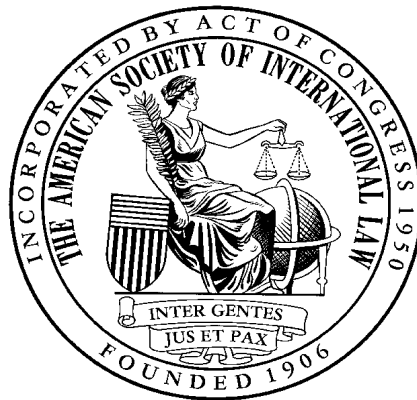


# INTERNATIONAL LEGAL THEORY



## Why Obey International Law?

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# Feminist Ambivalence about International Law

*Hilary Charlesworth*  
*Australian National University*

My comments offer a feminist perspective on why states do, or should, obey international law. First, I will reflect on what it means to have a feminist perspective on international law.

Being a professional feminist means carrying a label wherever you go. We can be confident that no one at this conference<sup>1</sup> has been asked to present a masculinist perspective on questions of international law. Masculinity has so permeated the mainstream of international law that it has become the norm. The particular (the masculine) has become the general. As I grow older and more impatient, I look forward to the day when issues of sex and gender will become less relevant, and concerns of humanity will become more significant. This will mean that women will not be required to speak *as women*, simply because men are always speaking *as men*.<sup>2</sup>

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<sup>1</sup> Author refers to the 2005 Annual Meeting of the ASIL, held in Washington, DC.

<sup>2</sup> See Anne Phillips, *Engendering Democracy*, 7 (Polity Press 1991).

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In the context of a grand establishment organization, such as the American Society of International Law, the feminist perspective carries a whiff of danger about it. Allowing a feminist to participate, suggests the broadmindedness of the Society and its tolerance of offbeat perspectives. While I believe that the Society is born of a genuine liberal tolerance, it is striking that the tolerance is passive and does not lead to any real engagement of ideas.

Looking at the major writings in international law and theory over the past decade, it is very hard to detect any real attempt to engage with feminist theories of international law, or indeed with any outsider perspectives. Feminist theories seem to remain in a scholarly ghetto, at most a brief footnote, in international legal scholarship. Fernando Tesón is an exception to this tendency and I welcome his interest (though it is highly critical) in feminist theories of international law.

Of course, the meaning of feminism is highly contentious. I have surveyed students in both the United States and in Australia and discovered that the most common definition of feminism is a refusal by women to shave their legs! What are the central concerns of feminist jurisprudence? The term “feminism” is an over-extended umbrella; we can readily find bitter theoretical disputes between scholars who identify themselves as feminists. Examples include the debate over pornography, or the trafficking of women.



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An early search for points of commonality among women has fractured. Now it is common to find references to “feminisms” rather than “feminism.” The Canadian academic Denise Réaume challenged the idea of feminist jurisprudence as a distinctive school of thought and has attempted to recognize the diversity within feminist scholarship.<sup>3</sup> She proposed an account of feminist jurisprudence as “an analysis of the exclusion of (some) women’s needs, interests, aspirations, or attributes from the design or application of the law.”<sup>4</sup> This account does not require a thick substantive conception of the aims of feminism.<sup>5</sup> In other words, it assumes a broad commitment to the equality of women, without defining what equality actually is. Réaume’s notion of feminist jurisprudence also builds on the sense that the injustice women face is structural and systemic; feminist jurisprudence is skeptical about the justice of traditional power structures.

I find this explanation of feminist jurisprudence (with the exclusion of women) attractive as an alternative to the radical feminism, associated most strongly with the writings of Catharine MacKinnon, because it does not depend on a notion of the universal victimization of women and the universal empowerment of men.<sup>6</sup> It moves us a-

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<sup>3</sup> See Denise Réaume, What’s Distinctive About Feminist Analysis of Law?, A Conceptual Analysis of Women’s Exclusion from Law, 2 *Legal Theory* 265 (1996).

<sup>4</sup> *Id.* at 271.

<sup>5</sup> See *Id.*

<sup>6</sup> See Vanessa E. Munro, On Power and Domination: Feminism and the Final Foucault., 2 *Eur.J.Pol Theory* 79, 80 (2002).

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way from the rather dispiriting and often paralyzing idea that women are eternally downtrodden at the hands of an international brotherhood of men.

I use the theme exclusion of women, in the design and application of law, as a response to why states should obey international law. I offer three reflections on this topic, but acknowledge that they do not all point in the same direction.

First, using the lens of the exclusion of women, it might be said that the reason states should obey international law is that it gives much greater attention to the position of women than almost any national legal system. Perhaps the most obvious example of this is in the area of human rights, where the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) gives treaty status to the norm of nondiscrimination against women. This is why major women's groups support the ratification of CEDAW. In my country, Australia, national sex discrimination laws gain constitutional basis from Australia's ratification of CEDAW. Other responses in international law to the situation of women include the International Criminal Court statute's explicit recognition of rape as a war crime.

My first response is that, from the perspective of the exclusion of women, the normative values of international law are superior to those of national law. International law, at least, includes some recognition of the needs and aspirations of

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women. At the same time, we should acknowledge all the barriers that still prevent states from taking international law with respect to women seriously. Perhaps more than in any other area of international law, states have crafted many techniques to avoid implementing international norms relating to women in national legal systems. These techniques include extensive reservation toward CEDAW and the invocation of notions of “local culture” as a reason not to accept the principle of women’s equality with men.

A longer look at international legal norms leads to a second observation: by and large, women remain excluded from the design of international law. The international legal principle of non-discrimination on the basis of sex is primarily focused on discrimination in the public world, but even with this limitation, it is very hard to take it seriously. For example, the individuals currently debating over the norms related to the use of force in Iraq are almost entirely male. Women’s voices have been comprehensively diverted. Of the major law-making institutions of the UN Charter, the International Court of Justice has one woman member, and the International Law Commission has two. Yet, this great imbalance is not seen to impinge on the legitimacy of these legal bodies.

The reform agenda in international law calls (at best) for equality in the participation of women. It does not deal at all with the gendered or male-centric bases of concepts such as peace, security, democracy and self-determination. We can see

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that international law implicitly excludes women by assuming a male norm. In other words, international law is built on the understanding that “whatever is true of men, or makes sense to them... automatically suffices for women.” It might also be noted that international law pays only perfunctory attention to differences *among* women. For example, international humanitarian law is concerned with women chiefly in roles as mothers. In some contexts, the limits of international law with respect to women can constitute a restraint on the development of progressive national law. Thus, a constitutional challenge was made to Australian sexual harassment laws on the ground that CEDAW does not refer to sexual harassment. Although this challenge was unsuccessful, it illustrates the more general problem.

At a third level, whether states should obey international law when it conflicts with national law can, itself, be interrogated from a feminist perspective. The question assumes that international law and national legal systems are all command-and-control-type systems. What if we were to think of the relationship between international law and municipal law as less of a competition and more of a conversation or exchange? If one aim of this conversation is to reverse the exclusion of women, this could lead to a less competitive and more productive relationship between the two legal systems. This prescription might sound straightforward, but we must recognize that it goes against the values of all dominant cultures.

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As things stand, neither international law nor most national legal systems respond adequately to the exclusion of women. Indeed, from a feminist perspective, it may be more accurate to say that the two legal systems are symbiotic: they work together to normalize the exclusion of women. In this sense, we should be more interested in alliances between the two legal systems, rather than their divergence. Both use complex and fluid disciplinary techniques to define truth and normality with respect to women's lives.

We must question the adequacy of theories in compliance with international law that do not take into account the exclusion of women from the design and application of all forms of law. For example, is it not relevant that the "iterative process of discourse" (celebrated in the Chayes' managerial model of compliance)<sup>7</sup> is almost exclusively between men? Is Harold Koh's account of the transnational legal process (by which international norms are internalized) limited because it does not pay enough attention to the sexed identity of the players in the internalization process? Compliance is negotiated through a masculine grapevine, although occasionally women may be allowed to participate. And why is Fernando Tesón not interested in the absence of women in public decision-making in "democratic" states? When respected mainstream scholars begin to address these types of issues, we will be making significant progress.

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<sup>7</sup> Réaume, *supra* n. 2, at 278.



# Globalization and the Theory of International Law

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## I. INTRODUCTION

Contemporary globalization both requires *and permits* the re-casting of international law away from a “society of states” model and toward a true model of a global society, or even a global community.<sup>1</sup> By effectively eliminating both time and space as factors in social interaction, globalization is changing the nature of global social relations, which intensifies the obsolescence of the “society of states” model and demands a fundamental change in the social theory of international law, toward a global society of persons. Because of these changes, globalization requires that we refashion international law into a global public law, and expand the domain of justice from the domestic

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<sup>1</sup> This essay is drawn from a larger work-in-progress, delivered as a working paper at MIT, Brandeis, and Boston College. The author would like to thank those audiences for their helpful input, and Mark Toews for his able research assistance. This essay was prepared with the support of the Boston College Law School Fr. Francis Nicholson Fund.

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into the global sphere, as the fundamental normative criterion for international law. Through a profound re-examination of core inter-national legal doctrines and institutions (such as boundaries, sovereignty, legitimacy, citizenship, and the territorial control of resources) the inter-national law of a society of states can be re-fashioned into the global public law of a global society.

II. FROM STATES TO PERSONS: RECONCEPTUALIZING GLOBAL LEGAL REGULATION

The dominant contemporary account of the social basis of international law has been the “society of states” model.<sup>2</sup> In this view, to the extent that international law constructs an ordered social space (a claim which has been contested since Hobbes, if not before), it is a social space in which states are the subjects. In other words, international law exists to order a community in which states are the members.

This view that international law regulates a society of states has two important normative implications, both flowing from the underlying analogy of the model: states to persons. First, it asserts a strong view of state autonomy: like persons in domestic society, states in international society are viewed as autonomous sources of moral ends, immune from external

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<sup>2</sup> See CHARLES BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 67-123 (1979) (overview of the society of states model of international relations, superseding earlier Realist paradigm).



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interference.<sup>3</sup> Second, there is no principle of distributive justice to which states are subject; they are presumed entitled to the resources they control.<sup>4</sup> Taken together, this approach can be called the “morality of states” model of international justice.<sup>5</sup>

We can see this approach played out doctrinally in many key areas. For example, the core doctrines of non-intervention, self-determination and state responsibility treat the state as the primary locus of autonomy, self-realization, and rights, and are framed largely in view of the interests and needs of territorial states. International harms to individuals are understood within a framework of harm to a state’s rights. In all cases, the analogy between states and persons controls, and it is the state’s liberty and rights which are defined as the primary subjects of the law.<sup>6</sup>

Pressure to shift away from this model began in earnest in the mid 20<sup>th</sup> Century through human

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<sup>3</sup> Beitz, *supra* n. 1, at 65-66.

<sup>4</sup> Beitz has analogized this to 19<sup>th</sup> century liberalism at the international level: “a belief in the liberty of individual agents, with an indifference to the distributive outcomes of their economic interaction.” *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> To cite just one example of the doctrinal pre-eminence of this view, the society of states model underlies the entire approach to international law taken in the Third Restatement of Foreign Relations Law of the United States. The Third Restatement asserts that “international law is the law of the international community of states,” and “states are the principal persons in international law.” All other entities with any personality (international organizations and natural persons themselves) derive their personhood, and the extent of their legal rights in international law, from grants flowing from the primary persons: states. Restatement p. 16-17, 70-1.

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rights, international economic law, and the emergence of international civil society, all of which render the “society of states” model increasingly deficient both empirically and normatively. Criticisms of current international law and institutions point to the lack of democratic participation and legitimacy, lack of distributive justice, lack of basic welfare rights and security and similar attributes of any just society. From a theoretical viewpoint, these are not problems in the “society of states” model. Instead, they point to the *limits* of this model, signaling that we have reached those limits. What is the next step?

III. GLOBALIZATION, GLOBAL SOCIETY AND GLOBAL COMMUNITY

Efforts to reconfigure international law at the theoretical level often center on the fundamental moral status of individual persons, drawing on the work of Kant and others, and going by the name “cosmopolitanism.”<sup>7</sup> Such efforts, however, run into a variety of theoretical problems, including important communitarian objections to the possibility of global justice on the grounds that justice is a virtue *within* political communities, not *between* them.<sup>8</sup> This objection fits well with

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<sup>7</sup> See generally Charles Beitz, “Cosmopolitan Liberalism and the State System,” in POLITICAL RESTRUCTURING IN EUROPE (BROWN ED. 1994) (surveying contemporary cosmopolitanism).

<sup>8</sup> See generally DAVID MILLER, ON NATIONALITY (1995), MICHAEL WALZER, SPHERES OF JUSTICE (1983) (raising general communitarian objections to global justice).

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the “society of states” model, and helps keep justice out of international law.

However, by effectively eliminating both time and space as factors in social interaction,<sup>9</sup> globalization is changing the nature of global social relations and creating the basis for both society and community at the global level. Viewed from the perspective of political theory, globalization is lifting relationships out of the strictly territorial into the “global” or meta-territorial.<sup>10</sup> The political and legal significance of this change is immediate and fundamental: as the space in which we conduct our social relations changes, our manner of regulating those relations must also change. To be effective, regulatory decisions must increasingly involve the meta-state level. Globalization thus requires a fundamental re-examination of social regulation and governance at the global level, leading to a system in which states may still have a preeminent role, but not the only role.<sup>11</sup>

For our purpose here, we need to understand how globalization changes the nature of social relations at national and “global” levels, and paves

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<sup>9</sup> For a comprehensive overview of globalization as a phenomenon, emphasizing changes in the perception of time and space, see Heba Shams, “Law in the Context of ‘Globalization:’ A Framework of Analysis,” 35 INT’L LAWYER 1589 (2001).

<sup>10</sup> See generally *Id.* and GLOBAL TRANSFORMATIONS (HELD, ET AL. EDS 1999) (reviewing evolution of meta-state institutions).

<sup>11</sup> See, e.g. ANNE MARIE SLAUGHTER, A NEW WORLD ORDER (2004); MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY (1996).

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the way for global community for global justice, even on stringent communitarian terms.<sup>12</sup> This change has a fundamental impact on the possibilities open to international law.

First, globalization brings about at the global level the conditions which make justice both possible and necessary at the domestic level, which Rawls calls “the circumstances of justice.”<sup>13</sup> Rawls lists five circumstances: a moderate scarcity of resources, a shared geographical territory, a capacity to help or harm each other, and (subjectively) that people are both non-altruistic and hold conflicting claims.<sup>14</sup>

The key point is that globalization brings about the same circumstances of justice at the global level, which Rawls describes at the domestic level. To begin with, we find the same basic scarcity of resources at the global level. Through globalization, people increasingly compete for the same resources on a global scale in a shared territory: our planet. That they are non-altruistic and assert conflicting claims over these resources does not need to be argued.

