* Associate Professor, University of Toronto Faculty of Law. Thanks to Rachael Turkienicz and Shulamit Almog for their helpful comments.

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

2 Shalom, Silvan, 'A Fence built for peace' *The Guardian* (3 February 2004), online: Guardian Unlimited <http://www.guardian.co.uk/israel/comment/0,10551,1137685,00.html>.

3 *Ibid.*, quoting Harry S. Truman ('... if we seek to use it [the United Nations] selfishly—for the advantage of one nation or any small group of nations—we shall be equally guilty of ... betrayal').

4 See *Written Statement of the Government of Israel on Jurisdiction and Propriety* (30 January 2004), online: <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> 40-54 ('The Palestinian Terror Threat to Israel').

5 'UN's Twin Betrayal' *The Telegraph* (22 July 2004), online: <http://www.opinion.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2004/07/22/dl2202.xml&sSheet=/opinion/2004/07/22/ixopinion.html>.

6 *Legal Consequences*, *supra* note 1 at para. 139 ('Consequently, the Court concludes that Article 51 of the [United Nations] Charter has no relevance in this case'). The Court describes the route (or planned route) of the barrier at paras. 80-1.

7 For the Israeli view that the ICJ has undermined the Security Council Resolution 1515 (19 November 2003) and its endorsement of the 'roadmap' formula for a negotiated settlement of the conflict, see Government of Israel, *Written Statement on Jurisdiction and Propriety*, Request for an Advisory Opinion from the 10th Emergency Session of the General Assembly on the 'legal consequences arising from the construction of a wall being built by Israel' (30 January 2004), online: <http://www.jewishvirtuallibrary.org/jsource/Peace/ israelbrief.pdf>.

the League of Nations Palestine Mandate,[8] by the Allies in failing to confront the Nazi regime's anti-Jewish policies,[9] or by the United Nations in fostering rhetorical attacks on the Jewish state[10]—as a formative theme for the State of Israel.[11] Accordingly, just as the International Court of Justice ruling against Israel was in keeping with prevailing attitudes in international institutions,[12] so the Israeli perception of the judgment has been in keeping with tradition. The purpose of this essay is to delve into the question of betrayal and history, with a view to discerning how the most dramatic forms of self-denial and treachery equally reflect the most dramatic assertions of self-determination and national identity.[13] The same theme may hold for the Court as holds for the nation, since international law's propensity to undermine itself may turn out to be part of what makes it work.

Turning from international betrayals to the domestic front,

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8 On British policy limiting Jewish immigration to Palestine as a 'betrayal', see 'British Mandate: McDonald White Paper', online: Palestine Facts <http://www.palestinefacts.org/pf_mandate_whitepaper_1939.php> ('The Jews of Palestine and the rest of the Jewish world were outraged at this British betrayal').

9 On the betrayal of the allies during the Nazi period, see Michael Neufeld & Michael Berenbaum, eds., *The Bombing of Auschwitz: Should the Allies have Attempted it?* (Lawrence, KS: University of Kansas Press, 2003).

10 See 'Betrayal at the U.N.' *Jerusalem Post* (10 October 2000), online: Christian Action for Israel <http://christianactionforisrael.org/un/betrayal.html>.

11 See 'A History of Betrayal: The Zionist Establishment of Israel' *The Orthodox Presbyterian* (18 January 2002), online: Free Republic <http://www.freerepublic.com/focus/news/611272/posts>.

12 For a description of the ICJ judgment as in keeping with the history of UN motions, resolutions, and pronouncements condemning Israeli actions, see Anne Bayefsky, 'Had Enough?' *National Review* (17 July 2004), online: National Review <http://www.nationalreview.com/comment/bayefsky200407171024.asp>.

13 This article explores incidents of actual treason or betrayals of the Israeli national cause, not rhetorical uses of the betrayal image. See, for example, the accusations by the right wing of the Likud Party that Prime Minister Ariel Sharon's disengagement plan for Gaza represents a form of 'betrayal' (Lonnie C. Mings, 'PM Sharon: We Will Not Wait Indefinitely' *Israel News Digest* (January 2004), online: Christian Friends of Israel <http://www.cfijerusalem.org/article.asp?id=17&publication=monthly&category=IND&cat=1>). It may also be noted that Palestinian political rhetoric has followed a similar pattern. See, for example, reports of Palestinians labeling Arab cement contractors working on the security wall a 'betrayal' of the nationalist cause ('Betrayed in Palestine' *Radio Netherlands* (3 August 2004), online: Radio Netherlands <http://www2.rnw.nl/rnw/en/currentaffairs/region/middleeast/isr040803.html>).

Israel's most recent case of treason made for a news story that was shocking even in a region that seems to specialize in shocking news.[14] In the summer of 2002 several Jewish residents of Adora—a West Bank settlement encircled by the security wall impugned by the International Court of Justice[15]—were detained by Israeli police for selling guns and ammunition to activists of the Fatah-affiliated Tanzim movement. Doubly astonishing is that the town of Adora had only three months previously, in April 2002, been the site of a terrorist attack in which four

