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International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility while Precluding Impunity

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1. Introduction

One of the hallmarks of the discussion and practice of international human rights law and of international criminal law in this decade has been a keen desire to preclude impunity for the commission of gross

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violations of international human rights and breaches of international humanitarian law.[1] This desire underpinned much of the impetus for the creation of the *Rome Statute of the International Criminal Court*[2] and continues to energize much of the enormous volume of state practice, academic commentary and internal discussion within the Court. A corollary of this desire has been an understandable visceral antipathy on the part of academics and advocates in the field of international human rights (many of whom have witnessed their abuses in Latin America in particular) towards military tribunals. Sometimes, however, even when motivated by the best of intentions, striving to advance the yardsticks of international law can overshoot the mark and produce a real-world effect contrary to that intended.

Animated by a desire to avoid impunity for the commission of gross violations of human rights and for breaches of international humanitarian law, the Special Rapporteur of the United Nations Sub-Commission on the Promotion and Protection of Human Rights, with the support of the Office of the High Commissioner for Human Rights and of the International Commission of Jurists, has produced a set of *Draft Principles Governing the Administration of Justice through Military Tribunals*,[3] with the intention that it be considered and

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[1] The Independent Expert to update the set of principles to combat impunity, Diane Orentlicher, defines impunity as meaning 'the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims': *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, 61st Sess., UN Doc. E/CN.4/2005/102/Add.1 (8 February 2005) at 6 [*Updated Set of Principles*]. Principle 1 of these updated principles declares that 'impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations' : *Updated Set of Principles* at 7.

[2] 17 July 1998, 2187 U.N.T.S. 90, UN Doc. A/CONF.183/9, 37 I.L.M. 999 (entered into force 1 July 2002) [*Rome Statute*].

[3] *Draft Principles Governing the Administration of Justice through Military Tribunals*, 62d Sess., UN Doc. E/CN.4/2006/58 (13 January 2006) [*Draft Principles*]. This latest version of the principles, produced by the Special Rapporteur, Mr Emmanuel Decaux,

adopted by the Human Rights Council.[4] More than merely an exercise in international standard-setting, its proponents aspire for the *Draft Principles* to constitute an important form of 'soft law' which would stand as a bulwark against barbarism and impunity. Significant effort by many eminent international legal scholars has gone into their drafting and refinement. The principles are said to be intended to become a 'minimum system of universally applicable rules'[5] to govern the administration of justice by military tribunals.

And there is the rub. For while the *Draft Principles* are a commendable effort and may make a significant contribution to informing debate and improving national practice in this important area of law, they remain significantly flawed in several respects. It is the contention of this article that, in an effort to be universal, the *Draft Principles* seek to capture too broad and varied a spectrum of phenomena and subject them to the same unjustifiably dismissive assessment. In doing so, they distort the reality of many legitimate military justice systems which currently exist and risk demonizing a necessary, valuable and sometimes irreplaceable species of court whose full potential has yet to be realized. It is a truism that in human affairs, 'where one stands depends on where one sits.' Therefore, it is not surprising that the outlook of the *Draft Principles* document

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built upon earlier versions developed by Mr Louis Joinet. The *Draft Principles* were the subject of discussion at expert meetings on human rights and the scope of jurisdiction of military tribunals organized by the Office of the High Commissioner for Human Rights and the International Commission of Jurists in Geneva in January 2004 and November 2006, and in Brasilia in November 2007, in which the author participated.

[4] See *Draft Principles*, *ibid*. at 2 (Summary), which details the procedural history of development and consideration of the *Draft Principles* from 2000 through 2006. This version of the *Draft Principles* was intended to be considered by the Commission on Human Rights at its sixty-second session. While the Commission ultimately did not examine the *Draft Principles* during its last and final session, the newly established Human Rights Council decided 'to consider at its forthcoming session all outstanding reports referred by the Commission on Human Rights to the Human Rights Council': Human Rights Council, *Extension by the Human Rights Council of all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights*, 1st Sess., UN Doc. A/HRC/DEC/1/102 (2006) at para. 5. As of November 2007, consideration of the *Draft Principles* by the Human Rights Council was still pending as the recently established Council has been preoccupied with first agreeing fundamental issues concerning its procedures.

[5] *Draft Principles*, *ibid.* at 2.

reflects the perspectives arising from the experiences of its primary drafters and proponents, who are predominantly civilian legal academics schooled in civil law traditions.[6] While there are instances of tribunals promoting impunity and perverting military justice, such as Latin American junta-appointed military tribunals, these should not be taken as representative of military courts as a whole. One should not extrapolate from these unfortunate examples a universal proposition that military courts cannot try soldiers and civilians fairly and should be done away with, especially those subject to constitutional restraints and the supervisory jurisdiction of civilian appellate courts as in Canada, the United Kingdom, Australia, New Zealand, and the United States. Moreover, it is important to avoid the risk of creating or perpetuating situations of de facto impunity with respect to certain increasingly important categories of person, such as civilian contractors and other persons accompanying armed forces on international deployments, an outcome which would be perversely contrary to the intent which animates the creation and expression of such principles.

In order to offer a useful critique of the *Draft Principles*, it will be necessary to first set the frame of reference by examining more broadly the issues of what constitute military courts, what are the legitimate purposes of military justice systems and what attributes need to be possessed by military courts. Further, one needs to examine what principles should guide their operation. In this, particular attention should be paid to the issue of sentencing. It will also be necessary to examine the international legal framework to ascertain what conventional and customary law is applicable. This will be followed by a discussion of the jurisprudence of various courts and human rights treaty bodies concerning military tribunals in respect of international human rights law. In light of these considerations, the intent of this article will then be to examine what principles should guide the exercise of jurisdiction by military tribunals and how these principles interact with the legal framework of international human

[6] Rather than, say, military common law practitioners, such as the author.

rights law, particularly concerning the judicial guarantees in article 14 of the *International Covenant on Civil and Political Rights*.[7]

The conclusions reached in this global analysis will differ significantly from some of those which underpin the *Draft Principles* as they are currently presented for consideration by the Human Rights Council and will lead to a specific examination of three important areas where the author differs from the conclusions of the Special Rapporteur concerning the human rights dimensions of military justice systems: (*a*) the question of civilians being tried by military judges, especially contractors and persons accompanying the force on United Nations peacekeeping missions or other extraterritorial deployments; (*b*) the question of the rights and judicial guarantees afforded to military personnel who are brought to trial in military courts; and (*c*) the vexed question of military personnel who are alleged to have committed human rights violations being tried by military courts.[8] A number of subsidiary issues will also be briefly examined.

Why does this matter? It matters now in particular because there are currently few more 'hot topics' in international human rights and international criminal law than the avoidance of impunity, dealing with massive unresolved backlogs of cases in situations of transitional justice such as the Democratic Republic of the Congo (DRC) and dealing with the past abuses of military regimes. But it also matters because military justice systems, when properly constituted, play a crucial role in the preservation and promotion of the rule of law, both domestically and in the context of international peacekeeping and peacemaking operations, and may be anticipated to do so to an even greater extent in the future. There is a global outcry calling for increased intervention by the international community in places such as the Darfur region of Sudan, the DRC, as well as in myriad other hotspots. To do so effectively, without adding to the misery of the

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7 International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [ICCPR].

8 Federico Andreu-Guzmán, Background Note No. 1, *The Rationale for Military Tribunals*, OHCHR/ICJ Expert Meeting on the Scope of Jurisdiction of Military Tribunals, 6-7 November 2006, Palais des Nations, Geneva at 4 [Andreu-Guzmán Briefing Note No. 1], which characterizes the human rights dimensions of military justice as encompassing these three main areas.

unfortunate inhabitants of such places who have already been victimized, or suffering humiliating and debilitating harm to their own national reputations and the operational effectiveness of their armed forces, states will require increasingly effective military justice systems both to discipline their own armed forces and to regulate the civilians who accompany them.

2. Military Courts

2.1. What constitutes a Military Court?

Before embarking on this analysis, it is necessary for the purposes of the present discussion to specify with some precision what is meant by 'military court'. State practice is heterogeneous as to what actually constitutes a military court, with military tribunals taking various forms in different states. As noted by one prominent commentator,

> Looked at from the point of view of domestic legislation, military jurisdiction as an institution presents a rich and heterogeneous panorama. In terms of personal, territorial, temporal and subject-matter jurisdiction, national legislation regulates military justice in a wide variety of ways. Military jurisdiction varies in terms of functions, composition and operation from one country to another. The position of military courts within the structures of the state and their relationship to the judiciary also vary.[9]

Although there will thus be a wide spectrum of the scope of jurisdiction *ratione materiae*, *ratione personae*, *ratione loci* and *ratione tempore*, one distinction common to many military justice systems, particularly those which evolved from the British model, is between jurisdiction by officers in the chain of command to try relatively minor disciplinary-type offences by some form of summary trial and more formal courts martial (akin to civilian courts), which are presided over by a military

[9] Federico Andreu-Guzmán, *Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations*, vol. 1 (Geneva: International Commission of Jurists, 2004) at 13 [Andreu-Guzmán, *Military Jurisdiction*]. See also Andreu-Guzmán, *Military Jurisdiction* at 153-378 (Part II), which provides a comprehensive survey of domestic legislation dealing with military jurisdiction in 30 states.

judge, have more elaborate procedural and evidentiary rules, and try more serious offences.[10]

While both summary trials and courts martial are key elements of a fully functional military justice system, for the purposes of the present article, the term 'military court' will be used more restrictively to refer to a court martial-type of tribunal. That is, a form of judicial body established by a constitution or legislation to try persons under the military law of the state, presided over by a military judge or by a civilian judge sitting as a Judge Advocate,[11] in which the triers of fact are military, and possessing the core attributes of a court.

2.2. Purposes of a Military Justice System

It must be recognized as a point of departure for discussion of this topic that there is widespread skepticism about the fairness or legitimacy of purpose of military justice systems and that such initial

[10] See e.g. *National Defence Act*, R.S.C. 1985, c. N-5, ss. 163-164, which statutorily creates summary trial jurisdiction (in the Canadian military justice system, there are three types of summary trials for the trial of military members accused of the commission of relatively minor offences, presided over by officers in the chain of command of the accused individual: summary trial by commanding officer, by delegated officer, or by superior commander). See also *National Defence Act*, ss. 166-196, which statutorily creates and governs the court martial jurisdiction (there are four types of courts martial in the Canadian system for the trial of more serious offences, presided over by a military judge appointed by the Governor in Council in a manner closely analogous to that in which judges of civilian courts are appointed: a Standing Court Martial (trial by a military judge sitting alone); a Disciplinary Court Martial (trial by a Military Judge plus a panel of three officers or senior non-commissioned members roughly analogous to a jury in the civilian context); a General Court Martial, for the trial of the most serious offences (a Military Judge sitting with a panel of five officers or senior non-commissioned members); and, a Special General Court Martial (a Military Judge sitting alone for the trial of civilians subject to the Code of Service Discipline)). See also *2005-2006 Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces* (Ottawa: Office of the Judge Advocate General, 2006) at 84 [*2005-2006 JAG Annual Report*]: the summary trial will usually be the workhorse of the military justice system on a day-to-day basis; for example, in 2005-2006, 97% of the charges in the Canadian military justice system were tried by way of summary trial.

[11] As currently in the United Kingdom. The term 'Judge Advocate' historically denoted the legally trained person who presided at a court martial, who may at various times and places and in different national systems have been either a military or civilian lawyer or judge.

skepticism is not unjustified.[12] It must be acknowledged that in many states, the military view their primary purpose as being to serve their own interests rather than those of their parent society or they view themselves as the 'guardians' of the 'true' character of that society, possessed with a sort of veto entitling them to intervene militarily to 'correct' the evolution of affairs if it is disagreeable to them. The sad litany of abusive military regimes across much of Africa, Asia, Europe and Latin America over the past sixty years needs little elaboration.[13] Such regimes have undoubtedly victimized their own populations and have often utilized military tribunals as one instrument with which to do so. Recent history is replete with examples of their attempts to subsequently grant themselves amnesties to shield themselves from accountability for their actions.[14] The universal tide of repugnance at perceived impunity arising from this has already been alluded to.

But in many democratic states which are committed to observance of the letter and spirit of human rights, professional militaries also exist as legitimate institutions which are fully subservient to civil authority and consider themselves to be constrained in their actions by the rule of law. A key foundational concept in this regard is the model of civil-military relations which prevails in a given state:[15] abuse of military tribunals is a symptom of a wider systemic societal dysfunction in this regard, not its primary cause. When states take collective action under the authorization of the United Nations Security Council for the maintenance of international peace and security or to alleviate humanitarian suffering in failed or failing states, their militaries are, of necessity, usually amongst the

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[12] In a now clichéd phrase, the French Prime Minister Georges Clemenceau was famously claimed to have said that 'military justice is to justice what military music is to music.' Whether the attribution of the remark to him is apocryphal or not, the maxim is now a commonplace.

[13] A partial list would include Chile, Argentina, Brazil, Paraguay, Uruguay, Colombia, Peru, Ecuador, Honduras, Guatemala, Greece, Spain, Portugal, Turkey, Burma, Thailand, Pakistan, and many of the states of sub-Saharan Africa.

[14] In Chile, for example.

[15] For a classic exposition of this theme, see Samuel P. Huntington, *The Soldier and the State: the Theory and Politics of Civil-Military Relations*, (Cambridge: The Belknap Press of Harvard University Press, 1957).

primary instruments of choice. No change to this fact is realistically on the horizon. It is thus facile to pretend that having an effective military justice system is optional for modern states which possess armed forces: disaster and opprobrium await those which do not. This is especially true for those states which shoulder their share of the international community's burden by deploying their troops extraterritorially in support of UN-mandated operations. There is, of course, considerable debate about how the creation of such a system might best be accomplished and a wide spectrum of models of how to do it.

A classic and internationally cited articulation of the necessity for the existence of a separate military justice system in a modern liberal constitutional democracy is that provided by Chief Justice Lamer in his reasons for judgment in the Supreme Court of Canada case of *R. v. Généreux*:

> The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military.

> There is thus a need for separate tribunals to enforce special disciplinary standards in the military.[16]

All military justice systems thus find their primary raison d'être in the necessity for the maintenance of discipline. Discipline contributes to assuring that operational aims are achieved through the appropriate use of armed force. The use of military force can never be left uncontrolled. Undisciplined forces may come to constitute a danger not only to themselves but to others, including their parent society. As Rowe notes, the need for discipline is especially prominent during multinational extraterritorial operations: '[t]he degree to which soldiers act as a disciplined body whilst forming part of a multinational force will largely determine the success of the operation in relation to the respect due to the civilian population.'[17]

But discipline is not solely an end in itself. Rather, it is a means to an end as one component of the concept of operational effectiveness. Operational effectiveness means the capacity of the armed forces of a country to effectively achieve the purpose for which it is created and maintained: to conduct military operations on the direction of the government of, and in service to the interests of, the state. That is why states have armed forces. It is widely recognized in military sociology that there is a triad of factors which contribute to operational effectiveness: discipline, efficiency and morale.[18]

In more sophisticated military justice systems, this raison d'être of the military justice system will be reflected in a statutory articulation of the purposes of the system. The place where this may most effectively be expressed might be in the sentencing principles articulated to guide military courts (and, in more sophisticated systems, civilian appellate courts exercising supervisory appellate jurisdiction over military courts). This is because, expressed in colloquial terms, sentencing is where 'the rubber meets the road' in

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[16] *R. v. Généreux* [1992], 1 S.C.R. 259 at 293.

[17] Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge: Cambridge University Press, 2006) at 225 [Rowe].

[18] *2005-2006 JAG Annual Report*, *supra* note 10 at vii. See generally Canada, Department of National Defence, *Leadership in the Canadian Forces: Conceptual Foundations*, CF Pub. No. A-PA-005-000/AP-004 (Kingston, Ontario: Canadian Defence Academy Canadian Forces Leadership Institute, 2005).

terms of what one is actually trying to accomplish in trying someone in the military justice system. In a modern state, the statutory articulation of the fundamental purpose of the military justice system will likely be a synthesis of military and civilian sentencing principles. As an example, in the Canadian context,[19] proposed legislation provides that the fundamental purposes of sentencing in the military justice system are both:

> (a) to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and,
>
> (b) to contribute to respect for the law and the maintenance of a just, peaceful and safe society.[20]

This articulation of fundamental principles may be further amplified by a statement of the objectives of sentencing in the military context. Once again, using the Canadian legislative framework as an example, proposed legislation provides that the fundamental purposes shall be achieved by imposing just sanctions that have one or more of the following objectives:

> (a) to promote a habit of obedience to lawful commands and orders;
>
> (b) to maintain public trust in the Canadian Forces as a disciplined armed force;

---

[19] Examples of the Canadian military justice system will be used repeatedly throughout the article for several reasons: after a period of considerable controversy, it has recently undergone extensive scrutiny and statutory reform and may thus be regarded as amongst the most 'leading-edge' military justice systems in the world, which has been studied as an example by other states contemplating reform of their systems such as Australia, New Zealand and the United Kingdom; its historical origins lie in the British military model, many of whose core elements remain common to the systems of countries such as Canada, the United Kingdom, Australia, New Zealand, Kenya and even, to a certain extent, the United States; and, not least, it is the system with which the author is most familiar. It will thus be utilized as a primary vehicle for the examination of many of the issues raised in the present article, which are common to the military justice systems of many countries. This is not to suggest, of course, that the Canadian system is perfect or could not benefit from further improvement: see *2005-2006 JAG Annual Report* , *ibid.* at xi ('reform of the military justice system is not a one-time event, but rather a continuing process of improvement').

[20] Bill C-7, *An Act to Amend the National Defence Act*, 1st Sess., 39th Parl., 55 Elizabeth II, 2006, cl. 64 [*Bill C-7*], proposing amendments to the *National Defence Act*, *supra* note 10, by the creation of a new s. 203.1(1).

> (c) to denounce unlawful conduct;
>
> (d) to deter offenders and other persons from committing offences;
>
> (e) to assist in rehabilitating offenders;
>
> (f) to assist in reintegrating offenders into military service;
>
> (g) to separate offenders, if necessary, from other officers or non-commissioned members or from society generally;
>
> (h) to provide reparations for harm done to victims or to the community; and,
>
> (i) to promote a sense of responsibility in offenders, and an acknowledgement of the harm done to victims and to the community.[21]

This represents a synthesis of the classic criminal law sentencing objectives of denunciation, general and specific deterrence, and rehabilitation and restitution, with those targeted at specifically military objectives, such as promoting a habit of obedience to lawful commands and orders, and the maintenance in a democratic state of public trust in the military as a disciplined armed force. This synthesis illustrates that military law has a more positive purpose than the general criminal law in seeking to mould and modify behaviour to the specific requirements of military service. Simply put, an effective military justice system, guided by the correct principles, is a prerequisite for the effective functioning of the armed forces of a modern democratic state governed by the rule of law. It is also key to ensuring compliance of states and their armed forces with the normative requirements of international human rights and international humanitarian law.

It should also be recognized that international law requires states with armed forces to possess a disciplinary code and a functional military justice system if the state wishes members of its armed forces to have the benefit of being treated as prisoners of war if they are captured during armed conflicts. As Rowe notes, 'there is therefore a *quid pro quo* for prisoner of war status, that individuals can be

[21] *Ibid*. (proposing a new s. 203.1(2) of the *National Defence Act*, *supra* note 10).

punished under [the disciplinary system of their own forces] for breaches of international humanitarian law (or the laws of war) and that a superior officer is responsible for those under his command.'[22]

2.3. Required Attributes of a Military Court

Before essaying universal categorization and prescription of principles in general terms such as those in the *Draft Principles*, it is important to articulate what states require military justice systems to actually do and what attributes they therefore will functionally need to possess. This will also determine what categories of person the military justice system should have jurisdiction over and in what circumstances. These questions are logically prior to declarations about what principles one may desire to obtain in the abstract. It is patent that states will not accept sweeping aspirational statements of general principles which they fear may detract from something as important as the efficacy of their armed forces, without being persuaded that the principles are well-grounded in practicality as well as in law. Demonstrating a logical linkage between such general principles and effective operation of military justice systems would help assuage such concerns. In other words, it is necessary to be both principled and pragmatic. In military parlance, states and their armed forces will need to be persuaded that adherence to such principles will be a 'force-multiplier' rather than an 'ivory tower' obstacle to operational effectiveness.

Experience has demonstrated that military courts or service tribunals must possess certain attributes in order to meet the requirements of military justice and discipline of modern, effective armed forces of a democratic state, as well as adhere to legal principles

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[22] Rowe, *supra* note 17 at 67. See *Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land*, 18 October 1907, 205 Cons. T.S. 277, art. 1, 36 U.S. Stat. 2277 (entered into force 26 January 1910); *Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949*, 12 August 1949, 75 U.N.T.S. 135, art. 4(2) (entered into force 21 October 1950) [*Geneva Convention III*]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 U.N.T.S. 3, art. 43 (entered into force 7 December 1978) [*Additional Protocol I*]. For example, *Additional Protocol I*, art. 43(1) requires that '... armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.'

manifesting fundamental conceptions of fairness and the rule of law.[23] First, they must possess the requisite legal jurisdiction to deal with matters pertaining to the maintenance of discipline and operational effectiveness. This means both that they must be established by law and form part of the regular justice system of the state, and that they must be ascribed sufficiently broad jurisdiction to deal effectively with the various categories of person whose conduct will have an impact on the discipline and operational effectiveness of the armed forces. Second, they must not only possess an understanding of the necessity for, and role of, discipline in an armed force, but also an understanding of the specific requirements of discipline. The import of these two closely related criteria is that the tribunal must either be military or staffed with judges with military experience and an intimate knowledge of the operation of the armed forces.

Next, military courts and tribunals in a modern society must act in a manner which is both fair and perceived to be fair. In addition to legal requirements of fairness, this is very important both for the maintenance of broader societal support for the military justice system and for maintaining the support of the members of the armed forces themselves. In modern all-volunteer forces, soldiers, sailors and airmen will not long abide or acquiesce in the judgments of a disciplinary system which does not comply with this basic requirement. A classic articulation of the necessity for fairness was provided in the *Powell Report* of 1960:

> Discipline-a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed-is not a characteristic of a civilian community. Development of this state of mind among

[23] See especially OHCHR/ICJ, Expert Meeting on Administration of Justice by Military Tribunals, *Briefing of the Canadian Forces Office of the Judge Advocate General: Purposes of a Military Justice System* (Palais des Nations, Geneva: 6-7 November 2006). The concepts in the discussion in this section of the present article dealing with the required attributes of military justice systems are drawn from the briefing, which in turn were drawn from the JAG Communiqué portion of the *2005-2006 JAG Annual Report* , *supra* note 10 at x-xi. Although the particular wording articulating them in this section 2.3 of the present article is the author's, the concepts represent the collective thoughts of many individuals; in particular, the author would like to highlight the prominent contribution in this regard of Colonel Patrick Olson and Colonel Patrick Gleeson of the Canadian Forces Office of the Judge Advocate General.

> soldiers is a command responsibility and a necessity. In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice-the two are inseparable.[24]

A further criterion is that the operation of military justice systems should be compliant with the basic constitutional requisites of the law in that state. In the context of the Canadian Forces, this means that military law and the operations of military courts must be fully compliant with the requirements of the *Canadian Charter of Rights and Freedoms*.[25] Constitutional exemptions should not be granted to military justice systems. In the context of international law, this also means that such systems should be compliant with the due process requirements and judicial guarantees of article 14 of *ICCPR* for those countries that are states parties to the Covenant.[26] International humanitarian law also prescribes certain guarantees concerning the right to a fair trial, due process and humane treatment of persons subject to military jurisdiction.[27] In respect of civilians in the power of a party to a conflict who do not take a direct part in hostilities, as well as all persons *hors de combat*, state practice also arguably establishes as a norm of customary international law applicable in both international and non-international armed conflicts that 'no one may

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[24] U.S., Department of Defense, *Report to Honorable Wilber M. Brucker, Secretary of the Army by Committee on the Uniform Code of Military Justice, Good Order, and Discipline in the Army ('Powell Report')* (OCLC 31702839) (18 January 1960) at 11.

[25] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

[26] *ICCPR*, *supra* note 7, art. 14.

[27] Additional Protocol I, supra note 22, art. 75, para. 4; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609, art. 6, para. 2 (entered into force 7 December 1978) [Additional Protocol II]; Geneva Convention III, supra note 22, arts. 82-108; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, 12 August 1949, 75 U.N.T.S. 287, arts. 64-77 (entered into force 21 October 1950) [Geneva Convention IV].

be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees.'[28]

The next three criteria arise from considerations of practical necessity. First, military courts must be able to dispense justice promptly. If the primary raison d'être for military courts is the enforcement of discipline as a requisite of operational effectiveness, then discipline must be enforced proximate in time to the alleged offence. It does little good for the maintenance of discipline in an operational setting on deployment on a UN peacekeeping mission in the DRC, for example, to hold a trial a year later at some distant remove in another country. The extended delay in bringing matters to trial seemingly endemic in many civilian justice systems makes them manifestly unsuited for the positive purpose of maintaining military discipline, which requires a more expeditious handling of breaches of discipline and the concomitant alleged commission of offences. Extensive delays in dealing with offences which have disciplinary implications will result in the rapid erosion of discipline and a consequential negative impact on operational effectiveness of the force.

Second, military courts must be portable and deployable, both across the national state and abroad. If one of the primary reasons states possess and invest in armed forces is to enable them to undertake extraterritorial deployments in furtherance of the goals of the state and of the international community (for example, deployment of forces from diverse countries on a UN-mandated or UN-sanctioned mission in a troubled state abroad), then the military justice system should be capable of holding trials in that state, both for reasons of practical effectiveness and of justice. One of the greatest sources of shame for the international community in recent years has been allegations that UN peacekeepers have engaged in the sexual victimization of vulnerable women and children in the DRC, Somalia

[28] Jean-Marie Henckaerts and Louise Doswald-Beck, eds., (International Committee of the Red Cross) *Customary International Humanitarian Law Volume I: Rules*, (Cambridge: Cambridge University Press, 2005) at 352 (Rule 100).

and elsewhere.[29] The local population in such countries should be considered entitled, as a simple matter of justice, to observe that justice is done in respect of crimes committed against them by being able to attend at least some of the actual trials of military personnel accused of such crimes. The requirement to possess the ability to hold trials *in situ* is also buttressed by considerations of practical necessity. For example, if an offence is alleged to have been committed in the DRC, then that is where the bulk of the witnesses are likely to be found. It is impractical to suggest that the inconvenience and expense of bringing those witnesses back to the national state of the accused to attend at trial will often be borne by that state. The extensive expenditures which have marked the operations of the International Criminal Tribunal for the Former Yugoslavia are unlikely to be replicated at the level of national military courts by many states. Further, as a perhaps ugly but also salient truth, it is also quite likely that the Foreign and Immigration Ministries of many countries would inform the Defence authorities that they cannot acquiesce in holding many such trials on the home territory of the national state, because of the practical risk that witnesses from distant war-torn impoverished countries would immediately make claims for refugee status once present on the territory of the national state.

Portability is linked to flexibility, the last criterion, by which it is meant that the military justice system must be capable of holding trials in operational theatres at all levels in the spectrum of conflict, from peacetime to combat operations. Because of this potential requirement to hold trials in close proximity to zones of active military operations, while the procedures and the body of law which they employ may be quite sophisticated in some cases, the physical circumstances in which military courts hold trials might be quite primitive. The courtroom might be a tent. Advocates of doing away with military courts entirely and letting civilian courts handle all military cases should note that, as the sardonic may observe of the seemingly universal sense of self- importance concerning their status

[29] See *Report of the Secretary-General*, '*Special Measures for Protection from Sexual Exploitation and Sexual Abuse*', 58th Sess., UN Doc. A/58/777 (23 April 2004). See also *Summary Record of the 1707th Meeting*, CCPR/C/SR.1707 (27 October 1998), relating to Belgian soldiers in Somalia.

which attends many of them across all societies, civilian judges don't *do* tents.

3. International Human Rights Legal Framework

3.1. Conventional Law

Neither the *ICCPR*, nor the other United Nations or regional human rights treaties contain specific provisions on the subject of military courts. In particular, none of the treaties address the rationale for or the nature of military jurisdiction,[30] regulate specifically the administration of justice by military tribunals, or prohibit the trial of civilians by military tribunals.[31] Neither do they provide a definition of what should constitute a military offence or prescribe what combination of criminal or disciplinary types of offences should fall within military jurisdiction.[32]

As courts exercising jurisdiction over criminal offences and possessed of powers of punishment incorporating true penal consequences, military courts should be subject to the judicial guarantees provided for in article 14 of the *ICCPR* for states party to the Covenant,[33] in article 6 of the *European Convention on Human*

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[30] Andreu-Guzmán Briefing Note No. 1, *supra* note 8 at 5.

[31] Federico Andreu-Guzmán, Background Note No. 3, *Personal Jurisdiction: Military Personnel and Civilians as the Objects of Military Tribunals*, OHCHR/ICJ Expert Meeting on the Scope of Jurisdiction of Military Tribunals, 6-7 Nov 2006, Palais des Nations, Geneva, at 11 [Andreu-Guzmán Briefing Note No. 3].

[32] Federico Andreu-Guzmán, Background Note No. 2, *The Concept of Military Offences (Criminal and Disciplinary)*, OHCHR/ICJ Expert Meeting on the Scope of Jurisdiction of Military Tribunals, 6-7 Nov 2006, Palais des Nations, Geneva, at 4 [Andreu-Guzmán Briefing Note No. 2]. See also Andreu-Guzmán, *Military Jurisdiction*, *supra* note 9 at part II, for an extensive discussion of the topic of what combination of disciplinary and criminal types of offences should fall within military jurisdiction.

[33] *ICCPR*, *supra* note 7, art. 14. As of 20 July 2007, 160 states were parties to *ICCPR*: Office of the United Nations High Commissioner for Human Rights website, accessed 29 July 2007: "Ratifications and Reservations: Status by Treaty: CCPR-International Covenant on Civil and Political Rights", online: Office of the United Nations High Commissioner for Human Rights <http://www.unhchr.ch/tbs/doc.nsf/newhvstatbytreaty?OpenView&Start=1&Count=250&Expand=3.2> (last checked 20 January 2008).

Rights[34] for states party to that instrument or those in any other international treaty to which the state is a party. It should be noted that the rights provided for in article 14 are not amongst those specifically enumerated as non-derogable in article 4(2) of *ICCPR* and thus are notionally susceptible to some derogation 'in time of public emergency which threatens the life of the nation,' and 'to the extent strictly required by the exigencies of the situation.'[35]

3.2. Jurisprudence

The widespread abuse of human rights by militaries in Latin America has generated a large number of cases in national courts,[36] as well as several important cases in the Inter-American Court of Human Rights.[37] The jurisprudence of the European Court of Human Rights has concentrated on issues of the independence and impartiality of the tribunal and guarantees of a fair trial under article 6 of the *ECHR*. [38] The African Commission of Human and Peoples' Rights has examined the question of the trial of civilians by military courts, analyzing the practice in light of Articles 7 and 26 of the *African Charter on Human and Peoples' Rights*,[39] which concern the right to a fair trial and the obligation to ensure that courts are independent. Generally speaking,

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[34] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, art. 6, Eur. T.S. No. 5, (entered into force 3 September 1953) [*ECHR*].

[35] *ICCPR*, *supra* note 7, art. 4. For the author's view on this subject, see below.

[36] See Andreu-Guzmán, *Military Jurisdiction*, *supra* note 9 for a fulsome discussion of such cases.

[37] *Durand and Ugarte Case (Peru)* (16 August 2000), Inter-Am. Ct. H.R. (Ser. C) No. 68; *Castrillo Petruzzi et al Case (Peru)* (30 May 1999), Inter-Am. Ct. H.R. (Ser. C) No. 52; *Genie Lacayo Case (Nicaragua)* (29 January 1997), Inter-Am. Ct. H.R. (Ser. C) No. 30; *Velázquez Rodriguez Case (Honduras)* (29 July 1988), Inter-Am. Ct. H.R. (Ser. C) No. 4.

[38] See e.g. *Engel v. Netherlands* (1976), 1 E.H.R.R. 647; *Kalac v. Turkey* (1997), 27 E.H.R.R. 552 ; *Incal v. Turkey* (1998), 29 E.H.R.R. 449; *Findlay v. United Kingdom* (1997), 24 E.H.R.R. 221 [*Findlay*]; *Cooper v. United Kingdom* [GC], no. 48843/99, [2003] 39 E.H.R.R. 8 [*Cooper*]; and, *Martin v. United Kingdom*, no. 40426/98, [2006] 44 E.H.R.R. 31.

[39] *African Charter on Human and Peoples' Rights* (1981), 27 June 1981, 1520 U.N.T.S. 217, arts. 7, 26, 21 I.L.M. 58 (1982) (entered into force 21 October 1986).

the ACHPR has taken the view that 'a military tribunal per se is not offensive to the rights in the Charter nor does it imply an unfair or unjust process. We make the point that Military Tribunals must be subject to the same requirements of fairness, openness, and justice, independence, and due process as any other process.'[40] Elsewhere, it has expressed its opposition to the trial of civilians by military courts.[41]

4. The *Draft Principles*

4.1. Positive Developments

Before turning to a discussion of important areas of difficulty with the *Draft Principles* produced by the Special Rapporteur, one should acknowledge those principles articulated in the draft which are deserving of approbation and whose adoption would constitute a signal advance in this field. The first of these is Principle No.1, which relates to the establishment of military tribunals by the constitution or the law:

> Military tribunals, when they exist, may be established only by the constitution or the law, respecting the principle of the separation of powers. They must be an integral part of the general judicial system.[42]

As the Special Rapporteur declares, 'emphasis must be placed on the unity of justice.'[43] To occupy a legitimate place in the justice system of a country, military courts should be an integral part of the general judicial system established by law and not brought into being as some species of 'star chamber' created by the executive on an ad hoc or exceptional basis, as so many of the disreputable Latin American examples were.

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[40] *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria* (7 May 2001), African Comm. on Human and Peoples' Rights, Communication No. 218/98 at para. 44.

[41] *Principles and Guidelines on the right to a fair trial and legal assistance in Africa*, (African Union Doc. DOC/OS(XXX) 247), (May 2003) at Principle L.

[42] *Draft Principles*, *supra* note 3 at 8 (Principle No. 1).

[43] *Ibid*. at para. 14.

Second, it is important that respect for the standards of international law be exemplified in the operation of military courts, as provided for in Principle No. 2:

> Military tribunals must in all circumstances apply standards and procedures internationally recognized as guarantees of a fair trial, including the rules of international humanitarian law.[44]

These are most importantly for the present purposes codified in the judicial guarantees of article 14 of *ICCPR*. As the Special Rapporteur states, 'if article 14 of the Covenant does not explicitly figure in the "hard core" of non-derogable rights, the existence of effective judicial guarantees constitutes an intrinsic element of respect for the principles contained in the Covenant, and particularly the provisions of article 4, as the Human Rights Committee emphasizes in its general comment No. 29.'[45]

The other principles which should be readily agreed with include: (*a*) the guarantee of the right to *habeas corpus*[46]; (*b*) the right to be tried by a competent, independent and impartial tribunal[47]; (*c*) the full application of the principles of international humanitarian law to the operation of military courts[48]; (*d*) the compliance of military prisons with international standards and their accessibility to domestic and international inspection bodies[49]; (*e*) that all principles relating to the administration of justice by military tribunals should continue to apply in full during times of emergency, and that military tribunals should not be substituted for ordinary courts in times of emergency, in derogation from ordinary law [50]; (*f*) non-imposition of the death penalty for offences committed by persons under the age of 18,

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[44] *Ibid*. at 8 (Principle No. 2).

[45] *Ibid*. at para. 15.

[46] *Ibid*. at 16-17 (Principle No. 12).

[47] *Ibid*. at 17-18 (Principle No. 13).

[48] *Ibid*. at 9-10 (Principle No. 4).

[49] *Ibid*. at 16 (Principle No. 11).

[50] *Ibid*. at 9 (Principle No. 3).

pregnant women or persons suffering from mental or intellectual disabilities [51]; and (*g*) the public nature of hearings.[52]

4.2. Jurisdiction of military courts to try civilians

One of the aspects of the jurisdiction of military courts most fraught with controversy and suspicion is the scope of their jurisdiction to try civilians. The abuses of military tribunals in trying civilians in Latin America during the 1970s and 1980s are one of the primary sources of the animus against such courts as a general category of tribunal.[53] This deep-seated mistrust animates Principle No. 5 of the *Draft Principles*:

> Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts.[54]

It is not difficult to understand what motivates the desire to advance such a proposition. In the commentary of the *Draft Principles*, the Special Rapporteur alludes to the Human Rights Committee's General Comment No. 13 on article 14 of the *ICCPR*.[55] The full text of paragraph 4 of this General Comment provides

> The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not

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[51] *Ibid*. at 23-24 (Principle No. 19).

[52] *Ibid*. at 18-19 (Principle No. 14).

[53] See generally Andreu-Guzmán, *Military Jurisdiction*, *supra* note 9 for an extensive discussion of this.

[54] *Draft Principles*, *supra* note 3 at 10 (Principle No. 5).

[55] *Ibid*. at para. 20.

prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. The Committee has noted a serious lack of information in this regard in the reports of some States parties whose judicial institutions include such courts for the trying of civilians. In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14.[56]

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[56] Human Rights Committee, *General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)*, 21st Sess., UN Doc. A/39/40 (13 April 1984) at para. 4. See also *ICCPR*, *supra* note 7, art. 14. See also Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, 90th Sess., UN Doc. CCPR/C/GC/32 (23 August 2007) at para. 22, which was adopted by the Human Rights Committee on the right to equality before courts and tribunals and the right to a fair trial under Art. 14 of ICCPR, replacing General Comment 13. Paragraph 22 of GC 32 declares:

> The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military. The Committee notes the existence, in many countries, of military or special courts which try civilians. While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard

One should agree with the declaration of the Special Rapporteur that 'tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.'[57] The spectre of military kangaroo courts being instituted to cow the civilian population through enforcement of some species of martial law during periods of crisis tends to haunt consideration of this issue. However, in its desire to avoid such evils, the bald assertion of Draft Principle No. 5 goes too far. This is because there are indeed circumstances where it is appropriate that military courts should have jurisdiction over civilians and in which the subject civilians would *prefer* that this be so. Further, the existence of such jurisdiction may be required to prevent situations of de facto impunity arising, which would be exactly contrary to the desire which animates the advancement of the *Draft Principles* by their proponents.

The first of these propositions relates to the civilian dependants of military members posted abroad who accompany those members to live for a time in the territory of a different state. Both the armed forces of the sending state and the dependants who accompany them are present on the territory of the receiving state with the consent of that state. This is a very common arrangement amongst states which, since it is based on consent, involves no derogation from the sovereignty of the receiving state. Such forces stationed on the territory of another state with the consent of that state are usually referred to as 'visiting forces'. An example would be the forces of other NATO countries stationed in the United Kingdom, Belgium, Italy and Germany. The legal status of such civilian dependants will usually be governed by a Status of Forces Agreement (SOFA) between the various states parties.[58] Such a SOFA will address, amongst other issues, the question of which state would assume primary and secondary jurisdiction in relation to criminal or other offences allegedly committed by the civilian dependants on the territory of the receiving

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to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.

[57] *Draft Principles*, *supra* note 3 at para. 21 (commentary).

[58] See e.g. *Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces*, 19 June 1951, 199 U.N.T.S. 67.

state.[59] It will also commonly permit the sending state to hold military courts on the territory of the receiving state for the purpose of trying offences allegedly committed both by military members and by civilian dependants accompanying the armed forces of the sending state.

It is readily apparent why the sending state should wish to have such jurisdiction over its own nationals. This permits it to exercise control over persons who have the potential to engage its state responsibility through their misconduct. It also allows it to be satisfied that its own nationals are being treated fairly. However, such an arrangement is also beneficial to the civilian dependants concerned, for several reasons. First, it allows them to be subject to the domestic law of their national state and tried in accordance with its national procedures, rather than the possibly unfamiliar law and procedures of the receiving state, as well as being subject to its punishments. The greater the difference between the two national legal systems, the greater the degree of comfort this is likely to bring. Second, it allows them to be tried in a court which uses their own language for its proceedings. Third, the provision of legal aid will allow them to choose to be defended by a lawyer who speaks their language and is well versed in their national law. As an ancillary benefit, the morale of the military member concerned will likely be better if he or she knows that their dependants are being tried in their own national legal system rather than that of another state.[60]

There are also other categories of civilian persons who may be subject to the jurisdiction of military courts abroad. These may include 'persons accompanying the force,'[61] such as contractors, cooks,

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[59] See generally D. Fleck, ed., *The Handbook of the Law of Visiting Forces*, (Oxford: Oxford University Press, 2001).

[60] Rowe, *supra* note 17 at 105.

[61] In order to avoid disputes about questions of fact as to who constitutes a 'person accompanying the force', it is useful to have an explicit statutory definition. See e.g. *National Defence Act*, *supra* note 10, s. 61(1), which provides that a person accompanies a unit or other element of the Canadian Forces that is on service or active service if the person:

(a) participates with that unit or other element in the carrying out of any of its movements, manoeuvres, duties in aid of the civil power, duties in a disaster or warlike operations;

cleaners, maintenance personnel, translators, or in some other capacity related to the welfare or functioning of the force. It would also include reporters embedded with the force. A further category would be persons not otherwise subject to military jurisdiction who serve with or in aid of the force under an engagement with the government whereby the person agrees to be subject to military jurisdiction.[62]

These categories of person are increasingly important to military forces deployed on operations outside their own territory, including on peacekeeping or peace enforcement missions sanctioned by the United Nations. In many modern armed forces, civilian contractors who accompany the armed forces and work alongside them now perform maintenance and servicing functions for a broad spectrum of military equipment, from ordinary trucks to the most sophisticated aircraft, radars and other weapons systems. Many basic logistic support functions previously performed by military members may also now be performed by civilian contractor cooks, mechanics, translators, launderers, drivers, security guards, supply and welfare support personnel.[63] Other important logistics-related functions may be performed by other nationals of the sending state operating at a greater remove from the deployed force and less under their immediate scrutiny or supervision.[64] This is where the capacity to require such persons to enter into agreements to be subject to military jurisdiction becomes important, where it is less obvious that they would be captured by the statutory definition of persons accompanying the force.