Because of globalization, we also now have the capacity to help and to harm each other at the

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<sup>12</sup> My treatment here draws on a fuller exposition of these issues, in “Globalization, Global Community, and the Possibility of Global Justice,” available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=661564](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=661564).

<sup>13</sup> JOHN RAWLS, A THEORY OF JUSTICE 126-130 (1971) (overview of circumstances of justice).

<sup>14</sup> *Id.*

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global level to an unprecedented degree. Through globalization, we increasingly find that we have the capacity to effectively respond to the needs and concerns of others beyond our boundaries through the transnational mobilization of information, power, capital, or public opinion.<sup>15</sup> Because of globalization, we also increasingly find that our state's policies and our own political and consumer choices influence the life prospects of others in direct and dramatic ways. The globalization of markets means that, in many cases, we are directly profiting from the economic and social conditions in other parts of the world. Thus, completing Rawls' basic conditions, we have the capacity to harm each other as well.

Together, these global circumstances of justice offer one kind of argument for a global society, making justice both possible and necessary. A second, more ambitious argument is that globalization has gone beyond a global society and is creating a global community, at least to a limited degree.

One basis for a global community is the globalization of knowledge. Through globalization, we know so much more, immediately and intim-

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<sup>15</sup> CHARLES JONES, *GLOBAL JUSTICE* 9 (1999). Even David Miller, a communitarian critic of global justice, acknowledges that the "prosaic observation that the rich countries now have the technical capacity to transfer large quantities of resources to the poorer countries," makes a prima facie case that such transfers have become morally obligatory. "The Limits of Cosmopolitan Justice," in *INTERNATIONAL SOCIETY* 164 (MAPEL AND NARDIN EDS. 1998).

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ately, about the plight of people in other parts of the world. One specific type of shared knowledge important to globalization is the growing recognition of the risks we share as human beings on this planet and our shared interest in addressing those risks. In this sense, globalization is creating what is called a “community of risk.”<sup>16</sup>

Such knowledge satisfies a basic requirement for community: that we have the capacity to know another’s needs, concerns and preferences. This kind of knowledge is the basis for creating solidarity; that leap of the moral imagination, which pronounces that your concerns are my concerns.

This community of knowledge and risk increasingly becomes a community of shared traditions, practices and understandings. These grow both spontaneously and institutionally out of our perception of shared needs and interests, our capacity to help and to harm, and of our awareness of each other’s plight. In short, our understanding of globalization interlocks our fates. Despite the reality of conflict over social practices and values, we are increasingly a part of many sorts of global social networks.<sup>17</sup> Moreover, commentators suggest that (at least at the political level) there is an emerging consensus or

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<sup>16</sup> DIRK MESSNER, “World Society – Structures and Trends,” in GLOBAL TRENDS & GLOBAL GOVERNANCE 24 (KENNEDY, ET AL. EDS. 2002).

<sup>17</sup> Examples include multi-national corporations, NGO’s and various organs of international scientific cooperation.

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shared understanding about the importance of markets, democracy and human rights.<sup>18</sup>

I would like to focus on two aspects of contemporary globalization as particularly indicative of the emergence of a global community in each respective realm: markets and meta-state institutions.

To the extent that globalization creates a global market society, this in itself, constitutes a set of shared practices and contributes to a community of shared interests. For example, market society has certain attributes: the need for bureaucratic regulation, recognition of private property and civil courts (to name a few), which by virtue of their pronounced spill-over effects, contribute to shared interests among participants.<sup>19</sup> Not the least of these is an interest in considering institutions that supplement and mitigate the rigors of capitalism, compensating the “losers” through some form of wealth transfer.

Perhaps the strongest force for, and evidence of, an emerging global community involves our shared need to look to institutions beyond the

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<sup>18</sup> This consensus can be seen at the level of positive international law, and also normatively, insofar as the world's leading religious and philosophical traditions can be said to converge around this triad. David R. Mapel, “Justice Diversity and Law in International Society,” in Mapel and Nardin, *supra* note 14 at 247.

<sup>19</sup> See *e.g.* DON SLATER AND FRAN TONKISS, MARKET SOCIETY 92-116 (2001) (surveying range of institutions which markets require/are embedded in).

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state for an adequate social response to many of the problems and challenges we face. Allocative social decision-making today is increasingly conducted through a complex partnership consisting of states and their constituent units, international organizations, and non-state actors (all regulated or established through International Law), and forming a “global basic structure” in Rawlsian terms.<sup>20</sup>

This shift towards the meta-state level has profound consequences for global community. First, this shift indicates that national communities of justice are no longer self-sufficient. From a distributive perspective, globalization reveals domestic society to be an incomplete community: incapable of securing the overall well-being of its members by itself, and requiring a higher (global) level of community to secure this well-being.<sup>21</sup> Second, this shift signals the emergence of global politics. The role played by common institutions sharing a common language in building policies out of disparate

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<sup>20</sup> “The institutions and quasi-formal arrangements affecting persons’ life prospects throughout the world are increasingly international ones – IFI’s, MNC’s, the G-8, the WTO...” Jones, *supra* note 8 at 8. Jones also argues that the traditional Rawlsian view, limiting justice to domestic society, “fails to assess the moral character of those institutions.” *Id.*

<sup>21</sup> Walzer describes the political community of justice as one “capable of arranging [its] own patterns of division and exchange, justly or unjustly.” *supra* n. 7, at 31. When a community is no longer capable of fixing its own patterns of division and exchange, it is no longer sufficient to analyze the justice of that community with sole reference to itself. In other words, unable to fix its own distributions entirely itself, it is not capable of delivering its own justice. We must therefore look to that further level of institutions which is affecting that community’s distributions – the global; and to its justice – global justice.



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peoples, has long been recognized in domestic politics as “nation-building.” Similarly, the growing tendency to look to meta-state institutions for responses to global social and environmental problems *itself* constitutes a shared understanding that such institutions will increasingly formulate or channel social policy decisions and orchestrate social welfare responses, and that few States can act without them on any important social issue.<sup>22</sup>

I am not suggesting that global social relations *in toto* form the sort of full-blown political community that communitarians point to in domestic social relations as exemplar. However, globalization creates a third possibility: global society, understood as containing “limited” degrees of community in specific functional areas.<sup>23</sup> If we disaggregate the notion of community, we see that globalization creates certain *elements* of community at the global level, such as knowledge of inter-connectedness and the

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<sup>22</sup> Indeed, the many anti-globalization protests focused on Bretton Woods institutions indicate a growing awareness both that these institutions increasingly constrain allocative decision-making at the national level, and that they themselves engage (through the allocation of trade benefits, critical currencies and development aid, for example) in positive distributive functions; thus the anti-globalization movement represents the formation of a transboundary polity organized around meta-state institutions, albeit in a critical role.

<sup>23</sup> Moreover, the trend is towards increasing community. Bruno Simma and Andreas L. Paulus list Rwanda and Somalia as examples of a weak solidarity which can suggest that the concept of global community is either half-full, or half-empty. They decide it is half-full, asking “After all, who would have cared - and how - a hundred years ago?” “The ‘International Community:’ Facing the Challenge of Globalization,” 9 EUR. J. INT’L L. 266, 276 (1998).

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circumstances of others: creating true community in certain *areas* of global social relations, such as humanitarian relief and trans-boundary economic relations and establish a social bond necessary to support justice. This means that global society taken as a whole may not rise in all cases to the level of community which communitarians posit, but has enough elements of community and contains enough pockets of community to support an inquiry into justice in at least in some areas of global social relations.

IV. GLOBAL PUBLIC LAW

If global community emerges, at least in a limited form, then we need a global public law to structure it.<sup>24</sup> This is the transformative challenge for international law and legal theory today: to move from the public law of inter-state relations to the public law of a global community of persons. This involves many theoretical and doctrinal tasks. At the core, these new tasks involve a global system for safeguarding and delivering what can be called the “global basic package:” a basic bundle of political, social and economic rights that everyone is entitled to as a function of their humanity (and which is safeguarded and delivered at the primary level by

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<sup>24</sup> We can think of global public law as the organization of the macro, the law which sets the structure of powers, duties and limits of the macro and its officers, relations of the macro to the midrange (states) and the micro (individuals), and the definition of and exercise of powers of the macro for the public good. Alternatively, we can think of it as the regulatory system for delivery of global public goods. PROVIDING GLOBAL PUBLIC GOODS (KAUL, ET AL., EDS. 2003).

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the global community). This list can be drawn in a variety of ways, but minimally contains four elements: security, subsistence, liberty, and voice.

We see the germ of a global basic package today in international human rights law, humanitarian aid, and the notion of humanitarian intervention. International law already recognizes a core commitment to deliver basic rights, subsistence, food, shelter and minimum levels of security as a function of our basic humanity.<sup>25</sup> In reality, this often amounts to very little if anything at all: a food package, a blue helmet in the vicinity, and an occasional visit by an international human rights investigator.<sup>26</sup>

What is still missing? There are two fundamental gaps: the absence of effective mechanisms for global wealth transfers at the scale necessary to support the global basic package, and the absence of effective political representation or voice at the global level.<sup>27</sup> This

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<sup>25</sup> These achievements can be seen as representing a high water mark of cosmopolitanism in contemporary international law.

<sup>26</sup> Indeed, the limited nature of this response has lead commentators such as Jean B. Elshtain to argue that in these particulars there is still no equivalent to the state, citing Ahrendt's point that the only meaningful site for citizenship remains the state. "Theorizing Globalization in a Time of War: Challenges and Agendas (panel)," Annual Meeting of the American Political Science Association, September 2, 2004 (on file with author). However, I believed this says more about the limits of current theory and politics, than it does about the intrinsic limits of meta-state institutions. International law is incapable of reaching further cosmopolitan goals under a "society of states model," until it shifts to a model of global community and becomes global public law.

<sup>27</sup> Jay Mandle and Louis Ferleger refer to this as the need for institutional mechanisms for compensation and control, two fundamental elements of the

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change from international law to global public law will require a profound re-examination of core international legal doctrines and institutions such as boundaries, sovereignty, legitimacy, citizenship, and the territorial control of resources.

Let me suggest as a starting point, that we re-think the role of territorial political boundaries. Territorial boundaries now serve as the frame on which we hang various concepts of distributive justice, such as citizenship and the territorial control of resources, which profoundly influence the life prospects of all affected individuals. By privileging citizens over non-citizens in providing access to the global basic package, the political boundary of citizenship dramatically affects our life prospects on the basis of one of the most arbitrary aspects of our natural condition: the place we are born. In the words of one commentator, “Citizenship in western liberal democracies is the modern equivalent of feudal privilege—an inherited status that greatly enhances one’s life chances.”<sup>28</sup>

Citizenship illustrates how the current “society of states” model of international law, permitting territorial boundaries to function at the global level, is one of the main obstacles in delivering a global basic package. If global community is possible and emerging, then we have to re-think

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regulation of global market society. “Preface: Dimensions of Globalization,” 570 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 16 (2000).

<sup>28</sup> Joseph H. Carens, “Aliens and Citizens: The Case for Open Borders,” in KYMLICKA, THE RIGHTS OF MINORITY CULTURES (1995).

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the discretion given states to use boundaries as primary determinants of global justice.<sup>29</sup> We need to develop a model for the international delivery of the basic package: a concept of effective global citizenship, in which the accident of birthplace or the vagaries of naturalization law do not fundamentally affect each person's life prospects.

In order to do so, global public law needs to tackle distributive issues both between and within states. The "society of states" model places the question of justice outside the realm of international law. Globalization makes inequality a central problem of global social relations in the same way that it is a central problem of justice at the domestic level.<sup>30</sup>

What should the role of the state be in a global public order? Global community demands a new view of this role, in which the state no longer holds a monopoly on the delivery of basic public goods, but must nevertheless play a central role in

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<sup>29</sup> As things stand, there is a pernicious anomaly: free movement of capital but no free movement of persons, which could be seen as a deliberate attempt to keep labor costs from equalizing. A global economic space demands something approaching the free movement of persons, subject to some notion of carrying capacity or assimilation rate. The very idea conjures images of unsupportable mass migrations, which are not inevitable, nor are they the necessary result of changes in border policies. The primary reason for such shifts would be economic inequality, a subject which poses a central challenge to global public law.

<sup>30</sup> See generally FRANK J. GARCIA, *TRADE, INEQUALITY AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE* (2003) (arguing a central role for inequality and its amelioration in contemporary international economic relations).

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their delivery, as the guarantor of last resort.<sup>31</sup> This does not, however, mean that global institutions must be modeled on domestic institutions to form a world state. Rather, we must see to it that in normative terms, global institutions are justifiable according to the same principles we apply in domestic political theory, whatever their shape.<sup>32</sup> Their legitimacy can no longer rest entirely on their creation by states along duly authorized treaty lines, but will require some increased form of public participation, reflecting normative principles of political theory in the same way that domestic institutions must.

V. CONCLUSION

The absence of global institutions capable of giving everyone both the resources reflected in this basic package, and a voice in formulating this basic package, is a fundamental gap in the global basic structure today. We are indebted to the anti-globalization protests for building awareness of this problem<sup>33</sup> and for reminding us that the creation of a global market society need not result in a global *laissez faire* market culture. We must recall, however, that the progression towards

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<sup>31</sup> Indeed, Manuel Castells has argued that globalization is bringing about a new form of nation-state, the "network state," whose principle duty is to successfully manage on our behalf this web of networks. *THE POWER OF IDENTITY* 242-273 (1997).

<sup>32</sup> See LEA BRILMAYER, *JUSTIFYING INTERNATIONAL ACTS* (1989).

<sup>33</sup> *GLOBALIZATION IN WORLD HISTORY* 23 (A.E. HOPKINS ED. 2002) (though under-theorized, anti-globalization protests maintain public awareness of the inadequacies of under-regulated capitalism and the range of values affected by market-driven globalization).

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globalization is not inevitable or linear, nor is the achievement of a just globalization necessarily assured. The task of international legal theory or global legal theory is to draw upon both traditional domestic political theory and innovative studies of global social reality to design the next generation of global institutions and doctrines, capable of delivering global justice for a global community.





