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The legitimacy of international organizations



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Edited by Jean-Marc Coicaud and Veijo Heiskanen

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# Introduction

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*Veijo Heiskanen*

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Most of the intergovernmental organizations that are important today were created some fifty years ago in the aftermath of the Second World War. These include: the United Nations organization; the Bretton Woods organizations (the International Monetary Fund (IMF) and the World Bank); the General Agreement on Tariffs and Trade (GATT), which subsequently evolved into the World Trade Organization (WTO); and the many agencies of the United Nations family. The establishment of these organizations was the outcome of a particular political-historical bargaining process, reflecting the balance of political power as well as the political, social, and economic interests and concerns that prevailed at the time. But the purposes and functions of these organizations also embody a certain socio-philosophical and political-philosophical understanding of their legitimate role in the international system.

Over the past fifty years, fundamental changes have taken place in the operating environment of these international organizations (IOs). These changes, many of which have, of late, been lumped together under the term “globalization,” include: decolonization; growing awareness of the global nature of many social, environmental, and public health problems; multiplication of non-governmental organizations; globalization of mass media and the economy; the end of the Cold War; rapid developments in the field of biotechnology; and the emergence of the Internet. As a result of these changes, many international organizations, in particular the United Nations, have been struggling to maintain or re-establish

the role that they once were perceived, or expected, to have in international relations.<sup>1</sup> On the other hand, new international organizations have been created, while the structures of certain existing organizations (such as the WTO) have been upgraded, and their functions enhanced and redirected. These ambivalent developments, which involve both a sense of a “legitimacy deficit” as well as one of opportunity and momentum, along with the magnitude of changes in the operating environment of the international system, suggest that the time has come to take a fresh look at the philosophy of international organization. This book undertakes such a philosophically-oriented examination.

More specifically, this book attempts to understand the present state of international organization in terms of its “legitimacy.” Approaching international organization in these terms raises a number of conceptual difficulties, which are compounded by the fact that there has been very little political-philosophical or socio-philosophical interest in the subject. While the problem of legitimacy has been the central problem of modern political and social philosophy, the two main traditions of modern political and social philosophy – the predominantly Anglo-American Liberalism and the predominantly continental-European Enlightenment – have focused almost exclusively on legitimacy issues raised by the internal structures and workings of the nation-state and by its relationship with civil society, largely disregarding international organizations. Moreover, while there appears to be a broad consensus among political and social philosophers that the concept of “legitimacy” relates to the ways and means of organizing the relationship between the state or government on the one hand and the people or individual citizens of civil society on the other,<sup>2</sup> for reasons associated largely with differing historical experiences, the two main modern traditions of social and political philosophy have approached the problem of legitimacy from different angles.<sup>3</sup> This difference in approach has resulted in competing, and in practice often conflicting, views on the legitimate organization of the relationship between the state or government and the people or citizens, and has consequently yielded differing interpretations of the concept of legitimacy.

The Continental Enlightenment philosophy has traditionally been concerned with the legitimate organization of the relationship between popular sovereignty and public (state) power, seeking to establish, as a matter of policy, the primacy of the former over the latter. More specifically, it has sought to define the conditions under which it could be legitimately argued that the exercise of state power reflects the will of the people and, accordingly, that the doctrine of the sovereignty of the people prevails over that of the sovereignty of the state. Accordingly, the main mission of the Enlightenment philosophy has been twofold: to enlighten, or “civilize,” the people by enhancing their ability to form, express, and justify their

political views in a rational public debate; and to establish an administrative state machinery that has no independent political goals of its own, other than the loyal implementation of popularly enacted laws. This political ideal is embodied in the continental concept of “*Rechtstaat*” – a stable, civilized, and rationally administered democratic state that loyally implements popular laws and thus serves as a technical instrument in the promotion of social and economic progress.<sup>4</sup>

The Enlightenment philosophy’s greatest concern, indeed fear, has been that the people will not be able, or allowed, to make a free and informed political choice, and that public opinion will be manipulated and the political passions of the people unleashed, leading to uncontrollable political turmoil and violence. This, in turn, would open the door to the deconstitution of the democratic state: declaration of a state of emergency to restore law and order; repression of democracy and human rights; and eventually, a take-over of the state by a counter-revolutionary, totalitarian government.<sup>5</sup> Hence, the critical political requirement embodied in the concept of *Rechtstaat* is that all exercise of public power, especially the exercise of public power in extraordinary circumstances (states of emergency), in order to be politically legitimate, must be based exclusively on popularly enacted written laws, which constitute the primary source of legitimate governmental authority. This political requirement not only secures popular participation in the enactment of such laws, it also ensures that the doctrine of popular sovereignty is honoured even in extraordinary circumstances where its very survival may be at stake.

Unlike the Enlightenment philosophy, which seeks to pre-empt, or at least minimize by legal regulation, the risk of abuses of public power, Liberalism has traditionally been more concerned with the government’s authority to take decisions, precisely on the basis of such pre-existing majoritarian laws, without having to ask the individual citizen’s consent each time such authority is exercised.<sup>6</sup> From the Liberal point of view, such legislative authority is fraught with the risk of abuse. Consequently, the Liberal tradition has approached the legitimacy problem from the back end, focusing on the exercise of governmental authority *vis-à-vis* individual citizens of civil society.<sup>7</sup> In order to establish, as a matter of principle and in case of conflict, the primacy of the fundamental rights of the individual citizens over governmental authority, Liberalism has sought to imagine a political system that gives precedence to the intrinsic value of life, liberty, and private property.

These Liberal ideals are embodied in the concepts of the rule of law and the free market economy. The purpose of the rule of law is, on the one hand, to identify and establish a bill of inalienable individual rights and, on the other, to circumscribe and constrain the exercise of govern-

mental power by providing adequate constitutional safeguards against governmental encroachment upon those individual rights, including the separation of powers and the possibility of judicial review of governmental actions. While the primary purpose of the rule of law is to secure the primacy of the individual's fundamental rights and liberties over governmental authority, the free market economy is essentially a consequence of a governmental system based on the rule of law: once the individual's right to life, liberty, and private property is secured and protected by constitutional constraints, a legal framework for free economic enterprise is established, within which individuals are free to pursue their happiness and seek their fortune as they see fit.

Consequently, just as the Enlightenment philosophy seeks to establish the policy of popular sovereignty over state sovereignty and to "civilize" the people in order to promote social progress and to ensure the continuity and sustainability of popular democracy, Liberalism seeks to establish the principle of the rule of law over governmental authority in order to ensure individual freedom, protect private property, and foster economic prosperity. Reflecting these divergent political interests and concerns, the two traditions develop divergent political biases. While in the Continental tradition the concept of state, particularly that of a democratic *Rechtsstaat*, develops into a political-philosophical ideal (indeed, an embodiment of the Enlightenment's mission of social progress and economic welfare), within the Liberal tradition, the concept of state effectively disappears from the political-philosophical lexicon and is reduced to the concept of the government – the necessary but inherently suspect management unit of the Liberal polity.<sup>8</sup> Conversely, while the Enlightenment develops a built-in bias against the relentless pursuit of individual self-interest and the primacy of economic interests over civic virtues and cultural values – such excesses tending to erode and undermine the moral unity of the populace – Liberalism cherishes the concept of the rule of law, which is viewed not only as the prime structural constraint against the possibility of abuses of governmental power, but also as the *sine qua non* of private property and freedom of enterprise, the legal prerequisite for economic prosperity.

Yet, despite these differences in emphasis, approach, and structural bias, both Enlightenment and Liberalism share, and operate within, a common conceptual framework. While Enlightenment is more concerned with social progress and the welfare of the people than with the property rights of individuals, and while Liberalism is more interested in the happiness and prosperity of its citizens than in the promotion of a welfare state, the fact remains that both operate within the same conceptual framework – the relationship between the state/government and civil society (people/citizens). Reflecting this common conceptual framework, academic political and

social philosophy in the West (the intellectual home of both Enlightenment and Liberalism) has largely disregarded international organizations, which tend to fall beyond their shared conceptual horizon.

However, an analogously structured debate has emerged within the academic discipline of international organization, probably as a reflection or projection of the underlying political-philosophical and socio-philosophical conflict involved. Although lacking in political-philosophical and socio-philosophical content, and thus more conceptually and intellectually impoverished than Enlightenment and Liberalism, the two competing theoretical views on the role of international organizations in international affairs – realism (or “reductionism”) and idealism (or “institutionalism”) – adopt positions that correlate to the underlying socio-philosophical or political-philosophical debate. Just as Enlightenment and Liberalism tend to approach the relationship between state/government and civil society from different angles, realism and idealism hold conflicting views on the relationship between international organizations and states.<sup>9</sup>

According to the reductionist or realist thesis, international organizations have no independent role or function in international affairs, but are simply extensions or instruments of state power. As opposed to “naturally” developed political communities such as the state, international organizations are artificial creatures, set up by states and governments solely to serve as fora for international cooperation among states and to assist them in the management of international affairs. International organizations, in other words, have no independent political “will” and therefore effectively no political independence or existence. Consequently, in the realists’ view, an excessive focus on formal international organizations and their internal structures is mistaken, as it diverts attention from the real subject matter of international relations: the relationships among states and governments.

Conversely, according to the idealist or institutionalist theory, international organizations play a role in international affairs that is somewhat independent of states and governments, their creators. Like states, international organizations are formal subjects of international law, having an independent legal identity and the capacity to sue and be sued in international and national fora, within the limits of their functional immunity. But in terms of substance, too, the proliferation of international organizations since the end of the Second World War and the corresponding increase in the tasks performed by them show that these organizations perform functions that states and governments alone are incapable of performing. Consequently, international organizations have to be understood as players that not only have to be taken into account, but also have to be made accountable.<sup>10</sup>

Like the difference between Liberalism and Enlightenment, the controversy between institutionalism and realism seems driven by conflicting political-philosophical and socio-philosophical assumptions that have not been spelled out. This raises the question of whether the underlying socio-philosophical and political-philosophical debate, of which the organization-theoretical debate simply seems a reflection or projection, should be extrapolated explicitly to the international level. However, any such attempt seems pre-empted by the conceptual framework that the two philosophies share – that is, by the circumscription of the debate within the framework of state/government and civil society. Given this common conceptual basis, which focuses on the national or domestic rather than the international context, it seems that the underlying socio-philosophical and political-philosophical debate can be extrapolated to the level of international organization only with considerable conceptual difficulty.

Unlike the national or domestic context, there is generally no direct relationship between intergovernmental organizations and the people or citizens of the various member states.<sup>11</sup> As the relationship between international organizations and the people remains indirect, being mediated as it is by the representatives of member states and governments, ordinary people or citizens normally have no access to the international arena, nor consequently any role to play in it. This indirect, representative relationship between people and international organizations means, effectively, that the international “community” established by the constituent documents of the international organizations, such as the Charter of the United Nations, is not an international “civil society” consisting of peoples and individuals, but an exclusive community of political and diplomatic representatives of states and governments.<sup>12</sup> For international organizations, the “consent” or concurrence of those representatives is much more important than the views of individuals in the various member states.

Given the lack of a direct relationship between international organizations and the people, posing the question of the “legitimacy” of international organizations seems very misleading. Is not the function of the representatives of states and governments precisely to convey the views of the people at the international level, and to ensure that the activities of international organizations conform to the legitimate expectations of the people and that these organizations do not appropriate powers beyond those provided in their charters? More fundamentally, does not positing a direct relationship between international organizations and the “people” necessarily treat the peoples of the various member states as a unified group, thus disregarding the economic, social, political, and cultural dif-

ferences among them, and indeed within them? Does not such an approach presume the existence of a global public sphere, or polity, that does not yet, in fact, exist, and that is unlikely to emerge any time soon, given the relatively low incidence of interactive transnational communication between members of civil society (as opposed to government representatives) and the corresponding lack of public debate about issues of common transnational (let alone global) interest? In other words, is it not still true that the state is, and will probably remain, the “container” of democratic legitimacy?<sup>13</sup>

Apart from the apparent lack of a direct relationship between international organizations and the people, the absence of a unified global “people,” and the consequent inapplicability of the doctrine of popular sovereignty at the international level, there seem to be other conceptual difficulties associated with the use of the term “legitimacy” in the context of international organizations. It is arguable, in line with the realist view, that international organizations are not effectively engaged in governing, but rather in the administration of functions delegated to them by states and governments. Speaking in terms of the “legitimacy” of international organizations thus seems to amount to a reversal of the subject-object relationship between states and international organizations – it suggests that international organizations govern over the community of states, whereas at least formally, the relationship is the reverse: states and governments are supposed to govern international organizations. Under the Charter of the United Nations, for instance, the Security Council, although the supreme body of the organization, is only in substance a forum for meetings of the representatives of member states. Without these representatives, the Security Council is reduced to a nameplate on the door.

In line with this understanding of their role as administrators rather than governors, many international organizations, and particularly international civil servants working within such organizations, view themselves as servants of the member states rather than as their masters, and see as their main function the implementation of the decisions taken and the policies adopted by the representatives of these states.<sup>14</sup> According to this view, states have, in effect, never relinquished their substantive political powers to international organizations, but have withheld them, thus reserving for themselves the possibility of circumventing international organizations and using other, more informal fora for international decision- and policy-making.<sup>15</sup>

Nonetheless, it is hard to deny that from the perspective of states that have, for instance, become targets of United Nations sanctions or other coercive measures approved by the Security Council, or that are on the



receiving end of accusations by human rights organizations of alleged domestic human rights violations, or that are faced with the take-it-or-leave-it conditionality attached to IMF and World Bank credit and loan approvals, these international organizations are effectively exercising functions that verge on the governmental.<sup>16</sup> In other words, the system seems capable of encroaching upon the sovereign rights of individual states that are members of the international community and, by extension, upon the rights of individuals residing in such states, without their specific consent.<sup>17</sup>

This raises the question of whether there is, in effect, a need for “constitutional constraints” on the decision-making carried out by international organizations to protect the target states against the abuse of institutional authority. This approach, however, would seem to assume that a consensus exists among international lawyers on the applicability of constitutional analogies in the interpretation of the charters of international organizations – an assumption that is not necessarily borne out by the facts.<sup>18</sup> And even if there were such a consensus, the problem remains that only a handful of governments have accepted the compulsory jurisdiction of the International Court of Justice (ICJ), the principal judicial organ of the United Nations. What is more, the Court has not, until now at least, shown great enthusiasm for assuming powers of judicial review over the resolutions of the Security Council.<sup>19</sup>

Thus, the answer to the question of whether or not international organizations exercise functions that can be characterized as “governmental” seems to depend largely on whether one approaches the decision-making of the organizations from the perspective of those states that are sponsoring a particular institutional decision, or those that are being (adversely) targeted by such a decision. Like the tension between idealism and realism in international organization theory, this divergence can be understood as a reflection and projection of the underlying political-philosophical and socio-philosophical debate – just as the former view approaches international organizations as progressive instruments of states, the latter view labels them as potentially oppressive tools of majoritarian political power. However, although the debate about the governmental nature of international organizations’ powers seems to be structured like the underlying political-philosophical debate, it remains only a projection of it – people and citizens have no direct role in, nor direct access to, this debate, which is conducted at a high diplomatic, political, and legal level. The lingering question thus remains as to whether this debate can be appropriately approached, or framed, in terms of “legitimacy,” in this term’s traditional, Western, popular or individual-oriented sense.

But cracks seem to have appeared recently in this received wisdom. The revolutionary changes in the international organizations’ operating

environment that have taken place since the end of the Second World War, noted in the beginning of this Introduction, seem to be blurring the traditionally clear conceptual picture, which is founded on a definite conceptual distinction between the international and the national, between the transnational and the domestic. New intellectual efforts to understand the nature and function of international governance have begun to emerge. Indeed, the increasing frequency of the very use of the word “governance,” instead of government, as the preferred term of the day encapsulates the shift in intellectual attempts to come to terms with the ongoing technological, economic, social, and political developments that are generally considered under the term “globalization.”

Whether or not this is the proper term to describe these developments, they are beginning to undermine many of the assumptions underlying not only international organization theory, but also modern political and social philosophy itself. These shifts started with the emergence of mass media more than a hundred years ago, acquired a universal state-based system as a result of decolonization, and gained momentum through the proliferation of popular non-governmental organizations that aimed to tackle global problems that had penetrated public awareness through the mass media. They were then extended to the economic sphere as a result of the continuing liberalization of international trade, the liberalization of international capital movements following the fall of the gold standard, and the subsequent creation of global financial markets. They further intensified following the end of the Cold War and the collapse of socialist economic systems, and in the consequent large-scale adoption of the market economic model. And they are now breaking new ground as a result of rapid developments in such fields as biotechnology and, in particular, the emergence of the Internet.

While these changes have had, and continue to have, wide-reaching consequences outside the world of international organizations, and have affected different organizations in different ways, there is hardly any organization that has not been touched by them. Importantly, besides a number of newly established international organizations, other social structures and institutions have emerged that can be used not only as fora for debate about issues of common interest and concern, but also as bases for mobilizing governmental support for the conduct of international affairs.<sup>20</sup> While international organizations continue to play a role in international governance, providing fora for more formal, structured, and transparent decision-making about international affairs,<sup>21</sup> they are no longer considered entitled to a monopoly in the political marketplace as vehicles for debate and decision-making. Rather, they must compete with other, more informal social structures and institutions, including traditional fora such as intergovernmental conferences, meetings, and con-

sultations. In other words, an international political “marketplace” has emerged.<sup>22</sup>

The (re-)emergence of competing political fora has affected practically all of the important international organizations, and in particular the United Nations. One of the consequences has been the spread of the idea that there is an analogy between the management of international organizations and that of private-sector entities – that the general philosophy of corporate governance and the principles applicable in the commercial world also apply in public administration. In an effort to bolster their competitiveness, international organizations have increasingly sought to streamline and restructure their internal operations, as well as to adopt and apply corporate management philosophies and techniques in the organization and management of their businesses. This trend has become particularly apparent after the end of the Cold War, reflecting the collapse of competing management ideologies. Consistent with the corporate bias, governmental or administrative functions that would probably once have been delegated to an international organization are now being privatized.<sup>23</sup>

The recent practice of certain international organizations (particularly those involved in economic or market-related and technical functions, as opposed to universal political or “progressive” functions<sup>24</sup>) of engaging in direct “consultations” with various “stakeholder” groups is the most recent form of organizational activity based on corporate analogies.<sup>25</sup> The use of the consultative method is also undermining the assumption that individuals have no direct access to, or role in, international or transnational governance. In an attempt to reach out to such “stakeholders,” or a subset of professionals who are likely to be interested in a particular item on the organization’s agenda, certain international organizations have adopted the practice of consulting such interested stakeholders by organizing meetings, setting up Internet-based discussion lists, and soliciting written comments, in order to hear their views and get their input.<sup>26</sup> While the consultative process approach may involve political risks – it is likely to create, on the part of the stakeholders, an expectation of accountability – it also establishes a direct and more formalized relationship between the organization and its stakeholders, thus bringing the organization closer to the “people” and enhancing the perceived legitimacy of its decision-making. At the same time, the consultation process also opens up, importantly, the possibility of mobilizing “popular” stakeholder support for the policies promoted by the organization, which, once secured, would tend to increase the likelihood of approval of such policies by government representatives. But if consultative procedures evolve into a *modus operandi* of international organizations, whatever the underlying motivation for the deployment of such proce-

dures, the consequence will be that they tend to strengthen the organizations' functional independence from states and governments, on whose political will and formal consent they are based.

Although not all international organizations have, to date, engaged in consultative processes, and evidence of an operative change therefore remains limited, the fact that the consultative process approach is used typically by those economic and technical international organizations involved in transnational rather than international governance is unlikely to be a coincidence. The ongoing globalization of the economy and the recent revolutionary developments in communications technology, in particular the emergence of the Internet, are fundamentally transforming the operating environment of precisely such economic and technical organizations. While it may be premature to argue that the Internet already serves as the technological platform of an emerging transnational, if not global, civil society and consumer market, the Internet community's reliance on self-government certainly provides a philosophical basis for further efforts to sever Internet administration from national and international governmental authority. The privatization of the technical administration of the Internet further boosts such developments.<sup>27</sup>

Whatever the future developments, however, the fact remains that the revolutionary changes in the technological base and modalities of communication brought about by the Internet and its "official" philosophy of self-governance seem to be not only the enabling factors but also the driving forces behind the increasing involvement of stakeholders in transnational governance. Moreover, as a global, non-territorial medium of communication, the Internet seems to provide, in theory at least, an alternative platform for the development of a public sphere or polity that, unlike the modern concept of the nation-state, is not based on territory.<sup>28</sup> Thus it is possible that there will be a trend towards the increasing participation of stakeholders in not only transnational but also international governance.

Taken together, these developments – the widespread use, at the international level, of concepts and techniques based on corporate analogies, the increasing participation of stakeholders in transnational and even international governance, the re-emergence of the idea of self-government in the context of the Internet, and the privatization of governmental functions that before would probably have been delegated to an international organization – suggest the emergence of a new concept, or ideology, of "corporate democracy" or (in more individualistic terms) "cosmopolitan democracy," made possible by technological developments, fuelled by the political mood of the post-Cold War era, and shaped by the specific requirements of transnational governance. The consultative process approach, in particular, reflects and embodies this emerging concept be-

cause the international organization's request to participate in the consultative process is not addressed to the people, nor to the collectivity of universal citizens, but rather to those that are likely, for *professional* rather than for ideological or personal reasons, to be interested in the subject or issue covered by the process – in other words, the stakeholders.<sup>29</sup>

Unlike the two dominant schools of modern political and social philosophy, Liberalism and Enlightenment, the emerging model is not based on the concept of popular sovereignty, or a universal citizenship with equal and interchangeable or fungible political rights, but on the quintessentially corporate concept of the stakeholder. Under this approach, the participation of individuals in transnational governance is not viewed as a matter of universal, formal right, but as a consequence of the individual's holding of certain context-specific professional interests or concerns that justifies the hearing of such interests or concerns in the consultative process, but only to the extent that the process in question may affect these interests or concerns.<sup>30</sup>

Thus, while the concept of corporate democracy allows and invites individuals to participate in international policy-making, such an allowance or invitation is addressed to the individual in their professional rather than personal capacity, thus introducing and relying on a concept that is drastically different from the modern concepts of popular sovereignty and the universal citizen. Novel issues will arise, chief among them being the question of how the context-specific criteria of "stakeholderhood" are defined.<sup>31</sup> Furthermore, it seems that, inevitably, any definition of the criteria will have to depend on the context. There being no meta-context, or context of all contexts, that would allow the overall management and coordination of all of the various contexts in a competent, professional manner,<sup>32</sup> the constitutional principle will have to be, by default, self-government of each context. In other words, the various stakeholder groups will have to reach an agreement on the criteria of stakeholderhood among themselves, in each context.

But do these developments confirm the thesis of the triumph of Liberalism, the fallback position of Western political philosophy, as the dominant political philosophy of our era?<sup>33</sup> Yes and no.

Yes, because those international organizations whose functions and activities are substantially informed by the Enlightenment philosophy of social progress and economic development have largely fallen victim to the Cold War and its aftermath and to other aspects of globalization; whereas those international organizations exercising mainly economic and technical functions designed to promote free international trade, liberalization of capital movements, and technological development have largely benefited from globalization.<sup>34</sup>

No, because the emergence of the novel concept of corporate democracy not only signals the end of the modern project of Enlightenment, its mission accomplished; it also reflects a transformation of the concept of Liberalism. Just as the uneducated masses that the Enlightenment saw as its mission to educate have evolved into a civilized middle class that no longer feels a need to be represented in order to be able to express its views, the universal citizen of Liberal polity has been transformed into a cosmopolitan professional with transnational rather than local or jurisdiction-based interests. As a consequence, just as the former has triggered the gradual erosion of the self-evident legitimacy of the doctrine of popular sovereignty, the latter is gradually relativizing the importance of national constitutional constraints.

Thus, the West is in the process of entering a post-modern or neo-liberal era, where the focus of social and political philosophy is no longer on the nation-state/government and its relationship to civil society, but on international and transnational contexts. The emergence of such contexts, which straddle the modern conceptual framework or context of state/government versus civil society, does not mean that this framework or context is being replaced with another overriding context or meta-context. Just as there never was one state/government versus civil society context, but many – one for each state/government versus civil society complex – the context of state/government versus civil society as the home of political and social philosophy is being replaced by a number of international and transnational contexts.<sup>35</sup>

Unlike the international organization or the state, these international and transnational contexts are not transparent conceptual formations that can be logically deduced or formally defined. Rather, they are epistemic communities consisting of international civil servants, government officials, NGO activists, private-sector professionals, academics, and others involved in an international or transnational activity or project that requires certain types of professional expertise and experience. In order to understand the workings of these contexts – their agenda-setting mechanisms, constitutive structures, policy-making functions, dispute settlement procedures, and other features – one has to be in the loop, or at least a close observer of ongoing developments. In the absence of a shared, transparent conceptual framework across the various contexts, this is the only way to keep oneself informed and to understand what is going on. Moreover, as such epistemic communities may form around one-time projects, unlike states and international organizations, they are not immutable or permanent conceptual formations, but may come and go. What emerges as a result is a more opaque and less certain world; at least, and particularly, from the point of view of those who are not involved.

The above is not to suggest, by any means, that states or civil societies have ceased to “exist.” Quite the contrary, as the process of decolonization – one of the globalizing events that has fundamentally modified the operating environment of international organizations established in the aftermath of the Second World War, as noted above – has practically ensured that, more than ever, the state system is the conceptual and factual foundation of international and transnational governance, which not only endures but indeed assumes, even requires, a comprehensive, relatively stable state system as its basis. Rather, the suggestion is that, given the widening scope and increasing intensity and complexity of international and transnational interaction (including cooperation and conflict) among international civil servants, government officials, market participants, and other actors that has followed on from globalization, an epistemological rather than methodological (or conceptual) approach needs to be developed. To enhance our conceptual horizon and, consequently, to understand what is going on in the system of international and transnational governance – that is, in order to be able to generate knowledge, as opposed to information, about international and transnational interaction – an approach based on the conceptual framework of state/society is no longer legitimate. Hence the suggestion put forward in this Introduction that a new approach needs to be formulated, based on the epistemological “concept” of international and transnational epistemological contexts, rather than the modern conceptual-methodological framework of state/society. Not only to be able to empower and emancipate, but, indeed, to be able to survive, practical philosophy – if this is the term to be used to cover both social and political philosophy – must leave behind the era of conceptual methodologism inaugurated by Georg Wilhelm Friedrich Hegel some two hundred years ago, and enter a new era of epistemology.

Within the broad conceptual and epistemological framework described above, this book attempts to explore and analyse selected theoretical issues associated with the legitimacy problem of the international organization, as well as to explore a number of international organizations and regimes in the context of these issues. It is not suggested that the selection of international organizations and regimes made herein is exhaustive nor even the most appropriate; rather, the goal is to focus on a number of such organizations and regimes that are generally considered central and important as fora for international decision-making. Consequently, this book is structured around certain international organizations (the United Nations, the WTO, the World Bank) and regimes (the international financial architecture, the climate change regime) as a means of identifying a number of contexts that seem important in understanding and assessing the legitimacy issues arising within the current

system of international governance. In other words, the goal of the project is to take stock of issues that have arisen in a number of contexts that seem, *prima facie*, relevant for developing an overview of the current state of international governance, and to suggest an agenda for future research in the area.

This book is also mindful of the underlying organization-theoretical differences discussed above, regarding the degree of independence of international organizations from states and governments. These differences present a methodological challenge that cuts across various disciplines. While it may be difficult for a legal scholar, for instance, to avoid opting for some form of institutionalism, a political scientist is likely to adopt a more reductionist approach. Social scientists, on the other hand, are likely to have a more realistic picture of the role and function of international regimes; that is, international cooperation to address problems in the absence, or outside the framework, of formal international organizations. Consequently, this book makes an attempt to adopt a more comprehensive, interdisciplinary approach to its subject matter, including contributions by scholars from various fields such as political philosophy, law, political science, economics, and environmental studies.<sup>36</sup> It is hoped that the pitfalls of disciplinary bias are thereby minimised and that, on the whole, a more balanced picture of the philosophy, evolution, and current state of international organization will thus emerge.

Accordingly, the book is organized in three sections, as follows: (1) the theoretical issues associated with the legitimacy of international organizations, including the role of democratic principles and constitutionalism in international governance, as well as the relationship between the use of force and the evolution of international organization; (2) the changing environment of international organizations, in particular the impact of globalization and the challenges faced by the United Nations during the post-Cold War era; and (3) the socio-economic context of international organization, including the increasingly central role of the international trade regime as part of the international organizational structure, the attempts to establish a new international financial architecture, the role of the World Bank in world economic development, and the participation of developing countries and non-governmental organizations in the negotiations on a climate change convention. The remaining part of this Introduction will summarize each chapter of the book in order to provide an overview of their contents.

In chapter 1, “Democracy and international governance,” Susan Marks discusses the concept of democracy against the backdrop of the profound political changes that took place in the late 1980s and early 1990s. She notes that, as a result of these changes, the concept of democracy has



undergone three major modifications. Firstly, some of the “worst excesses of democratic Newspeak,” such as “people’s democracy” and “one-party democracy,” have disappeared, as multi-party elections have been held in a number of newly democratic countries and other liberal democratic procedures have been put in place. Secondly, and ironically, along with the nearly global triumph of Liberal principles, there has been an increasing disillusionment with the concept of democracy in the Western liberal democracies, as demonstrated by low voter turnout and widespread distrust of politicians and political institutions. Thirdly, and perhaps most importantly, as a result of globalization, “Efforts to improve national democracy [have begun] to seem radically inadequate when account is taken of the extent to which, and the ways in which, national options are now shaped by decision-making in non-national settings.”

Marks sets out to explore the dilemma of modern democracy in the era of globalization by looking at the ideas underpinning the concept of the nation-state as modern democracy’s “container.” Drawing on the work of political theorists and international relations scholars, notably David Held, she argues that there are two such ideas: the notion that democratic polities are essentially territorially bounded communities; and the idea that the world beyond the nation-state, the international sphere, is a Hobbesian state of nature, a theatre of power politics. In other words, while the nation-state, or the modern democratic polity, has been seen as a “community of fate” where democratic principles apply, the international sphere has been conceived of as a world between governments and government representatives where democracy and its principles have no room in practice, nor any role to play in theory.

Marks argues, convincingly, that as a result of contemporary globalization, both of the above ideas are being challenged. On the one hand, “If globalizing processes are enhancing the extent to which actions in one country have ramifications in another, and if those same processes are also augmenting the extent to which national options are shaped by actions in international and other non-national settings, then the notion of the national ‘community of fate’ becomes extremely difficult to sustain.” On the other hand, the “supposition that (national) democracy can thrive in a sea of (international) non-democracy is called seriously into question. If national boundaries do not describe the limits of a community of fate, how can they describe the limits of democracy?” Marks concludes that, in these circumstances, an analysis of the concept of democracy must focus on both the global context of national democracy and the democratization of international governance.

Marks identifies three visions of global democracy that have been put forward by democratic theorists: world government (a vision “predicated upon the disappearance of the state system and its replacement by gov-

ernment on a worldwide scale”); pan-national democracy (envisaging the establishment of a global democracy at the level of each nation-state); and the democratization of global governance. Marks is sympathetic towards the third view, and discusses at length the argument of its main advocate, David Held, who argues that global democracy need not await the demise of the state system, because democratization can take place within the existing structures. According to Held’s concept of “cosmopolitan democracy,” which Marks seems to endorse, “The notion of a democratic political community should be untied from the whole ‘idea of locality and place.’”

Having outlined the theoretical dilemma involved, Marks goes on to examine the efforts of international law scholars to resolve it. She discusses the work of two prominent legal scholars, Anne-Marie Slaughter and Thomas M. Franck. In Marks’ words, Slaughter’s theory of “transgovernmentalism” “refutes both the contention that national governments are declining in importance and the contention that international organizations, subnational authorities and non-governmental actors are rising in significance.” According to Slaughter, although profound changes are taking place, the focus of analysis should not be on national governments or international organizations, but on the interaction taking place among governments. As a result of this “disaggregation of sovereignty,” there emerges a network of transgovernmental relations constituting a new, transgovernmental order, or the “real new world order.” Because government networks are based on informal decisions and forms of co-operation, they require no formal transfer of power and therefore “carry the legitimacy of the national processes with which they intersect.”

Marks remains unconvinced. Characterizing Slaughter’s transgovernmental theory as “emphatically pan-national,” she argues: “However effectively citizens may be able to hold their own governments accountable in connection with transgovernmental activities, democratic legitimacy depends on accountability to *those affected* by such activities.” But in the transgovernmental context, those affected “will necessarily include citizens of other countries, among them countries very probably not represented in the relevant network.” In other words, transgovernmentalism relies on an idea – the non-coincidence of national boundaries and the national community of fate – that undermines, precisely, the possibility of using national citizenry as a basis for its legitimation. “When options in one country are shaped by transgovernmental networks, which are themselves shaped by decisions in other countries, national democracy – no matter how widespread and how deep-rooted – cannot suffice.”

Marks’ account of Thomas M. Franck’s fairness-based theory of legitimacy places Franck in the long line of Liberal internationalist traditions. In contrast to Slaughter, Franck’s argument remains based on the argu-

ment that non-state actors are gaining importance in international relations. To remedy the “fairness deficit” in decision-making by international organizations (mainly resulting from the inadequate representation of the people of the more populous states, as well as indigenous and other disenfranchised groups) that he identifies as the salient problem, Franck proposes the creation of a new forum in which people, rather than governments, are directly represented. This could be achieved, for example, by dividing the United Nations General Assembly into a two-chamber body.

In Marks’ view, then, Franck’s fairness-oriented approach seems based, like Slaughter’s, on the assumption that “democracy is a form of national government, and pan-national democracy the corresponding global project.” Moreover, Franck’s analysis is limited to “official” international decision-making, and overlooks developments in unofficial, private settings. But according to Marks, “steps to democratize ‘official’ international activity must be accompanied by, and linked to, steps to democratize other sites of decision-making with global or transnational impact.” Marks acknowledges that such a project of global democratization “demands change of transformative proportions,” and calls for debate on “the theoretical, and ultimately political, question of what global democracy should mean.” Recognizing, however, that the concept of democracy remains essentially contested and thus to be defined in political struggle, Marks proposes not to offer any easy solutions. The meaning of the concept remains to be defined and redefined not through “scholarly fiat,” but through day-to-day political struggle. But because democracy is a manipulable concept, and thus not only “the enemy of oppression, but also the friend,” it can be abused to serve ideological purposes and to legitimate and sustain hierarchies of power. The scholar’s role, therefore, is “to remain permanently attentive in exposing such moves, and in searching for ways to realize the concept’s emancipatory potentials.”

Philip Allott, in the chapter “Intergovernmental societies and the idea of constitutionalism,” explores the idea of constitutionalism in a broad historical and philosophical context. Allott approaches constitutionalism as a social theory; that is, as a theory whereby a civil society constitutes itself. Allott contrasts constitutionalism with absolutism and theocracy. While the former denies any appeal to the ideal, validating authority solely on the basis of the actual, theocracy justifies the existing social power by referring to transcendental, inexplicable, and unjustifiable criteria.

Unlike absolutism and theocracy, constitutionalism has both an explanatory and justificatory aspect to it, as it both defines the society’s ideal and serves as a standard of that ideal when projected back onto the society. Within this framework of pure theory, society acts as the realm of practice, serving as the theatre of daily political struggle concerning

the interpretation and application of its ideal constitution. According to Allott, an intergovernmental organization has the unique feature of being a society of societies, in the sense that its member states are themselves societies. International organizations are, furthermore, also members of a society; that is, the international society, or the society of all societies, “the collective self-constituting of all-humanity.”