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[14] 'Arms scandal shocks settlers' *BBC News* (19 July 2002), online: Phase III <http://news.phaseiii.org/article1793.html>. See also, 'Jewish settlers suspected of selling ammunition to Palestinians' *Associated Press Worldstream* (19 July 2002), online: eI-media <http://groups.yahoo.com/group/eI-media/message/149> ('Not just we on the settlement but the whole Israeli people, I think, is struck with disbelief'). It should also be noted that the more recent case of Elhanan Tenenbaum, a high ranking Israeli reserve officer who went to Lebanon for mysterious reasons and was held there as a hostage for several years, has also been discussed in the Israeli media in terms of treachery and betrayal. See Mathew Gutman, Margot Dudkevitch & David Rudge, 'Prisoner Swap Includes Killers' *The Jerusalem Post* (27 January 2004), online: Jerusalem Post Online Edition <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/Printer&cid=1075114462121>. The list of analogous cases might also include that of Tali Fahima, who in 2004 set up camp in the home of Zakariya Zubeidi, the commander of the Al-Aqsa Martyrs' Brigades in Jenin, in order to act as a 'human shield' against his assassination; in the Israeli press, however, the Minister of Defense's labelling of her as a threat to public safety and the administrative detention in which she has been held has been portrayed more as a potential miscarriage of justice than as a case of actual treason. See Orit Shohat, 'Throwing the Book at Tali Fahima' *Ha'aretz* (31 December 2004), online: haaretz.com <http://www.haaretzdaily.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=521424>. Perhaps a closer parallel would be the saga of Udi Adiv, who in 1973 was imprisoned for espionage resulting from his visit to Damascus, Syria in his capacity as a representative of Matzpen, a radical Israeli anti-zionist activist group. The perception of this group remains divided until today. For the differing views, see Uri Davis, 'Citizenship Legislation in the Syrian Arab Republic' (1996) 18 Arab Studies Quarterly, online: Find Articles <http://www.findarticles.com/p/articles/mi_m2501/is_n1_v18/ai_18413376> ('[Matzpen] aimed to form a common anti-Zionist military resistance underground for Arabs and Jews inside Israel …'); and Stephen Plaut, 'The Israeli Analogues to Taliban John' *FrontPage Magazine* (27 May 2003), online: frontpagemag.com <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=8017> ('The Matzpen of the 1960s and 1970s was little more than a lunatic fringe circus curiosity…').

[15] For a map of the security fence, or separation wall, see online: PASSIA <http://www.passia.org/images/pal_facts_MAPS/WallWeb/pages/FSpstateorPS14.htm>.

residents, including a five-year-old child, were killed in a gunfight.[16]

In the ongoing prosecution the suspects face treason charges and, some have even suggested, the death penalty,[17] for having crossed from the ultra-nationalist edge of society to the opposite, anti-nationalist side. Certainly one can say that the loyalties of the settler/soldiers were at best ephemeral. Having stolen the weapons from the Israel Defense Forces base on which they served reserve duty, the suspects changed direction again upon arrest and began cooperating with the police investigating the rest of their group.[18] The multiple betrayals seem as complete as could be.

This article proceeds on the assumption that complex political and social events are understood in the contemporary imagination through the narratives and metaphors of popular media.[19] And indeed, the twisted saga of civilians turned frontier settlers, then turned soldiers, then turned thieves, then turned traitors, then turned mercenaries, then turning on the enemy for whom they betrayed their own, speaks of a lawlessness seen more on movie screens than in newspapers. In point of fact, it is a close parallel to the story line of one of the most famous, and most shockingly violent Westerns ever made, Sam Peckinpah's *The Wild Bunch* (1969).[20] In the West Bank town of Adora and in the Wild West settings of Peckinpah, characters seem to compete to break the rules of

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16 Israel Ministry of Foreign Affairs, '2000-2005 Major Terror Attacks' (14 January 2004), online: Israel Ministry of Foreign Affairs <http://www.mfa.gov.il/MFA/Facts+About+Israel/Israel+in+Maps/2000-2004-+Major+Terror+Attacks.htm>; Moshe Fox, 'The Killing of Innocents in Adora' Embassy of Israel Briefing, Washington, DC, (29 April 2002), online: Embassy of Israel <http://www.embassyofisrael.org/articles/embassy-briefing/2002042900.html>.

17 Margot Dudkevitch, 'Israelis Suspected of Selling Arms to Tanzim may face Treason Charges' *The Jerusalem Post* (19 July 2002), online: <http://goldwater.mideastreality.com/israelisuspect.html>.

18 Nadev Shragai, Jonathan Lis & Amos Harel, 'Four soldier-settlers are prime suspects in arms sales case' *Ha'aretz* (20 July 2002), online: haaretz.com <http://www.haaretzdaily.com/hasen/pages/ShArt.jhtml?itemNo=188421&contrassID=2&subContrassID=1&sbSubContrassID=0&listSrc=Y>.

19 The point is stated in reverse in a comment by film scholars written in the immediate aftermath of the attacks of 9/11/01: David Sterritt & Mikita Brottman, 'Hollywood's Metaphors' *The Chronicle of Higher Education: The Chronicle Review* 48:5, (28 September 2001) B15 ('Perhaps ... the ungraspable enormity of the tragedy, will now compel us to look beyond Hollywood for our narratives and metaphors').

20 For a review of *The Wild Bunch* and a description of the provocatively graphic violence of the film, see Tim Dirks, '*The Wild Bunch* (1969)', Film Review, online: The Greatest Films <http://www.filmsite.org/wildb.html>.

the society around them.[21]

Whereas the International Court of Justice ruling was received with an attitude of resignation, news of the Adora arrests was greeted with an overwhelming sense of incredulity at the turns that life can take. As one settler asked rhetorically, '[h]ow can such a thing happen, the thought that some of the weapons could be used to murder our own residents …'[22] All of this occurred at a time of general political confusion. Certainly, with the start of construction on the security fence in 2002,[23] it had become increasingly difficult for many Israelis to take refuge in the usual paradigms of humanism and nationalism, or to re-capture the boundary between order and chaos, 'home' and the 'territories', the 'self' and the 'other.'[24] The political right vied with the political left in both supporting and opposing the wall between themselves and the Palestinians in the most confusing possible way.[25] With the Adora arrests added to the overall strain of the prolonged occupation and the renewed *intifada*, the society appeared to have lost its normative bearings altogether. The entire country, it seems, began yearning for a simpler time.