(b) is accommodated or provided with rations at the person's own expense or otherwise by that unit or other element in any country or at any place designated by the Governor in Council;

(c) is a dependant outside Canada or an office or non-commissioned member serving beyond Canada with that unit or other element; or

(d) is embarked on a vessel or aircraft of that unit or other element.

[62] See e.g. *ibid.*, s. 60(1)(j), which is a statutory provision providing for this.

[63] Many of these functions would previously have been performed by junior non-commissioned members of the armed forces. In Iraq, for example, the United States has some 130,000 civilians, many of them U.S. nationals, supporting 150,000 soldiers and marines: John M. Broder, "Low profile and high price for Iraq contractors" *International Herald Tribune* (17 July 2007) at 1.

[64] Long-distance truck drivers who may transit through several countries, for example.

This brings one to the second proposition, relating to the avoidance of the creation of a situation of de facto impunity. One of the most problematic and notorious aspects of the intervention of the international community in places such as Bosnia, Kosovo, East Timor and the DRC has been the degree to which civilian contractors, of varying degrees of closeness of connection with the forces they are supporting, have victimized the local population by engaging in criminal behaviour, often involving theft, smuggling, black marketing or sexual abuse.[65] This has occurred in a practical vacuum of jurisdiction, resulting in a situation of de facto impunity. In addition to being morally wrong, this conduct is practically injurious to the effectiveness of the operation because it erodes the trust with the local population and damages the reputations of the United Nations and the countries concerned. Proposals for some sort of UN Court to exercise jurisdiction over such persons associated with a UN mission[66] are currently a distant dream. As Rowe puts it, 'any possibility of the United Nations taking disciplinary action against its peacekeepers is non-existent, despite the issue of misconduct being raised on a number of occasions.'[67] This would seem to apply *a fortiori* to civilian personnel.

The level of conduct spoken of here, while egregious, will not meet the threshold for engagement of the jurisdiction of the International Criminal Court, which anyway will not have the level of

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[65] See *Report of the Secretary-General, Comprehensive Report Prepared Pursuant to General Assembly Resolution 59/296 on Sexual Exploitation and Sexual Abuse, Including Policy Development, Implementation and Full Justification of Proposed Capacity on Personnel Conduct Issues*, 60th Sess., UN Doc. A/60/862 (24 May 2006); *Report of the Secretary-General on Children and Armed Conflict*, 55th Sess., UN Doc. A/55/163-S/2000/712 (2000); *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, UN Doc. S/1999/957 (1999); "Only Just Staying in One Piece", *The Economist* 384:8539 (28 July-3 August 2007) 55 at 56.

[66] See e.g. Frederick Rawski, "To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations" (2002) 18 Conn. J. Int'l L. 103 at 124; Manfred Nowak, "The Need for a World Court of Human Rights" (2007) 7 Hum. Rts. L. Rev. 251.

[67] Rowe, *supra* note 17 at 225. See generally Peter Rowe, "Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents" (2000) 5 J. Confl. & Sec. L. 45.

resources to prosecute the large number of cases which would be involved in effective enforcement.[68]

Local courts and police forces in such situations are often either non-existent or lacking in the capacity to deal with such cases. Nations should be obliged to take responsibility for the conduct of their civilian nationals in such situations when their presence in the countries concerned is attributable to the presence and operations of their national military contingents. Therefore, it must be acknowledged that there is no practical alternative on the horizon to the exercise of national military jurisdiction over such persons.[69]

Moreover, the same argument which applies to the trial of civilian dependants of military members would apply to civilian contractors, if they were actually faced with the choice between a trial in their own national legal system, utilizing their own law and language, and a trial by local judicial authorities in the local system. Given that such civilian contractors or support personnel accompany the force a voluntary basis and, unlike members of the armed forces, cannot be compelled to serve in a particular location, the assurance that one would be tried in one's own national legal system would constitute a significant reassurance. The contrary possibility might well serve as a powerful disincentive to such civilians' willingness to work in such situations. It must also be borne in mind that such civilian persons willingly consent to subject themselves to the jurisdiction of military courts as a condition of their employment (in systems which

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[68] This point is raised here because it has been suggested in some quarters as an alternative to effective military jurisdiction. Such a suggestion ignores the fact that the ICC, in the terms of the *Rome Statute*, *supra* note 2, preamble, is meant to exercise its jurisdiction over only 'the most serious crimes of international concern,' and confuses a fond aspiration for the future effectiveness of the ICC with the practical reality of resource constraints. It also ignores the basic fact that the ICC is meant to operate on the principle of complementarity with national jurisdictions, not to replace them. It is illustrative of the degree to which proponents of the ICC have often invested it with wholly unrealistic expectations. The ICC is not the new Sheriff in such situations: nations will have to police themselves.

[69] The United Kingdom has provided for a Standing Civilian Court (civilian judge sitting alone) to deal with relatively minor cases of civilian dependants abroad (primarily in Germany), but more serious cases must still be dealt with by court martial. It is far from clear that such a civilian judge would be willing or able to sit in the conditions of deployed peacekeeping missions: Rowe, *supra* note 17 at 108.

provide for this). No one forces them to accept that particular employment. There is at least an implied consent, which may be reinforced by a written acknowledgement of understanding. In respect of those who enter into actual written agreements with the government to be subject, the consent is explicit. Respect for their autonomy of choice seems a dispositive argument in this context.

Some questions might well then be posed in respect of these two categories of civilians discussed above: why does it have to be a military court which exercises jurisdiction over these civilians? And how does this relate to the primary raison d'être of military courts as being the maintenance of discipline and operational effectiveness of the armed forces expounded above, when we are speaking of civilians? The assertion of jurisdiction of military courts over civilians in such situations does not seem to sit entirely comfortably with the fundamental premises advanced above of the first principles justifying the existence of military justice systems.

These are certainly valid questions which seem at first impression to pose some awkward challenges. The answer lies in a combination of legal and practical reasons. First, one must not underestimate the difficulties inherent for countries with common law legal systems in providing for the extraterritorial application of their criminal law. This is an issue in the discussion of this topic which seems to be often underappreciated by lawyers from civil law systems. Common law legal systems are inherently resistant to the extraterritorial application of their criminal law. While many have legislated to provide their military justice systems with jurisdiction over offences which occur while they are deployed abroad, few have more than a skeletal extension of their ordinary criminal law enforced by civilian courts to acts occurring outside their national territory. Exceptions are usually narrowly confined to specific areas involving offences such as hijacking, terrorism and piracy. Countries which are states parties to the *Rome Statute of the International Criminal Court* have undertaken certain obligations to allow for prosecutions for the offences in the *Rome Statute* which have occurred abroad, namely war crimes, crimes against humanity, genocide and aggression,[70] but these

[70] *Rome Statute*, *supra* note 2, art. 5.

'most serious crimes of concern to the international community as a whole'[71] will not capture a civilian dependant who has engaged in impaired driving in Germany or a civilian contractor who has sexually assaulted one person in the DRC.

The practical reasons may be even more salient. Even if some sort of extraterritorial jurisdiction over civilians by civilian courts were established, considerations of expense and convenience militate against it: the numbers of cases are unlikely to warrant a civilian court sitting to try dependants in another state. Further, civilian judges are unlikely to be willing to expose themselves to the dangers and privations of trying cases in failed or failing states which are the locus of deployed peacekeeping missions, even presuming the unlikely situation where the authorities of the local state would permit the civilian courts of another state to try cases on their territory. Accepting the jurisdiction of military courts of the sending state provided for under a SOFA to try cases on their national territory is now a widely accepted feature of international state legal practice. Accepting the operation of a national civilian court of another state on their own territory is another matter, however, which many states would regard as an unacceptable intrusion on their sovereignty. Moreover, it may well be that the bulk of witnesses are located there and could not be subpoenaed to attend a trial in the home state of the accused.[72] As to the question of raison d'être, if one takes a holistic view of what impacts operational effectiveness, then the exercise of the jurisdiction of military courts over certain categories of civilian nationals abroad is consistent with this concept. Currently, one must concede that there is no more viable alternative practically available for most states.

As Rowe notes, an instinctive concern may perhaps arise that there is a 'greater *perception* of the lack of independence and impartiality of a military court when it is trying a civilian.'[73] However,

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[71] *Ibid*., preamble.

[72] This was the case in *R. v. Martin* [1998] A.C. 917, [1998] 2 W.L.R. 1. The House of Lords dealt with an accused who was charged with murder while his father, a British soldier, was serving in Germany and who was convicted in a trial by court martial in Germany. See also *Martin v. United Kingdom*, *supra* note 38, on the subsequent disposition of the *Martin* case by the European Court of Human Rights, discussed below.

[73] Rowe, *supra* note 17 at 101.

after stipulating the necessity for sufficient safeguards to be taken to show that the court is, objectively, sufficiently independent and impartial, Rowe declares that

> There is no reason in principle why, if such safeguards are taken where a military court, established by the national law of the State, tries a civilian that court cannot be an independent and impartial tribunal. It is too easy to conclude that a civilian can never receive a fair trial by an independent and impartial court if he is tried by a military court.[74] This would be a surprising conclusion given that the Geneva Conventions 1949 themselves permit the trial of civilians by a military court. The key issue is not the status of the court as a military one or the role of the military officers but whether there are, objectively perceived, sufficient safeguards to guarantee independence from the executive and the impartiality of the court.[75]

As Rowe further notes,

> If it is assumed that a particular military court has acquired a sufficient degree of independence and impartiality to be consistent with human rights instruments, and it is 'an integral part of the general judicial system' why should that independence and impartiality alter depending upon whether the accused is a soldier or a civilian?[76]

He concludes that 'it is likely, however, that this court will satisfy the requirements of an independent and impartial tribunal [in respect of the trial of civilians] if it does so in the trial of soldiers.'[77]

A recent significant case of the European Court of Human Rights requires comment in this context. *Martin v. United Kingdom*

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[74] See *Genie Lacayo Case (Nicaragua)*, *supra* note 37 at para. 84: 'the fact that it [trial of a civilian] involves a military court does not *per se* signify that the human rights guaranteed the accused party by the Convention are being violated.'

[75]Rowe, *supra* note 17 at 101.

[76] *Ibid*. at 100.

[77] *Ibid*. at 107.

was a case in which the civilian teenage son of a British serviceman serving in Germany had been found guilty in 1998 (*R. v. Martin*) of the murder of a young German civilian woman by a British court martial sitting in Germany, and in which the conviction had been upheld by the Court Martial Appeal Court and by the House of Lords.[78] The European Court of Human Rights allowed the complaint of the accused and held that the nature of the court martial in his case violated the right to trial by an independent and impartial tribunal contained in article 6 of the *ECHR*. The case turned on deficiencies in the British Army court martial system as it then existed, primarily concerning the role of the Convening Authority (which have subsequently been changed) similar to those which the Court had previously found to be unacceptable in *Findlay v. United Kingdom*.[79] The Court considered that the essential safeguards that were lacking in *Findlay* were also absent in this case and, as in *Findlay*, the Judge Advocate at the trial did not provide the same guarantees of independence and impartiality as were found to be present in a different factual context in *Cooper v. United Kingdom*.[80]

It is submitted that this particular case turned on its facts regarding certain features of the British Army court martial system as they then existed and thus would be of limited precedential value in considering other military justice systems in which the role of a Convening Authority in the chain of command has been replaced or is not present.[81] Of more importance are the *dicta* of the Court regarding the trial of civilians by military courts generally:

> It [the Court] recalls, by way of preliminary remark, that there is nothing in the provisions of Article 6 to exclude the determination by service tribunals of criminal charges against service personnel. *The question to be answered in each case is whether the individual's doubts about the*

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[78] *Martin v. United Kingdom*, *supra* note 38; *R. v. Martin*, *supra* note 72.

[79] *Martin v. United Kingdom, ibid.* at paras. 46-49; *Findlay*, *supra* note 38.

[80] *Martin v. United Kingdom*, *ibid.* at paras 46-54; *Cooper*, *supra* note 38.

[81] Similar concerns over the role of a military Convening Authority have animated significant changes to the convening of courts martial in the military justice systems in Canada, Australia and New Zealand over the past decade.

> *independence and impartiality of a particular court-martial can be considered to be objectively justified and, in particular, whether there were sufficient guarantees to exclude any such legitimate doubts*….
>
> It is, however, a different matter where the national legislation empowers a military court to try civilians on criminal charges…. *While it cannot be contended that the Convention absolutely excludes the jurisdiction of military courts to try cases in which civilians are implicated, the existence of such jurisdiction should be subjected to particularly careful scrutiny*, since only in very exceptional circumstances could the determination of criminal charges against civilians in such courts be held to be compatible with Article 6…. The power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case. It is not sufficient for the national legislation to allocate certain categories of offence to military courts *in abstracto*….[82]

The Court clearly intended to make a significant statement here, so its language deserves careful analysis. It should first be noted that the Court did *not* make a blanket declaration that the right to trial by an independent and impartial tribunal under the *ECHR* precluded the trial of civilians by a military court. It is keen to insist, however, that the exercise of such jurisdiction should be subject to careful scrutiny and must be substantiated in each specific case. This, it is submitted, is appropriate. It is further submitted that the exercise of such jurisdiction in the circumstances outlined above in the present article would be consistent with the standard adumbrated by the European Court of Human Rights in *Martin*. Clothing military courts with jurisdiction to try civilians accompanying the force for offences committed outside the territory of the national state is not allocating 'certain categories of offence' to military courts *in abstracto*. Rather, it

[82] *Martin v. United Kingdom*, *supra* note 38 at paras. 43-44 [emphasis added].

focuses on the geographic *locus* in which offences are committed, in circumstances where there is no legal or practical alternative to the exercise of jurisdiction over civilian nationals by a military court and in which the consequence of failure to exercise jurisdiction would either result in impunity for the commission of crimes, or be less advantageous to the individual concerned if they were to be tried in the justice system of the local state.

Public confidence that justice has been done in such cases will be buttressed by the availability for both military personnel and civilians tried by military courts of a right of appeal to a civilian appellate court. As Rowe notes, the participation of civilian judges in hearing appeals from military courts may reflect that states accept that civilian judicial scrutiny of trials held by military courts is desirable in ensuring that the accused 'has received a fair trial in the military court or to provide some re-assurance to society generally that the system of military courts is (ultimately) under civilian control in the same way as the armed forces themselves are under civilian control.'[83] The supervisory jurisdiction of civilian appellate courts constitutes an important instrument to achieve this and is a direct demonstration of the integration of military courts into the national legal system as a whole.

The author agrees that there is no legitimate basis for the trial of civilians by a military court within its own national territory, in respect of alleged offences which have been committed on that territory.[84] This is the scenario which prompts the concerns reflected in the *Draft Principles* and which is the origin of the abuses of military tribunals as a genus surveyed above. However, as discussed, for entirely valid and non-sinister reasons, it goes too far to exclude the jurisdiction of military courts over certain civilians on a class basis in

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[83] Rowe, *supra* note 17 at 87.

[84] Except, perhaps, for the offence of spying. While international humanitarian law deals to some extent with who may be accused of espionage and how alleged spies should be treated (see e.g. *Additional Protocol I*, *supra* note 22, art. 46), it does not actually create the offence of spying or declare what species of court should have jurisdiction. That is a matter for domestic legislation. It will be a matter for each state as to whether it creates the offence of being a spy in its military disciplinary code, or its civilian criminal code.

respect of offences allegedly committed outside the territory of the national state.

Before leaving the topic of military jurisdiction over civilians, it should not be forgotten that in certain circumstances international law may *require* states to have military tribunals exercise jurisdiction over civilians. The first of these relates to the Prisoner of War status determination tribunals required by article 5 of *Geneva Convention III*.[85] Certain categories of civilians specified in paragraphs 4, 5 and 6 of article 4 of *Geneva Convention III* (persons who accompany the armed forces without actually being members thereof, members of crews of the merchant marine or of civil aircraft, and inhabitants of a non-occupied territory who on the approach of the enemy spontaneously take up arms to resist invading forces[86]) are, pursuant to article 5, entitled to have their status determined by a competent tribunal, which will almost inevitably be a form of military tribunal.[87] Second, in respect of the duties of an Occupying Power under *Geneva Convention IV*, pursuant to article 66 of that Convention, in the case of a breach of the penal provisions applying to civilians in the occupied territory promulgated by it by virtue of article 64(2), the Occupying Power may hand over the accused to its 'properly constituted, non-political *military* courts, on condition that the said courts sit in the occupied country.'[88] Third, article 84 of *Geneva Convention III* provides that a prisoner of war (who, as indicated above, may actually be a civilian) 'shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of

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[85] *Geneva Convention III*, *supra* note 22, art. 5.

[86] *Ibid.*, art. 4: such persons may be entitled to prisoner of war status, notwithstanding the fact that they are civilians. Recognition of their possession of this status may be of vital importance to them, as it may result in substantially better treatment than they would otherwise be accorded; in some situations, it may even mean the difference between life and death.

[87] See e.g. *Prisoner of War Status Determination Regulations*, SOR/91-134, made pursuant to the Canadian *Geneva Conventions Act*, R.S.C. 1985, c. G-3.

[88] *Geneva Convention IV*, *supra* note 27, art. 66 [emphasis added].

war.'[89] The consequence of these provisions of international humanitarian law is that the adoption of Principle No. 5 of the *Draft Principles* as it is currently proposed by the Special Rapporteur would actually be contrary to existing international law.[90]

4.3. Judicial Guarantees applicable to military personnel tried in military courts

The rationale discussed above regarding the necessity for full judicial guarantees for the trial of civilians is equally applicable to the trial of military personnel in military courts. All of the due process and judicial guarantees exemplified in article 14 of *ICCPR* should be fully applicable to such trials.[91] The key issue in this context, it is submitted, will be whether there are sufficient guarantees of the independence and impartiality of the military court. While military courts are s*ui generis*, they must still satisfy these fundamental criteria as courts of justice. This will involve an assessment of the three key components of judicial independence, which are equally applicable to military judges as they are to civilian judges: whether military judges are possessed of sufficient security of tenure, financial security and institutional independence for the administrative functioning of the court,[92] while still retaining their military character. While the achievement of this requires a careful crafting of the legislative provisions for the selection, appointment, remuneration and security of tenure of military judges, as well as diligence in safeguarding the legal and practical aspects of their relationship with the military chain of command and the executive branch of government, it is indeed possible for military judges in a modern military justice system to satisfy these fundamental

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[89] *Geneva Convention III*, *supra* note 22, art. 84 (but this is subject to the following limitation: 'In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105'). The author is grateful for the opportunity to discuss certain of these issues with and receive input from Professor Charles Garraway.

[90] *Draft Principles*, *supra* note 3 at 10 (Principle No. 5).

[91] *ICCPR*, *supra* note 7, art. 14.

[92] *R. v. Généreux*, *supra* note 16, Lamer CJC.

criteria for objective independence and impartiality.[93] The cynicism reflected in the commentary in the *Draft Principles* in this regard is unwarranted.

4.4 Scope of Jurisdiction of Military Courts

One of the most significant areas of difficulty with the *Draft Principles* is exemplified in its Principle No. 8, which provides that:

> The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel. Military courts may try persons treated as military personnel for infractions strictly related to their military status.[94]

What the Special Rapporteur intends by this principle, clear from the accompanying commentary, is that the jurisdiction of military courts should be confined to purely 'disciplinary' types of military offences, rather than those of a criminal nature.[95] The difficulty with this is that, as Rowe remarks, '[a] criminal offence committed by a soldier within a military context is no less a breach of discipline than a purely military offence.'[96] The commission of a sexual assault or of a theft from comrades on board a military ship or aircraft or on operations in the field detracts from discipline and operational effectiveness to no less a degree than the classically disciplinary offence of insubordination, as they have a clear nexus to the maintenance of military discipline. This reality is captured by the concept of a 'Service Offence' which in many military justice systems establishes military jurisdiction over offences, meaning that jurisdiction will be established over not only purely military offences, but also criminal offences which have a disciplinary impact.[97] Moreover, as previously discussed, a state may be under an

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[93] See e.g. *Bill C-7*, *supra* note 20, cls. 39-43.

[94] *Draft Principles*, *supra* note 3 at 13 (Principle No. 8).

[95] See e.g. *ibid*. at para. 29.

[96] Rowe, *supra* note 17 at 80.

[97] See e.g. *National Defence Act*, *supra* note 10, s. 2, which provides that a service offence includes any offence specifically created in the *National Defence Act*, all offences in the *Criminal Code*, as well as in any other Act of Parliament, committed by a person while subject to the Code of Service Discipline. It thus becomes a matter for prosecutorial discretion and discussion between military and civilian prosecutors whether an act which

obligation pursuant to a SOFA to exercise jurisdiction over its nationals present on the territory of the receiving state in all circumstances, even if there is limited disciplinary nexus on the particular facts of that case.

For these reasons, the dogmatic approach exemplified in Principle No. 8 is too narrow and should be rejected.

4.5. Trial by Military Courts of Persons Accused of Serious Human Rights Violations

Principle No. 9 of the *Draft Principles* declares that:

> In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.[98]

Once again, it is understandable why the drafters of the *Draft Principles* should feel this way, in light of the Latin American experience in particular. Their rationale is set out explicitly in the commentary:

> Contrary to the functional concept of the jurisdiction of military tribunals, there is today a growing tendency to consider that persons accused of serious human rights violations cannot be tried by military tribunals insofar as such acts would, by their very nature, not fall within the scope of the duties performed by such persons. Moreover, the military authorities might be tempted to cover up such cases by questioning the appropriateness of prosecutions,

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straddles both military and civilian aspects should be prosecuted in the military or the civilian criminal justice system, if committed within the domestic territory of the national state.

[98] *Draft Principles*, *supra* note 3 at 13 (Principle No. 9).

> tending to file cases with no action taken or manipulating "guilty pleas" to victims' detriment.[99]

There are several difficulties with this reasoning. It is true that the commission of human rights violations would not properly fall within the scope of the duties of military personnel and that 'the constituent parts of the crime of enforced disappearance cannot be considered to have been committed in the performance of military duties.'[100] However, the fallacy of this assertion in this context is apparent: neither is the commission of such 'ordinary' crimes as murder, rape, fraud or theft properly within the scope of military duties. They are crimes and breaches of discipline. That is why they are offences under military and criminal law, just as participation in extrajudicial executions, enforced disappearances and torture would be.[101] They should be susceptible to being tried by a military court as a court of law. It is important in this context not to conflate the prosecution of criminal offences with threshold issues of liability in tort, where the concept of whether a given act was committed within the scope of the soldier's duties as a Crown servant or agent of the state is important for engaging the vicarious civil liability of the state. The real issue here is whether military courts in a given state are 'real' courts possessed of sufficient integrity, independence and impartiality to try such grave offences. If they are, there is no principled reason to

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[99] *Ibid*. at para. 32 (commentary).

[100] *Ibid*. at para. 33 (commentary). This line of thinking seems to evoke the same principle expressed by Lord Millet and Lord Phillips of Worth Matravers in *R.v. Bow Street Stipendiary Magistrate and Others,ex parte Pincochet Ugarte* [1999] 2 All E.R. 97 (H.L.) [*Pinochet No. 3*] concerning the involvement of the former Chilean dictator General Pinochet in crimes of torture, wherein, with respect to the issue of immunity of heads of state, they held that it could not properly be considered part of the duties of a head of state to be party to the crime of torture. This is certainly correct, but is beside the point in this context, as we are here concerned with jurisdiction of national courts to try criminal offences, not issues of personal or head of state immunity or state responsibility in international law, or vicarious state liability in tort.

[101] For an example of a case where allegations of torture were tried by a military court, see *R. v. Private Elvin Kyle Brown* (1995), CMAC-372, in which a member of the Canadian Airborne Regiment was tried and convicted by a court martial of the offence of torture under s. 269.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, prosecuted under s. 130 of the *National Defence Act*, *supra* note 10, for the torture and killing of a teenager in Somalia. The conviction was upheld on appeal to the Court Martial Appeal Court, and leave to further appeal to the Supreme Court of Canada was declined by that Court.

carve out certain classes of offences from their jurisdiction. If they are not, then there is a broader systemic problem with the particular military justice system which goes to its ability to properly try any sort of grave offence, not just these particular ones. What the drafters of the *Draft Principles* are really saying here is, in effect, we have been so stung by the Latin American experience that we are going to declare that all military courts are inherently untrustworthy and should be considered incapable of trying these sorts of offences. The blanket nature of this declaration, advanced as a 'universally applicable rule' to be applied 'in all circumstances,' is not an objectively accurate depiction of the state of all military justice systems worldwide. The correct approach is rather articulated in the *International Convention for the Protection of All Persons from Enforced Disappearances*: 'any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law.'[102]

As has been consistently argued in the present article, there are military justice systems fully capable of trying such offences properly. This is not to be naïve: of course there are still many military justice systems around the world which could not be trusted to properly try such cases. But such systems would more broadly fail to satisfy the criteria elaborated in this article for the operation of a legitimate military justice system generally. It is not their military character per se which makes them unsuitable for this purpose, but rather their individual deficiencies as courts of justice, which may well spring from a dysfunctional model of civil-military relations within that state or the rottenness of the government as a whole. A properly constituted and operated military court in state X may be much fairer and more competent to try such offences than a civil court in state Y. Furthermore, there are important reasons not to remove from them the jurisdiction to do so.

The first of these goes to the fundamental raison d'être of military justice systems articulated previously: the maintenance of discipline. Whatever else they might be, offences involving the gross

[102] *International Convention for the Protection of All Persons from Enforced Disappearance*, GA Res. 61/177, 61st Sess., UN Doc. A/RES/61/177 (20 December 2006) 1 at 5 (art. 11, para. 3).

violation of human rights of other persons are breaches of discipline. There is no legitimate military utility in such actions. The reality is that properly disciplined armed forces respect the civil and human rights of civilians with whom they come in contact.[103] This is true as much for practical as for legal reasons. It is important for the maintenance of discipline within armed forces that such breaches are dealt with expeditiously and fairly, but also severely, and that the armed forces of a state are required to take ownership of this issue by being fixed with the responsibility for dealing with it.[104] Self-regulation is one classic hallmark of professionalism and in this sense it is important to both the self-identity of, and public trust in, the profession of arms.[105]

The second involves an appreciation of the fact that military tribunals can be effective tools for ending impunity. One of the principal fears of the drafters of the *Draft Principles* is that military courts dealing with such cases will be keen to shield military perpetrators of gross human rights abuses, particularly those of senior rank. Again, the real issue in this context goes to the nature of the military court, the professionalism of the armed forces and the actual model of civil-military relations prevailing in the state. It is not the case that any military court will be inherently sympathetic to members of the military committing gross violations of human rights and that it

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[103] The author is grateful to Colonel Dominic McAlea of the Office of the Judge Advocate General for originally suggesting this concept in discussion of this topic.

[104] Concurrent jurisdiction between the military and civilian justice systems for offences committed within the national territory of the state will provide an important safety valve to prevent abuses of this jurisdiction by the military and to preclude impunity for the commission of such offences. It is not argued in the present article that the scope of military jurisdiction should act as a zone of class privilege to shield members of the military from accountability for their actions, which is one of the principal fears expressed in the *Draft Principles* and their commentary; rather, the ability of civil authorities to also prosecute will prevent such a phenomenon. See e.g. *National Defence Act*, *supra* note 10, s. 71, which indicates in the Canadian context that there shall be no interference with civil jurisdiction by providing that nothing in the *Code of Service Discipline* affects the jurisdiction of a civil court to try persons for any offence triable by that court. It would seem that civil law lawyers may be somewhat uncomfortable with the concept of concurrent jurisdiction, but it is common in common law systems. Moreover, it may be considered conceptually akin to the doctrine of complementarity of jurisdiction between different systems which applies in the context of the ICC.

[105] This consideration underpins the sentencing objective of maintaining public trust in the armed forces as a disciplined armed force: see *Bill C-7*, *supra* note 20.

will be inclined to mitigate punishment because of the position of the accused: quite the contrary. In a professional military, abuse of one's rank or position has classically been treated as a greater breach of trust. A statutory articulation of this is found in proposed legislation in the Canadian system respecting the sentencing principles to be applied at court martial which provides that abuse by the offender of his or her rank or other position of trust or authority shall be considered as an aggravating factor on sentencing.[106]

This principle may come to be of great importance in situations of transitional justice. Militaries are frequently one of the few institutions in post-conflict states possessing the resources and organizational ability to effectively and expeditiously deal with large numbers of persons accused of serious offences, many of whom may be imprisoned awaiting some sort of trial. This is not to minimize the very real difficulties which may obtain in such circumstances, including the fact that large numbers of the members of such militaries may very well themselves have been involved in human rights violations. However, it is important to recognize, and for the members of such societies to recognize, that professionalization of the military is one of the core attributes of a mature state. This is one reason why reform of the military justice system of such states as the DRC and Afghanistan has received significant attention from the international community as a perceived key element to progress in the creation of just, stable and sustainable societies.

4.6 Role of victims in proceedings

There are several additional aspects of the *Draft Principles* worthy of brief comment. The first of these relates to the proposed Principles No. 16 (b) and (c) regarding access of victims to proceedings. The thrust of Principle No. 16, surely arising from salutary impulses, is intended to guarantee that due regard be paid to the rights and interests of victims of crimes to be tried in military courts and to provide a safeguard against things being 'swept under the carpet'. However, these specific

[106] *Bill C-7*, *supra* note 20, cl. 64, proposing amendments to the *National Defence Act*, *supra* note 10 by the creation in that Act of a new subparagraph 203.3(a)(i).

proposals go too far in conflating civil with criminal proceedings and would distort the nature of the trial process. They suggest that victims of crimes or their successors should be guaranteed that they

> (b) Have a broad right to intervene in judicial proceedings and are able to participate in such proceedings as a party to the case, e.g. a claimant for criminal indemnification, an *amicus curiae* or a party bringing a private action;
>
> (c) Have access to judicial remedies to challenge decisions and rulings by military courts against their rights and interests.[107]

There are multiple difficulties with these proposals. They conflate criminal proceedings intended to maintain discipline with civil actions in tort.[108] Criminal or disciplinary prosecutions are brought in the name of the state (whether this is styled as the 'Crown' or 'Queen' or 'People' or 'State') against the accused individual. Prosecutions are undertaken in the name of the relevant community because it is alleged that the accused person has broken the criminal law. In common law legal theory, although the gravamen of the offence may involve injury to that particular victim, the wronged party with standing to prosecute as a criminal offence (as opposed to a tort) is society. In the military context, charges are also brought for the positive societal purpose of maintaining discipline in the armed forces as a prerequisite to operational effectiveness. Thus, the military prosecutor should be a minister of justice, not the agent of an aggrieved victim or their family. The alleged victim should not be considered 'a party bringing a private action', nor is it appropriate to convert the military justice system of a

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[107] *Draft Principles*, *supra* note 3 at 21 (Principle No. 16).

[108] It is recognized that there are some substantial differences in practice in this regard between adversarial common law systems and some civil law jurisdictions in which it is more common for civil parties to be joined to criminal proceedings. The author would make two observations in this regard; first, for the reasons elaborated below, this is inappropriate in a military context, having regard to the purpose of the system; and, second, it should be recalled that the *Draft Principles* purport to be of universal application, and their prescriptions must be amenable to both common law and civil law types of systems. The drafting of this suggestion suggests a privileging of civil law over common law principles and practice regarding criminal prosecutions.

state into one of private prosecutions.[109] Still less should alleged victims be considered '*amici curiae*': that concept imports that the *amicus* is essentially neutral and impartial, participating in the proceedings for the purpose of assisting the court as 'friend of the court', not as a partisan participant with a personal interest in the outcome of the trial.[110] To allow such participation could actually infringe the right of the accused to a fair trial, contrary to the requirements of article 14 of *ICCPR*.[111] This is not to say that requiring the offender, once properly convicted, to make some restitution to the victim as one aspect of sentencing or having separate provision for the access of victims to some sort of criminal injuries compensation fund distinct from the trial, are in any way improper; indeed, they are standard aspects of many civilian criminal justice systems and may be present in some military justice systems as well.[112] But providing for victims to 'have access to judicial remedies to challenge decisions and rulings by military courts against their rights and interests' converts them into a litigant in a civil case rather than their proper role as victim in a criminal trial.

Victims have an important role to play in criminal trials, including trials in military courts, as witnesses and as wronged persons seeking justice in the outcome, but not as parties in the trial itself.[113] If

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[109] Notwithstanding the current widespread desire to embrace alternative or indigenous modes of restorative justice in certain societies, such as Gacaca in some African societies, it must be remembered that one is dealing here with a core function of the state in the maintenance of military discipline, which is not amenable to more consensus-oriented modes of proceeding. It should also be recalled that the *Draft Principles* purport to be of universal application, and their prescriptions in this context would in any event not be appropriate to Western militaries.

[110] The drafting of this proposed principle suggests that concern for fair trial rights of the accused has been subordinated to an agenda of ensuring prominence for the interests of victims. In any event, it is submitted that these proposals have been insufficiently thought through in their implications, and need to be reworked.

[111] *ICCPR*, *supra* note 7, art. 14.

[112] See e.g. *Bill C-7*, *supra* note 20, cl. 64, as an example of a proposed statutory authority for a military court to make restitution orders in proposing the creation of a new s. 203.91 in the *National Defence Act*, *supra* note 10.

[113] It is recognized that achieving the correct balance in this regard is not easy. See *Rome Statute*, *supra* note 2, art. 68, para. 3:

a victim wishes to seek damages (as opposed to restitution, which has a more limited scope) against a soldier who has injured them, then the appropriate method to do so would be to initiate an action as plaintiff in a civil trial as a separate proceeding; a military court is not an appropriate forum in which to do so.[114]

4.7. Periodic review of codes of military justice

Principle No. 20 calls for periodic systemic review, conducted in an independent and transparent manner, of codes of military justice.[115] In itself, this is an excellent suggestion. Providing statutorily for periodic review of military justice systems ensures that they will be able to achieve some attention in what may be crowded legislative agendas of governments and guarantees that they will be subject to scrutiny to ensure their continued fairness of operation and that they keep pace with the evolution of the general criminal law within a state.[116] However, the tenor of the language suggesting such reviews in the

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> 'Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.'

In the author's view, to avoid unsustainable prejudice to the fair trial rights of the accused, the presentation of the 'views and concerns' of victims in this sense (as opposed to their evidence about what happened) must be confined to the sentencing phase of a trial. In any event, this expression of a right of victims to participate is far more limited and nuanced than the current version of subparagraphs 16(b) and (c) of the *Draft Principles*: *supra* note 3 at 21 (Principle No. 16).

[114] Just as in the common law civilian context, criminal courts are not the appropriate forum for seeking damages. This is without prejudice to the ability of a victim to make a claim for restitution as part of the sentencing phase of the trial in the military court, but that is distinct from an action for damages. It is appreciated that the motivation behind the suggestion may well embrace a desire to afford some access to justice to victims in developing countries or in situations of transitional justice who may not have the resources or the sophistication to initiate separate civil proceedings, but this must not be allowed to distort the fundamental first purpose of a criminal trial: to provide a fair trial for the accused.

[115] *Draft Principles*, *supra* note 3 at 24 (Principle No. 20).

[116] See e.g. *Bill C-7*, *supra* note 20, cl. 109, an example of a proposed statutory provision requiring periodic independent reviews of the military justice system every five years in proposing the creation of a new s. 273.601 in the *National Defence Act*, *supra* note 10.

commentary to Principle No. 20 is misplaced, as it is laced with suspicion of the legitimacy of military justice systems[117] and suggests that the primary purpose of the review would be to continually narrow the scope of jurisdiction of military tribunals, placing the onus on them to continue to justify their existence.

5. Military Commissions

Recently, one of the most prominent topics in international criminal and human rights law has been the subject of military commissions, specifically those proposed by the United States of America to try captured persons held at Guantánamo Bay in Cuba on suspicion that they had committed crimes as members of Al Qaeda or the Taliban while not entitled to lawful belligerent status under the laws of armed conflict.[118] This is an important, complex and fascinating subject worthy of an entire article unto itself; unfortunately, considerations of space do not permit extended discussion of this subject in the present article. A few brief remarks must suffice.

Enormous controversy has attended the passage by the United States Congress of the *Military Commissions Act*[119] in the wake of the judgment of the United States Supreme Court in *Hamdan v. Rumsfeld*,[120] which criticized the structure of the previous system of military commissions created by the Bush Administration.[121] Many have expressed grave concerns as to the compliance of even the revised military commission structure with the requirements of international

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[117] See e.g. *Draft Principles*, *supra* note 3 at para. 64 (commentary) ('since the sole justification for the existence of military tribunals has to do with practical eventualities, such as those related to peacekeeping operations or extraterritorial situations, there is a need to check periodically whether this functional requirements still prevails.').

[118] See generally Charles Garraway, "Military Commissions – Kangaroo Courts?" (2005) 35 Israel Yearbook on Human Rights 101.

[119] Pub. L. No.109-366, 120 Stat. 2600 (2006).

[120] 126 S. Ct. 2749 (2006).

[121] For earlier criticism, see Johan Steyn, "Guantánamo Bay: The Legal Black Hole" (2004) 53 I.C.L.Q. 1; D. Rose, *Guantánamo: America's War on Human Rights* (London: Faber and Faber, 2004).

law,[122] including many of the military lawyers within the armed forces themselves, and have suggested that such military commissions are an unfortunate perversion of military law and of the general fairness of the regular court martial system of the United States Armed Forces governed by the Uniform Code of Military Justice.[123] For the purpose of the present article, the author would like to make clear that it is not considered that such military commissions would fall within the operative definition of 'military court' as it has been used herein and is not advocating that they would satisfy the requirements of international law or that they should be adopted as a valid model by any other state. Given the evolution of recent events involving the dismissal of charges in some of the trials on jurisdictional grounds as well as the continuing domestic and international controversy, many have suggested that it is unlikely that the commissions will survive past their infancy and that the Government of the United States will ultimately be obliged to utilize another model of tribunal for this purpose, perhaps even the regular court martial system. It is submitted that, in both law and policy, this would be a far preferable alternative.

6. Conclusion

Military courts undeniably constitute a salient feature of the legal landscape in many countries and will continue to do so. Their continuing importance and their ability to fully comply with relevant principles of international human rights and international humanitarian law have been vigourously insisted upon in the present article. While the degree of faith in the legitimacy and potential of military courts displayed herein may initially seem to many both counterintuitive and excessively idealistic, it is important not to lapse into a facile cynicism in this regard. Advocates of international human rights should temper their predispositions with a healthy dose of practicality and due regard for the exigencies of current and foreseeable military deployments in support of the principles of the United Nations and the international community which they espouse.

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[122] David W. Glazier, "Full and Fair by What Measure?: Identifying the International Law Regulating Military Commission Procedure" (2006) 24 B.U. Int'l L.J. 55.

[123] Louis Fisher, "Detention and Military Trial of Suspected Terrorists: Stretching Presidential Power,"(2006) 2 J. Nat'l Security L. and Pol'y 1.

In the real world, humanitarian intervention for the protection of human rights (whether in the guise of peacekeeping, peacemaking or more robust military humanitarian intervention in extreme situations of humanitarian emergency in failed or failing states) requires professional, effective and well-disciplined military forces to accomplish, if they are not potentially to do more harm than good. As demonstrated, the possession of an appropriate military justice system is key to the creation and operation of such forces. In particular, one should not conflate military tribunals used for political purposes to dominate civilians (the historical Latin American experience) with the legitimate use of military courts to maintain the discipline of military personnel or to respond effectively to the commission of crimes by those civilians who accompany them on extraterritorial deployments. Respect for human rights and the maintenance of military discipline are not mutually exclusive. This is not a Manichean dynamic. The actual practice of military courts of different states today is just as diverse as the character of their parent societies. Some are deserving of praise, others of opprobrium, just as the human rights records of different countries are generally, and no doubt in much the same measure. Military courts should be neither sanctified nor demonized. They are too important both for states and for the rule of law to do so.

As discussed, some aspects of the *Draft Principles* as currently proposed would impair the utility of military courts without actually advancing the goal of precluding impunity. It is important to strike the right balance in this regard. While a worthy undertaking, it is submitted that further consideration should be given to the improvement of the *Draft Principles* prior to their submission for adoption by organs of the international community, lest they become an obstacle to the achievement of the very goals which animate them. The full potential of military courts as a vehicle for the advancement of respect for human rights and to combat impunity has yet to be consistently realized. Their utility in this regard should not be discounted or forestalled.

A Call to Freedom: Towards a Philosophy of International Law in an Era of Fragmentation

ALEXANDRA KHREBTUKOVA*

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I. Introduction

Today, it is not uncommon to conceive of international law in terms of multiple specialized branches.[1] With the proliferation of international multilateral treaty regimes surrounding specific issue-areas, the

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[1] Examples include, but are not limited to, international human rights law, international environmental law, international trade law, international law of the sea, international space law, European law, international health law, international humanitarian law, and so on.

international legal landscape will differ – from the law, to its administration, to the methods of dispute resolution – depending on whether the issue is seen as one of international trade, international human rights, international environmental concern, international humanitarian law, and so on. The many specific issue-areas into which international law has proliferated has been described as special "self-contained regimes."[2] Different international legal regimes may embody incommensurable systems of norms, and no over-arching legal system has been politically negotiated to create a global hierarchy. In this article, I argue that a re-politicization of the modes of global decision-making, and a re-conceptualization of the nature and role of the state, are potentially fruitful avenues for our approach to international law in the modern era of fragmentation.

Often, the interests at issue in an international conflict fail to fall unambiguously within a single pre-negotiated legal framework. As a result, conflicts between certain norms remain unresolved. For example, while the General Agreement on Tariffs and Trade balanced the protection of national industries against the free movement of goods and services, it did *not* fully settle the relationship between the interest in removing restrictions to trade and the interest in a precautionary approach to the exploitation of natural resources. What is the hierarchical relationship between the different norms these two interests embody? Is the norm favouring free trade in the absence of conclusive evidence of its harmfulness more important than the norm against engaging in enterprises whose long-term effects on the environment are unknown but potentially grave?