Allott observes that the need for a social and political order – the idea of constitutionalism – emerges at times of great social disorder, or during periods of exceptional social and economic change. This suggests that, historically, the social and political function of constitutionalism has been to serve as a method of managing political change – the changeover of power between rulers – in order to secure stability and continuity of governmental power in situations of transition. While constitutionalism may not be able to ensure a peaceful transition from one power constellation to another – to convert a revolutionary process to an evolutionary one – it nevertheless tends to minimize the likelihood of outright battles over power.<sup>37</sup>

Allott notes a “striking fact of history”: namely, that there “seems to have been a parallel development in the idea and the ideal of law in otherwise disparate cultures.” Allott traces the historical and philosophical origins of the idea of constitutionalism from the early philosophical traditions, focusing on the Greek and Roman concepts of constitutionalism. In the process, he identifies two competing models of constitutionalism, the Aristotelian and the Roman. While the former is based on the idea of a good social order, the idea of constitutionalism thus growing out of, and forming the structure for, civil society, the latter model views society as an artificial creation constituted by its institutions and the principle of distribution of power. In other words, while according to the former view constitution remains essentially a social formation, thus establishing a direct link between the people and constitution, according to the latter view, the constitution’s role is to regulate the relationship between the political institutions of society and the distribution of powers among them. Allott argues that it is the former idea – the idea of a naturally conditioned social order – that would “provide the basis for the flourishing of the idea of constitutionalism in the modern world.”

Allott’s idea of two constitutions – one for the government, which would essentially be based on the doctrine of the separation of powers and the ordering of relationships among governmental institutions, and another for international civil society, which would essentially serve to define the structure of civil society – is insightful, and has interesting parallels outside the realm of theory. Indeed, while the United Nations Charter could be viewed as an “institutional” constitution in the sense of the Roman tradition, the current discussion on the modalities of self-

government of the Internet can perhaps be understood in terms of the Aristotelian tradition. If it is true, as suggested earlier, that the Internet may prove to provide a technological platform for the development of a global civil society, then the question of its constitutional ordering takes on a whole new dimension. But here one must agree with Allott's caution: "The actual form which the theory of constitutionalism will take, within the actual development of international society hereafter, is something which will be determined dialectically in the total social process of the self-constituting, ideal and real and legal, of the international society of the twenty-first century."

José E. Alvarez's chapter, "Constitutional interpretation in international organizations," approaches constitutionalism from the inside, analysing the approaches adopted by international lawyers in interpreting the charters of international organizations and the use by these lawyers of national constitutional analogies. Alvarez explores the debate surrounding the applicability of doctrines such as constitutional methods of interpretation, "democratic principles," separation of powers, and judicial review in the context of international organizations. Recalling that the impetus for the United Nations was "the statist ideal of a collective security scheme," he argues that it is "misleading to read the UN Charter, a document premised on a *Realpolitik* bargain based on what sovereign states would tolerate in 1945, as, in any sense, a 'democratic' document." While questioning the assumptions that seem to underlie the use of constitutional analogies, Alvarez acknowledges their persistence, even beyond the circle of international lawyers.

When considering the issue of who is authorized to render an authoritative interpretation of an international organization's charter, Alvarez refers to the recommendation reached at the San Francisco conference; that is, that the charter interpretation be left, at least initially, to each institutional organ. As the San Francisco recommendation has subsequently become the practice for most organizations, it has allowed "a continuous, evolutionary development of international institutional law." Such evolutionary development is further facilitated by the flexible rules for treaty interpretation embodied in the Vienna Convention on the Law of Treaties, which also accords authority to the "subsequent practice" of interpretation, as well as the widely accepted doctrine of implied powers. Alvarez concludes that, whatever the merits of arguments denying the applicability of constitutional analogies in the interpretation of the charters of international organizations, such analogies remain popular.

Alvarez also analyses the constitutional arguments made in connection with the Kosovo crisis, both in support of and against the legality of the use of force by NATO. Characterizing the NATO bombing of Serbia as "the prototypical case of ambiguity," he identifies the tension between

the maintenance of peace and the protection of human rights as the underlying substantive value conflict in the constitutional debate, concluding that “a conclusive determination continues to elude the international community.” But despite the continuing openness of the substantive issue, Alvarez notes that all parties to the debate have argued in legal terms, avoiding blatantly political arguments. According to Alvarez, this demonstrates the constraining power of constitutional discourse.

Alvarez’s analysis, particularly the Kosovo case study, highlights the fundamentally liberal nature of the international legal system, which survives and thrives on its substantive openness. The system allows, indeed requires, as a condition of its functionality and continuing development, the coexistence and availability of conflicting substantive arguments, on which the parties to the conflict may build their case. Which argument will eventually survive or gain the upper hand in any given legal dispute will depend on a number of factors, including the factual circumstances surrounding the dispute – in legal terms, the evidence – as well as the professional skill with which the legal argument is presented. While the substance of international law may, indeed must, remain open and challengeable from substantive – political and moral – angles, there is a considerable degree of consensus among international lawyers, as emphasized by Alvarez, on the method and procedure of legal argument.

At the same time, in the absence of a substantive closure, lingering questions remain about the legitimacy of the collective use of force in connection with the Kosovo crisis. Is it sufficient, for purposes of political legitimation, to appeal to the (ideal) purpose for which force is used (maintenance of peace and security, protection of human rights, prevention of genocide), if in actual reality, on the ground, there is no objectively observable, qualitative difference between the ways and means of using force by each of the parties to the conflict?

Veijo Heiskanen’s contribution, “The rationality of the use of force and the evolution of international organization,” is a sweeping analysis of the relationship between the use of force in international relations, the various concepts of rationality, and the evolution of international organization. He links the changing views of the legitimacy of the use of force in international relations to corresponding political-philosophical theories of the rationality of social and political action. Together these components are used to account for the evolution of international organization from the nineteenth century nation-state-based international system through the League of Nations to the United Nations and, eventually, to the present-day post-modern, pluralistic international organizational structure, where the United Nations is seen as only one of many players.

Heiskanen approaches Clausewitz’s account of warfare as an expression of instrumental rationality. He analyses Clausewitz’s understanding

of war as an absolute machine consisting of three main components: the people, whose irrational political passion provides the flammable fuel for the war machine; the army, which serves as the war's professional body and logistical engine; and the government, which determines the war's political goal and guides it towards that goal. According to the Clausewitzian mechanistic concept, the war's rationality, and accordingly its political legitimacy, depends on its effectiveness as a means of reaching the political goal.

As the Clausewitzian concept of absolute, unlimited warfare was increasingly questioned towards the end of the nineteenth century, two competing approaches to the legitimacy of the use of force began to evolve. Heiskanen terms these two approaches the "politics of collective security" and the "policy of peace." While the former sought to establish a collective security system by monopolizing the authority to use force in the hands of an international organization, the latter sought to develop procedures, arbitral and legal, for the peaceful settlement of international disputes. Heiskanen understands the former as an expression of the Weberian theory of formal rationality, and the latter in terms of Habermas' theory of communicative rationality. While both approaches made considerable headway during the twentieth century, both have proved incapable of resolving the dilemmas associated with the use of force.

Heiskanen argues that recent developments since the end of the Cold War suggest the emergence of a new, post-modern concept of rationality in international relations. The new thinking, often termed "international crisis management," approaches international crises armed with a series of crisis management tools, ranging from preventive diplomacy through sanctions, peacemaking, and peacekeeping to peacebuilding, that can be customized according to the type of crisis at hand. Unlike its predecessor philosophies, which tended to draw a strict line between diplomatic and military tools, the crisis management philosophy consists of an amalgam of diplomatic and military thinking and thus represents a shift towards a technocratic, depoliticized, and consequently more managerial approach to the legitimacy of the use of force in international relations.

But like its predecessor philosophies, international crisis management has failed to fully resolve the normative ambiguities associated with the use of force in international relations. As evidenced by the recent Kosovo crisis, in extreme situations where diplomacy has failed and the time is not yet right for peacekeeping – in other words, in situations where peacemaking is required – the logic of international crisis management tends to break down – and the war machine breaks loose.

Heiskanen suggests that the system tends to stall in these extreme circumstances because the technology currently available for international

crisis management purposes still reflects the nineteenth century political-philosophical thinking – the available technology has been designed to serve the Clausewitzian war machine, rather than the post-modern crisis clinic.

G. C. A. Junne's chapter, "International organizations in a period of globalization: New (problems of) legitimacy," explores the effects of globalization on the legitimacy of international organizations. Junne approaches the issue in four stages: (1) by analysing the concept of legitimacy as applied and applicable to international organizations; (2) by placing the issue into a historical perspective; (3) by looking into the internal workings of the globalization process; and finally, (4) by assessing the consequences and available alternatives.

Junne notes the complexity of the concept of legitimacy and the difficulties encountered when applying the concept to international organizations. The source of legitimacy may be derived from a number of alternatives – justice, correct procedure, the representativeness of the government, the government's effectiveness, charismatic leadership. Whatever the preferred source, however, the problem that is faced when analysing international organizations is that it is not immediately clear whether the relevant constituency is the government or the "people" – the public at large. In other words, it remains unclear whether the social basis of international organizations should be, in terms of theory, the international society (inter-state relations) or the global society (global social relations).

Following David Held's analysis, Junne distinguishes three broad approaches to globalization: the hyperglobalist thesis, the sceptical thesis, and the transformationalist thesis. While the hyperglobalists argue that economic globalization will result in new social and political structures that will supplant nation-states, the sceptics point to the persistent role of states and governments in international politics. In the sceptics' view, the discourse of globalization is primarily an argumentative tool used by politicians to get unpopular measures accepted. The transformationalists, for their part, recognize the reality of the globalization process, but remain hesitant about its direction and consequences.

Looking at globalization from a historical perspective, Junne argues that the present wave of globalization differs qualitatively from earlier examples. While the present wave, like those before it, can be explained by technological innovations and evolution, it is largely driven by innovations in the field of information technology, thus affecting, in particular, the services sector, whose "products" consist essentially of information and are thus digitizable. As the services sector accounts for more than half of economic activities in most countries, the development of information technology has enabled the cross-border provision of ser-



vices and has, consequently, dramatically extended economic globalization. Better access to information, in turn, has speeded up technological development and innovations, further intensifying the globalization process, shortening economic cycles, and increasing uncertainty.

Globalization is characterized by the monopoly of the market economic model, largely by default or in the absence of competing economic models. Junne describes the “U-turn” in development strategies that took place in the 1980s and 1990s, resulting in the effective abandonment of the rhetoric about a “new international economic order” and the policy of import substitution as a model for economic development that went with it. The collapse, or “implosion,” of communism at the end of the Cold War opened the former socialist countries to the world market, depriving the developing world of an alternative economic model and paving the way for the emergence of a truly global market economy.

Junne explores the globalization process from a number of angles, including worldwide media coverage, expansion of world trade and foreign direct investment, the integration of financial markets, the evolution of the Internet, international labour migration, the emergence of global environmental problems, and the globalization of crime. Noting the ambiguity and ambivalence of the various aspects of the process, Junne remains cautious and refrains from quick conclusions about the direction and consequences of globalization and its impact on international organizations. He identifies the features of international organizations that make them particularly vulnerable to the consequences of globalization (notably bureaucratic inertia and lack of coordination), and looks at alternative forms of coordination, including the formation of informal networks that further blur the lines between formal and informal, multilateral and unilateral, governmental and non-governmental, public and private, official and unofficial, organizational and non-organizational (*ad hoc*). According to Junne, “It is the rise of such alternative structures as a result of the globalization process that might be a bigger challenge to the legitimacy of [international organizations] than the direct impact of globalization on the demand for IO activity and on the effectiveness of their actions.”

Jan Klabbers’ chapter, “The changing image of international organizations,” is an account of the ebbs and flows in the image of international organizations during the twentieth century. According to Klabbers, the backlash that he has observed seems to be the result of a number of factors, particularly the ongoing liberal move away from big government and politics towards more informal and flexible arrangements. Another factor may be the increasing “anti-formalization” of politics – the post-modern move from substantive political decision-making and consensus-building towards depoliticized managerialism. And finally, international

organizations themselves may be to blame, having not only mushroomed in number but also having amassed, over the years, new powers and functions.

Suggesting, with reference to Weber, that “the legitimacy of international organizations depends to a large extent on perceptions and images,” Klabbers embarks upon his journey by analysing the concept of international organization. He identifies neorealism and institutionalism (that is, generally, the approach to the study of international organizations adopted by international lawyers) as the two dominant approaches to understanding the nature and function of international organizations.

Noting the professional tendency of international lawyers to view international organizations as “good things” and independent actors with a “*volonté distincte*,” Klabbers identifies as the main intellectual problem of the theory of international organizations the relationship between the organizations and their members, characterizing it as “schizophrenic.” In the final analysis, according to Klabbers, the concept of international organization is practically indistinguishable from the concept of state, as the two concepts are interdependent. Klabbers notes that the theory’s constant conceptual oscillation between the organization and its members is reproduced at the level of legal doctrine, the result being that “whenever a decision has to be made, it is usually made on the basis of a policy preference masquerading as a legal rule.” The argument being, in the present context, that the earlier policy preference that tended to tilt the decision in favour of the organization is shifting. But this shift is not necessarily in favour of the international organization’s traditional rival, the state, as there are changes taking place at other levels as well.

Klabbers identifies two legal doctrines, the implied powers doctrine and the principle of speciality or attribution, as the two legal mechanisms that have enabled the entry of the realist and institutionalist (or legalist) positions into legal discourse. While the early case law of the Permanent Court of International Justice (PCIJ) tended to interpret the two doctrines in a manner favourable to the international organizations, the seeds were sown in these two doctrines for a later constraint of institutional power – which is precisely what occurred, according to Klabbers, in the advisory opinion issued by the International Court of Justice on the request by the World Health Organization (WHO) regarding the legality of the use of nuclear weapons. The interplay between the two doctrines displays the tension between the realist view that international organizations are “mere vehicles for the aggregate wishes of their member states” and the idealist conception of international organizations as separate entities. Klabbers concludes that, although there is a built-in bias in the law of international organizations in favour of the organization, there are few hard and fast rules in the law of international organizations, as a result of the incessant interplay of realism and institutionalism.

Klabbers argues that, of late, there has been a marked shift against reliance on the implied powers doctrine by international courts and tribunals. He traces this shift through a number of cases and scholarly materials. He lists other developments as well, such as the prevailing tendency towards establishment of organs at a “legally subliminal level” – that is, forms of cooperation among states that do not amount to formal international organizations – and towards increased reliance on international dispute settlement mechanisms. A number of other developments, including those taking place within the European Union and other fora, as well as trends discernible in legal literature, point in the same direction.

And what does Klabbers make of all of this? He is not pleased with the shift away from formal politics that he has diagnosed. Leaving the space open for other actors, notably non-governmental organizations, the perceived shift may amount to a loss of authority not only by international organizations but also by states. And as the lack of a rigorous definition of informal international organization is not particularly conducive to enhancing transparency or accountability, Klabbers ends up calling for a reappraisal and reimagination of formality as a necessary element of legitimate authority.

Jean-Marc Coicaud’s chapter, “International democratic culture and its sources of legitimacy: The case of collective security and peacekeeping operations in the 1990s,” explores the impact on the legitimacy of the United Nations of peacekeeping operations conducted by the organization between 1992 and 1996, the critical period immediately following the end of the Cold War. Largely seen as failures, these peacekeeping operations serve as a case study for Coicaud’s attempt to identify the various sources of legitimacy that the United Nations has relied on in order to establish itself as a legitimate international organization.

Coicaud starts with an analysis of the United Nations’ role during the Cold War, when the collective security system embodied in Chapter VII of the Charter was put in stasis and the United Nations had to invent other ways to deal with international crises, in order to avoid abdicating its institutional responsibility to maintain international peace and security. Peacekeeping operations were the organization’s imaginative response to the political stalemate at the intergovernmental level. As Coicaud notes, to the extent that the organization has had any success in maintaining peace and security, those successes are largely due to the deployment of peacekeeping operations. As a result, the organization’s legitimacy in the field of peace and security was effectively linked to its success in handling those operations.

While during the Cold War the United Nations was able to develop its own niche in the shadow of the two superpowers, the political landscape changed drastically when the Soviet Union collapsed and the Cold War

ended. While the frozen geostrategic structures of the Cold War melted away, a new kind of political instability emerged, and a series of armed conflicts erupted. The disappearance of the Cold War structures that had prevented the United Nations from redeeming the promise incorporated into its Charter created the expectation that the organization could finally emerge from the shadow of the great powers and reassert itself by successfully managing the new crises. And indeed, although the United Nations' role remained limited on the occasion, the way the international community handled the Gulf War was seen by many as "a tone-setter for multilateral cooperation in the post-Cold War era."

But, as Coicaud notes, the Gulf War proved to be an exceptionally clear-cut case that was not duplicated in later conflicts. While the United Nations got involved in international conflicts on an unprecedented scale, the changed nature of the conflicts, coupled with the new tasks with which the organization was entrusted, not only changed the nature of the operations but also greatly complicated their conduct. Coicaud identifies the main characteristics of the new, much messier situation with which the organization was faced: intrastate (as opposed to inter-state) conflicts; military operations directed primarily against the civilian population (ethnic cleansing); a consequent need for the United Nations to get involved in humanitarian assistance; the launch of operations while there was still fighting; and the resulting necessity for the United Nations to resort to force. And, as is well-known and painstakingly chronicled by Coicaud, the United Nations failed to withstand this baptism of fire, so that the period 1992–1996 has come to be seen as a series of failures and missed opportunities for the organization.

Coicaud offers a number of explanations for the mismanagement of the operations, including those intrinsic as well as extrinsic to the organization. On the internal side of the balance sheet, Coicaud lists the organization's notorious inefficiency and shortcomings in the management and logistics of the operations, but also the Security Council's wavering in its decision-making and the resulting lack of leadership. Among the notable external factors, he identifies the divided loyalties of the great powers and the resulting divided sources of legitimacy, identifying the deaths of 18 US soldiers in Somalia as a turning point from multilateralism towards selective engagement. As the emphasis in the policy positions of the great powers shifted from the projection of multilateral concerns towards the protection of their geostrategic interests, the United Nations was left holding the bag. Coicaud concludes that, in these circumstances, it is appropriate to speak in terms of co-responsibility.

Tetsuo Sato's chapter, "The legitimacy of Security Council activities under Chapter VII of the UN Charter after the end of the Cold War," is a legal analysis of the issues raised by the reactivation of the Security

Council during the post–Cold War era. Sato takes as his starting point the observation that, although there have been only minor changes in the legal framework governing the Security Council’s authority, the Council’s operating environment has changed dramatically since the end of the Cold War. In short, the discussion has shifted from one focusing on the paralysis of the Council to a critical analysis of possible excesses of authority.

Sato embarks upon his analysis by examining the institutional position of the Security Council within the framework of the Charter. Sato notes that neither the International Court of Justice nor any other organ of the United Nations possesses the exclusive authority to interpret the provisions of the Charter. An understanding and practice has evolved over the years that each body of the organization is, in the first place, entitled to interpret such provisions as part of its day-to-day operations. But this obviously does not preclude the member states from disagreeing with or challenging such interpretations.

In attempting to trace the developments in the Security Council’s position, Sato takes a look back at the Cold War period. He analyses the three occasions during that period which resulted in enforcement actions by the Security Council under Chapter VII of the Charter – the Korean War and the Rhodesian and South African human rights situations. Sato concludes on the basis of his analysis that during the Cold War, the Security Council extended the concept of threat to international peace and security to include instances such as the systematic denial of basic human rights. On the other hand, a consensus developed during that period that the Security Council would not be authorized to take action under Article 42 of the Charter in the absence of the specific military agreements envisaged in Article 43 of the Charter.

Moving to the post–Cold War era, Sato analyses instances when the Security Council saw fit to take action for the maintenance of international peace and security. Putting particular emphasis on the Security Council’s handling of the Gulf War and its aftermath, Sato takes careful note of the criticisms levelled against each of these instances. He concludes, tentatively, that the Security Council has, during the post–Cold War era, entered into “legally grey areas” where the legality of its actions remains ambiguous.

Shifting from a discussion of the legal aspects of Security Council activities to an assessment of their legitimacy, Sato takes up two competing theories of the United Nations Charter as a constitution. One of them views the Charter as a constitution of the United Nations alone, whereas the other elevates the Charter to a level where it is seen as the constitution of the international community. Observing that each of these views has a certain merit, Sato proceeds to identify the dilemma between fair-

ness and effectiveness as the conceptual angle from which the legitimacy of the Security Council's activities should be approached. He develops his thesis on the basis of Professor Thomas Franck's theory of legitimacy, which is based on a procedural understanding of legitimacy as a theory of fair process.

In Sato's account, another important aspect of legitimacy, apart from the balancing of fairness and effectiveness, is the doctrine of separation of powers. He takes note of the dictum by the International Criminal Court for the Former Yugoslavia in the *Dusko Tadic Case*, to the effect that there is no organizational separation of powers within the United Nations system. However, Sato suggests, interestingly, that the lack of such an organizational doctrine does not preclude the possibility of a functional analysis: the classification of whether the Security Council is acting in an executive, legislative, or judicial capacity has a bearing upon the propriety of its actions. Nonetheless, even the functional understanding of the separation of powers doctrine does not prevent the Security Council from establishing, in the exercising of its executive function for the maintenance of international peace and security, subsidiary bodies to exercise functions that the Security Council itself is not authorized to exercise. The establishment of the International Criminal Tribunal for the Former Yugoslavia is the most recent demonstration of this executive authority. Sato suggests, however, that there are limits to this authority and that not all of the decisions taken by the Security Council were entirely appropriate, at least in quasi-judicial terms.

Sato concludes with an assessment of the role of judicial review in the constitutional system of the United Nations. Noting the paucity of judicial precedent and the divergence of opinions among legal scholars, Sato ends up recommending the involvement of the Court "to a reasonable extent" in an assessment of the legitimacy of Security Council actions. Such involvement could include both an application of the functional separation of powers analysis in the interpretation of the Charter, as well as the possibility of judicial review, as, according to Sato, the more the Security Council steps into the legally grey areas, the more important the role of such institutional mechanisms becomes.

Robert Howse's chapter discusses "The legitimacy of the World Trade Organization." Identifying the legitimacy problem as the core issue of Western modern political thought, Howse defines it as "a question about the nature, salience, and location of power." In the context of international organizations, the debate revolves around the issue of whether these organizations have too little or too much power, the resolution of this issue being relatively independent of the underlying and more fundamental issue; namely, whether international organizations should be made sites of political power in the first place.

Howse tracks the evolution of the World Trade Organization on the basis of its predecessor, the General Agreement on Tariffs and Trade, and identifies the latter's core principles: most-favoured-nation treatment and non-discriminatory market access (the national treatment principle). But apart from these relatively formal principles that were "policed" by GATT through its consensus-driven dispute resolution mechanism, the organization also operated as a midwife in the liberalization of international trade – its efforts focused more on system maintenance than on its policing. By the time the GATT was ripe to be transformed into the WTO, it had become "the site of two kinds of power: the formal legal power of rules and related commitments (tariff bindings) negotiated by consensus among the membership"; and "a technocratic, epistemic [power of an] *'eminence grise'* nature," arising from GATT's management of the normative divide between acceptable and non-acceptable national regulation. Howse notes that, unlike the former type of power, the latter was "exercised non-transparently and often invisibly."

The transformation of GATT into the WTO resulted in the addition of a third type of power: judicial power, in the form of the Appellate Body (AB), which is vested with the authority to exercise judicial control over panel rulings. But the transformation also changed the balance between the pre-existing formal and informal powers: new, explicit rules were developed for areas where normative controversy had prevailed, including technical barriers, services, intellectual property, and subsidies. At the same time, the contracting parties were apprehensive about conferring to the WTO any regulatory or executive functions, retaining the prerogative of binding decisions.

Howse's analysis of the legitimacy of the WTO's regulatory power proceeds on the basis of the concept of consent. As Howse observes, however, the requirement of consent does not make countries equal, and consequently the terms of many arrangements negotiated under the auspices of GATT/WTO reflect differences in the political weight of the members involved. Moreover, while the formal legitimacy of government consent to international trade rules can be secured by appropriate domestic constitutional procedures, the substantive social legitimacy of the regulations is not necessarily secured by such arrangements. Howse explores the various ways in which the concept of social legitimacy could be filled in with substantive content. He reviews both the wealth generation and welfare enhancement theories, concluding that these theories fall short of legitimating some of the new WTO rules, such as those relating to the protection of intellectual property rights. Howse argues, persuasively, that the implementation of the new rules may in fact result in a decrease in aggregate global welfare, at least in the short term; in any event, their welfare-enhancing effect is at least debatable.

A broader case for the substantive legitimacy of trade regulations can be founded on the so-called “Washington consensus”; that is, “the view that a combination of specific [market-friendly] policies . . . represents an optimal prescription for public policy regardless of the country or the region of the world in question.” Howse argues that, like its traditional rival the welfare enhancement theory, the Washington-consensus-based case for legitimation requires a leap of faith. It is possible, he states, to “articulate the ‘Washington consensus’ as being solely about the optimal choice of regulatory instrument, and therefore possessing much the same normative structure as the welfare-based case for free trade, which relies on the notion that there is always, or almost always, a regulatory instrument less costly, or more ‘efficient,’ than trade protection to achieve *any* legitimate policy objective.”

Howse also explores other attempts at substantive legitimation of the WTO’s regulatory power, including Ernst-Ulrich Petersmann’s natural-rights-based approach as well as the conflict management theory, which anchor the legitimacy of the global trade regime in their built-in freedom-enhancing and peace-promoting tendencies respectively. In the end, he appears to settle on political liberalism, which links the case for free world trade to the promotion of a cosmopolitan political outlook, resulting in the rejection of protectionism more on the basis of its built-in xenophobic, discriminatory tendencies than its economic consequences. As Howse notes, however, while political liberalism tends to legitimate much of the traditional GATT law, which addressed itself to inter-state trade, it does not adequately explain some of the new WTO rules, which are more geared towards importing free-market principles into the member states’ national economies than promoting free international trade. The legitimation of the latter rules remains essentially based on the Washington consensus.

Howse assesses the legitimacy of the WTO’s “bureaucratic power” against the backdrop of the WTO treaties, which accord little, if any, executive power to the organization’s secretariat. In these circumstances, the secretariat’s technocratic power consists mainly of its agenda-setting ability for future trade negotiations, the technical advice that it provides to the various WTO committees, the generation of reports on strategic issues, and the (largely informal) monitoring of trade policies and implementation of trade rules. However, the secretariat’s capacity to influence the formulation of trade policies and rules is enhanced by its being part of what Howse calls “the network”: a group of former and incumbent governmental trade officials, interested academics, and international civil servants of other international organizations dealing with trade matters, as well as private attorneys, consultants, and others active in the field. The epistemic power and expertise that resides with the “network”



is, in Howse's account, largely shaped by Washington-consensus-style economics.

Howse's comprehensive analysis of the third kind of power exercised by the WTO, the judicial power, focuses on the organization's enhanced dispute settlement system, particularly the Appellate Body, whose creation has effectively limited the role of the secretariat's bureaucratic power in the judicial process. Howse identifies three outstanding elements that underlie the social legitimacy of the judicial power: fair procedures; coherence and integrity in interpretation; and institutional sensitivity.

Howse argues that the fairness of the WTO procedures has been substantially enhanced by the practice of the Appellate Body, which has found not only the panels' substantive but also their procedural findings to be reviewable, allowing it to adopt and develop standards of due process. The Appellate Body has also contributed to the coherence and integrity of interpretation in the WTO context by deciding to apply the canons of interpretation of public international law to the interpretation of international trade law obligations. More generally, Howse observes "a 'structural' coherence function" in the Appellate Body's jurisprudence relating to the interface between free trade rules and other international law regimes, which has allowed the evolution of the WTO law "in a manner that reduces, rather than enhancing, conflict and inconsistency with evolving law in other international regimes." Appropriate deference to competent determinations made by other institutions, domestic and international, similarly serves the purpose, in Howse's view, of substantively legitimating the multilateral trading system.

In conclusion, Howse remains optimistic about the WTO's ability to push through its global-Liberalist agenda, provided that the organization continues on its new-found path of "modesty in rule-making and rule interpretation." In any event, despite the problems identified by the critics, their arguments tend to be based on assumptions that confirm rather than contradict the Liberal economic theory, and show that there is no viable "alternative model of human social and economic organization premised on protectionism and discrimination in trade."

Marc Uzan's chapter, "The process towards the new international financial architecture," discusses attempts to establish a new international financial architecture in the aftermath of the recent financial crises in Asia and Latin America. Calls for an enhancement of the existing system were made as a result of the severity of the crisis, which rivalled that of the worst years of the debt crisis in Latin America and was comparable to the early years of the Great Depression in the United States. Institutional inadequacies were highlighted by the fact that interventions by international financial institutions (IFIs) and the G7 governments failed to stem the spread of the crisis.

While the focus of Uzan's chapter is on the principal ideas for reform that have been put forward by the international financial community, he also outlines the causes of the crisis and the inability of most analysts to anticipate it, differences between the various countries affected by the crisis, and the reasons for the failure of the international system. Uzan's account of the main causes of the crisis is succinct: "The Asian financial crisis was a different kind of crisis; rather than a traditional balance of payments crisis or a government-induced crisis, it was more of a private-sector crisis." In Uzan's view, most analysts failed to anticipate the crisis because they were looking at the wrong set of crisis indicators. Instead of the indicators relevant to past sovereign debt crises, analysts should have been looking at the financial fragility indicators in private-to-private borrowing, as the present crisis was essentially one precipitated by international illiquidity. As for the "new fundamentals" that should be looked at, Uzan identifies three factors: the ratio of foreign exchange reserves held by the central bank to the level of short-term debt within the economy; the strength of the domestic banking system; and the real exchange rate.

While recognizing that it is not possible to eradicate all causes of financial crises and that consequently such crises are likely to occur again in the future, Uzan argues that much can be done at the national level to reduce their incidence and severity. He suggests that developing countries, in particular, should proceed with more caution in financial deregulation and capital account opening; that large fiscal deficits and fixed and overvalued exchange rates should be avoided; and that ways should be developed to curb volatile, short-term capital inflows.

Uzan discusses at length the various proposals that have been made to enhance the existing international financial system to prevent future crises. The key ideas to restructure the system consist of the introduction of a number of policies, including limited introduction of capital controls; enhancement of transparency and disclosure; the strengthening of policies and financial systems in emerging markets; the bolstering of prudential regulation in industrial countries; the sequencing of capital account liberalization; involvement of the private sector in crisis prevention and management; and strengthening and reform of the international financial institutions. In Uzan's diagnosis of the crisis, microeconomic approaches would be key in improving the manageability of the international financial system.

One of the consequences of the crisis has been the new role that is starting to emerge for the Bretton Woods institutions – the International Monetary Fund and the World Bank. This new role is that of an international standard-setter for financial regulation, information, and transparency. Efforts are under way to develop "standards and codes of good

practice that build on and offer the potential to globalize the standards that exist within the most advanced nations.” The IMF, for instance, has developed a Special Data Dissemination Standard (SDDS) for governments in its area of responsibility. The World Bank, together with the IMF, has been looking at ways to strengthen national financial sectors, based on the Basle core principles. This cooperation, which has also involved the Bank of International Settlements (BIS), the Organization for Economic Cooperation and Development (OECD), and a group of influential central banks, has resulted in a draft Code of Good Practices on Transparency in Monetary and Financial Policies. Work is also under way in areas such as accounting, auditing, corporate governance, payment and settlement systems, insurance, and bankruptcy.

While Uzan recognizes that the development of international standards is legitimately driven by the G7 countries, which control the preponderance of the resources needed by the non-G7 countries to support long-term economic growth and development, he argues that, so long as non-G7 countries are involved in the discussions, it is “unrealistic to expect that the proposed standards will be accepted generally.” Similarly, given its role and control of resources in the global economy, the private sector must also be appropriately involved in the process.

Uzan argues that the international financial architecture should be thought of and designed “as an institutional mechanism to give incentives for better performance by domestic political institutions.” The key to achieving this is to induce domestic political institutions to better manage the trade-offs and conflicts of interest associated with financial management. Given the complexity and interaction of factors that underlie the recent crises, Uzan acknowledges that the management of these trade-offs and conflicts, which involve issues such as exchange regimes and domestic financial liberalization, is not easy and is bound to take time. Yet, financial globalization remains an essentially irreversible process, putting increased pressures on states and reducing the scope of available policy alternatives, while conferring greater autonomy upon market actors.

In Uzan’s account, apart from sound economic fundamentals (prudent macroeconomic policy; open, liquid, and transparent financial markets; open trade policies; and market-led economic adjustment strategies), the real bottom line is the political legitimacy of the global convergence of forms of capitalism. This challenge lies “in the ongoing patterns of distributional conflict which are a part of any market system, or indeed any system of social organization at all.” Uzan warns that the instability of the ongoing structural adjustment to global market pressures “risks disturbing [national political] systems too rapidly for them to survive without major convulsions.”

Kerry Rittich's chapter, "Distributive justice and the World Bank: The pursuit of gender equity in the context of market reform," takes a critical look at the role of the World Bank in world economic development, focusing on the distributional effects of market reform, particularly on gender equity. Rittich characterizes the Bank's current, neoliberal or Washington-consensus-based approach to economic development issues as a "transformative project that aims to normalize a particular culture of the market and set of relationships among market actors through the standardization of a canonical set of policies, practices, institutions, and regulations."

Apart from the promotion of global economic integration, the Bank's standard package of fiscal, policy, and regulatory recommendations contains, in Rittich's account, a policy bias for market-driven economic growth and privatization, thus implying a view of the state as a site of "waste and inefficiency, if not corruption, with persistent vulnerability to capture by special interests." Under this approach, the state's role is reduced to that of a servant of a globalizing economy, having as its primary function the enhancement of the operation of the markets involved. Rittich observes that, although under its Articles of Agreement the Bank and its officials must not "interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member concerned," since the early to mid-1990s, governance issues have been "the chief preoccupation of the World Bank, rather than a mere adjunct to the generation of economic growth."

Rittich argues that the transformation of the role of the state has been at the heart of the Bank's policy, the goal being to redesign the view of the state as an instrument of redistribution. In this vision, a range of redistributive functions that the modern welfare state was expected to perform are now regarded "not only as inefficient and costly but as simply undesirable state functions in a globalized, post-industrial economy." Consistent with this view, "The Bank has actively attempted to persuade states, developing states in particular, to eschew the 'welfare state' model, promote individual self-reliance for welfare and, wherever possible, rely on market solutions to problems of poverty and inequality." Adoption of the recommended policies, in turn, has resulted in reductions in state expenditures, downsizing of the state sector, elimination of subsidies on goods and services, and privatization of many services formerly provided by the state. This has resulted in "the effective elimination of many of the classic mechanisms of redistribution."

These actions have not been without social costs, provoking criticism that the Bank's restructuring programmes are undermining social welfare. While Rittich acknowledges that the Bank has always recognized the risk of transitional hardship as an integral part of economic restructuring, she

argues that the distributional disparities resulting from the implementation of the Bank's policies may be structural rather than transitional.

According to Rittich, this is because market and non-market institutions are linked "in ways that mean that economic restructuring and reform will engender a range of effects and responses outside the market as well."

The focus of Rittich's analysis is on gender equity and its role as a development objective. While the Bank's official position is now that gender equity is good for economic growth, Rittich asserts that gender disadvantage results "simply from basic institutional decisions about the legitimate and proper functions of the state and the optimal or efficient structure of markets." This is so because the basic assumptions about the structure of a market society, including those relating to the proper role of the state and the boundary between private and public, are "distinctly gendered."