Likewise, *The Wild Bunch* starts off with confusion. The film relates the tale of a group of aging men first seen as Texas Rangers helping old ladies cross the street in a frontier town, who then are

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21 'Film Masterclasses: Sam Peckinpah', online: channel4.com <http://www.channel4.com/film/reviews/feature.jsp?id=31292> at 1.

22 Dudkevitch, *supra* note 17.

23 See Adam Keller, 'The Israeli fence is not going to deliver' *The Guardian* (19 June 2002), online: Communist Party of Australia <http://www.cpa.org.au/ garchve5/1096fence1.html>. Construction of the security fence around the bloc of settlements where Adora is located was commenced in June 2002. See Palestinian Society for the Study of International Affairs, *PASSIA Annual Report 2002*, online: PASSIA <http://www.passia.org/publications/annual_seminar_reports/ annual2002n.htm>.

24 Meron Benvenisti, 'The Fence May Blend in with the Olive Trees', Opinion and Comment, *Ha'aretz* (7 June 2002) 1; Ephraim Ya'ar & Tamar Hermann, 'A Fence, yes—But not in Jerusalem', online: Colorado Campaign for Middle East Peace <http://www.ccmep.org/ hotnews2/fence060702html.htm>.

25 On the early support of the left and opposition of the right to the security fence, see Moshe Feiglin, 'Fences Against Wisdom—A Tragic-Comedy in Five Acts', online: Israel Universe <http://www.israeluniverse.com/post-search.php3?RowID=411&x=49&y=7>. On the later support of the right and opposition of the left to the security fence, see Chemi Shalev 'Sharon Faces Ire As he Eyes Hamas Prisoner Release' *Forward* (18 July 2003), online: Forward <http://www.forward.com/issues/2003/03.07.18/ news7.html>.

revealed as bank robbers and fugitives. The Bunch flees across the Rio Grande and sides with local villagers against a Mexican general before signing on as mercenaries with the same general, who hires them to re-cross the border and steal weapons and ammunition from the United States cavalry. Adding final injury to their tendency to insult the loyalties of virtually everyone, they ultimately face a death penalty on all sides by selling arms to rebels fighting the Mexican army for whom they had, in turn, betrayed their own country.[26]

The response of the townsfolk caught in the initial shootout, like that of the United States cavalrymen surprised by the bandits and the Mexican soldiers betrayed in the final scene, is one of incredulity.[27] Even the Bunch themselves are surprised by the complexity of the times and the twists and turns of life, as they relate their own stories of betrayal and nostalgia for an era of more honour among men and thieves. The movie is set in 1913, thirty years later than the classic Western setting, and the first automobiles, automatic weapons, and even world politics in the form of Germany's pre-World War I alliance with one of the Mexican factions, have invaded the cowboy world.[28] In this atmosphere of aging bandits and an aging West, everyone seems to have lost the normative compass by which they previously measured their lives. The entire society, it seems, yearns for a simpler time

The last Israeli death penalty case—that of Holocaust master planner, Adolf Eichmann—does hark back to a morally more straightforward era. Despite the standard condemnation of capital punishment, including Eichmann's, by international human rights groups,[29] Israeli law reflects a collective consciousness of the case as one in which a redemptive death sentence vanquished oppressive violence. There may have been an element of frontier justice in the abduction of the Nazi fugitive from his South American sanctuary, but the dramatic action captured virtually everyone's sense of right.[30]

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26 For a more detailed account of the film's narrative, see James Mulay, '*The Wild Bunch*' *Cinemania* (1994), online: <http://members.aol.com/tonywestok/private/wildbunc.htm>.

27 Lawrence Russell, '*The Wild Bunch*', Film Court Review, online: Culture Court <http://www.culturecourt.com/F/Westerns/WildBunch.htm>.

28 '*The Wild Bunch*', online: Films on Disc <http://www.filmsondisc.com/DVDPages/WildBunch.htm> ('Sam Peckinpah's paean to the changing world').

29 See Israel Ministry of Foreign Affairs, 'Justice Ministry Reply to Amnesty International Report' (5 July 1995), online: Israel Ministry of Foreign Affairs <http://www.mfa.gov.il/mfa/go.asp?MFAH0c0u0>.

30 The UN Security Council condemned the self-help capture of Eichmann, prompting Israel to express regret over its method of arrest and urge Argentina to accept Israel's apology as an end to any international law

The Supreme Court's assessment that Eichmann's 'crimes against the Jewish people'[31] correspond with the most heinous crimes under the United Nations' *Genocide Convention*[32] lives on in the Israeli imagination as the moment in which national and international ethics coincided. Thus, the state could assert universal jurisdiction and reflect the humanistic *raison d'etr*e of all legal systems; and, at the same time, it could fulfill its legal role as territorial sovereign and reflect a nationalist view of itself as the truly final solution to the historic 'Jewish problem.'[33] The society lived by and, indeed, embodied an all-encompassing normative code.

Living life by a code is also, of course, what the classic Western movie is all about. Good conquered evil from John Ford's *Stagecoach* (1939), where civilization first headed west bringing noble traits to even the drunken doctor and the barroom whore,[34] to *Red River* (1948), where an epic cattle drive evaded Indians and traversed a bleak landscape taking John Wayne to the promised land.[35] The gunfights, whether at the OK Corral or over Clementine,[36] came at the climax of the films and, as in *High Noon* (1952), where a lone lawman stood his ground against marauding outlaws,[37] were meant to redeem civilized society

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claim. See UN SC Res. 138, UN SCOR, 15th Sess. 865th Mtg., UN Doc. S/4349 (1960).