The starting point for this article is that each special 'self-contained' international legal regime represents a framework for systematically resolving a particular set of conflicting interests according to a particular hierarchy of norms and values. In specific contexts, whether the potential risks to the environment outweigh the negative consequences of a trade restriction is a decision that is sure to

[2] Bruno Simma, "Self-Contained Regimes" (1985) 16 Netherlands Yearbook of International Law 111. Much debate continues to surround this issue since 1985. *Cf.* Bruno Simma & Dirk Pulkowski, "Of Planets and the Universe: Self-Contained Regimes in International Law" (2006) 17 Eur. J. Int'l L. 483; Anja Lindroos & Michael Mehling, "Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO," (2005) 16 Eur. J. Int'l L. 857.

affect the lives of many, irrespective of which side it comes out on. I will argue that the real issue with respect to the so-called fragmentation of international law is not, as is commonly argued, that the proliferation of regime-specific decision-making bodies poses a threat to the continued coherence of general international law. Rather, the threat is that, given the non-existence of a definitive global legal hierarchy of norms (outside of the extremely limited scope of *jus cogens*), important political and normative decisions will be made piecemeal by the decision-making bodies of particular legal regimes. These decision-making bodies, already embodying particular systems of valuation, are then thereby handed power and influence without a pre-negotiated body of law to apply.

In arguing for more democratic involvement at certain levels of normative decision-making, this article aims to complement and parallel the scholarship of the Global Administrative Law (GAL) Project.[3] The GAL Project's aim is to increase the transparency, accountability, and participation in global regulatory regimes, and in that regard, represents a move toward greater democratic legitimacy. What I wish to do here, however, is flesh out an additional and often neglected perspective - the role of the state in the era of globalization.

Using a theoretical framework based on the notion of the 'empty signifier', I aim to push for a particular ideal of the state – that is, the state as the concrete embodiment of individual freedom to engage the collective order through political struggle. I argue that a conscious move on the part of a state's agents toward this self-perception may stimulate a rethinking of the role of states in debating and negotiating the resolution of global normative conflict. Furthermore, I argue for a new approach to the vocational training of international lawyers, redefining and refocusing their role and agency in a globalized, though fragmented, legal landscape. In doing so, I seek to catalyze the movement toward a much-needed rethinking of the concept of the state and of the international rule of law, to allow for a more inclusive and more democratic understanding of international community.

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[3] See generally Benedict Kingsbury, Nico Krisch & Richard B. Stewart, "The Emergence of Global Administrative Law" (2005) 68 L. & Contemp. Probs. 15.

Part I of this article presents a perspective for thinking about the nature of self-contained regimes. Part II explores the incommensurable clash of normative systems that results from inter-regime conflict. Part III proposes a re-conceptualization of the nature and role of the state as a potential starting point for rethinking the way in which normative conflict is approached through international law. Part IV suggests some ways in which this re-conceptualization could effect a novel understanding of an international rule of law, focusing on a shift in the concept of state sovereignty. Part V concludes the discussion with some remarks about the role and modes of education conducive to effecting these conceptual shifts.

II. Self-Contained Regimes

A. Introduction

The term 'self-contained regime' has enjoyed a number of usages in international law. Sometimes the notion appears to refer solely to a set of secondary rules of state responsibility, in contrast to, and with primacy over, general international law.[4] Sometimes the phrase is used to describe interwoven bundles of primary and secondary rules dealing with an issue in a way other than that issue would have been dealt with under general international law.[5] And sometimes it is used in reference to entire specialized branches of international law – such as 'human rights law,' 'humanitarian law,' 'international trade law,' 'European law,' 'international environmental law,' 'space law,' and so on – with particular modes and techniques for interpreting and administering a functionally specialized body of jurisprudence that often modify or exclude general international law.[6] It is the latter of these three senses that forms the focus of the present discussion. It is

[4] See *Case concerning the United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* [1980] I.C.J. Reports 41 at para 86 [*Tehran Hostages*].

[5] See *Case of the S.S. "Wimbledon"* [1923] P.C.I.J. (Ser. A) No. 1 at 23-4.

[6] See Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law - Report of the Study Group of the International Law Commission, 58th Sess., UN Doc. A/CN.4/L.682 (2006) at 62 [ILC Report]; see also ILC Report at 68-72 for an elaboration of this third sense of the phrase.

this definition that is meant by usage of the phrase 'self-contained/special regime' throughout the remainder of this text.

One example of the way in which international law has been conceived as a set of discrete and relatively autonomous fields is provided by the *Legality of the Threat or Use of Nuclear Weapons* case, in which the International Court of Justice, having recognized the need to consider 'the great corpus of international law norms available,'[7] then proceeded to examine a series of smaller corpuses, each separate and distinct from one another: international human rights law, international environmental law, and international humanitarian law. Throughout the opinion, the treaties embodying these various corpuses are seen not as instruments of a general and unitary international legal spectrum; rather, they are envisaged as forming relatively separate spheres of their own special law. Thus, for example, the Court points out that the Hague Conventions of 1899 and 1907, the St. Petersburg Declaration of 1868 and the Brussels Conference of 1874, as well as the Geneva Conventions of 1864, 1906, 1929 and 1949, cohere in a way that transcends the simplicity of their existence as multilateral treaties within the corpus of general international law. Rather, 'they are considered to have gradually formed one single complex system, known today as international humanitarian law.'[8] They are considered, in the terms of the present discussion, to have formed one self-contained regime.

As the *Nuclear Weapons* case illustrates, it is not uncommon that a single legal issue may implicate a multiplicity of such 'single complex system[s]'. Thus, from the perspective of the International Covenant on Civil and Political Rights, the legality of the threat or use of nuclear weapons gives rise to a particular set of legal issues. From the perspective of the norms embodied in the international environmental regime, a whole new set of issues arises. Each seeks to effect a legal resolution most favourable to its own specific set of concerns. A solution satisfactory to the legal regime of one system of international law will not always (if ever) satisfy the others – a rule of

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[7] *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, [1996] I.C.J. Rep. 226 at para 23 [*Nuclear Weapons*].

[8] *Ibid*. at para 75.

the absolute illegality of the threat or use of nuclear weapons, favoured by the perspective of human rights, may not be acceptable from the perspective of the laws of war, concerned with national security and strategic self-defence. As a result, each legal regime will naturally assert *itself* as the proper forum in which to address the situation, claiming superior status for its particular descriptions and concerns.[9]

Moreover, each regime system is often equipped with its own structures of judgment and oversight, in the form of specialized international tribunals or other implementation mechanisms. Each such mechanism, by its very nature, is programmed to frame the legal matters before it in a way that addresses the issues pertinent to its special regime. Given that the issues pertinent to varying international regimes are often very different, and given also that the same legal matter may give rise to issues in multiple legal regimes – and hence appear before multiple international mechanisms – it is conceivable that there will emerge divergent and possibly incompatible legal resolutions of the same issues. The multiplicity of international legal spheres may thus be seen to threaten the continued existence of a single and coherent international law.

Such concerns have sometimes been expressed at high levels. In 2001, Judge Guillaume, speaking as President of the International Court of Justice (ICJ) to the United Nations General Assembly, expressed his fear that '[t]he proliferation of international courts may jeopardize the unity of international law and, as a consequence, its role in inter-State relations.'[10] His predecessor, Judge Schwebel, had similarly spoken of the dangers inherent in the possibility 'of significant conflicting interpretations of international law,'[11] and the

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[9] See e.g. *Commission of the European Communities v. Ireland*, C-459/03, [2006] E.C.R. I-04635, (European Court of Justice condemned Ireland for taking its issues in the MOX Plant case to the adjudicating bodies of international legal regimes other than the legal regime of European law, asserting its supremacy over international environmental law or international law of the sea in describing and framing the issues of the situation).

[10] H.E. Judge Gilbert Guillaume, (Speech to the General Assembly of the United Nations, 30 October 2001). Judge Guillaume is a former president of the International Court of Justice.

[11] Judge Stephen M. Schwebel, (Address to the Plenary Session of the General Assembly of the United Nations, 26 October 1999). Judge Schwebel is a former president of the International Court of Justice.

current President of the ICJ, Judge Higgins, has also expressed a concern for prioritizing the resolution of issues arising from the fragmentation of international law.[12] In response to such growing anxieties, the United Nations enlisted the work of the International Law Commission to deal with the topic of problems arising from the diversification and expansion of international law. The Commission completed its work in 2006.[13]

Many have tried to quell the fears and anxieties arising from the fragmentation of general international law into numerous separate spheres of law. Some have urged the various regimes to monitor each other's decisions so as to assure maximum overall consistency.[14] Others have suggested that the tribunals of a given particular regime take other regimes into account as relevant rules of law applicable to the relations between the parties.[15] And some have argued that the proliferation of international regimes and their separate tribunals does not pose a threat to the coherence of the international legal system because, '[u]ltimately, one would expect that the best ideas will be adopted widely, contributing to the body of international law.'[16]

These formulations suggest that the difficulties arising from the expansion and diversification of international law are a matter of purely technical concern. Such solutions assume a number of important propositions: (1) that a particular regime, engaged in managing an internally connected and relatively autonomous sphere of issues, has the capability to comprehend properly the problems arising

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[12] Judge Rosalyn Higgins, (Address to the Plenary Session of the American Society of International Law Annual Meeting, 31 March 2006) [Higgins]. Judge Higgins is the current president of the International Court of Justice.

[13] ILC Report, supra note 6. For a more full account of the unease surrounding the proliferation of international branches of law and their special tribunals, see Martti Koskenniemi & Paivi Leino, "Fragmentation of International Law? Postmodern Anxieties" (2002) 15 Leiden J. Int'l L. 553 [Koskenniemi & Leino].

[14] See e.g., Andreas Fischer-Lescano & Gunther Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law," (2004) Michigan Journal of International Law 25 at 999.

[15] See e.g., Joost Pauwelyn, "Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands" (2004) 25 Mich.J.Int'l L. 903.

[16] Jonathan I. Charney, "The Impact on the International Legal System of the Growth of International Courts and Tribunals" (1999) 31 N.Y.U.J. Int'l L. & Pol. 697 at 700.

from a given situation which would be pertinent to a wholly different regime; (2) assuming the truth of (1), that such concerns can then be easily integrated into the problematic situation, as formulated in the language of the first regime; and (3) assuming the truth of both (1) and (2), that the regime being taken account of will tend to be satisfied with the results thus obtained, and that the process will tend toward general agreement operating on Darwinian principles, where 'the best ideas' are accepted as such by all those involved.

It is not self-evident that such assumptions are correct. And in fact, these assumptions have not quelled the anxieties surrounding fragmentation – as recently as the spring of 2006, the President of the ICJ again placed the concerns of fragmentation at the forefront of problems confronting the international legal community.[17] Yet any technical solution, seeking simply to coordinate existing structures, is bound to operate upon these non self-evident assumptions – assuming, at the very least, that one regime is capable of understanding and formulating the concerns of another, as well as of resolving the two sets of concerns in a manner acceptable to both. As will be further discussed in Part II, these assumptions are not necessarily warranted. Solutions built upon them may thus ultimately lack validity.

Part of the anxieties aroused by the proliferation of international regimes may stem from the lack of a consistent usage of the notion of a self-contained regime. In the *Tehran Hostages* case, the ICJ calls 'rules of diplomatic law' a 'self-contained regime' because they lay down obligations, foresee transgressions, and identify means of addressing them.[18] But as has already been mentioned, the term has also been used in a narrower sense – referring solely to a set of secondary rules, without the requirement of its own special primary obligations – as well as in a much wider sense – referring to entire branches of international law, consisting not only of rules, but also of special institutions, complete with their own administrative procedures and decision-making tribunals.

Furthermore, as early as 1985, Bruno Simma, in an article entitled 'Self-Contained Regimes', pointed to the ambiguity involved in

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[17] Higgins, *supra* note 12.

[18] *Tehran Hostages*, *supra* note 4.

addressing that aspect of an international regime which may be said to be 'self-contained'.[19] For, on the one hand, such regimes are distinguishable from one another precisely because they may be said to operate as the *lex specialis* applicable in separate legal situations; and yet, on the other hand, each such *lex specialis* acquires its legal character from the *lex generalis* of general international law, and in this sense bears a relation to other regimes that cannot be said to fall under the rubric of 'self-contained'. This ambiguity is explored in greater detail in the Report of the International Law Commission on the Fragmentation of International Law, completed in the summer of 2006.[20] In other words, there does not appear to be a full grasp on the phenomenon that the term 'self-contained regime' is meant to describe.

The following two sub-sections, addressed to the notions of regime and systemic self-containedness respectively, will analyze a helpful and under-explored approach to conceiving international specialized legal regimes as formalizations of unique and self-perpetuating modes of reasoning. In sub-section B, an understanding of the concept of regime derived from political science literature and from the International Law Commission's Fragmentation Study Group's report serves to highlight important aspects of international legal regimes, whereby those acting within particular regime frameworks may be seen to at least partially commit themselves to a particular logic of argumentation, derived from a particular world-view. Sub-section C analyzes the concept of systemic self-containedness from the perspective of autopoietic systems theory, emphasizing the nature of international specialized legal regimes as normatively-closed self-perpetuating communicative systems. Sub-section D then addresses the epiphenomenon of structural bias that results from the combination of these characteristics. The resultant understanding of the nature of international legal self-contained regimes provides a useful refocusing for approaching an understanding of what is at stake in a potential normative clash between them, discussed in Part II.

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[19] Simma, *supra* note 2 at 111.

[20] See ILC Report, *supra* note 6.

B. The Regime

One influential definition of 'international regime' was given by Stephen Krasner in 1982[21]:

> implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.[22]

It is striking that, while the definition speaks of 'beliefs', 'standards', 'prescriptions/proscriptions for action', and 'prevailing practices', it never mentions a legal code, treaty, or judicial decision. In fact, no mention is made of any source of legal authority. Instead, the core of the definition resides in the convergence of the 'actors' expectations' about a specific area of international relations, whether these are explicit or implicit. Such a perspective appears to suggest a broader connotation of the regime concept, more akin to a separate culture than a mere list of primary and secondary rules. Hence Kratochwil and Ruggie conceive the 'international regime' as 'principled and shared understandings of desirable and acceptable forms of social behaviour.'[23] Elaborating this definition, Hasenclever, Mayer, and Rittberger maintain that international regimes 'embody shared social knowledge, and they have both a *regulative* and a *constitutive*

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[21] For one recent discussion linking the legal discourse of 'self-contained regimes' to the political science discourse of Regime Theory generally, and Krasner's definition of regime in particular, see Math Noortmann, *Enforcing International Law: From Self-Help to Self-Contained Regimes*, (Burlington, VT: Ashgate, 2005). Noortmann argues that the concept of '"self-contained regimes" . . . [is] an interdisciplinary concept, which carries both dominant political and legal features.' *Ibid*. at 133-134.

[22] Stephen D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," in Krasner (ed.), *International Regimes* (Ithaca: Cornell University Press, 1983) at 2.

[23] Friedrich Kratochwil and John Gerard Ruggie, "International Organization: A State of the Art on an Art of the State" (1986) 40 Int'l Org 764.

dimension. On the one hand, they operate as imperatives requiring states to behave in accordance with certain principles, norms, and rules; on the other hand, they help create a common social world by fixing the meaning of behaviour.'[24] Similarly, Neufeld describes such regimes as a 'web of meaning' making sense of state action in particular issue-areas and manifesting links between otherwise disjoint courses of action.[25]

These early political science definitions of 'international regime' suggest a concept much broader than the legal conception of 'regime' as a set of treaties and institutions. Here the notion of a multiplicity of 'international regimes' is seen as an array of social cultures surrounding certain sets of issues whose various rules of etiquette are not necessarily restricted to those explicitly set out by multilateral treaties. The rules governing State conduct with respect to the issues pertinent to a given regime are envisaged rather as holistic modes of reasoning about specific situations, creating a 'common social world' by weaving a 'web of meaning'.

In 2006, the Report of the Study Group of the International Law Commission took it one step even further, suggesting that the special regimes which are constituted by entire branches of international law:

> may even be said to express different social rationalities: a clash between them would appear as a clash of rationalities--for example, environmental rationality against trade rationality, human rights rationality against the rationality of diplomatic intercourse. Thus described, fragmentation of international law would articulate a rather fundamental aspect of globalized social reality itself – the replacement of territoriality as the principle of social differentiation by (non-territorial) functionality.[26]

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[24] Hasenclever, Mayer, and Rittberger, *Theories of International Regimes* (Cambridge: Cambridge University Press, 1997) at 163.

[25] Mark Neufeld, "Interpretation and the 'Science' of International Relations" (1993) 19 Review of International Studies 43. Please note: Neufeld seems to refer to a "web of meaning" in terms of individual interaction, rather than state action.

[26] ILC Report, *supra* note 6 at 71. See also Koskenniemi & Leino, *supra* note 13; Fischer-Lescano & Teubner, *supra* note 14.

A 'common social world' may be conceived in a way which allows for its self-understanding to be bounded – that is, it may be capable of conceiving the limits of its own applicability as well as the potential applicability of other 'social worlds' in other areas of interest. By contrast, a 'social rationality' refers to something that can only conceive itself to possess a realm of applicability in all areas of social interaction. A social rationality is, after all, that which tasks itself with rationalizing the social as a whole.

What emerges is an understanding of the special regime as a particular way of reasoning the relationship between the elements of society. No longer is it seen as a set of institutions embodying the response of humanity to the conflicts of a specific issue-area: operating as a social rationality, the regime does not hold views about a bounded issue, it holds views about the *world*.[27]

Fragmentation of international law thus points to the following transition: the international legal arena has ceased to harbour solely a spectrum of *national* identities, and has instead (and/or additionally) become a stage for the interaction of a spectrum of identities based on a given *world-view*.[28] From within a human rights regime, for example, *all* international political issues invoke the applicability of its legal regime, because for such a regime the world is conceptualized at the most fundamental level in terms of the rights of human beings. It embodies a hierarchy of norms whereby those norms protecting individuals rights are given preference. In the dialectic of human rights, it is definitionally more important to evaluate a given situation on the basis of its effect on the exercise of such rights. All other potentially relevant considerations serve, at most, as secondary values. Thus actors within this regime structurally commit themselves to conceptualizing issues of global conflict in terms of, first and

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[27] For a discussion of the processes of social world-creation through shared rationalities, see Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality* ((New York: Doubleday, 1966). For a detailed example of the effect of varying vocabularies of expertise on world re-construction – discussing how a 'human rights' vocabulary was used to reconstruct the previously 'economic' world-view of Europe – see Martti Koskennimi, "The Effect of Rights on Political Culture," in Philip Alston (ed.), *The EU and Human Rights* (Oxford University Press, 1999).

[28] See also Martti Koskenniemi, "The Fate of Public International Law: Between Technique & Politics" (2007) 70 Modern L. Rev. 1.

foremost, the potential impact they may have on the pervasive application of the regime's primary norm – the protection of human rights.

Similarly, from the perspective of international environmental law, *all* international political issues invoke the applicability of *its* legal regime. This is so because, for an environmental rationality, the most fundamental concern of society is the maintenance of a safe and habitable ecosystem. Given the inevitable effect that human interaction has upon the environment, all international legal and political issues may be seen to potentially implicate the international environmental regime. The regime is committed to a world-view and method of structuring normative hierarchies so as to preference a description of global conflict that respects its particular method for balancing global values. This reasoning may continue: all political international interactions may be seen to have implications for trade relations, for Europe, and so on.

This understanding suggests a view of special regimes as hegemonic forces seeking identification of their specific rationalities with the structure of the international political world as a whole.[29] Conflicts between the various special regimes become the 'expression of the fundamental conflicts between organizational principles of social systems.'[30]

C. Self-Containedness

It has been pointed out that the use of the term 'self-contained' in reference to the regimes presently at issue is inappropriate.[31] Firstly, no regime is really self-contained. General international law penetrates regimes by providing a normative background which comes into play when the special regime lacks primary or secondary rules appropriate to the situation, or else when the special regime fails to properly operate.[32] No legal regime is isolated from general

[29] See Koskenniemi & Leino, *supra* note 13.

[30] Fischer-Lescano & Teubner, *supra* note 14 at 1024.

[31] See Simma, *supra* note 2.

[32] See ILC Report, *supra*, note 6 at 100; Simma & Pulkowski, *supra* note 2.

international law. It is doubtful whether such isolation is even possible – a regime can receive (or fail to receive) legally binding force ('validity') only by reference to valid and binding rules or principles *outside it*.[33]

Nevertheless, there is a different sense in which these special regimes, as social rationalities, may indeed be said to be 'self-contained' – that is, in so far as they are self-perpetuating. The institutions and tribunals of regimes are set up in order to administer the continued application of their specific rules and principles. Born of the rationality embodied in a given regime's particular hierarchies of norms and values, its implementation bodies deal with issues formulated on the basis of that rationality. Their judgments are made with the aim of perpetuating the values expressed in their methods of reasoning. In this way, regimes perpetuate themselves.

To understand the depth of the problem, it is helpful to have recourse to an examination of autopoietic systems theory.[34] Social rationalities are communicative self-perpetuating systems. Like all such systems, their evolutionary success depends upon 'introducing the difference between system and environment into the system – a "re-entry of the form into the form."'[35] This distinction is effected through the simultaneous closedness and openness of the system: 'the system is *normatively* closed and *cognitively* open at the same time.'[36] That is, the system is open to learning new facts (*did* this happen?), while closed to accepting them as new norms (*should* this have happened?). The system perpetuates the distinction between itself and the surrounding environment through an internal distinction between facts and norms. 'Norms, then, are purely internal creations serving

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[33] ILC Report, *ibid*.

[34] An autopoietic system is one that "produces and reproduces its own elements by the interaction of its elements." See Gunther Teubner, "Introduction to Autopoietic Law," in Gunther Teubner, ed., Autopoietic Law, A New Approach to Law and Society (Berlin: Walter de Gruyter & Co., 1987) 1 at 3.

[35] Niklas Luhmann, "Operational Closure and Structural Coupling: The Differentiation of the Legal System" (1992) 13 Cardozo Law Review 1419, 1423 [Operational Closure], citing George S. Brown, *Laws of Form*, (New York: Dutton, 1979) at 56-57, 69-76. See also Niklas Luhmann, *Law as a Social System*, trans. Klaus A. Ziegert (Oxford University Press: 2004).

[36] Operational Closure, *ibid*. at 1427.

the self-generated needs of the system for decisional criteria without any corresponding "similar" items in its environment.'[37] A given system's normative framework provides the operational closure essential to the system's continued existence.

The contrast between facts and norms nevertheless remains strictly internal to the system: 'The distinction of normative and cognitive expectations, and this holds true for any distinction, has to be *made* . . . It cannot be found in the natural or created world. It is not a "categorical" property of the world. . . Facts are constructions, statements about the world. . .'[38]

Thus, although the system remains cognitively open, it remains constrained in the manner in which the 'facts' of its environment are formulated. In the process of dynamic evolution, the systems may 'look for occasions, irritations [surprises, unpredictabilities], opportunities in their environment. But even the classification as occasion, irritation, opportunity . . . is an internal classification and not something which exists independently of the system in its environment'[39]

As a result of this process of fact formation, the 'facts' of one cognitive system will often be radically different from the 'facts' of another. Thus, just as 'careful sociological investigations show that scientific facts and facts which serve as components of legal or political-administrative decision making differ in remarkable ways,'[40] so too the 'facts' of the international health regime may dramatically differ from the 'facts' of say, international trade law. Consider the recent debates surrounding genetically modified foods, also known as 'biotech products.' After the European Communities (EC) applied a moratorium on the approval of such products, the United States, Canada, and Argentina brought the matter to the Dispute Settlement Body of the World Trade Organization (WTO), arguing that the EC

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[37] *Ibid*. at 1428.

[38] *Ibid*. at 1429.

[39] *Ibid*. at 1427, n. 24.

[40] *Ibid*. at 1430, citing Smith, Roger, and Wynne, Brian (eds.), *Expert Evidence: Interpreting Science in the Law* (London: Routledge Chapman & Hall 1989).

action was an unlawful restriction of their imported food products.[41] The WTO Panel found that, because the EC's scientific committee had itself already assessed the risks of biotech products and had found no conclusive evidence of a threat to human health, such products were in fact safe, and a moratorium on their admission into the territories – pending further investigation – was unwarranted on grounds of health or safety.[42] Thus the trade mentality: any product not scientifically proven to be unsafe for the human organism is 'healthy' and must be allowed free movement. The World Health Organization, on the other hand, took a broader view of conceiving the health of the individual, taking into account social, cultural, and ethical considerations in addition those of the hard sciences.[43] Thus, whereas the mentality of international trade law saw the fact of safety as an inevitable conclusion stemming from a lack of conclusive scientific evidence that biotech products pose a threat to the human organism, the mentality of the international health regime did not see the 'fact' of its inevitability, and indeed saw the situation as being merely in its early stages of investigation.

It is in this sense, as a direct consequence of the systemic nature of the special regimes, that they may indeed be said to be 'self-contained'. Even during the course of a given regime rationality's interaction, conversation, or evolution within its environment, the distinctions demarcating the possibilities of such engagements remain eternally internal to the (albeit dynamic and evolving) system. However willing an international environmental regime may be to take into account certain factors of trade, for example, the fundamental issues will always remain, for it, environmental. Thereby its world is contained.

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[41] *European Communitie – Measures Affecting the Approval and Marketing of Biotech Products*, (2003) WT/DS291/1.

[42] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products—Reports of the Panel*, (2006) WT/DS291/R, WT/DS292/R, WT/DS293/R..

[43] See "Current GM foods can bring benefits but safety assessments must continue" 23 June 2005 WHO News Release, online: WHO <http://www.who.int/mediacentre/news/releases/2005/pr29/en/index.html>.

D. Structural Bias[44]

This systemic reproduction of facts and norms according to a precommitted ethic also constitutes and motivates international legal institutions:

> In contrast to the courts of developed Nation-States that guarantee legal unity, globally dispersed courts, tribunals, arbitration panels and alternative dispute resolution bodies are so closely coupled, both in terms of organization and self-perception, with their own specialized regimes in the legal periphery that they necessarily contribute to a global legal fragmentation. These conflicts are a result of the 'polycontexturalization' of law. They are created by the different internal environments of the legal system, which, for their part, are dependent upon multiple paradigms of social ordering.[45]

International special regimes institutionalize themselves through the establishment of various tribunals, alternative dispute resolution and administrative bodies. These are in turn peopled with decision-makers, operating in their decision-making capacity on the basis of certain reasoned principles. The guiding rationality behind this decision-making process is none other than that of regime-specific hierarchies regarding global norms and values, and the particular structure of systematic reasoning that is necessary in order to maintain consistently these internal hierarchies. At bottom, the institution that is the office of a given intra-regime decision-maker exists, in self-perception and material effect, to perpetuate the values and the unique balance of interests reflected in the special mode of reasoning particular to that regime.

In virtue of this situation, it is inevitable that these decision-making bodies 'are so closely coupled, both in terms of organization and self-perception, with their own specialized regimes in the legal

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[44] See Martti Koskenniemi, *From Apology to Utopia* (New York: Cambridge University, 2005) at 600-15.

[45] Fischer-Lescano & Teubner, *supra* note 14 at 1014.

periphery that they necessarily contribute to a global legal fragmentation.'[46] Different reasoning yields different conclusions. And dispersed international regime-specific decision-making bodies, operating on the basis of distinct value-systems and unique systematic approaches to harmonizing diverse interests, are thus likely to arrive at multiple, and sometimes incompatible, resulting outcomes.

Take, for example, the *Beef Hormones* case,[47] where the WTO's Appellate Body (AB) upheld the Panel's conclusion that the European Communities (EC) could not justify a restriction on United States and Canadian beef made with hormones on the basis of the precautionary principle with respect to the potentially grave and irreversible consequences that such hormones may threaten for human health. The Panel found, and the AB upheld that, irrespective of the EC's understanding of it, the principle was given a WTO-specific meaning in article 5.7 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). This WTO-specific meaning makes the principle subordinate to articles 5.1 and 5.2 of the SPS Agreement, [48] which the AB analyzes to require sufficient scientific proof of a sufficiently specific threat posed by the enterprises at stake.[49] This hierarchy in the structure of the SPS agreement reflects the hierarchy of norms of the WTO regime, and is itself reflected in the regime's distribution of the burden of proof: although the precautionary principle appears in some translation in SPS article 5.7, the burden of proof, as reflected in the superiority of articles 5.1 and 5.2, is on the party seeking to avoid the risk to show sufficient scientific evidence that the risk exists, in order to justify application of the principle. Although in this specific case the EC argued for the precautionary principle as a customary rule of international law, one can easily see how its role changes in the context of a different regime's

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[46] *Ibid*.

[47] *EC Measures Concerning Meet and Meet Products* [Hormones], (1998) WT/DS26/AB/R, WT/DS48/AB/R, online: WTO <http://www.wto.org/english/tratop_e/dispu_e/hormab.pdf>.

[48] *Ibid*., recital 125.

[49] See *ibid*. at 178-209. Compare especially 199-201, 207, and fn. 182 (describing the existence of some level of risk) with 200, 201, 205, 208-209 (finding insufficient data on the specifics of the threat, and so presuming insufficient risk to restrict trade).

normative hierarchy. Thus, for example, Principle 15 of the Rio Declaration on Environment and Development (1992), applying the precautionary principle, is not subordinate to scientific proof of the existence of risk but rather to the potential seriousness or irreversibility of the risk, and the Wingspread Consensus Statement on the Precautionary Principle, for example, has interpreted the principle to place the burden of proof on the party taking the risk to show that the risk is not sufficiently grave.[50] This difference in the distribution of the burden of proof, and the subsequent effect this has on the controversy's outcome, reflects the bias inherent in the normative hierarchies particular to the structures of different regimes toward certain norms over others.

This structural bias unavoidably guides the decisions of special regime decision-making bodies. It is precisely in virtue of its firm hold upon the minds of these decision-makers that certain mainstream solutions to the anxieties aroused by the fragmentation of international law are likely to be illusory. For example, Joost Pauwelyn concludes,

> [B]efore a particular court or tribunal, it is important to include *all* international law binding between the parties as part of the *applicable law*, even if the *jurisdiction* of the adjudicator is limited to a given treaty (say, WTO covered agreements). If all courts and tribunals follow this approach, it would mean that, although they may have *jurisdiction* to examine different claims, in so doing they would apply *the same law*. Hence, in theory, no conflict should arise.[51]

Thus, the argument goes, the emerging fragmentation of international law may be made whole by appealing to the diverse special regimes to continuously take account of one another in the process of their decision-making. If State A and State B, both simultaneously being party to both a multilateral environmental treaty (forming part of the constellation of the international environmental regime) and a multilateral trade treaty (and thereby participating in the international

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[50] See Report by the Science and Environmental Health Network, online: <http://www.sehn.org/wing.html>.

[51] Pauwelyn, *supra* note 15.

trade regime), appear before a decision-making body of one of these regimes, that decision-making body is implored to consider, as part of the applicable law between the parties, the implications arising from the parties' involvement in the other regime, and the resulting outcomes of these various regime decision-making bodies will be consistent.

However, a theory under which 'no conflict should arise' if all courts and tribunals take account of all the regimes to which the parties before them may be subject neglects to take into account the phenomenon of structural bias. The international trade regime decision-making body may well attempt to consider the effect of the international environmental regime's involvement upon the situation before it. But, as is amply exemplified by the *Beef Hormones* case, it will inevitably do so strictly based on the principles and modes of reasoning of a rationality specific to the regime of which it forms a part. Were the same case, between the same parties, ever to end up in front of a decision-making body of the *other* regime(s), the divergent reasoning inherent in the very essence of the otherness of that regime will in all likelihood, despite having considered the 'applicable law' of the first regime's involvement, render a decision that will not neatly fit the framework established by the first regime's conclusion, thereby continuing to contribute to the fragmentation of international law. This was noted by the International Tribunal for the Law of the Sea, set up under the United Nations Convention on the Law of the Sea (UNCLOS,) in its discussion of the *MOX Plant* case, a controversy regarding the operation of the MOX Plant nuclear facility at Sellafield, United Kingdom, which was also brought before the Tribunal under the Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), as well as the European Court of Justice under the European Community (EC) and Eurotom Treaties: owing to 'differences in the respective context, object and purposes, subsequent practice of parties and *travaux preparatoires*'[52] of the different regimes involved, the UNCLOS arbitral tribunal concluded that 'even if the OSPAR Convention, the EC Treaty and the

[52] *MOX Plant* case, *Request for Provisional Measures Order* (*Ireland* v *the United Kingdom*) (3 December 2001) International Tribunal for the Law of the Sea (2005) 126 ILR vol. 273-74, at [51].

Euratom treaty contain rights or obligations similar to or identical with the rights set out in [the UNCLOS], the rights and obligations under these agreements have a separate existence from those under [the UNCLOS].'[53]

This same reasoning is recognized in the report of the International Law Commission Study Group on the topic of Fragmentation of International Law:

> It is true that by now, WTO Dispute Settlement organs have used international customary law and general principles very widely to interpret WTO treaties. Few lawyers would persist to hold the WTO covered treaties, whatever their nature, as fully closed to public international law. The question remains, however, that trade rationality may occasionally – perhaps often – be at odds with the rationality of protecting the sovereign and that when a choice has to be made, the general objectives and 'principles' of trade law - however that is understood – will seem more plausible to trade institutions and experts than traditional interpretive techniques.[54]

Naturally, 'the general objectives and 'principles' of trade law . . . will seem more plausible to trade institutions and experts', for it is these objectives and principles which flow from the very structure on which these institutions, and the reasoning of experts operating within them, are based. Such seduction by the overpowering plausibility of the reasoning inherent in the structure of one's own regime is the experience of structural bias.

III. Incommensurability: Inter-Regime Conflict

To sharpen the analysis of regime-conflict, consider the analysis of what Jean-Francois Lyotard calls the *differend*.[55] As Lyotard defines the term, '[A] case of differend between two parties takes place when the "regulation" of the conflict that opposes them is done in the idiom

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[53] *Ibid*., 273 at [50].

[54] ILC Report, *supra*, note 6, at 71-2.

[55] Jean-Francois Lyotard, *The Differend* (Minneapolis: University of Minnesota Press, 1988) Originally published as Le Differend (Les Editions de Minuit, 1983).

of one of the parties while the wrong suffered by the other is not signified in that idiom.'[56]

When a matter of concern to the international environmental regime appears before the regulating bodies of the WTO, the structural bias of these bodies will inevitably formulate the situation in the language – the facts and norms – of its system. But the issues formulated by the international environmental regime are, as we have seen, a part of the 'self-contained' production of its own, different, facts and norms. The original environmental issue is thereby 'regulated' in an idiom in which its complete sense, in particular its sense under competing regimes, cannot be signified.

We have already seen how a special regime may be 'self-contained' through the perpetual reproduction of a unique set of facts and norms relating to the world at large. That which links a given set of such facts and norms internally – the particular world view embodied in the regime's foundational understanding of rational social organization – is, ultimately, a specific teleology. The aim of each regime is to perpetuate *its* rationality of the fundamentals of social ordering, and to effect *its* applicability (if not total primacy) in every area. Thus, the international human rights regime aims for a world in which issues of human rights, *as formulated by the international human rights regime*,[57] arise at all junctures where humans are affected by the rights of others. So too, the international environmental regime aims for a world where environmental issues, as formulated by the international environmental regime, are given proper consideration (as well as their deserved priority) in every instance where the acts of human interaction affect the environment. The same may be said for each international special regime appearing as a particular social rationality. In a world as interconnected as ours, large-scale international human interaction will generally implicate certain issues within each of these regimes – whether it be human rights, the environment, trade, the EU, or even space – and each in

[56] *Ibid*. at para. 12.

[57] This concern may be manifested by, for example, the fact that the international human rights regime does not present the International Law Commission with difficult human rights issues for their 'resolution' through codification or progressive development. The regime prefers, instead, to apply its own expertise to these difficulties.

turn seeks to be the one who gets to formulate these issues, and that these issues attain their proper priority.

Lyotard dubs this coupling of teleology with a rationality of coupling phrases (which may be seen as the embodiment of various facts and norms) *genres of discourse*.[58] For Lyotard, genres of discourse determine the way in which phrases may be linked together to form description, thoughts and projects. 'The stakes bound up with a genre of discourse determine the linkings between phrases,'[59] such that, 'a genre of discourse imprints a unique finality onto a multiplicity of heterogeneous phrases by linkings that aim to procure the success proper to that genre.'[60] It is precisely this 'unique finality' that makes for the irreconcilably different idioms of two or more regimes in conflict:

> There are stakes tied to genres of discourse. When these stakes are attained, we talk about success. There is conflict, therefore. The conflict, though, is not between humans or between any other entities; rather, these result from phrases. . . . No matter what its regimen, every phrase is in principle what is at stake in a differend between genres of discourse. This differend proceeds from the question, which accompanies any phrase, of how to link onto it. And this question proceeds from the nothingness that 'separates' one phrase from the 'following.' . . . This 'nothingness' is ... what opens up the possibility of finalities proper to the genres.[61]

Different social rationalities arise from the openness – the 'nothingness' – of the potentiality for social organization. Precisely because there is no determined law that this rather than that form of social reaction follow from a particular state of affairs, different ways of rationalizing the world, and human interaction within it, arise. And due also to this absence of necessity, conflicts over the manner of rational construction inevitably come into play. But, as Lyotard also

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[58] Lyotard, *supra* note 55.

[59] *Ibid*. at para. 148.

[60] *Ibid*. at para. 180.

[61] *Ibid*. at para. 188.

points out, in the 'absence of a universal genre of discourse to regulate them (or, if you prefer, the inevitable partiality of the judge),'[62] the various rationalities cannot pursue a mutually satisfying resolution.

The wrong done from the point of view of one regime is not signified in the idiom of the other because the two rationalities are untranslatable into one another. This follows, again, from the specificity of the *world* created by each separate rationality.

> A genre of discourse exerts a seduction upon a phrase universe. It inclines the instances presented by this phrase toward certain linkings, or at least it steers them away from other linkings which are not suitable with regard to the end pursued by this genre. It is not the addressee who is seduced by the addressor. The addressor, the referent, and the sense are no less subject than the addressee to the seduction exerted by what is at play in a genre of discourse.[63]

Thus, properly understood, a teleological 'self-contained' rationality, functioning as a genre of discourse, effects a complete encompassing of the entire world for those operating within its idiom. It is not the case that the addressor of one idiom is seducing, by means of persuasion in a common language, the addressee of a wholly different idiom. Rather, in the eyes of this addressor, the concepts being used, and that which is being talked about, are all formulated entirely differently than if one were to venture into the eyes of the addressee from the other idiom. Such is the power of this teleological seduction, that 'genres are incommensurable, each has its own "interests",'[64] each is a world unto itself, and unlike any other:

> whether child, diplomat, subordinate, or superior, the author of the image does not link up the same way with the original phrase as with its 'transcription.' For them, the analogy of 'sense' between the two phrases is not only the analogy between the abstract concepts to which they can be reduced, but it should also extend to the universes

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[62] *Ibid*. at xii.

[63] *Ibid*. at para. 148.

[64] *Ibid*. at para. 231.

> which are presented by the two phrases and within which they are themselves situated. These universes are constituted by the way the instances (not only the sense, but also the referent, the addressor, and the addressee) are situated as well as by their interrelations. The addressor of an exclamative is not situated with regard to the sense in the same way as the addressor of a descriptive. The addressee of a command is not situated with regard to the addressor and to the referent in the same way as the addressee of an invitation or of a bit of information is.[65]

Nevertheless, it may be objected, these special regimes are all part of the arena of general international law. They can and they certainly do communicate in *some* sort of a common language. After all, every international regime 'communicates' by using such terms as 'international law', '*erga omnes*', '*jus cogens*', and the like. This does not mean, however, that the same referent or meaning is invoked by all those involved.[66] The incommensurability of the various regimes may well be masked by common proper names – its proper name allows it to be pinpointed within a world of names, but not within a linking together of phrases coming from heterogeneous regimes and whose universes and the tensions exerted upon them are incommensurable with each other.

The incommensurability is not only masked in this way, but also goes completely unrecognized by the party in whose idiom the dispute is being 'regulated'. From its point of view, no problem exists. From its perspective, incommensurability is not an issue precisely because 'one speaks in [the other's] place, one reinterprets [the other's] theses, one makes [the other] presentable for dialogue.'[67] It is thus that the conflict is 'regulated,' thus that 'agreement' is reached. But the cost

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[65] *Ibid.* at para. 79.

[66] Personal observations of the work of the International Law Commission's Study Group on the topic of Fragmentation in International Law, for example, revealed profound differences in the meanings attributed by various international lawyers to the term '*erga omnes*'. ILC Report, *supra* note 6. On the issue of semantic indeterminacy in general, see e.g., H.L.A. Hart, *The Concept of Law* (Oxford University Press, 1961) at 126-28.

[67] Lyotard, *supra* note 55 at. 24.

of this 'resolution' is the victimization of one rationality to the idiom of the other – its reduction to silence. The bias of the judge will only hear a tongue in which its wrongs cannot be phrased. And so we have the *differend*:

> the case where the plaintiff is divested of the means to argue and becomes for that reason a victim. If the addressor, the addressee, and the sense of the testimony are neutralized [the witnesses silenced, the judges made deaf, and the testimony inconsistent (insane)], everything takes places as if there were no damages.[68]

And thus there is always a wrong and a victim in cases of inter-regime conflict. When the question is given to the tribunals or institutions of one regime, the rationality of the other is effectively silenced. The judge becomes the hegemon:

> [Humans] are situated in heterogeneous phrase regimes and are taken hold of by stakes tied to heterogeneous genres of discourse. The judgment which is passed over the nature of their social being can come into being only in accordance with one of these regimens, or at least in accordance with one of these genres of discourse. The tribunal thereby makes this regimes and/or this genre prevail over the others. By transcribing the heterogeneity of phrases, which is at play in the social and in the commentary on the social, the tribunal also necessarily wrongs the other regimes and/or genres.[69]

This is why no solution to inter-regime conflict may take place by letting the regimes 'talk it out' by taking stock of each others' issues. The incommensurability of these social rationalities leads not to compromise, but to the silence of one (or many) and to the complete victory of another. No matter how much international trade law attempts to conceive and take into account issues pertinent to the international environmental regime, for example, these issues will always be formulated in the world of the international trade regime so as to be unrecognizable to the regime which engendered them. If the

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[68] *Ibid.* at para. 12.