According to Rittich, the type of market reform promoted by neoliberalism cannot be neutral because it "precludes the use of many of the classic remedies for such disadvantage, such as labour market regulation and various forms of income transfers and support for care-giving labour on the part of the state." Thus, neoliberalism not only disproportionately disadvantages women, but also provides a justification for the normalization and persistence of particular forms of inequality.

Rittich comprehensively explores the various ways in which the market relies on the "non-market," or the reproductive, non-monetized sector of the economy. She suggests that there is no inherent difference between reproductive and productive labour; that both are equally monetizable.<sup>38</sup> But so long as the economic value of reproductive, non-market labour is not recognized, Rittich finds it likely that the externalization of costs from the productive to the reproductive or non-market sphere will continue. While the Bank has placed the gender issue on its development agenda, Rittich notes the scepticism and lack of unanimity within the Bank regarding the importance of the issue. Rittich argues, however, that instead of a policy bias, the Bank's ambivalence and equivocation over the importance of the gender issue reflects a deeper tension between commitments to gender equity and market-centred reforms. Rittich's analysis of this tension leads her to conclude that neoliberal policies and the promotion of gender equity are inherently incompatible goals.

While noting that there remain large, unsettled debates both within the Bank as well as in civil society about the role and functions of the state within a market economy, Rittich argues: "In embracing the 'effective' state, rather than the 'minimal' state, the Bank has signalled a new recognition of the importance to the economy of various forms of infra-

structure provided by the state.” In adopting this concept, the Bank has also recognized, at least as a possibility, that other forms of intervention and regulation that are now excluded may also become legitimate, creating opportunities “to revisit the regulatory and policy exclusions that often operate to disadvantage certain groups.”

In the concluding chapter, “Legitimacy in the real world: A case study of the developing countries, non-governmental organizations, and climate change,” Joyeeta Gupta reviews the impact of treaty negotiations on the legitimacy of the resulting treaties and international institutions or regimes.<sup>39</sup> Her chapter is essentially a case study on the negotiations over the global climate change convention and on the role of developing countries and non-governmental organizations in the negotiation process.<sup>40</sup>

Gupta focuses on the problem of climate change because it “represents a microcosm of environmental problems ... [and] touches almost every facet of human activity.” Listing a number of factors, including the links between emissions of greenhouse gases, which lie at the root of the climate change problem, the differences in the national income of countries involved in the process, and the new market-based mechanisms designed to deal with the problem, Gupta argues that the climate change problem “would appear to be one of the most all-encompassing global environmental problems.” Given the complexity and novelty of many of the issues, Gupta proposes to approach the legitimacy issue from one particular perspective, that of the North-South divide. This angle is, in her view, particularly important because of the linkage between economic development and environmental protection goals in the concept of sustainable development in general and the climate change philosophy in particular.

Gupta notes that there are over 150 international treaties addressing environmental issues, and that the number of agreements dealing indirectly with environmental issues is much higher. To develop a theoretical framework for understanding these agreements, and the effectiveness of their implementation, Gupta assesses the various theories of legitimacy. She presents as her starting point the view that there is “a struggle between ... powerful governments who want to arrange international policies to favour their own interests [and] the slow but inexorable development of common principles of international law that serve to balance the power of countries.” This means that “individual countries are not only motivated by their narrow national interests, but also by their role as members of the international community.”

On the basis of these theoretical premises, Gupta adopts a flexible approach to the concept of legitimacy. According to this approach, the legitimacy of international environmental regimes is not exclusively de-

pendent on the extent to which the quantitative goals embodied in such regimes are reached, but also on “the potential for countries to feel bound to address the environmental problem that is being dealt with by the institutions in question.”

Looking at the mechanics of the climate change negotiations, Gupta focuses on the role and authority of the various actors involved in the negotiation process. One of the defining features of the negotiation process is that, mainly because of the complexity of the technical issues involved, parties other than states are allowed, indeed encouraged, to participate in the development and implementation of the system. While these parties are not allowed to negotiate the text of the treaties, Gupta argues that the participation of non-governmental entities “can increase the legitimacy of the process, by ensuring greater democracy and transparency, and by providing input into the process.” The private sector is also included in the process as an active player at the implementation stage through the adoption of a series of market-based instruments that allow companies to minimize the cost of combating climate change, which might otherwise be prohibitive.

Gupta extensively analyses the legal character of the climate change regime and the various factors that impact on the legitimacy of the on-going negotiations. In Gupta’s account, “the effectiveness of international regimes like the climate change regime is based to some extent on the legitimacy of the regime, which is further based on implicit and explicit assumptions [of international law] about state behaviour that underlie [the two climate change conventions].” Gupta sets out to explain and discuss the role of these assumptions, which she identifies as follows: the state as a major actor; sovereignty and equality of states; common problem definition; informed and effective negotiators; the rules of procedure; balanced negotiations; determinate (interpretable) text; legitimacy of rules and the normative force of international law; *pacta sunt servanda*; and institutional capacity.

Having analysed each of the ten assumptions in great detail, Gupta concludes that the effectiveness of international law depends not only on “the legality of the negotiated instruments, but also on their inherent legitimacy.” According to Gupta, such legitimacy “depends to some extent on the appropriateness of the assumptions underlying international treaties in relation to the issue that is being addressed.” Gupta suggests that disparities among the participating countries may call into question the appropriateness of such assumptions, particularly in the context of complex negotiations like the global climate change convention. While listing a number of other strategies to enhance the legitimacy of international negotiations, including more effective participation by non-governmental actors, provision of legal aid for the least developed coun-

tries, elaboration of generic rules of procedure, and capacity-building, Gupta also underlines the importance of revisiting our expectations of the treaty approach; “instead of expecting that treaties are tools for problem-solving in complex issues, we should see treaties as tools of institutional learning.”

The diversity of the topics discussed by the contributors and the technical expertise required for their intellectual comprehension testifies to the ongoing fragmentation and specialization of international governance and international governance studies into intellectual “regimes,” or contexts, which seem to share little in common. Based on the varying topics analysed in the present volume, there seem to be no universal “first principles” or shared normative assumptions which would inform all of them. While some of the authors seem more inclined towards a Liberal rather than an Enlightenment-based approach or interpretation, some of them seem to believe that social and economic progress is a worthy cause and deserves to be promoted. But because the two grand Western philosophies are based on competing, even conflicting assumptions, as suggested earlier in this Introduction, no non-transcendental reconciliation seems forthcoming. There is simply no consensus on the fundamental philosophical assumptions on which social and political organization should be based.

Nor does the proposed concept of “corporate” or “cosmopolitan” democracy as a way of conceptualizing the ongoing developments affecting the operational environment of international organizations amount to, or indeed seek to amount to, such a grand universal theory or unifying force of international organization or governance. Rather, it remains simply a way to capture the lowest common – technical and professional – denominator of the various contexts in which issues of international or transnational interest and concern are debated and decided, and as such remains intellectually too modest to deserve the name of a philosophical theory. But the issue of whether its low-level academic contents only confirm academia’s worst fears about the intellectual impoverishment of our era, or whether its philosophical minimalism simply reflects an ongoing shift of the intellectual centre of gravity from academia to technocracy, or to the cosmopolitan professionals, seems worth debating. In this debate, however, academics cannot be seen, and should not qualify themselves, as a disinterested third party. As a party with a vested interest in defining the terms of intellectualism in such a way as to reserve the final word and decision-making power to itself, the academic world may be well-advised to start considering whether these terms should be redefined – or risk losing its intellectual authority and relevance in explaining and understanding the world around us.



## Notes

1. For an analysis see, in particular, chapter 7 of this book.
2. The terminological disagreement – whether one should speak of the state or the government, on the one hand, or of the people or the individual, on the other – is itself a reflection of the underlying socio-philosophical and political-philosophical difference.  
For further discussion of this point and of the concept of legitimacy, see generally Coicaud, J., 1997. “Legitimité et politique: Contribution à l’Étude du droit et de la responsabilité politiques.” Paris: Presses Universitaires de France.
3. The defining moment for Enlightenment was the French Revolution, while for Liberalism it was the United States’ Declaration of Independence, along with the respective preceding, surrounding, and subsequent events, which were often ambivalent and inevitably traumatic.
4. The Enlightenment philosophy animates the work of philosophers such as Voltaire, Montesquieu, Durkheim, Horkheimer, and Adorno. A late-modern version of the Enlightenment philosophy is propounded by social philosophers such as Jürgen Habermas.
5. This threat comes from both the extreme left and the extreme right. The anxieties of the Enlightenment philosophy are expressed particularly vividly in Horkheimer, M. and Adorno, T. W., 1987. *Dialectic of Enlightenment* (trans. Cumming, J.). New York: Continuum.
6. For discussion of the “consent of the governed” as a critical requirement of the Liberal polity, see Locke, J., 1982. *Second Treatise of Government: An Essay Concerning the True Origin, Extent and End of Civil Government*. 58–74.
7. The Liberal political philosophy dominates the work of such philosophers as Thomas Hobbes, John Locke, John Stuart Mill, and the founding fathers of the United States Constitution (Madison, Hamilton, and so on). A late-modern version has been promoted, for example, by Ronald Dworkin.
8. At the international level, the term “sovereign” is often used, instead of “state,” particularly among international law scholars.
9. For discussion of these two theories, see generally chapter 6 of this book. See also Mearsheimer, J. J., 1994/5. “The False Promise of International Institutions.” *International Security* 19: 5.
10. See the discussion in chapter 6 of this book. The recent theory on international organizations reflects an increasingly complex and sophisticated mix of idealist and realist views. See, for example, Barnett, M. N. and Finnemore, M., 1999. “The Politics, Power and Pathologies of International Organisations.” *International Organization* 53: 699 (1999).
11. For a discussion on this, see in particular chapter 3 of this book.
12. Ibid. In extraordinary situations of state formation, transformation, and dismemberment, the principle of popular sovereignty, or the self-determination of people, may have a role to play in international relations. However, the system is based on the assumption that, normally, the state system prevails.
13. For discussion of the idea of state as modern democracy’s “container,” see chapter 1 of this book.
14. As noted by Robert Howse in chapter 9 of this book.
15. This is effectively what happened during the Kosovo crisis, when the Security Council was short-circuited by certain permanent members of the Security Council, and NATO was used as the alternative forum of decision-making and collective action. For an analysis of the legal issues associated with the Kosovo crisis, see chapter 3 of this book. See also Susan Marks’ and Jan Klabbers’ discussion of “transgovernmentalism”; that is, direct cooperation of governmental agencies and officials of different countries without

the mediation and outside the sphere of international organizations. Klabbers notes that “‘transgovernmentalism’ is rapidly becoming one of the new locations for our ‘international project.’”

16. See, in particular, chapter 10 of this book.
17. For further discussion, see chapter 8 of this book.
18. See the discussion in chapter 3 of this book. Alvarez notes, however, that without constitutional checks, “the resort to the constitutional doctrine of ‘implied powers’ threatens to become an all-purpose vehicle to justify any action by UN organs, whether or not in conformity with the present Charter or as a vehicle for de facto Charter amendment.” See also chapter 6 of this book.
19. See the discussion in chapters 3 and 8 of this book.
20. See generally chapter 12 of this book. For the distinction between government and governance, see, for example, Young, O. R., 1994. *International Governance: Protecting the Environment in a Stateless Society*. Ithaca: Cornell University Press. This work emphasizes the distinction between “governance systems, which are social institutions or sets of rules guiding the behaviour of those engaged in identifiable social practices, and governments, which are organisations or material entities established to administer the provisions of governance systems” (p. ix).  
Young argues (pp. ix–x): “This distinction leads directly to the conclusion that, under a variety of conditions, the operations of governments are not only insufficient to ensure that growing demands for governance are met but also may be unnecessary for the provision of governance.” He suggests that “[t]his realisation is truly liberating,” as it does not lead to “a blanket rejection of arguments about the importance of governments or international organisations in efforts to fulfil the demand for governance. But it does allow us to think seriously about the idea of governance without government, and it encourages a critical assessment of the essential nature of those organisations that may prove useful in administering various governance systems.”
21. Ibid. See also chapter 6 of this book.
22. See, in particular, chapter 5 of this book.
23. The United States Government, in November 1998, delegated the technical administration of the Internet to a private, not-for-profit entity, the Internet Corporation for Assigned Names and Numbers (ICANN). For relevant background documentation see ICANN’s website at <http://www.icann.org>. Consistent with the policy bias for privatization is the parallel “flight into informality,” or a trend towards informal organization and “transgovernmentalism.” For discussion, see chapter 6 of this book.
24. Organizations such as the WTO, the IMF, WIPO, and the ITU are mainly involved in technical or market-oriented functions, whereas the functions of organizations such as the United Nations, WHO, UNESCO, UNICEF, and UNDP can be characterized as “progressive” (in the sense of the Enlightenment philosophy). Certain organizations, like the World Bank and UNCTAD, straddle this divide.
25. Consider, for example, the Internet domain name process launched by the World Intellectual Property Organization (WIPO) in July 1998, described in electronic documents available on the WIPO website, <http://www.wipo.int>. See also the process for the establishment of a new international financial architecture, described in chapter 10 of this book.

The newly formed entity in charge of Internet governance, ICANN, is also making extensive use of consultative process techniques. For the various processes launched by ICANN see their website, <http://www.icann.org>.

See also the electronic “development dialogues” set up by the World Bank, <http://www.worldbank.org>.

26. The terms “international” and “transnational” (or “global”) governance coincide with

the distinction made in note 24, above, between technical or market-oriented and progressive international organizations. Thus, the term “international governance” refers to the work of “progressive” or “political” international organizations, whereas transnational governance refers to matters falling within the competence of economic and technical international organizations (the governance of the emerging international civil society). Similarly, see Woods, N., 1999. “Good Governance in International Organisations.” *Global Governance: A Review of Multilateralism and International Organisations* 5: 39.

27. It should be noted, however, that ICANN’s authority to govern the Internet is derived from a contract between it and the United States Government. See “Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers of 25 November 1998,” <<http://www.icann.org>>.
28. For the conceptual linkage between the modern concept of democracy and the territorial nation-state, see chapter 1 of this book.
29. For discussion of the concept of “stakeholder,” see, for example, chapters 5 and 9 of this book.
30. Consider, for example, the proposed institutional structure of ICANN, which consists, apart from its administrative unit, of a number of “supporting organizations” that represent the various interest (stakeholder) groups: computer engineers and users, and those involved in the domain name business. For relevant documentation, see <<http://www.icann.org>>.
31. Other, more fundamental socio-theoretical and political-philosophical issues are also bound to arise. For instance, while the corporate democratic concept of the individual as a professional seems more limiting and thus less “democratic” than that of the universal citizen, it also sets up a protective barrier between the “lifeworld” against colonization by the “system” – to use Jürgen Habermas’ terms – and thus seems more efficient in protecting the former against colonization by the latter. See, for example, Habermas, J., 1987. *The Theory of Communicative Action: Lifeworld and System: A Critique of Functionalist Reason* (trans. McCarthy, T.). Boston: Beacon Press.
32. See, generally, Derrida, J., 1982. “Signature Event Context.” *Margins of Philosophy* 307; Derrida, J., 1988. *Limited Inc.* Illinois: Northeastern University Press.
33. See, generally, Fukuyama, F., 1992. *The End of History and the Last Man*. United Kingdom: Penguin.
34. For a nuanced view of this issue, see the Conclusion of this book.
35. The two types of contexts (international and transnational) are used loosely to refer to those contexts where political and social interests and concerns (peace and security or economic development, for instance) dominate (an “international” context) and to those where market-related and technological interests dominate (a “transnational” context).  
For an attempt to apply modern political philosophy (initially developed in a state/government versus civil society context) in an international context, see chapter 4 of this book.
36. See the biographies of the contributors to this book.
37. This point is supported by the constitutional peace and absence of revolutionary change in most liberal democracies of Anglo-Saxon origin, in which Liberalism generally preceded democracy. See Fukuyama, F., *The End of History* (see note 33, above), 212, 219.
38. And, indeed, following Rittich’s line of argument, while certain reproductive functions may in a sense “naturally” fall upon women, this does not necessarily justify the view that these functions are not economically valuable and thus non-monetizable. Other activities that were previously viewed as economically non-productive have been professionalized, monetized, and brought within the concept of the market – sports being

the prime example. Similarly, but not identically, the extensive subsidization by the Western governments of research and development activities, because of the presumed positive correlation between technological innovation and economic growth, reveals a certain selectivity *vis-à-vis* the acceptability of state intervention in the market mechanism. But the monetization of reproductive labour is not necessarily what Rittich is after, as becomes clear from the text.

39. As there is no comprehensive international environmental organization, Gupta speaks in terms of environmental “institutions” or “regimes.” Existing international environmental programmes, such as the United Nations Environment Programme, the Commission for Sustainable Development, and others, form part of such environmental institutions or regimes.
40. The United Nations Framework Convention on Climate Change, 9 May 1992, reprinted in *International Legal Materials* 31: 822, and the Kyoto Protocol to the United Nations Framework Convention on Climate Change, reprinted in *International Legal Materials* 37: 22, are the landmark treaties concluded in the course of the ongoing negotiation process.



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## Theoretical and structural issues

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## Democracy and international governance

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*Susan Marks*

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*Politics and the English Language*, George Orwell's celebrated meditation on the uses and abuses of political language, contains a section headed "Meaningless Words." Under this heading there appears the following passage:

In the case of a word like *democracy*, not only is there no agreed definition, but the attempt to make one is resisted from all sides. It is almost universally felt that when we call a country democratic we are praising it: consequently the defenders of every kind of regime claim that it is a democracy, and fear that they might have to stop using the word if it were tied down to any one meaning.<sup>1</sup>

Writing in 1946, Orwell was evidently responding to two changes affecting democracy. One was that, after centuries of service as a subversive, factional, and frequently pejorative term, democracy had decisively shed those earlier connotations and emerged as the byword for legitimate authority that we now recognize. The other was that democracy appeared in danger of becoming a victim of its own success. In the decades following the Second World War, virtually all political arrangements were re-described as democratic. Thus, decolonization ended one form of heteronomy, only to see it replaced all too often by "one-party democracy." Totalitarian regimes consolidated themselves in the Soviet Union and elsewhere under the banner of "people's democracy." And in Latin America, military juntas ruled by decree for the pretended purpose of



safeguarding “representative democracy.” Democracy seemed to mean everything, and therefore – as Orwell suggests – nothing.

As the twenty-first century begins, there can be little doubt that democracy continues to serve as fertile material for cant.<sup>2</sup> But today, two more recent changes claim our attention. In the first place, some of the worst excesses of democratic Newspeak have fallen away. As a result of the transformations of the 1980s and early 1990s, “one-party democracy” and “people’s democracy” have largely disappeared from our political vocabulary. In more countries than ever before, multi-party elections have been held, and other familiar liberal democratic procedures put in place. This is not to say, of course, that the meaning of democracy remains any less contested. Nor is it to say that democracy has any less ideological force as a tool for stabilizing ruling power. It is just to say that debate over the meaning of democracy and resistance to the concept’s use as a tool for stabilizing ruling power are under way in most parts of the globe. The second change of recent decades stands in striking contrast to this first set of developments. A profound and perhaps unprecedented sense of unease has come to surround the future of democracy. In the West low voter turnout and an often-voiced distrust of politicians testify to a widely shared perception that democratic institutions are distant and irrelevant. More than that, events in some post-communist countries have cast into fresh relief the violent potentials of modern democracy, the appalling consequences of unproblematically identifying the democratic community with the nation. But the most far-reaching source of unease (which overlaps with, yet extends beyond, those just mentioned) is surely the impact of globalization. Efforts to improve national democracy begin to seem radically inadequate when account is taken of the extent to which, and the ways in which, national options are now shaped by decision-making in non-national settings.

On the one hand, then, commitment to democratic politics has never been more widespread. On the other hand, awareness of the limitations, not just of particular national arrangements, but of all forms of national democracy, has rarely been more acute. Taken together, these two developments suggest a democratic approach to our central theme in this book. They invite us to open democracy’s compass, and extend the range of democratic concern beyond national political processes so as also to include non-national political arenas, among them international organizations. That is to say, the developments invite us to connect the legitimacy of international organizations with their democratization. But is it right to apply democratic principles to international institutions? Will this not simply help to dress up technocratic processes in more acceptable clothes? Is it not better to concentrate on supporting democratic moves at the national level? And if we are intent on pursuing democracy in inter-

national organizations, what is the concept to mean in this context? These are some of the questions that will be explored in this chapter.<sup>3</sup> The first part of the chapter draws on work by political theorists and international relations scholars. In this work the issues under consideration here are set within the broader framework of analysis of the implications for democracy of globalization. The second part of the chapter relates this discussion to arguments put forward by international legal scholars. According to some scholars, democracy should be recognized today as providing an international legal benchmark of legitimate authority. This clearly implies the democratization of national government. But what does it entail with respect to the legitimacy of international governance?

### Globalization: Implications for democracy

Had Orwell written *Politics in the English Language* in the 1990s, it is a fair bet that globalization would have featured prominently in it. As Jan-Art Scholte remarks: “Unfortunately many discussions of globalization suffer from over-simplifications, exaggerations and wishful thinking.”<sup>4</sup> For present purposes it will suffice to note that, though some see signs that the nation-state is in terminal decline, most observers take a more circumspect view. Globalizing processes are not generally understood to spell the end of the state as a structure for the organization of social power. But neither are those processes held to be without consequence for state sovereignty. Rather, globalization is associated with a reconfiguration of national sovereignty. What is significant, on this assessment, is the way global linkages are changing the context in which state functions are exercised. While state powers remain pivotal, and in some respects are assuming rising salience, so too is the impact of political initiative, decision-making, and action in other fora. In recalling relevant developments, scholars typically attach considerable importance to changes involving international organizations. Recent decades have seen a sharp rise in the membership of such organizations, as well as the creation of a number of new organizations. At the same time, the scope of organizational activity has enlarged significantly; a broad variety of issue areas today comes within the domain of international policy-making and regulation. Finally, there has been a widely remarked diversification in the actors engaged in international governance. The work of international organizations is now linked in complex ways with the activities of non-governmental organizations, private sector regulatory agencies, intergovernmental networks, and other frameworks for debate and action on transboundary issues. In Scholte’s summary, “the state is still very much in the picture, although its capacities, orientations and activities have changed ... At the same

time, however, other parties besides the state have also acquired important roles in the process of governance.”<sup>5</sup>

*The nation-state as democracy’s “container”*

If the capacities, orientations, and activities of the state are changing, and non-national (including international) forms of governance are assuming increasing importance, then pressing questions arise about many fundamental issues of political organization, among them democracy. Modern democracy has customarily been understood as the democracy of nation-states – in contradistinction to the ancient democracy of city-states. Historically, the development of liberal democracy is indeed inseparable from the project of building and consolidating the sovereign nation-state. The institutions associated with modern democracy were framed in connection with efforts to foster national solidarities and strengthen national polities, and modern democracy continues to be theorized as the working out of democratic principles for nationally organized political communities. Thus, in the leading accounts, the “people” is conceived as the nation; legitimacy is defined in terms of consent by, and accountability to, the national citizenry; popular consent is linked with the holding of periodic national elections and other mechanisms; accountability is related to the existence of a “public sphere” within national territory; self-government is identified with the independence of the state; and so on.

Underpinning this notion that the nation-state is modern democracy’s “container”<sup>6</sup> are two related ideas. One is the idea that democratic polities are territorially bounded communities. In this regard, David Held highlights a series of assumptions which have tended to inform democratic thought.<sup>7</sup> It has been assumed that democracies can operate as self-contained units, that they are clearly demarcated from one another, that change within democracies may be explained largely by reference to internal politics, and that democratic politics is a function of the interplay of national forces. The modern democratic polity has thus been seen, in Held’s phrase, as a national “community of fate”; that is to say, a community which governs itself and only itself. Put differently, a symmetrical or congruent relationship has been presumed to exist between those experiencing outcomes and those taking decisions. This relationship has been held to exist, above all, between national electorates and their elected representatives, and between those subject to national jurisdiction and national authorities.

The second idea underpinning the notion that the nation-state is democracy’s container is a corollary of the presumed boundedness of democratic polities. The world beyond the nation-state has been treated, for the most part, as a given. Democratic principles have not been seen as applicable to that world, and the lack of democracy in that world has not been

seen to affect the prospects for democracy in nation-states. Thus, the modern states system has been characterized, to quote Held once again, by a “striking tension between the entrenchment of accountability and democratic legitimacy inside state boundaries and the pursuit of power politics outside such boundaries.”<sup>8</sup> Democratic national arrangements have been accompanied by non-democratic international arrangements. Reflecting and reinforcing these ideas has been the emergence in the twentieth century of a disciplinary division between political theory and international relations, between the study of the politics of nation-states and the study of relations between them. Democracy has been the province of political theory. In international relations, the basis for a democratic (and, on some views, any) political community has generally been supposed to be lacking, and analysis has mostly focused on issues of war and peace, survival and security.

There have, of course, always been challenges to both these ideas, and especially the first.<sup>9</sup> In recent years, however, the misgivings have grown, as scholars on both sides of the disciplinary divide just mentioned have begun to argue that, in the circumstances of contemporary globalization, democratic politics cannot continue to be kept apart from international relations. On the one hand, assumptions about the boundedness of democratic politics seem less tenable than ever. If globalizing processes are enhancing the extent to which action in one country has ramifications in another, and if those same processes are also augmenting the extent to which national options are shaped by action in international and other non-national settings, then the notion of the national “community of fate” becomes extremely difficult to sustain. National democratic politics clearly cannot be understood in isolation from the global web in which national forces are enmeshed. To grasp the problems of democracy, and the possibilities for solving them, it is vital to look beyond the frontiers of the nation-state, and consider the role of other governments, international organizations, global markets, non-governmental organizations, and so on, in setting the terms of collective life.

On the other hand, and in consequence, the supposition that (national) democracy can thrive in a sea of (international) non-democracy is called seriously into question. If national boundaries do not describe the limits of a community of fate, how can they describe the limits of democracy? However legitimate a national political order, can national political legitimacy suffice when, in far-reaching ways, citizens are affected by decisions taken in non-national settings? On what basis are those decisions to be held legitimate? Where is the congruence between those decisions and their outcomes? When globalization is taken into account, the conception of democracy as the working out of democratic principles for national politics starts to appear dramatically inadequate. Correspondingly, the idea that democracy has no application in the international domain begins

to seem in urgent need of revision. The contradiction has to be confronted between “structures of power that seem to be increasingly internationalised, globalised, in some sense universalised and processes of participation, representation, accountability and legitimation that remain rooted in the institutionalised apparatuses of states.”<sup>10</sup>

The central implication of this analysis is that the nation-state cannot remain democracy’s container. In the first place, attention must be paid to the global context of national democracy, the various ways in which global networks may support, as well as constrain, the expansion of democracy’s purchase within national communities. The part played by transnational forces in spreading democratic ideas, fuelling democratic claims, and reshaping democratic practices must be taken into account. Secondly, consideration must also be given to the democratization of international governance. To resolve the contradiction between globalized structures of power and state-based democratic institutions, democracy must be applied to power relations across the world as a whole. Decision-making with global, or at any rate transboundary, impact – whether undertaken by governments, international or regional organizations, inter-governmental associations of officials and experts, private-sector regulatory agencies, multinational corporations, or other actors – must be brought within the scope of democratic concern. If politics has become global, then so too must democracy. What could this mean?

### *Three visions of global democracy*

For reasons already indicated, democratic theorists have not generally broached the topic of global democracy. Where they have done so, however, one of two assumptions has generally prevailed. Either it has been imagined that global democracy is predicated upon the disappearance of the states system and its replacement by government on a worldwide scale; or it has been envisaged that global democracy is achieved through democratization at the level of each nation-state. The former vision of global democracy might be labelled “world government”; the latter might be termed “pan-national democracy.” Yet, as is argued today, this rendering of the options is neither necessary nor sufficient. In connection with analyses of globalizing processes, more theorists have begun to consider the meaning of global democracy, and most have rejected its identification both with world government and with pan-national democracy. Instead, they have begun to explore a third set of possibilities for institutionalizing democratic global governance.<sup>11</sup> The work of David Held is a particularly influential example of contemporary approaches.<sup>12</sup>

Held refutes the notion that global democracy must await the demise of the states system. As observed above, few regard globalizing processes

as heralding the occurrence of that event. Still less is there (or has there ever been) among observers an expectation of – or a wish for – world government. In any case, as Held comments, there exists ample scope for democratization within the current structures of global politics. At the same time, Held also disputes that global democracy can be presumed to follow democracy within nation-states. In this regard, he notes that the widely celebrated turn to democracy in the early 1990s brought relatively limited progress in securing control of global decision-making by those affected. Indeed, in as much as related moves in the direction of economic liberalization served to strengthen global economic forces, the impact of the transformations was partly to weaken accountability. But even if global democracy could be presumed to follow universal national democracy, Held contends that efforts to pursue global democracy cannot be deferred until every nation-state has embraced democracy, or has reached a certain level of “democracy.” One reason for this is that national democracy is constrained by the undemocratic character of the international political-economic domain itself. In this sense, pan-national democracy is a self-defeating vision of global democracy. Distinct endeavours are required to reconstruct the institutions and procedures of global governance so that “citizens, wherever they are located in the world, have voice, input and political representation in international affairs, in parallel with and independently of their own governments.”<sup>13</sup> Democracy within nation-states and democracy in international affairs are mutually supportive developments, which must be pursued in tandem.

Held’s notion of global democracy thus goes beyond pan-national democracy, but falls well short of world government. Rather, it involves simultaneous efforts to deepen democracy within nation-states and extend it to international and transnational settings. It aims at the “creation of a democratic community which both involves and cuts across democratic states.”<sup>14</sup> Held calls this twofold agenda the project of “cosmopolitan democracy.” Like others who argue for an approach to global democracy that involves neither world government nor simply pan-national democracy, he readily acknowledges that the democratization of global governance presents a formidable challenge. Cosmopolitan democracy will not spring fully formed from humanity’s democratic imagination, any more than did nation-state democracy. Simply to work out how relevant decision-making processes currently operate is likely to be difficult enough. In the sphere of the world economy, for instance, Robert Cox highlights the operation of what he refers to as a “*nébuleuse*”: decisions are made within shadowy networks encompassing both national officials and international bureaucrats, intergovernmental bodies and independent experts, public institutions and private agencies, official meetings and unofficial conclaves.<sup>15</sup> That said, the project cannot be dismissed as futile, for – as

Cox, Held, and others also note – moves are already under way to demonstrate how transparency may be improved and accountability enhanced. In this regard, a frequently cited development is the rising profile of social movements, international non-governmental organizations, and pressure groups. Of course, only a small, self-selecting, and largely privileged section of the world's population takes part in such initiatives. But, while few observers have illusions that these elements of an international civil society alone can suffice, many see in them important indications of how the circle of participation in international and transnational decision-making might begin to be enlarged.

With a view to building on current trends and drawing out potentials of existing arrangements, Held elaborates both a theoretical framework which might inform efforts to institutionalize cosmopolitan democracy and a series of recommendations for reconstructing the institutions of global governance accordingly.<sup>16</sup> For present purposes, however, the details of Held's proposals are less important than his central claim that, if democracy is to flourish in conditions of intensifying global interconnectedness, it must "become a transnational affair, linked to an expanding framework of democratic institutions and agencies."<sup>17</sup> Democratizing efforts must embrace and connect all domains and levels of political interaction, just as globalizing processes do. This does not, he emphasizes, entail that democracy should become tied to the international arena, as it has earlier been tied to the city-state and the nation-state. Local and national arenas remain significant. Rather, what is entailed is more far-reaching than that. The notion of a democratic political community should be untied from the whole "idea of locality and place."<sup>18</sup> Is this chimerical? There can be no denying that, as William Connolly observes, precisely because it "lacks a territorial base through which [the terms of its accountability] could be solidified ... the project of nonterritorial democratisation ... exudes an air of unreality." But then, Connolly adds, "territorial [nation-state] democracy exudes its own aura of unreality in the late modern time." He continues:

Perhaps the basic issue today ... is which unreality to attack and which to succumb to – the unreality of territorial democracy or the unreality of nonterritorial democracy. Or perhaps it is best to conclude that neither of these modalities of democratic life can thrive at this time unless it enters into active relation with the other.<sup>19</sup>

### International law and the project of pan-national democracy

The foregoing discussion trains a spotlight on two questions which, until recently, have tended to fall into the interstices of democratic theory and

international relations scholarship.<sup>20</sup> Firstly, in what ways does the international system support and constrain democracy within nation-states, and how might the support be strengthened and the constraint reduced? Secondly, how can democratic principles be brought to bear in international governance? If we now turn our attention to legal scholarship, it is immediately apparent that the first question has not similarly remained in the dark. The substance of this question has long been a focus of legal analysis, whether in the context of work on human rights protection or in other contexts. Moreover, as mentioned earlier, scholars have recently begun to argue that democracy should be recognized as setting the international legal standard for legitimate authority. In different words, they contend that democratic governance should be regarded as an international legal entitlement.<sup>21</sup> Quite patently, those who advance this claim can hardly be accused of failing to consider how the international system might support democracy within nation-states (even if they may have failed to consider adequately how the international system constrains democracy within nation-states). But what of the second question? Does the idea of an entitlement to democratic governance imply that democratic considerations should determine the legitimacy not only of national governments, but of international governance as well? Do the scholars envision a multi-layered process of democratization, along the lines of cosmopolitan democracy? Or do they “succumb to the unreality of territorial democracy,” and assume that democratic global governance can be achieved pan-nationally, through the universalization of national democracy? In answering these questions, it will be instructive to consider the notion of globalization and its bearing on democracy, which informs the international legal arguments. For illustrative purposes, this chapter will focus on two accounts in particular, by two of the leading proponents of the democratic entitlement. In the first, Anne-Marie Slaughter discusses contemporary developments in terms of an emergent “transgovernmentalism”; in the second, Thomas Franck addresses the issue of “fairness” in international governance.