# The Value of Process

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For the last decade, most of my work as a lawyer, a scholar, and in the government has been devoted to three questions. First, why *do* nations obey international law? Second, why *should* they obey international law? Third, how are conflicts managed between the applications of international and domestic law? In a 1997 *Yale Law Journal* article<sup>1</sup>, I offer five answers to the first question “Why do nations obey international law?” These answers are summed as:

1. Reasons of power and coercion
2. Reasons of self-interest
3. Reasons of liberal theory (both rules and identity)
4. Communitarian reasons
5. Legal process reasons

To clarify a very long hypothesis in a very short time-frame, how do we persuade scofflaws to obey the law in a domestic setting? With persistent litterers or traffic violators, first threaten them with coercion (reasons of power). Second, suggest

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<sup>1</sup> See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *Yale L.J.* 2599 (1997).

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that it is in their long-term self-interest to obey the law (reasons of self-interest). Third, state that the rules are fair and they should pursue a law-abiding identity, which are liberal Kantian ideas. Fourth, make appeals to the community. Finally, use reasons of process (the ones that lawyers understand best): enmesh them in processes, institutions, and regimes that internalize the norms into their value sets.

As legal academics, we all know that if you have students with disciplinary problems, you put them on the disciplinary committee. Why? Because participating in the process of law enforcement forces students to see why it is in their enlightened self-interest to be law-abiding; it is also a means for incorporating enforcement into the student's value set. The core of this approach can be summarized as: "Most compliance comes from obedience. Most obedience comes from norm internalization. Most norm internalization comes from process." Played out in another setting, why do most people not kill other people? Because they have internalized religious faith (a normative set) that makes them obey that norm. They say to themselves, "I am a Christian," "I am a Bahá'í," or "I am a Muslim." It is not coercion, yet they obey the law.

In the transnational setting, there are basically three phases to the process (three interactions that promote interpretations of law) of internalization. This is not just a theory of explanation. It is also a blueprint for action.

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In the government, I learned that those with ideas have no influence, and those with influence have no ideas. This is a tragic triangle. Decision-makers promote policy without theory; activists implement tactics without strategy; scholars generate ideas without influence. To overcome this tragedy, the concept of transnational legal process should be used. I do not believe that international law is self-executing, but; by promoting norm internalization, lawyers, policymakers and scholars can promote greater compliance with international law. Three countries, whose noncompliance with international law is very much in the headlines, illustrate this theory: North Korea, Iraq, and the United States of America. I call them the axis of non-obedience.

North Korea is one of the most isolated countries in the world, and one of the biggest scofflaws. In 1993, it could not provide power and food to its own people, and started building nuclear weapons. The Clinton Administration decided that coercive approaches were not sufficient because they would jeopardize everybody on the peninsula. Instead, they took a transnational legal process approach. They tried to enmesh North Korea in a multilateral framework of agreement in which the United States, South Korea, and Japan would all diplomatically engage North Korea with a single message: "If you give up your nuclear program or reduce it, we will give you things in return (particularly involvement in the international

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community), as well as food, electrical power, and expansion of cultural and economic links.”

The agreed framework functioned for close to a decade. There is no doubt that North Korea violated it, but there is also no doubt that it had a restraining effect. It limited North Korea’s nuclear missile production; there was a moratorium on tests of long-range missiles. The North Koreans admitted, incredibly, that they had kidnapped Japanese citizens. They allowed greater inspections; they engaged in bilateral dialogue with South Korea (particularly Kim Dae Jung) and met with a high-level American delegation (of which I was privileged to be a member). Even if this framework of transnational legal process and law did not work perfectly, it started a process that could have led (and I think still could lead) to the internalization of norms into the North Korean system.

When the Bush Administration took office, the transnational legal process approach was abandoned. They stopped negotiating. Then they decided that the military option was unusable. This led Kim Jong Il to decide that (having suddenly incurred the wrath of the United States for no apparent reason) he would resume the process of building weapons. This happened because the United States will not negotiate unless they give up the weapons. So, we are in this strange situation where North Korea is going nuclear and the United States is doing essentially nothing about it. The solution is, again, a transnational legal process solution:

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We have to re-engage North Korea in a new agreed framework that is more verifiable and less subject to blackmail.

The same analysis also applies in Iraq. Saddam Hussein ranks right up there with Kim Jong Il as one of the grossest violators in the world of human rights, disarmament treaties, and cease-fires. In 1991, during the Gulf War, the United States and its allies used a coercive approach; but again, within a framework of international law. Security Council resolutions created an inspections regime that initially worked, but gradually atrophied, permitting massive noncompliance.

In a very worthwhile approach, the Bush Administration went to the UN General Assembly and expressed a willingness to use coercion, if necessary, to enforce international law. With the cooperation of Tony Blair, the US government brought the “use of force” issue and the “disarmament” issue back into the Security Council framework. Resolution 1441, which was unanimous, is a classic piece of transnational legal process: an interaction generated the interpretation that Iraq was in violation of a material breach. A process was set up (essentially a public trial of disarmament-type facts) that went on for about four months.

The transnational legal process approach took the Administration further than it might have preferred down a UN path. At first, they said they did not need a new resolution, and they got

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Resolution 1441. Then they said they did not need inspections, and they pursued inspections for four months. Then they said they did not need a second resolution, and they pursued a second resolution, which they did not get.

United States President Bush and the French President Chirac played chicken, in which each issued incompatible proclamations. The French said they would veto any resolution that called for force any time soon. President Bush said he would go to war whether he got a second resolution or not. That created the zero-sum situation where the only resolution that the United States thought was relevant (the one authorizing them to attack) was one the French were pre-committed to veto. This impasse also made it pointless to seek the support of the nine countries that were necessary to get a majority. Why? Because even close allies, such as Mexico and Chile, were not willing to subject their citizens to controversial votes that they knew were going to be meaningless. The United States would either go to war, or there would be a veto.

The transnational legal process solution was available, but was bungled. I blame Saddam for his venality. I blame Chirac for his obstinacy, which has perversely weakened the very institution on which France has a veto. Most importantly, I blame the Bush Administration's decision to frame the issue in bipolar terms: either attack, or accept the status quo in which Saddam is building weapons. The process solution not explored was

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to disarm Iraq without attack (through a strategy of disarmament, multilateral disarmament, enhanced containment) and more aggressive human rights intervention. This would have driven Saddam out, and driven Iraq into a system of accountability. Why didn't that happen? The Administration's goal (as it finally admitted) was not just to disarm, but to change the regime.

Transnational legal process questions might be: Why had the United States not done more to develop a Milosevic-type solution, through which Saddam and his sons might have been prosecuted for their offenses before a tribunal? Why not invest energy in creating such a tribunal, rather than invading? When the war began, both President Bush and Secretary of Defense, Donald Rumsfeld, said to the Iraqi leadership: "You *will* be prosecuted." But where? The United States has unsigned the International Criminal Court (ICC) treaty and Iraq was not present. Getting a Chapter VII resolution from the Security Council you have just snubbed is very unlikely. What the Bush Administration failed to see was that, by not using a legal process approach, they were stuck with coercive solutions—which diminished their capacity for leadership in a banner of rule of law.

The United States is the third and final member of the axis of non-obedience. It would have been one thing if what had happened was the only time that the United States expressed a disdain for international law. The real mystery, however, is how the headlines have turned from Iraq's

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noncompliance to America's noncompliance in three particular situations:

1. The unsigning of the International Criminal Court treaty, and the symbolic unsigning through the creation of military commissions
2. The Geneva Conventions, particularly the USs' unnecessary decision to create extralegal zones in Guantánamo and call extralegal people "enemy combatants." Rights-free zones and rights-free people already exist.
3. The death penalty, which has been an irritant in the relationship between the United States and the European Union in the war against terrorism.

Each of these areas of conflict arose from the fact that, where the Clinton Administration pursued what Strobe Talbot calls "strategic multilateralism and tactical unilateralism," the Bush Administration shifted to strategic unilateralism and tactical multilateralism. This is self-defeating in two ways.

First, the United States has demonstrated a loss of rectitude, which has led to at least a loss of its soft power (its persuasive, diplomatic power). This power is the only way the United States is going to rebuild Iraq, rebuild Afghanistan, fight al Qaeda in a multilateral effort, address the North Korean



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diplomatic crisis, and engage the Middle East peace process (the source of terrorism).

Second, the United States somehow sees these forms of laterism as necessary to preserve its sovereignty, not understanding (as Abe Chayes and Toni Chayes did)<sup>2</sup> that real sovereignty is to have membership in reasonably good standing among the regimes that make up the substance of international law.

If the diagnosis is that the United States has not made enough use of transnational legal process with regard to North Korea, Iraq, and its own conduct, what is the cure? The United States should engage more in transnational legal process in each case.

With regard to North Korea, coercive solutions alone will not succeed. We have to create a new transnational legal process framework (another agreed framework) with better verifiability, which will internalize these rules better than the former one did. With regard to Iraq; again, norm internalization is the approach, as it has been in post-conflict situations in Germany, Japan, Afghanistan, Kosovo, and Bosnia. Iraq needs a domestic constitution that internalizes these norms so that it can engage in international processes.

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<sup>2</sup> Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Rrgulatory Agreements* (1998).

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What about the United States? The United States is, on the one hand, the toughest case because it is the most powerful. On the other hand, it might be the easiest case because there are so many channels of internalization. Here's where mitigation of conflicts between domestic and international law is useful.

With regard to the ICC, three kinds of internalization should be attempted. First; internalize support for the ICC in US elites. Second, internalize guidelines for what responsible prosecution is in the prosecutor's office. Third, internalize the notion of case-by-case cooperation with the tribunal in the U.S. government. For example, litigation over suspects who might be apprehended on U.S. soil or over provision of classified information (as was done for the Milosevic prosecution) could be done again.

With regard to the Geneva Conventions, a transnational legal process is a solution. The Guantánamo and the enemy combatant cases are being litigated, not just in domestic courts, but also before the Inter-American Human Rights Commission and the British courts. Generating transactions or interactions in other non-American forums might produce interpretations that the United States would have to obey, rather than get out of, in the Fourth Circuit. The United States should be made aware of how its Geneva Convention flexibility will hurt it with regard to protesting the treatment of U.S. prisoners of war.

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There has been a massive effort by transnational legal process to bring the United States into line in regard to the death penalty. Most recently, the Mexican suit against the United States at the International Court of Justice (*Atkins v. Virginia*) is prevalent. The important thing is to identify the exact channels of internalization. Their names are Justice Kennedy and Justice O'Connor. If they would accept international law standards as relevant for constitutional interpretation, the dissonance in those cases could be avoided.

Never in the United States has there been a greater disparity between hard power and soft power. Even as we started bombing Baghdad with unprecedented technological skill, we could not get Mexico and Chile to vote a favorable Security Council resolution. As the administration railed against violations of Geneva Conventions, namely our own soldiers, it seemed oblivious to the fact that most of the world thinks that we are violating those conventions with regard to detainees at Guantánamo. President Bush is calling for prosecution of Iraqi war criminals, while insisting on opposing the ICC. U.S. officials, who said we do not need the United Nations to launch the attack, are saying that the United Nations should help to rebuild Iraq.

The point is that The United States is taking a Jekyll and Hyde approach. On the one hand, it pursues coercive theories of power-based internationalism; on the other hand, it recognizes the

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need for norm-based theories of international law-based internationalism. As a nation conceived in liberty and dedicated to inalienable rights, the United States has a very strong impulse not just to use power, but to combine power with principle. Lawyers, scholars and activists who care should do whatever possible to use trans-national legal process to prod this country into following the better angles of its national nature.

# Global Constitutionalism Revisited

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## I. INTRODUCTION

Observers of the international legal process perceive and describe the field in terms of paradigms that help to order complex realities. Some scholars argue that the structure of international law has generally evolved from co-existence via co-operation to constitutionalization.<sup>1</sup> The constitutionalist reading of current international law may be perceived as an academic artifact. For sure, the constitutionalist reconstruction has a creative moment, simply because it lays emphasis on certain characteristics of international law. But such an intellectual construct is nothing unusual in legal practice. If we accept the hermeneutic premise

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<sup>1</sup> See Wolfgang Friedman, *The Changing Structure of International Law* (1964). The three steps mark only a rough trend. Of course patterns of co-existence and co-operation persist even in a generally more constitutionalized world order. Parts of this paper can also be found in Anne Peters, „Global Constitutionalism in a Nutshell“, in: Klaus Dicke, Stephan Hobe, Karl-Ulrich Meyn, Anne Peters, Eibe Riedel, Hans-Joachim Schütz and Christian Tietje (eds.): *Weltinnenrecht, Liber amicorum Jost Delbrück* (2005), 535-550, which highlights the contributions of Jost Delbrück to the discourse on the constitutionalization of international law.

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that a naked meaning of a text, independent of the reader does not exist, then the reconstruction of some portions of international law as international constitutional law is just an ordinary hermeneutic exercise. It is no distortion of norms which are “objectively” something else, but a legitimate form of interpretation. This interpretation is, however, not a deduction from wishful thinking, but is induced by general developments in international law.

The old idea of an international constitution of the international legal community<sup>2</sup> deserves reconsideration in the light of globalization. In the era of globalization, a constitutionalist reconstruction is a desirable reaction to the visible de-constitutionalization on the domestic level.

### A. The Impact of Globalization on State Constitutions

The worldwide phenomenon of globalization is characterized by the appearance of de-territorialized problems and the emergence of global networks in the fields of economy, science, politics and law, which have led to increased global interdependence. Globalization puts the construct of the state and state constitutions under strain. Global problems have compelled states to cooperate within international organizations and enter into bilateral and multilateral

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<sup>2</sup> Seminal Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926), Preface.

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treaties. Previously typical governmental functions (such as human security, freedom and equality) are in part transferred to “higher” levels. Moreover, non-state actors (acting within states or even in a trans-boundary fashion) are increasingly entrusted with the exercise of traditional state functions, including core tasks such as military and police activity.<sup>3</sup> The result of these trends is that “governance” (understood as the overall process of regulating and ordering issues of public interest)<sup>4</sup> is increasingly being exercised beyond the states’ constitutional confines. State constitutions can no longer regulate the totality of governance in a comprehensive way and, therefore, the state constitutions’ original claim to form a complete basic order is defeated. The hollowing out of national constitutions affects not only the constitutional principle of democracy, but also the rule of law and the principle of social security. Overall, state constitutions are no longer “total constitutions.” In consequence, a **compensatory constitutionalization on the international plane** should be asked for.<sup>5</sup> Only the various levels of

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<sup>3</sup> In US-occupied Iraq of 2003/04, employees of federal contractors and sub-contractors (Blackwater USA, Kroll Inc., Custer Battles, the Titan corporation and others) worked as mercenaries, police, guards, prison officers and interrogators.