[69] *Ibid.* at para. 196.

tribunals of a given regime assert a wider jurisdiction than another over issues pertinent to both, then the rationality of one will inevitably be silenced by the hegemony exerted by the other. This is, as we have seen, the problem of the differend resulting from structural bias. Escape from victimization lies solely in finding the means to lift the silences effected by its presence: 'To give the differend its due is to institute new addressees, new addressors, new significations, and new referents in order for the wrong to find an expression and for the plaintiff to cease being a victim. This requires new rules for the formation and linking of phrases.'[70]

The freedom to do so lies in the openness that allows, and indeed beckons, for a multiplicity of rationalities and ways of structuring and restructuring the social. Thus, '[Human beings] are summoned by language, not to augment to their profit the quantity of information communicable through existing idioms, but to recognize that what remains to be phrased exceeds what they can presently phrase, and that they must be allowed to institute idioms which do not yet exist.'[71]

Pointing to structural bias is useful not only to re-conceptualize inter-regime conflict, but also to respond to institutions better suited for the re-conceptualization: 'to *institute* idioms which do not yet exist.' This is precisely the work of politics: 'it is the multiplicity of genres, the diversity of ends, and par excellence the question of linkage.'[72]

> What politics is about and what distinguishes various kinds of politics is the genre of discourse, or the stakes, whereby differends are formulated as litigations and find their 'regulation.' Whatever genre this is, from the sole fact that it excludes other genres, ... it leaves a 'residue' of differends that are not regulated and cannot be regulated within an idiom, a residue from whence the civil war of 'language' can always return, and indeed does return.[73]

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[70] *Ibid*. at para. 21.

[71] *Ibid*. at para. 23.

[72] *Ibid*. at para. 190.

[73] *Ibid*. at para. 201.

In this way, the recognition of the problem of structural bias may be seen as a call to political freedom: freedom from the hegemony of one social rationality over another (or others), and freedom to recreate the language and the institutions upon whose stages the conflicts among different modes of social ordering take place. 'The "people",' Lyotard proclaims, 'is not the sovereign, it is the defender of the differend against the sovereign.'[74]

IV. Rethinking Statehood

A. Introduction

Thus far, I have attempted to draw attention to the essentially extra-legal decisions that are being made when the norms of one regime are evaluated with respect to those of another in the absence of a politically pre-negotiated normative relationship. In doing so, I have noted the lack of political legitimacy and accountability in creating a hierarchy between incommensurable legal norms. Saturated with its own teleology and reasoning, the institutional structure of any particular international legal regime will fail to phrase issues pertinent to a different regime as the latter would have. The incommensurability of regime dialectics, and the impossibility of articulating the concerns of one regime in the forums of another, inevitably lead to the potentially undesirable situation where, by redefining the values of an opposing regime in its own terms, the regime with the widest jurisdiction constrains the modes of reasoning available to the global public. In a world where every forum is already conquered, what is needed is an un-prefigured and flexible space from which one may engage with the forces of functional rationalities on grounds more open to the simultaneous presence of multiple idioms.

In an effort to pursue one potentially fruitful avenue for the re-politicization of discourse regarding the normative clash at the heart of genuine regime conflict, I argue for a re-conceptualization of the state that will allow for the creation of a multiplicity of spaces. Within these spaces, the competition of different international regime normative hierarchies may receive, if nothing else, a less biased expression.

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[74] *Ibid*. at para. 208.

Subsection B argues that the fragmentation of international law along the functional lines of distinct teleological reasoning is not sign of the demise of the state as a needed sphere of public organization, but rather, paralleling numerous other efforts to increase the democratic legitimacy of global decision-making, is a call to renew its usefulness.

The state is already a concept that resonates with the notion of emptiness and a lack of functional rationality. It exists, in its own self-perception, primarily to serve the public space. Indeed from its birth as a political formation out of the feudal order, the self-understanding of the state, as originally embodied in its king, was that of a public space independent of individual teleologically-oriented estates, serving the public precisely through its lack of a given pre-determination.[75] This historicity suggests that the concept of the state can be a potentially ideal candidate for a modernizing re-conceptualization that will help alleviate some of the tensions presented by the fragmentation of international law. In this section, I propose a new conception of the state based on the idea of the state as an empty signifier – that is, the state as a public space disentrenched from the permanence of specific teleological commitments. Refocusing on the idea of the state and its agents, both domestically and abroad, may result in a more inclusive and more politically accountable environment for the production and application of international law.

B. Fragmentation and the Need to Rebuild the State

As argued above, one way of thinking about the fragmentation of international law is to emphasize the threat to the political freedom of global society – the freedom to negotiate different normative hierarchies – posed by appointing structurally-biased special regime decision-makers as the ultimate authority over the conflicting norms of incommensurable regimes. Delegating such normative decision-making in the final instance to the special regimes constrains, through the phenomenon of structural bias, the lines of argument available for reasoning the stakes of inter-regime conflict. The idioms of dominant

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[75] See e.g. the idea of the State as a civitas, in contrast to a purposeful enterprise, in Michael Oakeshott, On Human Conduct (Oxford: Clarendon Press, 1975). See also Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton: Princeton University Press, 1997).

regimes silence that which is lost in translation, leaving important issues and norms off the table.

A potentially serious threat from this system is that dominant regimes will naturalize themselves to the exclusion of all others. Interests unrepresented by any particular interest-balancing scheme may come to be regarded as illegitimate or insane.[76] As Ernesto Laclau and Chantal Mouffe point out, when dealing with political struggle, '[W]e are dealing with discourses which seek, through their categories, to dominate the social as a *totality*.'[77]

One way to combat the threat of this freedom-constraining and potentially dangerous naturalization is to preserve the multiplicity of spaces for public decision-making. As Laclau and Mouffe state: 'The multiplication of political spaces and the preventing of the concentration of power in one point are . . . the preconditions of every truly democratic transformation of society. . . . This requires the autonomization of the spheres of struggle and the multiplication of political spaces . . ..'[78]

However, as will be explored in the following sub-section, the state already exists as a concrete manifestation of the ever-present possibility for change. If the state is viewed as an empty signifier, it is always subject to internal hegemonic struggle and revolution. Hence, a multiplicity of states may facilitate the autonomization of diversified spheres of struggle. Thus, as put by Roberto Mangabeira Unger, 'those whose hopes depend upon our further emancipation from false necessity cannot bypass the state; they must rebuild it.'[79]

C. The State As Empty Signifier

Inseparably linked to the role of the state as protector against hegemonic naturalization of particular idioms and interests to the exclusion of others is the concept of the state as an empty signifier.

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[76] See e.g., Michel Foucault, "Power/Knowledge", in S. Seidman (ed.), *The Postmodern Turn: New Perspectives on Social Theory* (Cambridge University Press, 1977) at 29–45.

[77] Ernesto Laclau and Chantal Mouffe, *Hegemony & Socialist Strategy: Towards a Radical Democratic Politics*, (London: Verso, 1985) at 182-183.

[78] *Ibid*. at 178.

[79] Roberto Mangabeira Unger, *False Necessity* (London:Verso, 2004) at 312.

The notion of *empty signifier*, as used, for example, by Ernesto Laclau,[80] signifies a concept without specificity of content, inseparable from its concrete manifestations. Laclau gives the example of the concept of 'order':

> 'Order' as such has no content, because it only exists in the various forms in which it is actually realized, but in a situation of radical disorder 'order' is present as that which is absent; it becomes an empty signifier, as the signifier of that absence. In this sense, various political forces can compete in their efforts to present their particular objectives as those which carry out the filling of that lack.[81]

The same may be said for the concept of the state. Already it, too, exists only 'in the various forms in which it is actually realized' – one knows nothing of the state in the abstract, but rather knows only *particular* states. When describing a state in detail, one will always be forced to clarify which state is being described. Further, in the experience of statelessness, the state, like 'order' during chaos, 'is present as that which is absent.' When the state falls, as during revolution, the concept of the state continues to hover as an ever-present lack throughout its populace. It is this concept – the state – that signifies such absence, and, having done so, it engenders a political maelstrom in the battle to fill it.

Clearly, it would be improper to assume that a situation of utter statelessness is required for such an experience of absence. As Laclau describes, 'If democracy is possible, it is because the universal has no necessary body and no necessary content; different groups, instead, compete between themselves to temporarily give to their particularisms a function of universal representation.'[82]

So, while there may well be a state in the particular expression given to the term by some, this very term will signify that which is so obviously absent in the philosophies of others. The 'universal representation' of any given state, therefore, in any of its myriad

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[80] Ernesto Laclau, *Emancipations* (London: Verso 1996).

[81] *Ibid*. at 44.

[82] *Ibid*. at 35.

specific incarnations, will always be temporary, always facing competition. Recall: 'the universal has no necessary body and no necessary content;' the state is an empty signifier. In its abstract emptiness, no final content, apart from that of endless cycles of particulars, awaits discovery, and its particular expressions may never hope to pass beyond the status of the hegemon:

> [I]f that impossible object – the system – cannot be represented but needs, however, to show itself within the field of representation, the means of that representation will be constitutively inadequate. Only the particulars are such means. As a result the systematicity of the system, the moment of its impossible totalization, will be symbolized by particulars which contingently assume such a representative function. This means, first, that the particularity of the particular is subverted by this function of representing the universal, but second, that a certain particular, by making its own particularity the signifying body of a universal representation, comes to occupy – within the system of differences as a whole – a hegemonic role.[83]

Precisely owing to the openness of that which falls within the rubric of the empty signifier, its any given content, in so far as it professes to portray *the* content proper to the form, will always be a subject to re-evaluation. The one propounds to signify the many, and exerts upon them hegemonic force. So long as minds are free and politics makes space for change, the ever-present lack of the residual differends assures that any given content will always be impermanent.

As a result, the structure of the state remains inevitably never 'fully reconciled with itself, ... it is inhabited by an original lack . . . .'[84] Its implication, then, is the existence of 'a radical undecidability that needs to be constantly superseded by acts of decision.'[85] This is, in Lyotard's language, 'the nothingness that "separates" one phrase from

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[83] *Ibid*. at 53.

[84] *Ibid*. at 92.

[85] *Ibid*.

the "following".'[86] It is this 'nothingness' – this 'radical undecidability' at the heart of all empty signifiers (whether 'state' or 'law' or 'order') – that permits the identification of a particular reasoning with the representation of rationality per se. Yet it is nonetheless this same 'nothingness' that allows for the creation of spaces within which the hegemony may fall prey to contest. 'As society changes over time this process of identification is no longer automatic, different projects or wills will try to hegemonize the empty signifiers of the absent community. The recognition of the constitutive nature of this gap and its political institutionalization is the starting point of modern democracy.'[87]

The empty signifier of the state is thus a perfect stage for the conception of a space for something like political freedom – a space signified through the political institutionalization of 'the constitutive nature of [the] gap' between the given and what follows.

D. Aims Toward a Negative Structural Bias

It is not enough to point to the concept of the state as empty signifier. The current understanding of states is often in terms of static and purely nationalistic interests. There is no desire to simply trade in the structural bias inherent in current fragmentation for a nationalistic bias in favour of a particular group of nationals. Hence, a reconceptualization of the State itself and its democratic institutions is necessary. As Laclau maintains, '[a] democratic society is not one in which the "best" content dominates unchallenged but, rather, one in which nothing is definitely acquired and there is always the possibility of challenge.'[88] A reconceptualization of the modern democratic state can perhaps provide a sphere of articulation more suitable to the political resolution of global normative conflict than its counterpart in the institutions of regimes.

Of course, every structure will effect a certain bias – no truly innocent spaces can arise. Yet, spheres may be conceived that tend toward what can be termed a bias toward disentrenchment. By

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[86] Lyotard, *supra* note 55 at para 188.

[87] Laclau, *supra* note 80 at 46.

[88] Laclau, *supra* note 80 at 100.

manifesting a commitment not to posited functional teleologies, but rather to the negative space within which new modes of description and normative ordering may arise, the democratic institutions can come to minimize their bias toward specific substantive directions. Such institutions would thereby allow for a less constrained debate and decision-making procedure. Conceived in this way, they may be said to maximize the effect of a *negative* structural bias – an acknowledgment of the empty gap between the universal and the specific order seeking to depict it. In this way, we can conceive of the democratic process as one where institutions and procedures serve not to restrict but to facilitate competition among various idioms and methods for both describing and evaluating the priorities and values of the social order.

Unger sees the potential for a similar 'negative capability' in a society that empowers 'through disentrenchment.'[89] That is, a society that allows for the constant rethinking of its structures and values before these are so entrenched in routine that their particularism becomes inseparable from the empty universal. Through a commitment to disentrenchment, democratic structures can single out the ultimate falsehood of all that is professed as absolutely necessary, and thereby free its people from the constraints of any permanently absolute system.

By building structures favourable to the emergence, expression, and competition between new and different idioms, the empty signifier of the state may be a space in which contending normative systems face each other in as near to fair a context as possible. The terms of the conflict's outcome would have no set and predetermined character. Such context may, as Lyotard puts it, thus 'save the honour of thinking' for the policy decision-maker.[90]

Conceived in this way, the state is an appropriate forum in which to vest the ultimate legitimacy for resolving global normative conflict from different international special regimes. As political spaces committed to disentrenchment and the ever-present potential for renewed political struggle over the modes of social ordering, states

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[89] *Ibid*. at 249.

[90] Lyotard, *supra* note 55 at xii.

are more legitimate spaces for balancing global interests than the structurally biased institutions of conflicting regimes.

Of course, there are times when the expertise of a special regime's decision-making body is legitimate, such as when interpreting the application of its legal regime to a conflict between interests that fall within the scope of those addressed in the balance of interests constitutive of the forum regime's normative structure. However, owing to the nature of international regimes as not only rules, norms, and principles, but also particular descriptive dialectics for formulating the content of global issues, the regime's decision-making bodies may be structurally prevented from recognizing the involvement of interests not implicated in the negotiation of their regimes' interest-balancing schemes.

In deciding these types of issues, it is important to remember that what is at stake is a hegemonic struggle for the (ultimately temporary) content of the structural relationship between various global normative systems in particular situations, not the reflexive protectionist and purely nationalistic perspective so often characteristic of modern state negotiations. In a globally integrated world fragmented along functional lines of different teleologies for describing and ordering global values, what is needed is not only a shift in the internal self-perception of the state ideal, but also a shift in the self-perception of the state itself, represented by its agents on numerous global stages vis-à-vis the global community. The following section describes how the shift in the self-perception of the state toward a space for political struggle with respect to global norm hierarchies can lead to the development of a body of customary international law that responds to a more inclusive international community.

V. Towards a Philosophy of International Law in an Era of Fragmentation

A. Introduction

One way in which a re-conceptualization of the state as a genuinely open public space can effect a shift in thinking about international law in an era of fragmentation is through its effect on the concept of state

sovereignty. To witness the impact that such a re-conceptualization may have, it is helpful to recast the discussion of hegemonic struggle for the content of the empty signifier (section III C above). There are important implications for instituting a commitment to the empty signifier – implications for the relationship between the freedom of the individual within the state and the sovereignty of the state over the individual. Here a Hegelian conception of the freedom of an individual in relation to his state provides a useful parallel for launching the discussion from the re-conceptualization of the state on the basis of the empty signifier toward rethinking the nature of an international rule of law conducive to a more inclusive and more democratically legitimate international society.[91]

Using this framework, subsection B discusses the re-conceptualization of individual freedom attendant to restructuring the state on the basis of a commitment to the empty signifier, as well as the relation of individual freedom to the sovereignty of the state over its subjects. Subsection C expands upon this conception of sovereignty to address some of its implications to alleviate tensions produced by the anxieties of fragmentation.

B. The Freedom of the Individual and the Sovereignty of the State

A useful bridge from the discussion of the state as empty signifier to the impact that this theoretical move has on the understanding of state sovereignty may be found in the Hegelian notion 'that what we call "the state" is nothing other than a further aspect of our own self-determination.'[92] In this vein, Hegel proposes that '[t]he state is the actuality of concrete freedom.'[93] For Hegel, 'concrete freedom consists in this, that personal individuality and its particular interests not only achieve their complete development and gain explicit recognition for their right . . . but, for one thing, they also pass over of their own accord

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[91] As there appears to exist a modern tendency to cringe at the mention of Hegel, I must say that the use of one Hegelian concept does not entail an uncritical subscription to the whole complex of Hegelian thought.

[92] Shlomo Avineri, Hegel's Theory of the Modern State (London: Cambridge University Press, 1972) at 138.

[93] G.W.F. Hegel, *Philosophy of Right*, trans. T.M. Knox. (Oxford: University of Clarendon Press, 1942) at 160 [Hegel, *Philosophy of Right*].

into the interest of the universal, and, for another thing, they know and will the universal.'[94]

One is of course free to become oneself, to be counted as such, and achieve one's particular goals and interests. The Hegelian notion of freedom has, however, two subsequent layers of meaning, the freedom of individuality within a sea of individuals being but the beginning.

'[F]or one thing,' writes Hegel, the experience of 'concrete freedom' requires also that these individuals 'pass over of their own accord into the interest of the universal.' This is the moment at which, in the words of Laclau, '. . . a certain particular, by making its own particularity the signifying body of a universal representation, comes to occupy – within the system of differences as a whole – a hegemonic role,' such that 'the systematicity of the system, the moment of its impossible totalization, [is] symbolized by particulars which contingently assume such a representative function.'[95] The further step taken in the development of the concept of freedom is thus the recognition of the phenomenon of hegemonic struggle whereby certain particular interests may in effect surpass their individuality and (temporarily) occupy the interest of the universal.

'[A]nd, for another thing,' writes Hegel, in the experience of concrete freedom, 'personal individuality and its particular interests' must 'know and will the universal.' Therein lies the highest emancipation: for Hegel, the release of immortality. To illustrate the distinction, Hegel contrasts the civic involvement of citizens in the Greek polis with those of the subsequent Roman Empire. As Avineri explains,

> Under the [Roman] Empire, the readiness to work for the whole disappeared and the citizen became a private person, not recognizing anything transcending his particularity. If in the polis the citizen was ready to go to war for the commonwealth, under the Empire the only

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[94] *Ibid*.

[95] Laclau, *supra* note 80 at 53.

> thing he could defend would be his property, and for *this* no one was ready to sacrifice life and limb.[96]

When all one knows and wills is one's own private individuality and one's own private property, one is forever constrained by the mortality of one's own existence. Though the individual may develop such an individuality to its fullest, and though she may accumulate all her desired possessions, she will never attain a true freedom, for she will always be bound by her death. Such is the warning served by the example of the Roman Empire, where the mentality of life as the polis – an inter-connected whole of social existence – gave way to an atomization of the individual:

> [A]ctivity was no longer for the sake of a whole or an ideal. Either everyone worked for himself or else he was compelled to work for some other individual . . . All political freedom vanished also; the citizen's right gave him only a right to a security of that property which now filled his entire world. Death . . . must have become something terrifying, since nothing survived him.[97]

By contrast, the citizen of the Greek polis is seen in a state of emancipation from the oppression of man's fixation upon his own mortality: 'the republican's whole soul was in the republic; the republic survived him, and there hovered before his mind the thought of its immortality.'[98] Such is the last step taken by Hegel in his development of the concept of 'concrete freedom' that finds actuality within the political space of the state: the freedom not only to partake in hegemonic struggle to advance one's own individualistic interest, but also in order to expand beyond the bounds of individuality and to identify ones movements with the movements of the whole – it is the freedom, as Hegel puts it, to 'know and will the universal.'[99]

It is of course the second of these three freedoms that binds together the experience of freedom as an individual qua subjective

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[96] Avineri, *supra* note 92 at 25-6.

[97] G.W.F. Hegel, *Early Theological Writings*, trans. T. M. Knox, (Chicago: University of Chicago Press, 1948) at 157.

[98] *Ibid*.

[99] Hegel, *Philosophy of Right*, supra note 93 at 160.

particular (first tier), and that of the individual qua member of the universal (third tier). As previously discussed, it is precisely this type of freedom that allows for the particular subject to fill the gap of 'nothingness' between the given and the yet anticipated of social reality in his own particular way. Such filling will, as has already been mentioned, inevitably foster countless differends, which, in their quest to find expression, motivate unrepresented interests to redefine the 'nothingness' within this gap and so arrive at alternate modes of social ordering. It is this environment of hegemonic struggle that allows for the particular to vie for its expressions of the larger universal. And it is in this sense that leeway to engage in competition for this 'nothingness' presents the individual with opportunity to 'know and will the universal.' For, says Hegel, 'the eternal nothing is one's own. It, and all its movements, are the highest beauty and freedom.'[100]

It is also the three-fold freedom at the heart of hegemonic struggle that forms the source of its converse, the sovereignty of the state over its subjects, embodied in a democracy in the rule of law. For Hegel, the laws of the state are the specific embodiment of the freedoms actualized through its existence. They are the fruits of one's self-determination through the unhindered development of both self and state. Thus:

> [the laws] are not something alien to the subject. On the contrary, his spirit bears witness to them as to its own essence, the essence in which he has a feeling of his own self-hood, and in which he lives on in his own element which is not distinguished from himself. The subject is thus directly linked to the ethical order by a relation which is more like an identity than even the relation of faith or trust.[101]

Again, the subject attains her ultimate emancipation not only through the private enjoyment of exclusive title to a tangible set of objects, but also through her participation in the struggle to participate in the value-formation and – prioritization within her society. In the words

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[100] Hegel, *Schriften zur Politik und Rechtsphilosophie*, ed. G. Lasson. (Leipzig: Felix Meiner, 1913) at 469.

[101] Hegel, *Philosophy of Right*, *supra* note 93 at § 147.

of Aristotle, man is a political animal. His freedom lies in spheres of movement wider than the confines of his own corporal existence. Thus, when 'his spirit bears witness to [the laws] as to its own essence, the essence in which he has a feeling of his own self-hood,' the laws are not felt as a flight from politics, where the rule of law is conceived as an independent and objective realm.[102] Such a conception would have precisely the contrary effect of alienating the subject from his legal order. Rather, the 'essence' herein attested to – that 'feeling of his own self-hood' – is the manifestation of the subject's ultimate capacity for self-determination through his continuous movement within the political spaces made possible by the existence of the state. The subject extends herself into the socio-political realm. In this way, the laws that personfiy her presence and interaction on these substantive planes are but the extension of her wider, freer self. The rule of law embodies this realm, 'in which [the subject] lives on in his own element which is not distinguished from himself.'

The rule of law is thus not something logical or objective, to which one may bear 'the relation of faith or trust.' It is the gesture of the subject and the concrete outcome of his political struggle, and, as such, bears to him 'a relation which is more like an identity.'

In this way, the rule of law that is the sovereignty of the state over its subjects may be seen as the extension of the subject's self-determination into the realm of public existence. Thus Hegel writes, 'in the state, as something ethical, as the inter-penetration of the substantive and the particular, my obligation to what is substantive is at the same time the embodiment of my particular freedom.'[103]

By broadening herself into the public realm, the subject takes the whole into herself. No longer is she a mere part of that whole – in the sense of belonging to an aggregate of individuals – rather, the whole becomes a part of her, for she no longer simply knows and wills her own particular existence, but knows and wills the universal as well. This is the sense of identity from which the subject subsequently recognizes herself in the laws that are the concrete productions of

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[102] See Martti Koskenniemi, "The Politics of International Law" (1990) 1 Eur. J. Int L. 4 at 4-5.

[103] *Ibid*. at 161.

political interaction: the subject is 'directly linked to the ethical order' for she has, in achieving her liberation, taken this larger realm into herself; it is thus that she feels to it 'a relation which is more like an identity,' and thus that she finds in obligation to it to be 'the embodiment of [her] particular freedom.'

C. State Sovereignty and International Law

As Avineri points out, Hegel himself is 'adamant about the distinction between the nature of internal and international law.'[104] To explain, he provides the following distinction:

> While internal law is binding, under penalty of sanctions, and in case of infringement there exist both an objective criterion for judgment as well as an objective judge to administer it, international law is binding only insofar as the parties concerned are willing to abide by it. It is of the nature of a voluntary act, expressing the subjective wills of the parties involved, not of a binding, objective law. Hence international law remains always an 'ought'.[105]

The operative dissimilarity thus appears to be that internal law, on the one hand, has the character of 'a binding, objective law,' with 'an objective criterion for judgment as well as an objective judge,' whereas international law, on the other hand, has only a subjective character, in so far as it 'is binding only insofar as the parties concerned are willing to abide by it.'

However, given the above discussion of the Hegelian notion of internal rule of law as 'the essence in which [the subject] has a feeling of his self-hood,'[106] it seems more than a little strange that the same Hegel would now put such emphasis on the objectivity of internal law, in contrast to the subjectivity of the international. To maintain that '[t]he subject is ... directly linked to the ethical order by a relation which is more like an identity than even the relation of faith or trust,'[107]

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[104] Avineri, *supra* note 92 at 200.

[105] *Ibid*.

[106] Hegel, *Philosophy of* Right, supra note 93 at 106.

[107] *Ibid*.

appears to make the call for legal validity to find its basis in objective judgment and administration a moot point. To maintain the relation of identity of the particular to the legal order – stemming from the nature of the rule of law as 'the embodiment of my particular freedom' – requires, as discussed above, that a certain subjectivity be placed at the very core of the legal relation. As such, the rule of law is not diminished by being 'of the nature of a voluntary act, expressing the subjective wills of the parties involved.' It is, rather, fortified by the subjective sentiment of its existence as the manifestation of the concrete freedom of its subjects. The subject abides by the laws as the outcome of political struggle knowing the continuity of that struggle, and the ever-present possibility that his particular value-system may (temporarily) come to signify the collective social order.

In this way, the present discussion departs from Hegel's literal argument, though stays within the Hegelian theoretical framework. Though international law may indeed project a largely subjective character, the path of our previous discourse suggests that this need not be a hindrance to the nature of its legality. It is with this notion in mind that I will now venture to extend the re-conceptualization of state sovereignty and its embodiment in the rule of law, as defined above, to the international realm, in an effort to show how rethinking the role of the state in a democratic society may lead toward a useful rethinking of the role of international law in addressing conflicts between competing global normative systems.

When a participant in domestic government, at any level of involvement, partakes in the creation or application of governing laws, she acts, at some level of consciousness, on the basis and in furtherance of a particular understanding of the structural nature of her state. Similarly, when such participants interact, on behalf of their state, on various global stages with participants from other states, they do so on the basis and in furtherance of their understanding of the nature and interests of the states involved. In negotiating, renegotiating, and interacting with the various sources of international law, to the extent that these actors participate as agents and representatives of their states,[108] they are exercising a sovereignty that

[108] As already mentioned, this discussion is intended as a complement to the numerous other democracy-enhancing discussions currently under way in the re-conceptualization

derives from the internal sovereignty of the state over its constituents. If the state agent understands its state's internal sovereignty on the basis of a rule of law instituted to allow for the potential of open debate and rethinking with regard to prioritizing collective commitments, this understanding of sovereignty may translate into the agent's understanding and goals in exercising state sovereignty on an international plane. Hegemonic struggles at the domestic level inform the hegemonic struggles for the empty signifier of global coordination.

Because, as shown above, shifting the understanding of political freedom entails a shift in the relationship between the rule of law and its subject, approaching global normative conflict from the perspective of a democratic struggle attentive to the presence of a multitude of differends will similarly effect a shift in the relationship between state agents and the international rule of law. From this perspective, the interest of the state becomes an extension of its own political contestations over the content of its value systems and the indeterminacy of structuring a systematic hierarchy of global values.

The outcome of such global hegemonic normative battles in terms of the formation of a body of customary, general principle- or treaty-based international law with respect to the ranking of competing normative and legal systems in particular contexts will depend, as in the domestic context of the politically free state itself, on the persuasive force of a particular mode of structuring the values and interests at stake – that is, on the ability of the particular to succeed in representing the universal. The agents of the state engaged in the creation and/or application of international law, if democratically accountable through domestic state mechanisms, become place-holders for the particular in one sense and the universal in another. As agents of the state, they are accountable for upholding the outcomes of political struggle at home, and in that sense hold the place of the universal – the temporary winning constellation of the ordering of social values with respect to a particular context. But as agents of one state among many, and even perhaps still as representatives of one agency of the state among many, they are particulars negotiating to have their particular approach come to occupy, however briefly, the

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of international law. As a result, the role of non-state actors and their agents is left for future articles.

universal of the global order with respect to the hierarchical relationship, in a specific context, between competing legal systems embodying competing normative orders.

As in the case of the state reconceived on the basis of the empty signifier, the rule of law emergent from these global hegemonic struggles is the embodiment of the political freedom of its subjects. Similarly, the interest of the state bears an identity relation to the sources of international law that concretize international political interactions, as the realization of that part of itself which has surpassed its own territorial boundaries and entered the will of a larger entity. Thus, an international rule of law emerges as the manifestation of international political freedom.

However, as in the domestic context, owing to the non-necessity of any given particular mode of structuring the normative relationship, competing considerations will always remain, and so there will always remain countless differends. So, again as in the context of the state reconceived on the basis of the empty signifier, the approach to creating and applying sources of international law must be sensitive to the inclusion of different interests and descriptive dialectics in the negotiations surrounding the proper particular place-holder for the global empty signifier, and must be flexible enough to respect the disentrenchment of hegemonic outcomes. Such flexibility may reflect the self-perception of the state, on the basis of which and in furtherance of which its agents engage in political and legal interaction with one another, as a space for the protection of political freedom, and one conducive to rethinking the bases of normative relationships. Legal sources created and applied by agents of states oriented in this way may thereby manifest a more community oriented law-making process.

VI. Professional Sensibility

A potentially very effective way of shifting the self-conception of the state, both domestically and internationally, toward a more inclusive community is to attend to the education of its agents. No amount of structural coherence, no amount of technical safeguard can sustain a system geared toward teleological openness when its operators are not well-equipped to master it. As one method of facilitating a rethinking of international law so as to address the issues of democratic legitimacy

by the foregoing discussion, this section addresses some potential avenues for refocusing the training of the international lawyer.

First, it is important to note that developing a legal sphere whose structural bias lies in a negative direction – that is, whose institutions are geared *against* their own automatic entrenchment, thereby maintaining sufficient fluidity to accept re-description – does not mean creating a legal sphere in complete abstraction from the political and legal traditions of the state. Rather than placing the advisors, advocates and judges operating and maintaining such legal structures into a socio-political vacuum, the creation and sustenance of a system geared toward systemic openness requires instead that these legal professionals preserve a sensibility oriented toward the protection of the system's sensitivity to re-conceptualization and change.

Maintaining the negative structural bias of such a legal system thus requires its legal professional to serve in a certain role of statesmanship – the role of preserving the openness and freedom of the state.[109] Indeed, it has been noted that in this capacity – that of the guardianship of the statesman himself (and so too of his state) from the ensnaring passions of fleeting ideologies – the statesman finds the very heart of his vocation. As Max Weber observed in his 1918 speech entitled 'Politics as a Vocation',[110] the 'devotion of those who obey the purely personal "charisma" of the "leader",' and the legitimacy that thereby attaches to the 'leader's political acts – the defining characteristic of statesmanship, as the leadership of a state – is reserved for those who manifest the symptoms of a true political *calling*. '[T]he leader is personally recognized as the 'leader of men'. Men do not obey him by virtue of tradition or statute, but because they believe in him.'[111]

This calling, and above all this belief in the leader of men, is that which, alongside the 'traditional' and the 'legal' considerations,

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[109] For the similar suggestion that the effective lawyer should hold a mentality similar to that of the moral politician, see Martti Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization" (2007) 8 Theoretical Inquiries in Law 9.

[110] M. Weber, "Politics as a Vocation", reprinted in H.H. Gerth and C.W. Mills, From Max Weber: Essays in Sociology (Oxford: Oxford University Press, 1946) 77.

[111] *Ibid*. at 79.

legitimates the obedience and following of his fellow countrymen.[112] It is that which elevates the mere political dilettante to the role of the statesman, that which enables the formation and maintenance of states in the face of political anarchy. The calling thus lies at the heart of the statesman, and that which lies at the heart of this calling Weber characterizes as follows: 'The "strength" of a political "personality" means, in the first place, the possession of the ... qualities of passion, responsibility, and proportion.'[113]

'Passion' in the sense of '*matter-of-factness*, of passionate devotion to a "cause".'[114] 'Responsibility' in the sense of making 'responsibility to this cause the guiding star of action.'[115] And 'proportion' as that capacity which acts as the condition of possibility for the coexistence of both 'passion' and 'responsibility' within a single individual. For 'mere passion, however genuinely felt, is not enough. It does not make a politician, unless passion as devotion to a "cause" also makes responsibility to this cause the guiding star of action. *And for this, a sense of proportion is needed.*'[116]

Weber goes on to explain, however, that 'a sense of proportion' cannot, of itself, conclude the inquiry. 'For the problem is simply how can warm passion and a cool sense of proportion be forged together in one and the same soul?'[117]

And for this he provides a solution. At the heart of the true statesman – that which 'distinguishes the passionate politician and differentiates him from the "sterilely excited" and mere political dilettante'[118] – is the following requisite characteristic:

> This is the decisive psychological quality of the [true] politician: his ability to let realities work upon him with inner concentration and calmness. Hence his *distance* to

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[112] *Ibid*.

[113] *Ibid*. at 116.

[114] *Ibid*. at 115.

[115] *Ibid*.

[116] *Ibid*. (emphasis added).

[117] *Ibid*.

[118] *Ibid*.

> things and men. . . . [And] that firm taming of the soul, which distinguishes [the statesman from the dilettante], is possible only through habituation to detachment in every sense of the word.[119]

In this way, Weber has brought us home to the very idea with which we began. For the legal professional's adherence to a negative structural bias – her unending devotion to a sense of openness, and her consequent readiness and ability to redescribe each situation – mirrors Weber's perception of 'the decisive psychological quality' at the heart of the true, because legitimate and because effective, statesman. For that 'firm taming of the soul' that allows for the capacity 'to let realities work upon [oneself] with inner concentration and calmness' comes, as Weber puts it, from '*detachment*' – from the maintenance of a '*distance* to things and men'. It is precisely the ability to guard oneself from the specific biases of fashionable ideologies that provides the statesman with the space he needs to cultivate his 'inner concentration and calmness' – his definitive quality. This mentality is particularly crucial to the statesman concerned with safeguarding the freedom of the state itself. For here the 'cause' to which the statesman finds herself devoted – in the 'passionate devotion to a "cause"'[120] that elevates her actions to the realm of the political – is that of making space for the unanticipated, of allowing for the possibility of causes as of yet still unforeseen. Thus here especially the keeper of such open spaces must retain that 'inner concentration and calmness', that 'distance from things and men', and that 'firm taming of the soul' which guards oneself from falling prey to the hegemony of present particulars without regard to the perception of proportionality.

The requisite professional sensibility for a legal profession geared toward the building and maintenance of the types of open institutions argued for above is thus akin to that of the statesman championing the cause of the state as empty signifier. Because the legal sphere envisioned responds to the state's call to freedom, its lawyers must, just as its statesmen, remain the ever-watchful wardens of its flexibility. And since the lawyer is a trained professional, this

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[119] *Ibid*. at 115-16.

[120] *Ibid*. at 115.

principle must find expression in the course of her professional training. Thus, she must find in the course of her studies the means to attain that 'inner concentration and calmness' that will allow her to retain her distance from the eternal systemic closure of dominating paradigms. Like the detachment central to the calling of the statesman, she must find at the core of her legal training the distinction between, on the one hand, working in the service of a functional teleology and, on the other, 'let[ting] realities work upon [her] with inner concentration and calmness', guided by a sense of proportion.

This distinction may be found in, for example, Michael Oakeshott's idea of 'education in the true sense.'[121] Oakeshott distinguishes and distances his idea of a liberal education from 'a world of power and utility, of exploitation, of social and individual egoism, and of activity, whose meaning lies outside itself in some trivial result or achievement …'[122]

This is the world of functional teleology. One's movements, motivation, and reasoning within this world are explicitly guided by the pursuit of specific ends. To function in this world, one demands a particular world-view to map his course, a particular goal in furtherance of which to overpower, utilize, and to exploit. It is this end, this goal, this telos – 'some trivial [or even grand] result or achievement' – that structures this world, and actions have no meaning without reference to it. The description is a perfect parallel to what has already been ventured during the analysis of international regime-rationalities above – the functional world-views of teleologically-oriented regimes, structurally biased to act and to reason according to a particular schematic of prioritizing values. Of course, lawyers would cease to be competent professionals if they were to discontinue their training in these fields. Yet there is truth in Oakeshott's warning that an educator must be wary of placing too much emphasis – and not enough detachment – on this functional world, lest she find that 'instead of educating men and women [she] is training them exactly to

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[121] Michael Oakeshott, "The Idea of a University" in *The Voice of Liberal Learning* ed. by Timothy Fuller (New Haven: Yale University Press, 1989) at 95-104.

[122] *Ibid*. at 103.

fill some niche in society.'[123] Thus, in contrast to the type of education which provides mere 'qualification for earning a living or a certificate to let [the student] in on the exploitation of the world,'[124] Oakeshott proposes one which imparts on the student an 'understanding of the manners of conversation'[125]:

> The pursuit of learning is not a race in which the competitors jockey for the best place, it is not even an argument or a symposium; it is a conversation. And the peculiar virtue of a university (as a place of many studies) is to exhibit it in this character, each study appearing as a voice whose tone is neither tyrannous nor plangent, but humble and conversable.[126]

Such is the world of 'inner concentration and calmness',[127] imparted onto the student in 'a place of many studies' – studies engaged not in argument or competition, but rather in conversation. It is a world where the voices of these many studies do not pound upon one's heart with teleological argument – do not scream with a passionate fever to drown out their competitors – they are 'neither tyrannous nor plangent, but humble and conversable.' Here, as the interlocutor of multiple idioms, the student is shown precisely that position of distance and detachment from the passions of particular ideologies which is so crucial to the calling of the statesman, and so central to the maintenance of systemic openness.

Although Oakeshott focuses specifically on 'the peculiar virtue of a *university*', the key to the conversational character at the heart of this exercise is that it occurs within 'a place of many studies' – if indeed this virtue be 'peculiar' to the specific institutions of a university, the fact is contingent and easily rectifiable. For it is equally important for trained professionals seeking to safeguard legal and political spaces from hegemonizing rationalities to be able to retain their distance –

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[123] *Ibid*.

[124] *Ibid*. at 104.

[125] *Ibid*. at 99.

[126] *Ibid*. at 98.

[127] Weber, *supra* note 110 at 115-116.

their 'cool sense of proportion'[128] – from the bounded ideologies inherent in the structural biases of functional legal regimes. Only then may they truly guard 'the nothingness that "separates" one phrase from the "following".'[129]

In the legal world, the school of law is indeed 'a place of many studies'. The study of contract law will differ from the study of criminal law or property law, and so on. And in the study of *international* law, the student will encounter here as well the sound of many different voices – international human rights law, international trade law, international environmental law, international humanitarian law, European law, and the list goes on.. However while these voices may often be studied side-by-side one another, and while one often has the opportunity to learn to speak in the languages of these various disciplines, rarely is one taught, while learning them, to step outside of them, or to engage them in an open conversation with each other, in other words, to gage their impact on one another, and, further, to gage their impact on one's self. Education, in addition to functional training, should allow the student to distance herself from the argument inherent in the value-orientation of each particular voice, and to find herself as an interlocutor, where the pursuit of learning is no longer argument but conversation, 'each study appearing as a voice whose tone is neither tyrannous nor plangent, but humble and conversable.'[130] This is not to propose that the student may then piece together the 'best' parts of a political arrangement, the 'best' components of conceiving and structuring international values. This would be, as Oakeshott puts it, 'a corrupting enterprise and one of the surest ways of losing one's political balance.'[131] Rather, it is important that the lawyer, operating and maintaining spaces oriented toward safeguarding the open nature of the state, take great care to retain his

[128] *Ibid*.

[129] Lyotard, *supra* note 55 at. para 188.

[130] Oakeshott, "The Idea of the University", *supra* note 121 at 98.

[131] Michael Oakeshott, "Political Education" in *The Voice of Liberal Learning* ed. by Timothy Fuller (New Haven: Yale University Press: 1989) at 154.

own 'cool sense of proportion.'[132] As Socrates believed, one should attend to one's self that one may attend to the city-state itself.[133]

At the core of the state itself lies the emptiness of the empty signifier. It takes great care, and great responsibility, to see that it be filled – and re-filled, and re-filled again – consciously and deliberately. It takes a custodian of negative structural bias, and so it takes an education of the self, beyond mere 'training . . . to fill some niche in society.'[134] Having mastered the art of responsibility to oneself – and not to predetermined forces of coercion – one may then guide his state through its conscious encounters with threats of hegemony.

VII. Conclusion

In a globally integrated world, national borders no longer confine the diverse views that prioritize subjects of international law. Today, different perspectives are often less identifiable with specific states than with discrete branches of the law, each manifesting separate functional perceptions of what that law should take as its primary focus. What significance does such a shift hold for the international legal community? Many have argued that this shift poses a threat to the uniformity and coherence of general international law. Further, it is argued that this shift has created a given international law a too fragmented and inchoate existence, and that to recapture whatever sense of singularity that law may have at some point in the past attained, it is imperative that these regimes themselves be made to take account of one another, to understand one another, and to go about their respective decision-making processes in a way that places them within the scheme of one cohesive international legal system. This position has been the starting point of the present discussion that the

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[132] Weber, *supra* note 110 at 115-16.

[133] Plato, "Apology", in Benjamin Jowett (tr.), *Selected Dialogues of Plato* (New York: The Modern Library, 2000), at 313-314. Socrates argues that, because teaching citizens to attend to themselves also teaches them to attend to the city-state itself, he has indeed been providing 'a useful service to the city-state, more useful even than an athlete's victory at Olympia'. Appears also in Michel Foucault, "The Hermeneutic of the Subject," in Paul Rabinow (ed.), *Ethics: Subjectivity and Truth* (vol. 1) (The New Press of New York, 1997).

[134] Oakeshott, "The Idea of the University", *supra* note 121 at 103.

real possibility of such seemingly logical and straight-forward solutions has all too often been assumed without its due examination.

Upon further examination, the functional rationalities of distinct international regimes have shown themselves incommensurable. Worse than not taking account of one another at all, they formulate each others' problems in a language radically different and utterly unknown to the original. In speaking for the other, they reduce the each other to silence. In applying their regime to overpower values outside the scope of their pre-negotiated normative system, the decision-making bodies of special international legal regimes overstep the limits of their legitimacy, removing the choice of prioritizing global values from those whose lives will be affected by it.

It has been the aim of this article to show the necessary closedness of the teleologically-oriented, autopoietically structured systems of such regimes. The introduction of a more open-textured conception of statehood and the consequent rethinking of the nature of a more inclusive rule of law has been but the beginnings of a method aimed at recognizing the constraints imposed upon the powers of description by the very nature of such posited and functionally-oriented orders. For to lock oneself within a single self-proliferating scheme of structuring the world's priorities is to close oneself within a needlessly self-limiting world-view. So long as one speaks in the language of a single systemic perspective, one may never step out of oneself to see with the eyes of the other – to formulate thoughts in the words and formations of different regimes. This was the lesson of Lyotard's *differend*. How then must legal scholarship deal with this emergent multiplicity of closed and incommensurable systems of structuring global priorities? This article has suggested that preserving the dignity of one's liberty and limitless potentiality can only be done by approaching these systems from outside of the systems themselves – that by freeing oneself from the constraining power of any one particular language, by engaging oneself in the endless task of re-description, one may effectively break out of their autopoietic systemic closedness and wage the battle of discourse on a playing field less pre-determined by structural happenstance.