*Slaughter: Transgovernmentalism as the “real new world order”*

In an essay entitled “The Real New World Order,” Slaughter refutes both the contention that national governments are declining in importance and the contention that international organizations, subnational authorities, and non-governmental actors are rising in significance.<sup>22</sup> Profound changes are indeed under way in the structure of international governance, she holds. But neither of those two analyses captures them, for each is preoccupied with the wrong domain. Instead of scrutinizing the activities of national governments and international, subnational, and



non-governmental bodies, the focus should be on changes at the level of transgovernmental interaction. What is occurring is best understood as a “disaggregation of sovereignty.” In her words:

the state ... is disaggregating into its separate, functionally distinct parts. These parts – courts, regulatory agencies, executives, and even legislatures – are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order. Today’s international problems – terrorism, organised crime, environmental degradation, money laundering, bank failure, and securities fraud – created and sustain these relations.<sup>23</sup>

“Transnationalism,” then, is the central characteristic of Slaughter’s “real new world order.” As the passage above indicates, she considers this trend to be evident in all spheres of state activity. But it is in the regulatory sphere that she appears to find government networking most advanced. As an example of networking in this arena, she cites the Basle Committee on Banking Supervision, formed in 1988 not by inter-state treaty but by independent decision of twelve central bank governors. Despite the Committee’s lack of official or legal competence, it exerts considerable influence: “Wall Street looks to the Basle Committee, rather than the World Bank.”<sup>24</sup>

If bodies like the Basle Committee have assumed a central role in global governance, in Slaughter’s analysis this is because they offer a more promising framework than international institutions for finding and implementing solutions to our most pressing global problems. In the first place, government networks have at their disposal highly flexible and efficient ways of dealing with transnational activity. More can be generally achieved by “[n]etworks of bureaucrats responding to international crises and planning to prevent future problems” than through the centralized, hierarchical, and slow-moving procedures of international institutions.<sup>25</sup> Secondly, government networks are likely to escape the negative attitudes which have hampered international organizations. Slaughter observes that “efforts to expand supranational authority ... have consistently produced a backlash among member states,” as “major powers [will not] cede their power and sovereignty to an international institution.”<sup>26</sup> Government networks, by contrast, require no formal transfer of power, and are thus able to command wider support. Finally, and for related reasons, government networks enjoy greater legitimacy than international institutions. Since transgovernmental networks have no independent competence, and serve only to enforce law made at the national level, they carry the legitimacy of the national processes with which they intersect. Transgovernmentalism sidesteps the “prospect of a supranational bureaucracy accountable to no-one” by leaving “the con-

trol of government institutions in the hands of national citizens, who must hold their governments as accountable for their transnational activities as for their domestic duties.”<sup>27</sup> Slaughter recognizes that transgovernmental networking may aggravate the problem of non-transparent decision-making by unelected officials, but recalls that “checking unelected officials is a familiar problem in domestic politics.” Established national procedures for securing accountability can thus be expected to come into play. After all, she remarks, “citizens of liberal democracies will not accept any form of international regulation they cannot control.”<sup>28</sup>

Slaughter also recognizes, of course, that government networks do not engage officials from all parts of the world to the same extent. She observes that transnational networks are “concentrated among liberal democracies”; however, “they are not limited to them.”<sup>29</sup> Some non-democratic states have institutions (regulatory agencies, judiciaries, and so on) which are capable of cooperating with counterparts from democratic states. In such cases, networking helps to strengthen the institutions and protect them from political domination, corruption, and incompetence. Viewed from this perspective, she argues, government networks not only open up the prospect of surpassing the achievements of international institutions with respect to global governance. They also offer a compelling means of achieving “democratization, step by step,” institution by institution. Enlarging transnational networks to include institutions from non-democratic states serves to “expand the circle of democracies one institution at a time.”<sup>30</sup> Networking in this way chimes with international and foreign policies aimed at promoting liberal democracy. At the same time, the disaggregation of the state facilitates the enforcement of an entitlement to democratic governance. It becomes possible to assess whether or not governments are democratic by reference to the quality of specific judicial, administrative, and legislative institutions. Slaughter concludes that transgovernmentalism is not only an emerging reality. It is also a “world order ideal in its own right,” a suitable “blueprint for the international architecture of the 21st century.”<sup>31</sup>

In what sense is this a blueprint for a *democratic* international architecture? Slaughter’s account of the norm of democratic governance is informed by a notion of global democracy that is unequivocally, indeed emphatically, pan-national. For her, the democratic deficits of international organizations are a powerful reason for eschewing visions of cosmopolitan democracy and concentrating on expanding the community of liberal democratic states. Yet, in the light of the analysis presented earlier in this chapter, the limitations of this approach are all too plain. If transgovernmental networks are as central to contemporary political life as Slaughter suggests, to what extent can global governance be deemed democratic? Slaughter argues that transgovernmental networks draw

legitimacy from the national processes with which they intersect. Whereas international organizations involve the prospect of a supra-national bureaucracy accountable to no one, government networks leave control in the hands of national citizens. To be sure, she observes, government networks often promulgate their own rules; in doing so, however, the purpose is always to “enhance the enforcement of national law.”<sup>32</sup> With transgovernmentalism, the “makers and enforcers of rules are national leaders who are accountable to the people.”<sup>33</sup>

All of which might well prompt one to enquire: which national citizens? Whose national law? What people? However effectively citizens may be able to hold their own governments accountable in connection with transgovernmental activities, democratic legitimacy depends on accountability to *those affected* by such activities. In this context, those affected will necessarily include citizens of other countries, among them countries very probably not represented in the relevant network. To recall earlier discussion, the nation-state might appropriately serve as democracy’s “container” if territorial boundaries coincided with a “national community of fate”; that is to say, a community which governs itself, and only itself. But Slaughter’s account of the role of transgovernmental networks precisely illustrates the point that territorial boundaries *do not* coincide with a national community of fate. A symmetrical or congruent relationship does not exist between those taking decisions and those experiencing outcomes. When options in one country are shaped by transgovernmental networks, which are themselves shaped by decisions in other countries, national democracy – no matter how widespread and how deep-rooted – cannot suffice. From this perspective, it is difficult to see on what basis the Basle Committee offers a more legitimate forum than the World Bank, difficult to grasp how Slaughter’s real (and ideal) new world order makes up the democratic deficits of other forms of global governance.

Indeed, transgovernmentalism might plausibly be seen to push in quite the reverse direction. This chapter has so far stressed that, even if citizens are able to hold their own governments accountable in connection with transgovernmental activities, democratic legitimacy requires accountability to the wider constituency of all those affected. But to what extent are citizens likely to be able to hold their governments accountable with respect to transgovernmental networking? Slaughter acknowledges that networking may aggravate the problem of non-transparent decision-making by unelected officials. “To many,” she concedes, “the prospect of transnational government by judges and bureaucrats looks more like technocracy than democracy.” To her, however, such a view fails to register that the challenges involved are not intrinsically different from those routinely faced in domestic democratic politics. With this in mind, she expresses confidence that citizens of liberal democracies will not accept

international regulation which they cannot control. As Philip Alston contends in a response to Slaughter's account, this seems far too sanguine an assessment.<sup>34</sup> With transgovernmentalism as she describes it, the *nébuleuse* evoked by Cox threatens to become so nebulous as to be almost completely unassailable. He writes:

If [Slaughter] is correct, her analysis ... implies the marginalisation of governments as such and their replacement by special interest groups, which might sometimes include the relevant governmental bureaucrats. It suggests a definitive move away from the arenas of relative transparency into the back rooms ... the bypassing of the national political arenas to which the United States and other proponents of the importance of healthy democratic institutions attach so much importance.<sup>35</sup>

According to Alston, Slaughter exaggerates the decline of international institutions. While she identifies an observable trend, she overstates – or, at any rate, overgeneralizes – the extent to which transgovernmental networking is replacing action within the framework of organizations. At the same time, she understates the significance of changes within the global economy. Indeed, he suggests, these two shortcomings are linked. One reason why Slaughter is excessively optimistic about the prospects for national democratic control over transgovernmentalism is that she leaves out of consideration the impact of neoliberal economic values, practices, and institutions. When discussing the non-state dimensions of transnational activity, her focus is on non-governmental organizations and social movements; transnational business and associated agencies scarcely figure in her analysis. Yet, as theorists of globalization point out, the context in which governments exercise their functions has altered considerably as a consequence of the whole range of developments associated with late twentieth century globalization. Wall Street may look to the Basle Committee, but pressing questions arise as to how adequate scrutiny may be exercised over Wall Street (in addition to the questions already raised about scrutiny of the Basle Committee itself). Alongside Slaughter's government networks, then, international organizations remain important, and private economic actors also play a major part in shaping the options open to national communities. Once these phenomena are taken into account, it becomes even harder to see on what basis national democracy can be held to suffice.

In a passage quoted earlier, Slaughter provides a vivid illustration of what happens when global democracy is understood in terms of pan-national democracy, rather than in terms of an effort to create a democratic community that involves, but also cuts across and extends beyond, nation-states. As “today's international problems” she cites “terrorism,

organised crime, environmental degradation, money laundering, bank failure and securities fraud.”<sup>36</sup> If these are indeed to be rated as our most pressing international problems, then – to quote Alston again – “the plight of a billion or so people living in poverty seems to become a domestic problem, or at least to have disappeared from the international agenda, perhaps to be best taken care of by the free market”; the same goes for malnutrition, lack of access to basic education, inadequate provision of health care, the persecution of minority groups, the plight of refugees and displaced persons, regulation of global economic life, and other aspects of the protection of human rights.<sup>37</sup> Slaughter’s “largely equity-free international agenda”<sup>38</sup> is also a largely democracy-free international agenda. When global democracy is identified with pan-national democracy, the central democratic preoccupations – equality, inclusion, accountability, and so on – are removed from the sphere of international concern. In Slaughter’s account, democracy becomes a matter of national “institutions” (executive agencies, judiciaries, legislatures), and global governance a function of interaction among these institutions, in response to an agenda set by “the internationalists of the 1990s.” Who are these? “Bankers, lawyers, businesspeople, public-interest activists, and criminals.”<sup>39</sup>

Slaughter’s characterization of changes in the organization of global politics raises many troubling questions. For the present purposes, however, what is most significant about her analysis is that, while the transnationalization of decision-making processes is registered, the implications of this for democracy are not fully pursued. The legitimacy of a trans-governmental political order thus comes to rest on the inadequate ground of pan-national democracy.

### *Franck: Fairness and the reform of global governance*

Compared to Slaughter’s theory of transgovernmentalism, Franck’s understanding of contemporary international politics seems to stand more directly in the line of liberal internationalist traditions. This is made clear in his wide-ranging study, *Fairness in International Law and Institutions*.<sup>40</sup> In one of the book’s early chapters, Franck considers the issue of “fairness to persons.” It is in this context that he makes the claim that a democratic entitlement should be recognized in international law.<sup>41</sup> Then, after exploring his central theme from various other angles, he turns his attention in the book’s final chapter to the fairness of international fora.

The discussion opens with some observations about developments affecting the structure of the international polity. Putting forward one of the propositions which Slaughter precisely seeks to refute, Franck argues

that, while national governments remain pivotal, non-state actors are assuming rising salience in global political life.

What was an anarchic rabble of states has transformed itself into a society in which a variety of participants – not merely states, but also individuals, corporations, churches, regional and global organisations, bureaucrats, and courts – now have voice and are determined to interact.<sup>42</sup>

This being so, his concern is to examine the extent to which international decision-making is organized in ways that can be considered fair. A wide diversity of actors may now have voice in global affairs and be determined to interact. But, he asks, to what extent do their participation and interaction take place on fair terms? He contends that, despite changes which have occurred, two principles compromising the fairness of international decision-making processes remain dominant. Firstly, in most international institutions each state has one vote, irrespective of the size of its population. Secondly, the predominant mode of organizing international decision-making is that only governments have a vote. It follows from the first principle that the citizens of small states are unfairly accorded a greater say than their counterparts in more populous states. And it follows from the second principle that members of indigenous and other subaltern communities are unfairly deprived of adequate representation.

Franck concludes that the international system suffers from a serious “fairness deficit.” To overcome (or at any rate reduce) this deficit, a new forum “in which people rather than governments are directly represented” must, in his view, be created.<sup>43</sup> This would help to establish some correlation between population and representation. It would also give voice to groups that are currently disenfranchised. Franck proposes that such a forum might additionally offer a number of further benefits. It would enable excluded communities to enhance their participation in international affairs without claiming independent statehood, thus helping to curb the threat of secessionist violence. It would create a popular constituency with a stake in the activities of international institutions and might, in that way, aid efforts to expand the role of the United Nations and other international organizations. It would encourage the mobilization of alliances across territorial lines, thereby serving to broaden understandings of national interest. And it would assist in monitoring compliance with an international legal entitlement to democratic governance. In his words, such a systemic reform “would provide [an opportunity] for institutionalising the democratic entitlement and certifying the authenticity of the link between people and their representatives.”<sup>44</sup>

Franck gives brief consideration to the question of how such a forum might be established. One possibility, which he endorses at least as an initial stage, is the widely mooted idea that the United Nations General Assembly might be divided into a two-chamber body, with one chamber constituted along current lines, and the other constituted through direct election and on the basis that seats are allocated in proportion to population size. Resolutions on important matters could then be required to be passed by a majority of both chambers. Since the consent of the chamber-comprising governments would always be needed, he observes that “little actual power would be transferred from governments to popular representatives at this stage of reform.” It would be “on the ethos of the international community, not on the allocation of political power, that such reform would have its impact.”<sup>45</sup> Franck stresses, however, that his primary aim is less to argue for this particular reform than to highlight the need for current procedures of intergovernmental decision-making to be supplemented through the creation of a global popular forum. In so far as global politics continues to be conceived as a “conversation among nations,” this “limited view is ... [n]ot only inaccurate,” he holds; it is also unfair.<sup>46</sup> But is it undemocratic?

For all his evident concern with the shortcomings of international governance, it is striking that Franck refrains from characterizing those shortcomings as challenges for democracy, and treats them instead as instances of unfairness. He pointedly modifies a familiar phrase in calling attention to the “fairness deficit” of the international system. More generally, he detaches the question of extending democracy’s purchase from the problem of improving global decision-making processes. When presenting his case for the democratic entitlement, he does not deal with international political structures. When addressing international political structures, he does refer to the democratic entitlement, but in a way which confirms that the latter finds expression in the arena of national politics; efforts to make the international system more fair are said to provide a means for helping to monitor compliance by national authorities with the right to democratic governance. As in Slaughter’s otherwise very different account, the assumption appears, then, to be that democracy is a form of national government, and pan-national democracy the corresponding global project. Yet, once again, such an approach sits uneasily with the recognition of changes in the international polity. While Franck in some respects sidesteps the issues raised above in connection with Slaughter’s analysis, in other respects his discussion of the fairness of international fora exemplifies those issues, and also brings into relief a number of further points.

An initial concern arises from the *focus* of the effort to pass beyond a “limited view” of global politics. In examining “who has a voice and how

decisions are reached” in global affairs, Franck takes his bearings from the procedures of international organizations.<sup>47</sup> What of the phenomenon to which Slaughter attaches so much importance? Transgovernmental networking, if overemphasized by Slaughter, is largely put to one side in Franck’s account. On the other hand, Franck shares Slaughter’s tendency to underrate the political significance of developments in the international economy. Had his analysis encompassed these “unofficial” and “private” settings, the scale of the problem he seeks to address might have appeared considerably larger. The fairness of international decision-making processes might have been seen as compromised not just by the failure to make allowance for disparities in the population size of states, and not just by the exclusion from consensus or vote of representatives of non-state communities; the fairness of those processes might also have been seen as compromised by the fact that decisions are taken in fora containing no representative from some of the states where outcomes are produced, as well as in private-sector fora which are regulated in the interests of only a fraction of those affected – and in some cases scarcely regulated at all. Put differently, asymmetries of participation in institutionalized international activity might have seemed a small subset of the skewed relations that form the context of global governance today.

This then prompts reflection on the *scope* of the effort to pass beyond a limited view of global politics. As noted, Franck considers how international procedures might help to support national democracy (or at any rate, to support the turn to democratic constitutions). But he does not ask how those procedures might work to constrain national democracy. The logic of his analysis is that the organization of international politics is presumptively neutral with respect to the conduct of national politics; that international political arrangements are without necessary consequence for the quality of national democratic life. Yet (to recall earlier discussion once again) globalization entails that international and national domains are less separable than ever. The condition of nation-states cannot be understood in isolation from the wider web in which relationships and institutions are enmeshed. And if that is so, then correspondingly, the prospects for democracy cannot be understood in isolation from that wider web. Moves to promote democracy in national politics must be accompanied by, and linked to, moves to promote democracy (not just “fairness”) in the international polity. In turn, steps to democratize “official” international activity must be accompanied by, and linked to, steps to democratize other sites of decision-making with global or transnational impact. From this angle, Franck’s worry about the international “fairness deficit” appears to be an advance on Slaughter’s celebration of transgovernmentalism. But it remains difficult to see how even his combination of national democracy and public-international fairness can suffice.



Finally, there is the question of the *character* of the effort to pass beyond a limited view of global politics. In order to alleviate the unfair operation of current procedures, Franck advocates the establishment of a new popular forum. He observes that such a forum might be grafted on to the existing United Nations structures. Whatever the merits of this idea, a different approach is required once the focus and scope of analysis are widened, and the points raised above taken into account. Fairness may call for institutional and procedural reform. Democracy, however, demands change of transformative proportions. If global governance is to be democratized, proposals concerning particular institutions and relationships need to be connected to a much more far-reaching project. Such fundamental issues have to be opened to question as the character of political community, the nature of political agency, the constitution of the sovereign people, the significance of territorial boundaries. It follows that an approach centred on reform also falls short in another respect. A project of this kind clearly cannot be pursued by remaining at the level of practical proposals and technical solutions, important as those undoubtedly are. Debate must be initiated on the theoretical, and ultimately political, question of what global democracy should mean.

The thrust of the argument presented here is that on this question Franck and Slaughter are *ad idem*, even if they are at variance on the issue of how globalizing processes should be characterized and evaluated. Both take democracy to refer to a set of national political practices and institutions – periodic elections, the separation of powers, the rule of law, the guarantee of civil rights – and both take global democracy to mean the universalization of those practices and institutions. Though Franck attaches greater importance to the activities of international organizations than Slaughter seemingly does, he still shares her reluctance to reconceive democracy in the manner of David Held and others. He still pulls back from the notion that, in circumstances of intensifying globalization, steps to establish national representative government must be accompanied not only by renewed efforts to combat political alienation and social exclusion within national arenas, but also by moves to bring the democratic ideals of self-rule and political equality to the arena of global politics more generally. In the work of Franck and Slaughter, democracy remains a strictly territorial affair.

As already noted, this approach has not gone unchallenged. For Philip Alston, pan-national democracy represents an inadequate response to contemporary circumstances. In his words, there is an urgent need to enhance awareness of how far “the emerging shape of the international system reflects the principles of transparency, participation and accountability” by which national arrangements are increasingly judged.<sup>48</sup> Alston remarks on the disparity between the central role of international lawyers

as “in many respects . . . handmaidens of the changes wrought by globalisation” and the limited attention given by those lawyers to the ramifications of globalizing processes.<sup>49</sup> Richard Falk is one of the few international lawyers who has bucked this trend. In his study, *On Humane Governance*, Falk develops an account of “humane governance” which resonates strongly with Held’s work on cosmopolitan democracy.<sup>50</sup> He writes of the way “traditional [that is, territorial] democracy becomes increasingly marginalised and formalised insofar as authority over an integrated world economy and information order is shaped by extraterritorial forces.” At the same time, “such democracy may be accompanied by varying degrees of social regression as a result of the impact of capital-driven geogovernance.”<sup>51</sup> Given “the realities of globalisation,” Falk argues, “democratisation efforts [must] be extended to geopolitical and market arenas, as well as ‘internalised’ at all levels of political organisation.”<sup>52</sup> The main focus of his discussion in this regard is on the possibilities for enhanced enforcement of international legal commitments, and for the restructuring of international agencies, especially the United Nations.<sup>53</sup> In the end, however, he concedes that “it is difficult to be more than heuristic at this stage, pointing to the need and to possible directions of democratising efforts, but being hazy about means and effects.”<sup>54</sup> Given that pan-national parameters effectively occlude cosmopolitan ambitions, this already seems a significant step in opening the way to a democratic criterion of international political legitimacy.

## Conclusion

This section will try to draw together some of the threads of this discussion. The chapter began by proposing a democratic approach to the legitimacy of international organizations. Against this approach were foreshadowed a number of objections. One questioned the wisdom, or at any rate the point, of enlarging the focus of democratization to include non-national decision-making fora. As indicated, the notion that efforts to entrench democracy are best concentrated on supporting moves at the national level is reflected in international legal calls to recognize a “democratic entitlement.” An answer to this may be gleaned from accounts by political theorists and international relations scholars of the relationship between globalization and democracy. If national options are now shaped in significant ways by action in international organizations, transgovernmental networks, global markets, and transnational “civil society,” then, these scholars observe, the nation-state cannot continue to be regarded as modern democracy’s “container.” National democratic politics cannot be understood without reference to international forces.

More than that, democracy cannot flourish in nation-states unless efforts are made to democratize the processes of transnational and global decision-making as well. Since power relations do not stop at national borders, democratic principles must not be allowed to stop there either.

A second objection concerned the issue of democracy's meaning in relation to international organizations. What is democratization to entail in this context? It is certainly the case, as many analysts note, that change is difficult to specify. In Richard Falk's words, extending democracy to geopolitical arenas is "more problematic to depict in situational terms than is the familiar terrain of state/society relations."<sup>55</sup> The obvious reason is that, to date, democracy has largely been understood as a principle of national politics, and one of the few certainties of international democracy is presumably that it cannot involve the simple transposition to international fora of national democratic institutions and practices. What seems to be important is that debate be initiated and imaginative effort deployed. At the same time, however, it is worth recalling democracy's status as an essentially contested concept.<sup>56</sup> A key feature of such a concept is that not only do people hold a diversity of views as to its meaning; they are also aware that they hold a diversity of views, and that those views are linked to different notions of the good life. In no setting is the meaning of democracy a technical issue, on which a scholar might hope authoritatively to pronounce. Rather, the significance attached to "rule by the people" is always and everywhere a political struggle. At stake is nothing less than the organization and ends of social power. It follows that democracy is defined and redefined not through scholarly fiat, but through the interplay of social forces.

A final objection highlighted the danger that democracy might simply serve to clothe in more legitimate garb the largely technocratic processes of international organizations. One answer to this is that, on the contrary, democratic principles are a crucial corrective to technocratic forms of decision-making. Through those principles a basis is established for challenging elites and enhancing the opportunities for participation by those affected. And yet, this objection is not without force. Like all modernity's best products – equality, freedom, the rule of law, and so on – democracy is the enemy of oppression, but also the friend. We cannot prevent it from being enlisted ideologically as an agent for legitimating, and thus sustaining, structures that systematically marginalize some citizens while empowering others. What we can and must do is to remain permanently attentive in exposing such moves, and in searching for ways to realize the concept's emancipatory potentials. Orwell, then, was right to warn that democracy might be made to mean its opposite – and everything in between. But, as this enquiry into the legitimacy of international organizations perhaps confirms, he was wrong to write it off as a "meaningless word."

## Notes

1. Orwell, G., 1954. *A Collection of Essays*. New York: Doubleday Anchor, 162.
2. See Dunn, J., 1993. *Western Political Theory in the Face of the Future*. Cambridge: Cambridge University Press, 2 and 12.
3. The discussion that follows draws on *The Riddle of All Constitutions*. Oxford University Press, 2000, chapter 4.
4. Scholte, J., 1997. "The Globalisation of World Politics," in Baylis, J. and Smith, S. (eds), *The Globalisation of World Politics*. Oxford: Oxford University Press, 13, 18.
5. Ibid., 23.
6. The author owes this image to Anthony McGrew. See "Introduction" in McGrew, A. (ed.), 1997. *The Transformation of Democracy?* Cambridge: Polity Press, 1, 5.
7. See, *inter alia*, Held, D., 1995. *Democracy and the Global Order*. Cambridge: Polity Press.
8. Ibid., 73.
9. Among the most notable challenges have been those informed by world-system theory and related Marxist and neo-Marxist approaches. See, for example, Wallerstein, I., 1974. *The Modern World-System*. New York: Academic Press.
10. Walker, R., 1993. *Inside/Outside*. Cambridge: Cambridge University Press, 143.
11. For an illuminating account of recent work, see McGrew, A., 1997. "Democracy Beyond Borders? Globalisation and the Reconstruction of Democratic Theory and Practice," in McGrew, A. (ed.), *The Transformation of Democracy?* (see note 6, above), 231.
12. See, *inter alia*, Held, D., *Democracy and the Global Order* (see note 7, above).
13. Archibugi, D. and Held, D., 1995. "Editors' Introduction," in Archibugi, D. and Held, D. (eds), *Cosmopolitan Democracy*. Cambridge: Polity Press, 1, 13.
14. Ibid.
15. Cox, R., 1997. "Economic Globalisation and the Limits to Liberal Democracy," in McGrew, A. (ed.), *The Transformation of Democracy?* (see note 6, above), 49, 60.
16. See Held, D., *Democracy and the Global Order* (see note 7, above) (esp. chapter 12, setting out his recommendations).
17. Held, D., 1995. "Democracy: From City-States to a Cosmopolitan Order?" in Held, D. (ed.), *Prospects for Democracy*. Cambridge: Polity Press, 13. See, further, Held, D., *Democracy and the Global Order* (see note 7, above).
18. Held, D., 1995. "Democracy and the New International Order," in Archibugi, D. and Held, D. (eds), *Cosmopolitan Democracy* (see note 13, above), 96, 112. For the claim that, to meet the challenges of globalization, democracy needs to become "issue based, rather than territorially based," see also Kaldor, M., 1995. "European Institutions, Nation-States and Nationalism," in Archibugi, D. and Held, D. (eds), *Cosmopolitan Democracy* (see note 13, above), 68, 88.
19. Connolly, W., 1991. *Identity/Difference*. Ithaca: Cornell University Press, 219–20.
20. In formulating these questions, the author draws on the account in Archibugi, D. and Held, D. (eds), *Cosmopolitan Democracy* (see note 13, above), 8.
21. See, for example, Franck, T., 1992. "The Emerging Right to Democratic Governance." *American Journal of International Law* 86: 46. See also Slaughter, A., 1995. "International Law in a World of Liberal States." *European Journal of International Law* 6: 503.
22. See Slaughter, A., 1997. "The Real New World Order." *Foreign Affairs* 76: 183. For an earlier intimation of this argument, see also Slaughter, A., "International Law in a World of Liberal States" (see note 21, above).
23. Slaughter, A., "The Real New World Order" (see note 22, above), 184.
24. Ibid., 185.
25. Ibid.
26. Ibid., 183.

27. Ibid., 186.
28. Ibid., 197.
29. Ibid., 194.
30. Ibid.
31. Ibid., 186, 197.
32. Ibid., 191.
33. Ibid., 192.
34. Alston, P., 1997. "The Myopia of the Handmaidens: International Lawyers and Globalisation." *European Journal of International Law* 8: 435.
35. Ibid., 441.
36. Slaughter, A., "The Real New World Order" (see note 22, above), 184.
37. Alston, P., "The Myopia of the Handmaidens" (see note 34, above), note 32, 439.
38. Ibid., 446.
39. Slaughter, A., "The Real New World Order" (see note 22, above), 184.
40. Franck, T., 1995. *Fairness in International Law and Institutions*. Oxford: Oxford University Press.
41. Ibid., chapter 4.
42. Ibid., 477.
43. Ibid., 482.
44. Ibid., 482.
45. Ibid., 484.
46. Ibid.
47. Ibid., 478.
48. Alston, P., "The Myopia of the Handmaidens" (see note 34, above), 447.
49. Ibid., 435.
50. Falk, R., 1995. *On Humane Governance: Toward a New Global Politics*. Cambridge: Polity Press, esp. chapter 4.
51. Ibid., 107.
52. Ibid., 131.
53. Ibid., esp. chapters 4 and 7. See also Falk, R., 1995. "The World Order Between Inter-State Law and the Law of Humanity: The Role of Civil Society Institutions," in Archibugi, D. and Held, D. (eds), *Cosmopolitan Democracy* (see note 13, above), 163; and "The United Nations and Cosmopolitan Democracy: Bad Dream, Utopian Fantasy, Political Project," in Archibugi, D., Held, D., and Köhler, M. (eds), 1998. *Re-Imagining Political Community*. Cambridge, Polity Press, 309.
54. Falk, R., *On Humane Governance* (see note 50, above), 131.
55. Ibid.
56. See Gallie, W. B., 1995–56. "Essentially Contested Concepts." *Proceedings of the Aristotelean Society* 56: 167.

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## Intergovernmental societies and the idea of constitutionalism

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*Philip Allott*

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### The challenge of intergovernmental public power

Wherever and whenever public power is exercised, there arises the challenge of its explanation and justification. Why is public power being exercised by this person or these persons? What conditions governing the exercise of public power are accepted by those exercising that power, and by those affected by its exercise? The posing of such questions, and the answers given to them in a particular society at a particular time, are a product of historical circumstances, including the historically produced state of social consciousness in that society. Intergovernmental organizations are a particular systematic form in which public power is exercised in the contemporary world. They cannot avoid the challenge of the explanation and justification of public power.

The public power exercised by governments participating in an intergovernmental organization is an externalizing of their public power. It is for the social consciousness of the society within which a given government is constituted to explain and justify the externalizing of that power within the context of the social consciousness of that society. Within that context, the explanation and justification of the externalized power of particular governments participating in a given intergovernmental organization may accordingly differ, as a function of the state of the particular social consciousness of the different societies.

This situation gives rise to a special and especially difficult challenge in

the case of intergovernmental organizations. How can the collective exercise of public power in the systematic processes of an intergovernmental organization be explained and justified in the context of the social consciousness of international society? This chapter is based on the premise that, like the exercise of any other form of public power, the collective exercise of public power in intergovernmental organizations must be explained and justified, and that, as in the case of any other form of public power, the conditions governing the collective exercise of public power in an intergovernmental organization must be acceptable not only to those exercising that power, but also to those affected by its exercise. It is the purpose of this chapter to suggest that the exercise of public power in intergovernmental organizations may be explained and justified at the level of international society in terms of a theory of constitutionalism. It is a theory of public power which has been historically produced within the social consciousness of countless societies over long periods of time. It is a theory which is capable of transcending the theoretical diversity of the explanations and justifications of public power of particular societies at the present time.

### Constitutionalism as social theory

Constitutionalism is a *theory*; that is to say, a mental ordering of the reality within which a particular society constitutes itself.<sup>1</sup> It is an explanatory and justificatory theory of a society's self-constituting. The defining characteristic of constitutionalism as a theory is that society makes an *idea* of its own self-constituting into an *ideal* of its self-constituting, and incorporates that *ideal* into the *theory* of its self-constituting. The idea is projected from the actual to form an ideal and, as an ideal, is reintroduced into the actual. For a society which adopts constitutionalism as its theory, constitutionalism enables and requires the society to organize and direct its own self-constituting in accordance with its transcendental idea of itself.

Within the *pure theory* of such a society,<sup>2</sup> constitutionalism is the way in which the society contemplates and articulates the actuality and the potentiality of its own self-constituting. It is what the society says to itself about what it is and why, and what it might choose to be. It dominates the society's *ideal self-constituting*, as the society debates within itself the nature and significance of its idea and ideal of constitutionalism.<sup>3</sup> It is formed by, and forms, its *social consciousness*; that is, the consciousness of its *public mind*.<sup>4</sup> It dominates each aspect of the society's dynamic process of self-constituting – the forming of its unique identity, the integrating of its willing, the unifying of its values, the relating of its order

to the order of that which lies beyond it, its persistence through the passage of time.<sup>5</sup>

Within the *practical theory* of such a society,<sup>6</sup> constitutionalism means that the society's self-transcending idea and ideal of its self-constituting is made into an integral and functional part of the day-to-day process of its *real* and *legal self-constituting*.<sup>7</sup> The ideal is present in the actual. Society *enacts* its pure theory of constitutionalism as practical theory. A major part of the day-to-day social process of such a society consists of political debate and political struggle about the interpretation and application of its own theory of constitutionalism, *politics* being the leading institutional form of that debate and struggle. Society's own idea of its potentiality is actualized in the course of its becoming.<sup>8</sup>

To illustrate its specific character as the theory of particular societies, constitutionalism may be contrasted with other pure and practical social theories of particular societies, especially absolutism and theocracy. *Absolutism* excludes, from the self-constituting of a society which adopts it as its practical theory, any systematic appeal from the actual to the ideal, so that the willing and acting of the holders of social power are validated in practice by, and are understood to be validated in theory by, the fact of that willing and acting. The actual is the ideal. *Theocracy* places the focus of a society's self-transcending in something which is conceptually and systematically external to that society, so that the willing and acting of the holders of social power are explained and justified, in practice and theory, by reference to ideas whose source and validity are not themselves explicable and justifiable by reference to the society's own idea of itself, formed in the historical process of that society. The ideal is other than the actual.

In addition to its role within the theory of particular societies, constitutionalism is also a category within *social philosophy*. Social philosophy is the self-contemplating of human beings in their capacity as social beings. Constitutionalism, as the theory of particular societies, was historically produced within the development of those societies. As a matter of social philosophy, we are able to abstract a particular theory, such as constitutionalism, from its historical and social contexts, and to use our abstraction of the idea in our understanding of the actuality and potentiality of societies in general, and hence in our understanding of the actuality and potentiality of particular societies. As social philosophers, we may choose to undertake a specific society-transcending function; namely, to think about the self-constituting of societies in such a way that our thinking is not intended to form part of the ideal self-constituting of any particular society, including the societies to which we, as particular human beings, happen to belong. Such a thing is a possible ideal of the personal self-constituting of the philosopher. But even the mind of



the social philosopher is socially produced. And social philosophy, when it is communicated, enters the public mind of particular societies, and is liable to modify their ideal self-constituting. It may affect the pure and practical theories of their self-constituting, and so may even affect the actual social process of their real and legal self-constituting. The potential world-changing effect of philosophy is no reason to abandon the project of philosophy. But it imposes a particular kind of moral responsibility on the philosopher.<sup>9</sup>

### International societies and social theory

An intergovernmental organization is a *society*.<sup>10</sup> It is a collective self-constituting of human beings. It is also a *society of societies*, if it has states as its society-members, since states are themselves societies. The activity of human beings within the society of the intergovernmental organization includes not only willing and acting on behalf of the organization itself, especially by its own employees, but also willing and acting on behalf of the society-members of the organization. Finally, an intergovernmental organization is itself a *society-member*, in the sense that it participates in international society, the society of all societies – the collective self-constituting of all-humanity.

As a society, a society of societies, and a society-member, an intergovernmental organization is thus an *intermediate society*, intermediate between the self-constituting of all-humanity and more particular levels of social self-constituting. Intermediate societies *contained within* other societies are a common social phenomenon. The societies known as “states,” in the current stage of international social development, are themselves full of intermediate societies – the constituent states of a federation, constitutional organs, political parties, industrial and commercial corporations, and countless others. And even such intermediate societies, contained within societies, themselves often *contain* other societies.

The specificity of intergovernmental organizations as international societies thus arises from their particular intermediate situation between the superordinate international society on the one hand, and the subordinate state-societies on the other. We may classify them as *superordinate intermediate societies*. The particular challenge which intergovernmental organizations pose for the social philosopher is a function of three facts.

- The societies which are the society-members of international organizations (the states) bring to the ideal self-constituting of the organization their own social theories, an array of social theories which are intrinsically, and perhaps profoundly, heterogeneous, since each social theory is the unique product of the particular history of a specific society.

- Those theories are also theories of a different form of society (state-society), not inherently applicable to a superordinate level of international society.
- The superordinate international society itself has only the most rudimentary theories of its own self-constituting and hence of its constitutional relationship to its subordinate societies.

Like its real and legal self-constituting, the ideal self-constituting of international society is at a primitive stage of development by comparison with even the least complex of national societies, let alone the most complex.

On the other hand, thinking about the self-constituting of intergovernmental organizations is assisted by the fact that they are societies which are established purposively *ex nihilo*, by specific legal-constitutive behaviour, and by the fact that their day-to-day functioning is generally more transparent and less complex than, for example, that of the state-societies which participate in their self-constituting.

In four respects, the social-philosophical category of constitutionalism is a particularly useful heuristic matrix for the study of intergovernmental organizations as international societies, given the social-theoretical diversity of their society-members.

- The category of constitutionalism identifies a form of social theory which postulates a society whose self-constituting is self-contained, in the sense that its idea of itself is not necessarily dependent on some other religious or philosophical theory external to that society.
- It identifies a form of theory which, when applied as the theory of a given society, accepts and even promotes social diversity within that society at the level of general ideas, even including the possibility of competing theories of religion and philosophy, and competing ideas about fundamental social and political purposes and values (normally institutionalized in the form of political parties).
- It identifies a form of theory which sees the *legal* self-constituting of a society as the principal means of resolving the struggle of ideas and power which forms the ideal and real self-constituting of the society. Intergovernmental organizations are characteristically and predominantly *legal* in their formation, form, and functioning.
- Constitutionalism is a theory whose central focus is the problem of the relationship between the source of the authority of political power and the practical control of its exercise; this, incidentally, is one possible definition of the social-philosophical problem of "legitimacy." Intergovernmental organizations are a new manifestation of that age-old problem.