31 *Nazi and Nazi Collaborators (Punishment) Law*, 1950, section I(a)(1). Passed by the Knesset on the 18th Av, 5710 (1 August 1950) and published in Sefer Ha-Chukkim No. 57 of the 26th Av, 5711 (August 9, 1950) at 281; the Bill and an Explanatory Note were published in Hatza'ot Chok No. 36 of the 11th Adar, 5710, (28 February 1950) at 350.

32 *Attorney-General of Israel v. Adolph Eichmann*, 36 I.L.R. 5 (1968) (Isr. Dist. Ct., Jerusalem 1961), aff'd 36 I.L.R. 277 (1968) (Isr. S. Ct. 1962) [*Eichmann*].

33 *Ibid.*, 304 at para. 20. ('The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant').

34 For a description of *Stagecoach* as the film that initiated the classic Western, see '*Statgecoach*', online: RaveCentral.com <http://www.ravecentral.com/stagecoach.html>.

35 For a summary of the plot of *Red River* and an explanation of the title, which echoes the Biblical crossing of the Red Sea, see Tim Dirks, '*Red River* (1948)', Film Review, online: The Greatest Films <http://www.filmsite.org/redr.html>.

36 The seminal film about the showdown between US Marshal Wyatt Earp and his brothers on one side, and the evil Clanton gang on the other, was *My Darling Clementine* (1946), but the story was made most famous in *Gunfight at the OK Corral* (1956) with the appearance of Burt Lancaster as Earp and Kirk Douglas as his gambler friend, Doc Holliday.

37 For a summary of the plot of *High Noon* and a review of the 1950s era of McCarthyite, good vs. evil politics against which it was set, see Tim Dirks,

from oppression.

Students of the genre have noted that it was the Western's ability to engage with the morality of violence,[38] as well as its capacity to instil positive civic ideals and unambiguous gender roles,[39] that accounted for its enduring effect on the popular imagination. The pedagogical message was one in which the specific socio-political ethic of 1940's and 1950's America coincided with the universal need for civilization to defeat savagery. To do this, cinematographic society lived by and, in its white hats and black hats, embodied an all-encompassing normative code.

In *The Wild Bunch*, director Sam Peckinpah set out to demonstrate that codes, even sacred ones like those of the Western, are made to be broken. The gunfight, which unlike the sterile versions in classical Westerns graphically depicts arterial blood spurting with every wound, comes right at the beginning of the film. The leader of the Bunch is dapper, articulate and talkative instead of rough, strong and silent, but, as one critic has noted, civility is 'an ill-fitting suit for an animal that has lived by a more violent nature.'[40] Thus, he speaks about camaraderie even as he kills an injured gang member in order not to slow the Bunch down, and speaks of honor even as he leads his gang into a futile showdown where the Mexicans butcher them. The law enforcement agents chasing the anti-heroic Bunch are even worse, acting like vultures that descend to take the boots off townspeople shot in the crossfire and lying dead on main street.

The characters' roles constantly reverse with the twists of *The Wild Bunch*'s plot, conveying the message that even the strongest codes are breached when pressed.[41] It is as if this1969 movie, made nearly fifteen years after Hollywood's high point for the Western,[42] cannot recapture the morality of the 1940s and 1950s any more than twentieth century characters can replicate nineteenth century heroes. The nostalgia for a time before codes and roles were betrayed is destined to be unfulfilled.

'*High Noon* (1952)', Film Review, online: The Greatest Films <http://www.filmsite.org/high.html>.

38 Robert Warshow, 'Movie Chronicle: The Westerner' in *The Immidiate Experience: Movies, Comics, Theatre, and Other Aspects of Popular Culture* (Garden City, N.J.: Doubleday, 1962) 151.

39 Lee Clark Mitchell, *Westerns: Making the Man in Fiction and Film* (Chicago: University of Chicago Press, 1996) at 191.

40 Craig Winter, 'Shoot to Immortalize: Sam Peckinpah shoots from the tragically hip' *Movia's* (1 July 2000), online: Movia's <http://www.geocities.com/ movias/on8.html>.

41 Mulay, *supra* note 26.

42 Mitchell, *supra* note 39 at 241.

Back on the Israeli front, the role reversals that come with Jewish betrayal of the Jewish cause also challenge preconceived notions of morality and civic duty. In a series of reports curiously similar to the opening scene of Peckinpah's film, the principal suspects in the arms sales to the Tanzim were alternatively misdescribed in the press as civilians who were soldiers and soldiers who were civilians.[43] Further, the principal players may have been streetwise characters who knew precisely where to acquire and unload their wares, or, alternately, they may have been greedy dupes of underworld middlemen—criminals who mis-stepped or traitors by mistake. In this, the reports share something with the International Court of Justice, whose ruling on the West Bank security wall has taken politics for law,[44] leaving the reader wondering whether the judges are excessively shrewd or remarkably naïve about the relationship between the two.

Indeed, in the area of legal investigation mistakes may be more the norm than the exception. In one infamous Israeli case, a field military court in 1948 tried, and convicted, Meir Tubiansky of treasonous collaboration with the British in the last days of Britain's Mandate for Palestine.[45] A posthumous inquiry, commissioned by Prime Minister David Ben-Gurion after what appeared to be Tubiansky's excessively hurried execution, revealed the charges to have been fabricated and the penalty imposed by a 'show trial'.[46] The episode almost caricatures notions of honor and dishonor, individual and community, rule and law, military and intelligence, all of which were able to reverse themselves on command.

Perhaps even more notorious a case of betrayal was the so-called 'Lavon Affair' of 1954. In a plot with surprises worthy of Hollywood, Minister of Defence Pinhas Lavon was found guilty, then

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43 Jonathan Lis, 'More arrests expected soon in soldiers Tanzim arms scandal' *Ha'aretz* (21 July 2002), online: haaretz.com <http://www.haaretzdaily.com/hasen/pages/ShArt.jhtml?itemNo=188830&contrassID=2&subContrassID=1&sbSubContrassID=0&listSrc=Y>.