What follows from this point is only the beginning of an answer. To see the dangers of one's steadfast course, that is, to see the

threatening hegemony of international regimes that seek to meld the fragmentation of the legal world by 'taking account' of the other's perspective is but the first step mapping movement toward recourse. What follows after it is surely much more difficult. The above reflections have attempted to convey a sense of opportunity lurking in the apprehension of disharmony among the international regimes. They have witnessed the despair inflicted by the radical disparity of self-perpetuating modes of reasoning, and they have seen the hopes unveiled upon the quest for novel re-conceptualizations. They seek to be a launching pad for the rethinking of the international rule of law required to preserve democratic legitimacy in the age of fragmentation into self-contained regimes of international law disciplines.

These thoughts have sought to peer upon the pathways open to a thinker wielding hosts of empty signifiers. The hope remains only to have these closing lines deliver the sense of possibility inherent in the very notion giving rise to that well-placed unease with which our searching lines began. Such fears are but a call to freedom; such searching, but a path to gain.

The Domestic Legal Status of Customary International Law in the United States: Lessons from the Federal Courts' Experience with General Maritime Law

DAVID GINN*

Table of Contents

I. Introduction

The institutional dimension of state behaviour has received insufficient attention in the international law and international relations literature. Scholars typically assume that states are unitary actors driven by discrete motivations; for most states, however, national authority over foreign affairs is distributed across many different government bodies. In the United States, for example, authority over the interpretation,

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implementation, and enforcement of international treaties is shared by Congress,[1] the President,[2] the federal judiciary,[3] and various state institutions.[4] Commentators who ignore these internal arrangements may misunderstand some of the complex processes that determine state behaviour on the international plane.

A new generation of political scientists and international law scholars has taken this insight to heart. Casting aside explanations of national behaviour that assume a unitary state, these scholars have begun to explore the role of domestic institutions in foreign relations.[5] They have paid particularly close attention to the activities of courts, which are thought to 'create mechanisms for ensuring that a state abides by its international legal commitments whether or not particular government actors wish it to do so.'[6] Legislators and executive officers may also contribute to international legal compliance

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[1] See e.g., *Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, §* 506, 18 U.S.C. § 2340A (2000) (implementing the United States' obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment).

[2] See e.g., Memorandum from Jay S. Bybee to Alberto R. Gonzales, Counsel to the President, Re Status of Taliban Forces under Article 4 of the Third Geneva Convention of 1949 (7 Feb , 2002), online: <http://news.findlaw.com/hdocs/docs/torture/bybee20702mem.html> (interpreting the Geneva Convention Relative to the Treatment of Prisoners of War).

[3] See e.g., *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (interpreting the Vienna Convention on Consular Relations).

[4] See e.g., *Ex parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006) (considering the binding effect of a decision of the International Court of Justice).

[5] See Oona A. Hathaway, "*Hamdan v. Rumsfeld:* Domestic Enforcement of International Law", *in International Law Stories*, John Noyes et al., eds. (New York: Foundation Press, 2007) (describing the role of the Supreme Court in enforcing international legal norms in the war on terrorism); Oona A. Hathaway, "Between Power and Principle: An Integrated Theory of International Law" (2005) 72 U. Chi.. L. Rev. 469 at 499. [Hathaway, *Integrated Theory*] (arguing that international law 'creates a more strongly observed obligation in states in which the government is constrained by independent courts that allow extragovernmental actors to challenge state action'); Karen J. Alter, *Establishing the Supremacy of European Law: the Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001) (exploring the role of national courts in the development of the legal supremacy of the European Court of Justice over European Community member states).

[6] Hathaway, *Integrated Theory*, *supra* note 5 at 497.

by enforcing international legal norms against other government actors.

Building on this body of work, this article explores the significance of domestic institutions by focusing on the reception of customary international law (CIL)[7] into the domestic legal system of the United States. Because there are few international mechanisms for enforcing CIL against states, domestic enforcement of CIL is crucial to ensuring compliance. States that grant their domestic institutions significant enforcement authority will likely comply with CIL more consistently than states that withhold such authority.[8] The status of CIL in the United States legal system is thus of great importance: if CIL is binding domestic law, enforceable in domestic courts, then the United States will be more likely to comply with international legal norms; if CIL is not binding domestic law, the President and other government actors will enjoy greater discretion in deciding how to respond to international legal problems.

Despite the importance of this question, the domestic legal status of CIL is hotly contested. Until recently, it was widely assumed that CIL automatically operated of its own force as a type of federal common law[9] in United States courts. Professor Louis Henkin, for example, has written that customary international law 'is "self-executing" and is applied by courts in the United States without any need for it to be enacted or implemented by Congress.'[10] The *Restatement (Third) of the Foreign Relations Law of the United States* echoes this view: '[c]ustomary international law is considered to be like

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[7] Customary international law is a type of binding international law that arises out of the consistent practices of states, rather than by virtue of any formal legal instrument. See Part II.A.

[8] *Cf.* Eric Neumayer, "Do International Human Rights Treaties Improve Respect for Human Rights?" (2005) 49 J. Conflict Resol. 925 at 950 (finding a correlation between the strength of a country's democracy and its compliance with international human rights treaties).

[9] The term 'federal common law' refers to federal rules of decision that are not derived from the Constitution, statutes, or treaties of the United States. For more discussion, see Part II.D.

[10] Louis Henkin, "International Law as Law in the United States" (1984) 82 Mich. L. Rev. 1555 at 1561.

common law in the United States, but it is federal law'[11] which can 'supersed[e] inconsistent State law or policy.'[12] With few exceptions, the federal courts have adopted a similar stance.[13]

This view, which has been dubbed the 'modern position' by its detractors,[14] has more than just theoretical significance. Its adoption by the federal judiciary has permitted a flourishing of human rights litigation under the Alien Tort Statute, which grants the federal courts jurisdiction over actions by aliens for torts committed in violation of international law.[15] If, as the modern position holds, CIL is part of federal law, then claims based on CIL 'aris[e] under . . . the Laws of the United States'[16] for the purposes of Article III of the federal Constitution.[17] The constitutionality of the Alien Tort Statute's extension of the federal judicial power thus depends upon the correctness of the modern position. If the statute does not satisfy the terms of the Arising Under Clause, it may be unconstitutional as

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[11] *Restatement (Third) of the Foreign Relations Law of the United States* § 111 cmt. d (1987) [*Restatement*].

[12] *Ibid*. § 115 cmt. e.

[13] See e.g., *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

[14] Curtis A. Bradley & Jack L. Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position" (1997) 110 Harv. L. Rev. 815 at 816.

[15] See 28 U.S.C. § 1350 (2000).

[16] U.S. Const. art. III, § 2.

[17] Article III delimits the outer constitutional boundaries of the jurisdiction of the federal judiciary. Among other things, it extends the federal judicial power to 'all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.' *Ibid*. The Supreme Court has interpreted this provision broadly to permit federal jurisdiction over any case in which any of the aforementioned sources of law 'forms an ingredient of the original cause.' *Osborn v. Bank of the United States*, 22 U.S. 738, 823 (1824). In the case of CIL, the question is whether CIL is part of 'the Laws of the United States.' If it is not, then the federal courts may only exercise jurisdiction in cases based solely on CIL if the parties fit within one of the other heads of jurisdiction in Article III—for example, if the United States is a party or if one of the parties is a citizen of a state. See *supra* note 16.

applied to parties that do not fit within any of the other Article III heads of jurisdiction.[18]

In 1997, Professors Curtis Bradley and Jack Goldsmith challenged the modern understanding of CIL in a prominent article.[19] Arguing that the modern position was based on a flawed understanding of history and the proper powers of federal courts, these 'revisionists' claimed that CIL 'had the status of federal common law only in the relatively rare situations in which the Constitution or the political branches authorized courts to treat it as such.'[20] Underlying the revisionists' critique seems to be a fear that, if left with a free hand, federal courts will apply newly developed CIL human rights norms to invalidate state activity in a number of controversial areas. Thus, norms 'prohibit[ing] certain applications of the death penalty, restrictions on religious freedom, and discrimination based on sexual orientation'[21] might be used to impose supposedly liberal internationalist policies on the unwilling states.

This paper draws from the federal courts' experience with general maritime law to argue that both views are mistaken. General maritime law – that is, the body of legal traditions and customs collected and passed down by seafaring nations that American courts apply in admiralty cases – provides an interesting basis for comparison for several reasons. General maritime law and CIL share a common origin as two of the historical branches of the law of nations. Both bodies of law are customary in nature: they are comprised of legal norms that have developed over long periods of time through tradition, practice, and tacit agreement among nations. All nations are theoretically bound by the two bodies of law, and all nations

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[18] See *Filartiga v. Pena-Irala,* 630 F.2d 876 at 885–89 (2d Cir. 1980) (considering the constitutionality of the exercise of federal jurisdiction over a tort committed in a foreign country by a foreign national against another foreign national).

[19] See Bradley & Goldsmith, *supra* note 14. The Bradley & Goldsmith article was preceded by several lesser-known articles criticizing the modern position. See also Phillip R. Trimble, "A Revisionist View of Customary International Law" (1986) 33 UCLA L. Rev. 665; A.M. Weisburd, "State Courts, Federal Courts, and International Cases" (1995) 20 Yale J. Int'l L. 1.

[20] Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, "Customary International Law, and the Continuing Relevance of *Erie*" (2007) 120 Harv. L. Rev. 869 at 871.

[21] Bradley & Goldsmith, *supra* note 14 at 818.

theoretically have a role in developing and administering them. In addition, both general maritime law and CIL are thought to be incorporated into the American legal system as species of federal common law.

Moreover, there is a substantial corpus of American legal decisions dealing with general maritime law from which to draw lessons. The federal courts have had a number of significant and direct opportunities to consider the role of general maritime law in the US constitutional system. In contrast, because the federal courts have only has occasional opportunities to address the role of CIL, they have done so in an oblique and inconclusive manner. American admiralty decisions thus function as a large data set from which to draw tentative conclusions about the role of customary forms of law in the domestic legal system.

Drawing from this body of decisions, the paper identifies and criticizes two flawed predictions made by participants in the CIL debate. On the one side, modernists wrongly assume that denying the wholesale incorporation of CIL into domestic law will effect 'the near complete ouster of customary international law rules from federal judicial interpretation.'[22] On the other side, revisionists wrongly assume that permitting federal judges to incorporate CIL without clear statutory or constitutional authorization will cause the constitutional system to be unbalanced by '*unelected federal judges* apply[ing] customary law made by *the world community* at the expense of state prerogatives.'[23]

The federal courts' experience with the general maritime law demonstrates that neither of these scenarios is likely to come to pass. With respect to the modernists' worry that CIL will be ousted from the federal courts, admiralty provides a helpful comparison. The US Supreme Court (Supreme Court) has clearly stated on numerous occasions that the general maritime law is only part of federal law to the extent that it is incorporated by Congress, the President, or the judiciary – precisely what modernists fear. Nevertheless, US admiralty

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[22] Harold Hongju Koh, "Commentary, Is International Law Really State Law?" (1998) 111 Harv. L. Rev. 1824 at 1828.

[23] Bradley & Goldsmith, *supra* note 14 at 868.

law remains remarkably faithful to its international roots. As one text has said of comparisons between American and foreign admiralty law, 'In place of the radical incomprehensibility, to the common-law man, of the whole frame of reference of a French treatise on, say, Property, one finds oneself in a familiar world of one-to-one correspondence with the well-known.'[24] The general maritime law is alive and well in US law. This suggests that requiring affirmative incorporation by American institutions will not necessary relegate CIL to second-rate status.

On the other hand, the admiralty experience also demonstrates that the revisionists' fears of a CIL-based jurisprudence that concentrates power in the federal judiciary at the expense of federalism and separation of powers will not necessarily materialize. Belying the revisionists' suggestion[25] that allowing CIL to become federal law will necessarily mean that CIL will preempt inconsistent state law, support Article III 'arising under' jurisdiction,[26] bind the President under the Take Care Clause,[27] and so forth, the federal courts' approach to the general maritime law has been measured and context-sensitive. General maritime law exhibits 'federal' attributes in some circumstances – for example, for purposes of supremacy under Article VI – but lacks such attributes in others – for example, for purposes of statutory federal question jurisdiction. In each case, the courts have tailored the result to fit the particular textual, historical, and policy factors in play. This suggests that CIL need not possess all or even most of the typical attributes of federal law

The remainder of this article fleshes out this argument in three stages. Part II introduces and explains the ideas of CIL and federal common law. Particular attention is paid to the uncertain boundaries of the federal courts' power to make common law. Part II then reviews the CIL debate in more detail. After describing the various positions, it suggests that the major disagreements between modernists and

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[24] Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty*, 2d ed. (New York: The Foundation Press, 1975) at 46–47.

[25] See Bradley & Goldsmith, *supra* note 14 at 817.

[26] See *supra* note 16.

[27] See *ibid.* § 3.

revisionists can be expressed in four key questions: (1) How does CIL become part of US law? (2) If CIL is automatically part of US law, how much of CIL is part of US law? (3) What are the characteristics of CIL once it is part of US law? (4) If courts can incorporate CIL into US law, what circumstances permit them to do so?

Part III argues that the first, second, and third questions could be settled relatively easily. The issues these questions raise are not unique to CIL, and the CIL debate could benefit from a comparative look at the closely related issues that have arisen in the context of admiralty law. Part III asks how the federal courts have addressed each of the three questions in the context of general maritime law. The first two questions can be answered together: the general maritime law is only part of federal law to the extent that it is incorporated by Congress, the President, or the judiciary. The third question draws an interesting answer, described above: the general maritime law exhibits some, but not all, of the typical characteristics of federal law. The fourth question – under what circumstances may courts incorporate CIL into US law? – represents the truly difficult issue at the heart of the incorporation debates. As this article shows, this question remains unresolved in the context of general maritime law, which makes it difficult to draw any lessons for CIL.

Though Part III is comparative, its purpose is not to suggest that the federal courts should treat CIL in exactly the same way they treat general maritime law. There are factors unique to each body of law that counsel against such a wholesale transposition. At the same time, because CIL and the general maritime law are so similar, the federal courts' experience with the latter has clear relevance to the CIL debate.

Finally, Part IV draws two modest, but important, conclusions. First, it is possible for CIL to be treated as federal common law without either incorporating it wholesale or effectively banishing it from the federal courts. Second, if CIL is understood to be federal common law, it need not have all the same attributes as other types of federal common law or as federal statutes. It might even be possible for different CIL norms to be treated separately. Ultimately, the American experience with general maritime law demonstrates that federal courts can take a flexible approach to the incorporation of a foreign body of

norms into federal law. There is little reason to think that the federal courts' approach toward CIL would not be similarly flexible.

II. The Domestic Legal Status of Customary International Law

This Part provides background to the debate over the domestic legal status of CIL. First, for readers who may not have a background in international law, it describes the notion of CIL and how it relates to countries' domestic legal systems at the most general level. The key point is that countries are required under international law to comply with CIL norms, but international law leaves the details of compliance to the countries themselves. International law does not specify a particular role for CIL in a country's domestic legal system; the questions at issue in this paper must be resolved by reference to American law rather than international law.

The article then describes the debate between proponents of the modern position, who argue that CIL is 'part of our law,'[28] and revisionists, who claim that CIL is only federal law to the extent that it is incorporated into law by Congress or the President. The review is intended to give an overview of the issues involved.

Because CIL has traditionally been conceived of as a type of federal common law, the third section addresses the debate about the proper scope and nature of the federal courts' ability to make common law rules. As will be explained, there is significant uncertainty about the federal courts' power to make such rules, and, to the extent that the power exists at all, when the federal courts should exercise it.

After laying out these two debates, this Part attempts to clarify the points of disagreement by isolating four key questions that lie at the heart of the CIL debate. I argue that three of the four questions have been satisfactorily resolved with regard to general maritime law, and that there is no reason why they could not be similarly resolved in the context of CIL. As for the remaining question, I suggest that its resolution depends upon larger issues relating to the legitimacy and scope of federal common law. It should thus be engaged as part of the

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[28] *The Paquete Habana*, 175 U.S. 677 at 700 (1900).

broader federal common law debate rather than in isolation among foreign relations scholars.

A. Customary International Law

Customary international law was historically considered to be a branch of the law of nations. Blackstone described the law of nations as:

> a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance frequently occur between two or more independent states, and the individuals belonging to each.[29]

This system of rules, which emerged from tacit agreement and consistent practice, was traditionally divided into three parts: the law merchant, governing commercial matters; the law maritime, governing matters on the seas; and the law of states, governing the rights and duties of nations with respect to one another.[30] This latter branch, in a somewhat modified form, is what is now referred to as public international law.[31]

Under the modern system, public international law has three sources: treaties and other international agreements; 'general principles common to the main legal systems of the world'; and customary international law.[32] CIL, in turn, is defined as 'a general and consistent practice of states followed by them from a sense of legal obligation.'[33] A practice or custom must therefore satisfy two criteria for it to become a binding rule under international law. It must be

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[29] William Blackstone, 4 Commentaries *66.

[30] See Edwin § Dickinson,, "The Law of Nations as Part of the National Law of the United States" (1952) 101 U. Pa. L. Rev. 26 at 27.

[31] *Ibid*. at 29.

[32] *Supra* note 11 at § 102(1).

[33] *Ibid*. at § 102(2).

'general and consistent' and it must be 'followed . . . from a sense of legal obligation.'[34]

CIL norms, as with all sources of international law, are binding on nations, and nations are obligated to follow them.[35] Beyond that, however, 'how a [nation] accomplishes that result is not of concern to international law or to the state system.'[36] CIL norms bind the nation as a whole, not any particular institution or person.[37] The CIL debate is primarily about how the American constitutional system distributes the authority to enforce CIL obligations – in particular, whether and in what circumstances federal courts are authorized to enforce binding CIL norms.

B. The CIL Debate

As noted in the introduction, it used to be accepted wisdom among judges and scholars that CIL is incorporated as a whole into federal law. This 'modern position' finds strong support in a number of 19th and early 20th century US Supreme Court cases. In perhaps the most famous of these cases, the Court declared that '[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.'[38] This and other judicial statements led the drafters of the *Restatement (Third) of Foreign Relations Law* to conclude that '[c]ustomary international law is considered to be like common law in the United States, but it is federal law.'[39] Moreover, CIL, because it is federal law, 'supersedes inconsistent State law or policy.'[40] This position has more

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[34] This latter requirement is referred to as *opinio juris*.

[35] See Lori F. Damrosch et al., *International Law: Cases and Materials*, 4th ed. (St. Paul: West Group, 2001) at 159.

[36] *Ibid*. at 160–61.

[37] *Ibid*. at 159.

[38] *The Paquete Habana*, *supra* note 29 at 700. See also *The Nereide*, 13 U.S. 388 at 423 (1815) (Marshall, C.J.) ('Till [a relevant] act be passed, the Court is bound by the law of nations which is a part of the law of the land.').

[39] *Supra* note 11.

[40] *Ibid*. § 115 cmt. e.

than just theoretical significance. As explained in the introduction, its acceptance by the judiciary permitted a blossoming of international human rights litigation under the Alien Tort Statute.

The modern position was forcefully criticized in a 1997 article by Professors Curtis Bradley and Jack Goldsmith.[41] Professors Bradley and Goldsmith, advancing what has come to be known as the 'revisionist position', argue that the modern position rests on a fundamental misunderstanding of the domestic legal status of CIL in the 19th century and the changes that *Erie Railroad v. Tompkins*[42] wrought in the relations between federal and state courts. According to them, CIL as conceived by the pre-*Erie* courts was precisely the type of general common law that *Erie* did away with. In the post-*Erie* legal system, federal courts cannot apply CIL as a federal rule of decision without permission from some sort of positive authority – either the Constitution or a federal statute. Because neither the Constitution nor any federal statute authorizes a wholesale incorporation of CIL, federal courts can only apply CIL as a federal rule of decision to the extent that particular statutes or constitutional provisions authorize them to do so. If this means that 'CIL in some instances "[would not be] United States law at all!"'[43] the revisionists do not seem troubled.

A number of positions between the two extremes have emerged. Professor A.M. Weisburd has proposed treating CIL 'as neither state nor federal law, but rather as . . . international law . . . made . . . collectively by the world's nations and available to American courts in appropriate cases.'[44] Professor Weisburd would treat CIL as analogous to the law of a foreign country, and would avert to traditional choice of law principles to determine when it should be applied.[45] Professors Ernest Young and Alexander Aleinikoff have adopted a similar tack, arguing, respectively, that CIL should be treated as 'general law' and applied by federal courts according to somewhat

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[41] See Bradley & Goldsmith, *supra* note 14.

[42] 304 U.S. 64, 78 (1938) [*Erie*].

[43] Curtis A. Bradley & Jack L. Goldsmith, "Federal Courts and the Incorporation of International Law" (1998) 111 Harv. L. Rev. 2260 at 2260.

[44] Weisburd, *supra* note 19 at 49.

[45] See *ibid*.

modified choice of law principles[46] or as non-preemptive, non-federal law that can be used as a rule of decision in federal court but should be applied in all appropriate cases rather than according to the choice of law balancing approach.[47] Finally, Professor Michael Ramsey has argued that CIL has indeed been incorporated as 'the law of the land.'[48] However, he maintains that CIL does not fall within the text of the Supremacy Clause and so should be considered non-preemptive federal law.[49]

The Supreme Court itself has entered the fray, albeit in a cautious and ultimately inconclusive manner. In *Sosa v. Alvarez-Machain*, the Court considered, *inter alia*, whether the Alien Tort Statute authorizes federal courts to create a cause of action for violations of the CIL right against arbitrary detention.[50] Writing for the majority, Justice Souter recognized that the Statute was 'enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations ... .'[51] Nevertheless, because the norm against arbitrary detention was not 'so well defined as to support the creation of a federal remedy,'[52] the plaintiff's request for relief was denied.[53] The *Sosa* ruling meant, at a minimum, that certain statutes can be read to authorize federal courts to apply CIL as federal common law in certain circumstances,. Beyond that, less is clear. Some argue that *Sosa* confirms the modern position,[54] others claim that *Sosa* merely repudiated the revisionist

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[46] See Ernest A. Young, "Sorting Out the Debate over Customary International Law" (2002), 42 Va. J. Int'l L. 365 at 370.

[47] See T. Alexander Aleinikoff, "International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate" (2004) 98 Am. J. Int'l L. 91 at 97–98.

[48] See Michael D. Ramsey, "International Law as Non-Preemptive Federal Law" (2002) 42 Va. J. Int'l L. 555 at 557–58.

[49] See *ibid.* at 558.

[50] See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) [Sosa].

[51] *Ibid.* at 724.

[52] *Ibid.* at 738.

[53] See *ibid.*

position,[55] and still others maintain that *Sosa* rejected the modern position's view of CIL's domestic legal status.[56] *Sosa* thus leaves open key questions at the core of the CIL debate.

C. Federal Common Law

Some participants in the CIL debate argue that CIL should be understood as federal common law, but it is not always clear what is meant by this argument. Federal common law is notoriously hard to define.[57] For the purposes of this paper, the term 'federal common law' will be used broadly to mean '*any* federal rule of decision that is not mandated on the face of some authoritative federal text . . . .'[58] Note that this definition is wide enough to encompass some rules of decision that might also be understood to be the result of statutory or constitutional interpretation,[59] depending upon one's view of the limits of interpretation.[60]

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[54] See Ralph G. Steinhardt, "Laying One Bankrupt Critique to Rest: *Sosa v. Alvarez-Machain* and the Future of International Human Rights Litigation in U.S. Courts" (2004) 57 Vand. L. Rev. 2241 at 2259 ('Customary international law was and remains an area in which no affirmative legislative act is required to "authorize" its application in US courts.').

[55] See Harold Hongju Koh, "The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law" (2004) 12 Tulsa J. Comp. Int'l L. 1 at 12 ('I know of no court that has followed the Bradley/Goldsmith position, while all of the other circuits have gone the other way (and now the US Supreme Court has as well, in the *Alvarez-Machain* case).').

[56] See Bradley, Goldsmith & Moore, *supra* note 20 at 904 (*Sosa*'s 'approach to judicial incorporation of CIL is fatal to the modern position that all of CIL is federal common law').

[57] Compare Martha A. Field, "Sources of Law: The Scope of Federal Common Law" (1986) 99 Harv. L. Rev. 883 at 890 *with* Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System, 5th ed. (New York: Foundation Press, 2003) at 685 (federal common law means 'federal rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional commands').

[58] Thomas W. Merrill, "The Common Law Powers of Federal Courts" (1985) 52 U. Chi. L. Rev. 1 at 5.

[59] See *ibid.*

[60] For the purposes of this paper, it is better to adopting an overly broad definition rather than an overly narrow one. '[I]nterpretation shades into judicial lawmaking on a spectrum.' Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System*, 5th ed. (New York: Foundation Press, 2003) at 685. Whereas some

The source and scope of the federal courts' power to make common law is hotly contested. [61] Under the traditional account of federal common law, federal courts felt free throughout the 18th and 19th centuries to apply a body of 'general common law' that was neither state nor federal. This freedom, exemplified by the infamous decision *Swift v. Tyson*,[62] permitted federal courts to resolve disputes by rules of their choosing without preempting inconsistent state law. In 1938, however, the Supreme Court purported to banish the general common law from federal courts, holding in *Erie Railroad v. Tompkins*[63] that '[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.'[64] From that point onward, federal courts were theoretically supposed to ground the rules of decision applied in their cases in either an authoritative federal text or state law.

However, the post-*Erie* legal landscape did not submit neatly to the commands of *Erie*. As federal courts scholars like to point out, Justice Brandeis, the author of *Erie*, wrote an opinion the same day that *Erie* came down declaring that a dispute involving the

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theorists choose to define federal common law narrowly and explain the majority of federal courts' creative work as 'interpretation,' see e.g., Alfred Hill, "The Law-Making Power of the Federal Courts: Constitutional Preemption" (1967) 67 Colum. L. Rev. 1024 at 1026, the adoption of a broad definition has the virtue of forcing scholars to confront the wider implications of their theories. It is a bit too clever to gerrymander the definition of federal common law to fit one's preferred theory, while bracketing off a large amount of indistinguishable judicial work as a matter for scholars of 'interpretation' to consider on another occasion.

[61] Compare Field, *supra* note 57 at 887 ('the only limitation on courts' power to create federal common law is that the court must point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule') *and* Merrill, *supra* note 58 at 47 (arguing that federal common law is legitimate only to the extent that there is 'evidence, based again on the specific intentions of the draftsmen of an authoritative federal text, that lawmaking power with respect to this issue has been delegated to federal courts in a reasonably circumscribed manner') *with* Martin H. Redish, "Federal Common Law, Political Legitimacy, and the Interpretive Process: An 'Institutionalist' Perspective" (1989) 83 Nw. U. L. Rev. 761 at 766 ('all federal "common law" . . . constitutes an illegitimate judicial rejection' of the goals of the Rules of Decision Act).

[62] 41 U.S. 1 (1842).

[63] 304 U.S. 64, 78 (1938).

[64] *Ibid*. at 78.

apportionment of water between two states was governed by 'federal common law.'[65] This new breed of law was apparently federal in nature, at least to the extent that it could be used to support federal question jurisdiction.[66] Thus began the modern era of federal common law.[67] Federal courts under the new regime apply federal common law in cases where strong federal interests demand a federal rule of decision. As one commentator put it, 'Unto each Caesar, State or federal, is thus rendered that which properly belongs to that particular Caesar, supreme in its distinctive field.'[68]

Despite early optimism about the 'beautifully simple'[69] logic of the post-*Erie* paradigm, the Supreme Court has failed to develop a coherent or compelling approach to federal common law. Indeed, the Court has rarely even attempted to describe the underlying rationale for its federal common law jurisprudence, and, in those few cases where it has, the reasons it has offered give little guidance beyond stating that federal common law should control in 'essentially federal matters.'[70] As a consequence, the standards governing when federal courts may properly apply common law have become, as one

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[65] *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) [*Hinderlider*].

[66] See *ibid.*

[67] See Henry J. Friendly, "In Praise of Erie - And of the New Federal Common Law" (1964) 39 N.Y.U.L Rev. 383 at 405. ('The clarion yet careful pronouncement of *Erie*, "There is no federal general common law," opened the way for what, for want of a better term, we may call specialized federal common law.') (citation omitted).

[68] Armistead M. Dobie, "The Conflict of State and Federal Judicial Power," Lecture Delivered Before the Association of the Bar of the City of New York (26 Feb., 1941) (quoted in Friendly, *ibid.* at 407–08).

[69] Friendly, *supra* note 67 at 422.

[70] *United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947) [*Standard Oil Co.*]. *See also Tex. Indus. v. Radcliff Materials*, 451 U.S. 630, 640 (1981) (legitimate areas of federal common law 'fall into essentially two categories: those in which a federal rule of decision is "necessary to protect uniquely federal interests," and those in which Congress has given the courts the power to develop substantive law') (citations omitted); *Standard Oil Co.*, 332 U.S. at 307 (federal common law properly governs 'matters exclusively federal, because made so by constitutional or valid congressional command, or others so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings')

commentator somewhat generously put it, 'highly confused.'[71] Even the revisionists concede that the Court's federal common law decisions 'do not lend themselves to ready synthesis.'[72]

The closest the Supreme Court has come to announcing clear limits on the federal common lawmaking power has been the identification of several narrow 'enclaves' within which the federal courts may permissibly fashion common law rules:

> [A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.[73]

As commentators have pointed out, however, the enclaves approach is unsatisfying in several respects. First, it provides no reasoned explanation for why federal common lawmaking is permissible in these areas but not others. Because the federal courts' authority is based in substantial part on their ability to justify their decisions through careful exposition, they risk being perceived as illegitimate when they pass judgment without being able to explain the result. Second, it fails to account for more recent cases where the Supreme Court has applied federal common law outside of the established enclaves.[74] If the Court can add new categories whenever it

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[71] Field, *supra* note 57 at 927., Other commentators have been less generous. See e.g., Larry Kramer, "*The* Lawmaking Power of the Federal Courts" (1992) 12 Pace L. Rev. 263 at 27. ("the Court's decisions are inconsistent (to say the least)"); Louise Weinberg, "Federal Common Law" (1989) 83 Nw. U. L. Rev. 805 at 828 (the development of the federal common law after Erie 'became . . . a hopeless muddle').

[72] Bradley & Goldsmith, *supra* note 14 at 855.

[73] *Tex. Indus. v. Radcliff Materials*, 451 U.S. 630, 641 (1981) [*Tex. Indus.*]. *See also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964) (identifying several 'enclaves of federal judge-made law which bind the States'); Hill, *supra* note 60 at 1025 (identifying four areas where the Constitution preempts state law and allows federal common lawmaking).

[74] See e.g., *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 US 497 (2001). *See generally* Jay Tidmarsh & Brian J. Murray, "A Theory of Federal Common Law" (2006) 100 Nw. U.L. Rev. 585 at 593.

can muster the votes, the enclaves approach ceases to be a limit on common lawmaking power at all. Instead, it becomes simply a list of areas where the Court has previously made common law.[75]

In the absence of satisfactory guidance from the Supreme Court, the academy has busied itself crafting theories of federal common law of its own. At one end of the spectrum are theories that very closely circumscribe the power and discretion of the federal courts to fashion federal common law rules of decision. Professor Redish, for example, believes that all federal common lawmaking is illegitimate.[76] At the other end of the spectrum are theories that assert that the federal courts have very broad power to adopt common law rules. Thus Professors Martha Field believes that 'the only limitation on courts' power to create federal common law is that the court must point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule.'[77] Note, however, that even the most expansive theories of federal common law argue that the federal courts' broad power to make federal common law should be exercised rather sparingly.[78]

Most judges and commentators agree that federal courts can sometimes employ rules of decision that derive from neither federal enactments nor state law; however, as discussed, there is vast uncertainty surrounding the limits of this power. Because the propriety of federal common lawmaking is hotly debated, the traditional analogy between CIL and federal common law is not terribly useful. Even if everybody agreed that CIL is a type of federal common law, the agreement would resolve little about the extent to which CIL can or should be part of the domestic legal system. In order to overcome this persistent uncertainty, the following section frames the questions underlying the CIL debate in more specific terms.

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[75] *Cf.* Tidmarsh & Murray, *supra* note 74 ('A definition that simply adds new categories as time goes by is not a definition, but rather a list.').

[76] See Redish, *supra* note 61 at 766.

[77] Field, *supra* note 57 at 887.

[78] See *ibid.* at 950 (arguing that there is a 'presumption in favor of using state law' when federal courts decide whether to make common law).

D. Isolating the Important Questions

In an attempt to clarify the inquiry, this section isolates four questions that are at the core of the CIL controversy. Courts and commentators often frame their inquiry in terms of whether CIL is federal common law.[79] However, because of the unsettled boundaries and ambiguous status of federal common law, it is unhelpful to focus exclusively on this question. There are at least four distinct questions that underlie the CIL-as-federal-common-law inquiry: (1) How does CIL become part of US law? (2) If CIL is automatically part of US law, how much of CIL is part of US law? (3) What are the characteristics of CIL once it is part of US law? (4) If courts can incorporate CIL into US law, what circumstances permit them to do so? This section explains each of these questions in greater detail. By shifting the focus to these narrower underlying issues, commentators can clarify the inquiry and separate out their various points of agreement and disagreement.

First, and most obviously, proponents of the modern position and revisionists disagree about how CIL becomes part of US law. Is CIL a species of automatically self-executing US law? Can CIL only become US law through incorporation by valid legislative or executive enactment? In what circumstances can the judiciary properly incorporate CIL norms into US law? Are state institutions free to incorporate CIL into their law?

Second, if one assumes that CIL is automatically or necessarily part of US law, it is not clear *how much* of CIL is part of US law. Is all of CIL automatically part of US law? Or is only some subset of CIL – for example, *jus cogens* norms – automatically part of US law?

Third, regardless of how CIL becomes part of US law, it is not necessarily clear what effects and attributes it has once it is part of US law. Recent articles have suggested the possibility that CIL might be (or become) part of US law without sharing precisely the same characteristics as 'normal' federal law.[80] For instance, Professor Michael Ramsey argues that CIL is part of federal law for purposes of

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[79] See *Filartiga v. Pena-Irala*, *supra* note 18 at 885; *Restatement*, *supra* note 11; Bradley & Goldsmith, *supra* note 15 at 816.

[80] See Aleinikoff, *supra* note 47; Young, *supra* note 46; Ramsey, *supra* note 48; Weisburd, *supra* note 19 .

Article III jurisdiction but not for purposes of Article VI supremacy.[81] This raises a number of intriguing possibilities, which will be explored at length in the following Part. If CIL is (or can become) part of US law, is it federal law, 'general law,' or something else entirely? What characteristics does CIL have once it is part of US law? Does it provide a basis for federal 'arising under' jurisdiction? Is it considered the 'Supreme Law of the Land'? In what circumstances does it preempt inconsistent state law?

Finally, those who argue that courts can incorporate CIL into US law must grapple with the difficult question of what circumstances permit federal courts to do so. This question is very closely tied to the federal common law debate described above, and can be conceived in terms of two separate prongs of inquiry: when federal courts have the power to incorporate CIL and when they should exercise that power to incorporate CIL.[82] Are federal courts required to point to an authorizing enactment before incorporating CIL into US law? If so, how clear must the authorization be? Must courts wait for express textual authorization? Is congressional intent sufficient, and, if so, must the intent be specific or can it be more general? Can courts base their power to incorporate CIL on the general structure of the constitution and federal enactments? If courts have a broad power to deploy CIL in appropriate circumstances, what exactly constitute appropriate circumstances?

In the following part, I argue that the federal courts' experience with the general maritime law suggests that the first, second, and third questions can be settled fairly non-controversially. General maritime law, which is very similar to CIL in both origin and nature, has successfully dealt with these questions without unbalancing the constitutional system. The fourth question – when can federal courts incorporate CIL as federal common law? – is the true sticking point in the CIL debate. It is best understood as a close relation of the more general questions about federal common law: how much discretion do courts have to create federal common law and what principles should guide that discretion?

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[81] See Ramsey, *ibid.*

[82] *Cf. United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979) [*Kimbell Foods*].

III. The Domestic Legal Status of General Maritime Law

This Part explores possible answers to the four questions outlined in the preceding section by drawing from the federal courts' experience with admiralty law. Admiralty provides a uniquely helpful basis for comparison. By most accounts, it represents an entirely legitimate instance of federal common lawmaking.[83] At the same time, its history is intimately connected with foreign and international law, and its content draws heavily from international sources. The basis of American admiralty law is what is known as the general maritime law, a body derived from legal traditions and customs collected and passed down by seafaring nations over thousands of years. Both general maritime law and CIL were traditionally considered to be branches of the 'law of nations.'[84] Indeed, many prominent cases addressing the role of international law in the US legal system are admiralty cases.[85] Finally, there is a very large number of reported admiralty decisions from the federal courts, meaning that there is a significant amount of evidence regarding the status of general maritime law in the US legal system.

While these factors should not be taken to mean that the lessons of the federal courts' experience with admiralty can be directly applied to the CIL question, viewing the issues from the lens of admiralty will help to clarify the debate. A number of problems that are controversial with respect to CIL are quite settled with respect to admiralty. First, it is clear from admiralty that non-federal sources of law do not automatically become part of US law, no matter how distinguished their pedigree. The general maritime law is only part of US law to the extent that it has been recognized as such through an authoritative act by one of the branches of government. As a corollary to this, not all of the general maritime law is part of US law. Again, the three branches are free to choose not to adopt a given maritime rule. Finally, general maritime law does not behave like 'typical' federal law in many respects. The question of maritime law's characteristics is

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[83] See e.g., *Tex. Indus.*, *supra* note 73 at.

[84] See Dickinson, *supra* note 30 at 27 .

[85] See e.g., *The Paquete Habana*, *supra* note 29; *The Nereide*, *supra* note 38..

much more complex than simple references to its federal nature would suggest. Courts engage in a separate inquiry each time they are faced with questions about a particular attribute of the general maritime law, and they can often resolve the relevant issues as a matter of statutory interpretation rather than by resort to constitutional or jurisprudential principles.

A. How does Maritime Law Become Part of US Law? How Much of Maritime Law is Part of US Law?

The general maritime law derives its content from ancient codes and practices that have little connection to the US political system. Beginning with the island nation of Rhodes around 900 BC,[86] a succession of seafaring cultures developed legal codes that regulated sea-based activity. This collection of codes from centuries past – Justinian's Corpus Juris Civilis, the Rules of Oleron, the Laws of Wisby, the Marine Ordinances of Louis XIV, and so forth – forms the foundation of the general maritime law that is applied in federal and state courts today.

Courts still cite these foreign codes on occasion,[87] but federal admiralty decisions are now so numerous that courts tend to rely more on their own precedents.[88] As one text puts it, 'only the rare case now requires recourse to the Rules of Oleron or Cleirac or Bynkershoek.'[89] Yet the reader should not be fooled. The US law of admiralty remains remarkably faithful to its roots in historic foreign and international materials.

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[86] Most writers assume that the law of Rhodes was an early precursor of the modern general maritime law. See e.g., *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 960 (4th Cir. 1999) [*R.M.S.Titanic*]. According to one text, however, 'the existence of such a code has been pretty well cast in doubt.' Gilmore & Black, Jr., *supra* note 24 at 46. In either case, the roots of the general maritime law are undeniably quite old.

[87] See e.g., *Dowdle v. Offshore Express, Inc.*, 809 F.2d 259, 263 (5th Cir. 1987) (citing Laws of Oleron).

[88] See Gilmore & Black, Jr., *supra* note 24 at 46. ('As the nineteenth century wore on, the bases of the substantive maritime law became settled in this country, and the emergent problems came to be more and more those arising out of special national conditions. For both these reasons, overt reliance on foreign authorities diminished . . . ')

[89] *Ibid*.

In a certain sense, judgments that rest upon these codes – either explicitly or through several generations of judicial opinions – have even less democratic legitimacy than those that rest on CIL norms. Whereas the United States has a chance to participate in the formation and evolution of CIL, the maritime codes were adopted well before the nation's founding. But to jump to that conclusion is to misunderstand the nature of maritime law in the US legal system. The general maritime law may derive much of its *content* from non-US sources, but it derives all of its *authority* from acts of US political institutions. Maritime law is authoritative US law only to the extent that it has been declared to be law by Congress, the President, or the courts.

Some examples can helpfully illustrate the distinction between sources of content and sources of authority. Federal law relating to minerals on public lands provides that rights of possession shall be determined 'according to the local customs or rules of miners in the several mining districts.'[90] Local mining customs, of course, have no federal legal force on their own. Nevertheless, they have become authoritative federal rules of decision through incorporation by Congress.[91] The mining customs are the source of the law's content, but the Act of Congress is the source of its authority.

Courts also incorporate non-authoritative bodies of rules into US law. In cases involving the rights and obligations of the United States, for example, federal courts often craft common law rules of decision in order to protect US interests.[92] Sometimes the courts choose to apply state law as the federal rule of decision.[93] They do this as 'a matter of judicial policy' quite apart from any application of *Erie*

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[90] 30 U.S.C. § 22.

[91] See *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 at 512 (1900) (noting that the Supremacy Clause requires states to adhere to the law, even though it does not necessarily provide a basis for federal question jurisdiction).

[92] See *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

[93] See *Kimbell Foods*, *supra* note 82; see also *Standard Oil Co.*, *supra* note 70 at 308 ("in many situations, and apart from any supposed influence of the *Erie* decision, rights, interests and legal relations of the United States are determined by application of state law, where Congress has not acted specifically").

or federal statute.[94] Thus, state law, which does not operate of its own force in such cases, can be incorporated by judges as the authoritative rule of decision. Similarly, in interstate cases, 'federal, state and international law are considered and applied'[95] even though the rules of decision are clearly federal in nature.[96]

The general maritime law derives its authority within the US legal system in precisely this way. As one text puts it, 'it is only by voluntary adoption and with such qualifications as our jurisprudence and statutes have made in it that it becomes our law.'[97] It is an open question whether the earliest judges conceived of the relationship between the general maritime law and US law in this way. As discussed previously, early American judges may have believed themselves to be bound by a body of general common law originating outside of the US Certainly, an impressive amount of judicial rhetoric supports this view. But some early admiralty decisions evidence a bit more nuance.[98] At the very least, general maritime law was understood

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[94] *Kimbell Foods*, *ibid.* at 728.