<sup>4</sup> James N. Rosenau, “Governance, Order, and Change in World politics” in *id./Ernst-Otto Czempiel* (eds.), *Governance Without Government* 1 at 7 (1992): “Governance” as opposed to “government” does not stem from some overarching governmental authority. *See also* Commission on Global Governance, *Our Global Neighbourhood: The Report of the Commission on Global Governance* (1995).

<sup>5</sup> *See* Anne Peters, “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures”, *Leiden Journal of International Law* 19 (2006), issue 3 (forthcoming)

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governance, taken together, can provide full constitutional protection.<sup>6</sup>

### B. Which Notion of “Constitution?”

In order to identify a constitution (or elements of constitutional law) within international law, the notion of “constitution” must be clarified. The meaning of the term varies according to different constitutional cultures. Constitutions have historically been closely linked to states. Further, some observers contrast the constitutional idea to the (ostensibly anti-constitutional) international sphere.<sup>7</sup> However, the term “constitution” has never been exclusively reserved only for use by state constitutions. Today, the perception that there is a link between state and constitution has further been loosened in everyday language, as well as in legal discourse (and thereby the meaning of “constitution” may have been broadened). It is not *per definitionem* impossible to conceptualize constitutional law beyond the nation or the state.<sup>8</sup>

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<sup>6</sup> This is the central argument of Thomas Cottier and Maya Hertig, “The Prospects of 21st Century Constitutionalism,” 7 *Max Planck UNYB* (2003) 261-328. See also John H. Jackson, *Changing Fundamentals of International Law and International Economic Law*, Part II “International Organizations & Institutions: A New ‘Constitutionalism’.” “We are going to need a new constitutionalism of institutions,” 41 *Archiv des Völkerrechts* 435 at 447 (2003).

<sup>7</sup> “État ou barbarie, telle est l’alternative simple que connaît la société internationale.” Serge Sur, “L’état entre éclatement et mondialisation,” 30 *Revue Belge de Droit International* 5 at 11 (1997).

<sup>8</sup> But see Jed Rubenfeld, “The Two World Orders” 27 *The Wilson Quarterly* 28 et seq. (2003), arguing that “international constitutionalism” is a genuinely European conception. In contrast, the (supposedly) American, or “democratic national constitutionalism”, regards constitutional law “as the embodiment of a



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### 1. Traditional Formal Properties of Constitutions

Constitutions, particularly state constitutions, possess similar formal characteristics. First, constitutions are typically codified in one document. The most well-known exception is the English constitution. Bardo Fassbender and others have argued that the United Nations (UN) Charter is the constitutional document of international law.<sup>9</sup> However, the UN Charter does not go far enough to codify the scope and powers of the various governing bodies in relation to the creation and execution of international laws. Therefore, the international community continues to lack a comprehensive con-

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particular nation's democratically self-given legal and political commitments." Note that this ostensibly genuinely "American" conception is identical to a traditional German one: See Dieter Grimm, "Braucht Europa eine Verfassung?" 50 *Juristen-Zeitung* 581(1995); Cf. Ulrich Haltern, "Internationales Verfassungsrecht," 128 *Archiv des öffentlichen Rechts* 511-556 (2003) (with the basic proposition that international law lacks the "symbolic-esthetical dimension" which is inherent to national (constitutional) law, and that therefore the idea of international constitutional law is a sham). So the debate whether non-state constitutional law can exist is not a debate between national-constitutional cultures, but a cross-cutting one between diverging, but transnational ideologies.

<sup>9</sup> Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (1998); Bardo Fassbender, "The United Nations Charter as Constitution of the International Community," 36 *Columbia Journal of Transnational Law* 529-619 (1998); Ronald Macdonald, "The Charter of the United Nations in Constitutional Perspective," 20 *The Australian Yearbook of International Law* 205-231 (1999); Pierre-Marie Dupuy, "The Constitutional Dimension of the Charter of the United Nations Revisited," 1 *Max Planck UNYB* 1-33 (1997). Pioneering Wilfried Jenks, "Some Constitutional Problems of International Organizations," 2 *BYIL* 11-72 (1945); Alf Ross, *Constitution of the United Nations: Analysis of Structure and Functions* (1950).

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stitutional document, as the UN Charter is missing “constitutional substance.”

A different, though related, characteristic is that the foundational treaties of international organizations may be qualified as the constitutions of those respective organizations.<sup>10</sup> A constitutionalist approach to the law of international organizations provides the justification for legal constraints on the increasing (hence, potentially intrusive or abusive) activities of those organizations. In this context, constitutionalism opposes functionalism.<sup>11</sup> The second traditional formal property of constitutional law is that it supersedes ordinary law. This formal feature of supremacy is present on the international plane. *Ius cogens* is a specific, superior body of norms. It trumps conflicting international treaties<sup>12</sup> and customary law.<sup>13</sup> The UN Charter constitutes a different, treaty-related, type of higher law. According to Article 103 of the UN Charter, provisions (and arguably secondary acts such as

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<sup>10</sup> “From a formal standpoint, the constituent instruments of international organizations are multilateral treaties...Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional.” ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports (1996) 66 *et seq.*, para. 19.

<sup>11</sup> For a critique of the functional necessity theory of rights and obligations of international organizations, see Jan Klabbbers, *An Introduction to International Institutional Law* 36-39 (2002).

<sup>12</sup> Vienna Convention on the Law of Treaties, Art. 53.

<sup>13</sup> ICTY, Case IT-95-17/1-T, *Prosecutor v. Furundzija*, 38 ILM 317(1999), para. 153; ECHR, *Al-Adsani v. Great Britain*, judgment of 21 November 2001, 23 HRLJ (2002) 39, sep. op. Rozakis et al., para. 3.

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Security Council decisions) prevail in the event of a conflict between the Charter obligations of Member States and obligations under any other agreement. However, UN Acts privileged by Article 103 of the UN Charter still rank below *ius cogens* and would give way in case of conflict.<sup>14</sup> Consequently, a hierarchy of norms within international law exists.<sup>15</sup>

The third formal feature of codified constitutions, is that they are made by a *pouvoir constituant* in a revolutionary act, a kind of constitutional big bang. On the international plane, there were constitutional movements in 1945 and 1989. However, on the whole, constitutional developments in the international sphere are evolutionary. Overall, it is difficult to speak of an international constitution in a formal sense, apart from the embryonic hierarchical elements.<sup>16</sup>

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<sup>14</sup> ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, sep. op. Lauterpacht, ICJ Reports (1993) 4, at 440, para. 100.

<sup>15</sup> In a constitutionalist perspective, it is less important that *ius cogens* also bars states from enacting countervailing national law (ICTY, *Furundzija*, *supra* note 13, para. 155), because ordinary international law has this effect as well. The supremacy of international law over domestic law is not a constitution-like supremacy, but rather has a federal law-like rationale (preservation of legal unity in matters regulated on the higher level).

<sup>16</sup> Cf. Robert Uerpman, "Internationales Verfassungsrecht", 56 *Juristen-Zeitung* 565, at 571-2 (2001).

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### C. Traditional Substantial Properties of Constitutions

The substantial components of a “constitution” (in a normative sense)<sup>17</sup> are even more contested. There are at least three answers to the question: “Which functions and contents must be present to call a given body of law a “constitution” (or “constitutional law”)? The broadest notion of constitution refers to the bulk of laws organizing and institutionalizing a policy, thus international law is embodied within international organizations and institutions. This is an international constitution in this broadest sense.

The narrower, more functional notion of constitution relates to the rules and principles fulfilling traditional constitutional functions. These traditional constitutional functions are to: limit political power, organize a political entity, offer political and moral guidelines, justify governance, constitute a political system as a legal community and, finally, contribute to integration. It is fair to say that certain international rules and principles fulfill these functions, at least in part.<sup>18</sup> For example, international human rights law places important restraints on the exercise of governmental power towards the states’ own nationals.

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<sup>17</sup> As opposed to “constitution” as a descriptive term, in the sense of “Amsterdam is constituted of little canals.”

<sup>18</sup> See Georges Scelle, “Le droit constitutionnel international” *Mélanges Raymond Carré de Malberg* 501 at 514 (1933).

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The third and narrowest notion, which may be referred to as the legitimist notion of a constitution, is the one underlying 18<sup>th</sup> and 19<sup>th</sup> Century constitutionalism. It has been enunciated most famously in Article 16 of the French Declaration of the Rights of Man and Citizens of 26 August 1789: “*Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution.*” Human rights and separation of powers are the necessary contents of a constitution. Today, further material elements have been added, most importantly democracy and a minimum of social security guarantees. When considered in this perspective, constitution is a value-laden concept.

It is doubtful whether a constitution on the international plane can be found in this value-loaded sense.<sup>19</sup> Surely, the endorsement of human rights comes closest to universal acceptance. About three quarters of the UN member States (more than 140 of the total 191 States) have ratified the two universal Human Rights Covenants, and there is a rising tendency.<sup>20</sup> In contrast, the ideals of liberal democracy/popular sovereignty and separation of powers are not (yet?) universally accepted. On the one hand,

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<sup>19</sup> *But see* Christian Tomuschat, “Die internationale Gemeinschaft”, 33 *Archiv des Völkerrechts* 1 at 7 (1995). There is a constitution of the international community in which certain basics of peace and justice are laid down.

<sup>20</sup> Of course, there are important divergences in the interpretation of the internationally enshrined human rights, and great deficiencies in implementation, but that is another story.

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these two value-driven organizing principles are only tentatively and selectively applied as international law prescriptions directed at states. On the other hand, the international institutions hardly satisfy the requirements of democracy, separation of powers, and rule of law (or reasonably modified versions of these basic ideas). This means that the international legal order either does not possess a full constitution in the narrowest, most legitimist sense or that its constitution suffers from serious deficiencies of legitimacy.

### D. Different Phenomena of Arguable “Constitutionalization” of International Law

Against the background of what has usually been domestically called “constitution,” the second step is to approach the subject from the opposite side and look at those phenomena discussed under the heading of “constitutionalization of international law.” Then, one is able to judge to what extent this heading is justified.

The basic premise of the constitutionalist school is that the international community is a legal community.<sup>21</sup> A legal community is governed by rules and principles, not simply by power. The

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<sup>21</sup> See also for references to the “international community as a whole” ICJ, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (second phase)*, ICJ Reports 3, para. 33 (1970); Preamble of the ICC-Statute of 17 July 1998, para. 4 (UNTS Vol. 2187, No. 38544) and Art. 42 lit. b) of the ILC Articles on State responsibility Doc. A/CN.4/L.602, Rev. 1 (2001). See Andreas Paulus, *Die internationale Gemeinschaft im Völkerrecht*, engl. summary at 439 *et seq.* (2001).

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most fundamental norms might represent global constitutional law. Starting from this point, constitutionalists discern and support the emergence of new bases of legitimacy for the international legal system. The traditional legitimating factors of international governance are state sovereignty and the effective exercise of power. Therefore, international law used to be blind for constitutional principles within states. In contrast, the idea of constitutionalism implies that state sovereignty is gradually being complemented (if not substituted) by other guiding principles, notably the “global common interest” and/or “rule of law” and/or “human security.” This important modification necessarily implies that international law cares about domestic constitutional standards. Neither spheres can be neatly separated, but must complement each other.

The latter claim is in fact already being satisfied by the increasing intertwinement of international law and national law. On the one hand, legal ideals, principles, and concrete types of instruments (originally conceived on the national level) continue to be transferred to the international level. Democracy is a conspicuous example.<sup>22</sup> Inversely, dense international legal

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<sup>22</sup> On democracy as a principle of international (soft) law, see Implementation of the United Nations Millennium Declaration, UN Doc. A/57/270 of 31 July 2002, Part V.: “Human rights, democracy and good governance,” paras. 82 *et seq.*; UN Commission on Human Rights, Res. 1999/57 of 27 April 1999 “Promotion of the right to democracy” OAS Interamerican Democratic Charter of 11 September 2001 (text in 41 ILM (2001) 1289). In scholarship Gregory Fox/Brad Roth (eds.), *Democratic Governance and International law* (2000); Steven Wheatley, “Democracy in International Law: A European Perspective,”

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obligations require states to enact specific domestic legislation in virtually all areas of law. Moreover, international prescriptions influence domestic constitutional law. For instance, the Swiss constitution (*Bundesverfassung*, BV) of 18 April 1999 incorporates the *non-refoulement* principle in Article 25 cl. 2 BV and seeks to fulfill the Convention on the Rights of the Child's duty to protect (Article 2 cl. 3 CRC) by way of introducing a novel constitutional Article on the protection of children.<sup>23</sup> However, the thicker the web of international legal obligations becomes, the more resistance meets the classical claim of supremacy of *all* international law over *all* domestic law. States rather insist upon safeguarding at least core constitutional principles against international encroachment. In this situation, the relationship between international and national law cannot plausibly be described as a clear hierarchy. Instead, both bodies of norms form a network.<sup>24</sup>

The current shift of the justificatory basis of international law manifests itself in a number of legal developments on the international plane which, in sum, account for an overall change of

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51 ICLQ 225-247 (2002); L. Ali Khan, *A Theory of Universal Democracy: Beyond the End of History* (2003); Jude I. Ibegbu, *Right to Democracy in International Law* (2003).

<sup>23</sup> Art. 11 BV.

<sup>24</sup> A network is a structure situated on the scale between a horizontal/loose/market-like structure and a hierarchical/institutionalized/state-like one. See Michael M. Atkinson/William Coleman, "Policy Networks, Policy Communities and the Problems of Governance," 5 *Governance: An International Journal of Policy and Administration* 154-181 (1992).



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paradigm. The first cross-cutting phenomenon is the erosion of the consent requirement manifesting itself in the weakening of the persistent-objector rule, third-party effects of treaties,<sup>25</sup> and majority voting within treaty bodies and international organizations. A most conspicuous event in this context is legislation by the Security Council (binding via Article 25 UN Charter and circumventing eventual ratification requirements of parallel treaties).<sup>26</sup> In this perspective, constitutionalism supplants voluntarism.

The second development is the creation of World Order Treaties, formerly called *traités-lois* or “objective” legal orders.<sup>27</sup> Such treaties have been adopted in the subject areas of human rights, law of the sea, environmental law, world trade law and international criminal law. A characteristic feature of these World Order Treaties is their quasi-universal membership. A more contested characteristic is their arguably non-reciprocal structure, which means that they embody collective obligations serving global community interests which transcend the individual interests of the state parties.<sup>28</sup> In these

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<sup>25</sup> Malgosia A. Fitzmaurice, “Third Parties and the Law of Treaties,” 6 *Max Planck UNYB* 37-137 (2002), concluding that the principle *pacta tertiis nec nocent nec prosunt* remains the general rule and that rights and obligations of third States stemming from treaties to which they are not parties remain exceptional.