44 *Legal Consequences*, *supra* note 1 at para. 41 ('As is clear from its long-standing jurisprudence on this point, the Court considers that the fact that a legal question also has political aspects, "as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a 'legal question'"'), citing *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, [1973] Advisory Opinion, I.C.J. Rep. 172 at para. 14.

45 For a detailed account, see Shabtai Teveth, *Ben-Gurion's Spy: The Story of the Political Scandal that Shaped Modern Israel* (New York: Columbia University Press, 1996).

46 'Operation Suzannah' *Wikipedia: The Free Encyclopedia*, online: <http://en.wikipedia.org/wiki/ Lavon_Affair>.

exonerated, then forced to resign, over a rogue intelligence operation designed to damage British and American installations in Egypt. Without the knowledge of the political echelons at the Ministry of Defense, military intelligence chief and Ben-Gurion protégé Benjamin Givly (parenthetically, the same agent who as field officer had condemned Meir Tubiansky),[47] established a sabotage ring whose aim was to alienate western opinion from the regime of Gamal Abdul Nasser that had recently overthrown King Faruk.[48] The operation, in effect, turned Israel on its friends in order to turn its friends on its enemies. Perhaps befitting an operation permeated by double-cross, the plan turned disastrous for Israel when one of the saboteurs turned informant and later revealed himself as an Egyptian double agent.[49]

What made the plan even more controversial than the notion of damaging Nasser by damaging western interests in Cairo was the idea of using Egyptian Jews as saboteurs.[50] The involvement of a diaspora Jewish community has been a sensitive area for Israeli policy. Indeed, it represents a publicly espoused taboo from the earliest days of statehood that has been chronicled by no less an authority on the subject than the convicted American Jewish spy for Israel, Jonathan Pollard.[51] One could be forgiven for concluding that, on the odd occasion, the interests of the State of Israel seem to conflict with, and override, those of its dispersed people.[52] With an extra dose of cynicism, one might also say that, in the mid-1950s, the presence of a rather well educated and affluent community in a hostile Arab country provided fertile grounds for the government to accomplish multiple tasks with a single strategy. As one understated scholar put it, '[t]he welfare of Oriental Jewry in their various homelands was … Israel's last concern.'[53]

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47 *Ibid.*

48 Jewish University in Cyberspace, 'The Lavon Affair', online: The Jewish Agency for Israel <http://www.jajz-ed.org.il/juice/service/week2.html>.

49 Ami Isseroff, 'The Lavon Affair: Israel and Terror in Egypt', online: MidEastWeb <http://www.mideastweb.org/lavon.htm>.

50 See Alfred M. Lilienthal, 'The Lavon Affair' in *The Zionist Connection II: What Price Peace?* (New Brunswick, N.J.: North American, 1982).

51 Jonathan Pollard, 'Who's Afraid of Jonathan Pollard?' *New Jersey Jewish News* (14 August 1997), online: Temple of the Screaming Electron <http://www.totse.com/en/conspiracy/institutional_analysis/pollfrad.html>.

52 'Israel Honors Terrorists' (1 April 2005), online: The Arabist Network <http://arabist.net/archives/2005/04/01/> ('The legacy of the Lavon Affair was especially unpleasant for Egyptian Jews and for Jews living in other Arab countries').

53 David Hirst, *The Gun and the Olive Branch: The Roots of Violence in the Middle East* (London: Futura, 1984), online: <http://www.geocities.com/CapitolHill/Senate/7891/lavon_hirst.html>.

In the result, the Israeli democracy accused the Egyptian military regime of staging a show trial,[54] while the authoritarian Egyptian court made what later were conceded to be accurate findings and spared most of its conspiring Jewish citizens the Meir Tubiansky fate.[55] The recruited Jewish loyalists were eventually repatriated from Egypt only to complain bitterly about their treatment, while Ben-Gurion, whose handpicked intelligence chief was revealed as the ultimately culpable party, never quite shook the political stigma of the affair.[56] Taken in its entirety, the Lavon saga rivals King David's many infidelities and the tale of betrayal by his son, Avshalom, who seized the throne in revenge for David's siding with his other son, Amnon, who had in turn raped their sister, Tamar.[57] If nations live by a code, this one was breached in so many directions that it seemed rent beyond recapture or repair.

How, one might ask, can roles get so reversed and things go so wrong? In *The Wild Bunch*, the clue lies in the fact that the reversals take place not only in the present, but in the past. Thus, for example, the Bunch is chased by a posse that turns out to be headed by a former partner of the Bunch itself, whom their current leader had betrayed years before. In an immediately telltale scene, the opening credits of the film show small children torturing a scorpion by pushing it into a nest of killer ants, and then dousing the ants in kerosene and setting them on fire. The shots get frozen into black-and-white stills resembling old newspapers, as if today's action is frozen into history as it unfolds.[58] Just as the past inevitably intrudes into the present, so the present is shown to be inseparable from the past.

The history captured by this technique, of course, is one of non-innocent children. The message of the film is that the Bunch cannot recapture an idealized past, where civilized codes and an ethic of loyalty restrained the impulse to violence and betrayal, because there was no such idealized past. The old West (and the old Western movie), now almost gone, was a non-innocent child. Today's chaos—the 'ballet of violence' with which the gruesome film ends[59]—is but a reenactment of

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54 'Egypt Show Trial Arouses Israel, Sharrett tells House. Sees Inquisition Practices Revived' *The Jerusalem Post* (14 December 1954) 1.