[95] *Connecticut v. Massachusetts*, 282 U.S. 660 at 670 (1931).

[96] See e.g., *Hinderlider*, *supra* note 65 at 110.

[97] Erastus C. Benedict *et. al.*, *Benedict on Admiralty* 7th ed. revised, volume 1, looseleaf (New York: Matthew Bender & Co. 2007) at s. 104.

[98] An 1806 decision of the Supreme Court of Pennsylvania, for example, notes that foreign codes have been received in US courts 'not as containing any authority in themselves, but as evidence of the general marine law.' *Morgan v. Insurance Co. of North America*, 4 U.S. 455 at 458 (Sup. Ct. of Pa. 1806) [*Morgan*]. Though such foreign authorities 'are not to be respected' when they are 'contradicted by judicial decisions in our own country,' they are 'worthy of great consideration' on matters of first impression. *Ibid.* Ultimately, the court adopts the rule laid out in a foreign treatise on the grounds that the court 'think[s] [the rule] reasonable' and 'most agreeable to reason and justice.' *Ibid.* The court here seems to be aware that it is exercising independent judgment about the proper rule to apply in the case.

Even the early Supreme Court case holding that maritime law does not 'arise under the Constitution or laws of the United States' for the purposes of a statute establishing the jurisdiction of territorial courts in Florida is not unequivocal on this point. In *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511 (1828), Chief Justice Marshall wrote that cases in admiralty 'are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise.' *Id.* at 545. This is often taken to mean that maritime law is a separate system of general common law binding upon the United States. But note Marshall's focus on the federal courts, which 'appl[y]' maritime law 'to the cases as they arise.' If the phrase 'is applied' is taken to be merely descriptive rather than mandatory, Marshall's view could be understood to

not to be synonymous with the foreign codes and decisions from which it was derived.[99] Beyond that, less is clear. It is difficult to ascertain whether judges believed general common law to be an objectively 'discoverable' body of rules that was binding of its own force, or whether they recognized that it had legal authority only as applied by the courts and other political institutions of each nation.

In any case, whether or not the earliest decisions support the positivist view of the general maritime law, later decisions clearly do. Indeed, contrary to the standard account of general common law, the Supreme Court had explicitly adopted this position well prior to the *Erie* decision. Perhaps its clearest expression came in the 1875 case, *The Lottawanna*.[100] In that case, which dealt with the law of maritime liens, Justice Bradley gave 'the first complete analysis of the admiralty law since the days when it was viewed as a branch of the law of nations.'[101] Describing the relation between the general maritime law and nations' domestic legal systems, Justice Bradley wrote:

> Each [nation] adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law.[102]

The Court echoed these same notions in a later case, noting that 'the general maritime law is in force in this country, or in any other, so far only as administered in its courts, or adopted by its own

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embrace the positivist position staked out in later cases. Marshall does not say that courts are never free to refuse to apply the general maritime law; he merely suggests that courts generally apply it. See also *The Genesee Chief*, 53 U.S. 443 (1851) (rejecting the longstanding English tradition confining admiralty jurisdiction to tidewaters in favor of a distinctly American navigability rule).

[99] See *Morgan*, *ibid*. at 458.

[100] *The Lottawanna*, 88 U.S. 558 (1875).

[101] David W. Robertson, *Admiralty and Federalism*, (Minneola, NY: The Foundation Press Inc., 1970) at 137.

[102] *The Lottawanna*, *supra* note 100 at at 572.

laws and usages.'[103] And Justice Holmes lent his characteristically memorable phrasing to the idea in a 1922 case:

> In deciding this question we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules.[104]

Numerous other decisions restate this same basic position in one form or another.[105] It is clear that the general maritime law is – quite independently of the *Erie* decision – only operative in US insofar as it is incorporated by one of the branches of government.

For the majority of US history, maritime law was predominantly incorporated by federal courts acting without any legislative guidance.[106] Indeed, until the 1900s it was not settled that Congress had the power to regulate maritime matters at all.[107] Over the

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[103] *The John G. Stevens*, 170 U.S. 113 at 126–27 (1898).

[104] *The Western Maid*, 257 U.S. 419 at 432 (1922).

[105] See e.g., *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 at 245 (1942) ('The source of the governing law applied is in the national, not the state, government.'); *Southern Pac. Co. v. Jensen*, 244 U.S. 205 at 215 (1917) ('in the absence of some controlling statute the general maritime law, *as accepted by the federal courts*, constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction') (emphasis added). For a more modern restatement of the basic position, see *R.M.S. Titanic, supra* note 86 at 960 ('the Constitution conferred admiralty subject matter jurisdiction on federal courts and, by implication, *authorized the federal courts to draw upon and to continue the development* of the substantive, common law of admiralty when exercising admiralty jurisdiction') (emphasis added).

[106] State courts also have a role under the Saving to Suitors Clause. See 28 U.S.C. § 1333 ('The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled*.') (emphasis added).

[107] See *Panama R. Co. v. Johnson*, 264 U.S. 375 (1924); Gilmore & Black, Jr., *supra* note 24 at 47.

past century, however, Congress has assumed a significant role in incorporating maritime law into US law. Many rights and duties in admiralty are now governed by statute rather than judge-made law.[108] But the role of courts in deciding how much of the general maritime law will be incorporated into US law should not be minimized. A substantial portion of admiralty is still governed purely by judge-made law.[109]

All of this is to say that the general maritime law becomes US law only to the extent that it is incorporated by US political institutions – Congress, the President, or the Judiciary. The two questions outlined in the heading to this section are thus connected: the general maritime law becomes US law through incorporation by US political institutions, and elements of the general maritime law that have not been incorporated are not part of US law. However, this should not be taken to suggest that the general maritime law has limited application in US law. The federal courts have historically felt free to incorporate nearly all of the general maritime law. There might even be a presumption that general maritime rules should be incorporated as new cases arise. But none of this changes the fundamental conclusion that the general maritime law does not operate of its own force.

B. What are the Characteristics of General Maritime Law under US Law?

Much of the CIL debate seems to assume that CIL must either be federal law or something else entirely. As Professor Michael Ramsey has helpfully pointed out, however, the concept of 'federal law' is not necessarily monolithic: 'Federal law has at least three distinct attributes that are also claimed for international law: it serves as a rule of decision, it is preemptive of state law and it is the basis of federal jurisdiction.'[110] Professor Ramsey hypothesizes that the different

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[108] See e.g., *Jones Act*, § 33, 41 Stat. 1007, (codified at 46 U.S.C. § 30104 (1920)); *Carriage of Goods by Sea Act*, 49 Stat. 1208 (codified at 46a U.S.C. § 1303 (1936)).

[109] See generally Robert Force, *An Essay on Federal Common Law and Admiralty*, 43 St. Louis L.J. 1367 (1999) (cataloguing the sources of admiralty law's content in various subject-matter areas).

[110] Ramsey, *supra* note 48 at 559.

wording of the grant of 'arising under' jurisdiction in Article III and the Supremacy Clause in Article VI might demand that a single legal rule be treated differently under each clause.

This section explores the idea that the attributes of federal law can be disaggregated and considered separately. It explores the characteristics of the general maritime law in some depth. As it turns out, the general maritime law does not behave like 'typical' federal law in certain respects. It is the 'Supreme Law of the Land' under Article VI. It can preempt state law in some cases, but it does not conform to the normal rules of preemption. It does not provide a basis for federal question jurisdiction. It might not provide a basis for Supreme Court review of state court judgments. And so forth. The inescapable conclusion, which will be fleshed out further in the final section of this Part, is that designating a legal rule as 'federal' does not necessarily mean that it possesses all of the attributes of a typical federal statute. Each aspect must be considered separately, in light of the relevant statutory or constitutional provisions.

1. Supremacy. — The issues of Supremacy and preemption are often confused, but they are in fact two distinct – albeit related – ideas.[111] The Supremacy Clause contains two relatively narrow obligations: state court judges are obligated to apply federal law in cases where it applies ('Judges in every State shall be bound thereby')[112] and, in cases of conflict between federal and state law, federal law prevails ('any Thing in the Constitution or Laws of any State to the Contrary notwithstanding').[113] Preemption is related to Supremacy, of course – non-Supreme law cannot preempt state law – but it has a much broader reach: it means '(a) that states are deprived of their power to act at all in a given area, and (b) that this is so whether or not state law is in conflict with federal law.'[114] Whereas Supremacy is a general constitutional command, preemption must be determined on a case-by-case basis by assessing the features of the federal rule in question. In the statutory context, for example,

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[111] See Stephen A. Gardbaum, "The Nature of Preemption" (1994) 79 Cornell L. Rev. 767.

[112] *Supra* note 16 art. VI.

[113] *Ibid*.

[114] *Supra* note 111 at 771.

Congress can decide whether, and to what extent, each provision will preempt state law by expressly stating its intention.[115] However, even statutes that are expressly non-preemptive are nevertheless part of the Supreme Law of the Land.

Turning to admiralty, it is clear that the general maritime law as received by federal courts is part of the Supreme Law of the Land. State courts hearing admiralty cases *in personam*[116] are under an obligation to follow federal maritime precedents where applicable. As the Supreme Court has put it, this 'so-called "reverse-*Erie*" doctrine . . . requires that the substantive remedies afforded by the States conform to governing federal maritime standards.'[117] Though the Supreme Court has not stated it in so many words, the principle finds its roots in the half of the Supremacy Clause that declares that 'Judges in every State shall be bound' by the 'the supreme Law of the Land.'[118] How else to explain the obligation of state courts to follow federal decisions on matters of general maritime law?[119]

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[115] See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 at 203 ('It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms.').

[116] The state courts are able to hear admiralty cases under the so-called saving-to-suitors clause: 'The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled*.' 28 U.S.C. § 1333 (emphasis added).

[117] *Offshore Logistics v. Tallentire*, 477 U.S. 207 at 222 (1986). See also *Carnival Corp. v. Carlisle*, 2007 Fla. LEXIS 287, *4–*5 (Fla. Sup. Ct. Feb. 15, 2007) ('Both federal and state courts must apply federal maritime law that directly addresses the issues at hand.'); David W. Robertson, "Displacement of State Law by Federal Maritime Law" (1995) 26 J. Mar. L. & Com. 325 at 333.

[118] *Supra* note 16 art. VI. See *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918) (holding that federal courts should apply maritime law and not the common law in maritime diversity actions and approvingly quoting language in the lower court opinion to the effect that the law applied 'must be the same in every court, maritime or common law'); David W. Robertson, "Displacement of State Law by Federal Maritime Law" (1995) 26 J. Mar. L. & Com. 325 at 333 [Displacement]. ('[t]he reverse-Erie metaphor . . . has long served as useful shorthand for the state courts' supremacy clause obligation in maritime cases').

[119] *Cf. Cooper v. Aaron*, 358 U.S. 1 at 17–18 (1958) ('the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States').

The Court has not felt the need to probe too deeply into how the general maritime law becomes part of 'Laws of the United States which shall be made in Pursuance [of the Constitution].'[120] Saying that the supremacy of general maritime law derives from the federal constitution, does not speak to why the federal constitution requires that the general maritime law be supreme. Indeed, the face of the Article VI, which refers to 'Laws . . . made in Pursuance' of the Constitution, does not seem to embrace a body of law that originated long before that document was ratified.

Fortunately, the Court's maritime supremacy cases suggest a source for the doctrine: principles derived from the structure of the constitution. In the first true maritime supremacy case, *Chelentis v. Luckenbach*, the Court held that federal courts sitting in diversity should apply maritime law rather than the common law,[121] despite the language of the jurisdictional statute 'saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.'[122] Writing for the majority, Justice McReynolds quoted extensively from *The Lottawanna*:

> One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.[123]

Note the heavy emphasis on constitutional policies. The Court did not simply ask whether the general maritime law is 'federal' and therefore supreme. Rather, it focused on the unique situation of admiralty

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[120] *Supra* note 16 art. VI.

[121] See *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 [*Chelentis*].

[122] Act March 3, 1911, § 256, 36 Stat. 1092, 1161 (1911). The current language remains largely unchanged.

[123] *Chelentis, supra* note 121 at 382 (quoting *The Lottawanna*, *supra* note 100 at 575).

jurisdiction in the constitutional scheme, concluding that the constitutional requirement of national uniformity required that maritime law be treated as supreme.

The other major maritime supremacy case, *Pope & Talbot, Inc. v. Hawn*,[124] echoes the *Chelentis* language and reasoning. There the Court held that the maritime tort on which the plaintiff sued was to be governed by the flexible maritime comparative negligence rule rather than the 'harsh' state contributory negligence rule.[125] The majority described the maritime tort as 'a type of action which the Constitution has placed under national power to control in "its substantive as well as its procedural features . . ."' and found that it must therefore be governed by national maritime principles.[126] Again, key to the Court's analysis was admiralty's unique constitutional position rather than anything having to do with the origins or sources of the general maritime law. Because the Constitution entrusts maritime law primarily to the national government and presumes a uniform application of the maritime law, maritime law 'as accepted by the federal courts'[127] is binding upon state courts and supreme over contrary state law.

2. Preemption. — The question of preemption of state law by the general maritime law is a bit thornier than the supremacy question. For nearly 100 years, the federal courts have upheld a controversial doctrine whereby otherwise valid state law can be displaced in both federal and state court 'if it . . . works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.'[128] The precise textual origins of this doctrine are unclear. In the original maritime preemption case, *Southern Pacific Co. v. Jensen*, the Supreme Court struck down New York's application of its workers' compensation laws to the wrongful death of a

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[124] *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406 (1953).

[125] See *ibid.* at 408–11.

[126] *Ibid*. at at 409 (quoting *Panama R. Co. v. Johnson*, 264 U.S. 375 at 386 (1924)).

[127] *Southern Pac. Co. v. Jensen*, 244 U.S. 205 at 215 (1917) [*Jensen*].

[128] *Ibid*. at 216.

stevedore.[129] Anticipating the later maritime supremacy cases, the *Jensen* Court focused on the need for national uniformity in the application of maritime law. The majority quotes *The Lottawanna* for the proposition that leaving the regulation of maritime matters to the states 'would have defeated the uniformity and consistency at which the Constitution aimed.'[130] From there it concludes that the Constitution must necessarily put limits on the extent to which the general maritime law can be modified or supplemented by state legislation.[131]

Rather than displace state substantive law from the admiralty jurisdiction entirely, however, the Court decided that it 'cannot be denied'[132] that state law can affect maritime matters to at least some extent. The trick, of course, is how to locate the line between permissible and impermissible state interference with the general maritime law – a line that the Court admits is 'difficult, if not impossible, to define with exactness.'[133] In the end, the Court settled for the test described above, which seems to have been patterned loosely on the Court's dormant commerce clause jurisprudence.[134]

The *Jensen* decision gave birth to a long and ignominious line of cases attempting to fix the proper boundaries of maritime preemption. Though the Supreme Court and commentators have attempted to supplement the rather vague rule announced in *Jensen* with various other tests,[135] it remains largely a matter of guesswork which state laws will be preempted and which will not. As one

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[129] See *ibid.*

[130] *Ibid*. at 215 (citing *The Lottawanna*, *supra* note 100 at 575).

[131] See *ibid.* at 215–16.

[132] *Ibid*. at 216.

[133] *Ibid*. at 216.

[134] *Ibid.* at 216–17 (describing the dormant commerce clause and noting that 'the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the states to interpose where maritime matters are involved').

[135] See Ernest A. Young, "Preemption at Sea" (1999) [Preemption], 67 Geo. Wash L. Rev. 273 at 294-302; Robertson, Displacement, *supra* note 118 at 338-347.

observer put it, 'It cannot be gainsaid that the area of federalism and admiralty is plagued with inconsistencies.'[136]

In any case, there are two observations worth making. First, the doctrine of maritime preemption bears little resemblance to the doctrines that are typically applied in federal preemption cases.[137] Second, the preemptive power of maritime law seems to be rooted in the admiralty grant in Article III rather than the Supremacy Clause.[138] In this sense, it is much more like the dormant commerce clause than like statutory preemption. There do not seem to be any cases that suggest that particular principles of maritime law have preemptive force of their own accord. Indeed, unlike in statutory cases, the maritime preemption inquiry is primarily focused on the state law. For better or for worse, maritime preemption is a completely unique creature, invented out of a perceived need to protect the peculiar situation of admiralty in the federal system.

3. Federal Question Jurisdiction. — The operation of the general maritime law as a basis for federal subject matter jurisdiction is well established. The Constitution provides that '[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction.'[139] Pursuant to the constitutional grant of jurisdiction, Congress has provided that '[t]he district courts shall have original jurisdiction . . . [of] [a]ny civil case of admiralty or maritime jurisdiction.'[140] Of course,

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[136] David P. Currie, "Federalism and Admiralty: 'The Devil's Own Mess'" (1960) Sup. Ct. Rev. 158 at 220.

[137] Compare Young, Preemption, *supra* note 135, at 294–302 (describing the maritime preemption doctrines), with Caleb Nelson, "Preemption" (2000), 86 Va. L. Rev. 225 at 226-229 (describing the doctrines applied in cases of statutory preemption).

[138] But see *In re Air Crash at Belle Harbor*, 2006 AMC 1340 (S.D.N.Y. 2006) ('Under the Constitution's Supremacy Clause, Article VI, Cl. 2, and Article III, § 2, granting the Supreme Court the judicial power to declare federal maritime law, the issue is always whether federal maritime law displaces or preempts state law or allows supplementation with non-conflicting state law.'); *Cobb Coin Co. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 525 F. Supp. 186 at 201 (S.D. Fla. 1981) ('This Court takes it as settled doctrine that in admiralty, state legislation that conflicts with federal maritime principles cannot be given effect under the supremacy clause of the United States Constitution, article VI, paragraph 2.')

[139] *Supra* note 16.

[140] 28 U.S.C. § 1333. The original grant, which used nearly identical language, was part of the *Judiciary Act of 1789*. *Judiciary Act of 1789*, ch. 20, § 9, 1 Stat. 73 at 76–77 (1789).

the term 'admiralty or maritime jurisdiction' is not self-defining. It might not necessarily include causes of action under the general maritime law. Nevertheless, there does not ever seem to have been a doubt that such actions could be heard under the grant of admiralty jurisdiction.[141]

The more interesting question is whether causes of action under the general maritime law fall under the district courts' federal question jurisdiction. For most of the history of the Republic, claims under general maritime law have been brought in the federal district courts in two different ways. As noted above, they can be brought under the admiralty jurisdiction. In addition, they can be brought under the federal courts' diversity jurisdiction if the parties are, in fact, diverse.[142] For a brief period in the 1950s, there were also suggestions that general maritime claims could be brought under federal question jurisdiction, which, as originally written, granted the lower federal courts jurisdiction 'of all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States . . . .'[143] The theory was that the preemption line of cases revealed that 'the Constitution itself adopted [the general maritime law] and

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[141] See Gilmore & Black, Jr., *supra* note 24 at 20. See also *Glass v. The Sloop Betsey*, 3 U.S. 6 (1794) ('every District Court in the United States, possesses all the powers of a court of Admiralty'); *DeLovio v. Boit*, 7 Fed. Cas. 418, No. 3776 (C.C.D. Mass. 1815) (Story, J.) (the admiralty and maritime jurisdiction 'comprehends all maritime contracts, torts, and injuries,' most aspects of which were governed exclusively by the general maritime law as received by US courts).

[142] See *Norton v. Switzer*, 93 U.S. 355 at 355–56 (1876) ('Parties in maritime cases . . . may resort to their common-law remedy in . . . the Circuit Court, if the party seeking redress and the other party are citizens of different States.').

[143] *Judiciary Act of 1875* (codified at 28 U.S.C. § 1331). This issue was more than just theoretical because federal courts had separate procedures for admiralty suits until 1966. Unlike claims brought in admiralty, which were tried by the court, claims brought on the 'law side' of the federal courts could be tried by a jury. This difference in treatment began to cause difficulties in the 1950s as three-count seaman's injury cases became popular. The count for negligence under the *Jones Act* was triable by jury, whereas the counts for unseaworthiness and maintenance and cure under the general maritime law were not. Courts were forced to consider whether they could entertain all three claims in a single trial by jury – either because all three fell under their original jurisdiction on the "law side" or because they could be brought in under the courts' pendent jurisdiction. See Brainerd Currie, "The Silver Oar and All That: A Study of the Romero Case" (1959) 27 U. Chi. L. Rev. 1 at 18.

established [it] as part of the laws of the United States.'[144] Consequently, 'a suit . . . on a claim under the general maritime law, is a "civil action" which "arises under the Constitution" within the meaning of 28 U.S.C. § 1331.'[145] Three federal courts of appeals considered the question. The First Circuit concluded that actions brought under general maritime law 'aris[e] the Constitution or laws of the United States';[146] the Second and Third Circuits came to the opposite conclusion.[147]

The Supreme Court addressed this split of authority in *Romero v. International Terminal Operating Co*,[148] holding that claims under the general maritime law do not arise under the Constitution for purposes of statutory federal question jurisdiction. Justice Frankfurter, writing for the majority, made it clear that the issue was one of statutory interpretation: 'the problem is the ordinary task of a court to apply the words of a statute according to their proper construction.'[149] He expressly left open the possibility that Congress could constitutionally include maritime cases within a future revision of the federal question statute, noting, 'It is a statute, not a Constitution, we are expounding.'[150]

The precise reasoning of the case is unimportant, but it is worth emphasizing that the holding rested on a highly contextual and historically contingent interpretation of the federal question statute rather than a broad attempt to classify the general maritime law as 'federal' or 'not federal.' For the Supreme Court, at least, it is not

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[144] *Doucette v. Vincent*, 194 F.2d 834 at 844 (1st Cir. 1952).

[145] *Ibid*.

[146] See *ibid.*

[147] See *Paduano v. Yamashita Kisen Kabushiki Kaisha*, 221 F.2d 615 (2d Cir. 1955); *Jordine v. Walling*, 185 F.2d 662 (3d Cir. 1950).

[148] 358 U.S. 354 (1959).

[149] *Romero v. International Terminal Operating Co*., 358 U.S. 354 at 360 (1959) [*Romero*].

[150] *Ibid*. at 379. See also Currie, *supra* note 143 at 12 n.42 ('The decision is not a construction of Article III of the Constitution and is not placed on constitutional grounds. The authority of Congress to treat maritime cases as cases arising under federal law is expressly recognized.').

enough to rely on 'wooden'[151] categorizations. Frankfurter derides such attempts as 'empty logic, reflecting a formal syllogism.'[152] Instead, the Court encourages readers to be attentive to the 'interpretive setting of history, legal lore, and due regard for the interests of our federal system.'[153] CIL would presumably trigger the same contextual analysis; declaring it to be federal common law does not mean that it will necessarily support federal question jurisdiction.

4. Supreme Court Review. – Intriguingly, the Supreme Court has held that the general maritime law *can* support the Supreme Court's jurisdiction to review state court judgments. The jurisdictional statute, of course, is worded quite differently from the federal question statute:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.[154]

Note the conspicuous absence of the 'arising under' language found in Article III and the federal question statute. Setting aside cases where a federal or state statute is called into question, the proper inquiry seems to be whether 'any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.'[155]

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[151] *Romero, ibid*. at 379.

[152] *Ibid*. at 377.

[153] *Ibid*. at 379.

[154] 28 U.S.C. § 1257.

[155] *Ibid*.

The Supreme Court addressed this question once, but the precise holding in that case is somewhat unclear.[156] In *Garrett v. Moore-McCormack Co.*,[157] the plaintiff brought an action in state court against his employer for damages under the *Jones Act* and maintenance and cure under the general maritime law. He alleged that injuries he sustained while working on one of his employer's vessels were caused by the employer's negligence. When the employer produced a full release that the plaintiff had executed, the plaintiff alleged that he had signed the release while under the influence of pain medication and under duress from the employer.

The relevant question in the state courts was which party should bear the burden of proof with respect to the validity of the release. Under state law, the party who attacks the validity of a release bears the burden of proof. Under admiralty law, by contrast, the party who sets up a seaman's release must prove that the release was executed freely. The state supreme court applied its local rule on the ground that the burden of proof on releases 'is merely procedural, and is therefore controlled by state law.'[158]

The Supreme Court reversed, writing that 'the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so raises a federal question reviewable here under [28 U.S.C. § 1257].'[159] It is not entirely clear from this passage whether the Supreme Court can review the application of the general maritime law itself or whether the Court will only review the application of the federal choice of law principles that govern whether maritime law will apply in the first place – as on the *Garrett* facts.[160] Yet if the *Garrett* Court had adopted the latter, more restrictive view, it presumably would have reversed the state court's judgment on the ground that federal admiralty law applied and then remanded to the state court for the

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[156] See generally Jonathan M. Gutoff, "Admiralty, Article III, and Supreme Court Review of State-Court Decisionmaking" (1996) 70 Tul. L. Rev. 2169.

[157] 317 U.S. 239 (1942) [*Garrett*].

[158] *Ibid*. at 242.

[159] *Ibid*. at 245.

[160] See Gutoff, *supra* note 156 at 2189.

application of the general maritime law. Instead, the Court proceeded to review and define the seaman's rights under general maritime law with great precision.[161] This suggests that the Court does not view its jurisdiction as confined to choice of law questions.[162]

In either case, *Garrett* supports the disaggregation thesis. If the Supreme Court can review state court interpretations of general maritime law, the inconsistency between federal question jurisdiction and Supreme Court appellate jurisdiction shows that not all 'federal' law is treated the same. And if the Supreme Court lacks the power to review state court maritime judgments, then the inconsistency is between Supreme Court review and supremacy.

5. Miscellaneous. – There are numerous other questions that might be asked about the characteristics of maritime law. Is it binding on the President and/or lower executive branch officials? If so, can the President overcome this obligation through an authoritative executive act? Is general maritime law binding on the legislature? Once a maritime right is identified, does it necessarily create a cause of action or might the right be defensive only? Can a new right under the general maritime law supplant a prior statute under the last-in-time rule?[163] What remedies, if any, attach to maritime rights?[164]

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[161] *Supra* note 157 at 246–48.

[162] This interpretation is further supported by the language preceding the quoted passage. The Court points out that '[t]he source of the governing law applied is in the national, not the state, government,' then states that if 'the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would . . . actually deny, federal rights . . . .' *Ibid.* at 245. It then suggests that its intended result is the inverse of that achieved in *Erie*, implying that the federal courts should have ultimate control over the content of the general maritime law, just as the state courts have ultimate control over the content of state law. *Ibid.*

It is possible that *Romero* altered this, but the *Romero* Court did not give any indication that it was distinguishing or overruling *Garrett*. The majority's sole citation was in a footnote discussing the Court's maritime preemption jurisprudence. More generally, it is uncontroversial that federal question jurisdiction and Supreme Court appellate jurisdiction do not necessarily have the same contours. To take one example, the well-pleaded complaint rule does not apply to Supreme Court review. Because the two types of jurisdiction are not necessarily linked, it would take more than a decision based on a close historical analysis of the federal question statute to change the ambit of the appellate jurisdiction statute.

[163] See e.g., *Miles v. Apex Marine Corp.*, 498 U.S. 19 at 24 (1990) [*Miles*] ('Congress, in the exercise of its legislative powers, is free to say "this much and no more." An admiralty

In each case, as in the cases discussed in the previous sections, the inquiry is context-sensitive. Courts ask what factors unique to the general maritime law make it more or less suitable to possess the attribute in question. This necessarily entails an examination of the text, underlying policies, and history of the statute or constitutional provision that enables the attribute.

C. Under What Circumstances May Courts Incorporate General Maritime Law into US Law?

Of course, analogies between general maritime law and CIL are only useful to the extent that the relevant features of general maritime law are well-settled. If the courts and Congress have not authoritatively passed on a particular issue in the maritime context, there is little that may be drawn upon to clarify the CIL debate. It is thus important to note one important respect in which the relationship between general maritime law and the US legal system remains unsettled: the Supreme Court has not yet clearly delineated the circumstances under which courts may incorporate general maritime law into US law.

Prior to the twentieth century, courts exercised this power without worrying much about its propriety. As Congress took a more active role in shaping admiralty law, however, the judiciary increasingly struggled to define the limits of its own power. In *Moragne v. States Marine Lines*,[165] which raised the issue of whether there should be a cause of action for wrongful death under the general maritime law, the Supreme Court considered the tension between the traditional authority of the admiralty courts to create their own rules of decision, on the one hand, and the more recent emphasis on statutory remedies, on the other. Writing for the majority, Justice Harlan characterized the task of an admiralty court as being similar to that of a traditional common law court: it must be able to 'perceive the impact

court is not free to go beyond those limits.'); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 at 393–403 (1970) [*Moragne*] (searching for congressional direction before creating a new maritime remedy).

[164] See e.g., Gilmore & Black, Jr., *supra* note 24 at 627–33 (listing claims that give rise to maritime liens, and thus support jurisdiction and remedies *in rem*); *ibid*. at 40–43 (describing the availability of equitable remedies in federal admiralty courts).

[165] *Moragne, supra* note 163.

of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles.'[166] The courts are thus free to incorporate new rules of maritime law to the extent that such rules are consonant with the relevant federal statutes. Within this zone of discretion, the courts may exercise their power in accordance with the principles of *stare decisis* and as dictated by policy considerations.[167]

Yet the boundaries of the zone of discretion have proven difficult to map. At one point, the trend seemed to be toward a heavily circumscribed judicial power. In *Miles*, the Court suggested that for areas of law that are now predominantly statutory, such as tort actions brought on behalf of seamen, 'an admiralty court should look primarily to these legislative enactments for policy guidance.'[168] Though the courts may 'supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate,' judges must be sure to 'keep strictly within the limits imposed by Congress.'[169] Unsurprisingly, the lower federal courts and state courts have struggled to determine what policies and limits have been imposed by Congress. To take one example, the courts are divided on the availability of non-pecuniary damages for personal injury and wrongful death actions based on general maritime law.[170] Even the Supreme Court has given mixed signals; despite the warnings in *Miles*, it extended the *Moragne* action for wrongful death in the face of a substantial body of federal statutory law.[171]

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[166] See *ibid.* at 392.

[167] See *ibid.* at 403–04 ('We conclude that the Death on the High Seas Act was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations not covered by the Act. Because the refusal of maritime law to provide such a remedy appears to be jurisprudentially unsound and to have produced serious confusion and hardship, that refusal should cease unless there are substantial countervailing factors that dictate adherence to *The Harrisburg* simply as a matter of *stare decisis*.').

[168] *Miles, supra* note 163 at 27.

[169] *Ibid.*

[170] See Robert Force, "The Legacy of *Miles v. Apex Marine Corp.*" (2006) 30 Tul. Mar. L. J. 35 at 41–45.

[171] See *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811 (2001).

The breadth of the courts' power to incorporate general maritime law into US law thus remains unsettled and cannot properly serve as the basis for a comparison of the judicial incorporation of CIL. Yet this uncertainty can help clarify the proper scope of the CIL debate. As with general maritime law, the most important and controversial issues in the CIL debate are best understood as arguments about the bounds of judicial discretion. These questions raise important concerns about the relative institutional competence of the three branches of government and the proper distribution of authority between them. As the following Part will explain, participants in the CIL debate should focus their attention on the question of judicial discretion and encourage the courts to settle the other questions as they have settled them in the general maritime law context.

IV. The Domestic Legal Status of Customary International Law Reconsidered

This section addresses the implications of the preceding analysis for the CIL debate. As noted, the previous section was not meant to suggest that CIL should be treated in exactly the same manner as the general maritime law. Many salient differences between the two bodies of law counsel against the wholesale mapping of the features of one onto the other. Nevertheless, it is possible to draw some lessons from the federal courts' experience with admiralty.

With respect to how and how much of CIL becomes part of US law, the maritime experience shows that courts need not choose between incorporating CIL wholesale into US law or effectively banishing it from the federal courts. As with general maritime law, particular CIL norms should not become part of US law unless they are incorporated as such by an authoritative act of one of the three branches of government. Congress and the President may incorporate CIL norms into US law, just as they already do.[172] Importantly, however, the federal courts should also be able to incorporate CIL norms into US law on their own initiative, that is, without any explicit statutory or constitutional authorization. The circumstances under

[172] See e.g., 18 U.S.C. § 2441 (incorporating a portion of the international laws of war into the U.S. criminal code).

which the courts would properly be able to do so are open to debate; this question, which corresponds to the fourth key question outlined above, is inextricably linked to the larger issue of federal common law and might be profitably addressed by a collaboration between experts in foreign relations law and experts in the law of federal courts.

There are indications that CIL's relationship to US law has historically been conceived in precisely this way. The early case *Brown v. United States*,[173] for instance, concerned the government's power to seize and condemn property during wartime. Chief Justice Marshall reasoned that 'proceedings to condemn [enemy property] can be sustained only upon the principle that they are instituted in execution of some existing law.'[174] After deciding that no Act of Congress authorized seizure in question, Marshall considered whether the international laws of war could directly authorize the seizure:

> This argument must assume for its basis the position that modern usage [of the law of nations] constitutes a rule which acts directly upon the thing itself by its own force, and not through sovereign power. This position is not allowed. This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet is may be disregarded.[175]

Justice Bradley offered a similar observation sixty years later in *The Lottawanna*.[176] Arguing that general maritime law does not directly bind the US courts, Bradley drew an analogy to international law. 'In this respect,' he wrote, general maritime law 'is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such.'[177]

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[173] 12 U.S. 110 (1814).

[174] *Ibid*. at 123.

[175] *Ibid*. at 128.

[176] 88 U.S. 558 (1875).

[177] *Ibid*. at 572.

The second important point also draws from the maritime paradigm: even if a particular CIL norm is incorporated as federal law, it need not have all the same attributes as 'normal' federal law. Courts can and should remain highly sensitive to context in determining whether CIL can satisfy the requirements of Article III 'arising under' jurisdiction or statutory federal question jurisdiction; whether and in what circumstances CIL should preempt inconsistent state law; and so forth. Allowing courts to incorporate CIL into US law opens the dialogue about CIL's characteristics rather than closes it. It might even be possible for courts to treat different CIL norms in different ways; for example, fundamental *jus cogens* norms might have a stronger effect in domestic law than other CIL norms.

Again, there are indications that the characteristics of CIL have always been treated in this disaggregated fashion. Even during the pre-*Erie* CIL heyday, CIL was generally not thought to be supreme over state law[178] and could not form the basis of jurisdiction for Supreme Court review.[179] And the Supreme Court's recent decision in *Sosa* appears to support the idea that CIL's attributes can be disaggregated and treated separately.[180] This approach suggests that revisionists' fears of a CIL-based jurisprudence that concentrates power in the federal judiciary at the expense of federalism and separation of powers are off-base. The federal courts' approach to the attributes of general maritime law has always been measured and

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[178] See Bradley & Goldsmith, *supra* note 14 at 816 (describing early cases where the federal government denied that it had the power to enforce CIL against the states).

[179] See e.g., *Ker v. Illinois*, 119 U.S. 436 at 444 (1886) ('[T]he decision of [the question whether forcible seizure in foreign country is grounds to resist trial in state court] is as much within the province of the State court, as a question of common law, or of the law of nations, of which that court is bound to take notice, as it is of the courts of the United States. And though we might or might not differ with the Illinois court on that subject, it is one in which we have no right to review their decision.').

[180] See William S. Dodge, "Bridging Erie: Customary International Law in the U.S. Legal System after Sosa v. Alvarez-Machain" (2004), 12 Tulsa J. Comp. Int'l L. 87 at 96-97 ('In contrast with the all-or-nothing approach of Justice Scalia, and of Professors Bradley and Goldsmith, the Court seems to prefer a more particularized approach that looks at the incorporation of customary international law into the U.S. legal system issue-by-issue. Customary international law may be federal common law for purposes of the ATS, but not for the purposes of 1331.').

context-sensitive, and there is no reason why CIL will not be treated similarly.

As I noted at the outset, these observations will not resolve the debate over CIL's status. The most important question – when courts should exercise their discretion to incorporate CIL into US law – remains unresolved in the context of both general maritime law and federal common law, and there is no reason to think that it can be resolved more easily with respect to CIL. The purpose of this paper is to clarify the CIL debate by drawing attention away from the three easy questions and focusing it on the narrow, difficult question of the federal courts' discretion to make federal common law.

I am optimistic that the CIL debate can be resolved without either ousting CIL from US law or allowing the 'world community' to determine US policy. As the American experience with general maritime law demonstrates, federal courts have taken a flexible approach to the incorporation of a foreign body of norms into federal law. There is little reason to think that the federal courts' approach toward CIL would not be similarly flexible.

Theories of Compliance with International Law and the Challenge of Cultural Difference

ASHER ALKOBY*

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I. Introduction

The question of states' compliance with international law (IL) has become one of the central topics of academic research in the field.[1] As more and more areas of social life are being heavily regulated by IL, understanding the connection between law and state action becomes crucial. Explaining why states do or do not comply with IL is important for designing international commitments and improving the effectiveness of international institutions. The study of state behaviour, however, often takes an unduly narrow definition of 'compliance' as its starting point. The traditional view of international lawmaking

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[1] For a comprehensive annotated bibliography of this literature see W. Bradford, "International Legal Compliance: An Annotated Bibliography" (2005) 30 N.C. J. Int'l L. & Com. Reg. 379.

considered law as a collection of formalized and institutional features, and it is striking to see how this view continues to be explicitly endorsed by leading scholars who have shaped the compliance debate in recent years.[2] These scholars treat the act of contractual obligation as the defining moment when a law comes into being and measure the behaviour of states with reference to that point in time.[3] What these analyses often fail to acknowledge is that, given the nature and reach of IL in the past few decades, these traditional categories must be re-examined. Very often, the formal act of accepting a legal obligation is only a point signalling the beginning of a broad process of lawmaking.[4] Law is thus 'much more about process than about form or product.'[5] There is an increasing number of voices advocating a more expansive view of law and aiming to situate it in a broader social context. Harold Koh's formulation of 'transnational legal process' has been especially influential. International legal obligation is created, he maintains, in a series of continuous repeated interactions in which a legal rule is constructed, interpreted, clarified, internalized, and enforced.[6] Even after binding commitments are made, their clarification, interpretation and implementation is constantly renegotiated and reflected upon in light of changing circumstances, new information, or a deepening consensus among the key actors.

Studying compliance, in turn, increasingly demands a close consideration of social processes, including the necessary economic, political and cultural conditions for the successful implementation of international legal commitments. A particularly pertinent example of

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[2] See the contributions to J.L. Goldstein *et al.,* eds., *Legalization and World Politics* (Cambridge: MIT Press, 2001).

[3] Notable example for treating *ratification* as the defining moment of lawmaking is the comprehensive studies on compliance with human rights and environmental treaties conducted by O.A. Hathaway, "Between Power and Principle: An Integrated Theory of International Law" (2005) 72 U. Chicago L. Rev. 469.

[4] R. Goodman and D. Jinks, "Measuring the Effects of Human Rights Treaties" (2003) 14 E.J.I.L. 171 at 174.

[5] M. Finnemore and S.J. Toope, "Alternatives to "Legalization": Richer Views of Law and Politics" (2001) 55 Int'l Org. 743 at 750.

[6] H.H. Koh, "Transnational Legal Process" (1996) 75 Neb. L. Rev. 181 at 184.

this challenge is the Climate Change Convention.[7] Compliance with this agreement requires more than the domestic incorporation of a set of international rules and regulations. Compliance demands profound changes in political, social and individual patterns of thinking, and entails private consumers' acceptance of decisions that would have direct impact on their daily lives, as well as major changes in productions industries. Such profound changes in values and perceptions are likely to proceed differently across cultures. Another example is the implementation of intellectual property rights norms, requiring a development of what Tom Tyler has termed a 'culture of compliance' whereby people avoid illegal use of copyrighted materials because they internalize the norms prohibiting it.[8] When compliance can only be achieved in this 'wide' and 'deep' sense, governments need more than their publics' support in order to meet their commitments – an active *participation* of the public is a necessary condition for the successful implementation of international commitments.

If the spread of international norms needs to be achieved in both a 'wide' and 'deep' sense, variations in cultural perceptions and diffusions of such norms become particularly relevant. A theory of state compliance with international norms must therefore consider cultural diversity a crucial factor when attempting to build a coherent compliance model. This article examines some of the important conceptual and empirical contributions to the study of compliance in order to ask to what extent existing approaches consider the impact of cultural diversity on state compliance with IL. Much of this scholarship purports to develop models of compliance that claim to have practical utility for institutional design. Cultural diversity, I argue, is a crucial explanatory factor that is often overlooked in the study of international normative change.

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[7] *United Nations Framework Convention on Climate Change*, 9 May 1992, 31 I.L.M. 849 and the subsequent *Kyoto Protocol to the Framework Convention on Climate Change*, 10 December 1997, 37 I.L.M. 22. For a preliminary discussion of the breadth of the challenge see David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy*, 2d ed. (New York: Foundation Press, 2002) at 589.

[8] T.R. Tyler, "Compliance with Intellectual Property Laws: A Psychological Perspective" (1997) 29 N.Y.U.J. Int'l L. & Pol. 219.

The burgeoning literature on compliance is still in its infancy, but there is a growing interest in building a unified theory among IL scholars that is greatly influenced by international relations (IR) scholarship. International lawyers turn to IR theory for better explanatory models for the evolution of norms and for compliance with them, while IR scholars turn to theories on law for normative models in order to better understand observed behavioural regularities.[9] Coming from one discipline (IL), my foray into the other (IR) is motivated not by an attempt at 'bridging' them or seeing how they may converge but by the need to critically examine the influence of the one (IR) on the other (IL) in light of the recent extensive cross traffic between the two.[10]

Given my interest in the nature of *the process* through which norms are constructed and rule-guided behaviour is then achieved, I define compliance not in co-relational terms (the measured conformity of a behaviour with a norm), but in a causal way (compliance as a *norm driven* behaviour).[11] IR/IL compliance literature identifies three causal mechanisms that lead states to comply with international norms: coercion, persuasion and acculturation (or normative coercion). The first emphasizes the constraining effect of norms, while the latter two are said to have a constitutive effect on actors, namely the power to

[9] See S.J. Toope, "Emerging Patterns of Governance and International Law" in M. Byers, ed., *The Role of Law in International Politics* (Oxford: Oxford University Press, 2000) 91 at 93.