There is a still more general reason for considering intergovernmental organizations in the light of constitutionalism. The human individual

and the human species are the particular and the universal poles of human self-constituting. The particular and the universal of human self-constituting are resolved dialectically in the many-in-one of the countless forms of human society. Intergovernmental organizations in their present form have been produced in the course of international history, especially the history of the last 150 years, as a new form of the further universalizing of subordinate social forms, as an extrapolation from the subordinate societies rather than as an intrapolation from international society. It is important to know whether the characteristic features of the category of constitutionalism, if and to the extent that they apply to intergovernmental organizations, might be universalized still further to apply to the ultimate form of human society, the international society of the whole human species; the society of all societies. We need to know whether the category of constitutionalism could be applied to international society, not only as an idea within social philosophy but also as the theory adopted by international society itself as the theory, pure and practical, of its own self-constituting.

The particular characteristics of intergovernmental organizations mean that the challenge which they pose for the social philosopher is of exceptional interest and significance. In studying the theory of the self-constituting of intergovernmental organizations, we may be able to see with unusual clarity the dynamic potentiality of the socializing of all-humanity, within its inadequate actuality.

### The presence of the past

Eighteenth-century rationalists and nineteenth-century positivists convinced themselves that the study of human history reveals a line of progress in human enlightenment, leading from the *Urdummheit* (primal stupidity) of pre-theistic religion, through the relative *Dummheit* of theistic religion, to the primitive rationality of metaphysics, and thence to the triumph of rationality in science, natural and human. After two more centuries of unusually enlightening human experience, we are less inclined to take such an optimistic view, or even to regard such a view as, in principle, optimistic. We are now more inclined to wonder at the intelligence and sophistication of earlier complex cultures, and to acknowledge the humbling fact that they articulated with extraordinary clarity the problems of human existence which remain to this day. It seems that the problems of human existence are never solved, only worked on once more. Revenants of Confucius and Lao Tzu, Aristotle and Averroes, Machiavelli and Voltaire, not to mention the Buddha and Jesus Christ and Muhammad, would find that they could re-enter with very little difficulty the continu-

ing dialogue of the human mind with itself. We might hope that they would take the consoling view that the human species is still a young species; that 5,000 years are as a day in the long process of human self-evolving.

We are more inclined now to see that religion and philosophy and science are distinctive, if related, manifestations of human self-consciousness, and that they can coexist, competitively and also cooperatively, in the forming of social consciousness. We can, as individuals and societies, choose to favour one at the expense of the others, to reject one or more as worthless or harmful. As historians and as social philosophers, we cannot ignore the power which they have exercised, and are still exercising, over the making of human history and the future of the human species.

There is a second dramatic aspect to our new-found humility in relation to the human past. The present is the presence of the past. We are now able to see that all our social institutions are inheritances, each the particular product of a particular succession of events which occurred within the general history of human socializing, and in one or more of its particular sub-histories. We see now that both the capacities and the limitations of our social institutions – social good and social evil – are by-products and side-effects of that history and those histories. Above all, we see now that all our ideas have been historically produced – our ideas of God and gods, our ideas of nation and gender and race, our ideas of the true and the good and the beautiful, our ideas of society and law, our ideas of international society and international law, our ideas about our own humanity, our ideas about the past and the future, our ideas about ideas. All of them might have been otherwise. All of them are not otherwise. Social consciousness forms itself organically, by accretion and transformation. New ideas grow in the compost of old ideas.

It follows also that old ideas contain the possibility of new ideas. The ideas we have contain the ideas that we might have. The present state of human consciousness contains the possibility of new states of consciousness which are ours to explore and ours to choose.

### The genealogy of constitutionalism

At the level of all-humanity, social consciousness is formed from the flow of consciousness within and between the public minds of countless subordinate societies over thousands of years, as they constitute themselves in consciousness and as they form their self-consciousness in the light of the self-constituting of other societies. Nowhere is this more true than in the evolution of the idea of constitutionalism. The past of the idea of

constitutionalism is a past which extends over several millenia and many cultures, and includes not only the turbulent development of social consciousness within particular societies but also the flow of consciousness among all the most dynamic cultures, ancient and modern. So deep are its roots in human social experience, in all times and all places, that we might well wonder whether it is a manifestation of some part of the genetic programme of human socializing, a species-characteristic and not merely a contingent by-product of history.

The future of the idea of constitutionalism, as a possible idea within our ideas of international society and international law, is thus a present potentiality which we have inherited from an exceptionally long and an exceptionally rich past. As an historically produced social phenomenon, constitutionalism has taken countless different forms as the theory, pure and practical, of countless different societies. Its deep-structural unity lies in the fact that it offers to a society the most valuable prize of all – that is to say, a practically effective idea of the order of its own self-ordering. In an unusually clear example of the dialectical development of social consciousness, the idea of constitutionalism allows a society to reconcile the ideal with the actual by negating and incorporating its idea of the transcendental.<sup>11</sup> For each society, it presents in one mental structure its own theory of the idea and the ideal of law. The history of constitutionalism is the history of the struggle of countless societies with the problem of the idea and the ideal of law.

It is a striking fact of history that there seems to have been a parallel development in the idea and the ideal of law in otherwise disparate cultures. It is a mental phenomenon whose history can be plotted over time in particular cultures but which cannot be isolated from their general history, because it has always been closely connected with other aspects of social and economic development. In particular, it seems that, in periods of exceptional social and economic change, and especially in periods of great social disorder, societies have been led to reconsider the foundations of their social order, including its transcendental parameters. This reconsideration has been an integral part of social struggle, as contending parties sought to enlist competing versions of transcendental ideas into their own idea of a better society. Such an appeal could be used as a weapon either of reaction or revolution, an unchanging standard of judgement by which it could be argued that the present state of society was either a betrayal of society's ancient ideals, or a denial of the true potentiality of those ideals.

The fact that all sides in revolutionary social struggle refer to the idea of the social-transcendental, but struggle passionately about its meaning and its relevance to the current social situation, has created a particular difficulty for historians, generating secondary disputes among historians

themselves about both these things. It is also particularly difficult to avoid anachronism in making our historical judgements about such matters, given that we happen to know how things turned out, how the struggles were resolved in the further development of the ideal, real, and legal self-constituting of the societies in question.

As we enter the new century, social philosophy must make the effort to form a reliable view of such processes, because the perennial problem of human social self-constituting now presents itself as its limiting case at the level of all-humanity, where oppositions of social theory, including transcendental oppositions of philosophy and religion, will have to be resolved in some new idea and ideal of law. Revolutionary social change is now present at the level of all-humanity, and that social change puts into question, among many other things, the nature and function of intergovernmental organizations as superordinate intermediate societies, a relatively new form of human self-socializing which may or may not contain the emerging pattern of still more developed forms. The international social struggle at the level of ideas, the ideal self-constituting of international society, calls for the contribution and the courage of a new breed of international social philosopher.

International social philosophy must consider urgently whether the idea of constitutionalism might realize its ultimate destiny as the *practical theory* of the ultimate society – international society – reconciling and overcoming the passionate pure-theoretical diversity, historical and religious and philosophical, of its countless subordinate societies within the revolutionary self-reconstituting of all-humanity.

### The genetics of constitutionalism

Historically, the various forms of constitutionalism have been a manifestation of the ideas which particular societies have formed of the relationship between the theory of their own social order and one (or more) of four more general theories – divine order, the sovereignty of law, natural cosmic order, and natural social order.

Constitutionalism has been used to establish (1) an idea of a very human social order which is seen, paradoxically, as the controlling presence of a *divine order*; (2) the idea of the authority of everyday law-making and law-enforcing as the controlling presence of the *sovereignty of law*; (3) the idea of a very particular and artificial human social order which is seen, paradoxically, as the controlling presence of a *natural cosmic order*; and (4) the idea of the particular and artificial order of a given society as the controlling presence of a *natural social order*.

Or, to put these four germ-ideas into a single genetic programme, we

may say that constitutionalism postulates an idea and an ideal of law which is less than (1) the will of God and more than (4) the general will, something which is more than (2) the rule of law and less than (3) natural law. Such is the evolved charismatic power of the idea of constitutionalism, and the potentiality of its future power.

### *Divine order*

In *The Ancient City*, Fustel de Coulanges set an extreme benchmark in relation to which all subsequent opinions may be situated. He said: "Among the Greeks and Romans, as among the Hindus, law was at first part of religion<sup>12</sup> ... The law among the ancients was holy, and in the time of royalty it was the queen of kings. In the time of the republic it was the queen of the people."<sup>13</sup>

Religion may be "what the individual does with his own solitariness," as Whitehead said,<sup>14</sup> or it may be a product of "man's need to make his helplessness tolerable," in the words of Freud.<sup>15</sup> Or, on the contrary, it may be a society's "collective ideal," as Durkheim suggested,<sup>16</sup> or "the dream-thinking of a people"<sup>17</sup> or "collective desire personified."<sup>18</sup> It may be a crude weapon of power in the hands of the ruling class, as Polybius and many others have suggested,<sup>19</sup> or it may be the self-serving ideology, or at least the dominant mentality, of an ascending social class, as Tawney and Weber have argued.<sup>20</sup>

Whether religion is seen as the internalizing of social consciousness or as the externalizing of individual consciousness – social imposition or individual expression – religion as a social phenomenon is a fusion of pure theory and practical theory. The puzzling human disposition known as "belief" may be defined as assent to a set of ideas (pure theory) which is manifested as a corresponding modification in the believer's willing and acting (practical theory).<sup>21</sup> Religion manifests itself not only as a system of ideas but also in ritual forms of modified behaviour, ranging from individual acts of piety in front of a shrine, altar, or image to complex public ceremonies and complex social structures and systems of overwhelming social power.

Religion places a focus of ultimate reality beyond the limits of the society within which it manifests itself. But the constitutive consequences of this constitutional transcendentalism have varied from society to society. Religion may be fully integrated in society's structures and systems, as in ancient Egypt,<sup>22</sup> ancient India,<sup>23</sup> and ancient Israel.<sup>24</sup> It may be invoked as the ultimate source of public authority, as in ancient Mesopotamia<sup>25</sup> and ancient China.<sup>26</sup> Or, it may be an integral part of a society's self-identifying, conditioning but not determining society's structures and systems, as in ancient Greece<sup>27</sup> and ancient Rome.<sup>28</sup>

The constitutive paradigms of religion have persisted throughout human history. They are present in the contemporary world, even if only in a vestigial form in those societies which have a legally constituted separation of religion and political authority. But the part they have played in the genesis of the idea of constitutionalism lies in an important logical corollary that they contain in their deep-structure. Belief in a theory of the transcendental source of public power is also a belief in the subjection of public power to its transcendental source. An emperor or a king is both empowered and constrained by having the status of “Son of Heaven,” the Lord’s Anointed, King and Priest, *pontifex maximus* (high priest), or God’s vicar on Earth, or if royal power is believed to be held “under God” or “by the grace of God.”<sup>29</sup>

Belief in a religious source of public power may be part of the ideal self-constituting of societies, and may be made part of their legal self-constituting. It must be said, however, that all of recorded human history shows that such a belief may also be the source of the most extreme abuses of public power, in the everyday real-constituting of particular societies.

### *The sovereignty of law*

A second thread in the fabric of the idea of constitutionalism, from the most ancient complex societies to the most complex societies of the present day, is to be found in a legal transcendentalism which is reminiscent of, and sometimes accompanies, socially transcendent religion. Indeed, it is tempting to rejoin the thesis of Fustel de Coulanges,<sup>30</sup> at an analytical level at least, and to say that religion and law were originally inextricable because a common categorical pattern is to be found at the root of both of them.<sup>31</sup> They both affirm systems of order which transcend the order of individual consciousness. They both imply acceptance of an external control of consciousness, not by force but by the conforming of consciousness to the external system of order. They both recognize the interaction of individual and social consciousness, each flowing into the other. They both assume a shared acceptance of such systems of order by others, not only by other faithful and loyal individuals but also by rulers and, indeed, by whole societies.

Customary law – that is to say, unlegislated law – is a feature common to all societies at some stage in their development, especially and necessarily at the pre-literate stage. It is the law which arises from the day-to-day *real* self-constituting of a society to become the means of its *legal* self-constituting, and so finds its reflection in that *ideal* self-constituting which in turn conditions the making and finding of law.<sup>32</sup> It seems that, paradoxically, the *idea* of law – as opposed to the fact and practice of law, and as opposed to the idea of religion – came to the surface of social self-



consciousness when law-giving began to coexist with law-finding, when unlegislated law was supplemented by legislated law. The ancient world knew many events of law-giving – Hammurabi, Manu, Draco, Moses, Lycurgus, Solon, the Twelve Tables of ancient Rome, Ashoka, Justinian – each of which had, or acquired, a legendary status. But the striking fact is that it was claimed, in each case, that the ordained law was designed to supplement and to reinforce unordained law, not to replace it. Even the most powerful law-givers – Hammurabi in Babylon,<sup>33</sup> Ashoka in India,<sup>34</sup> Solon<sup>35</sup> in Athens, and Justinian in the eastern Roman Empire<sup>36</sup> – placed their law-giving in a context which affirmed their own function as agents of a law which pre-existed and transcended them. The new law was set against a background of inherited law, the obscurity of whose source (personal or impersonal) was an integral part of its authority, the later law-giving events being designed to borrow the charisma of the old law while correcting and completing it. Law that was made affirmed the dignity of law that was found.

It was in ancient China that the idea, and not merely the fact, of law first came to dominate the ideal self-constituting, the self-understanding and the self-directing, of a complex society. It was Confucius (K'ung Fu Tzu; 551–479 BCE) who symbolized and formed that social self-consciousness. And it was Confucius who insisted most on his role as a faithful voice of the past, rather than a mere legislator of the future.<sup>37</sup> Again and again, from eighteenth-century Babylon, through fifth-century Athens and republican Rome, to the English Civil War and the French Revolution, a society is compelled to explore the basis of its own order in periods of the greatest social disorder.<sup>38</sup> Such was the historical role of Confucius. At such times, society reconstitutes itself ideally; in reconceiving its past, it reorients its future.<sup>39</sup>

The belief that there is an idea of law which is above and beyond the fact of law was represented in powerful imaginative form in the *Antigone* of Sophocles.<sup>40</sup> It was enacted poignantly in the death of Socrates.<sup>41</sup> It was imagined metaphysically in the philosophy of Plato, and it was established by Aristotle in the language of social and moral philosophy.<sup>42</sup> The Romans also relied, in Confucian fashion, on ancestral custom (*mos maiorum*) which could be invoked by reactionary, reformist, and revolutionary alike in the unending real-constitutional political struggle.<sup>43</sup> But it was the idea of law which provided the social cement of Roman society – successively monarchy, republic, principate, and empire – a society whose permanent characteristic was ceaseless social change. It was an idea of law which was constantly repaired and refashioned, but never abandoned, until the Roman inheritance was handed on to its various law-obsessed heirs; especially to those other hazardous forms of polity which included many nations and many subcultures – the Church of

Rome, the Holy Roman Empire, the European colonial empires, the European Union.

The Romans established a powerful conceptual distinction between *fas* (divine law and religious custom), *mos* (social custom), *ius* (human law in the broadest sense), and *lex* (legislated law). *Ius* was the generic idea of human law (in English, *the* law, as opposed to *a* law).<sup>44</sup> The conceptual isolation of such an idea helped to establish it as an active presence in the theory, pure and practical, of countless societies, as something which was distinct both from justice and from positive law (*ius positum*), something which is both transcendental in relation to any particular society (and hence capable of being common to all societies), and yet which is formed in substance in the self-constituting of each particular society.

### *Cosmic order*

In the middle of the first millenium BCE, there occurred three parallel moments<sup>45</sup> of human enlightenment in China, India, and Greece: Taoism,<sup>46</sup> Buddhism,<sup>47</sup> and metaphysical philosophy.<sup>48</sup> They had two important effects – one general, one particular – on the evolving idea of constitutionalism. The general effect was that society would in future be accompanied by a second image of itself, a reflection not of its actuality but of its potentiality – of what it could be, an alternative reality seen in the light of its highest values. The particular effect was that law would be accompanied by a second image of itself, seen in the light of an order which transcended it – an order of its order, a higher order which might be expressed as Tao, as *dharma*, or as justice.<sup>49</sup>

The threefold enlightenment was not religious in the sense considered above. It proposed a cosmology – not a second reality of gods and the supernatural, but a form of reality which included things natural and human in a single order, even if all three cosmologies proved capable of being translated into religious practice, including practice of the most popular kind. The new enlightenment proposed an idea of a transcendental reality in which humanity was present only as an atom in an infinity, but which might nevertheless be particularized in the most specific programmes of value and action for individual human beings and societies.<sup>50</sup> And it presented itself as a universalism, abstracted from the history and consciousness of any particular human society, but capable of being particularized as the theory (transcendental, pure, and practical) of particular societies. Each was a *way*, a way of knowing and being rather than a body of doctrine and practices, but each proved to be an inexhaustible source of derived doctrine and practice. This new self-empowering of human consciousness has been charted with particular precision in the case of ancient Greece, because the written materials

which survive from that period, such as they are, enact and celebrate the change with remarkable self-consciousness, much self-admiration, and much passionate debate. The process was doubly dialectic. The new way of thinking made possible the negating of its own negating, as philosophical arguments were used to challenge the validity and the value of the new philosophy – a debate which has continued unabated to the present day. And the new thinking was enriched by the old thinking which it negated.

The road from *mythos* to *logos*, as one writer has described it – from mythical thinking to rational thinking<sup>51</sup> – is not a one-way road. The personalized Olympian gods and the heroes of mythology might be seen as forming a transitional stage on the way from inchoate animism and fatalism to the individuated abstractions which would become the hallmark of Greek philosophy.<sup>52</sup> But the new individuated abstractions, including those which would so profoundly affect the future of the idea of constitutionalism – justice, the good, law, nature – still carried with them something of the aura of the individuated gods and heroes.<sup>53</sup> We can watch the process of change. Hesiod (eighth century BCE) speaks of Justice, who sits beside the throne of Zeus.<sup>54</sup> Plato (fifth–fourth century BCE) devotes the most influential of his dialogues (*The Republic*) to an exploration of the idea of justice as the ideal of human self-perfecting through social self-perfecting, in accordance with an ideal of cosmic order. Hesiod tells how Zeus (chief of the gods) married Themis (tribal law) and had three daughters, one of whom was Eunomia. Solon, law-giver and poet (seventh–sixth century BCE), describes in an elegy (*Eunomia*) the work he has done for Athens, telling the Athenians of the practical merits of *eunomia* (good social order), which “straightens crooked judgements” and “stops the works of factional strife.”<sup>55</sup>

Within the Western tradition, the effect of the idea of ideal reality has been historically decisive. It has meant that not only individual human beings but also whole societies have been able to imagine and articulate a reality-for-themselves which is a potentiality within actual reality, and which can be chosen to become actual reality. In other words, the idea of the ideal has been at the heart of the idea of progress. It has been at the root of the fact of ceaseless, relentless, self-directed change, a lyrical counterpoint to all the evil and atavism which has also characterized the twin dialectics of theory and practice in the Western tradition.<sup>56</sup>

Within the Western idealist tradition, the idea of cosmic order also manifested itself (in the third century BCE) in the form which came to be known as stoicism; from it there emerged the idea of natural law, the ideal order of law. The idea of natural law would also profoundly affect the evolving idea of constitutionalism. The Greeks distinguished between *physis* (nature, or rather, the energizing force of the universe and its order) and *nomos* (the law of human society). The idea of natural law is

a paradox, a *nomos* which is rooted in *physis*. The paradox is still more apparent in Latin, where the phrase *ius naturale* (natural law), or *ius naturae* (law of nature), manages to combine into a single notion the idea of human “law” in the broad sense (*ius*)<sup>57</sup> and the idea of “nature.” The idea of nature was the central stoic idea, closely analogous to the Tao of philosophical Taoism. Stoicism, like Taoism, moralized the idea of the order of the universe by prescribing that the ultimate moral responsibility of human beings is to make their daily life, and indeed their consciousness, conform to the order of nature. The human mind is equipped with a characteristic (*logos*, reason) which enables us to uncover the order of the universe – the *logos* of the *kosmos* (Chrysippus) – because the mind (*nous*) itself participates in that order, the order of nature, the *nous Dios* (the mind of Zeus or God). Since mind and reason are shared by all human beings, it followed, for stoicism as for Taoism, that there is an order of obligation which is shared by all human beings on a basis of natural equality.<sup>58</sup>

True law [*vera lex*] is right reason [*recta ratio*] in agreement with nature [*naturae congruens*]; it is of universal application, unchanging and everlasting ... We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and one ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge.<sup>59</sup>

To provide everyday law with such a monumental philosophical superstructure – nature, reason, justice, universality, God – was a central strategy in the Roman use of law as the theoretical binding force of an overwhelmingly heterogeneous and unstable society. The same strategy was used by Roman Christianity to help to establish the theoretical binding force of an intrinsically universal society. In the second hellenizing of Christianity, dominated by Thomas Aquinas in the thirteenth century,<sup>60</sup> natural law was installed as a product of human reason seeking to uncover the “eternal law” of God’s universe, in addition to that part of “divine law” which had been revealed to believers in the book of the Bible and the teachings of the Church.<sup>61</sup> The social-theoretical effects of the idea of cosmic order would continue to be substantial, not least in the further development of the idea of constitutionalism.

### *Natural social order*

We have seen that the genealogy of the idea of constitutionalism contains three powerful universalizing elements which seem to have a relatively

high degree of cultural universality: the idea of a supernatural universal order which can be known through the life-transforming and society-transforming medium of belief; an idea of law which transcends all particular instances of law; and an idea of the order of the universe in which the human mind can participate and which can become an ordering principle of individual and social self-ordering.

The remaining universalizing element in the making of the idea of constitutionalism has the highest claim to cultural universality. There cannot be a major religion or any major philosophy which has not treated as a central focus of concern the question of the species-nature of the human species, the problems of human nature and the human condition. Human self-constituting in consciousness has necessarily included a never-ending effort to form a theory of the human self and the self of human society.

In its (human nature's) reality, it is possible to be good. This is what I mean by saying that it is good. If men do what is not good, it is not the fault of their natural powers.<sup>62</sup>

We are not spoken of as good or bad, in respect of our feelings but of our virtues and vices ... Again, what capacities we have, we have by nature; but it is not nature that makes us good or bad. So, if the virtues are neither feelings nor capacities, it remains that they must be dispositions.<sup>63</sup>

It was Aristotle, above all, who ensured that, for the following 23 centuries, the human mind would contain as a powerful and controversial presence the idea of the naturalness of human society's incorporation of the natural characteristics of human beings. The reason for this, no doubt, is that Aristotle, although himself a pupil of Plato's, did not derive such an idea as a deduction from any universal metaphysical system, but from a feature of his own personality – his own obsession with the nature of physical reality, especially in its biological aspects. It was an idea which was based on nature, not in the sense of ideal universal order, but in the sense of the order which we share with the rest of the living world and the rest of the material world, and hence an idea of nature which is inherently and potentially supra-cultural and supra-temporal. Moving in this different direction, he arrived at a view of the world which was as much a mind-made reality (of logic, categories, definitions, abstractions, essences, substances, potentiality, and dispositions) as Plato's. But it was a world-view which shared something with that of the contemporary Greek materialist philosophers and scientists and which, following the scientific revolution of our own era, anticipated that other mind-made reality, the reality of the modern natural sciences.

A contractual model of society was one of the social theories considered by Socrates and the other participants in the discussion in Plato's

*Republic*.<sup>64</sup> It was a primary purpose of that dialogue as a whole to show that such a model was wholly inadequate as a theory of human society. But Aristotle rejected the model on quite different grounds from those put forward by Socrates and Plato. Society is not an artificial construction, but a reflection of the species-characteristics of the human animal.

For what each thing is when fully developed, we call its nature, whether we are speaking of a man, a horse, or a family ... Hence it is evident that the state is a creation of nature, and that man is by nature a political animal.<sup>65</sup>

It is clear then that a state is not a mere society, having a common place, established for the prevention of crime and for the sake of exchange. These are conditions without which a state cannot exist; but all of them together do not constitute a state, which is a community of well-being in families and aggregations of families, for the sake of a perfect and self-sufficing life. Hence arise in cities family connections, brotherhoods, common sacrifices, amusements which draw men together. They are created by friendship, for friendship is the motive of society. The end is the good life, and these are the means towards it.<sup>66</sup>

Once again, by a quite different route, Aristotle has arrived at a position not wholly remote from Plato's: the idea of the ethical state. That idea, paradoxically, is a special form of contractual theory, a sort of natural social contract, if only in the sense that it postulates the naturalness of a society in which society-members share in the purpose of society, and in the acceptance of it, and hence in the implicit terms and conditions of their socializing.<sup>67</sup> It is this idea – of a naturally conditioned social order – which would provide the basis for the flourishing of the idea of constitutionalism in the modern world. But the idea of constitutionalism would be in permanent dialectical tension with another powerful idea which would also flourish in the modern world, and which has dominated the development of international society to the present day – the idea of society as an artificial construction constituted by its institutions and by the legally enforced distribution of social power, an idea which owes much to the experience of Rome.

Rome, in all its ceaseless constitutional change, was certainly not, and was not conceived of as, a natural society, let alone an ideal society.<sup>68</sup> It was precisely because of its artificiality that law played so great a part in its social self-conceiving.<sup>69</sup> In the absence of a written constitution, it was law (a cloudy mixture of *mos*, *ius*, and *lex*) which was used, and abused, to determine the distribution of ultimate social power. In Republican Rome (up to 27 BCE), a benevolent version of social theory sustained the idea that power was divided between the people and the Senate, with the Senate exercising a law-making authority which derived from the ultimate power of the people: *potestas in populo, auctoritas in senatu*.<sup>70</sup>

When, in the real constitution (with the coming-to-power of Octavian under the grandiose title of Augustus), all political power came to be concentrated in the hands of someone at first called “the Prince” (*princeps*, the prime member of the Senate), the old theory survived for a while, until the first citizen came to be, and to be seen as, an “emperor,” a monarch reminiscent of Egyptian and Persian traditions, uniting *potestas* and *auctoritas* in one person.

After the collapse of the Roman Empire in the West, the ideal self-constituting of the successor nations was filled with a passionate Roman-style dialectic about the distribution of ultimate legal power. At the highest level, the debate was conducted between the head of the Church of Rome (the Pope) and the Emperor of the Franks, who allowed himself to be crowned in Rome by a Pope (in the year 800) and whose successors, for a thousand years, were monarchs of a “Holy Roman Empire of the German People.” It was a debate which would have the most profound effects on the further development of the idea of constitutionalism. In the thirteenth century, this Roman tradition of constitutionalism entered into dialectical competition with a revived Aristotelian tradition, as we may call it. From that dialectic there would emerge a succession of new theories about the distribution of *potestas* (government by the people) and *auctoritas* (government of the people). It is a dialectic which must now be raised to the level of the problem of the power and authority of a new type of society – intergovernmental international societies – and the problem of power and authority in the society of all societies, international society.

### The naturally artificial<sup>71</sup>

In England, the medieval dialectic was resolved in a particular, not to say peculiar, way. Thomas Hobbes (1588–1679), geometer of the human psyche (as he might have been pleased to be called), proposed to make a theory of society, government, and law on the basis of deductions from realistic axioms about human nature and the human condition. In so doing, he respected one aspect of the Aristotelian tradition and rejected another. And, in so doing, he respected one aspect of the Roman tradition and rejected another. He accepted Aristotle’s biologism, but rejected the wishful thinking of his practical idealism. He accepted the sovereignty of positive law (*lex*), but rejected the anarchic tendency of *mos* and *ius*. From both traditions he rejected the speculative morass of medieval ideas of limited kingship (*la monarchie tempérée*) – contracts of government, coronation oaths, kings by election, by divine right, or by papal anointing, kings *sub Deo* and/or *sub lege*, kings subject to the *consilium* of leading

citizens, kings subject to customary law or the “ancient liberties of the people,” kings subject to the ultimate right of citizens to resist or overthrow tyranny. We post-Marxians may tend to see all such things as a “coating of deceit” (see note 70), the false consciousness manufactured by the intellectual acolytes of this or that form of entrenched or aspiring social power. For Hobbes, they were simply no basis on which to establish the sovereignty of law. That could only be based on conceptions which transcended all social institutions. He paid ambiguous respect to the ideas of divine order (the ambiguity leading to his being denounced as an atheist) and natural law (which he saw as the law of our biological nature rather than as a mystic communing of human reason with cosmic order). But the sovereignty of law can only be securely founded on consideration of the species-characteristics of the human species. Society is an artificial construction imposed by biological necessity, and law is sovereign because it is the voice of natural necessity.

To reject Aristotelian biologism and yet to believe in the naturalness of society requires an heroic effort of social metaphysics, an effort which we associate with the name, and the ramshackle social philosophy, of John Locke (1632–1704). A pre-societal natural legal system, the will of God, social teleology, natural human sociability, pre-societal constitutional sagacity, a constitutionally limited sovereign, sovereign law made and enforced by means of a confusion of separated legal powers, *potestas* restored to the people and *auctoritas* to the legislative assembly, the will of the representative majority, a remote right of popular resistance and revolt – the Lockeian constitutionalist cocktail contained something of everything and something for everybody. It was an ironical, almost comical, product of millenia of passionate theoretical and practical human social experience.<sup>72</sup> Locke’s syncretism managed to combine something taken from all four elements of the idea of constitutionalism as we have analysed it. God, the idea of law, natural law, natural social order – they were all present, albeit in a somewhat quixotic form.

The fact that such ideas arose within the ideal self-constituting of England seems to be attributable to, among other things, a particular social phenomenon – that the profession and the practice of the law acquired a status in medieval and post-medieval England which made it a countervailing social power in relation to the monarch and the royal court. The continental European phenomena of revived Roman law and feudalism took only a tenuous hold in medieval England.<sup>73</sup> A Roman obsession with the transcendental society-forming power of law (especially the *ius* of common law) provided a Roman-style illusion of constitutionalism, punctuated by occasional, more or less constitutional *leges*, including the legislative affirmations of the *Magna Carta* (1215). When sixteenth-century English monarchs sought to emulate the power and



splendour of continental European monarchs, the idea of law played a major part in the long struggle in the real-constitution to put an end to such ambitions. The fact, and not merely the idea, of law also played a role in the economic transformation which culminated in the development of capitalist society in England.<sup>74</sup>

### Three mythologies and a heresy

The pure theories sustaining the ideas of Representative Democracy and Laissez-faire Economics acquired charismatic power through their practical-theory application in many countries, helping to transform Old Regimes, as it was said, into New Regimes, in the name of an idea which was given the seductive title of Modernity.<sup>75</sup> At the same time, they became subject to intellectual fall-out from the force-field conventionally referred to as the eighteenth-century Enlightenment in western Europe, with profound consequences for the further evolution of the perennial and universal idea of constitutionalism. The idea of constitutionalism came to be confused with the idea of democracy.<sup>76</sup> “Modernity” (democracy and capitalism) came to be seen as the beginning of “the end of history.” International society was left irredeemably anomalous.

These developments led to a new kind of absolutism, the absolute power of society; not only the unlimited power of the public realm (through law and administration) over the everyday life of citizens, but the total power of society over consciousness. The new totalitarianism included the internalizing of the transcendental. Democracy and capitalism seem to contain their idea of themselves. They seem to be the cause and effect of their own values and purposes. Whatever remains of the transcendental (in religion or philosophy) is seen merely as a socially tolerated contingency. Constitutionalism, on the other hand, in the meaning proposed in the present chapter, depends on a separation between the social actual and the social ideal, the social actual being profoundly affected by the ideal which haunts it as judge of social actuality, mediator of social struggle, and attractive force of social progress, interceding between individual and social consciousness in the name of a form of order which transcends both, making the perennial and the universal of human existence into a permanent presence within the transient and the particular. Within the idea of constitutionalism, it is the function of the ideal to be other than the actual.

The de-transcendentalizing of the social order, in certain countries and over recent centuries, was reinforced by three intelligent but disturbing mythologies – naturalism, realism, pragmatism – which were by-products of the eighteenth-century Enlightenment. They have had powerful effects

on pure and practical social theory in those societies, but their most important effect is at the level of transcendental theory; that is to say, in relation to our understanding of the mental processes through which humanity makes and re-makes itself in consciousness, our idea of what we can say about ourselves.<sup>77</sup>

Naturalism – the Anglo-French ideology, as we may call it – is the idea that human phenomena can be assimilated to natural phenomena, and hence, *inter alia*, that appropriate investigation may discover their causes.<sup>78</sup> When this idea is added to the irreversible Marxian idea that socially significant ideas are socially constructed, and the Freudian idea that human consciousness is determined or conditioned by its unconscious vector, then humanity's relationship to its own mental products – including its conception of knowledge, values, ideals, the transcendental, and, not least, constitutionalism – is profoundly modified.

Realism – the German ideology, as we may call it – is the idea that an entity produced by human consciousness (an *ens rationis* – people, nation, state, race, market, public opinion) has characteristics analogous to those of entities in the natural world, including its own history, its own potentialities, and its own power over human consciousness.<sup>79</sup> Such an idea inevitably tends to disempower human consciousness in relation to its own products, alienating itself from itself and greatly complicating humanity's moral responsibility for those products.<sup>80</sup>

Pragmatism – the American ideology, as we may call it – is the idea that there is not, and cannot be, a hierarchy of ideas, with “higher-level” ideas determining the validity, or otherwise controlling the significance, of lower-level ideas.<sup>81</sup> The validity and significance of ideas can only be determined by the same process by which all socially significant ideas are created and controlled: through social interaction among the makers and users of ideas – even if, in the course of that process, some ideas are proposed and accepted as having a higher-level status (for example, constitutional values, intellectual objectivity, fairness, moral seriousness, and so on).<sup>82</sup> Such an unphilosophy or anti-philosophy undermines rather fundamentally the self-confidence of human consciousness in saying anything about itself.

These movements of thought may be characterized as mythologies because, like the pre-philosophical Olympian mythology of pre-classical Greece, they disempower while seeming to empower. They involve a primitive surrender to a fatality which is made by humans but is beyond human control – ancient Greek *moira* or Latin *fortuna* – the state, the market, consensus. In the twentieth century, they have been reinforced in their social effect by the rise of a new form of magic – science and engineering – whose world-changing power is a product of human consciousness, but whose effects are inescapable and incomprehensible to

most people. And they have been assisted by the self-disarming of much of professional philosophy, through those sets of ideas (logical positivism, phenomenology, analytical philosophy, neo-pragmatism) which seem to resign themselves to an idea of philosophy as nothing more than “talk about talk.”<sup>83</sup>

They have also been joined by an idea which has particular relevance to the significance of the idea of constitutionalism. That idea, which may be associated particularly with the name of Max Weber, suggests that the question of the legitimacy of social systems is a matter which can be rationally determined.<sup>84</sup> This is a heresy in relation to the orthodox belief systems of democracy and capitalism, which contain internal (non-transcendental) grounds of self-identifying and self-judging which function vigorously as *values* – their own totalitarian values – and not merely as rational models of social reality. In relation to the perennial and universal idea and ideal of constitutionalism, the self-justifying of a social system is a matter which is neither rationally determined from outside the system nor determined merely by reference to the internal values of the system.

### The generic principles of constitutionalism

It has been the purpose of this chapter to show that, given the perennial and universal character of the idea and ideal of constitutionalism, it is available to *social philosophy* as a way of understanding the self-constituting of those societies which are intergovernmental international organizations, and hence that it is available to form part of the self-creating *theory* of the self-constituting of actual intergovernmental organizations within the self-constituting of the society of the whole human race.