55 Doron Geller, 'The Lavon Affair' in *Jewish Virtual Library*, online: <http://www.us-israel.org/jsource/History/lavon.html>.

56 *Ibid.*

57 2 Samuel 13:1-22 to 18:1-18.

58 On the place of children within the theme of *The Wild Bunch*, see James Berardinelli, '*The Wild Bunch*: A Film Review' (1995), online: Reelviews <http://movie-reviews.colossus.net/movies/w/wild_bunch.html>.

59 Peckinpah's slow-motion technique for portraying mass shootings has been

yesterday's chaos. The characters yearn for a simpler time, but that time is nothing but a mirage in the desert.

But can the same be said of Israel and its struggles? It is one thing for the internal complexities of politics, loyalty and identity to have infiltrated the sovereign state in the Lavon Affair and other such episodes; indeed, this is almost a badge of Zionism's success, as if the structural normalization of Jewish society has by osmosis produced the same level of disorder within the state as without.[60] The pre-state era, however, with its massive external threats to existence, should be contemplated as a time of normative simplicity. As the *Eichmann* case seems to demonstrate, the darkness of Nazism was followed, as it were, by a time of light, when an idealized code of universal conduct actually walked the earth, straddling the courthouses in Nuremberg[61] and Jerusalem.[62] Indeed, at Israel's birth the International Court of Justice could recognize the prospect of Israeli sovereignty and defence in a way that became impossible by the time the West Bank security wall came into legal view.[63]

Although the *Eichmann* judgment exhibits a veneer of fidelity to nation and to international ideals,[64] press further into the history of Israel's legal engagement with the Nazi era and one finds the conflicted story of Rudolph (Israel) Kasztner. In 1953, the government launched a

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dubbed the 'ballet of violence', and is credited as the originator for the extended violent episodes that have become commonplace in action films. See David A. Cook, 'Ballistic Balletics: Styles of Violent Representation in *The Wild Bunch* and After' in Stephen Prince, ed., *Sam Peckinpah's The Wild Bunch* (Cambridge: Cambridge University Press, 1999) 130.

60 Labor Zionism generally sought to normalize the Jewish situation so that Jews could participate in world events as one more nation, while Revisionist Zionism generally sought to accentuate the special situation of the Jews making them a *sui generis* nation. For a summary of this debate, see Real Jean Isaac, 'What Went Wrong?' *Outpost* (April 1999) 3, online: Outpost <http://www.afsi.org/OUTPOST/96APR/apr3.htm>.

61 See the seminal legal instrument on crimes against humanity, *Charter of the Nuremberg International Military Tribunal*, Annexed to the London Agreement, 8 August 1945; 82 U.N.T.S. 279; 59 Stat. 1544, 8AS No. 472, reprinted in (1945) 39 Am. J. Int'l L. 257.

62 The *Eichmann* case was heard initially by the District Court for Jerusalem and, on appeal, by the Israel Supreme Court. *Eichmann*, *supra* note 32.

63 *Reparations Case*, [1949] Advisory Opinion, I.C.J. Rep. 174 (Israel responsible for death of UN diplomat in Jewish-held part of Jerusalem).

64 Editors of international law casebooks have tended to stress one or the other, but rarely both, of the *Eichmann* case themes. For the stress on universal jurisdiction, see Jordan J. Paust *et al.*, *International Criminal Law* (Durham, NC: Carolina Academic Press, 1996) at 1038-44. For the stress on Israeli national sovereignty, see D.J. Harris, *Cases and Materials on International Law*, 5th ed. (London: Sweet & Maxwell, 1998) at 280-8.

prosecution for criminal libel against an elderly writer, Malchiel Gruenwald, for having named Kasztner as a Nazi collaborator. According to Gruenwald, Kasztner arranged for the cooperation of Hungarian Jews facing deportation in 1944, at a time when the fate of Polish and Slovakian deportees was already known to the Jewish leadership.[65] The state's siding with Kasztner instead of against him in this tale of collaboration signals that fidelity can turn to betrayal with relative ease.

Kasztner was the head of the Labor Zionist movement in Hungary. In return for the cooperation of the Jewish masses, he had arranged with the Nazis to send 600 Jews, most of whom were from his home town of Kluj, to Palestine instead of Auschwitz.[66] Kasztner negotiated the deal with none other than Adolf Eichmann. In interviews taped by Dutch Nazi journalist Willem Sassen, who met with Eichmann in Argentina in 1955 and published his interviews in *Life Magazine* in 1960 after the capture of the genocidal grandmaster, Eichmann described the tenor of his wartime meetings with Kasztner: 'While we talked he would smoke one aromatic cigarette after another, taking them from a silver case and lighting them with a little silver lighter. With his great polish and reserve he would have made an ideal Gestapo officer himself.'[67]

Other European survivors have accused the Zionist movement, including such notables as Israel's first foreign minister, Moshe Sharett, and its first president, Chaim Weizmann, of selling out Hungarian Jewry for the sake of an elite emigration to Palestine.[68] In yet another wrinkle, Gruenwald was represented at the *Kasztner* trial by Revisionist lawyer and later Likud minister of justice, Shmuel Tamir. The lawyer's primary aim was to expose the moral bankruptcy of Labor policies in sacrificing the many for the few.[69] Hungarian Jewish Laborites testifying at the trial described the several hundred headed for Palestine amidst the multitude headed for death camps as 'Kasztner's pride—the

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65 See Leora Bilsky, 'Judging Evil in the Trial of Kastner' (2001) 19 L.H.R. 117 (2001) at 120.

66 For an assessment of whether the Hungarian Zionist leaders were self-interested collaborators or realistic activists, see Randolph Braham, 'The Role of the Jewish Council in Hungary: A Tentative Assessment' 10 Yad Vashem Studies 78.