<sup>26</sup> See UN SC Res. 827 (1993), installing the ICTY, and UN SC Res. 1373 (2001) on the Financing of Terrorism.

<sup>27</sup> See Bruno Simma, “From Bilateralism to Community Interests,” 250-VI *RdC* 217-384 (1994).

<sup>28</sup> See with regard to the human rights instruments Human Rights Committee, General Comment No. 24 (1994), paras. 8 and 17 (CCPR/C/21/Rev. 1/Add.6).

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treaties and in customary law, one can identify “public interest norms”<sup>29</sup> embodying universal values. Such widely shared values are the centrality of the human being, the acceptance of a common heritage of mankind, and the ideas of sustainable development or free trade.<sup>30</sup>

Moreover, the new regimes are increasingly enforced by international courts and tribunals, such as the International Criminal Court (ICC) or the International Tribunal for the Law of the Sea (ITLOS) or on the regional level, the European Court of Human Rights (ECHR). Judicial review is one of the core elements of the rule of law.

Third, there are changes in the concept of statehood and a legal evolution regarding the recognition of states and governments. In this context, the principle of effectiveness is marginalized and standards of legitimacy (concerning human rights and democracy) are set up.<sup>31</sup> For example; after the Iraq war, a UN Security Council Resolution formulated (albeit implicitly) condit-

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Negating of the “collective” character of the WTO Agreement: Joost Pauwelyn, “A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?” 14 *EJIL* 907-951 (2003).

<sup>29</sup> See Jost Delbrück (ed.), *New Trends in International Lawmaking – International ‘Legislation’ in the Public Interest* (1997).

<sup>30</sup> In the words of the IJC with regard to the genocide convention: ‘In such a convention, the contracting states do not have any interest of their own; they merely have, one and all, a *common interest ...*’. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951], ICJ Rep., at 23 (emphasis added).

<sup>31</sup> See Roland Rich, “Recognition of States: The Collapse of Yugoslavia and the Soviet Union”, 4 *EJIL* 36-65 (1993); see also Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (1998).

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ions for the recognition of a new Iraqi government. The Council here encouraged the people of Iraq to form “a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender ...”<sup>32</sup>

A final general phenomenon is the growing participation of non-state actors, such as Non-Governmental Organizations (NGOs), transnational corporations, and individuals in international law-making and law-enforcement. In recent years, NGO lobbying has strongly influenced international standard setting. Notably, the Landmines Convention of 1997<sup>33</sup> and the ICC Statute of 1998 would probably not have come into being without the intense work of transnational NGO coalitions. Inversely, NGO resistance was a crucial contribution to the failure of the projected Multilateral Agreement on Investment (MAI) in 1998.

On the implementation level, it is well known that the efficiency of human rights monitoring to a large extent depends on shadow reports of NGOs submitted to the respective treaty bodies.<sup>34</sup> The law of the World Trade Organization (WTO) is increasingly enforced by *ad hoc* public-private trade litigation partnerships formed by private

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<sup>32</sup> See UN SC Res. 1483 (2003).

<sup>33</sup> See Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 18 September 1997, UNTS Vol. 2056 at 211.

<sup>34</sup> See also Art. 15 cl. 2 and Art. 44 cl. 4 ICC-Statute (*supra* note 21) on information submitted by NGOs and on “gratis personnel” employed by the ICC.

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firms in collaboration with governments.<sup>35</sup> Moreover, international environmental law is implemented by public-private partnerships for sustainable development;<sup>36</sup> examples of this include the Prototype Carbon Fund (PCF) within the Clean Development Mechanism of the Kyoto Protocol.<sup>37</sup> Finally, the compliance mechanism of the Aarhus Convention on Environmental Information<sup>38</sup> can be triggered by private persons.<sup>39</sup> This trend erodes the public-private-split on the international plane. It may, on the one hand, contribute to constitutionalization because it integrates the transnational civil society into the fabric of international law and,

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<sup>35</sup> Greg Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (2003).

<sup>36</sup> These partnerships were officially recognized as “Type II outcomes” at the 2002 World Summit on Sustainable Development. See Plan of Implementation, revised version of 23 September 2002 (Doc. A/CONF.199/20), [http://www.johannesburgsummit.org/html/documents/summit\\_docs/2309\\_plan\\_final.htm](http://www.johannesburgsummit.org/html/documents/summit_docs/2309_plan_final.htm), visited on 11 April 2006. See also Charlotte Streck, “The World Summit on Sustainable Development: Partnerships as New Tools in Environmental Governance”, 13 *Yearbook of Environmental Law* 3-95 (2002).

<sup>37</sup> See the World Bank Executive Directors' decision of 20 July 1999 to establish the Prototype Carbon Fund (PCF) <http://carbonfinance.org/Router.cfm?Page=PCF&ft=About>, visited on 11 April 2006. The World Bank's partnership with the public and private sectors is intended to mobilize new resources for its borrowing member countries while addressing global environmental problems through market-based mechanisms. The PCF will invest contributions made by companies and governments in projects designed to produce emission reductions consistent with the Kyoto Protocol. Participants in the PCF will receive a pro rata share of the emission reductions.

<sup>38</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 25 June 1998, <http://www.unece.org/env/pp/documents/cep43g.pdf>, visited on 11 April 2006.

<sup>39</sup> Decision I/7 on review of compliance, part. VI “Communications from the Public”, paras. 18-24 (see [www.unece.org/env/pp/compliance.htm](http://www.unece.org/env/pp/compliance.htm), visited on 11 April 2006).

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thereby, arguably pro-motes the constitutional principles of broad deliberation, transparency and public accountability. Opening up the circle of law-makers and law-enforcers creates new problems of legitimacy of international law. On the one hand, the principle of state sovereignty no longer serves as the exclusive source of legitimacy of international norms (and is, from a normative standpoint, increasingly contested as a legitimizing factor in itself). On the other hand, the multiple actors which contribute to the generation of hard and (more often) soft transnational norms are not *per se* legitimate law-makers and their empowerment may camouflage governments' tendency to avoid commitment to hard and binding law.

Somewhat apart from the general debate on constitutionalism, one distinct subject area has been particularly scrutinized through a constitutionalist prism. It is the law of the WTO. Within this special field, various legal aspects are considered to "constitutionalize" the WTO.<sup>40</sup> The first aspect is the legalization of dispute settlement (the creation of a scheme of quasi-arbitration by panels and the Appellate Body) that replaced the

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<sup>40</sup> See seminal Ernst-Ulrich Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991). See also Markus Krajewski, "Democratic Legitimacy and Constitutional Perspectives of WTO Law," 35 *Journal of World Trade Law* 167-186 (2001); Steve Charnovitz, "WTO Cosmopolitics", 34 *NYU Journal of International Law and Politics* 299-354 (2002); John McGinnis/Mark Movsesian, "The World Trade Constitution", 114 *Harvard Law Review* 511-605 (2000); Peter Gerhart, "The Two Constitutional Visions of the World Trade Organization," *University of Pennsylvania Journal of International Economic Law* 1-75 (2003) ; Deborah Z. Cass, *Constitutionalization of the WTO* (2005).

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former diplomatic means of settlement. Second, the traditional trade law principles of most-favored nation and national treatment are increasingly viewed as two facets of a constitutional principle of non-discrimination ultimately benefiting the ordinary citizens (importers, exporters, producers, consumers, tax-payers). This view gives rise to the quest for a general maxim of interpretation of the General Agreement on Tariffs and Trade (GATT) obligations of WTO member states (and the relevant exception clauses) in light of human rights guarantees.<sup>41</sup>

A third ostensible factor of constitutionalization of WTO law is seen in one of its core functions: international trade rules neutralize the domestic power of protectionist interests. Thereby, they overcome the domestic political process-deficiencies.<sup>42</sup> This is a typically constitutional function, which is in the domestic realm served by fundamental rights guarantees and by judicial protection of constitutional courts.<sup>43</sup> Finally, the option of directly applying GATT rules (which is still rejected by most courts) can be seen in a constitutional perspective. The capability of self-interested trade-participants to enforce international trade rules before domestic courts would empower the individuals and would enable the judiciary to check the executives who would

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<sup>41</sup> See Ernst-Ulrich Petersmann, "Human Rights, Constitutionalism, and the WTO: Challenges for WTO Jurisprudence and Civil Society", 19 *Leiden Journal of International Law* (2006 forthcoming).

<sup>42</sup> See Petersmann, *supra* note 40, Chap. V (at 96 *et seq.*)

<sup>43</sup> See John Hart Ely, *Democracy and Distrust* (1980).

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otherwise enjoy unfettered discretion in applying the rules which were actually designed to restrain those very actors.

The overall tendencies just sketched are sometimes characterized as an evolution from a civil law-like system (“horizontal” relations between juxtaposed, autonomous actors) to a more public law-like system (strengthened central authority, hierarchical elements, and legally binding decisions without or against the actors’ will).<sup>44</sup> This analysis does not altogether differ from the constitutionalist reading because the move from civil law to public law is mostly associated with the shift from contract to constitution.

### E. Antagonist Trends Fragmentation, Softening and American Hegemony

In opposition to the mentioned, arguably constitutionalist developments, important anti-constitutionalist trends are visible in international law. First of all, many observers perceive the flourishing of specific regimes, such as international environmental law, international trade law, or international criminal law, and their accompanying specialized courts, as a threat to the unity of international law. This fragmentation precludes the existence of one single, overarching, in-

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<sup>44</sup> See Christian Tomuschat, “Obligations Arising for States Without or Against their Will,” 241-IV *RdC* 209-240 (1993).

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ternational constitution.<sup>45</sup> If at all, there are specific constitutions each of which display more or less typically constitutional features.<sup>46</sup> To accept these bodies of law as “partial constitutions” implies giving up the traditional constitution’s feature of totality. As aforementioned, even state constitutions have lost their capacity to regulate total political activity due to globalization.

The second anti-constitutionalist trend is the softening of international law. Instead of creating formal compulsory hard law, governments increasingly rely on *soft law*.<sup>47</sup> *Soft law* is not legally binding, but arises in the grey zone between law and politics.<sup>48</sup> These soft rules have the advantage of being quicker and easier to agree on, precisely because of their reduced bindingness. From the constitutionalist perspective, soft legalization is laudable to the extent that it allows a host of non-state actors to intervene and to act as co-lawmakers.<sup>49</sup> Moreover, it may pave the way

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<sup>45</sup> See Christian Walter, “Constitutionalizing (inter)national Governance - Possibilities for and Limits to the Development of an International Constitutional Law,” 44 *GYIL* 170 at 191-196 (2001).

<sup>46</sup> Arguably, the various regimes function as complementary elements of an embryonic international constitutional order with the UN-Charter as the main connecting factor (see de Wet, *supra* note 30, at part 3.B.).

<sup>47</sup> See e.g. the International Code of Conduct against Ballistic Missile Proliferation (ICOC) of 26 November 2002 with currently 109 subscribing States, <http://www.armscontrol.org/documents/icoc.asp>, visited on 11 April 2006.

<sup>48</sup> But see Kenneth W. Abbott/Duncan Snidal, “Hard and Soft Law in International Governance,” 54 *IO* 421-456 (2000) distinguishing “soft” from “hard” law along the parameters of obligation, precision, and delegation, which means that there is a sliding scale between harder and softer norms.

<sup>49</sup> See e.g. the Wolfsberg Statement on the Suppression of the Financing of Terrorism of January 2002, issued by the so-called Wolfsberg group of leading



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to hard commitments even on the level of international constitutional law. The Helsinki Final Act of 1975, with its principles on human rights and democracy,<sup>50</sup> is the most pertinent example of success in that direction. On the other hand, soft law is anti-constitutional because it may undermine the normative power of law as such.<sup>51</sup> Most importantly, it leaves the states' sovereignty largely intact and, thus, fails to fulfill the core constitutional function of constraining the most powerful actors. This shortcoming is, however, put into perspective by the parallel domestic trend to overload state constitutions with non-justifiable, lofty and hortatory articles.

The third anti-constitutionalist trend lies in the current sole superpower's activities on the borderline of international legality, notably in the fields of state jurisdiction, international criminal law, human rights protection, treaty application, and the use of force.<sup>52</sup> First, the United States of America (USA) exercises extraterritorial jurisdiction in criminal and civil law matters in an exorbitant

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international banks (<http://www.wolfsberg-principles.com/standards.html>, visited on 11 April 2006). *See also supra* part C on non state-actors.

<sup>50</sup> *See* Final Act of 1 Aug. 1975, Basket I, Questions relating to Security in Europe: Declaration on Principles Guiding Relations between participating States, Principle VII on human rights and fundamental freedoms. [http://www.osce.org/documents/mcs/1975/08/4044\\_en.pdf](http://www.osce.org/documents/mcs/1975/08/4044_en.pdf), visited on 11 April 2006.

<sup>51</sup> *See* for a classical critique Prosper Weil, "Towards Relative Normativity in International Law?", 77 *AJIL* 413-442 (1983) (orig. "Vers une normativité relative?", 86 *RGDIP* 5 (1983)).

<sup>52</sup> *See* in detail Anne Peters, "The Growth of International Law between Globalization and the Great Power", 8 *Austrian Review of International and European Law (ARIEL)* (2003), 109-140.

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fashion.<sup>53</sup> At the same time, the USA prevents the exercise of universal jurisdiction by other states, e.g. universal criminal jurisdiction by Belgium.<sup>54</sup>

On the other hand, when it comes to restricting (not extending) USA activity, American jurisdiction is denied. So far, American constitutional guarantees have been held inapplicable to Taliban and Al Qaeda combatants who have been detained since 2001 in Guantánamo Bay,<sup>55</sup> even though this territory is under “complete jurisdiction and control” of the United States by virtue of the 1903 Cuban-American Treaty.<sup>56</sup> The United States consistently refuses to ratify the New World Order Treaties, such as the Kyoto Protocol on Climate Change. Moreover, the USA actively undermines the International Criminal Court (ICC). The policy of obstruction compromises bilateral immunity agreements,<sup>57</sup> including a UN guarantee

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<sup>53</sup> Jurisdiction is claimed over European firms which seek trade with Cuba. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms Burton Act), P.L. 104-114, <http://usinfo.state.gov/regional/ar/us-cuba/libertad.htm>, visited on 11 April 2006.

<sup>54</sup> See Universal Jurisdiction Rejection Act of 2003 (referred to the House Committee on International Relations on 9 May 2003 (H.R. 2050)), <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:h.r.02050;> visited on 11 April 2006. Since May 2003, no action has been taken.