The survey of the genetics and the genealogy of the idea and ideal of constitutionalism contained in this chapter has also sought to identify constitutionalism conceptually as something which is seen, from the point of view of a given society, as transcending the self-creating of that society, but which acts as an immanent force within its own ideal self-constituting. This chapter has suggested that the idea might be specified conceptually in relation to other foundational ideas and ideals of social self-constituting: as something less than the will of God and more than the general will, something more than the rule of law and less than natural law. It remains to specify the structural-systematic implications of constitutionalism as it forms part of the theory of a society – to postulate its social-genetic programme, its inherent social reality-forming potentiality.

The logical structure of the idea is also a structural metaphysics of the

societies in whose theories it is present. Those theories, as the theories of actual societies, not only condition the given society's understanding of its own self-constituting; they also influence the most general organization of the social structures and systems which distribute and regulate all forms of social power and, in particular, the social power which takes the form of law. We may distil the logical-metaphysical implications of the perennial and universal idea and ideal of constitutionalism into a set of *generic principles*:<sup>85</sup>

- Principle of *integration*. Law is an integral part of the total social process of a society, inseparable from the rest of the society's self-constituting.
- Principle of *transformation*. Law is dynamic, not a thing but a process of ceaseless social self-transforming.
- Principle of *delegation*. All legal power is power delegated by society. To claim to exercise legal power is to acknowledge the source of that power.
- Principle of *the intrinsic limitation of power*. All legal power is limited by the terms of its delegation by society.
- Principle of *the supremacy of law*. All social power is under the law, since the function of law is to transform social power into the particular form of law.
- Principle of *the supremacy of the social interest*. All legal power is power delegated by society in the social interest, and hence is to be exercised to serve the social interest.
- Principle of *social responsibility*. The exercise of all social power, including legal power, is accountable to society, which conferred the power.

In the application of each of these principles to intergovernmental organizations, the superordinate society in question is the international society of the whole human race, the society of all societies. By incorporating such principles in their ideal self-constituting, and by actualizing them in their real and legal self-constituting, intergovernmental organizations will participate in a perennial and universal tradition of human social self-constituting, a tradition which may at last find its natural fulfilment at the level of the society of all-humanity.

### The constitutionalizing of intergovernmental societies: *captor-captus*<sup>86</sup>

Since intergovernmental organizations are international *societies*, they are constituted in the manner of the self-constituting of all societies. Because they are *intergovernmental* societies, they cannot escape the potentiality of the universal and perennial idea and ideal of constitu-

tionalism. To claim to act as a government is to claim to exercise public-realm social power; that is to say, power which is delegated by society to be exercised in the public interest. To claim to exercise public-realm power is to acknowledge the theoretical conditions which are inherent in that power, the conditions which the ideal constitution of the given society imposes in conferring such power – conditions which are contained in that society's theories of its self-constituting, including conditions for justifying all public-realm power and conditions concerning the determination of the public interest. Constitutionalism may be an actual theory, and is always a potential theory, of the ideal self-constituting of any society.

When a government exercises public-realm power externally, in relation to other governments, including in the forming of intergovernmental societies, it carries with it the constitutional conditions on the exercising of that power. To act as a government externally, on behalf of a given society, is to claim to act as the holder of public-realm powers which have been conferred in the self-constituting of that society.

The coming-to-consciousness in international society of the idea and ideal of constitutionalism is thus a reintegration of the theoretical coherence of an aspect of the exercising of public-realm power by governments, the removal of a self-contradiction in the case of those societies which acknowledge constitutionalism within their own theories, and a self-redeeming act in the case of other societies. Needless to say, in either case there are obstacles in the way of a self-reconceiving of intergovernmental societies at the beginning of the twenty-first century. Intergovernmental societies have existed, throughout the twentieth century, in a primitive, old-regime international society, theoretically isolated from national constitutional systems; a sort of constitutional wasteland or empty quarter. They have allowed the controllers of the national public realms to act in relation to each other like unconstitutional monarchs, exercising a combined monarchy limited only by the systematic conditions which they themselves have accepted. In intergovernmental societies in their present form, *auctoritas* and *potestas* are fused; a self-conferred and self-regulated power which is subject to the *consilium* of other social actors, including the people and the peoples of the world and their non-governmental representatives, to a degree varying from small to negligible.

As more and more of the responsibility of the national public realms is exteriorized and communalized in what we may call *international inter-government*, the more urgent becomes the problem of its theoretical justification, in terms of the ideals not merely of this or that subordinate culture, however dominant in the actual self-constituting of international society, but in relation to all the cultures which participate in international society.

For those who look to a new kind of future for international inter-government within a new kind of international society – the society of all-humanity – the necessary theoretical revolution must proceed from the starting point of the perennial and universal idea of constitutionalism, which this chapter has attempted to outline. This is an idea inherently and necessarily suited to be an idea and an ideal within the ideal self-constituting of international society. The actual form which a theory of constitutionalism will take, within the actual development of international society hereafter, is something which will be determined dialectically in the total social process of the self-constituting, ideal and real and legal, of the international society of the twenty-first century.

## Notes

1. For the concept of a society's *theory*, see Allott, P., 1990. *Eunomia. New Order for a New World*. Oxford: Oxford University Press, esp. para. 2.45ff.  
 "... as force is always on the side of the governed, the governors have nothing to support them but opinion. It is therefore, on opinion only that government is founded." Hume, D., 1907. "Of the First Principles of Government," in Hume, D. (Green, T. H. and Grose, T. H. (eds)), *Essays Moral, Political, and Literary* I (IV). London: Longmans, Green, 110.  
 "For a society is not made up merely of the mass of individuals who compose it, the ground which they occupy, the things which they use and the movements which they perform, but above all is the idea which it forms of itself." Durkheim, E., 1912. *The Elementary Forms of the Religious Life* (trans. Swain, J. W.). London: George Allen & Unwin, 422.
2. For the concepts of pure theory and practical theory, see Allott, P., *Eunomia* (see note 1, above), para. 2.52ff. The distinction is related to Aristotle's distinction between speculative reason and practical reason (*Politics*, VII (14)) or, as he puts it in bk. I.vii of the *Nicomachean Ethics*, the difference between the thinking of the geometer and the thinking of the carpenter. In Eunomian terms, *practical* theory consists of the ideas which are present in actual social behaviour (ideas as practice), and *pure* theory is the theory of practical theory (ideas about ideas). *Transcendental* theory is a society's epistemology, its understanding of the source of truth and value, its theory of theory. All three forms of theory are actualized as particular social phenomena in particular societies.
3. For the three dimensions of a society's self-constituting, see Allott, P., *Eunomia* (see note 1, above), para. 9.6ff. A society constitutes itself ideally in the form of ideas, really through the day-to-day exercise of social power by society members, and legally in the form of law. "[T]he real constitution (*wirkliche Verfassung*) of a country exists only in the true actual power-relations which are present in the country; written constitutions thus only have worth and durability if they are an exact expression of the real power-relations in the society." Lassalle, F., 1863. "On the Nature of the Constitution," in Bernstein, E. (ed.), 1919. *Gesammelte Reden und Schriften* (II). Berlin: P. Cassirer, 60 (present author's translation). Lassalle, a follower of Hegel and, less faithfully, of Marx, and the founder of the General Union of German Workers (the first political party of the working class), contrasted the real constitution with the written (or legal) constitu-

tion, the former but not the latter (in the Germany of the 1860s) being the expression of the real power of nobles, great landowners, industrialists, bankers, and major capitalists.

In the Eunomian framework, the other forms of social self-constituting do not merely express the state of the real constitution. All three forms develop in dialectical relation to each other. The constitution is a permanent process, not a thing. "The laws reach but a very little way. Constitute Government how you please, infinitely the greater part of it must depend upon the exercise of powers which are left at large to the prudence and uprightness of Ministers of State . . . Without them, your Commonwealth is no better than a scheme on paper; and not a living, active, effective constitution." Burke, E., 1770. *Thoughts on the Cause of our Present Discontents*, in Langford, P. (ed.), 1981. *The Writings and Speeches of Edmund Burke* (II). Oxford: Clarendon Press, 277.

4. For the concept of social consciousness (public mind), see Allott, P., *Eunomia* (see note 1, above), para. 2.42ff.
5. For these five perennial dilemmas of a society's self-creating – that is to say, oppositions which a society resolves dialectically – see Allott, P., *Eunomia* (see note 1, above), para. 4.10ff. On dialectical thinking, see note 11, below.
6. See note 2, above.
7. See note 3, above.
8. The Aristotelian echo is intended here also. Aristotle, bringing to philosophy the mind of the biologist, universalized the wonderful mystery of organic life that is the negating of a present state of development by something which is, however, contained in the present state.
9. For further discussion of this, see Allott, P., 1997. "Kant or Won't? Theory and Moral Responsibility." *Review of International Studies* 23: 339–357.
10. For the concept of society, see Allott, P., *Eunomia* (see note 1, above), chapter 1. Society is the collective self-constituting of human beings for their survival and prosperity. The Eunomian concept of society is related to Aristotle's conception of *koinonia* (variously translated as community, association, or partnership): "Every state [*polis*] is a community [*koinonia*] of some kind, and every community is established with a view to some good; for mankind always act in order to obtain that which they think good." Aristotle, 1905. *The Politics*, bk. I.1 (trans. Jowett, B.). Oxford: Clarendon Press, 25.  
 Aristotle links the idea with the idea of friendship: "... friendship [*philia*] appears to be the bond of the state ..." and "... friendship is essentially a partnership [*koinonia*]." Aristotle, 1926. *Nicomachean Ethics*, bk. viii.1; bk. ix.12 (trans. Rackham, H.). Cambridge, Mass.: Harvard University Press, 453, 573.
11. Hegel's dialectical logic, which has a place on the human intellectual genome close to the dynamic epistemology of Socrates/Plato and the metaphysical biologism of Aristotle, resolves dissonances at all epistemic levels into something which "apprehends the unity of terms (propositions) in their opposition – the affirmative which is involved in their disintegration and in their transition." Hegel, G. W. F., 1973/1975. *Hegel's Logic* (Part One of the *Encyclopaedia of the Philosophical Sciences*) (trans. Wallace, W.). Oxford: Clarendon Press, 119. For Hegel, dialectic is "the very nature and essence of everything predicated by mere understanding" (116).
12. Fustel de Coulanges, N. D., 1980. *The Ancient City. A Study on the Religion, Laws, and Institutions of Greece and Rome*. Baltimore and London: The Johns Hopkins University Press, 178. Compare this to James Frazer's assertion: "... society has been built and cemented to a great extent on a foundation of religion, and it is impossible to loosen the cement and shake the foundation without endangering the superstructure." Frazer, J. G., 1913. *The Belief in Immortality and the Worship of the Dead* (I). London: Macmillan, 4. Many of Fustel's main contentions have been disputed by classicists and anthropologists, but his book can still be read with pleasure and profit as a lively intellectual catalyst.

13. Fustel de Coulanges, N. D., *The Ancient City* (see note 12, above), 182.
  14. Whitehead, A. N., 1926. *Religion in the Making*. Cambridge: Cambridge University Press, 16.
  15. Freud, S., 1927/1985. *The Future of an Illusion*. The Pelican Freud Library 12. London: Penguin Books, 198.
  16. Durkheim, E., *The Elementary Forms of the Religious Life*, 423.
  17. Dodds, E. R., 1951. *The Greeks and the Irrational*. Berkeley: University of California Press, 104. Dodds cites, as sources of this idea, Harrison, Rivers, Lévy-Bruhl, and Kluckhohn (122, footnote 5).
  18. Doutré, E., quoted and discussed in Murray, G., 1935. *Five Stages of Greek Religion*. London: Watts and Co., 26ff.
  19. "I believe that it is the very thing which among other peoples is an object of reproach, I mean superstition, which maintains the cohesion of the Roman state ... My own opinion at least is that they have adopted this course for the sake of the common people." Polybius, 1923. *Histories*, VI.56 (trans. Paton, W. R.). London: William Heinemann: Loeb Classical Library, 395.
  20. "It is not wholly fanciful to suggest that ... Calvin did for the *bourgeoisie* of the sixteenth century what Marx did for the proletariat of the nineteenth ... [He] taught them to feel that they were a chosen people, made them conscious of their great destiny in the Providential plan and resolute to realize it." Tawney, R. H., 1926. *Religion and the Rise of Capitalism. A Historical Study*. London: John Murray, 111–112.
  21. This definition takes up the idea that belief is not merely a primitive or degenerate epistemic form, but is rather another way of knowing and being. "Our word 'credo' is, sound for sound, the Vedic *ṛaddhā*, and *ṛaddhā* means 'to set one's heart on.' ... Man, say the wise Upanishads, is altogether desire (*kāma*): as is his desire so is his insight (*kratu*), as is his insight so is his deed (*karma*)." Harrison, J., 1963. *Themis. A Study of the Social Origins of Greek Religion*. London: Merlin Press, 83. Harrison is apparently referring to a passage in the *Bṛihad Āraṇyaka* which continues as follows: "Where one's mind is attached – the inner self goes thereto with action, being attached to it alone." Embree, A. T. (ed.), 1966. *The Hindu Tradition*. New York: Vintage Books, 63.
  22. Whether or not its physical remains reflect the true nature of ancient Egyptian society as a whole, that society seems to have been the limiting case of a complex theocratic society, with the pharaoh-king being appointed by the Sun God, himself a living god.
  23. The ancient Vedic religion of India is entitled to be regarded as the limiting case of religion, the *summa* of all religions, integrating universalist theology, philosophy, social theory, and law within a structure of ideas which links the making and nature of the universe to the ordering of everyday life. It is a necessary implication of such a religion that "the Lord of Heaven" is also "the King of Earthly Kings." *Athava Veda* (Embree, A. T. (ed.), *The Hindu Tradition* (see note 21, above), 44).
  24. "By me kings reign and princes decree justice." *Proverbs*, viii. 15.
  25. Even Hammurabi (autocratic Babylonian king of a forcibly unified Mesopotamia, 1792–1750 BCE) prefaced his law-code with the words: "When Marduk [chief of the gods] commanded me to give justice to the people of the land and to let (them) have (good) governance, I set forth truth and justice throughout the land (and) prospered the people." Driver, G. R. and Miles, J. C., 1952. *The Babylonian Laws* (II). Oxford: Clarendon Press, 13.
- "In no other antique society did religion occupy such a prominent position ... The fact that the Sumerian society crystallized around temples had deep and lasting consequences. In theory, for instance, the land never ceased to belong to the gods, and the mighty Assyrian monarchs whose empire extended from the Nile to the Caspian Sea were the humble servants of their god Assur, just as the governors of Lagash, who ruled



- over a few square miles of Sumer, were those of their god Ningirsu.” Roux, G., 1964. *Ancient Iraq*. London: George Allen and Unwin, 85–86. According to Roux, the “Sumerian model” dominated Assyro-Babylonian civilization of the second and first millennia BCE (after the disappearance of the separate kingdom of Sumer, and other subordinate polities, in about 2000 BCE).
26. “The implications of the phrase *T’ien-tzu* [Son of Heaven] have exercised a profound effect on the Chinese concept of sovereignty. In so far as he is regarded as Heaven’s descendant, a sovereign is responsible for the conduct of the worship of *T’ien* [Heaven], just as every dutiful son attends to the placation of his deceased ancestors’ souls.” Loewe, M., 1966. *Imperial China. The Historical Background to the Modern Age*. London: George Allen and Unwin, 74. Loewe is here speaking of the pre-imperial age (before 221 BCE) and, indeed, the time before Confucius (551–479 BCE).  
See, further, Keighley, D. N. (ed.), 1983. *The Origins of Chinese Civilization*. Berkeley: University of California Press.
  27. “Now in the contest between city and tribe, the Olympian gods had one great negative advantage. They were not tribal or local, and all other gods were. They were by this time international . . . They were ready to be made ‘Poliouchoi’, ‘City-holders’, of any particular city, still more the ‘Hellânioi’, patrons of all Hellas [Greece].” Murray, G., *Five Stages of Greek Religion* (see note 18, above), 67. The original religions of Greece had included a familiar mixture of myth, magic, taboo, and ritual on the pattern of the early stages of the development of religion generally. The propagation by Homer and Hesiod (before the seventh century BCE) of the Olympian gods, under the chief god Zeus but themselves ruled by super-divine powers of fate and necessity, also prepared the way for the philosophy-religion initiated in fifth-century Athens. See Kitto, H. D. F., 1951. *The Greeks*. Harmondsworth: Penguin Books, 196ff.
  28. The part played by religion in the social consciousness of Rome is difficult to determine. It manifested itself in pious beliefs and rituals at the level of individual households, in public ceremonies of a superstitious character but of dubious sincerity, and in the literary and rhetorical rehearsing of parts of the Greek Olympian mythology. It seems that law rather than religion was the “cement” (see note 12, above) of Roman society from the first days of the monarchy to the last days of the Empire.
  29. James Frazer’s *The Golden Bough. A Study in Magic and Religion* (1890/1900) and his *Lectures on the Early History of the Kingship* (1905) bring together very many historical and legendary examples and aspects of the religion of kingship. Of the first Christian Roman Emperor (306–337 AD), it was said (tendentiously): “The God of all, the supreme governor of the whole universe, by His own will appointed Constantine . . . to be prince and sovereign . . . he is unique as the one man to whose elevation no mortal may boast of having contributed.” Eusebius, quoted in Cochrane, C. N., 1940. *Christianity and Classical Culture. A Study in Thought and Action from Augustus to Augustine*. London: Oxford University Press, 186. For the post-medieval survival of such ideas, see Figgis, J. N., 1922. *The Divine Right of Kings*. Cambridge: Cambridge University Press.
  30. See note 12, above.
  31. This more or less metaphorical echo of the concept of the “category” found in the Aristotelian and Kantian philosophies is intended to share in their idea that the mind cooperates with the non-mind in forming reality, by imposing its own patterns on the phenomena produced by the non-mind.
  32. See note 3, above.
  33. For a discussion of the status of the Laws of Hammurabi, see Driver, G. R. and Miles, J. C., *The Babylonian Laws* (I) (see note 25, above), 48ff. “. . . whatever the Laws are, they are not a code in the modern sense of the term; they may rather be compared with the English ‘Statutes of the Realm’. They do not wholly take the place of existing law but

are a series of amendments to that law, much in the same way as English statutes amend the common law and sometimes codify it in part.”

It is remarkable how, in the politics of Mesopotamia, the cradle of urban civilization, so many of the characteristics and problems of national and international social life in the following three millennia were pre-figured. See, generally, Maisels, C. K., 1990. *The Emergence of Civilization. From Hunting and Gathering to Agriculture, Cities, and the State in the Near East*. London: Routledge, esp. chapters 7–10. See also Postgate, J. N., 1992. *Early Mesopotamia – Society and Economy at the Dawn of History*. London: Routledge.

34. “In the past kings sought to make the people progress in Righteousness but they did not progress . . . Thus I have decided to have them instructed in Righteousness, and to issue ordinances of Righteousness, so that by hearing them the people might conform, advance in the progress of Righteousness, and themselves make great progress.” From the Seventh Pillar Edict of King Ashoka (c. 269–232 BCE), in Embree, A. T. (ed.), *The Hindu Tradition* (see note 21, above), 116. In his decrees, Ashoka added a Buddhist overtone to the ancient and beautiful Vedic idea of the moral order of the universe (*dharma*), of which law, unlegislated and legislated, and the moral conscience of human individuals are particular manifestations.
35. Aristotle surveys a large number of Greek lawgivers in *Politics* (II.12), and describes Solon’s laws at length in his *Athenian Constitution*. Athens did not have a written constitution, but it had much constitutional law. The laws of Solon (c. 640–548 BCE) contained a mixture of what would currently be called constitutional law and social legislation, proposing a new – and, as it turned out, not very successful – Athenian social contract.
36. The law-commissioners of the emperor Justinian (c. 482–565) had to bring order to a thousand years of intense but disorderly legal experience. “Instead of a statue cast in a simple mould by the hand of an artist, the works of Justinian represent a tessellated pavement of antique and costly, but too often incoherent fragments.” Gibbon, E., 1994. *The History of the Decline and Fall of the Roman Empire* (IV, chapter XLIV). London: The Penguin Press, 799.
37. On Confucius, “a creator through being a transmitter,” see Fung Yu-lan, 1937/1952. *A History of Chinese Philosophy* (I) (trans. Bodde, D.). Princeton: Princeton University Press, 62ff. On the central concept of *li* (socially accumulated rules of human conduct), see *ibid.*, 66ff.  
On the effect of *li* as a socializing and civilizing force, and on its long-term influence on Chinese society, see Loewe, M., *Imperial China* (see note 26, above), 95ff.
38. “And when there is good order in the empire, the people do not even discuss it.” Confucius, in Fung Yu-lan, *A History of Chinese Philosophy* (see note 37, above), 59.
39. Two centuries later, in another period of social disorder, an authoritarian reading of Confucius was given by the legalist or legist school, emphasizing authority, statecraft, and the sovereignty of law. Fung Yu-lan, *A History of Chinese Philosophy* (see note 37, above), 312ff; Loewe, M., *Imperial China* (see note 26, above), 78ff.
40. “*Creon*. And yet you dared, then, to defy the law? *Antigone*. It was not God that gave me such commandments./ Nor Justice, consort of the Lords of Death./ That ever laid on men such laws as these./ Nor did I hold that in your human edicts/ Lay power to override the laws of God,/ Unwritten yet unshaken – laws that live/ Not from to-day, nor yet from yesterday./ But always – though none knows how first made known.” Sophocles, 1968. *Antigone* (trans. Lucas, F. L.). New York: The Viking Press, 141, lines 449–457.
41. “As it is, you will leave this place, when you do, as the victim of a wrong not done by us, the laws, but by your fellow men.” Plato, 1961. *Crito* (trans. Tredennick, H.), in *The Collected Dialogues of Plato*. Princeton: Princeton University Press, 39. The dialogue

recreates a conversation with Socrates (c. 469–399 BCE) while he was in prison, following the judgement of an Athenian people's court which had sentenced him to death. Socrates imagines "the laws" telling him why he must respect them, rather than seek to escape from prison and evade his punishment.

42. "And the rule of law is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law." Aristotle, *Politics*, III.16.3–4, 139. "He who bids the law rule, may be deemed to bid God and Reason alone rule." Ibid., III.16.5, 140.
43. "The Romans believed that they were a conservative people, devoted to the worship of law and order. The advocates of change therefore appealed, not to reform or progress, not to abstract right and abstract justice, but to something called *mos maiorum*. This was not a code of constitutional law, but a vague and emotional concept. It was therefore a subject of partisan interpretation, of debate and of fraud; almost any plea could triumph by an appeal to custom or tradition." Syme, R., 1939. *The Roman Revolution*. Oxford: Oxford University Press, 153.  
Cicero took the Burkeian evolutionary view of the Roman constitution: "Now we have further proof of the accuracy of Cato's statement that the foundation of our State (*constitutionem rei publicae*) was the work neither of one period nor of one man." Cicero, 1928. *De re publica*, II.xx.37 (trans. Keyes, C. W.). Cambridge: Harvard University Press: Loeb Classical Library, 145.
44. Other languages reflect the Roman distinction by having separate words for *ius* and *lex*. They then create a new confusion by using the former word also to refer to "a right," in the sense of a particular legal relation. "Human rights" might have been more effective if they had been known as "human law" (*ius humani generis*). The ancient Greeks did not have a conception corresponding to the Roman *ius*. See McIlwain, C. H., 1940. *Constitutionalism Ancient and Modern*. Ithaca: Cornell University Press, 19.  
On the absence of an idea of *ius* in the perennial Chinese legal tradition, see Escarra, J., 1936. *Le droit Chinois*. Pékin: Editions H. Vetch; Paris: Recueil Sirey, 70ff. According to Escarra, the Chinese did not develop an abstract conception of positive law, since the law was subordinate to socially determined morality and to *li*, and was seen as both transcendental (reflecting the nature of the universe and of society) and casuistic (concerned with the uniqueness of each law-violating situation).
45. "Moment" in the Hegelian sense (Hegel, G. W. F., *Hegel's Logic* (see note 11, above), 113); not a moment in time (*der Moment*) but, in a sense borrowed from mechanics, a turning-point (*das Moment*) in the development of a thought-process.
46. The dating of Taoism is not straightforward. The source-book (the *Tao te ching*), if it is itself of the fourth century BCE, may have been a compilation of thought going back at least to the time of Confucius. See Hughes, E. R. (ed. and trans.), 1942. *Chinese Philosophy in Classical Times*. London: Dent and Sons: Everyman Library, 144. But see also, Fung Yu-lan, *A History of Chinese Philosophy* (see note 37, above), 170ff.
47. The Buddha's illumination occurred in c. 525. We may say that with Buddhism, the first world-religion, the potentiality of a supra-national and supra-cultural human consciousness was revealed. The spread of Greek metaphysical philosophy beyond Greece may be seen as a further step in that process.
48. Pythagoras (c. 570–480), Parmenides (c. 515–440), Socrates (469–399). For contemporaneous Chinese thought on the problem of knowledge (so central a problem for these Greek philosophers), see Hughes, E. R. (ed.), *Chinese Philosophy in Classical Times* (see note 46, above), 119ff. For contemporaneous thinking in the Hindu tradition on the self-redeeming of the mind, see Embree, A. T. (ed.), *The Hindu Tradition* (see note 21, above), 180ff.

49. Given the relentlessly dialectical character of collective human thought (see note 11, above), it is no surprise that each of these ideas was itself a surpassing of more ancient ideas.
50. Buddhists insist on the radical difference between what they see as the two-reality (phenomena-noumena) view of Western idealism and the seamless reality which is both the focus and the process of "enlightenment." Sangharakshita, 1957/1987. *A Survey of Buddhism, its Doctrines and Methods Through the Ages*. London: Tharpa Publications, 118ff. This work discusses the extraordinary complexity of the idea of *dharma*. However, the Plato of the *Republic* was certainly not a dualist (still less Spinoza or Hegel), even if the British empiricists and Kant may have been. The shadows on the wall of the dark cave (*Republic*, bk. vii) represent an illusionary reality, to be dissipated by something which is seen as a form of enlightenment, even if it is very different from the Buddhist form.
51. Nestle, W., 1940/1942. *Vom Mythos zum Logos*. Stuttgart: Alfred Kröner Verlag. Nestle presents it as a dramatic struggle in ancient Greece, a struggle which reason never finally won. Among the rationalist avant-garde, Hecataeus found mythology "funny." Heraclitus said that praying to a god's image was like speaking to a house instead of to its owner. Xenophanes said that, if an ox could paint a picture, its god would look like an ox. Herodotus (sixth century BCE), the first of a new kind of historian, spoke of the Hellenic race emancipating itself from "silly nonsense." References in Dodds, E. R., *The Greeks and the Irrational* (see note 17, above), 179ff; Murray, G., *Five Stages of Greek Religion* (see note 18, above), 39.  
 Thucydides (fifth century BCE) would in turn accuse Herodotus of being still the captive of myth, thereby initiating the great and continuing debate about the nature and function of historiography. See Allott, P., 1999. "International Law and the Idea of History." *Journal of the History of International Law* 1: 1–21.
52. Harrison, J., *Themis* (see note 21, above), 445ff. Subsequent religious history is the history of much travel in both directions. Christianity, a hellenized form of Judaic monotheism socialized under a Romanized legal-administrative system, made its central belief the incarnation of the *logos* (God made man), the demonstration (epiphany) of what human reality would be, if the ideal potential reality were simply and fully actualized as the ideal of everyday personal and social life.
53. The Greek myths, like the myths of so many other countries, remained as a permanent and substantial presence in Western consciousness, at least until very recent times. Aristotle said, in a private letter, "the more time I spend on my own, the fonder I have become of myths." Finley, M. I. (ed.), 1984. *The Legacy of Greece, A New Appraisal*. Oxford: Oxford University Press, 322.
54. For the complex and changing significance of the noun *dike* (justice), see Lloyd-Jones, H., 1971. *The Justice of Zeus*. Berkeley: University of California Press, 166–7, footnote 23.
55. Ehrenberg, V., 1967. *From Solon to Socrates. Greek History During the Sixth and Fifth Centuries B.C.* London: Methuen, 61.
56. For Cicero's unRoman tribute to philosophy – "The guide of our lives, the explorer of all that is good in us, exterminator of all evil! Had it not been for your guidance . . . what, indeed, would have become of all human life? . . . Inventor of laws, teacher of morals, creator of order!" – see Cicero, 1971. *The Discussions at Tusculum* (trans. Grant, M.). London: Penguin Books, 54ff.
57. See note 44, above.
58. It followed that all human beings belong to a universal society (*kosmopolis*). In the words of the Roman emperor who was also a Stoic philosopher, Marcus Aurelius (121–

- 180), writing in Greek: “If the intellectual capacity is common to us all, common too is the reason [*logos*], which makes us rational creatures. If so, that reason also is common which tells us to do or not to do. If so, law [*nomos*] also is common. If so, we are citizens [*politai*]. If so, we are fellow-members of an organised community. If so, the Universe [*kosmos*] is as it were a state [*polis*].” Aurelius, 1916. *Meditations*, IV.4 (ed. and trans. Haines, C. R.). Cambridge: Harvard University Press: Loeb Classical Library, 71. Augustine of Hippo (354–430) spoke of “mine own kind . . . mankind” (*Confessions*, II.iii.5). Alexander (356–323 BCE), the Macedonian warrior-king, had adopted *homo-noia* (unity of consciousness) as an ideal of his intensely heterogeneous empire in Greece, Egypt, Persia, and Babylon. A source of Stoic cosmopolitanism is in a saying attributed to Socrates and recounted by, among others, Cicero in *The Discussions at Tusculum*, V. 37.108 (see note 56, above), 109. When asked which city or state (*civitas*) he belonged to, Socrates said that he was “a citizen of the world” (*mundanus*, one of the many Latin words which Cicero invented or reinvented to express Greek ideas, in this case the idea of the *kosmopolites*).
59. Cicero, *De re publica*, III.xxii.33, 211. “. . . but out of all the materials of the philosophers’ discussions, surely there comes nothing more valuable than the full realization that we are born for Justice, and that right is based, not upon men’s opinions, but upon Nature.” “Now all men have received reason; therefore all men have received Justice.” Cicero, 1928. *De legibus*, I.x.28, I.xi.33 (trans. Keyes, C. W.). Cambridge: Harvard University Press: Loeb Classical Library, 329, 333. Cicero (106–43 BCE) – practising lawyer, politician, philosopher, polemicist – who had received part of his education from a Stoic teacher, thus managed to bring together various leading aspects of the Greek philosophical inheritance.
  60. The first hellenizing was the work of neo-Platonism, of the early Church Councils, and of Clement, Origen, and, especially, Augustine of Hippo. Mohammedanism may be seen as a reformation (eighth century) restoring obedience to the will of God as revealed to and by the Prophet and as recorded in the holy book of the Koran. The Christian Reformation (fourteenth–sixteenth century) also sought, among other things, to restore Christianity as the unmediated word of God revealed in the holy book of the Bible.
  61. In the meantime, natural law had been incorporated formally into the rationalizing and codifying of Roman law (including the codes of Justinian; see note 36, above). Gradually, *ius naturale* took on the character of *lex naturae*, expounded with ever more substantive content, to become, in Aquinas and his followers, a sort of positive law of higher morality. On the medieval development of natural law, see Ullmann, W., 1961. *Principles of Government and Politics in the Middle Ages*. London: Methuen, 237ff.
  62. Mencius (Meng Tzū, c. 371–289), quoted in Fung Yu-lan, *A History of Chinese Philosophy* (see note 37, above), 121. The philosophy associated with the name of Mencius is remarkable in its concern with the connection between individual and social morality which was also a central concern of Plato and Aristotle. For the Heraclitan/Aristotelian naturalism of the so-called Yin-yang school of Chinese philosophy, see *ibid.*, 159ff.
  63. Aristotle, 1953. *Nicomachean Ethics*, II.5 (trans. Thomson, J. A. K.). Harmondsworth: Penguin Books, 63.
  64. Theory supported in the discussion by Glaucon: *Republic*, II, 357–367.
  65. Aristotle, *Politics*, I.2, 28.
  66. *Ibid.*, III.9, 119–20.
  67. Ancient Chinese ideas of the king as “son of heaven” and the duty of ancient Indian kings to respect the higher Vedic law meant that the theory of their power was a theory of a sort of metaphysical contract of government.
  68. Greece and Rome are the Yin and Yang of a certain period of history, as, at other

times, were Greece and Persia, India and China, the Roman Church and the Holy Roman Empire, and the United States and the Soviet Union. The self-admiring self-consciousness of fifth and fourth century Greece was itself a transient epiphenomenon rising above chaotic social events; but the charismatic image of Greece, reinforced by the world-dominating success of Alexander the Great, haunted Roman self-consciousness, which was obliged to create a story of its own identity (*Romanam condere gentem*, as Virgil said – to construct the Roman race). This included an account of Roman history (Livy) which made it at least as remarkable as Greek history and also a legend of the origin of Rome (Virgil's *Aeneid*) in the coming to Italy of one of the Trojan warriors (Aeneas) who had defeated Greece (as told in Homer's *Iliad*).

69. Greece and Rome are also an example of what we may call the *captor-captus* phenomenon, which has occurred on many occasions, where a conqueror is conquered by the culture of the conquered – Greece/Rome, Roman Empire/Roman Church, Roman Empire/the barbarian nations of northern Europe, Norman/English. Perhaps the modern European colonial empires were destroyed by an idea (self-determination) which they introduced to the colonized peoples.

The origin of the *captor-captus* (the captor captured) metaphor is in the Roman poet Horace (65–8 BCE), *Epistles*, II.1, lines 156–157: “*Graecia capta ferum victorem cepit et artes/ Intulit agresti Latio*.” (“Captive Greece took captive her fierce conqueror, and introduced her arts into rude Latium [the Latin name for the area of Italy which includes Rome].”)

70. “Supreme power in the people ... actual authority in the Senate.” Cicero, *De legibus*, III.xii.28, 493. In fact, social theory and social reality were always somewhat distant from each other in Rome; fictions and self-serving fantasy served their perennial function of marrying the reality of power to its theory, the real constitution to the ideal constitution. See McIlwain, C. H., 1932. *The Growth of Political Thought in the West. From the Greeks to the End of the Middle Ages*. New York: The Macmillan Company, 132ff.
- See also Syme, R., *The Roman Revolution* (see note 43, above), 152ff. “The realities of Roman politics were overlaid with a double coating of deceit, democratic and aristocratic.” “Nobody ever sought power for himself and the enslavement of others without invoking *libertas* and such fair names.” “Fair names” is borrowed from the Roman historian Tacitus (c. 55–120): *speciosa nomina*.
71. There follows an interpretation of historical phenomena of baffling complexity over which turbulent oceans of speculative ink have flowed.
72. The third naturalist-metaphysical theory (Jean-Jacques Rousseau, 1712–1778) showed no less conceptual ingenuity, fusing power and authority in the idea of the general will, and adding a daring echo of Platonic idealism, in the idea that society so constituted must be seen, and can only be justified, as an instrument of human enlightenment and self-perfecting.
73. The Norman-French invasion (1066) modified but did not displace the existing customary law system, its main effect being a partial feudalizing of land law. See Barlow, F., 1955/1961. *The Feudal Kingdom of England 1042–1216*. London: Longmans, chapter 1. McIlwain (see note 44, above) calls it “the riddle of our medieval constitution” – was the English monarchy absolutist or constitutionalist? He says that the first use of the English word “constitution” in the modern sense was in 1610 (27).
74. “The first country in modern times to reach a high level of capitalistic development, i.e., England, thus preserved a less rational and less bureaucratic legal system. That capitalism could nevertheless make its way so well in England was largely because the court system and trial procedure amounted until well into the modern age to a denial of justice to the economically weaker groups.” Weber, M., in Shils, E. and Rheinstein, M.