[10] Some authors argue that the increasing IL/IR collaboration reflects a sense of inferiority among some international lawyers, and that it often results in the narrowing of the disciplinary imagination. They contend that international lawyers typically draw on strands from IR theory that perpetuate existing power configurations by deploying realist IR theories as if they were the only ones available, or by reducing IL to a set of contractual obligations through the deployment of game theory, thereby ignoring the complexity of international lawmaking (see, e.g. J. Klabbers, "The Relative Autonomy of International Law or The Forgotten Politics of Interdisciplinarity" (2005) 1 J. Int'l L. & Int'l Rel. 35). My use of the IR and other literatures, however, is anything but uncritical adoption of theories that downplay the role of law or the complexity of the international lawmaking enterprise. The following discussion, rather than jeopardizing the relative autonomy of IL, seeks insights from a neighbouring discipline that may shed more light on the richness of IL and the meaningful role it could play in global social life.

[11] For a use of the first definition see K. Raustiala and A.M. Slaughter "International Law, International Relations and Compliance" in W. Carlsnaes, T. Risse and B.A. Simmons, eds., *Handbook of International Relations* (London: Sage, 2002) 538 at 539.

alter their identities and preferences. Rational choice theories emphasize *coercion*, positing that norms may influence the behaviour of states by providing benefits for conformity or creating costs for non-conformity.[12] This approach assumes that beyond self-interestedness, only external forces can motivate compliance: norms are not internalized by actors but merely serve to constrain their behaviour. The rationalist model offers a very limited engagement with cultural difference because it fails to treat both the international and the domestic realms as social environments.

Constructivist approaches, on the other hand, treat states as social entities that, in interacting with each other, develop shared understandings regarding what is appropriate, which then give rise to behavioural norms. These norms, in turn, shape the identities of states, which then transform their interests . This growing body of literature is now infusing the debate over the character of the international system with exciting new insights, and the empirical studies that it has generated to date have successfully challenged the materialist assumptions that form the basis of many of the dominant rationalist accounts. The serious contemplation of social action offered by constructivism opens the way to a much-needed consideration of cultural contingency. This article suggests, however, that the particular strand of constructivism that is gaining some followers in the IL community does not fully realize the potential of this approach to meaningfully engage with the challenge of diversity.

Conventional constructivists[13] claim that human agents do not operate in a normative vacuum but in a social environment with 'its

[12] See D. Snidal, "Rational Choice and International Relations" in Carlsnaes *et al., ibid.* at 73. For a representative collection of studies in IL see R.O. Keohane, "Rational Choice Theory and International Law: Insights and Limitations" (2002) 31 J. Legal Stud. 307.

[13] A distinction between 'conventional' and 'critical' constructivists will be made in the following discussion, following T. Hopf, "The Promise of Constructivism in International Relations Theory" (1998) 23(1) Int'l Security 171. Conventional constructivist analyses are grounded in positivist thinking. What unites them, among other things, is a belief in scientific enquiry and the view that empirical validation or falsification is the hallmark of such enquiry (i.e. at least methodologically, social sciences can be studied in the same way that natural sciences can). Their approach is also objectivist: the view that there is a distinction between facts and values. Objective knowledge of the world is possible despite the fact that observations may be subjective. Critical constructivists, on the other hand, are post-positivists in that they consider observable facts as inseparable from values,

collectively shared systems of meaning ("culture" in a broad sense).'[14] The causal mechanism that they emphasize is social sanctioning, which is shown to be an effective tool for inducing compliance with norms. In much empirical work, therefore, a mechanism of *acculturation* is highlighted. This form of normative coercion serves as a collective disapprobation for the breach of norms, which is imposed by the community to which the noncompliant actor belongs. States have a sense of belonging to the international community, and it is their fear of loss of good standing in that community that motivates them to comply. While constructivism is ontologically about the *intersubjective* construction of norms, then, this strand of the literature focuses on the unidirectional diffusion of pre-existing normative structures through means of normative coercion.

More promise lies in another strand of constructivism, which has not gained much currency among IR compliance researchers, let alone IL scholars. Critical constructivism emphasizes the discursive interventions through which norms are constructed, and the meanings that they take on in that process. Discourse ethics, an idea most associated with the work of Jürgen Habermas, is a normative ethics for pluralistic societies which no longer have a single, overarching moral authority. Under this approach, actors engaged in a genuine discourse ought to be motivated and guided by a willingness to be persuaded by the 'unforced force of the better argument' which means that 'agents suspend their own truth claims, respect the claims of others and anticipate that their initial points of departure will be modified in the course of dialogue.'[15] In this view, norms will be complied with when they are constructed, interpreted and implemented in a process of

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because they are contingent upon human perception. What we see as facts is very much influenced by prior understandings and meanings that are embedded in our local environment and culture. Critical constructivists are also occupied with unmasking power relations in social exchanges, while conventional constructivist remain 'analytically neutral on the issue of power relations' (*ibid.* at 185). Critical theory is also self-reflexive in the sense that the knowledge that researcher generates is not neutral but politically and ethically charged (*ibid.* at 184).

[14] T. Risse, "Let's Argue! Communicative Action in World Politics" (2000) 54 Int'l Org. 1 at 5.

[15] A. Linklater, "Citizenship and Sovereignty in the Post-Westphalian State" (1996) 2 Eur. J. Int'l Rel. 77 at 86.

mutual persuasion, in keeping with the procedural rules of discursive argumentation. While IR compliance research has begun producing empirical evidence for processes resembling the conditions for discourse ethics identified in critical theorizing, (conventional) constructivists only borrow the sociological aspects of the theory without any reference to its critical and reflexive qualities.

The article begins in section II by proposing a working definition of 'culture' as a lens through which the question of diversity in IL may be examined, and draws parallels between this definition and underlying constructivist assumptions regarding the intersubjectivity of norms. Section III briefly surveys some of the notable attempts by IL and IR scholars to adopt rational-choice compliance models and their disregard for cultural variables. Section IV turns to provide a critical assessment of the constructivist literature, arguing that constructivism's potential to meet the challenge of cultural difference in IL holds great promise, but that the more influential strands of this approach to compliance raise some serious concerns regarding normative grounding as well as theoretical coherency.

The reliance of some conventional constructivists on acculturation, this article argues, assumes a relatively cohesive social environment in which norms operate. Authors who consider this mechanism favourably assume that this condition is met. This assumption, however, is not defended at the normative level, and empirically it infers the existence of a 'global culture' from structural similarities between states while ignoring the agency involved. Indeed, students of 'socialization' face a paradox: the conventional definition of socialization is 'the induction of members into (an existing) society.' If a global 'society' does not exist, what point is there to speak of the ways in which actors may be 'socialized'?

Acculturation may be seen as a useful compliance tool for established societies wishing to regulate the behaviour of its members. Persuasion, on the other hand, is a more attractive tool when a society's creation of norms is part of the process of constituting that society. But the mechanisms through which persuasion works remain underspecified in constructivist literature. Studies have shown how persuasion may work in diplomatic settings, where state representatives are sometimes persuaded to comply with international norms in a process of 'social learning.' But their attempts at examining

the domestic internalization of norms present us with a proposition that puts the coherency of this approach in question: that norms may have a constitutive effect at the international level but an instrumental role domestically. If persuasion only works at the level of state elites, it is not clear how norms come to constitute *state* identity, or how they resonate in its cultural environment. This difficulty is most evident in situations where compliance with international norms must run both 'wide' and 'deep' i.e. addressing a host of domestic actors and involving value-laden norms that are difficult to enforce and therefore must attain a high level of legitimacy in order to become effective. The article concludes that the challenge of cultural difference in the study of normative change in IL can only be met through a reflexive engagement with questions of moral discourse, such as that offered by critical constructivism.

II. Culture and Intersubjectivity

This article uses the term 'culture' in a broad sense, understanding it as the goals, values and pictures of the world that are made manifest in the speech, norms, and routine practices of a group of people.[16] This definition has been under sustained attack in the past few decades. Critical anthropologists have been renouncing the concept, locating its origins in forms of colonial governance, and arguing that such constructions of cultural identity served the interests of settler and colonial elites.'[17] The 'New Stream'[18] of IL scholarship has also been preoccupied with questions of cultural difference and international governance over the past two decades. Scholars have highlighted the continued use and misuse of 'culture' in the practice of IL, arguing that the concept is often employed in the service of dominant actors.[19] The

[16] See R.A. Shweder, "Culture: Contemporary Views" in N.J. Smelser and P.B. Baltes, eds., *International Encyclopedia of the Social & Behavioral Sciences* (Amsterdam & New York: Elsevier, 2001) 3151 at 3153 (quoting Isaiah Berlin).

[17] Ibid. at 3153-3154.

[18] A term coined in D. Kennedy, "A New Stream of International Legal Scholarship" (1989) 7 Wis. Int'l L.J. 1.

[19] See A. Riles, "Aspiration and Control: International Legal Rhetoric and the Essentianlization of Culture" (1993) 106 Harv. L. Rev. 723. The cultural neutrality of IL is seen by some to be part of the story of colonial subjugation. Colonial rulers developed a

central claim put forward by New Stream scholars is that IL, although assuming an agnostic position toward culture since its inception, *is a culture* in itself – it is an instrument and the refection of European culture, and its attendant lawmaking processes perpetuate its Eurocentric foundations.[20]

While these insights are valuable and have rightly been gaining the increasing attention of the IL audience, the corollary scepticism of the transformative potential of IL may be unwarranted. The rejection of objectivity and recognition of (radical) subjectivity leads some New Stream scholars to speculate 'an internationalism based on a global politics of identity, a shifting sand of cultural claims and contestations among constructed and overlapping identities about the distribution of resources and the conditions of social life.'[21] This is not a call to accommodate cultural diversity in the existing global governance framework: under this view, 'the notion of "culture" itself comes under pressure as an alternative to governance.'[22]

This dichotomous view of law and culture considers two options only: the use of existing governance frameworks to manage

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concept of law that was the antithesis of culture, coded as superstition, irrationality, timeless stasis and organic closed systems. 'Law,' on the other hand, represented the inexorable and universal forces of science, progress and rationality. Thus Europeans had 'law,' while others had 'culture.' R.J. Coombe, "Culture: Anthropology's Old Vice or International Law's New Virtue?" (1999) 79 Proc. Am. Soc. Int'l L. 261 at 265.

[20] For a historical perspective see Y. Onuma, "When Was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilizational Perspective" (2000) 2 J. Hist. Int'l L. 1 (exploring the European origins of modern IL and maintaining that it was one of many normative systems which existed in various regions of the globe). See also A. Anghie, "Francisco de Vitoria and the Colonial Origins of International Law" (1996) 5 Soc. & Leg. Stud. 321 (exploring the relationship between IL, colonialism and cultural difference). For an analysis of contemporary practice reflecting Eurocentric bias see D. Otto, "Subalterity and International Law: The problems of Global Community and the Incommensurability of Difference" (1996) 5 Soc. & Leg. Stud. 337. There is also a growing interest among New Stream scholars in the subjectivity of international lawyers, their 'situationality' or 'sensibilities' and how such biases limit the disciplinary imagination. See O. Korhonen, *International Law Situated: An Analysis of the Lawyer's Stance Toward Culture, History and Community* (The Hague and London: Kluwer, 2000).

[21] D. Kennedy, "The Disciplines of International Law and Policy" (1999) Leiden 12 J. Int'l L. 9 at 133.

[22] Kennedy, *ibid.* at 69.

differences (an 'objective' law that aims to transcend culture, but actually operates to legitimize the status quo) or the use of identity politics (subjective cultural claims competing against each other outside the governance framework).[23] I consider the constructivist contributions to the compliance debate especially promising in this respect because they invite us to examine the possibility of a third option: the development of *inter*-subjective understandings within the existing governance framework, in a process through which cultural claims may be raised and debated. The following sections of this article consider the extent to which this promise has been fulfilled.

The notion of intersubjectivity that the constructivist agenda has introduced to IL discourse implies an anti-essentialist understanding of culture. Similarly, my interest in cultural diversity lies not in the essentialist view of culture that serves as a basis for criticisms of the strong versions of identity politics.[24] It is not to advocate cultural preservation but to stress the need for a *recognition* of culture's role in the construction of new collectivities. The invocation of cultural specificity should not be done for the purpose of demarcating the boundaries between 'we' and 'others,' but for the production and reproduction of a new 'we' when possible. Thus, to argue, for example, that the cultural distinctiveness of nations ought to be taken seriously is not to affirm each nation's right to seal and guard the content and the boundaries of its identity. Rather, it is to acknowledge that international actors should be allowed to bring their cultural specificity into the critical dialogue, while at the same time insisting that they should recognize the fluidity of their cultural identities.[25] The obvious parallels between this conception of culture

[23] One of the earliest expressions of this dichotomy was in M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finnish Lawyers Publishing Company, 1989).

[24] Most notably by N. Fraser, "Rethinking Recognition" (2000) 3 New Left Rev. 107. The framework that I use draws especially on M. Carrithers, *Why Humans have Cultures: Explaining Anthropology and Social Diversity* (Oxford: Oxford University Press, 1992) and S. Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton: Princeton University Press, 2002).

[25] Note that if we accept that cultural identities are fluid, it also means that we cannot assume their necessary congruence with population groups. Thus, while a major concern for what remains largely a state-centric international system is the *national culture*, there is a need to consider other cultural groups as well. Cultural claims may also be raised by

and the constructivist ontology suggest that constructivism is where we may begin theorizing a culturally attuned approach to compliance with international norms. But before turning to the constructivist contributions to the compliance debate, the following section briefly considers some of the notable attempts at building compliance models based on rational-choice theory, where cultural difference appears to play no role.

III. Why Constructivism: Rational Choice and Culture

IR rationalists highlight the self-interested nature of state actors and suggest that, although actors' understandings of their interests vary, forces external to the state ultimately override any potential influence of internal cultural factors.[26] Rational choice theory considers human action to be driven primarily by the 'logic of consequences.'[27] According to this logic, the actions of individuals, organizations, or states are driven by calculations of interests and measured against prior preferences. Those preferences may be material, altruistic, or a mix of both, but they are prior to political interaction and are stable over time.[28] Simply put, action is viewed as driven by expectations of the

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sub-state groups in diverse immigration states or post-colonial states, operating at the national or transnational level (e.g. ethnic minorities, indigenous or religious groups, as well as issue-specific advocacy networks). Non-state groups are becoming key players in international lawmaking and their relevance for any study of state compliance is evident. As I argue elsewhere, opening up global discourses to their input may contribute to the successful implementation of international norms, because it gives voice to a broader range of cultural narratives that may not be fully reflected in the inter-state framework. See A. Alkoby, "Globalising A Green Civil Society: In Search of Conceptual Clarity" in G. Winter, ed., *Multilevel Governance of Global Environmental Change* (Cambridge: Cambridge University Press, 2006) 106. To a certain extent, IL discourse is receptive to cultural claims made by non-state entities. See generally B. Kingsbury, "Claims by Non-State Groups in International Law" (1992) 25 Cornell Int'l L.J. 481. Two kinds of groups are likely to be particularly resistant to intercultural influence: indigenous peoples, whose cultural identity is rooted in ways of life attached to a particular land, and who seek to preserve their unique culture that is often at odds with modernity, and religious fundamentalist groups who reject any possibility of compromise in their firmly held religious beliefs. For a preliminary discussion see Benhabib, *ibid.* at 184-186.

[26] For an overview see Snidal *supra* note 12 at 74.

[27] J.G. March and J.P. Olsen, "The Institutional Dynamics of International Political Orders" (1998) 52 Int'l Org. 943 at 949-952.

[28] *Ibid.* at 950-951.

consequences it will have. In the context of IL, a consequential perspective implies that international actors would choose to cooperate by binding themselves to agreements and norms, and comply with such commitments, because of expected gains or benefits. The expected benefit need not be material,[29] but human action is consistently understood in terms of its expected *consequences*.

Many IL and IR scholars, however, believe that state behaviour is more than simply 'consequential,' and posit additional descriptions of actor preferences and beliefs, often concluding that international actors in a wide variety of situations would always value things such as wealth, income, or power over others.[30] In addition to material costs and benefits, it is assumed that reputation is highly valued by international actors.[31] Reputation is defined as the reliability with which a state abides by its international commitments, which determines its value as a partner to future agreements. In this view, reputation is often assumed to have a monetary value: states factor it into their calculation of the material costs and benefits of compliance in any given situation.[32]

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[29] As Keohane points out, for example, even '[t]he rational environmentalist chooses strategies with the highest expected value of improving environmental outcomes.' Keohane, *supra* note 12 at 309. On the general tendency claim in the study of politics to keep assumptions about human goals and motivations to a minimum see D.P. Green and I. Shapiro, *Pathologies of Rational Choice Theory: A Critique of Applications in Political Science* (New Haven: Yale University Press, 1996) at 18.

[30] On how rationalism came to be associated with materialism in IR theory see J. Fearon and A. Wendt, "Rationalism v. Constructivism: A Skeptical View" in Carlsnaes *et al*., *supra* note 12, 52 at 58-60.

[31] G.W. Downs and M.A. Jones, "Reputation, Compliance and International Law" (2002) 31 J. Legal Stud. 95 at 96. Oona Hathaway makes a broader claim when arguing that in addition to legal enforcement of the terms of international agreements, the 'collateral consequences' of violating an agreement are also weighed by state leaders before deciding whether to commit and comply. These collateral consequences include the explicit linking of foreign aid, trade, or other benefits to voluntarily joining a treaty, and this increases the pressure for commitment. Whether collateral consequences actually increase the chances for *compliance*, claims Hathaway, depends on whether actors actually monitor and respond to violations. Hathaway, *supra* note 3 at 509.

[32] A. Guzman, "A Compliance-Based Theory of International Law" (2002) 90 Cal. L. Rev. 1823. For others, reputation has social value – which can still be factored into the strategic calculus in the same way that material rewards can. See e.g. P.H. Huang, "International Environmental Law and Emotional Rational Choice" (2002) 31 J. Leg. Stud. 237.

Why, then, do states make frequent references to moral and legal obligations when communicating with each other? Why do they communicate at all? If there is truth to the claim that moral and legal rhetoric may actually be credible and that it may also influence the behaviour of states, then there is a good reason to consider the content of the principles and ideals that are being invoked; to ask to what extent they reflect distinct cultural perspectives on the debated issue; and finally, to consider whether it is possible to bridge the cultural divide and arrive at a shared understanding on the matter. Rationalists, however, believe that international discursive practices can be explained without abandoning the basic assumption that states are self-interested and that culture is inconsequential.[33] Legal or moral rhetoric is usually not credible, they contend, which is not to say that it is useless. International law talk is always 'cheap' in the sense that it may only play a weak role as a signalling device. Thus, for example, a nation that wishes to maintain its reputation as cooperative would engage, out of purely self-interested motivation, in the 'right form of talk.'[34]

In other words, for rational choice theorists, culture has no bearing on international behaviour. The compliance models that this approach has generated pay little heed to the heterogeneity of identities and the uniqueness of cultures. Rational choice theorists would have us believe that strategic behaviour is stable over time and similar across people.[35] A step further is taken in the context of IL, where it is assumed that states (or people across states) operate on the same logic as well. Obviously, the 'thicker' the assumptions regarding human behaviour become, the more difficult it is to reconcile them with the theory's claim to universal validity. That *all* states act according to their calculation of anticipated consequences *all the time*

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[33] For a recent and one of the most thoughtful statements of this argument see J.L. Goldsmith and E.A. Posner, "Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective" (2002) 31 J. Legal Stud. 115.

[34] *Ibid.* at 124. For more on 'signalling' as an explanatory factor of state compliance see D.H. Moore, "A Signalling Theory of Human Rights Compliance" (2003) 97 Nw. U.L. Rev. 879.

[35] This assumption of homogeneity, Green and Shapiro point out, is justified on grounds of theoretical parsimony (*supra* note 29 at 17).

is difficult enough to establish; that the desired consequences are also necessarily *material* would be doubly hard to defend.

A particular strand of rationalism that is worth pausing over is liberal rationalism. In the context of international politics, rationalists generally do not consider the treatment of states as unitary actors problematic,[36] but this state-centric assumption is now being directly challenged by liberal IR theory.[37] Under this view, 'disaggregating' the state is a necessary conceptual move not just because there is increasing interdependence: it also rests on the normative assumption that the fundamental actors in international politics are individuals and private groups, and that global governance structures should be designed to directly address their needs. The main focus of this theory is the ways in which preference-aggregation takes place domestically and then finds expression at the inter-state level.

This central insight appears to be the beginning of a response to the concerns raised by the present inquiry, regarding the ways in which cultural variance is underrated by students of compliance. The notion of the 'disaggregated state' invites us to peer into the black box erected around the state and develop a contextualized understanding of compliance. It reminds us that state preferences are the aggregation of individual and group preferences, and that if we want to better understand why nations comply with international norms we must investigate the complex interaction of components within the state. In contrast to the universalist, a-cultural explanation of state behaviour offered by rational choice theory, liberal authors emphasize state identity: they suggest that 'how States behave depends on how they are internally constituted.'[38] Much of this scholarship seeks to extend the neo-Kantian premise and show how the relations among liberal democracies have a distinctive quality, which manifests itself not only

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[36] See Guzman, *supra* note 32; Downs and Jones, *supra* note 31; Huang, *supra* note 32; Goldsmith and Posner, *supra* note 33. But see R. Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games" (1988) 42 Int'l Org. 427.

[37] I use the term 'liberal theory' here as it is employed, e.g., in these two influential texts: A. Moravcsik, "Taking Preferences Seriously: A Liberal Theory of International Politics" (1997) 51 Int'l Org. 513 and A.M. Slaughter, "International Law in a World of Liberal States" (1995) 6 E.J.I.L. 503.

[38] Slaughter, *ibid*. at 537.

in a better compliance record with international treaties, but also in the successful operation of transgovernmental and transjudicial networks among liberal states.[39]

The assertion that 'liberal states behave better' is not uncontroversial, and the soundness of liberal theory as a descriptive account is being increasingly questioned.[40] For present purposes, it is important to point out that while liberal theory offers some crucial insights into the complexity of compliance with IL by considering differentiated state preferences, it remains a rationalist account of compliance. It offers a consequential explanation of individual and state action at both the domestic and the international levels. Under this model, ideas, values, and the cultural identities that they embody do have an effect on state behaviour insofar as they shape state interests, which inform these actors' calculations about whether or not to comply with their international obligations.[41] These values are 'pre-existing' in the sense they are formed at the domestic level, in the process of preference aggregation. It is not argued that values and identities are socially constructed at the domestic level: individuals and groups enter the political exchange with pre-existing preferences, informed by their values and ideals. This methodological individualism instructs that ideas and values are beliefs held by *individuals*, and, by extension, states. The intersubjective quality of ideas, and the possibility that they are a product of shared knowledge, is consistently neglected. Constructivist explanations of state behaviour, to which I turn next, aim to challenge rationalism precisely on this ground.

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[39] See A.M. Slaughter, "A Typology of Transjudicial Communication" (1995) 29 U. Rich. L. Rev. 99, A. M. Burley and W. Mattli, "Europe before the Court: A Political Theory of Legal Integration" (1993) 47 Int'l Org. 41, L.R. Helfer and A.M. Slaughter, "Toward a Theory of Effective *Supra*national Adjudication" (1997) 107 Yale L.J. 273.

[40] See e.g. J.E. Alvarez, "Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory" (2001) 12 E.J.I.L. 183.

[41] Moravcsik, *supra* note 37 at 540.

IV. Constructivism and Compliance: Taking Culture Seriously?

A. Culture, Identity and International Norms

The approaches reviewed so far consider social action to be driven by the 'logic of consequences.' The 'logic of appropriateness,' in contrast, considers human action to be driven by a sense of identity. Individuals do not simply choose their course of action based on a calculation of the anticipated consequences: action evokes an identity or role, and the course of action is chosen by matching the obligation of that identity or role to a specific situation.[42] In other words, behaviour is driven by an actor's social identity, not calculations of material cost and benefit. One would explain one's behaviour by stating, 'this is what I do because this is who I am' rather than 'this is what I do because this is what I want.' Compliance with rules, from this perspective, is achieved when rules are viewed as appropriate, in the sense that acting in accordance with the rules matches the conception of the self. And most importantly, identities of actors and their derivative preferences are not prior to social interaction but constituted by such interaction. The way to influence behaviour is thus to recognize the constitutive nature of rules and identities and exploring the ways in which they may be transformed.[43]

If the identity of each actor determines its course of action, then the differences between identities ought to be considered when attempting to understand patterns of behaviour. The influence of culture is far from negligible in this process, of course. While a group

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[42] March and Olsen, *supra* note 27 at 951.

[43] Some rationalists agree that these two logics of human action are not mutually exclusive and that each action probably involves elements of both. The relationship between the two logics, under this view, is a hierarchical one. It is only when the consequential logic becomes difficult to follow that the logic of appropriateness assumes its limited role. Very often states are unable to make decisions based on the consequences such decisions would have, because they are not sure which actions would lead to the desired consequences or because there are several possible actions that would lead to equally beneficial consequences. In such cases, culture may determine the chosen course of action. See J. Goldstein and R.O. Keohane, "Ideas and Foreign Policy: An Analytical Framework" in J. Goldstein and R.O. Keohane, eds., *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Ithaca: Cornell University Press, 1993) 3.

could share an identity without constituting a separate culture, culture typically provides the symbolic materials needed to mark the boundaries of identity groups.[44] The assumption that the conduct of states is guided by a sense of identity introduces normative concerns of legitimacy, morality, justice, and ethics to the set of factors influencing compliance with the law. These normative concerns bring us closer to realizing how tremendous the challenge of cultural diversity is for global governance: if what IL ought to achieve is a transformation in the identities of actors, so that they view international norms as matching their conception of the self, then the uniqueness of cultures is a significant (if not insurmountable) barrier to international cooperation.

Constructivists take pains to demonstrate how global normative structures operate in more than a regulative way: they are 'constitutive' in the sense that they constitute, create, or revise the actors and their interests. Examples of studies that illustrate how global norms achieve this include the case of the norm prescribing the creation of science bureaucracies by a number of states,[45] the broad acceptance of the rules governing the conduct of war,[46] the inclusion of distributional concerns in the definition of 'developing' countries propagated by the World Bank,[47] the development of normative taboos on the use of chemical weapons[48] and nuclear weapons,[49] the evolution of norms on humanitarian intervention,[50] and the way in which the

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[44] See T.K. Fitzgerald, *Metaphors of Identity* (Albany: SUNY Press, 1993) at 190.

[45] M. Finnemore, *National Interests in International Society* (Ithaca: Cornell University Press, 1996), ch. 2.

[46] *Ibid*., ch. 3

[47] *Ibid*., ch. 4.

[48] R. Price, *The Chemical Weapons Taboo* (Ithaca: Cornell University Press, 1997).

[49] R. Price and N. Tannenwald, "Norms and Deterrence: The Nuclear and Chemical Weapons Taboos" in P.J. Katzenstein, ed., *The Culture of National Security* (New York: Columbia University Press, 1996) 114.

[50] M. Finnemore, "Constructing Norms of Humanitarian Intervention" in Katzenstein, *ibid*. 139.

global norm of racial equality led states to redefine their interests and adopt sanctions against the Apartheid regime in South Africa.[51]

Two examples of studies by legal scholars influenced by constructivist thinking also demonstrate the constitutive effect of global norms on the identities and interests of states. Brunnée and Toope have shown how the normative framework for sharing freshwater has helped redefine both the identities and the interests of key actors in the Nile Basin, slowly establishing cooperative behavioural patterns.[52] Goodman and Jinks supplement constructivism with organizational-cultural theory to argue that several national security practices of states (including the composition of militaries, arms procurement and production, use of force and the conduct of troops during armed conflicts) are shaped by global structures that are constructed and propagated through global cultural and associational processes.[53]

But if, as constructivists claim, agents and structures are co-constituted, what are the mechanisms by which agents create or change structures? Or in other words, where do global norms come from? More recent work explores the agency side of the equation by attempting to trace the spread of global norms and the role of international actors in their diffusion. IR norms research suggests that there are two elements that contribute to the successful diffusion of norms. The first is the involvement of norms entrepreneurs in the introduction of the norm (by bringing attention to the need for the norm and mobilizing support for it) and the second is the availability of organizational platforms from which entrepreneurs can operate.[54]

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[51] A. Klotz, *Norms in International Relations: The Struggle against Apartheid* (Ithaca: Cornell University Press, 1995).

[52] J. Brunnée and S.J. Toope, "The Changing Nile Basin Regime: Does Law Matter?" (2002) 43 Harv. Int'l L. J. 105.

[53] R. Goodman and D. Jinks, "Toward an Institutional Theory of Sovereignty" (2003) 55 Stan. L. Rev. 1749.

[54] See M. Finnemore and K. Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 Int'l Org. 887 at 896. Norm entrepreneurs are groups or individuals, many of whom are motivated by altruism, empathy and ideational commitment. After they manage to persuade a critical number of states to act as 'norm leaders,' it is possible to say that the norm has reached a tipping point (and possibly an agreement is signed), after which a 'norm cascade' begins: an active process of international socialization intended to induce

These studies successfully challenge the assumptions underlying rationalism by showing how changes in behavioural patterns are not so much due to external constraints but the result of socialization.[55] Two distinct processes of social influence are explicated in this literature on international socialization: acculturation and persuasion. Both result in a change in the preferences of actors – and by that they may be distinguished from rationalist models – but the first emphasizes social *sanctioning* while the latter involves social *learning*. Both are said to bring an internalization of norms by actors to the point where they are unquestioned and taken for granted. At the level of theory, constructivists often speak of persuasion as one of the main issues separating their approach from that of rational choice.[56] They describe it as the 'process by which agent action becomes social structure, ideas become norms, and the subjective becomes intersubjective.'[57] But while many of these studies emphasize persuasion as a superior form of socialization, they often reveal in their findings a process that involves coercive measures of some sort along the way to rule governed behaviour. Other studies, which document instances of persuasion, have thus far focused on horizontal discursive interaction, while neglecting the discursive prospects of vertical interaction.

B. Acculturation and the Presumption of Community

Acculturation is the process by which 'actors adopt the beliefs and behavioural patterns of the surrounding culture.'[58] They are

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those who violate what now is a norm to comply with it (*Ibid.* at 898-904). Others have studied norm entrepreneurship by epistemic communities, defined as 'a group of intellectuals sharing a common causal understanding on a particular subject and who organize to turn this understanding into action strategies.' E. Adler, *Communitarian International Relation: The Epistemic Foundations of International Relations* (London and New York: Routledge, 2005) 76.

[55] See A. Wendt, "Collective Identity Formation and the International State" (1994) 88 Am. Pol. Sci. Rev. 384.

[56] On the centrality of persuasion in constructivist theorizing, see R.A. Payne, "Persuasion, Frames and Norm Construction" (2001) 7 Eur. J. Int'l Rel. 37 at 38.

[57] Finnemore and Sikkink, *supra* note 54 at 914.

[58] R. Goodman and D. Jinks, "How to Influence States: Socialization and International Human Rights Norms" (2004) 54 Duke. L. J. 621 at 638. The early and most influential

induced to change their behaviour through pressure (imposed by others or by the self) to assimilate. A decision to comply with social norms is based on cost-benefit calculations, but, contrary to the frequent assumption of rational choice theorists, the costs and the benefits are not material. They are the social-psychological costs of non-conformity, and the social-psychological benefits of conforming to group norms and expectations.[59]

The rewards and punishments are 'social' because only groups can provide them. While material costs can be imposed bilaterally, social costs can only be imposed by a group whose approval an actor values.[60] Actors who have prior identification with a group have a desire to maximize their status, honour, and prestige in the group, as well as a desire to avoid loss of status, shaming and humiliation. Therefore, a decision to comply is based on what is viewed as appropriate by the group, rather than what the individual actor considers as appropriate.

While initially states may act against their preferences due to social pressure (or may choose to comply for egoistic motives), the end result is some level of internalization of the norms and a change in the identity and preferences of affected actors.[61] After an actor is fully

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formulation of this approach is that of Abraham and Antonia Chayes. While emphasizing justificatory discourses, the reason why states ultimately obey the law in this account is their need to remain members in good standing of the international system. See A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard: Harvard University Press, 1995) 28. The term 'acculturation' was introduced to the compliance debate by Goodman and Jinks, *ibid* at 638-642. Other authors describe a similar mechanism and have termed it 'social influence' (A.I. Johnston, "Treating International Institutions as Social Environments" (2001) 45:4 Int'l Stud. Q. 487 at 499), 'social sanctioning' (J. T. Checkel, "Why Comply? Social Learning and European Identity Change" (2001) 55 Int'l Org. 553 at 558) or 'strategic social construction' (Sikkink and Finnemore, *supra* note 54 at 910).

[59] Goodman and Jinks, *ibid*. at 640. These costs, they claim, are also not measurable and therefore are not amenable to cost-benefit modeling (*ibid*. at 646).

[60] Johnston, *supra* note 58 at 499.

[61] Goodman and Jinks argue that acculturation is a lower level of socialization, and that it leads to 'incomplete internalization' of norms (*supra* note 58 at 642-644). Their entire model, however, is based on insights from sociological institutionalism, where state identities and interests are seen to be shaped by global norms and scripts in a process of mimicry and identification. See Goodman and Jinks, *supra* note 53, where they outline

inducted into society and adopts its shared standards, the norms assume their 'taken for granted' quality, and what was appropriate for the group becomes appropriate for the individual.

Empirical studies done by conventional constructivists, while stressing the intersubjectivity of norms and persuasion as a compliance-inducing mechanism, often slip into accounts that rely on acculturation. In their seminal study, Keck and Sikkink focus on the involvement of networks of activists in the processes leading to compliance with international norms. They described a 'boomerang effect,' whereby value activists in states that violate human rights, environmental rights, or indigenous rights, reach out to governments in Western countries as well as to the publics within them in order to bring pressure on their home governments from the outside.[62] The techniques they use to rally international support involve making information available to the public and framing the issue in a way that would appeal to distant audiences, i.e. persuasion methods.[63] Once support is achieved, the mode of operation becomes more coercive: these networks of activists, with the help of Western governments, use social pressure as well as material sanctions to bring violating states into compliance with the norms.[64] In a comprehensive study of the diffusion of human rights in 11 countries, Thomas Risse and his colleagues extended this observed pattern temporally and described a five stage 'spiral' model of socialization, consisting of repression by norm-violating states, followed by denial of accusations, tactical concessions, prescriptive status of norms (where violators claim to accept the norm), and finally, rule-consistent behaviour.[65] The dominant mode of interaction during the early stages of the norm cycle, claim Risse *et al.*, is instrumental: leaders of norm violating

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their theoretical model ('…we stress the ways in which orthodoxy and mimicry shape state identity, interests, and organizational structure.' *Ibid*. at 1753).

[62] M.E. Keck and K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, N.Y.: Cornell University Press, 1998) at 12-13.

[63] What they call 'information politics' and 'symbolic politics.' *Ibid*. at 18-23. A similar process is described by Klotz, *supra* note 51.

[64] Keck and Sikkink, *supra* note 62 at 23-25.

[65] T. Risse *et al*., eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999) at 17-33.

states are subject to material and social sanctions and compliance occurs without a change of preferences. At a certain point, however, the interaction begins to change and these state leaders begin to rethink their preferences and engage in 'argumentative behaviour.' Overall, however, what drives states to norm conforming behaviour under this model is not a process of persuasion (or social learning) but instrumental rationality. State decision makers only internalize new preferences after an initial softening-up by networks and activists through the use of material and social sanctioning.

It is not entirely accurate to claim that this account is purely rationalist, nor that the resulting norms lack legitimacy for that reason. What Risse *et al.* describe in the initial phases of the socialization process is how the different mechanisms play out, demonstrating how a combination of factors may lead to the optimal rule conforming behaviour – institutionalization. This happens, they argue, when state leaders become rhetorically 'self-entrapped' and what starts out as strategic behavior (a) may later lead to preference change (b).[66] The leap from (a) to (b), however, is underspecified and not properly explained: why and how is it that at some point actors stop using manipulation techniques in their speech acts and start actually believing in what they say?[67] In this sense, the constructivist mantra of mutual constitution of interests and identities is challenged by their own empirical research. What these studies often demonstrate is that the causal mechanism at work during the crucial stages of compliance is coercion rather than persuasion.

Recent contributions on the IL side have made an effort to define in more precise terms the difference between acculturation and persuasion. Goodman and Jinks rightly maintain that acculturation is a distinctive socialization process that is often under-analyzed in the study of international norms. But they go an important step further by

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[66] For an elaboration on the notion of rhetorical action, see F. Schimmelfennig, "The Community Trap: Liberal Norms, Rhetorical Action, the Eastern Enlargement of the European Union" (2001) 55 Int'l Org. 47.

[67] On this see J.T. Checkel, "Taking Deliberation Seriously" (2001) ARENA Working Paper WP 01/14, online: <http://www.arena.uio.no/publications/working-papers2001/papers/wp01_14.htm> (last visited 8 February 2008). For a similar argument see J. Fearon, "Deliberation as Discussion" In J. Elster, ed., *Deliberative Democracy* (NY: Cambridge University Press, 1998) 44.

claiming that 'the conditions favorable to acculturation are amenable to manipulation in order to promote behavioural change through institutions.'[68] At least in the area of human rights law, and possibly in other areas of regulation, these authors believe that acculturation is a powerful tool and make recommendations for the ways in which it can be utilized in regime design. They bring evidence across disciplines for the effectiveness of social rewards and punishments in group dynamics (shaming, shunning, back-patting), and explore the conditions under which conformity may be best achieved by using these forms of influence. Briefly, they posit that acculturation may be best achieved under conditions of inclusive membership in international regimes, high level of precision of obligations, and publicizing good and bad practices.

This account, however, neglects the normative implications of acculturation. There appears to be a leap from description (evidence for the spread of global norms and for the effectiveness of acculturation processes) to prescription (viewing acculturation processes favourably and considering the ways in which they may be utilized to improve compliance). There is no discussion of why and when acculturation is normatively desirable. Recall that acculturation only happens when an actor identifies with the relevant reference group. The social and cognitive pressures to conform can only be generated when there exists 'an intersubjective agreed upon notion of what socially valuable behavior looks like.'[69] And further, '[t]he more the audience or reference group is legitimate, that is, the more it consists of actors whose opinions matter, the greater the effect of back-patting and opprobrium.'[70] In other words, as the term 'acculturation' implies, this form of social influence assumes a world *culture*, with globally shared standards and commitments. Therefore, the principal concern is singling out governments engaged in violations of (consensual) norms and trying to change their pathological behaviour.

Goodman and Jinks' assumptions regarding a common world culture draw on the 'world society' theory developed by sociological

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[68] Goodman and Jinks, *supra* note 58 at 654.

[69] Johnston, *supra* note 58 at 501.

[70] *Ibid*.

institutionalists, who use (mostly quantitative) data to map the global diffusion of cultural standards as well as collective understandings and identities.[71] The empirical work done by the world society scholars aims to show how historically, global scripts have been enacted worldwide in processes that result in what is termed 'isomorphic' formal structures and models. Examples include the striking resemblance in state education systems, hospitals, national economic policies, environmental protection frameworks, national security policies, human rights protection, constitutional structures, and so forth.[72] Despite the neutrality of the term 'isomorphism,' there is no doubt that these ideas, models or scripts did not simply float down on nations from nowhere. While this approach is vague on the processes through which homogenization occurs,[73] it is clear that many of these developments are driven by the need for nation states to conform to an ideal of the rationalized bureaucratic state, and that they are essentially an outgrowth of Western culture.[74] To the extent that this approach considers culture to be relevant for international normative change, then, it is the culture of the dominant group and its effect on new members wishing to belong to that group.

Is structural and ideational isomorphism a story of domination then? Goodman and Jinks believe that it is not. They point out that norm adoption does not correlate with economic wealth or development of a country, and that isomorphism occurs regardless of

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[71] Some of the leading texts are J.W. Meyer and B. Rowan, "Institutionalized Organizations: Formal Structure as Myth and Ceremony" (1977) 83 Am. J. Soc. 340; W.W. Powell and P.J. DiMaggio, eds., *The New Institutionalism in Organizational Analysis* (Chicago: University of Chicago Press, 1991); J.W. Meyer *et al.*, "World Society and the Nation State" (1997) 103 Am. J. Soc. 144.

[72] See Goodman and Jinks, *supra* note 53 at 1759-1760 and the references there.

[73] As noted above, Goodman and Jinks hypothesize that the process through which pro-social behaviour can be encouraged is acculturation. That can be achieved through '(1) embedding target actors in an institutionalized social setting and (2) institutionalizing at the group level preferred forms of identity' (*supra* note 58 at 648). However, acculturation assumes an already high level of homogenization as its starting point.

[74] See Finnemore, *supra* note 45 at 21 and on the missing agency aspect in this approach, see S. Tarrow, "Transnational Politics: Contention and Institutions in International Politics" (2001) 4 Ann. Rev. Pol. Sci. 1 at 5-6.

whether there is external political pressure to conform.[75] However, their quick rejection of possibly imbalanced dynamics of norm diffusion is questionable. There are multiple ways in which power is implicated in social relations, global relations included. Mainstream IR and IL scholars, influenced by a realist conception, understand power in a limited way. They define it as the manner in which one state uses its material resources to compel another state to do something it does not want to do. But some are beginning to develop a broader analysis of power which includes 'a consideration of how social structures and processes generate differential social capacities for actors to define and pursue their interests and ideals.'[76] Power is produced not only through compulsion or institutional design, but also structurally and discursively.[77] In other words, relations of power (and resultant differentiated capacities) are not produced only through the exercise of material power. They are also the result of the structure of social relations between states, that is mutually constituted, and through systems of signification and meaning.[78]

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[75] In a recent critique of Goodman and Jinks' theory of acculturation, Jose Alvarez warns that '[a]n academic theory that stresses that states are driven to *conform* with human rights may exacerbate rather than lessen the charge that Western regimes are vehicles for neocolonialism…' J.E. Alvarez, "Do States Socialize?" (2006) 54 Duke L. J. 961 at 974. In a reply article, Goodman and Jinks reject this charge and maintain that '[b]ecause the strength and direction of acculturation require identifying target actors with the agents of socialization, the abuse of these processes would undermine the trust and social legitimacy that make acculturation possible in the first place.' R. Goodman and D. Jinks, "International Law and State Socialization: Conceptual, Empirical, and Normative Challenges" (2006) 54 Duke L.J. 983 at 998. But their overall conceptual schema, I would argue, is built upon an understanding of legitimacy as unthinking conformity, or willful emulation, rather than a reflexive engagement with the norms in question. Acculturation that is supported by a broad legitimacy basis as a result of a genuine engagement may be seen as a normatively defensible compliance tool. But that is not always the case, of course.