<sup>55</sup> Judicial review denied by US Ct. of App. DC Circ., *Al Odah v. US* (consolidated with *Rasul v. Bush*), judgment of 11 March 2003; but see US S.Ct., *Rasul et al. v. Bush*, 124 S.Ct. 2686 (2004), granting habeas corpus review.

<sup>56</sup> Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations of 23 February 1903, <http://www.yale.edu/lawweb/avalon/diplomacy/cuba/cuba002.htm>, visited on 11 April 2006.

<sup>57</sup> The exact number of BIAs (most of which were concluded under pressure) actually in force is currently not verifiable. The US State Department reports 100 (signed) agreements. In some States, a BIA is concluded as an executive

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of immunity to non-member States' soldiers who participate in UN peace-keeping activities,<sup>58</sup> and national legislation explicitly prohibiting any cooperation with the ICC.<sup>59</sup> In the field of human rights policy, the USA conditions financial and military aid on recipient states' human rights commitments in line with American guidelines, while subjecting itself only to a handful of international human rights instruments.<sup>60</sup> In those few cases, the USA makes ample use of reservations and declares the international instruments to be non-self-executing before the USA courts. Finally, the United States doctrine of pre-emptive strikes does not appear to respect Article 51 of the UN Charter. Their military attack on Iraq in the spring of 2003 was not supported by an unambiguous Security Council mandate or by traditional doctrines of self-defense.

The American posture of taking exception to international law threatens international constitutional principles, concerning the unilateral

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agreement which does not require ratification. Of the 100 States, 43 are ICC States Parties. See "Status of US Bilateral Immunity Agreements", [http://www.iccnw.org/documents/BIAsByRegion\\_current.pdf](http://www.iccnw.org/documents/BIAsByRegion_current.pdf), visited on 11 April 2006.

<sup>58</sup> UN SC Res. 1422 (2002), prolonged for one year until 30 June 2004 by UN SC Res. 1487 (2003). These Security Council Resolutions were adopted pursuant to the American threat not to prolong US forces in the peace-keeping mission in Bosnia-Herzegovina.

<sup>59</sup> "American Service Members' Protection Act of 2002" (ASPA), entry into force 2 August 2002, Sec. 2002 and 2004 (repr. in 27 *HRLJ* 275(2002)).

<sup>60</sup> ICCPR of 1966 (ratified in 1992, but not the optional protocol on individual communications); CERD of 1966 (ratified by the USA in 1994); CAT of 1984 (ratification in 1994 and acceptance of individual communications to the Committee (under Art. 21 CAT)); Genocide Convention of 1948 (ratified by the USA in 1988).

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use of force and the sovereign equality of states. Overall, the current United States hegemony does not reflect the constitutional ideal of checks and balances, or the traditional international “balance of powers.” This observation does not mean that the East-West “balance” until 1989 strengthened international law—quite the contrary. Obviously, global checks and balances must be more subtle and must encompass an institutional equilibrium.

F. Imagining a Multi-Level and Multi-Sectorial Constitutional Network

A gaze at international law and related state behavior through constitutionalist spectacles reveals a mixed picture. On the one hand, some formal properties of constitutional law are present on the international level: some constitutional functions are fulfilled and some universal values are identifiable. On the other hand, many phenomena which are discussed under the heading of constitutionalization may simply be called thicker legalization and institutionalization. Finally, the legal landscape is severely marred by important anti-constitutionalist trends, most notably the United States hegemony. All in all, considering both international and national law, fragmentary constitutional law elements can be discerned on various levels of governance, in part relating only to specific sectors (e.g. human rights law or trade law). We might visualize these elements as both “horizontally” (sector-based) and “vertically” situated (encompassing both the international and the national level). The

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constitutional elements on the various levels and in the various sectors may complement and support each other. This crisscross is called a “constitutional network...”<sup>61</sup>

### II. MOVING TOWARD A CONSTITUTIONALIST RECONSTRUCTION OF INTERNATIONAL LAW

The ultimate question is which policy effects the image of a “constitutional network” might have. One of the paradigm’s functions is to serve as a guideline for the interpretation of textually open international norms. To give but one example, a constitutionalist *Vorverständnis* supports a restrictive attitude towards reservations to human rights covenants, particularly if they curtail the normal respective control mechanisms.

In a constitutionalist perspective, such reservations are presumably incompatible with the object and purpose of the treaty in terms of Article 19 lit. c) VCLT.<sup>62</sup> Second, the constitutionalist paradigm may influence the process of lawmaking by the relevant political actors. Con-

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<sup>61</sup> See for the meaning of “network”, *supra* note 24.

<sup>62</sup> See for the full argument Anne Peters, “International Dispute Settlement: A Network of Cooperational Duties”, 14 *EJIL* 1-34 (2003). Another example of a constitutionalist reading of treaty clauses on judicial control is the Inter-American Court of Human Rights Case no. 54, *Ivcher Bronstein - Competencia*, paras. 32-55; Case no. 55, *Caso del Tribunal Constitucional*, paras. 31-54; both judgments of 24 September 1999 in <http://www1.umn.edu/humanrts/iachr/C/54-ing.html> and <http://www1.umn.edu/humanrts/iachr/C/55-ing.html>, visited on 11 April 2006. Here the Court held that withdrawal from submission to jurisdiction is only possible by denouncing the treaty as a whole. The Court thereby transformed the optional jurisdictional clause into a quasi-compulsory one.

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stitutionalists welcome the proliferation of international courts, tribunals and arbitral bodies as a promising step towards further implementation of an international rule of law. Or, to give another example, constitutionalist arguments can inform criticisms directed at the lack of proper representation on the Security Council, they can confirm the existence of legal boundaries to that organ's action, and they can suggest that the International Court of Justice (ICJ) develop its role as an "international constitutional court" by reviewing the Security Council.<sup>63</sup> Notably, the International Criminal Tribunal for Yugoslavia (ICTY) has, in the *Tadić* case, analyzed the Security Council's powers in a constitutionalist perspective.<sup>64</sup>

Third, a constitutionalist outlook helps to unveil shocking failures of international institutions to implement the ideals of good governance, such as in the UN directed territorial administration of Bosnia and Herzegovina.<sup>65</sup> The most important argument against the constitutionalist reconstruction is that, given the realities of power, international law must content itself with a more or less "symbolic constitutionalization." In the eyes of critics, such a reconstruction fraudulently

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<sup>63</sup> See Fassbender, *supra* note 9; Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004). In this context, the constitutionalist approach to International Organizations meets the more general international constitutionalism.

<sup>64</sup> ICTY, Appeals Chamber, Case No. IT-94-1-AR72, *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, 16 *HRLJ* (1995), esp. paras. 26-28.

<sup>65</sup> Gerald Knaus/Felix Martin, "Lessons from Bosnia and Herzegovina: Travails of the European Raj", 14 *Journal of Democracy* (2003) 60-74.

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creates the illusion of legitimacy of global governance.

Constitutionalist language abuses the highly value-laden term “constitution” in order to draw profit from its positive connotations and to dignify the international legal order. But, turning the critique around, it can be argued that the constitutionalist reading of the current international legal process has a highly beneficial critical potential. Because the idea of a constitution is associated with the quest for legitimacy, the constitutionalist reconstruction provokes the pressing question of legitimacy of global governance.

In consequence, the constitutionalist reconstruction of international law draws attention to existing legitimacy deficiencies in this body of law, which can obviously no longer rely on state sovereignty and consent alone. Ultimately, the constitutionalist reconstruction of international law helps to promote a multi-level, genuinely global constitutionalism, which is apt to compensate for national constitutions’ growing deficiencies. Global constitutionalism may contribute to the construction of a universally acceptable transnational network of legal orders.





# The Compulsory Character of International Law

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Notwithstanding the growing trend toward universalizing international law, the justification of its compulsory character still lacks any broad consensus sufficient to support the superstructure. While there seems to be a broad awareness that international law is binding, neither international law organizations nor academic writers have been able to articulate why it is binding.

## I. HISTORICAL APPROACH

We may trace the origin of public international law back to the most remote era in the history of man. A large part of the current institutions of this discipline (such as treaties for peace, boundaries, asylum, extradition and ambassadors) originated before recorded history. José Luis Bustamante y Rivero expressed this well:

The nation is not alone. A few others  
coexist with it all over the world. The  
primitive history of its contacts is

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made up of battles and conquests, a bloody alternative of dominating peoples and defeated peoples. Force, however, is not a principle of constructive or human coexistence. Friendship should replace violence and threats should be replaced by understanding. Then, under the shadow of peace, the awesome concept of the international community begins to take shape, broadening the horizon of harmony to the outer reaches of the earth. Treaties ban conquests and frontiers are discussed on conference tables rather than on battlefields.<sup>1</sup>

Above all, people from the earliest times have had a very clear notion that it is mandatory to keep promises, and have established sanctions to punish the violation of treaties, which includes resorting to justified warfare. This sense of compulsion extended only to the nations that signed the agreements, as there were no supranational laws to bind the people in general, except by agreement.

During the Middle Ages, no international law as such was needed since conflicts were limited to minor quarrels between subjects of the same king. Nevertheless, beginning in the late 15<sup>th</sup> Century, and particularly during the 16<sup>th</sup> Century, a

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<sup>1</sup> BUSTAMANTE Y RIVERO, José Luis, Speech, *Inaugural Session of the 5<sup>th</sup> Inter-American Conference of Attorneys*. Lima, November 25, 1947.

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conglomerate of international entities arose in Western Europe, which urgently required a code of urbanity and a good neighbor treaty for political, trade, and social relations.<sup>2</sup> The Peace of Westphalia of 1648, which put an end to the Thirty Years' War, marked the birth of modern international law, giving rise to the so-called collective treaties and originating multilateralism (as opposed to the bilateralism that had previously dominated treaty law until that time). This initiated a period of international cooperation maintained through the holding of international conferences.<sup>3</sup>

The 1789 Declaration of the Rights of Man and of the Citizen, at the outset of the French Revolution, marked an important milestone in the sphere of human rights. This was first time that fundamental rights of the person, at a universal level, were recognized in continental Europe for the benefit of the entire community.<sup>4</sup>

After World War I, states made an attempt to organize into an international community by creating the League of Nations, the Permanent Court of International Justice sitting at The Hague, and the International Labor Organization. Upon failing this initial attempt in World War II, a

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<sup>2</sup> ALLERO, J. *El origen español del Derecho Internacional*. In *Arbil, anotaciones de pensamiento y crítica*, No. 101.

<sup>3</sup> FENWICK, Charles. *Derecho Internacional*. Buenos Aires. Bibliográfica Omeba. Pp. 14 yss.

<sup>4</sup> MIAJA DE LA MUELA, Adolfo. *Introducción al Derecho Internacional Público*. Madrid: Atlas, 1979, p.329.

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new attempt was made in 1945 to create an international community through the United Nations (UN) organization. In the regional sphere, this same effort led to the creation of the Organization of American States on April 30, 1948.

Since then, further attempts toward unification began through the establishment of the Andean Pact in 1969 and the European Communities in 1951 and 1957. Furthermore, the internationalization of the protection of human rights was promoted by adopting the Universal Declaration of Human Rights in 1948 and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966.

At the end of the Cold War, a process of separation began and new states appeared, often in the context of ethnic and religious violence that took place in the former Yugoslavia. These conflicts also took place in Africa and Asia, causing the UN to play a decisive role in the maintenance of international peace and security. At the end of the millennium, international courts were created to determine the international criminal liability of people in the former Yugoslavia and Rwanda. Finally, in 1998, the International Criminal Court (ICC) was established by the Treaty of Rome.<sup>5</sup>

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<sup>5</sup> BARBOZA, Julio. *Derecho Internacional Público*. Buenos Aires: Zavalía, 1999, pp. 36-39.

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### II. CHARACTERISTICS OF INTERNATIONAL LAW

The international legal system has a number of characteristics that distinguish it from domestic legislation. In this regard, Pastor Ridruejo states:

When compared with the domestic legislation of the states, public international law appears as an especially problematic legal discipline, characterized by certain institutional deficiencies, which give rise to uncertainty and relativism in the regulatory field, serious insufficiencies in the prevention and sanctioning of breaches, and a broad policy... for the solution of disputes.<sup>6</sup>

In this sense, Ago adds:

The legal system of the international community appears, in fact, as one of a society not formed by individuals or by individuals and associations at the same time; but exclusively by a plurality of societies, which are legally organized among themselves or admit, in their associated life, that there is no reciprocal relationship of

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<sup>6</sup> PASTOR RIDUREJO, José Antonio. *Curso de Derecho Internacional Público*. Madrid: Tecnos, 1986, p.27.

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subordination, nor the participation of any hierarchically superior entity, but only relations of coordination on a parity basis.<sup>7</sup>

In the opinion of Monaco: “The international legal system is autonomous, original, and organized on a parity basis.”<sup>8</sup> Finally, Podesta Costa considers that:

[E]very law entails three elements: the law that defines it, the body in charge of enforcing the law, and the subsequent sanction for the transgressor. All this is found in domestic law, but it does not appear with the same completeness in relations between states.<sup>9</sup>

Doctrine has recognized the special nature of international law based on its defects or deficiencies, in comparison with the domestic law of the states. This study will focus on one deficiency in particular, which is the absence of a sanctioning or coercive body.

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<sup>7</sup> AGO, Roberto. “Science juridique et Droit International”. *RCADI*. 1956-II. T.90 p.858 cited by NOVAK, Fabián and Luis GARCIA-CORROCHANO MOYANO. *Derecho Internacional Público*. Lima: Fondo Editorial de la Pontificia Universidad Católica del Perú, 2003. t. 1 .p.37.

<sup>8</sup> MONACO, Riccardo. *Manuale di diritto internazionle pubblico*. Turín: Unione tipográfica-Editrice Torinese, 1982. p.15 Cit by NOVAK, Fabián and Luis GARCIA-CORROCHANO MOYANO. *Op.cit.*.p.37.

<sup>9</sup> PODESTA COSTA, Luis A and José María RUDA. *Derecho Internacional Público*. Buenos Aires: Tea, 1985, vol. 1 p.27.

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As opposed to national laws, where a rule may be coercively imposed upon individuals who fail voluntarily to comply with it, international law does not have a supra-state body that is capable of imposing laws coercively by sanctioning non-compliance. However, the absence of sanction does not make international law ineffective. There is a “system to guide the parties subject to international law towards the attainment of the final object of the international community.”<sup>10</sup>

For this reason, states are faced with a system of rules that combines the use of force with other coercive mechanisms.<sup>11</sup> The lack of coercion cannot be used to question the legal nature of international law, faced with a legal system whose subjects are sovereign entities. Therefore, it has its own characteristics and structural differences from that of the state legal system. This being the situation, the objective basis of the validity of international rules, according to their distinctive characteristics, remains to be determined.