- (eds), 1954. *Max Weber on Law in Economy and Society*. Cambridge: Harvard University Press, 354. Hegel took the view (*Philosophy of Right*, para. 211, comment) that the monstrous confusion of uncoded English law not only made judges into legislators but prevented rational universalizing. However, he accepted (*Philosophy of Mind*, para. 394) that the fact that the English recognize the rational in the form of individuality rather than universality made for tenacity in the pursuit of individual rights and, perhaps, accounted for “the conspicuous aptitude of the English for trade.”
75. The capitalizing of terms used in this and the next sentence indicates that they stand for ideas which are themselves tendentious socially constructed phenomena.
  76. For an incorporating of the English tradition of constitutional monarchy into the ideal self-constituting of the society of the United States of America, see Corwin, E. S., 1928–29. “The ‘Higher Law’ Background of American Constitutional Law.” *Harvard Law Review* XLII: 149ff. and 365ff.
  77. See note 2, above.
  78. The sub-title of D. Hume’s *Treatise on Human Nature* (1748) is *An Attempt to Introduce the Experimental Method of Reasoning into Moral Subjects*. The challenge was taken up by: Saint-Simon, who proposed as new intellectual disciplines “social physiology” and “political science”; Comte, who proposed “social physics” and “sociology”; and J. S. Mill, who proposed “moral sciences.” For Hume’s friend, Adam Smith, on the other hand, all systems of ideas (including the Newtonian system of the universe, as well as social and moral philosophies) are “imaginary machines,” “mere inventions of the imagination.” Smith, A., 1980. “The History of Astronomy,” in Smith, A., *Essays on Philosophical Subjects*. Oxford: Clarendon Press, 66, 105.
  79. The dispute between so-called “realists” and so-called “nominalists” is as old as philosophy. Sixteen centuries before William of Ockham and 23 centuries before logical positivism, Diogenes the Cynic said that he could see a table but not tableness (*trapezotes*).
  80. See Allott, P., “Kant or Won’t?” (see note 9, above).
  81. Contradicting all those foundational systems within the philosophical tradition which purport to have such an effect – logic, epistemology, moral philosophy, transcendentalism of all kinds.
  82. Jürgen Habermas has proposed the reconstruction of some sort of foundation for pragmatic discourse from within pragmatic discourse itself. See *The Theory of Communicative Action* (1) (trans. McCarthy, T.); *Reason and the Rationalization of Society* (2). London: Heinemann (1984); republished, Cambridge: The Polity Press (1994); *Life-world and System: A Critique of Functional Reason*. Cambridge: The Polity Press (1987). The German title of volume 1 is more accurate: *Handlungsrationalität und gesellschaftliche Rationalisierung* (Action-rationality and Social Rationalizing). The task is to find a foundation for “argumentative speech” in “good reasons or grounds.” See Ingram, D., 1987. *Habermas and the Dialectic of Reason*. New Haven: Yale University Press, esp. chapter 4.
  83. Ayer, A. J., 1963. “Philosophy and Language,” in Lewis, H. D. (ed.), *Clarity is Not Enough. Essays in Criticism of Linguistic Philosophy*. London: George Allen and Unwin, 403. Richard Rorty recommends that we should “see keeping a conversation going as a sufficient aim of philosophy” and “see wisdom as consisting in the ability to sustain a conversation,” abandoning the futile effort, even that of Habermas, to find an epistemological basis for objectivity. Rorty, R., 1979. *Philosophy and the Mirror of Nature*. Princeton: Princeton University Press, 378. Such ideas were classified as “negative dogmatism” by Sextus Empiricus (late second century) in his survey of the various schools of philosophical scepticism.
  84. The point of departure is in Jean-Jacques Rousseau: “How did this change [the substitution of social obligation for natural freedom] come about? I do not know. What can

make it legitimate? That question I think I can answer.” Rousseau, J., 1913/1973. *Social Contract*, I.1 (trans. Cole, G. D. H.). London: J. M. Dent, 165. Weber’s idea of “legitimacy” is of a justificatory theory of social domination (*Herrschaft*), whereas Rousseau, like Marx, sought to find a way of overcoming theoretically, and hence practically, the dehumanizing through alienation of the citizen in society. Liberal-democratic theory is not a theory of domination but of *self*-government, whatever the real and legal conditions of actual liberal-democratic societies may be.

85. For further discussion, see Allott, P., *Eunomia* (see note 1, above), chapter 11.

86. See note 69, above.



## Constitutional interpretation in international organizations

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This chapter (1) describes the prevalence of “constitutional” analogies in lawyers’ interpretative approaches to the charters of international inter-governmental organizations; (2) identifies the actors involved in charter interpretation; (3) outlines how lawyers interpret such charters; and (4) discusses the relevance of these issues to the legitimacy of international organizations.

### IO charters as “constitutions”

International lawyers, adjudicators, and officials engaged in the day-to-day work of IOs interpret the charters of these institutions using much of the rhetoric and many of the tools commonly used in the interpretation of national constitutions, particularly those governing federal systems such as the United States.<sup>2</sup> Although under traditional legal doctrine the instruments that create such autonomous entities as the United Nations, the GATT/WTO, or the International Atomic Energy Agency (IAEA) remain “treaties,” no different than, for instance, a bilateral arrangement between two states determining extradition procedures, lawyers have tended to apply special “constitutional” methods of interpretation to IO charters, while seeing bilateral treaties more as domestic contracts between individuals.

A recent exhaustive commentary on the UN Charter illustrates the

extent to which the legal literature concerning the interpretation of such IO charters remains in the grip of theories of interpretation reminiscent of those used to interpret national constitutions. In that work, George Renshaw indicates that the UN Charter:

contains contractual as well as normative elements. To those contractual elements, such as questions concerning the conclusion of the treaty, termination and to some extent amendment or modification, the ordinary rules for the interpretation of treaties must be applied . . . However, for the normative side of the founding treaty, the Charter and the organisational law derived from it (secondary law), the appropriate parallelism can only be found in domestic public law, e.g., the constitutional and administrative law of the member states. Different rules of interpretation must be applied not only to the internal law in a narrow sense, such as the secondary organisational law, but also to the normative part of the founding treaty, the Charter in the strict sense of the word, because of its similarity to national constitutional law.<sup>3</sup>

As this implies, just as national judges and commentators have argued for textual, originalist, or teleological (or “dynamic”) interpretations of national constitutions, those who have interpreted IO charters have favoured, at different times and with respect to different organizations, one or more of these approaches.<sup>4</sup> For his part, Renshaw favours a “dynamic-evolutionary” method of interpretation for the UN Charter and contends that International Court of Justice decisions support this view, since that Court no longer interprets the charters of international organizations restrictively for fear of limiting “sovereignty.”<sup>5</sup> Renshaw favours a purpose-driven inquiry, intended to effectuate the broad purposes contained in the UN Charter in light of existing community needs and “free from historical perceptions.”<sup>6</sup> As students of national constitutions might suspect, not everyone agrees with Renshaw’s interpretative approach, but even those who argue for more restrictive approaches to interpretation persist in making “constitutional” analogies. Thus, even those who disagree with Renshaw’s disparaging view of the historical intent of the drafters argue for particular interpretations of the UN Charter in terms scarcely distinguishable from those favoured by advocates of “original intent” for the purposes of national constitutions.<sup>7</sup>

Like lawyers who interpret national constitutions, UN Charter interpreters and reformers have, in addition, often turned to arguments premised on “democratic principles.” Thus, judges on the War Crimes Tribunal for the Former Yugoslavia have justified the legality of that Tribunal, established by the Security Council, on the grounds that, among other things, the Tribunal had the backing of the UN’s more “representative” organ, the General Assembly.<sup>8</sup> For their part, UN Charter reformers openly address the Security Council’s “democratic deficit” and propose

remedies, including greater consultations with the General Assembly, increased transparency, or more “representative” Council membership.<sup>9</sup> The post–Cold War reactivation of the UN Security Council, along with other developments, has also prompted open discussions on the prospects for “checks and balances” within the United Nations and other organizations, as by judges and scholars debating the possibility of “judicial review” over the Security Council.<sup>10</sup> Meanwhile, those defending the Security Council from such judicial inquiries make arguments analogous to those made by the US executive branch when it seeks to avoid judicial or legislative intrusions on its authority; the argument that the Security Council’s determinations of threats or breaches of the peace cannot be scrutinized by either the General Assembly or the ICJ seems scarcely distinguishable from similar defences of US executive action premised on the need to respect the “separation of powers” within the US constitutional framework.<sup>11</sup>

Similarly, in the wake of the post–Cold War reactivation of the Security Council, a lively debate has emerged in policy and academic circles concerning the extent to which the Council can delegate its constitutional authority – whether to the Secretary-General, to other UN organs or newly constituted entities, to regional arrangements, or to particular member states. The continuing debate concerning the extent to which the Council can “contract out” the use of force pursuant to Articles 25 or 42 of the Charter, or under some unenumerated “implied” power under Chapter VII, has generally been conducted in terms that would be readily recognizable to those who have engaged in debates over the scope of the US Congress to “delegate” power to the Executive Branch.<sup>12</sup>

Such “constitutional” analogies persist even though those who make them are aware that there is nothing in the texts of these IO charters comparable to the typical national constitution’s explicit conferral of “legislative,” “executive,” or “judicial” authority. “All legislative powers” are not conferred on the UN General Assembly under the UN Charter; the Security Council is not given plenary “executive power.”<sup>13</sup> Nor is the UN Secretary-General, merely the “chief administrative officer” and not the titular head of a governmental body, given any plenary powers, “executive” or otherwise.<sup>14</sup> Even the authority expressly conferred on the International Court of Justice is hedged, since that body is not given “[t]he judicial power,” as under Article III of the US Constitution.<sup>15</sup> Further, the ICJ’s statute precludes it from giving legally binding advice to UN organs, since those bodies can only request non-binding “advisory” opinions, only states that are party to ICJ judgements are bound to comply with those judgements, and even with respect to its binding judgements, enforcement of the Court’s decisions is secured only through the (unlikely) action of a political body, the Security Council.<sup>16</sup> As the ICJ itself has pointed out, the United Nations is not, for these reasons

among others, comparable to a “state” or a “super-state.”<sup>17</sup> As Arangio-Ruiz has noted, the degree of centralization of functions or powers in organizations such as the United Nations does not even approximate that of a confederation (compared to the Articles of Confederation preceding the establishment of a federal union within the United States), since the sovereignty of the UN’s members is preserved (see Article 2(1), United Nations’ Charter).<sup>18</sup>

Lawyers are also aware that it is misleading to read the UN Charter – a document premised on a *Realpolitik* bargain based on what sovereign states would tolerate in 1945 – as, in any sense, a “democratic” document. As Oscar Schachter has indicated, the negotiating history of the Charter does not invoke comparisons to the federalist papers; the motivations of Roosevelt and Churchill, intent on preventing another World War, were “not comparable to the reflections of Madison or Hamilton.”<sup>19</sup> Unlike the founders of the United States, the drafters of the UN Charter were not inspired by the notion of a verticalized social compact between individuals and their government, created to ensure and protect individuals’ fundamental rights. Although the “self-determination of peoples” and “human rights” were mentioned in the UN Charter alongside international peace and security as purposes for the organization, the rights of “peoples” formed no part of the content of the Charter. The “peoples” on whom ostensible self-determination rights were conferred were not specified. A bill of human rights was not attached. Instead, the “peoples” invoked in the Charter’s opening phrase essentially disappear in the operative text, as the protection of nation states from each other, and not that of individuals from their own governments, is given pride of place in the United Nations’ Purposes and Principles.<sup>20</sup> As befits an organization that has no direct power over the peoples of the world, the United Nations, like most IOs, does not provide any mechanism for the exercise of direct democratic control or participation by the people themselves – unlike federal constitutional schemes.<sup>21</sup> Accordingly, UN organs lack the basic elements by which federal governments expand their powers at the expense of their component sub-federal units.<sup>22</sup> For these reasons, as Arangio-Ruiz notes, the text of the UN Charter, drafted without the direct participation of the peoples of the world, foresees states but not their peoples as its natural “constituency,” and the community it creates (such as it is) embraces governments and not individuals.<sup>23</sup> To drive this point home, UN members were given assurances against interference in matters “essentially” within their “domestic jurisdiction,”<sup>24</sup> and the sole organ capable of puncturing that guarantee, the Security Council, was explicitly given binding authority only in connection with inter-state threats to, or breaches of, the peace.<sup>25</sup> Further, enforcement of most Charter obligations was essentially left to the members themselves – as it is with respect to enforcing the payment of UN dues under Article

19. Even military measures, taken ostensibly under Article 42 of the UN Charter, have relied, at least to date, on the willingness of willing member states to undertake the use of force.<sup>26</sup> Thus, even with respect to the primary goal of the Charter – the maintenance of international peace – the Charter creates at best a web of inter-state horizontal obligations – what Arangio-Ruiz calls a “private-law pact among sovereigns”<sup>27</sup> – that is in no sense a federal entity to which states are subordinate.

The goal of those who drafted the UN Charter, and particularly of the United States as principal drafter, was to create an inter-state compact to guarantee members’ (that is, governments’) collective security that would be more effective than the defunct League of Nations. The primary aim was:

to preserve and promote the independence of states ... 1945 marked the apogee of nationalism as an ideal. Peace and Security – the Charter’s aim – was seen mainly as protecting the constituent *states* against invasion and intervention from without.<sup>28</sup>

The statist ideal of a collective security scheme – dating back to Italian city-states in the fifteenth century, to the Treaty of Munster in 1648, and of course, to the League of Nations – rather than democratic self-government for the peoples within these states, was the impetus for the United Nations. As many have noted, the text of the UN Charter is reactive, crafted to deal with many of the flaws of the League as seen from the perspective of the Second World War, including the former organization’s failure to achieve universality and lack of real enforcement powers, reliance on unanimity for purposes of taking decisions, and inability to allocate peacekeeping responsibility between organs.<sup>29</sup>

Further, even as an inter-state compact, the “democratic” aspirations of the Charter’s drafters remain highly suspect. The UN Charter, like many IO charters, remains committed to “sovereign equality” only in a formal sense. The UN Security Council’s weighted voting, like that of many other IOs, fails to fully respect the equal “democratic” participation of members. By giving the world’s five “police” powers decidedly unequal powers in the Security Council, the UN’s drafters violated the equality between states mentioned in Articles 1 and 2 of the Charter for the sake of effective collective security. Thus did “[u]topian visions of world government with direct representation of the peoples in a world assembly, and supported by an international police force controlled by this body” fade away – to be replaced by an “undemocratic” hierarchical scheme dependent upon the hegemonic power of a handful of powerful states.<sup>30</sup>

That this undemocratic apparatus to secure a limited aim should share

comparable conceptions of “separation of powers” or “checks and balances” with federal systems of government seems, to commentators like Arangio-Ruiz, “absurd.”<sup>31</sup> Further, the “unconstitutional” aspects of this scheme cannot be blamed on Cold War paralysis. As has become clearer since the end of the Cold War, the UN Charter – unlike most constitutions worthy of the name – puts a single, unaccountable, uncheckable political body at its helm. When the Permanent Members are united, or at least fail to abstain, there are no apparent “checks” on Council action, apart from the failure of individual member states to comply with Council edicts. The prospect of the ICJ or the General Assembly emerging as such a judicial or political check remains dubious. While the General Assembly has repeatedly refused to defer to the Council, as seems anticipated in Article 12 of the Charter, Assembly resolutions – such as those criticizing the continuation of the Council’s arms embargo on Bosnia and Herzegovina – have not prevented the Council from undertaking action, since such resolutions, unlike Council decisions, are not binding. On the other hand, the Council has no apparent Charter authority to interfere in Assembly decisions such as those regarding the regular budget for the organization, and this Assembly power could, in theory, be used to prevent Council actions that require expenditures from taking effect. To date, since the Assembly has not made the attempt, the legality of such an effort has not been tested. Yet, without such constitutional “checks,” the resort to the constitutional doctrine of “implied powers” threatens to become an all-purpose vehicle to justify any action by UN organs, whether or not these actions are in conformity with the present Charter.<sup>32</sup>

The inappropriateness of domestic “constitutional” analogies would also seem to apply, perforce, with respect to other IO charters. If the UN Charter, the constituent instrument with the broadest purposes and principles and the only instrument plausibly regarded as a “constitution for the world community,”<sup>33</sup> cannot credibly be compared to a national constitution, this is all the more true of other organizations with more modest agendas and powers. Attempts at analogies between the texts of domestic constitutions and the constituent instruments of the vast majority of IOs seem strained. Despite the attempts of constitutionalists like Ernst-Ulrich Petersmann, neither the original GATT nor the more recent World Trade Organization can be said to be entities evincing a commitment to all the basic elements of “constitutionalism” as described by Petersmann – namely, separation of powers, checks and balances, parliamentarianism, human rights and other freedoms, the necessity and proportionality of governmental restraints, and democratic participation in the exercise of governmental power.<sup>34</sup> While the new WTO is more committed to the “rule of law” than its predecessor, its “constitutional framework” is but a pale imitation of those prevailing within nation-

states.<sup>35</sup> The one international entity whose structure and purposes might more plausibly be compared to those of governments – the European Union – is, at least in the eyes of some observers, more a proto-European state-in-the-making than a traditional “international organization.”<sup>36</sup> Subject to that possible exception, all international organizations are mechanisms to achieve limited horizontal inter-state goals with limited access given to non-governmental actors (much less individuals).

But if neither logic, function, text, or history support constitutional analogies as applied to IO charters, how then do we explain their popularity? Arangio-Ruiz, perhaps the foremost critic of such analogies, suggests the answer lies in the self-interested aspirations of international lawyers anxious to expand their own discipline to “invent any theory that may help demonstrate the legality of the conduct of UN organs.”<sup>37</sup> Yet, as Arangio-Ruiz also acknowledges, such analogies are not limited to academics but have been repeatedly used by international adjudicators and policy makers both within member states and within IO bureaucracies. Constitutional rhetoric, along with a commitment to the rule of law and the primacy of “constitutional” principles over subordinate rules, is evident in, for example, the decisions issued by the legal secretariats of international organizations, a growing number of specialized as well as more general international courts, international bodies charged with the implementation of human rights, and WTO panels.<sup>38</sup> Constitutional analogies are pervasive even with respect to the work of far more politicized bodies, as in the case of the Security Council’s attempts to explain its innovative solutions to the Gulf crisis, Lockerbie, the break-up of the Former Yugoslavia, and civil wars in Somalia, Rwanda, and Haiti. Further, constitutional analogies are not used merely by those trying to justify the Council’s expansive powers in all these instances, but also by those questioning the legality or propriety of these actions.<sup>39</sup> While all these actors may be no less self-interested than international law academics, in so far as this book seeks to identify what is actually occurring within these organizations, the presence and persistence of constitutional analogies remains a firm part of real world legal practice. The next section of this chapter will argue that the persistence of constitutional analogies may be partly due, paradoxically, to the heterogeneity of charter interpreters.

### Who interprets a charter?

The charters of some IOs formally entrust authoritative interpretation to particular organs. This is the case with respect to, for example, plenary bodies in the Food and Agriculture Organization (FAO), the Interna-

tional Maritime Organization (IMO), the Organization for African Unity (OAU), and the 27-member council of the International Civil Aviation Organization (ICAO).<sup>40</sup> In the IMF and some other financial organizations such as regional development banks, interpretative issues are left to the executive directors and to the board of governors.<sup>41</sup> In some of these cases, such as that of the ICAO, the charter may provide for appeal to the ICJ or an arbitral body, or to either of these. In other instances, members have decided to permit no such appeal but to instead dispose of all disputes through internal mechanisms, by policy-making organs, rather than more “objective” external adjudicative or judicial organs – as in the OAU.<sup>42</sup> Some of the charters of UN system organizations establish, on the other hand, elaborate internal alternative dispute-settlement or fact-finding mechanisms with jurisdiction over defined types of disputes between members that may, in the course of settling some interstate disputes, interpret the IO’s charter.<sup>43</sup> Some organizations, such as the GATT/WTO, the European Union, and regional human rights systems, have far more elaborate adjudicative fora with extensive jurisdiction over disputes between members.<sup>44</sup>

Most IO charters, including the UN Charter, do not formally assign the power of authoritative interpretation to any entity, whether a policy-making body or a judicial one.<sup>45</sup> In the United Nations, resort to that body’s principal judicial forum (the International Court of Justice) for an authoritative interpretation is further hampered by that entity’s limited jurisdiction.<sup>46</sup> In the absence of an express clause in an IO’s charter, who is authorized to render an “authoritative” interpretation of its charter? While this question has been most directly addressed in the context of the United Nations, its resolution has had implications for all IOs.

At the time the UN Charter was being drafted, Belgian representatives sought inclusion of a provision that would have indicated that resolution of interpretative disputes between members should be resolved by the ICJ.<sup>47</sup> This proposal was rejected, as was Belgium’s second proposal, which asserted that the Committee on Legal Problems “should determine the proper interpretative organ for the several parts of the Charter.”<sup>48</sup> Some have argued that this negotiating history shows that there can be no “established method for authoritative interpretation,” and that, therefore, each UN member is free to interpret for itself the meaning of the Charter.<sup>49</sup>

Others have suggested an interpretation totally at odds with the rejection of Belgium’s original proposals at San Francisco: namely, that an authoritative interpretation of the UN Charter can or should be given by the ICJ. Those who espouse this view defend it through a “dynamic” reinterpretation of Article 92’s recognition of the Court as the United Nations’ “principal judicial organ,” and through the “principle of effec-



tiveness,” as employed by the Court itself.<sup>50</sup> They argue that an authoritative interpretation of the Charter is necessary to permit the United Nations to operate as intended, that interpretation of the UN Charter is essentially a “legal” task, and that the only organ charged with such legal tasks is the World Court. Under this view, there would be no value in creating the ICJ as a judicial organ unless it were free to interpret the Charter, especially where resolution becomes an issue between two states and the Court’s duty to exercise jurisdiction over such a dispute requires that it consider the question of how the Charter may be interpreted. It might also be argued that this is what the Charter intends to accomplish when it makes ICJ decisions final and binding.<sup>51</sup>

Neither of these two extreme answers to the question of “who interprets” has entirely won the day. The first has tended to be dismissed as a recipe for Charter nullification. The second seems incompatible with both the intent of the drafters and the non-binding nature of ICJ advisory opinions (where issues of Charter interpretation are most likely to emerge). Instead, as is suggested by the decision taken during the negotiation of the Charter, a third position has gained the most acceptance.

As noted in Tetsuo Sato’s chapter in this book, the San Francisco drafters assigned the issue to a subcommittee whose report was subsequently adopted by the Committee on Legal Problems as well as by the Conference. This report did not recommend any changes to the Charter text but urged flexibility. It recommended neither total abdication to national sovereignty nor idealized resort to supra-national judicial authority. Instead, as the quotation contained in Sato’s chapter indicates, the subcommittee recommended that Charter interpretation be left, at least initially, to each institutional organ. At the same time, the subcommittee did not preclude resort to the ICJ or other forms of dispute settlement.

This interpretative decision today grounds authoritative interpretation within most IOs. Simply put, interpretations made in the course of day-to-day operations by IO organs, and which are not disputed by their members, are presumptively legal and constitute “precedents.”<sup>52</sup> All institutional organs (including, within the United Nations, the ICJ) are permitted to consider the meaning and interpretation of an IO’s charter and all are potentially key actors in rendering an authoritative interpretation. As with other interpretative decisions by other institutional organs, even advisory opinions issued by the ICJ, though not legally binding under the Charter, may ultimately prove to be authoritative if “generally acceptable.”<sup>53</sup> Even IOs whose charters provide for a precise or more formal mechanism for authoritative interpretations<sup>54</sup> have relied on this approach in practice: ordinarily, interpretative disputes are initially resolved by institutional organs, as IO officials must decide whether or not to pursue a course of action. Most of the time their decisions are not

challenged, and there is no resort to any more formal methods of interpretation even where these are available.<sup>55</sup>

As the San Francisco decision has been interpreted, the “presumption of legality” attached to institutional practice exists only for action taken in conformity with an IO’s charter and in fulfilment of its purposes.<sup>56</sup> In theory, it also applies only to institutional interpretations “adopted by unanimity, or by consensus without any objection.”<sup>57</sup> These limits are an attempt to avoid the implication that the practice of organizations is the sole determinant of legality. They are intended to protect states’ rights, and particularly the rights of the minority who would otherwise be disenfranchised.<sup>58</sup> As is suggested below,<sup>59</sup> these limits do not, in reality, always come into play and are not always an effective bulwark to protect the rights of all members.

Under the San Francisco decision, authoritative interpretation does not require a particular procedure and all elements of an organization – members, organs, and adjudicative bodies – are potential participants.<sup>60</sup> Despite the uncertainties that result from this approach,<sup>61</sup> this has become, *de facto*, the operating mode of behaviour for most IOs. Even when an IO charter is silent with respect to authoritative interpretation, members and organs routinely interpret that charter in practice, usually with authoritative effects, at least over the long term. Action taken by a member with respect to an organization, if unchallenged by the organization or other members, may also have a constitutive effect – in the sense of creating a precedent – as is true of action taken for the first time by an institutional organ that is not challenged by the membership. Similarly, a legal interpretation, as made by the legal department of the secretariat, once accepted by the membership, is usually presumed to be authoritative the next time a similar issue arises.<sup>62</sup> “Uniformly accepted institutional practice” is also often conclusive within formal adjudicative fora as well.<sup>63</sup>

The deceptively simple decision taken in San Francisco with respect to the interpretation of the UN Charter has facilitated the continuous, evolutionary development of international institutional law. In their day-to-day activities, IO organs have generated foundational interpretations of their constituent instruments. Most of these decisions have gone unchallenged and have therefore found “general acceptance,” thereby producing an ever-growing body of institutional precedents, usually in favour of expanded institutional competence. Furthermore, institutional practice has often whittled away ostensible limits contained in IO charters on the scope of institutional powers, including, most prominently, Article 2(7)’s promise of sacrosanct “domestic jurisdiction.” Since IO charters, unlike the typical bilateral inter-state compact, have licensed a variety of interpreters distinct from the treaty parties, and since these institutional inter-

pretations impose on members the burdensome duty to object lest these interpretations become “accepted,” these treaties have become, at least in this sense, “living constitutions” distinct from more static bilateral contracts.<sup>64</sup> These realities render constitutional analogies more plausible than they would otherwise be.

Thanks in part to the San Francisco interpretation decision, the texts of IOs’ charters make for deceptive reading. As the next section will show, despite lawyers’ emphasis on the importance of text, those who expect to draw an accurate view of an IO’s normative impact from an examination of its charter are bound to be as disappointed as someone who relies only on the text of the US Constitution for a sense of how the United States is governed.<sup>65</sup>

### How to interpret a charter?

Disputes between institutional organs or between members over the interpretation of an IO’s charter might be resolved by “power-oriented diplomacy” as opposed to lawyerly resort to rules. Faced, for example, with a dispute about whether a clause in the original GATT ought to be read to forbid a particular trade practice between particular parties, the GATT contracting parties have sometimes decided to simply let the parties “fight it out” between them. In such cases, a winner emerges as a result of one party’s ability to exert greater leverage over the other through, for example, unilateral threats to deny foreign aid or impose import restrictions. As John Jackson has suggested, this approach leaves the interpretative issue to be decided directly on the basis of processes (such as mediation) which are grounded in the relative powers of the disputants. Such a result does not tend to lead to stable, predictable interpretations of the underlying treaty which are of use to other parties.<sup>66</sup> For these and other reasons, neither the GATT nor other IOs have relied on this as the preferred method of interpreting their charters or resolving interpretative disputes.

Although the relative power of the governmental disputants will probably continue to be an issue even within sophisticated dispute settlement fora such as those in the new GATT/WTO,<sup>67</sup> these and other IO interpreters increasingly favour what Jackson calls “rule-oriented diplomacy,” by which disputes are not simply resolved on a basis of power differentials, but *adjudicated* on the basis of rules of law. Such rule-oriented resolutions, premised on generalizable principles of interpretation, are increasingly evident within IOs, even those that lack binding forms of dispute settlement comparable to those within the WTO.<sup>68</sup> The next section describes the elements of “constitutional” interpretation.

*The Vienna rules of treaty interpretation*

Non-lawyers frequently assume that legal rules of interpretation are more precise or clearer than they actually are. As all lawyers know, rule-oriented interpretation accords a great deal of discretion to the interpreter; this section tries to explain why.

The starting point for rule-oriented interpretation can be found in the rules set out in Articles 31–32 of the Vienna Convention on the Law of Treaties.<sup>69</sup> Under Article 31 of this “treaty on treaties,” a treaty needs to be interpreted “in good faith in accordance with the ordinary meaning” of its text, in “context,” and in light of its “object and purpose.” “Context” is defined to include, in addition to text, any preamble and annexes, and other contemporaneous and related agreements and instruments. Legal interpreters may also consider, together with “context,” subsequent agreements between the parties regarding interpretation, subsequent practice “in the application of the treaty which establishes the agreement of the parties regarding its interpretation,” any relevant international law rules, and any “special meaning” given to a term if so intended by the parties. Thus, even interpreters who ostensibly limit their discretion to “plain meaning” are nonetheless authorized to rely on various textual sources to discover that meaning, including more general, often nebulous rules of international law.

Under Article 32 of the Vienna Convention, “supplementary means of interpretation,” including reference to a treaty’s preparatory work (or *travaux*), may only be used (1) to “confirm” the meaning derived from application of Article 31, or (2) to determine the meaning in cases where application of Article 31 leaves the meaning “ambiguous” or “obscure” or leads to a result that is “manifestly absurd” or “unreasonable.” Article 31 is commonly interpreted as preferring text over negotiating history, as a result of Article 32’s seeming propensity to resort to original intent only when text and context fail.<sup>70</sup> This approach would appear to justify many judicial opinions that omit any reference to relevant negotiating history.<sup>71</sup>

Today, as Ress has noted, it is rare for an interpreter of a charter, especially a judge, to emphasize a charter’s negotiating history.<sup>72</sup> But Article 32 of the Vienna rules does not require this result. As noted, an interpreter is licensed to consider the negotiating history (or “original intent”) of a treaty in order to “confirm” its meaning.<sup>73</sup> Negotiating history need not be ignored if the text and context resolve a question; original intent can still be used to complement an interpretation reached by the methods described in Article 31. Under Article 32, therefore, an interpreter is free to draw upon negotiating history to buttress what would otherwise be a less than convincing interpretation of the charter

text. Moreover, Article 32 gives license even more clearly to the use of “supplementary means” of interpretation, including reference to “intent,” if the textual or contextual meaning is “ambiguous.” As modern scholars have amply demonstrated, language is often ambiguous; this is especially true of an IO charter, where provisions are often left consciously vague to permit initial agreement or to permit change as conditions warrant.<sup>74</sup> Treaty clauses likely to give rise to a serious dispute are especially likely to be “ambiguous,” particularly in the hands of skilled advocates on either side. As a result, on all but the simplest issues, charter interpreters have considerable discretion to resort to “supplementary means” of interpretation should they wish to do so.

Furthermore, assessing the “ordinary meaning” of IO charters is rarely simple.<sup>75</sup> As Oscar Schachter has noted, a treaty such as the UN Charter is characterized by its “open texture.”<sup>76</sup> It contains not only relatively precise “rules” (such as those relating to the composition of, and voting procedures in, various organs), but also highly abstract and frequently clashing “general principles” (such as the duty not to resort to force in Article 2(4) compared to the potentially conflicting right of “self-determination” mentioned in Article 1(2)), along with highly generalized “standards” (such as the requirement to be “peace-loving” in Article 4).<sup>77</sup> Opinions differ regarding not only the scope of even the more precise rules, but also the specific content and application of general principles and standards.

Determining “ordinary meaning” is often a matter of applying “canons of interpretation” that are open to considerable discretion as applied.<sup>78</sup> Consider, for example, the canon of interpretation *expressio unius est exclusio alterius* (the expression of one thing excludes another). Does this canon mean that since Article 19 of the UN Charter authorizes a loss of vote sanction for members who fail to pay their full financial assessments for two years, the organization (or its members) is thereby disempowered from undertaking other actions to supplement what has clearly become an ineffective remedy? Is Article 19 a kind of *lex specialis* or “self-contained” regime, to the effect that the United Nations could not, for example, deprive a member of other services for failure to pay, suspend a member under Article 5, or charge members interest on unpaid assessments? And what is the status of another possibly conflicting canon of interpretation – namely, the principle that “self-contained regimes must be entirely efficacious”? Does this latter principle mean that, Article 19 notwithstanding, the organization, and arguably members individually, are nonetheless permitted to take other measures to force reluctant members to pay?<sup>79</sup> As the debate on this issue suggests, competing interpretations often rely on competing canons of interpretation. Those who

would favour Article 19 as an exclusive remedy might, in addition, invoke the principle of restrictive interpretation in favour of state sovereignty; opponents might refer to the principle of (institutional) effectiveness.<sup>80</sup>

Furthermore, as Laurence Tribe has argued in the context of the US Constitution, canons of interpretation, even when they do not conflict, are also commonly interpreted in light of the “architecture” of the institutions defined by the text.<sup>81</sup> UN Charter silences – such as the omission of the word “only” in certain provisions – are typically “filled” by interpreters who resort to their own idiosyncratic interpretations of the Charter “scheme.” This helps to explain why the omission of the word “only” in Article 19, discussed previously, may lead to different interpretations. The Charter scheme seen by the majority of the judges in the Expenses Case was dramatically different from the structure described by the opponents of the contested peacekeeping expenses in that case. While Tribe believes that there are “right” and “wrong” architectural interpretations, even he would acknowledge that the attempt to read one provision in light of the “whole” accords Charter interpreters, even when restricted to “plain meaning,” great discretion. Finally, within the context of IO charters, the discretion accorded to interpreters is potentially greater than it is with respect to national constitutions for yet another reason: linguistic differences. Despite the traditional rule that, unless the parties indicate otherwise, all texts of a treaty in whatever language are “equally authoritative,”<sup>82</sup> distinct word choices in different language versions of IO charters have sometimes become significant.<sup>83</sup>

Given all the ambiguities with the license accorded to treaty interpreters by the Vienna rules of treaty interpretation, as well as the ambiguities in their application, these rules are open to manipulation and are routinely cited by those on both sides of an interpretative dispute.<sup>84</sup> As has been noted, interpretation of texts in international law, particularly the texts of IO charters, is an “art, not a science,” although “it is a characteristic or part of the art to disguise the process of interpretation as a science.”<sup>85</sup> And it is this art, along with the San Francisco decision with respect to interpretation, that has facilitated the “constitutionalization” of IO charters.

### *Institutional practice*

The discretion accorded under the Vienna rules is all the greater given the license in Article 31 to consider “subsequent practice” – a phrase which is commonly interpreted to extend not merely to the practice of state parties to a multilateral treaty, but to the practice of the organization they have created. As might be expected, the use of subsequent institutional

practice as an aid to the interpretation of IO charters was initially controversial since it threatens to impose a “tyranny of the majority” under the guise of institutional practice.