[76] M. Barnett and R. Duvall, "Power in International Politics" (2005) 59 Int'l Org. 39 at 42.

[77] *Ibid*, *passim*.

[78] Discussing the ways in which hegemonic powers maintain their dominance, political geographer Peter Taylor describes (in a chapter tellingly subtitled 'emulation as the sincerest form of flattery') how hegemons define for the world what works and what fails in social behaviour, and how particularistic ideas and values of the hegemon can be projected as being universal in nature. These values are not imposed but wilfully emulated by others: '[H]egemonic power relies on right as much as might. In a very important way hegemonic power goes beyond political and economic leadership to impinge on the social

World society scholars acknowledge the fact that local values and practices are not completely washed away by world culture. They observe a parallel process of 'decoupling' whereby states adopt global norms without effectively implementing them (e.g. creating science bureaucracies regardless of whether they have any science to coordinate, or ratifying human rights treaties without effectively implementing them).[79] But this lack of correlation between form and practice is seen as an advantage rather than an impediment to homogenization. Decoupling helps avoid disruption and conflict and enables states 'to maintain standardized, legitimating, formal structures while their activities vary in response to practical considerations.'[80] Over time, however, local systems are fully penetrated by global models, leading to more 'efficient' outcomes.[81] In other words, resistance actually helps to smooth over the transition to world culture by absorbing possible shocks to local institutions. Ultimately, cultural uniqueness is no more than the 'dramatization of the local.'[82] John Meyer, the founder of the world society school, concludes with this remarkable statement:

> Uniqueness and identity are thus most legitimately focused on matters of expressive culture: variations in language, dress, food, traditions, landscapes, familial styles and so on. These are precisely the things that in the modern system do not matter…[83]

The disconnect between local circumstances and global models is thus seen as a temporary condition. Global (read: Western) models of what it means to be a state, to be a hospital, to be an army, to be a schooling

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and cultural spheres of other countries.' P.J. Taylor, *The Way the Modern World Works: World Hegemony to World Impasse* (Chichester: Wiley and Sons, 1996) 119. For a similar analysis in the IR literature see G.J. Ikenberry and C.A. Kupchan, "Socialization and Hegemonic Power" (1990) 44 Int'l Org. 283.

[79] See Goodman and Jinks, *supra* note 53 at 1760-1761 and the references there. See also J.W. Meyer, "Globalization: Sources and Effects on National States and Societies" (2000) 15 Int'l Sociology 233 at 244-245.

[80] Meyer and Rowan, *supra* note 71 at 357.

[81] See Meyer, *supra* note 79 at 244.

[82] *Ibid*. at 245.

[83] *Ibid*.

system, to be a citizen, as well as principles such as universalism, individualism, and human purpose, are slowly but surely sweeping the planet. What cultural uniqueness is left belongs to the realm of 'heritage' (read: exotic folklore).

'World society' may represent only one strand of thinking that has influenced conventional constructivist scholarship, but the foregoing illustrates how international lawyers, when choosing to turn to other disciplines for a better understanding of international socialization, have adopted a model that stands on shaky normative grounds. Drawing prescriptive propositions from empirical findings of existing commonalities of norms and institutions, as Goodman and Jinks do, is a risky endeavour, because it overlooks the questions of the norms' origins, their interpretation, and their dynamic nature. First, this approach fails to ask where international norms come from and the extent to which relations of domination are implicated in their global diffusion. Second, it builds on the assumption that local cultures do not matter for state behaviour, and so once global norms fully penetrate local institutions they will have equal interpretation across countries. And finally, it assumes that the meaning of international norms is stable over time and that they are in complete congruence. However, norms may 'make countervailing claims on people and mobilize groups with opposing claims'[84] and they may also be in conflict with other, equally legitimate norms. In other words, even norms that are widely accepted by the international community leave 'substantial room for interpretation and contestation, particularly in light of other strong norms in international life.'[85]

Therefore, acculturation, as a measure of normative coercion designed to induce norm conformity, builds on questionable assumptions regarding the sociability of actors in international society. It assumes an already substantial degree of social cohesion (since a legitimate reference group is a condition for this form of social influence), and it takes global norms to be not only consensual but also with a fixed and determinate meaning across time and space. It may be too early to conclude that cultural diversity is decreasing in importance

[84] Finnemore, *supra* note 45 at 138.

[85] *Ibid* at 139.

in the age of globalization as posited by world society theory. To the extent that global culture is evolving, the meanings that global norms and practices take within each culture may differ markedly – beyond the expressive form.

These difficulties with the normative grounding of world society theory pose a challenge to all analytically oriented constructivist research programmes, as Adler has argued.[86] While constructivism has developed the analytical tools for measuring causal socialization, it is yet to fully grapple with the questions that normative IR theory has been occupied with for decades, concerning the attainable and desirable social cohesion at the global level. This is not to suggest that the norms that analytic constructivist studies often investigate (and endorse) are not laudable, but that students of compliance must acknowledge where these norms come from and the normative ground for their inclusion in the set of values that ought to be shared by the expanding 'international society.' Defining in more precise terms the origins of norms and the preferred image of the international society that ought to share them is not a mere exercise in political theorizing. It would provide a justification for why existing norms ought to spread (rather than only showing implicit sympathy for their diffusion) and in what way, as well as suggest how (and which) new norms may be constructed in the future. This, in turn, has direct bearing on the choice of mechanism for normative change. Sensitivity and respect for diversity, I would like to suggest, may point to one socializing process of international actors rather than another. My point is not that acculturation has no utility at present, but that one must be cautious of overemphasizing it and building a theory of compliance around it, because the constitutive effects of norms can also be expressions of power.

C. Persuasion and Legitimacy of Norms: Constructivism All the Way Down

If the recognition of cultural diversity instructs that the creation, interpretation and application of international norms should preferably take place in a process of social learning, or persuasion, then

[86] Adler, *supra* note 54 at 13-14.

it would be useful to consider the empirical evidence for successful processes of social learning found by analytic constructivist studies, as well as the models of compliance built upon them. In what follows, I examine some of these studies and point to the blind spots in the proposed models, arguing that (1) persuasion is not always found where it may conceivably reside and that (2) by accepting the normative priority of persuasion as a compliance tool, these models could improve their theoretical coherency.

(i) Persuasion and Horizontal Legitimacy

Constructivism's emphasis on agency, as noted above, has focused some thought on the 'bottom-up' involvement of activists in the emergence, adoption, and renegotiation of pre-existing global norms. The development of consensual norms through this pathway can be a long process, taking years if not decades.[87] Some analysts, however, seek evidence for persuasion from a 'top-down' perspective as well. State leaders and elite decision makers are not always passive 'norm-takers' who react to the agency of experts or activists, but very often take leadership in the process of norm construction, adoption and application. At that, they are sometimes engaged in social learning.

Several constructivists who elaborate on the notion of persuasion borrow from Habermas' theory of communicative action.[88] Rather than treating international talk as 'cheap,' it is posited that actors may be engaged in deliberation for the purpose of changing the minds of others. Speech can convince people to reconsider their positions and collectively decide which goals are valuable and what role they should play in social life. To say that actors are engaged in

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[87] As in the case of the norms on racial equality and women's suffrage. See, respectively, Klotz, *supra* note 51, and Finnemore and Sikkink, *supra* note 54 at 895-896.

[88] See Risse, *supra* note 14 and the references there, and also C. Reus-Smith, "The Constitutional Structure of International Society and the Nature of Fundamental Institutions" (1997) 51 Int'l Org. 555 at 564-566. But see Johnston, *supra* note 59 at 493-494 (uses communication theory, social psychology, and political socialization, claiming that 'Habermasian approaches are unclear as to what constitutes a "convincing" argument' and that the conditions for communicative action may be too demanding to be operationalized. Jeffery Checkel is also sceptical as to whether Habermas' theory can be tested empirically. J.T. Checkel, "Norms, Institutions and National Identity in Contemporary Europe" (1999) 43 Int'l Stud. Q. 83.

deliberative persuasion is to suggest that all participants in the discourse are open to being persuaded by the better argument. In the process of truth seeking, participants advance reasons why a certain behaviour ought to be avoided and another adopted. Once a consensus is reached, these reasons internally motivate the participants to behave appropriately.

Jeffrey Checkel argues that state elites sometimes engage in argumentative persuasion, defined as 'an activity or process in which a communicator attempts to induce a change in the belief, attitude, or behaviour of another person… through the transmission of a message in a context in which the persuadee has some degree of free choice.'[89] In attempting to outline the conditions under which persuasion is likely to occur in international settings, Checkel and others have drawn on literature in social psychology and communication research to suggest that persuasion works better in insulated, in-camera settings, where negotiators can freely exchange ideas and alter their positions without worrying about the possible embarrassment involved in retracting and publicly admitting that they were wrong.[90] This implies that secrecy of negotiations would increase the likelihood that mutual persuasion will take place. The alarming corollary is that transparency and publicity are likely to retard persuasion and should therefore not be encouraged. This conclusion stands at odds with the growing recognition by students of politics and law of the importance of civil society participation in global governance fora.[91] Yet Checkel qualifies

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[89] Checkel, *supra* note 58 at 562 (quoting Perloff). Checkel demonstrated how a pattern of constitutive compliance was found in the adoption of the Council of Europe's citizenship rights norms in the Ukraine, through an interaction of state officials with regional experts (*Ibid.* at 574-578). Similarly, Thomas Risse, drawing on studies of German unification, suggested that a process of social learning is what brought Soviet leadership to agree to German unification within NATO at the end of the Cold War. Soviet leaders were convinced by the arguments made by German and US officials, through a process of 'true dialogue of mutual persuasion,' among which was the legitimacy of the principle of self-determination. See T. Risse, "The Cold War's Endgame and German Unification (A Review Essay)" (1997) 21 Int'l Security 159. See also Risse *supra* note 14 at 23-28.

[90] See Checkel, *ibid;* Johnston, *supra* note 59 at 496-498.

[91] Some representative examples are D. Bodansky, "The Legitimacy of International Governance: A Challenge for International Environmental Law?" (1999) 93 Am. J. Int'l L. 596; R.O. Keohane and J.S. Nye, "The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy" reprinted in R.O. Keohane, *Power and Governance in a Partially Globalized World* (London: Routledge, 2002) 219 (recommending

his findings by arguing that another condition for successful persuasion is that members of the interacting group have a relatively high level of autonomy.[92] Under his model, the more centralized the government, the more likely it is that its leaders can be persuaded to adopt a norm and comply with it. Representatives of decentralized governments (typically liberal democracies), by contrast, would be less receptive to persuasion methods because they have less autonomy: they must represent and be accountable to their constituencies. As a result, their ability to engage in argumentative discourse is limited (they are not free to change their minds without a proper mandate). In other words, social learning, as a means of developing new norms across cultural divides, will be most effective when the deliberating parties are representatives of non-liberal states.

This model has two problematic implications. The first concerns the prospects for persuasion at the international level, or what I term (following Jutta Brunnée) 'horizontal legitimacy.' The second, to which I turn in the following subsection, has to do with potential pathways of domestic norm diffusion, or 'vertical legitimacy.'[93] The first problem is that at the inter-state level, promoting compliance by means of persuasion is claimed to be more likely when the target actors (the 'norm-takers') are leaders of states with centralized governments. Therefore, in multilateral fora the mode of interaction should be more instrumental than deliberative, because they include representatives of decentralized governments who would not be willing (or able) to engage in persuasion. International norms, then, may have a constitutive effect on some actors but not others.

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increased transparency and participation in the WTO); J. Brunnée, "COPing with Consent: Law-Making Under Multilateral Environmental Agreements" (2002) 15 Leiden J. Int'l L. 1 (arguing that greater transparency and increased participation of civil society in international environmental law-making processes would promote the public acceptance of these processes as legitimate). See also A. Alkoby, "Global Networks and International Environmental Lawmaking: A Discourse Approach" (2008) 8 Chicago J. Int'l L 377. For an extended review of this literature see A. Alkoby, "Non State Actors and the Legitimacy of International Environmental Law" (2003) 3 Non State Actors and Int'l L. 23.

92 Checkel, *supra* note 58, and also J.T. Checkel, "International Norms and Domestic Politics: Bridging the Rationalist-Constructivist Divide" (1997) 3 Eur. J. Int'l Rel. 473.

93 See Brunnée, *supra* note 91 at 13-15.

What is likely to take place in such cases is that actors who are open to being persuaded ('norm-takers') would be interacting with 'norm-givers' who are engaged in 'rhetorical action': an attempt to convince others to change their views, beliefs, and preferences in a justificatory discourse, while not prepared to be persuaded themselves.[94] Moreover, the more public the interaction, the more likely it is that parties will turn to strategic bargaining as their main mode of communication.

This account appears to be primarily concerned with 'vertical legitimacy,' that is, the acceptance of international norms by target actors domestically. State leaders who are democratically accountable to their constituencies only comply with norms in response to domestic societal pressure, while leaders of centralized governments engage in freewheeling without worrying about how their decisions will be received at home. But this account overlooks the possibility that horizontal factors may also enhance the legitimacy of norms. The concept of 'horizontal legitimacy' emphasizes the importance of legitimacy for the very existence of law.[95] It requires that the procedures through which norms are adopted adhere to certain requirements, and it treats all those who may be subject to the norms as participants in the lawmaking enterprise. In other words, both law-givers and law-takers are viewed as *law-makers*.[96] Legitimate norms are norms that are produced through 'inclusive law-making processes that expose all relevant actors to the mutual construction of norms and identities.'[97] This proposition suggests that (1) legitimacy is a function of the level of openness to persuasion, and (2) the more inclusive and

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94 On rhetorical action see Risse, *supra* note 14 at 8-9. Risse argues that rhetorical action evolves into true reasoning, but the examples he gives are of state leaders with a very high level of autonomy going through this transformation. He does not explain how and whether this could work in the case of democratically accountable leaders.

95 Brunnée, *supra* note 91 at 41.

96 For an extended version of this argument see Alkoby, *supra* note 91 at 86-96.

97 Brunnée, *supra* note 91 at 47. IL scholars are increasingly focusing on the question of horizontal legitimacy and many argue, albeit from different theoretical standpoints, that the *process* through which law is enacted, interpreted and applied is crucial for the legitimacy of norms and to better compliance as a result. See T.M. Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990). For a critical discussion see J. Brunnée and S.J. Toope, "Persuasion and Enforcement: Explaining Compliance with International Law" (2002) XIII Finish YBook Int'l L. 273.

transparent the process is, the more legitimate the resulting norms will be.

In reference to the model proposed by Checkel, this approach may suggest that the scepticism regarding the sociability of state representatives who are constrained by their principals, and their ability to develop shared norms despite their cultural disposition, is unwarranted. It may simply mean that negotiators should engage in a 'two-level arguing,' where they try to persuade not only their international counterparts but also their constituents that they should change their preferences too.[98] Opening up the international deliberation process to the public, in turn, could have the desirable effect of slowly merging these two levels of discourse, or the horizontal and vertical dimensions of legitimacy.

Checkel may well argue that his business is social science, not normative theorizing, and that rather than taking a theory-driven approach to the study of norms he is more interested in investigating whether and how preference change actually takes place in world politics by using process-tracing methods.[99] To treat all parties as 'law-makers,' then, is to imply that power relationships recede in the background and that the better argument wins. However morally compelling this idea may be, it can rarely be found in the real world.

One must separate two claims here. The first is that persuasion as a mechanism for inducing compliance is nice in theory but it is often found to be empirically false. Note, however, that even conventional constructivists who are strong supporters of a discourse approach to compliance do not consider it to be statement about the empirical world but an ideal type against which situations can be measured.[100] This implies that students of compliance must accept that a social scientific enterprise cannot be but normative, and more

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[98] See T. Risse, "Global Governance and Communicative Action" (2004) 29 Government and Opposition 288 at 312.

[99] See Checkel, *supra* note 58 at 565-567.

[100] See Risse, *supra* note 14 at 16-19. See more on this below in the concluding section.

specifically, they must recognize that deliberation is a normatively infused concept.[101] I will return to this point in the concluding section.

But the second, more difficult challenge for deliberative approaches to the study of norms is that they are underspecified. The mechanisms through which persuasion operates in a deliberative mode are not clear. It is not explained, for example, how one gets from point (*a*) – the use of manipulative rhetoric with no intention of being persuaded to (*b*) – an internalization of norms as a result of preference change. This point may well be a valid critique, and so far IL scholars interested in the construction of shared understandings and the persuasiveness of international law have offered illustrative examples, or used case studies where persuasion was inferred from observed policy outcomes rather than discovered through robust social science empirical tools.[102] Political scientists appear to have taken up this challenge and begun debating the ways in which the empirical study of deliberative politics may proceed.[103] This empirical turn is how the IR/IL dialogue on compliance can continue to move in more fruitful directions.

(ii) Persuasion and Vertical Legitimacy

The studies of 'top-down' persuasion – where norms are constructed at the inter-state level by state elites in a process of argumentative persuasion – explain *why* states commit to (and subsequently comply with) global norms, but they say little about *how* they comply. What does it mean that norms have constitutive effects on agents? Does the process of norm diffusion differ across cultures? Would it not be right

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[101] On this see M. Neblo, "Thinking through Democracy: Between the Theory and Practice of Deliberative Politics" (2005) 40 Acta Politica 169 at 173-174.

[102] For example Brunnée, *supra* note 91; Brunnée and Toope, *supra* note 51; Alkoby, *supra* note 90; and also J. Ellis and A. FitzGerald, "The Precautionary Principle in International Law: Lessons from Fuller's Internal Morality" (2004) 49 McGill L.J. 779. For an extensive theoretical discussion in IR on the possible pathways from one bargaining to arguing and vice versa, see H. Mueller, "Arguing, Bargaining and All That: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations" (2004) 10 Eur. J. Int'l Rel. 395.

[103] See most recently, Empirical Approaches to Deliberative Democracy, special issue of Acta Politica September 2005, especially C. Ulbert and T. Risse "Deliberately Changing the Discourse: What Does Make Arguing Effective?" (2005) 40 Acta Politica 351.

to argue that norms receive a different meaning in differing cultural contexts even after the relevant political actors are persuaded to comply with them? Would it be right to argue that some norms may have constitutive effects on some states but not on others?

It is partly a question of who the relevant political actors are. When we speak of horizontal persuasion, we are really talking about individuals – state representatives interacting and constructing global norms.[104] Studies have often emphasized the constitutive effect that norms have on state officials,[105] heads of states,[106] or bureaucrats.[107] In those cases, policy outcomes are in the hands of those individuals and compliance may be virtually achieved once they give their consent to adopt the norm. But very often compliance is a more complex process. While these persuaded individual actors may have every intention to comply with the norms, bringing these norms 'home' is not always a matter of individual decision. Compliance may involve more than an executive decision – it could require political, legal and social internalization of the norms domestically. It is then that the question of how norms may influence different actors differently – due to different cultural contexts in which they are received – becomes crucial.[108]

And indeed, scholars increasingly pay attention to the diversity of norm diffusion pathways. They point out that one of the main factors conditioning the impact of international norms domestically is the level of 'cultural match': the extent to which the norms introduced resonate with widely held domestic understandings, beliefs and obligations.[109] Cultural match is a matter of degree rather

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[104] Although others may also become involved in the process of horizontal lawmaking, broadly conceived – various individuals and groups (non-state actors).

[105] Checkel, *supra* notes 58 and 88.

[106] Risse, *supra* note 89.

[107] Finnemore *supra* note 45 at 131-137.

[108] For a rare example for an analysis of the impact of domestic factors on the resonance of EU norms, see A. Wiener and G. Schwellnus, "Contested Norms in the Process of EU Enlargement: Non-Discrimination and Minority Rights" Constitutionalism Web-Papers, ConWeb 2/2004, online: <http://www.bath.ac.uk/esml/conWEB/Conweb%20papers-filestore/conweb2-2004.pdf>.

[109] See Checkel, *supra* notes 89 at 86-87; A.P. Cortell and J.W. Davis, "Understanding the Domestic Impact of International Norms: A Research Agenda" (2000) 2 Int'l Stud. Rev.

than an either/or situation. The norm in question might confront a void about the regulated issue, or a lack of entrenched norms that resist the internalization of the values that the new norm embodies. This typically removes a potential barrier to norm diffusion. The difficulty arises when there exists a negative cultural match, and the norms appear in a contested normative arena. In such cases, norm internalization becomes a real challenge.

Harold Koh, a legal scholar who consciously draws on constructivist insights, argues that this challenge can be met in a 'transnational legal process': 'the theory and practice of how public and private actors – nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.'[110] He defines transnational law as 'all law which regulates actions or events that transcend national frontiers.'[111] Both interest-based and norm-based approaches to compliance, Koh maintains, fail to provide a sufficiently thick explanation of international obligation, because they do not fully account for the factors inducing compliance that arise from countless interactions between actors transnationally. While sympathetic to the constitutive explanations of compliance, accepting that state identities and interests are socially constructed, he points out that constructivists 'have given little close study to the "transmission belt," whereby norms created by international society infiltrate into *domestic* society.'[112]

Koh is thus interested in *how* nations comply, or the process through which norms acquire their 'taken for granted' quality and compliance becomes habitual. This process takes place, he argues, in three stages that may be separated conceptually: interaction and interpretation, which take place in various domestic and international

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65 at 73-76; A. Gurowitz, "Mobilizing International Norms: Domestic Actors, Immigrants and the Japanese State" (1999) 3 World Politics 413.

[110] Koh, *supra* note 6 at 183-184.

[111] H.H. Koh, "Why Do Nations Obey International Law?" (1997) 106 Yale L. J. 2599 at 2626 (following Philip Jessup).

[112] *Ibid*. at 2651 (emphasis in original).

fora, and internalization.[113] Political internalization happens when political elites adopt the norm as a matter of government policy. Legal internalization is the incorporation of norms into the domestic legal system through legislation, adjudication, or executive action. And finally, social internalization takes place when the norm 'acquires so much public legitimacy that there is widespread general obedience to it.'[114]

The workings of social internalization are not fully developed in Koh's model. In the illustrations that he has provided in the series of articles, he describes political and legal interactions leading to internalization in fairly mechanistic terms and the process of state identity change is assumed to have resulted from these repeated interactions. Like in some of the constructivist accounts reviewed earlier, each of his examples demonstrates interactions that were dominated by logic of consequences but then at the endpoint the norm somehow acquired its 'stickiness' and states complied with it because it had been internalized. How this leap takes place, again, is not clear. It is almost as if interaction is viewed as positive in its own right, regardless of what the nature of it is.[115]

On the IR side, Checkel, who was one of the first to identify the missing domestic link in constructivist literature,[116] began exploring

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[113] *Ibid*. at 2646.

[114] *Ibid*. at 2656.

[115] In *ibid*. at 2655 he writes: "In tracing the move from the external to the internal, from one-time grudging compliance with an external norm to habitual internalized obedience, the key factor is repeated participation in the transnational legal process. That participation helps to reconstitute national interests…" How this participation leads to internalization, however, remains underspecified. One of Koh's examples gives a clue as to what he considers to be the casual mechanisms for internalization. The Israeli government's obedience to the Oslo accords under the hawkish leadership of Netanyahu in the late 1990s, argues Koh, can be explained by the following reasons: the accords brought economic benefits to Israel (consequentialism), the democratic liberal character of Israel (liberal theory) as well as the fact that the country is a member of an international society that had strong expectations from it and pressured it to comply (acculturation). The repeated interactions which Koh identifies as transnational legal process served to link these factors together to override the political opposition to the agreement. (*ibid.* at 2651-2654). Persuasion or change of mind, it appears, is not identified as a part of the story of internalization.

[116] See J.T. Checkel, "The Constructivist Turn in IR Theory" (1998) 50 World Politics 324.

the causal mechanisms leading to compliance comparatively and has argued (as noted above) that domestic politics delimit the role of persuasion. His starting point is that both the rationalist logic of consequences and the constructivist logic of appropriateness capture and explain key features of social life. But the relationship between the two in Checkel's model is not hierarchical or developmental. Rather, the dominant logic of action varies as a function of the domestic structure, with four categories of states identified: liberal, corporatist, statist, and state-above-society. The more centralized the government is, the more likely it is that methods of persuasion will lead to norm-conformity: state leaders who have a high level of autonomy will internalize the norms and a policy change will ensue. In more liberal polities, individuals and private groups serve as the main diffusers of international norms, and they can succeed in altering elites' behaviour by means of mobilization and pressure. In such cases, norms do not have a constitutive effect but a constraining one.[117] Social groups may be driven by nonmaterial goals, but their mode of operation is strategic. The government's response, in turn, is driven by cost-benefit calculations.

I suggested earlier that that we must also consider the importance of horizontal legitimacy in international lawmaking, achieved through the interaction between *all* relevant actors. Checkel's model is too quick to dismiss the possibility that leaders of decentralized governments may also be socialized (by means of persuasion) in the same way that elites of other states can, only that the former may need to engage in a two level 'game' for the purpose of adopting and then applying the norms domestically.[118] But there is another difficulty here, one that has to do with the implications of this model for the ways in which *vertical* legitimacy may be attained. Given the assumption that persuasion works better under conditions of political insulation, this model predicts that deliberation involving

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[117] See Checkel, *supra* notes 58 and 92.

[118] See text accompanying *supra* notes 95-98. Checkel's argument resembles the curious proposition offered by one analyst, who argues that autocrats are more likely to protect the environment. See J. Klick, "Autocrats and the Environment, or It's Easy Being Green" (2002) George Mason Law & Economics Research Paper No. 02-16, online: <http://ssrn.com/abstract=311063>.

persuasion mechanisms will generally not take place within open societies. While the case study offered by Checkel may have confirmed this hypothesis (the diffusion of European citizenship rights norms in Germany and Great Britain), one must be careful of drawing generalizable conclusions from it. Over the past few decades, a number of Western democracies have been experimenting with discursive forms of public participation that are modelled on the ideals of deliberative democracy. Assessing the vast and rich literature that treats this alternative conception of democratic decision making is of course beyond the scope of the present enquiry, but the debate that it has generated does suggest that the image of representative democracy founded on instrumental rationality implied by this model is neither a theoretical nor a practical given.[119]

Therefore, constructivists, who take norms to have a *constitutive effect* on actors cannot afford to disregard the normative approaches in domestic politics (and the empirical evidence supporting them) to the development of collective understandings in a process of *deliberative decision making*. Accepting that instrumental rationality stands at the basis of the political process in democratic societies means that compliance with norms is driven by strategic bargaining most of the time, and that norms in general have a constraining effect rather than a constitutive one. This finding leaves us with a puzzling proposition: that the generalizable assumptions regarding the intersubjectivity of norms and the usefulness of social learning for processes of developing shared understandings across cultures actually hold in very rare cases, and only in diplomatic settings.

This proposition implies an almost negligible role for constructivism in world politics and international law. Whenever a liberal state is involved, international norms will have an impact on its behaviour only through a domestic political dynamic that involves a struggle between interest groups. A norm will be complied with if and when the more powerful social group will succeed in forcing the

[119] For a recent critical review of the practical aspects of discursive democratic approach see D.M. Ryfe, "Does Deliberative Democracy Work?" (2005) 8 Annu. Rev. Polit. Sci. 49. See also the sources cited in *supra* note 103. Some of these experiments might serve as a beginning of a response to Checkel's concerns, who wonders 'how does one maintain complex learning in settings where the static created by domestic politics hinders it?' (*supra* note 88 at 91).

government to do so. Can the state's *identity* be said to have changed in this process? Have its *preferences* changed? Has its cultural values been transformed? The answer appears to be negative. We are told that existing individual preferences were aggregated, not that new ones were endogenized. Checkel thus follows liberal theorists and 'peers inside the black box' only to find the same limited (not to say impoverished) image of liberal politics which could have the unfortunate effect of legitimizing the status quo. This raises the same difficulties with the analytical orientation of IR constructivism pointed to above: given the absence of a constructivist theory of politics, social learning is not granted the normative priority over other forms of norm diffusion.

The limited utility of this view of politics becomes even more apparent if we consider a class of international norms that is rarely treated in existing literature, namely norms that directly (or through national implementation measures) target a large group of 'norm-takers.' Authors who have explored the impact of domestic structures on compliance have focused thus far on norms that could be implemented in relatively simple measures taken by the state, at the executive or legislative level. Examples include definition of citizenship,[120] the treatment of immigrants,[121] policy toward the law of the sea regime,[122] upholding peace agreements,[123] arms control policies,[124] and adoption of human rights treaties.[125] In these examples, compliance with the norms in question was achieved (or could be achieved) in an act of the state through its agencies. The target actors are therefore very often the government and its proxies. In such cases, interest groups, social movements and lay citizens may take part in the public debate over the adoption of the norm, but they have limited

[120] Checkel's studies in *supra* notes 58, 88 and 92.

[121] Gurowitz, *supra* note 109.

[122] H.H. Koh, "The 1998 Frankel Lecture: Bringing International Law Home" (1998) 35 Hous. L. Rev. 623 at 636-642.

[123] Koh, *supra* note 111 at 2651-2654.

[124] *Ibid*. at 2646-2648.

[125] See Koh's discussion of the European human rights convention in British law in *supra* note 122 at 670-674 and more generally in H.H. Koh, "How is International Human Rights Law Enforced?" (1998) 74 Ind. L. J. 1397.

involvement in its implementation. The internalization dynamic is not only linear; it is also unidirectional, from society to the state. It also creates a curious dichotomy between a 'good society' and a 'bad government,' assuming that segments of society active in the political process will necessarily be pro-norm while the government will resist normative change.

Consider however, the two examples given above – those of climate change norms and intellectual property rights. Compliance with treaties that aim to tackle global warming or curb violations of copyrights involves not only significant legislative efforts, but also the active participation of a multitude of actors, from governments to business corporations to private consumers. It also requires wide public support for costly implementation measures. This is when the *vertical* aspect of the legitimacy of norms becomes crucial, and where pressuring governments to comply may be a necessary but not a sufficient condition for compliance.

A rationalist would argue, of course, that once there is a willingness on the side of governments to comply, ensuring the implementation of norms domestically can be achieved by coercive measures. After all, this is the crucial difference between bringing international actors to comply and doing so domestically, where there exists a central authority to enforce legal rules. Coercion may not even be necessary in practice: the threat of punishment is what prevents people from violating the law. But reliance upon threats of punishment is a strategy that is likely to be ineffective when the resources devoted to enforcement are moderate and the opportunities for cheating high (deterring people from copying articles, CDs, or DVDs, for example, is virtually impossible. Enforcing measures to reduce personal energy consumption levels would require resources that a society might not be willing to devote).[126] Studies of compliance with domestic law suggest that the perceived morality and legitimacy of norms are the main factors shaping law-related behaviour, and that they have a greater

[126] See Tyler, *supra* note 8.

effect than assessments of the likelihood of being caught and punished for wrongdoing.[127]

This is how the international and the domestic spheres of law become truly intertwined. For compliance with the law to be voluntary, 'norm-takers' must consider the norm to be legitimate. People would obey such norms, therefore, out of a sense of obligation that is based on their personal sense of what is right and wrong. The legitimacy of some international norms, even after they become state law, rests on understandings that must be globally shared, across different cultural perceptions and values. Consider, then, climate change norms. Taking measures to fight global warming is the 'right thing to do' for the common good. The common good is the prevention of harm to more than the regulated community members (i.e. the state). In fact, it would possibly *not* involve members of that community during the target actors' lifetime. Rather, it is an obligation toward (*a*) members of other living communities (e.g. small island states), (*b*) future generations, (*c*) ecosystems and non-humans. These obligations to 'outsiders' are examples of how global interconnectedness blurs the boundaries between the national and the international by creating interests that are generalizable on a global scale. The development of such generalizable interests in the face of considerable cultural divide is heavily dependent on the ability of both national and international actors to engage in meaningful, coercion-free, deliberation. It also requires, I have argued, a consideration of how the horizontal and the vertical dimensions of legitimacy could overlap and ultimately merge.

V. Conclusion: The Promise of Critical Constructivism

Reviewing the attempts by students of compliance to grapple with the puzzle motivating this article (to what extent is cultural diversity reckoned with in the study of international normative change), I have pointed to some of the blindspots and inconsistencies in the proposed models. Rationalism accords a limited role for law in international relations. Legal norms, rationalists argue, mostly in the form of

[127] *Ibid.* at 225. One such study cited by Tyler is R. Paternoster, "Decisions to Participate in and Desist from Four Types of Common Delinquency: Deterrence and the Rational Choice Perspective" (1989) 23 Law & Soc'y Rev. 7.

treaties, are best understood as declarations of convergence of opinions. Positions do not tend to change in the process of lawmaking; they just become clearer. Once a convergence is found, law may assume its instrumental role of enlarging the shadow of the future through the use of penalties and incentives. Similarly, if ideas, beliefs and cultural attitudes have no causal role to play in the process of lawmaking, culture does not really matter for compliance with the resultant norms.

Conventional constructivists have identified two causal mechanisms leading to compliance that are nonmaterial: persuasion and acculturation. Both are said to bring about internalization of norms and to habitual compliance as a result. While, theoretically, constructivists rely upon persuasion as a pure form of socialization, their studies often describe a process where material and social pressure is the main factor inducing norm conformity. The process of social pressure, labelled 'acculturation,' involves measures of normative coercion that are effective in a relatively cohesive social environment, but are arguably ill suited to culturally diverse global arenas.

Persuasion, on the other hand, is not a unidirectional form of socialization. It consists of uncoerced discursive interventions that may bring about normative change through the development of shared understandings. In the study of 'top-down' socialization, it has been shown how persuasion may be found in diplomatic settings, where state representatives are sometimes convinced to comply with international norms in a process of social learning. These studies, I have argued, fail to engage the normative aspects of norm compliance, and do not fully consider the implications that the horizontal and the vertical dimensions of legitimacy have for the power of norms to redefine preferences and identities. In their attempts at examining the impact of domestic structures on compliance (where the question of cultural difference becomes particularly crucial), some studies present us with a peculiar proposition: that norms may have a profound (i.e. constitutive) effect at the international level under certain conditions but not much more than an instrumental role at the domestic level. This implies that social learning as a means of bridging cultural divides stops at the border of states: once an international norm is agreed upon, its domestic implementation proceeds in ways that have no

resemblance to the deliberative mode of interaction envisioned globally.

Why this lack of consistency then? If identity (and derivative preferences) of social actors is partly constituted in collective dialogues, then at the very least, an explanation is in order as to why the emphasis on identity and preference change by means of argumentative persuasion holds in some cases (i.e. inter-state discourse) but not in others (state – society relations), or why it is found in the interaction between some types of actors but not others, or in some contexts but not others.

Such explanation, which could bring students of politics and law closer to a comprehensive and coherent compliance model, is still lacking. One reason for this neglect, as argued above, is the assumption regarding the stability of norms. The approaches highlighting acculturation as a causal mechanism concentrate on pre-established norms, and assume that their meaning is stable over time and across cultures. Interaction between agents is examined against an existing standard of behaviour, the origins of which (as well as its shifting meaning and legitimacy) remain bracketed.[128] Studies emphasizing persuasion, on the other hand, take the concept of mutual constitution more seriously by exploring not only how global normative structures constitute agents, but also how agents with different culturally determined preferences produce and reproduce norms through discursive interaction. This dynamic nature of norms, however, is typically explored in horizontal interactions taking place at the supranational level only, rather than carried 'all the way down.'

Another reason for constructivism's incomplete engagement with cultural difference lies in the normative agnosticism adopted by many of its adherents.[129] Conventional constructivists in both

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[128] For a similar point see A. Wiener, "The Dual Quality of Norms and Governance beyond the State: Sociological and Normative Approaches to 'Interaction' (2007) 10 Crit. Rev. Int'l Soc. Pol. Phil 47. See also J. Brunnée and S.J. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Colum. J. Transnat'l L. 19 (arguing that 'law is not exhaustive of attempts to provide structure to human existence through norms. Normativity is a continuum.' *Ibid*. at 60). Constructivism's limitation in fully capturing a long-term perspective on compliance, they argue, is rooted in its legal-positivist underpinnings (*id., passim*).

[129] For a discussion see Adler, *supra* note 54 at 3-28.

disciplines avoid making normative assumptions in the selection of what data is important, in interpreting that data, and in articulating why such research is significant. While making claims regarding the nature of social interaction, constructivism does not make explicit claims about the *content* of social relations and the norms that social actors may (or ought to) produce. Constructivism offers a 'thin' description of agents and structures and must be filled with substantive commitments before it may be considered a theory 'of something.'[130] The studies of compliance reviewed above eclectically borrow from substantive theories when studying compliance with international norms, but they typically do not state their normative agenda.[131] There is an irony in the fact that these analysts take pains at demonstrating why facts and values cannot be separated in social life, but claim to keep such separation in their own study of norms. Of the approaches to compliance outlined above, liberal theory is the most reflexive approach to the study of norms in that it is supported – whether explicitly or not – by a rich tradition of political theorizing upon which its premises and normative commitments rest. Arguably, its theoretical coherence is part of the reason for its prominence in both academia and the institutions of global governance.

Critical constructivism, I would like to suggest, holds greater promise in confronting some of the difficult questions raised by the challenge of cultural difference. Critical theorists suggest that the way to make new articulations of universality and particularity possible is through the adoption of a 'thin' universalism.[132] On the one hand, we ought to recognize that 'human subjects cannot perceive the world other than through the distorting lens of language and culture which

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[130] M. Finnemore and K. Sikkink, "Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics" (2001) 4 Ann. Rev. Polit. Sci. 391 at 393.

[131] Finnemore and Sikkink do not consider this to be problematic when writing, 'constructivists are not elaborating theories and engaging in wars among various "isms" (realism versus liberalism, for example). Rather, the modern constructivist research program… focuses on issues… and it aims at contingent generalizations' (*ibid*. at 396).

[132] Most notably A. Linklater, *The Transformation of Political Community* (Cambridge: Polity Press, 1998), and also R. Shapcott, "Cosmopolitan Conversations: Justice Dialogue and the Cosmopolitan Project" (2002) 16 Global Society 221.

has already made them what they are as moral subjects,'[133] and on the other hand remain loyal to the epistemologically foundationalist project of the Enlightenment 'which builds the goal of a cosmopolitan community of humankind.'[134] A thin conception of universalism accepts that there are certain duties which members of each state owe others by virtue of humanity alone, and that certain moral principles may be shared across cultures. However,

> [n]o culture can assume that its moral claims automatically have this transcultural status. Only through dialogue with other cultures can progress be made in separating merely local truths from those with wider acclaim.[135]

The dialogic approach rests on Habermas' notion of discourse ethics, which as we have seen finds confirmation in some empirical studies of international normative change. What often remains unacknowledged in these studies is that a discourse approach is founded on a set of normative commitments shared by critical theorists. The notion of discourse builds on the need to allow participants in political deliberation to account for their beliefs and actions in terms that would be intelligible to others, who may accept or contest them.[136] The assumption is that principles, norms or any institutional arrangement can be said to be valid only if they meet the approval of all those affected by them.[137] The implication is that a political community committed to discourse ethics must consider the effect of its actions on its members, as well as on outsiders.[138] As Linklater explains, '[t]he aim of discourse ethics is to remove the modes of exclusion which obstruct the goal – which may never be realized – of global arrangements which rest upon the consent of each

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[133] Linklater, *ibid.* at 48.

[134] *Ibid*. at 76.

[135] *Ibid*.at 79.

[136] J. Habermas, *Structural Transformation of the Public Sphere* (Cambridge: MIT Press, 1989) at 99.

[137] *Ibid*. at 82.

[138] Linklater, *supra* note 132 at 91.

and every member of the human race.'[139] Discourse ethics may thus provide the normative ground upon which the theoretical preference for social learning as a compliance tool could rest. If cultural diversity is truly to be reckoned with, the building of shared understandings both among and within nations ought to proceed through discursive means.

This kind of normative reflection is unavoidable in theory building, and the forgoing discussion demonstrates why the development of a culturally attuned theory of compliance cannot be value-free.[140] More to the point, in a culturally diverse global environment, one must be mindful of the normative implications of reliance on coercion (be it material or nonmaterial) as a method of inducing 'conformity' with norms. The theoretical preference for acculturation could be based on either (1) the belief that these norms embody values that *ought to be shared* across cultures, or (2) the argument that while persuasion is generally the preferred causal mechanism for inducing compliance with norms, the use of acculturation (or perhaps even material coercion) is normatively defensible when the norms have already reached the status of global consensus. The first argument is purely normative (and it is often used in liberal theorizing) while the second may also involve an attempt at empirical corroboration. Either way, analytical precision is necessary for maintaining theoretical coherence.

There are some moves in the critical direction, taken by both IR and IL scholars studying compliance, that adopt a more expansive view of legal normativity, and accept that compliance is a normatively infused concept.[141] These are solitary voices, however, and compliance

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[139] *Ibid*. at 93.

[140] A point already made by B. Kingsbury, "The Concept of Compliance as a Function of Competing Conceptions of International Law" (1998) 19 Mich. J. Int'l L. 345 at 346. A notable attempt at a synthesis of analytic and normative IR theory is made by Adler, *supra* note 54.

[141] See A. Wiener, "Contested Compliance: Interventions on the Normative Structure of World Politics" (2004) 10 Eur. J. Int'l Rel. 189, and also Wiener, *supra* notes 128 and 108; Brunnee and Toope, *supra* notes 52, 97 and 128; and Alkoby, *supra* note 91. See also A. Alkoby, "Improving Access to Essential Medicines: International Law, Normative Change and the Role of Civil Society" in L. Forman and J. C. Cohen, eds., *Access to Medicines as a Human Right: What Does it Mean for Corporate Responsibility?* (Toronto: University of Toronto Press, forthcoming). Price and Reus-Smith also seem to emphasize the

research on the IL side continues to be dominated by rationalist-liberal influences from IR. When international lawyers look beyond the consequential explanations of global social action, they often turn to the rich conventional constructivist analyses reviewed above. These studies do provide a conceptual opening toward a deeper, more nuanced understanding of international normative change, but as this article suggests, the potential remains only partly fulfilled.

interpretive qualities of both critical theory and constructivism, and begin to touch upon the notion of 'moral inclusion' in critical theory that constructivism may draw on, but they ultimately view constructivism as a social, not a political theory. See R. Price and C. Reus-Smith, "Dangerous Liaisons? Critical International Theory and Constructivism" (1998) 4 Eur. J. Int'l Rel. 259.