67 Adolf Eichmann, 'I Transported Them to the Butcher' *Life Magazine* (5 December, 1960) 146.

68 See Alex Weissberg, *Desperate Mission: Joel Brand's Story* (New York: Criterion Books, 1958) at esp. 208-10.

69 For transcripts of Tamir's cross-examinations of witnesses and of Kasztner himself, along with a general history of the *Kasztner* matter, see Ben Hecht, *Perfidy* (New London, NH: Milah Press, 1961).

Zionist youth.'[70]

In addition, Tamir set out to provide a not-so-subtle parallel between Kasztner and the pre-state Socialist Workers' Party (Mapai), demonstrating that Mapai, unlike the right-wing Revisionists, had corrupted itself in its relations with the British much as Kasztner had done with the Germans.[71] The *Katszner* trial, in other words, became a show trial about betrayal, and like all show trials it came to itself betray the legal principles on which it purported to stand.[72] The government turned on the Jews in favor of the collaborator, while the hardened Zionist lawyer turned on the national movement in favor of the uncommitted masses of European Jews. For its part, the Court lost control of the process, eventually refusing to hear from any *Kasztner*-related witnesses at the much higher profile *Eichmann* trial seven years later.[73]

Ironically, for a leader in a workers' movement supposedly devoted to national rebirth through socialism and labor, Kasztner engineered a story that has the flavor of a commercial transaction. He dealt in the coinage of live Jews, a valuable currency in Europe by the time of the destruction of Hungarian Jewry late in the war.[74] In ruling against Kasztner the Israeli court seemed to betray Labor Zionism, while Kasztner showed that the wartime Labor Zionists seemed to betray the Jews. Superficially, at least, the nascent state paralleled Peckenpah's theme of a non-innocent childhood, with each betrayal piled on top of the previous one, forming no more order than a wild bunch of betrayals. In this light, the circle from Kasztner back to the soldiers and settlers, the traders and traitors of the West Bank town of Adora, seems complete. Indeed, the links go as far as the International Court of Justice's consideration of the West Bank fence. The law sacrificed the sovereignty rights of Israel for the self-determination rights of the Palestinians, as if it were longing for the non-existent simpler time when the two legal principles could exist in mutual harmony.[75] In

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70 Lenni Brenner, 'Hungary: The Crime Within a Crime' in *Zionism in the Age of the Dictators* (London: Croom Helm, 1983), excerpted online: REDS—Die Roten <http://www.marxists.de/middleast/brenner/ch25.htm>, citing André Biss, *A Million Jews to Save: Check to the Final Solution* (London: Hutchinson, 1973) at 92-4.

71 On the use of *Kasztner* as a show trial against the Labor Zionist movement, see Bilsky, *supra* note 65, and Leora Bilsky, ed., 'Judgment in the Shadow of the Holocaust' (2000) 1 Theor. Inq. L. at 237-43.

72 *Ibid*.

73 Brenner, *supra* note 70.

74 Yehuda Bauer, *Jews for Sale? Jewish Negotiations, 1933-1945* (New Haven: Yale University Press, 1994).

75 On the contradiction between sovereignty and self-determination, see

similar fashion, the betrayed families and neighbours in Adora may yearn nostalgically for an ethic, or a time, that exists only in the imagination.

A closer look at *Kasztner*, however, shows that the West Bank analogy may be imperfect. The trial judge went out of his way to state that Kasztner was motivated by misguided idealism rather than selfish gain.[76] On appeal, the Supreme Court majority determined that although Kasztner was guilty of collaboration, one could sympathize with his plight. 'He didn't warn Hungarian Jewry of the danger facing it because he didn't think it would be useful…', the Court opined.[77] In this respect, Eichmann's *Life Magazine* interview is also revealing. The old Nazi perceived the betrayal of Hungary's Jews by its Laborite leadership as yet one more *selectzia*, this time in the name of building a nation rather than eliminating one. 'I believe that Kasztner would have sacrificed a thousand or a hundred thousand of his blood to achieve his political goal,' said the accomplished mass murderer. '"You can have the others" he would say, "but let me have this group here."'[78]

Much as international institutions attacking a state in the name of misguided liberation is not the same as attacking it out of sheer prejudice,[79] selling humanity for ideology, however twisted under the circumstances, is not the same as selling it for cash. One more story from the town of Adora illustrates the point. There was a crime wave in the settlement in 2001 in which almost every house was burglarized during the course of one night. Apparently, all of the settlement's children, and most of its adults, had already surmised that one of the teenagers arrested in the Tanzim affair was in all likelihood implicated

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Reference Re Secession of Quebec, [1998] 2 S.C.R. 217 at para. 111 (establishing a contest between two propositions: '… international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their "parent" state', and '…the implied duty of states to recognize the legitimacy of secession brought about by the exercise of the well-established international law right of 'a people' to self-determination').

76 The trial before Tel Aviv District Court Judge Halevi is described in Yitzhak Heimowitz, 'On the Kastner Case' *Middle East and the West* (31 January 1958) 3.

77 Biss, *supra* note 70 at 231.

78 Eichmann, *supra* note 67.

79 For the suggestion that the United Nations frequent condemnations of Israel result not from a misguided concern for the Palestinian cause but rather from anti-Semitism, see Anne Bayefsky, 'One Small Step: Is the U.N. finally ready to get serious about anti-Semitism?' *Wall Street Journal* (21 June 2004), online: Opinion Journal <http://www.opinionjournal.com/extra/?id=110005245>.

in the thefts, but due to the lack of absolute certainty no one in the closely knit community informed the police.[80] They could not bring themselves to betray their own betrayer, so they instead betrayed the state authorities out to protect the very lifestyle that brought them together in the first place.