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<sup>10</sup> PEIRANO BASSO, Jorge. “Naturaleza y Fundamento del Derecho Internacional Público”. In : *El Derecho Internacional en un Mundo en Transformación*. In : *Homenaje al Profesor Eduardo Jiménez de Aréchaga*. Montevideo: Fundación de Cultura Universitaria, 1994, t.I, p.196.

<sup>11</sup> Other sanctions of an inorganic nature administered by the damaged States themselves are pointed out by VARGAS CARREÑO, Edmundo. *Introducción al Derecho Internacional*. San José de Costa Rica: Juricentro, 1992, p. 35: “the withdrawal of diplomatic agents or the rupture of diplomatic relations with the infringing state; the suspension of compliance with treaty in respect of a state that has breached or failed to comply with it, the failure to recognize a situation arising from the violation of international law, etc.”

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### III. THEORIES ON THE CUMPULSORY CHARACTER OF INTERNATIONAL LAW

The theories that attempt to explain the basis of the compulsory character of international law can be classified into two categories:

#### A. Subjective or Voluntarist Theories

Subjective or voluntarist theories hold that the basis of every legal rule lies on human will. If domestic law relies on the consent of citizens, international law is based on the consent of states. The fundamental principle supposes that the supreme will of the state is what provides legal content to international rules. Starting from this fundamental principle, several different positions arise from this theory.

#### B. Doctrine of Autolimitation

A Doctrine of Autolimitation was developed by Hegel and Jellinek,<sup>12</sup> who suggested that each state, depending on its interests and needs, may decide to bind itself with respect to one or more states. Hegel considered the state to be an absolute power on earth and, therefore (by definition), not subject to any superior judicial authority.<sup>13</sup> In this sense, the state's capacity to freely decide to undertake an international

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<sup>12</sup> JELLINEK, Georg. *Teoría General del Estado*. Buenos Aires: Albatros, 1970, pp.78 ff.

<sup>13</sup> See the work of HEGEL, Friedrich. *Grundlinien del Philosophie des Rechts*. 1821.



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obligation also implies the capacity to be released from the obligation. Jellinek admits that a state has the right to release itself from obligations it deems to be contrary to its interests.

The same author points out that, although the sovereign state cannot be submitted to the will of others, it can limit its own will both in respect of its subjects and of its equals (the other states): “when it does the latter it imposes upon itself the duty of honoring the international legal system that it has contributed to create with the consensus of other state authorities.”<sup>14</sup>

### C. Doctrine of Common Will

The Doctrine of the Common Will, developed by Triepel and followed by Anzilotti and Cavaglieri, arose in a response to the Doctrine of Auto-limitation. The Doctrine of the Common Will understands that international law cannot be the result of an autonomous, sovereign and unilateral will of the state and must be the product of a concurrence of wills, whether it is expressly manifested (such as in treaties) or tacitly stated (as in international customs); in this sense, it requires the presence of at least two common wills.

The state is thus faced “with an objective norm, which is not a contract with opposed interests and

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<sup>14</sup> JIMENEZ DE ARECHAGA, Eduardo. *Derecho Internacional Público*. T. I. Montevideo: Fundación de Cultura Universitaria, 1993, p.115.

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not a simple addition of particular wills, but the result of a new volition originating from the collective will.”<sup>15</sup> Hence, the impossibility that any single state may unilaterally decide to terminate a legal obligation without implying that an international illegal act has been committed.

### D. Doctrine of Delegation of Domestic Law

The Delegation Doctrine was formulated by Wenzel and followed by Lasson and Kauffmann, among others. This provides that a states' international obligations are supported by the constitutional law of each state. This usually contemplates two different ways of creating legal rules: “The law, which constitutes a unilateral declaration of willingness by the state, and the treaty, which is result of the meeting of the minds.” It is therefore inferred that the state could unilaterally release itself from its international commitments by modifying its constitution.<sup>16</sup>

In general, Moncayo suggests that “the voluntarist theories do not explain the basis of the compulsory character of international law. In fact, they simply describe the process whereby the rules of international law are created.” Nobody doubts that the state's primacy of the will is fundamental to the creation of rules of international law; however, this does not explain

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<sup>15</sup> PODESTA COSTA, Luis A y José María RUDA. Ob. Cit., p.25.

<sup>16</sup> VARGAS CARREÑO, Edmundo. *Op.cit.*, p.41.

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the basis of their compulsory character. At present, states view international law as a compulsory normative system with or without states' consent, which is subjective and mutable. When a state acquires legal existence, it is subject to the pre-existing international law. International law can restrict the states' freedom, regardless of whether they give their consent to be restricted.

### E. Objective Theories

Objective theories consider the basis of the compulsory character of international law to be beyond the states' control. This attitude can take several forms:

#### 1. Positivist Doctrine

Positivist Doctrine, as developed by Hans Kelsen, holds that the validity of the rules of international law depends on the validity of pre-existing rules, particularly the rule *pacta sunt servanda* (agreements are considered law between the parties).<sup>17</sup> The entire international legal system may be supported by this rule. Kelsen suggests that:

In order to find the source of origin of international law, we must follow a procedure similar to the one that led

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<sup>17</sup> AGO, Roberto. *Op.cit.* pp. 889-890.

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us to the basic (original) rule of the national legal system. We must start with the lowest rule of international law, that is, the resolution or ruling issued by an international court. If we ask ourselves: [“]why is the rule created by said resolution valid[?”] we will find the answer in the treaty whereby the court was set up. If we ask ourselves again [“]why is the treaty valid[?”], we will be referred to the general rule that obliges states to abide by the provisions set forth in the treaties that they have signed, that is, to the rule usually referred to as *pacta sunt servanda*. As stated above, this is a general rule of international law, and international law is created on the basis of customary practices, consisting of the customary acts performed by the state. Therefore, the basic rule of international law must be a rule that accepts that customary practices are the source of origin of the rules. In fact, we could put it this way: states ought to behave as they have customarily behaved.<sup>18</sup>

Customary international law, through this rule, may be the first step in the international legal system. Treaties form the next step. The

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<sup>18</sup> KELSEN, Hans. *Principles of Public International Law*. Buenos Aires: El Ateneo, 1965, pp. 349.358.

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third step is made up of the rules created by bodies that are, in turn, created by treaties.

### 2. French Sociological or Solidarist Doctrine

Duguit, who regards the legal rule as a social product, founded this doctrine.<sup>19</sup> Duguit suggests that throughout time different social needs and circumstances bring about the development of certain legal rules. Social groups impose their needs upon the State which, as a political unit, interprets human needs through legal rules. “Law, closely related to human society, cannot be dissociated from human needs. Human needs ultimately legitimize law.”<sup>20</sup>

Human solidarity engenders a natural biological co-action that makes individuals comply with and abide by their social links. Awareness to comply with and abide by these inter-social links is absolutely indispensable for the rules of international law.<sup>21</sup>

### 3. Ius Naturalist Doctrine

The Ius Naturalist Doctrine holds that natural law is either revealed by God (scholastic cur-

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<sup>19</sup> AGO, Roberto. Ob. Cit. p.871.

<sup>20</sup> MONCAYO, Guillermo, Hortensia GUTIERREZ and Raúl VINUESA. *Public International Law*. Buenos Aires: Víctor P. De Zavalía, t.I. p.50.

<sup>21</sup> CAMARGO, Pedro Pablo. *Treaty on International Law*. Bogota: Themis, 1983, t.I p.95.

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rent) or discovered through human reason and empirical observation (rationalist current). The most outstanding exponents of the former current are Francisco de Vitoria and Francisco Suárez. While the most outstanding exponents of the latter current are Alberico Gentili, Hugo Grotius and Samuel Pufendorf, who understand that law is made up of principles of reasoning.

Embracing the Doctrine of St. Thomas, the Spanish theologians of the Sixteenth Century thought that natural law regulated not only individual relationships, but also the relationships between different political communities. Machiavelli argued that both national and international public law is supported by reasons of state. The Spaniards devised a philosophy of law that was supported by reason and subject to moral criteria. The founder of this Spanish school and (therefore) modern international law was the Spanish Dominican, Francisco de Vitoria (1480-1546).<sup>22</sup>

People organized in independent countries do not live separated from the rest of the world. All individuals are related to each other by a common origin and by similar necessities and limitations. To overcome all obstacles, everyone must collaborate towards the achievement of a harmonious target. It is the international

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<sup>22</sup> ALLERO, J. "The Spanish Origin of International Law". In *Revista Arbil*. N°14 On-Line Edition: [http://www.iespana.es/revista-arbil/\(14\)alle](http://www.iespana.es/revista-arbil/(14)alle).

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community that forms the whole group of political societies which, according to the line of thought of the Spanish school, must live interdependently.<sup>23</sup>

The rationalist current began with Hugo Grotius in the Seventeenth Century, when he secularized the Natural Law Doctrine. According to Grotius, Natural Law is not discovered or disclosed. Rather, it can be inferred from reason. Its principles are not found in sacred texts, but in the opinion of philosophers, historians, politicians and statesmen.<sup>24</sup>

In modern times, Ius Naturalists understand that international law is the result of certain legal convictions shared by different States, resulting from human nature. The so-called neo-iusnaturalist assumes the existence of certain universal and constant values, framed as legal principles. In this regard, Brierly is of the opinion that: "The rationale behind all this issue is that man, either individually or in association with other men in a state, is conditioned to the extent that it is a rational being, by the belief that order, not chaos, is the principle governing the world where men must live."<sup>25</sup> International law has gradually built on the basis of the people's common legal awareness, and is supported by the existence

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<sup>23</sup> *Id.*

<sup>24</sup> AGO, Roberto. *Op. cit.* p.111.

<sup>25</sup> Cited by MONCAYO, Guillermo y Otros. *Ob.cit.* p.52.

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of certain legal convictions shared by different states, which guarantee the survival of a minimum number of universal values that take precedence over positive law and give it compulsory character.

### IV. CONCLUSION

These different theories conclude that the Voluntarist Doctrines should be disapproved because, although the will of the states has created some of the rules of international society, there are other customary and conventional rules of compulsory character that are not based on voluntarism. For example, when new states enter the international society, they are subject to international customs that were developed before they were created. The Charter of the United Nations also contradicts the voluntarist theory of international obligation in Article 2, paragraph 6, which provides that the United Nations is authorized to take action regarding third-party states that are not part of the Convention to protect international peace and security. There is also a set of *ius cogens* rules, the compulsory character that prevents states from reaching certain agreements that would violate fundamental principles of international justice.<sup>26</sup>

As regards objective theories, Vargas Carreño suggested that they only provide a partial solution: the normativist doctrine explains the basis of the

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<sup>26</sup> VARGAS CARREÑO, Edmundo. *Op. cit.* Pp. 53-54



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compulsory character of conventional agreements freely reached by the states. The sociological doctrine allows us to understand how the effective force of an international rule is directly related to the social realities and needs it reflects, while the iusnaturalist doctrine explains the ultimate rationale of the rule, which is to achieve justice and peace.<sup>27</sup>

For these reasons, Vargas Carreño states that: “given the different nature, origin and extent of the rules of International Law, the basis of the compulsory character of each such rule can never be explained under the perspective of a single doctrine that is suitable to serve as a basis to support international law as a whole.”<sup>28</sup>

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<sup>27</sup> *Id.* at 56-57.

<sup>28</sup> *Id.* at 58.



# Defending International Law

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The war against Iraq was a great victory for human rights. Yet it is commonplace to hear that whether or not the coalition's action was moral, expedient, or desirable, it was surely unlawful. Perhaps intimidated by the intensity and frequency of this assertion, supporters of the war throw up their arms and conclude that if the war cannot possibly be defended on legal grounds, then international law is either not really law or, more likely, that there are times when international law becomes irrelevant (perhaps when the supreme interests of the state are at stake or when other kinds of urgencies force states—especially democracies—to disregard the law and act according to the exigencies of the situation).

I disagree. I resist the temptation to abandon international law to critics of the war. The unjustified assertions that they make about international law, and their spurious condemnation of the war on legal grounds, trades on the public's

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ignorance about what international law is or what it requires. In private and in public, critics of the war advance a conception of international law that reflects views current in the 1950s or, worse yet, the 1930s. For them, international law was meant to protect sovereign states from invasion. In particular, international law repudiates the notion of “regime change.” Governments are not supposed to change other regimes. The implication is that international intervention is never legal without previous Security Council approval, which was absent in this case. Critics of the Iraqi war assert that states may not attack other states except in response to an armed attack. They may not initiate wars. Those who initiate war are acting in a presumptively unlawful manner. So, whatever else is said about the morality or otherwise of this war, it is certainly unlawful.

I regard this concept of international law as not just inadequately simplistic, but as plainly mistaken. A better concept of international law sees it as serving the people on this globe, not their governments. Legal rules and processes should be interpreted in light of human values, not state values. Anything that deserves to be called law should protect persons, not rulers. Modern international law (as opposed to the 1930s throwback version that critics of the war circulate these days) is infused with the need to protect and promote human rights, not the instruments of power. Any concept of international law that protects the political space of brutal murderers such as Saddam Hussein does not

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deserve the label “law.” International lawyers should not defend an amoral concept of international law that protects the perpetrator and not the victims.

I realize that my assertion is as dogmatic as the one that I criticize. Am I not simply asserting my value preferences? Does not this very discussion show that I simply dislike international law as it is? Should I not then join those who openly admit that present international legal structures are simply inadequate to deal with the problem?

These are fair worries. I believe that international law can and should be interpreted with human values in mind. My central point is this: it is not a debate between critics of the war, who objectively interpret international law and conclude (alas, perhaps) that it does not help the coalition and supporters of the war, who either ignore inter-national law or distort it beyond recognition. International lawyers, critical of the war, are no more objective than I. They read international law in the light of their own values, which are state values. State values include the protection of incumbent governments, of international bureaucracies, and perhaps some notion of global stability. These are no more or less extra-legal than my own human values. The jurisprudential problem is that the sources of international law—on this matter, the justice of the war—underdetermine normative results.