Betrayal appears built into the genetic code of loyalty, as if it is the corrosive potential that gives the community and the nation its bonds. Without the possibility of betrayal there is no possibility of loyalty. The International Court of Justice defended nascent (Palestinian) nationhood and territory by undermining (Israeli) sovereign rights;[81] it brought the rule of law to bear on the conflict by ignoring the domestic courts and the judicial process actually at work in the West Bank and Israel.[82] It sold out its own themes of sovereignty and self-defence to build a new sovereignty and self-determination. It is very much like pre-state Israeli history, where Jewish lives were sold to purchase a few more residents of the inchoate Jewish nation.

In the West Bank settlement, when Israeli ammunition is sold to Palestinians the neighbors hope that it was likewise for twisted ideology, or for something other than the gratuitous desire for status and money.[83] Otherwise, the oppressive news of the moment would be more than merely a crude re-enactment of the oppressions of the past. Much as the *Kasztner* case acknowledged that the Hungarian Jewish masses were sold to feed a starving Jewish nation, one hopes that the International Court of Justice's betrayal of the Israelis protected by the separation wall is in the cause of a new Partition and a rebirth of the law.[84] As with the Adora settlers/soldiers, the motive—greed or

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80 Vered Levy-Barzilai, 'Salt in their Wounds' *Ha'aretz* (26 July 2002), online: haaretz.com <http://www.haaretzdaily.com/hasen/pages/ShArt.jhtml?itemNo=190463&contrassID=2&subContrassID=5&sbSubContrassID=0&listSrc=Y>.

81 *Legal Consequences*, *supra* note 1 at para. 88 ('The Court also notes that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV)…').

82 *Ibid*. at para. 100 (briefly mentioning, then ignoring, the Israel Supreme Court ruling on the separation barrier). See, *Beit Sourik Village Council v. Government of Israel*, H.C.J. 2056/04, English version online: <http://www.mfa.gov.il/NR/rdonlyres/75671100-3248-4196-888B-362D6425D3AA/0/HCJ_Fence_ruling_300604.doc>.

83 Shragai, s*upra* note 18.

84 In international law terms, Israel's establishment as a state resulted from the United Nation's partitioning of the territory of Palestinian into a Jewish and Arab state upon the termination of Britain's Mandate. See *Future Government of Palestine*, GA Res. 181(II), UNGAOR, 2nd Sess., (29 November 1947), online: United Nations <http://www.un.org/

ideology, prejudice or normativity—remains indeterminate. Either there is a productive seed buried in the rotten fruit, or the International Court of Justice and Adora episodes are, like a Peckinpah film, so nihilistic that the only point of its telling would be in the action of its telling.[85]

Whatever the specific motives, the message of history is that the idealized past is unattainable because it was always just a phantom. In international law, the principle of self-determination could always be betrayed for sovereignty reasons,[86] or statehood and self-defence could be betrayed for the cause of liberation.[87] In Jewish history, the nation could always be betrayed for humanitarian reasons, or human lives could be betrayed for nationalist reasons. The self betrayed by the other, or the other betrayed for the self. In this sense, international lawyers and Israeli society alike may be yearning for a simpler time that never did exist.

The ultimate betrayal, of course, would be the abandonment of both sets of ideals altogether. As with international law, it is society's complexities that give it momentum. Norms and states can either be reborn from the process in which they are undermined, or the act of undermining can be the death of all states and their norms. If the competition between nation and people gives way to a tale of simple greed in the West Bank, or if the elaboration of principles of sovereignty and human rights gives way to outright bias in the International Court of Justice,[88] the last of the societies' bonds will have been sold.

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documents/ga/res/2/ares2.htm>.

85 Michael Biss, '"Back Off to What?" Enclosure, Violence, and Capitalism in Sam Peckinpah's *The Wild Bunch*' in Prince, *supra* note 59 at 127 (describing the Bunch as '[b]itter, unloved, wanted only for the money that their "pelts" will bring…').

86 *Case Concerning the Frontier Dispute (Burkina Faso v. Mali)*, [1986] I.C.J. Rep. 15 at para 20 (defining the principle of *uti possidetis* and identifying its purpose as preventing 'fratricidal struggles provoked by the challenging of frontiers').

87 E.g. *Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine*, UNCHROR, 58th Sess., 39th Mtg., UN Doc. E/CN.4/RES/2002/8 (2002), online: <http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2002-8.doc> ('*Affirms* the legitimate right of the Palestinian people to resist the Israeli occupation' by any available means).

88 There is an accusation of actual and perceived bias in Israel's motion to preclude one of the ICJ judges from sitting on the case (*Legal Consequences*, supra note 1). See ICJ, Press Release 2004/4 'Composition of the Court' (3 February 2004) ('Israel contended that [Egyptian] Judge Elaraby, both in his previous professional capacity and in an interview given by him in August 2001 to an Egyptian newspaper, had been "actively engaged in opposition to Israel including on matters which go directly to aspects of the

This is the bleak future foreshadowed in *The Wild Bunch* when the Bunch's leader takes to dressing in a black suit and shoulder holster rather than in cowboy denim and guns at the hip. It is as if the era of the gangster movie, with its gratuitous action and amoral violence, has already arrived to displace the Western.[89] A world that pretends at idealism and normativity, even if corrupted by circumstances and living in fantasy of an uncorrupted time, is still better than a world that lacks this aspiration altogether. To abandon that pretense would be to lose the self-perpetuating momentum that allows a contradictory legal system and a contradictory nation to move along.

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question now before the Court"')

[89] On the moral distinctions between gangster movies and westerns, see Robert Warshow, 'Movie Chronicler: The Western' in *The Immediate Experience: Movies, Comics, Theater and Other Aspects of Popular Culture* (Garden City, NY: Doubleday, 1962) 151.