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International law underdetermines behavior: the rules are often too vague to yield normative results in concrete cases. The very discussion on the need for Security Council authorization illustrates the problem. Are those who claim that failure to authorize an action is equivalent to prohibiting it prepared to claim that failure to condemn action (because, say, of U.S. veto) is equivalent to approving it? Neither the explicit rules of the UN Charter nor a study of the practice of the Council yields a result; unless one has already decided that the action should be permitted or prohibited. If, instead of relying on treaty language, one appeals to customary law, the indeterminacy problem is even more acute. The concept of customary law, as applied by international courts and used by commentators, is incoherent. Because international practice is mostly chaotic and contradictory, it is not conceptually possible to “look” at that practice and infer a normative pattern, a rule. This is a conceptual problem; you cannot infer rules from fact. To try to do so is to commit a naturalistic fallacy.

It follows that any attempt to find normative patterns in international behavior will, of necessity, be informed by the background values of the interpreter. In logical terms, a rule may be inferred from facts only by adding a normative premise. There is no such thing as “State practice” staring at us with an unequivocal normative message.

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Inattention to this very elementary problem in logic is evidenced in a troubling fact about international law adjudication and commentary: Routinely, courts and commentators identify rules they like (for whatever reason: fairness, efficiency, or political viability) and declare them to be “custom.” A court either cites state practice selectively or omits citing that practice altogether. In the cases decided by the International Court of Justice, there are numerous examples of this intellectually dishonest habit.

The corollary is that it is perfectly possible to make customary law-types of argument for and against almost any particular view—say, whether or not there is a right of humanitarian intervention. To be sure, this problem may also arise in municipal legal systems, but in international law it is compounded incoherence of the concept of customary law and by the lack of institutional mechanisms to decide among conflicting interpretations of the law. The problem obviously is less acute with respect to treaty law: but here, too, self-serving interpretations of treaty language are common and disputes about treaty interpretation are not usually submitted to authoritative settlement.

The result is that propositions of law do not arise as a result of an objective, value-free, process. Someone who is concerned, for example, with Iraq’s sovereignty has already made a judgment that the need to preserve the government of Iraq is more important than other

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values like the human rights of the Iraqi people, or the urgency of the West to defend itself against terrorist attacks. The same can be said about someone who supports a very broad prohibition on the use of force and claims that, under such a reading (which he affirms with absolute certainty to be the correct one); the action against Iraq is unlawful. But surely there are serious violations of international law that will continue unless the regime is overthrown, including but not limited to, human rights violations. This person, therefore, cannot ground his claim against the war only on the need to respect international law because (in a fundamental sense) the action against Iraq is aimed at ending violations of international law.

Basically, neither supporters nor critics of the war can avoid “filling” the indeterminate gaps that are endemic to the international legal system. They can only do this by presupposing an adequate balance between the competing values at stake. Yet, there is no such thing as a scientific, objective, value-free ascertainment of legal rules and principles. If I am right about this, supporters of the war, too, can claim that the law is on their side. Who has the better argument will depend on who is morally right. It will be, in short, a matter of who strikes the right balance of values at stake, not who is for and who is against the international rule of law.

Let me sketch my interpretation of the relevant rules of law in light of human values. The first (again, without getting into detailed technical



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argument) is that brutal dictatorships—simply put—do not have a right to exist. This means that: whatever consideration we owe them (including sometimes deciding not to eliminate them) will be dictated by prudence, not law. Removing such regimes is, therefore, permitted under an interpretation of international law guided by human values.

The second is that a favored reading of the law on the use of force in conjunction with humanitarian law (reading the *ius ad bellum* and the *ius in bello*) limits the permissibility of war to the strictures of the doctrine of double effect. For reasons that centrally subordinate the principle of sovereignty to a commitment to human dignity, International law authorizes humanitarian intervention (whether the war against Iraq can be justified on other grounds, I do not address). If that argument is correct, the action cannot validly be criticized on the grounds that it will result in the deaths of innocents, as many critics contend. If that criticism were valid, no war or revolution would ever be justified. Instead, international law reluctantly but properly accepts the legality of (sometimes) conducting legitimate action that indirectly causes the deaths of innocent persons. A view of international law that relies on human values reluctantly accepts that sometimes justified wars will result in the deaths of innocents.

The doctrine of double effect intends to capture this idea. According to this doctrine, an act in

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which innocents are killed is legitimate only when three conditions are satisfied:

1. The act has good consequences (such as the removal of a tyrannical regime, including the killing of enemy soldiers who defend the regime).
2. The actor's intentions are good, that is; he aims to achieve the good consequences. Any bad consequences (such as the killing of non-combatants) are not intended.
3. The act's good consequences (such as the removal of the tyrannical regime) outweigh its bad consequences (such as the killing of non-combatants). This is called the doctrine of proportionality.

The doctrine of double effect distinguishes between actions with intended bad consequences and actions with unintended bad consequences. The former gives rise to moral blameworthiness. Depending on the circumstances, the latter may be excused. Thus; proportionate collateral harm caused by humanitarian intervention (where the goal is to rescue victims of tyranny) may be morally excusable. Humanitarian intervention is not an action conceptually structured (from the standpoint of the agent) as deontological pure behavior where the agent (the intervener) is absolutely constrained to respect the rights of everybody. It is, instead, an action intended to *maximize* universal respect for human rights but

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is morally constrained by the prohibition of *deliberately* targeting innocent persons. This is what I believe to be the approach taken by the coalition in the Iraq war. The proportionate collateral deaths of innocent persons (while indirectly caused by the intervener) do not necessarily condemn the intervention as immoral.

The argument for humanitarian intervention is located midway between strict deontological approaches and consequential ones like utilitarianism. The latter direct agents to intervene whenever they maximize the good in terms of the general welfare (often conceived in terms of human lives). The former would forbid intervention that results in violations of the rights of innocents—even intervention that will certainly maximize universal rights observance. Humanitarian intervention, understood as a morally constrained form of help to others, accepts that sometimes causing harm to innocent persons is justified as long as one does not *will* such harm in order to achieve not a greater general welfare, but a goal that is normatively compelling under appropriate principles of morality. The doctrine rejects, as deontological doctrines do, undifferentiated calculations of costs and benefits where justice (as a goal of the intervention) would be just one indicator of good aggregate consequences among many others.

Legality of the use of force in Iraq can neither be settled by appealing to simplistic slogans (such as the nonintervention principle), nor the need to

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respect the lives of innocents, nor the importance of sovereignty. Once we realize the crucial place that value judgments have in legal analysis, it is no longer possible to hastily claim that International Law is on anyone's side.

A reading of international law (informed by human values) undergirds other aspects of the war, as well. It dictates that the coalition must bend over backwards to comply with the Geneva Conventions: in particular, the treatment of civilian populations and prisoners of war. That is why I firmly join human rights organizations and others who have insisted on such compliance. The coalition, in order to persuade the world that it is indeed pursuing a humanitarian objective, must show this by example.

In that regard, I strongly endorse Harold Koh's eloquent criticism of the military commissions and similar measures, as inimical to the very values that animate the US war against terrorism. Similarly, the coalition must firmly preside over a democratization of Iraq, support a solution of the Middle East conflict that includes a genuinely democratic Palestinian State, and generally promote democracy and human rights in the region. The coalition must back its rhetoric of liberation with actions. It must clarify that it does not have territorial or economic designs on Iraq or the region, nor any other ambition to dominate. These imperatives also stem from a reading of international law in its best possible light.

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On a positive note, I join my colleagues who oppose the war in their rejection of the anti-law position: the position (quite popular, unfortunately, among many in power) that international law is irrelevant, that we should not strive to uphold the rule of law because there is no such thing. Perhaps (as Tom Farer would say) we international lawyers are waging our own jurisprudential war. But I believe we can pursue it while sharing a concern for justice and peace, finally, for all persons on the planet.



# *Comment on Fernando Tesón's Article: "Defending International Law"*

*Elias Davidsson  
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The question "Why obey international law?" which is the subject of this forum, cannot be answered without deciding what "international law" is and, in particular, what core values underpin this legal category.

In his article, Fernando Tesón argues that human values override traditional public international law (which is a system regulating interactions between States). In his own words:

A better concept of international law sees it as serving the people on this globe, not their governments. Legal rules and processes should be interpreted in light of human values, not State values.

One might add, in support of this assertion, that the United Nations (UN) Charter (often regarded as the precursor of an international constitution) does not refer at all to "state values." The word

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“state” does not appear in the Preamble or in Article One, which lists the Purposes and Principles of the Charter. The Preamble of the UN Charter, which refers to the underlying values of the United Nations Organization, mentions the stakeholders of the Organization as “succeeding generations,” “mankind,” “human person,” “men and women” and “nations.” States are clearly not regarded as primary stakeholders of the United Nations. On this base alone, one is permitted to argue that the rights and prerogatives of states are derivatives of overriding values (such as those of individuals, peoples and nations). It can also be said that the legitimacy of a collective entity (such as state, people or nation) rests on the free will of the individuals composing this entity. Collective rights, thus, derive from individual rights. They are not an independent category of rights.

On the base of this concept of international law (in my opinion, justified), Tesón attempts to demonstrate that use of the force in support of the protection of human values (humanitarian intervention) is justified. He therefore writes in the introduction of his article: “The war against Iraq was a great victory for human rights.” Leaving aside the sweeping nature of this assertion (having been informed that perhaps 100,000 civilians may have died in Iraq as a result of the US bombing, invasion and occupation), this comment addresses the more general question of “humanitarian intervention” that Tesón defends.



## *Comment on Tesón's Article*

On the face of it, the international community should intervene where there are evidences of gross violations of human values, such as crimes against humanity or genocide. The United Nations was facially established to serve mankind, rather than state reason. States being what they are (bureaucratic entities who serve primarily the vested interests of their own elites), the concept of international community requires to be examined more closely.

There are, in fact, a host of questions that must be asked before proposing the establishment of an international legal regime of humanitarian intervention. Here is a sample of these questions:

1. Who decides whom to “liberate” and under what circumstances to intervene?
2. Is it possible to ensure that intervention will not lead to the rule or hegemony of the intervener?
3. What specific human values are protected by intervention?
4. Have the people that are to be “liberated” been consulted?
5. Can the intervener be trusted to act by humanitarian, altruistic concerns?

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These questions were not addressed by the author. In this comment, I focus on the last question. I propose the following axiom as one of the constraints against abusive humanitarian interventions: A state or an international organization, which does not place the promotion of human dignity and human values at the top of its priorities, cannot be trusted to engage in a humanitarian intervention.

If this axiom is accepted, it follows that only states and international organizations, who demonstrate that they place human dignity and human values at the top of their priorities (including in their foreign policies), possess the moral credentials to intervene in a third state for the protection of human dignity and human values.

I do not believe that there exists evidence that states place global human dignity and human values above their own interests. The same applies to international organizations, where states simply negotiate their interests and collude (if necessary, behind closed doors) in utter disregard to human values.

The above claims can be verified empirically. Here is a small sample of observations:

1. The United Nations Security Council has imposed (with the acquiescence of all its members) a severe and deadly regime of economic sanctions on the Iraqi people. According to UNICEF, child mortality

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increased more than twofold during the sanctions years; excess deaths during these years numbered more than 500,000 children under the age of five. No one disputes that these deaths were the result of human agency. This crime (for there is no other word for such human agency) is unprecedented. Yet no UN member State has demanded an official inquiry to determine the legal and criminal responsibilities for causing such a Holocaust. Nor have UN member States proposed that the surviving, innocent victims of these UN-imposed sanctions be provided with effective compensation for the harm they suffered.

2. Over one billion people live in wretched poverty around the world. The Universal Declaration of Human Rights stipulates that every person has the right to an adequate standard of living. Yet the community of states, particularly those claiming to be guided by human rights and who possess adequate financial means, has miserably failed to address this global scourge. Their concern for human values ends where such values clash with corporate profits. Astronomical funds are spent by the most powerful states, who claim a right to humanitarian intervention, to develop and acquire tools of death. The United States alone spends more on arms and weaponry

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than all other states combined. Merely a fraction of such funds could ensure a life in dignity to millions of human beings and save millions of children every year from preventable death.

3. The right to food, clean water, basic education, a safe environment, basic medical care and an adequate standard of living is denied to a substantial portion of humankind. Yet states that claim to be moved by human rights concerns in support of interventions, strongly oppose the establishment of an international legal protection regime against infringements of these fundamental rights and refuse to recognize the legal right of human beings to clean water, food and medical care (a right, incidentally, legally required for pet animals in the United States).
4. The main proponent and practitioner of intervention in other states' affairs—the US Government—curtails human rights within its own jurisdiction in pursuing its “war on terrorism” and routinely engages in human rights violations around the world including torture, extra-judicial assassinations, kidnapping and indiscriminate attacks on civilians and civilian infrastructure.
5. The Permanent Five of the Security Council, who possess the sacred duty under the Charter to maintain and ensure internat-

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ional peace and security, are the main merchants of tools of death. They share among themselves more than 80 percent of global arms exports and profit, thereby, from armed conflicts. Their foreign ministries act often as official promoters for their arms industries. Their possession and deployment of nuclear weapons constitutes a continuous threat to human values, namely the very survival of humanity.

The brief listing demonstrates that UN member states, particularly those who claim for themselves the right to humanitarian intervention, cannot presently be presumed to act for altruistic reasons when acting in the international sphere.

Does this mean that humanitarian intervention should be relegated to the end of time and that nations should be left alone to be butchered by thugs? The answer is no. But the community of states cannot yet be trusted to institutionalize a regime of humanitarian intervention. States must first demonstrate *bona fide* concern for human rights. This would include:

1. The formal acceptance of UN member states of their legal obligation and that of all international organizations to (a) refrain from acts and policies that can reasonably be expected to undermine the enjoyment of human rights in any jurisdiction; and (b) to repress acts and policies by legal persons

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under their jurisdiction, which intend, or have the foreseeable effect of undermining the enjoyment of human rights in other jurisdictions.

2. The establishment of international judicial mechanisms open to victims of transnational human rights violations, empowered to adjudicate such cases, award remedies to victims and enforce their rulings through the power of the UN Security Council.
3. The inclusion of crimes of economic oppression (“measures committed with the intent and knowledge that they will subject a civilian population to inhumane conditions of existence or perpetuate such conditions”) as a crime against humanity under the Rome Statute of the International Criminal court and the adherence of all states to the Rome Statute.<sup>1</sup>
4. The amendment of the UN Charter to the effect of designating the promotion, respect and protection of human rights and fundamental freedoms (including civil, political, economic, social and cultural rights) as the major purpose of the United Nations.

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<sup>1</sup> See Elias Davidsson, *Economic Oppression as an International Wrong or a Crime Against Humanity*, Netherlands Quarterly of Human Rights, vol. 23 No.2, June 2005, 173-212.

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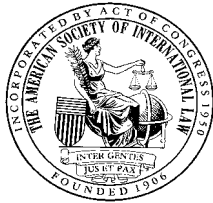
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