From a theoretical perspective, it is difficult to say precisely why institutional practice should be accorded deference. After all, resort to practice is questionable if an IO owes its legitimacy solely to the express consent of all state parties.<sup>86</sup> The practice of institutional organs would have dramatically less relevance as a reflection of the consent of members should that practice relate to a period in which the membership was significantly different than it was when the interpretative dispute arose, or if there is other evidence to suggest that the practice does not, at the time of such a dispute, reflect the intent of some portion of the membership (as in cases where a significant minority of members is contesting the legality of the practice). From the standpoint of the official rules of treaty interpretation, there is an additional problem: if institutional practice is, in theory, merely another form of evidence for the more contemporary intent of the majority of an IO’s membership, it is hard to see why that practice/intent should be given greater significance than is evidence of “original intent.” The Vienna rules do not say that present “intent” is to be preferred over original intent.

Despite these problems, it has become common for those interpreting IO charters to rely on institutional (or “customary”) practice as evidence of the meaning of a provision, at least so long as that practice is within the (usually broad) purposes of the organization.<sup>87</sup> These interpreters have routinely resorted to institutional practice in diverse institutional settings, from the Security Council to GATT/WTO dispute settlement, for a number of reasons. Such reliance may well be inherent in the “working legal culture” that operates even within politicized IO organs. Thus, Koskenniemi has argued that the necessity of creating an “open dialogue” with other institutional participants drives lawyers and non-lawyers alike to see prior actions as “precedents” and consistency itself as desirable.<sup>88</sup>

Others have suggested that the prior practice of institutional organs is simply better evidence of the collective “contemporary expectations” of members than are the statements or actions of individual members.<sup>89</sup> To those for whom state “consent” remains a primary justification for the legitimacy of IOs, the use of institutional practice might nonetheless be justified as an aid to interpretation because it reflects members’ “delegation” or collective submission to institutional authority. From this perspective, members are regarded as having specifically charged the collective, represented by institutional organs, and not themselves, with the carrying out of relevant commitments. If so, the practice of the organiza-

tion is better evidence of what states have agreed to do simply because members in their individual capacity are “interested” parties whose own national interests tend to preclude “objective” determinations relating to charter obligations. For these reasons, it is argued that since no GATT/WTO or UN member is delegated the responsibilities of implementing the GATT/WTO or the UN Charter, and since only organs under those respective charters are so charged, giving weight to what these organs determine is legally required best gives effect to members’ original intentions.<sup>90</sup>

According to this view, there need not be unanimous support for particular organizational practices for these to have persuasive effect.<sup>91</sup> While institutional organs are also “interested” parties in the sense that some interpretations result in an aggrandizement of their prerogatives, this casts doubt on some institutional interpretations, but not all. It only suggests that some institutional practices might be regarded with the same caution as self-interested interpretations by members. Viewed in this light, most institutional practice, even when controverted by some members, has an inherent value and is not simply shorthand for the contemporaneous intent of members.<sup>92</sup>

Despite the widespread reliance on institutional practice, questions about the respective weights that should be accorded to practice – as opposed to text, negotiating history, teleological purposes, or other factors – remain unresolved. There is considerable variation among different organizations, and even within a single organization over time, on such issues. In the 1971 *Namibia Case*, for instance, at least one ICJ judge argued that institutional practice, however uniform or long-standing, can never suffice to alter what is unambiguously stated in the UN Charter.<sup>93</sup> Yet, other ICJ judges have, in other cases, suggested that “pressing teleological requirements” might prevail even over clear text or practice.<sup>94</sup> As with respect to domestic constitutions, the relative importance given to institutional practice also depends on interpreters’ idiosyncratic views regarding the propriety of “dynamic” interpretations.

The possible limits on the use of “customary” institutional practice have given rise to controversy. It is uniformly accepted that institutional practice must conform to charter purposes, but the breadth and vagueness of these purposes prevent this requirement from being much of a limit in practice.<sup>95</sup> It has also been said that the use of subsequent practice should be limited to constitutional “gap-filling.” Under this view, institutional practice, however “customary,” should not be used to thwart formal amendment processes, change rights and obligations of members expressly contained in charters, or alter charter structures, such as the relationship between organs.<sup>96</sup> But ambiguities in the application of these



limiting principles, such as those that arise when determining whether constitutional “gaps” exist, have led to sharp differences among charter interpreters.<sup>97</sup> Furthermore, it is not clear whether organizations have adhered to such limits in practice.<sup>98</sup>

The assumption under which most charter interpreters work – that unchallenged institutional practice has received the “consent” of members of an IO – is also dubious. As within domestic systems, members may not contest institutional practices for a variety of reasons, including lack of transparency, absence of financial or other resources to mount a challenge, or simply fear of giving offence to powerful members or organs. Institutional practices may be “accepted” only in theory – by members’ inaction or default. Moreover, even when some members resist organizational practices, it might be too late. By the time that the cumulative effect of these practices becomes clear or certain members are emboldened to mount a challenge, other members or the organization’s secretariat might contest their right to do so, especially if prior silence is regarded as “acquiescence” or if the organization is said to have relied on members’ prior silence and these members should now be “estopped” from saying otherwise.<sup>99</sup> Furthermore, it is not altogether clear what counts as “opposition.” While it is sometimes said that for purposes of the creation of customary international law, the views and practices of those states that are “specially affected” by a contested rule have a greater say in its eventual acceptance, there is no agreement that a comparable rule applies with respect to the views of specifically affected members of an organization for purposes of the legitimation of that organization’s practices. Under international institutional law, it is not clear whether the opposition of certain states matters more than that of others.

Giving weight to institutional practice has particularly serious implications in those cases where the organ that is generating the institutional precedents is authorized to take “binding” action without the full participation or vote of all members of an organization. Finding “general acceptability” or “acquiescence” where a member is legally bound to accept the decisions of, for example, the Security Council (see Article 25 of the Charter) is troubling where the Council adopts, as it has in the post–Cold War period, controversial decisions. If a UN member wishes to protest the Council’s interpretation of what constitutes a “threat to the international peace” – as in the case of the Council’s use of such a finding to impose sanctions on Libya for its failure to extradite alleged terrorists long after the terrorist incident occurred, or to authorize the use of force to displace a government in Haiti – opposition seems, on the face of the Charter, to be limited to verbal protest.<sup>100</sup> But, so far at least, such protest has not been sufficient to cast doubt on the scope of the Council’s institutional “precedents.” As the General Assembly’s ineffectual op-

position to the continuation of the Council's arms embargo in Bosnia-Herzegovina suggests, the "general unacceptability" of Council action, even when expressed by a coordinate UN organ, does not necessarily prevent the Council from continuing it (or undertaking similar action in the future and justifying it by citing its earlier, controverted decision). In fact, despite doubts by some UN members, many lawyers continue to read Council authorizations of force with respect to Haiti, the Kurds in Iraq, Somalia, and in Bosnia-Herzegovina, as important legal precedents on the expanding scope of permissible "humanitarian intervention" under both the Charter and general international law.<sup>101</sup> As this suggests, in the case of organs like the UN Security Council, the tendency to accord great weight to institutional practice is a powerful tool for the expansion of institutional power – even at the expense of the wishes of the large majority of UN members not involved in Council decisions.<sup>102</sup>

### *Implied powers*

The doctrine of "implied powers," the stepchild of "customary powers," is also widely accepted in charter interpretation.<sup>103</sup> In theory, implied powers are not based on the subsequent practice of an organization but on inherent authority contained in a charter.<sup>104</sup> While some IO charters expressly authorize some organs to assume implied powers,<sup>105</sup> such powers have been found even in the context of IO charters containing no such explicit authority.

As applied by the European Court of Justice and the ICJ, the doctrine is another result of the "principle of effectiveness." As the European Court has indicated, such powers result from the application of a "rule of interpretation generally accepted in both international and national law, according to which the rules laid down by an international treaty or a law presuppose the rules without which that treaty or law would have no meaning or could not be reasonably and usefully applied."<sup>106</sup> Other institutional organs have similarly justified such powers as ancillary to powers explicitly authorized or because additional powers are needed to assure the "effectiveness" of authorized action.<sup>107</sup> Thus, the Security Council has justified decisions authorizing members to use force to implement economic sanctions on the grounds that the authority for such measures, while not specifically mentioned in Chapter VII of the Charter, is "essential" to make Article 41 sanctions, which are authorized by the Charter, effective.<sup>108</sup>

The scope of implied powers remains debatable, and resort to the doctrine varies among IOs. Though usually premised on "functional necessity," the doctrine of "implied powers" is sometimes applied not only to justify actions deemed "essential" for carrying out explicitly conferred

powers but also to permit achievement of much more expansive charter “purposes.”<sup>109</sup> Within the United Nations, the doctrine also has been cited to permit the organization to take action that is not, strictly speaking, “essential” or “necessary,” but is merely desirable or consistent with Charter powers or aims.<sup>110</sup> In its most direct statement on this point, the ICJ indicated in the Reparations Case that “[u]nder international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as essential to the performance of its duties.”<sup>111</sup> But even in that case, a majority of the Court applied the doctrine expansively – to justify the United Nations’ capacity not only to bring a claim of damages against members for injury suffered by the organization, but also to enable the organization to claim damages against non-members, including for injury suffered by individuals and not just the organization itself. As at least one dissenting judge argued, while the power to bring claims against members for damages suffered to the organization itself might arguably be “essential,” the other powers which the court majority accorded the organization in that case were hardly “necessary” to fulfil UN purposes.<sup>112</sup>

As the Reparations Case also suggests, a finding of “implied powers” may have consequential effects on the balance of powers among IO organs. As a result of that case, the UN Secretary-General seized the power to pursue, present, and settle part or all of such claims, incidentally expanding his own discretionary authority.<sup>113</sup>

The existence of implied powers and reliance on institutional practice as authoritative precedent elevates the potential significance of those provisions in an IO’s charter that purport to limit the authority of the organization or its organs. If an organization has, potentially, the authority to undertake virtually any action not inconsistent with its charter, express constitutional limitations become, at least in theory, an important safeguard on the encroachment of members’ “residual rights.” Among the most common of these safeguards are prohibitions on action that “interfere” with members’ “domestic jurisdiction” (or their *domaine réservé*).<sup>114</sup> In certain organizations, it is also usual to have “safeguard clauses” permitting members to escape from substantive obligations, such as the original GATT’s Article XII (balance of payments restrictions) and its Article XIX (emergency action to protect domestic producers against competitive imports), or the Chicago Convention’s Article 89 (permitting freedom of action during wartime or “national emergencies”).

The possibility that institutional powers may expand, based on “customary” or “implied” powers, also elevates the importance of making timely objections to members’ or organs’ actions, lest these become

“accepted” practice or suggest existence of implied powers previously unsuspected.<sup>115</sup> It also helps to explain occasional attempts by an organization to limit the “precedential” effect of certain of its actions – as in the case of the Security Council’s insistence that its actions with respect to Haiti and Somalia were responses to “unique” situations that required exceptional responses.<sup>116</sup> Through such statements, an organ might seek to reassure members as to the scope of institutional precedents being established. To date, the legal value of such assurances has been dubious, at least within the context of the Security Council, since lawyers and others have tended not to distinguish “unique” measures taken by the Council from its other decisions.<sup>117</sup>

### *Intent*

As scholars of domestic constitutional law would predict, “intent”-based arguments have proven to be controversial with respect to the interpretation of IO charters.<sup>118</sup> The argument begins, as noted above, with a dispute as to the weight to be accorded to such arguments under Article 32 of the Vienna rules,<sup>119</sup> but it does not end there. At least three different types of “intent” seem to be at issue: (1) the “original intent” of the framers of a charter as expressed in the travaux; (2) the contemporary “intent” of the membership at the time a dispute arises; and (3) the “presumed” intent of a charter gleaned from all the sources of treaty interpretation (including text and context). The second type of intent, to the extent discussed, tends to merge with discussions about the relevance of institutional practice. The most prominent clashes, at least among ICJ judges, have occurred between advocates of the first and third.

Varying trends have appeared from time to time with respect to the use of “original” and “presumed” intent, and not even the judges on the World Court have managed to adopt wholly consistent rules with respect to these.<sup>120</sup> Although there has been a tendency in the ICJ to award relatively little or no importance to “original intent” arguments, premised on statements in the travaux, there are occasional, loose references to “intent” and there has as yet been no wholesale embracing of interpretative approaches that would totally ignore the “intent” of states (loosely understood).<sup>121</sup>

There is within universal IOs, however, something of a north/south division of views at least with respect to “original intent,” and this division has dampened resort to such arguments. Developing nations in particular argue that the resort to negotiating history often favours those rich states with the resources to maintain archival records (their own or the organization’s) as well as the ability to participate widely in negotiation

conferences. There are some obvious examples of what they have in mind. The positions of the “Great Powers” of 1945 are, of course, privileged by the travaux of the UN Charter – as in the Declaration of the Four Inviting Powers (the Soviet Union, the United States, the United Kingdom, and China) with respect to the meaning of “procedural questions” in Article 27(3).<sup>122</sup> While it remains true that, theoretically, states which become members of IOs long after these organizations have been created might be said to “accede” to the negotiating history of IO charters in addition to the existing text of their charters, in practice these states examine only the wording of the texts and they argue that they could hardly be expected to do otherwise. Governments who later accede to IO membership cry foul when obscure parts of the original negotiating history, in which they did not participate, are cited to support an interpretation that is adverse to their current interests.<sup>123</sup>

Another reason for lawyers’ reticence to resort to “original intent” is the sheer volume of the typical multi-party negotiating record, which may span years (as did the latest GATT Uruguay Round) and arguably includes statements by national bodies in dozens of states, made in the course of sometimes complex national ratification procedures. Those involved in such multi-party negotiations come and go; by the end of such negotiations, even those states most closely involved retain few if any government officials or experts with a personal knowledge of their full details. In an ideal world, adherents to a treaty resulting from such a process would, at the time of accession, closely scrutinize all of the treaty’s travaux and related documents, including at least the formal interpretative statements made by other parties in the course of their ratifications. No one lives in that world. For many states it seems unfair and unrealistic to expect those who did not assume a major role in the negotiations or, worse still, did not participate – least of all developing states with meagre resources – to devote resources to such an effort. In short, even if there were uniform agreement on what constitutes a “travaux,” few read it in full, and if no one has done so, it is difficult to say that anyone has truly “consented” to its contents.

For these reasons, the caution with which many IO interpreters view “original intent” arguments is not just a function of judicial philosophy. The difficulties of determining what is legitimately contained in a travaux, conflicting views of what ought to “count,” and worries about undermining the legitimacy of an interpretation with respect to members that were not involved or only minimally involved in the original negotiations, all help to lessen resort to “original intent.”<sup>124</sup> This may also help to explain why Arangio-Ruiz’s cogent arguments relating to the “original intent” of the Charter drafters have not reduced the appeal of constitutional analogies so radically at odds with that intent.

## Constitutionalization and legitimacy

It is not self-evident why lawyerly approaches to charter interpretation, whether or not characterized as “constitutional,” matter. Given the flexibility of the Vienna rules for treaty interpretation described in the prior section – the absence of firm rules about the use of original intent and institutional practice and the vagaries of subjective doctrines such as those granting undefined “implied powers” – is “constitutional interpretation” merely a fig leaf for the pursuit of short-term national interest and power politics?<sup>125</sup> Do lawyers’ constitutional interpretations, rendered in the absence of a disinterested interpreter charged with the power of binding decision (as occurs under the UN Charter and in many IOs), have any legitimacy? This section will use the constitutional debates surrounding NATO’s use of force in Kosovo in 1999 to suggest a preliminary response.

At the time of writing, the most significant “constitutional” debate occurring within UN circles concerns the legality, under the UN Charter, of NATO’s bombing campaign in Kosovo. It is difficult to overstate the significance of the question posed. As Judge Weeramantry of the ICJ indicated, the issue posed goes to the “core” of the UN Charter and to the “roots of the international order,” with the potential for “long-term effects on the stability of the international community itself and on the international rule of law.”<sup>126</sup> The terms of that debate, conducted both by judges on the ICJ and academic commentators, are instructive.

The common starting point for all is the prohibition on the use of force “against the territorial integrity or political independence” of a state, contained in Article 2(4) of the UN Charter. No one disputes that this prohibition binds both members and non-members of the United Nations, including the members of NATO as well as NATO itself; indeed, most consider the prohibition on the use of force a prime candidate for *jus cogens* or pre-emptory status.<sup>127</sup> Few suggest that the NATO bombing campaign, despite the resulting loss of life within a sovereign territory, fails to come within Article 2(4)’s prohibitory words. Although the bombing is not directed at the permanent seizure of national territory or (at least arguably) the “political independence” of the Serbian government, few have argued that the prohibition on the use of force does not apply in the absence of such intent, presumably because such a justificatory attempt would be reminiscent of the Brezhnev and Reagan doctrines proclaimed during the Cold War to justify the use of force (in the form of Soviet expansion or “pro-democratic” intervention respectively).<sup>128</sup> Most international lawyers have rejected this sweeping contention for the same reasons that they rejected the earlier Brezhnev and Reagan purported evasions of Article 2(4): because it ignores the full text of Article 2(4) (“or in any other

manner inconsistent with the purposes of the Charter”), other Charter provisions (such as the monopoly on multilateral force accorded to the Security Council under Chapters VII and VIII and limits imposed on unilateral force under Article 51), and because it threatens to unravel, without any clear stopping point, the most fundamental principles underpinning the UN Charter.<sup>129</sup>

Collective self-defence as the justification for the attack on Kosovo has drawn only marginal support. While a few policy makers, including President Clinton, suggested that the bombing was justified as (presumably anticipatory) collective self-defence under Article 51,<sup>130</sup> the lack of concrete evidence that such a threat existed at the time the bombing began, along with the absence of any plea for assistance from the countries allegedly threatened, undermined support for this approach and it was never fully articulated by the United States or the other NATO partners. Moreover, as many international lawyers countered, Article 51 is limited to cases of “armed attack” and not ephemeral threats, even those posed by waves of refugees.<sup>131</sup> The same reasons led most international lawyers to dismiss claims for the legality of NATO’s actions premised on Article 5 of NATO’s treaty.<sup>132</sup>

More sophisticated, but still controversial, have been justifications premised on (1) tacit authorization by the Security Council; (2) the alleged duty of all parties to the Genocide Convention (and arguably all states under customary international law) to prevent genocide; and (3) humanitarian intervention.

Probably the most accepted argument in favour of NATO’s action has been the contention that its action was tacitly authorized by the Security Council. Some US officials argued that the mere invocation of Chapter VII in Council Resolution 1199 implicitly gave NATO the authority to use force.<sup>133</sup> Support for the legality of implied authorizations of force would presumably be based on a number of prior incidents where such action was also “impliedly authorized” by the Council, at least in the views of the nation(s) resorting to force, including India’s seizure of Goa from Portugal (1961), the United States’ interdiction of Soviet ships *en route* to Cuba (1962), Israel’s air strike against the Osiraq nuclear reactor (1981), ECOWAS’ intervention in Liberia (1990), the forceful provision of safe havens to Kurdish refugees and the enforcement of no-fly zones in Iraq (1991), and US/UK air strikes against Iraq to enforce UN weapons inspections (1998).<sup>134</sup>

Bruno Simma has articulated the clearest, if hedged, academic justification along these lines. Simma has argued that since NATO is not a regional organization in the sense of Chapter VIII of the UN Charter, the requirement enshrined in Article 53(1) (requiring prior or *ex post facto* authorization of enforcement action) is not applicable to it. He con-

tends that NATO, like any member state or organization, is nonetheless banned from using force except in self-defence or collective self-defence without authorization by the Security Council under Chapter VII, but that the sequence of Security Council actions and inactions (especially Council Resolutions 1160, 1199, and 1203, as well as the presidential statement of 29 January 1999) “could be seen as an implicit authorisation granted *ex post*.”<sup>135</sup> Simma points out that the Council, particularly in Resolution 1203, expressed a remarkable degree of “satisfaction” with the Holbrooke agreements and with the subsequent successes of the Contact Group, even though all of these were causally linked to the NATO threats of air strikes, and despite Russia’s clearly expressed opposition to the use of force. His argument for tacit Council approval is based on this evidence of political approval, the Council’s express determinations that the situation constituted a “threat to the peace” (contained in Resolutions 1199 and 1203), and (though Simma does not say so) the Council’s failure to condemn the bombing despite Russia’s attempt to secure such condemnation.<sup>136</sup> Simma notes that any Permanent Member could have blocked these developments but did not, and he suggests that the Council would not have welcomed and endorsed developments in violation of the UN Charter. Simma concludes that while the absence of express Council authorization for the use of force under Chapter VII is a troubling “breach” of Charter law, “a reading of the relevant Council resolutions together with the respective pronouncements of NATO (members) might lead an observer to conclude that the two sides acted in concert.”<sup>137</sup> He suggests that there was “interaction” or “synergy” between the United Nations and NATO, and expresses agreement with German Foreign Minister Kinkel, who argued that NATO acted in conformity with the “sense and logic” of the Council resolutions.<sup>138</sup> Simma argues that hard cases make bad law, and recommends that the Kosovo crisis be seen “as a singular case in which NATO decided to act without Security Council authorisation out of overwhelming humanitarian necessity, but from which no general conclusion ought to be drawn.”<sup>139</sup>

Antonio Cassese has argued, by contrast, that the underlying breach of the Charter in this instance cannot be dismissed as “negligible” or “minor,” portrayed as consistent with the current Charter scheme, or characterized as an “exceptional” instance incapable of setting a precedent.<sup>140</sup> Cassese contends that a prior Council determination that a situation constitutes a threat to peace “does not constitute *per se* a legal ground for initiating an armed attack against a sovereign state,” and that under the existing Charter law, in any instance in which the values of peace, human rights, and self-determination conflict, “peace must always constitute the ultimate and prevailing factor.”<sup>141</sup> Lobel and Ratner would appear to agree, adding that the prior instances of alleged tacit



Council authorization do not amount to the required “systematic, unbroken practice” that warrants a gloss on the Charter’s express requirement that the Council make a determination of a threat or breach of the peace (Article 39), find that alternatives to force are futile (Article 42), and explicitly authorize the use of force (also Article 42).<sup>142</sup> They argue against such a gloss because of the need for restraint, accountability, and control on the use of force, the difficulties of determining whether authorization has been given, and the attendant uncertainties for world order and the Council’s primacy. For Lobel and Ratner, creating such an unwarranted, anarchical exception to the prohibition on the use of force would only discourage the Council from undertaking hard decisions, thereby loosening the restraints on the use of force and permitting the powerful to “pick and choose” among Council resolutions to enforce and to “act unilaterally under the guise of multilateral authority.”<sup>143</sup>

The second and third types of legal justifications noted above, based on the alleged legality of humanitarian interventions particularly when intended to prevent ongoing genocide, are clearly suggested by numerous NATO statements directing attention to the widespread massacres, other gross breaches of human rights, and mass expulsions of thousands of Kosovo citizens belonging to a particular ethnic group.<sup>144</sup> International lawyers, sensitive to the self-judging risks attendant to such justifications, have been sceptical of these arguments as well. Even the (arguably) strongest claim – that NATO action is justified when it is needed to prevent genocide – has not drawn uniform praise. As is the case with respect to the argument based on tacit authorization, much of the problem lies in the lack of textual support for such an exception to the use of force – in either the UN Charter or any other relevant legal binding instrument – as well as the lack of clarity with respect to the purported exception to the prohibition on force.

The Genocide Convention is not seen as providing much support for NATO’s action. While it is true that Article 1 of the Genocide Convention ostensibly commits all parties to that treaty to “prevent” that horrendous crime, that article affirms only that genocide is a crime and that it is through the use of states’ criminal laws that this crime ought to be prevented and punished, as does the rest of that Convention.<sup>145</sup> Nothing in that treaty or in the UN Charter makes reference to an exception on the ban on force for this purpose, or for the general protection of human rights. It seems quite a stretch to interpret the Genocide Convention, a treaty that is on the whole committed to expanding criminal jurisdiction, as an exception to the ban on force contained in the UN Charter and in customary international law. Moreover, interpreting Article 1 of the Genocide Convention as a license to use force to prevent genocide seems inconsistent with the plain text of that provision, since its wording would

imply that states have a *duty* to use force when the threat of genocide clearly appears.<sup>146</sup> Not even NATO members would suggest that they were legally required to bomb Kosovo. There is even some doubt concerning whether the crimes committed within Kosovo, however horrendous, amount to genocide as opposed to crimes against humanity or war crimes.<sup>147</sup> Finally, there is some irony in interpreting a treaty that does not even license all countries to define genocide, wherever committed, as a crime under their national jurisdiction, as giving permission for all countries to use force to defend genocide's victims even on foreign territory and even when their own nationals are not involved.<sup>148</sup> Despite the weakness of arguments premised on the Genocide Convention, the genocide justification has had considerable resonance. Certainly, supporters of NATO's action in government and the media drew on the force and stigma of genocidal allegations as well as the contention that the drafters of the Charter, who vowed "never again" to permit genocide, would surely have approved of the use of force in this instance.<sup>149</sup>

Even critics of the "tacit authorization" justification for NATO's action are more sympathetic to these explicitly humanitarian justifications. Thus, Lobel and Ratner argue that "in the extreme case of an on-going genocide for which the Security Council will not authorise force, perhaps the formal law ought to be violated to achieve the higher goal of saving thousands or millions of lives."<sup>150</sup> In such cases, they suggest that the states acting in response to the genocidal threat would have to "weigh the risk of universal condemnation and sanctions," and be ready to make a "convincing case that the military action is not based on a mere pretext and will be effective and proportionate."<sup>151</sup> For Lobel and Ratner, in such circumstances, "silence by the Security Council might then reflect a community consensus that the legal requirement for its authorisation ought to give way to the moral imperative."<sup>152</sup> Similarly, Cassese argues that "from an ethical viewpoint [NATO's] resort to force was justified," even though contrary to existing *lex lata*.<sup>153</sup> Cassese suggests that NATO's actions were "rooted in and partially justified by contemporary trends of the international community," and that NATO's breach of the Charter "may gradually lead to the crystallisation of a general rule of international law authorising armed countermeasures for the exclusive purpose of putting an end to large-scale atrocities amounting to crimes against humanity and constituting a threat to the peace" as an "exception to the UN Charter system of collective enforcement based on the authorisation of the Security Council . . . similar to that laid down in Article 51."<sup>154</sup>

A certain sympathy for the humanitarian justifications offered for NATO's actions may also be suggested by the ICJ's treatment of Yugoslavia's claims against NATO members. By a vote of 12 to 4, the Court rejected Yugoslavia's request for indication of provisional mea-

tures on the extremely narrow technical grounds that Yugoslavia's acceptance of the Court's jurisdiction, limited to disputes arising since 25 April 1999, did not extend to a bombing campaign that began on 24 March 1999.<sup>155</sup> As various dissenting judges noted, this conclusion artificially focuses on the date of the start of the bombing campaign and ignores many discrete incidents after that date whose consistency with the law of the Charter, not to mention humanitarian norms, might be questioned.<sup>156</sup> Moreover, the Court's conclusion patently ignores the presumed intentions of the drafter of the jurisdictional limits which it cites in order to dismiss the claim. As Judge Weeramantry points out, it seems bizarre to conclude that Yugoslavia intended to exclude from the Court's jurisdiction the very incidents of which it was complaining.<sup>157</sup> One could interpret the majority of the judges' strained abdication of their judicial role in this instance as a way to avoid casting doubt on the legality of an action of which they approved for humanitarian, but not necessarily legal, reasons.

Indeed, even some of the judges who dissented from the dismissal of Yugoslavia's claim for provisional relief tacitly (if cautiously) supported the humanitarian nature of NATO's mission. Judge Weeramantry, for example, indicated that were he to reach the merits, he would have gone beyond Yugoslavia's petitions for relief and obligated both parties to refrain from the use of force and to refrain from any other actions that would aggravate the dispute. He pointedly reminded the applicant that cessation of NATO bombing was contingent on continuing respect for the "rights of Kosovo Albanians and all who live in Kosovo" to remain or to return, without hindrance, to their homes, and that "any act of interference with the rights of the people of Kosovo" would "immediately destroy the basis of any order the Court may make."<sup>158</sup> Even this dissenter to the Court's dismissal of Yugoslavia's petition for relief appeared to be suggesting that legal constraints on NATO force would cease to apply, at least in so far as the Court was concerned, should the Serbian government continue its campaign of ethnic cleansing in defiance of any Court order.

As this admittedly cursory summary of the arguments raised to date suggests, the legality of NATO's action has been examined by a variety of Charter interpreters, and – as is typical of difficult IO constitutional debates, especially within the United Nations – a conclusive determination continues to elude the international community. It is far from clear whether, even if the ICJ were to reach the merits of Yugoslavia's complaint, its conclusion would be regarded as authoritative, especially by Permanent Members of the Council. The legality of NATO's action, and its consistency with the Charter scheme, will ultimately be determined by how policy makers, both in the Council and outside of it, react to the legal arguments made by the relevant epistemic community of international lawyers in light of political constraints.

A review of the constitutional arguments concerning NATO's actions could elicit scepticism about the prospects of legal discourse ever proving to be a "gentle civiliser of national self-interest."<sup>159</sup> A disinterested analyst of the arguments raised, as opposed to an engaged participant, could regard these legal arguments as yet another demonstration of the unreconcilable tensions within international law noted by "critical scholars" like Martti Koskenniemi.<sup>160</sup> Far from presenting a self-contained series of neutral apolitical arguments, the arguments on either side can be deconstructed into contradictory attempts to be both "concrete" and "normative," with every appeal to apologetic concrete fact matched by one directed at utopian normative principle.<sup>161</sup>

The "politics" within international constitutional discourse can be seen in the way that those engaged in the Kosovo debate deployed the elements described above. Consistent with the manipulable Vienna rules on treaty interpretation, opponents of NATO's actions begin with textual arguments (including the wording of Articles 2(4), 2(7), and 53 of the UN Charter and Article 5 of the NATO treaty). These contentions are backed, in turn, by resort to canons of interpretation, including *expressio unius est exclusio alterius*:<sup>162</sup> the key argument is that the Charter's allocation of authority to the Security Council is meant to be, except in cases of self-defence, exclusive. This textualist interpretation is in turn supported by originalist and teleological interpretations of the Charter. For the reasons identified in this chapter, the appeal to "intent" is not grounded in anything specific to the Charter's travaux but more in terms of the "contemporary intent" of UN members (who "never consented to the use of force for such purposes") or their more general "presumed intent" ("since they never intended to license the violation of territory sovereignty or domestic jurisdiction by any entity other than the Security Council"). The appeal to "presumed intent" may become scarcely distinguishable from the more openly teleological arguments of commentators like Cassese, whose purpose-driven interpretation of the Charter gives priority to "peace." NATO's opponents also reject the contention that the Council has the implied power to tacitly authorize the use of force on the grounds that such a power would not only be unnecessary but would be detrimental to the Council's proper functioning. The appeal to inconsistent prior institutional practice is predictably rejected on the grounds that prior tacit authorizations were never really accepted by the membership, because prior institutional practice cannot be used to "thwart" the formal processes for Charter amendment, because the Charter order requires the Council to serve as a "check" on others' resort to force, or because the Council's monopoly over the use of powers cannot be disturbed without seriously affecting the Charter's original distributions of power. Although appeals to "democratic" principles do not appear on the surface of the Kosovo debates, they are implicit in sugges-

tions that NATO ought to have sought the approval of at least the General Assembly,<sup>163</sup> or in contentions that NATO's action can only be legalized by formal "democratic" amendment of the Charter. Indeed, opponents of the Council's "contracting out" the use of force would be expected to resist the legality of even Council-authorized humanitarian interventions on the basis of the unrepresentative or unaccountable nature of the Council.<sup>164</sup>

For their part, while some supporters of NATO's action rest their case purely on the text of Article 2(4), most exploit the textual ambiguities in the relevant treaties while stressing the significance of prior institutional practice. As might be expected, NATO's backers emphasize the presumptions of legality that attach to prior institutional practice. For NATO's defenders, the fact that neither the veto nor the ICJ has prevented the use of force helps to demonstrate "general acquiescence" in this (and perhaps prior uses of force pursuant to tacit Council authorization). For them, the most useful canon of interpretation proves to be the "principle of effectiveness," a key element in the contention that the Charter scheme needs to be interpreted in a way that permits the organization – and when the organization cannot, its members – to fulfil the Charter's fundamental purposes, including enforcing respect for human rights. Their teleological view of the Charter elevates human rights, at least in cases of mass atrocity, above the pursuit of peace, and denies that contemporary expectations are inconsistent with this hierarchy of constitutional values. Finally, as is suggested by Cassese's reminder that NATO's breach may contain the seeds of a new rule, NATO's defenders suggest that the Kosovo bombing is, in line with a growing number of UN precedents on behalf of the forceful defence of human rights, part of a never-ending evolutionary development of UN institutional law.

Far from keeping politics at bay, these conflicting sets of legal arguments might be seen as serving the thinly veiled political motivations of the respective debaters (or of the governments whose interests are served). Even NATO's self-imposed "legal" constraints on its use of force – including its refusal to expand its goals to include the toppling of the Milosevic regime – can be seen as face-saving resorts to law that attempt to disguise the West's failure of resolve. It might also be said that the very nature of legal argumentation facilitates exploitation by the politically motivated. After all, much of constitutional argument is characterized by the impossibility of absolute proof – hardly a surprise in a "relativistic" universe filled with ambiguity, equivocality, multiple interpretation, and multiple interpreters.<sup>165</sup> NATO's bombing presents, at least arguably, the prototypical case of ambiguity: it is apparently a case of first impression; the applicable rule (at least in favour of securing authorization from the Security Council) is subject to more than one

meaning; another seemingly applicable rule (the prohibition on force) is claimed to be invalid; and there is a possible conflict between two rules (the use of force versus the need to prevent genocide and other comparable crimes).<sup>166</sup>

Scepticism about the legitimacy of constitutional forms of argumentation is also heightened by the temporal problem suggested by Cassese's assertion that NATO's action might be seen as an evolutionary step rather than a sharp discontinuous break from fundamental Charter principles. This argument reminds us that, as Johnstone has noted:

[the] interpretative community is not static; incremental shifts in categories of understanding are possible ... A sharp break cannot be justified in "legal" terms because the audience one is attempting to persuade will understand the arguments as a rejection of the norms of the community. Arguments for incremental change, on the other hand, build on the conventions recognised by the interpretative community. The interpretative process, while embedded in accepted understandings and strategies, allows for departures as long as they cohere with those understandings and strategies.<sup>167</sup>

The proposition that some breaches of the established constitutional order, however serious, can be excused on the basis of existing "trends" introduces yet greater uncertainty and potential for politicization.

Furthermore, as is suggested by Cassese's list of emerging international "trends" that might eventually justify NATO's resort to force, the debates over NATO's actions are not bereft of appeal to "values," even if these are cast in a legalistic mould. NATO's critics appear to value the sanctity of borders, or at least the need to preserve the Council veto, over the prevention of ethnic cleansing. For their part, those defending NATO's action seem to be appealing, even more overtly, to natural law or Kantian values – precisely the kind of appeal to idiosyncratic principles of natural justice that the rule of law was designed to preclude.<sup>168</sup>

For all these reasons, the Kosovo constitutional debate makes us sceptical of the value of law or its significance to the outcome. In the end, it seems that, as law's *Realpolitik* critics would predict, fidelity to a Charter matters little. While, despite the insistence of powerful UN members to the contrary, the claim that the Security Council has the power to tacitly authorize the use of force did not win instant acceptance, the political will of those powerful members was not thwarted. Indeed, it remains possible, perhaps even likely, that, as occurs regularly within customary international law, hegemonic power will prevail. NATO's breach of Charter law may ultimately produce the change in the underlying legal rule suggested by Cassese.

But the foregoing sceptical account is only one side of the issue. Particularly to those engaged in the constitutional debates over Kosovo's

action, the underlying contentions, while they cannot be divorced from political concerns, are not synonymous with them. The lawyerly “fight against politics” was waged in this instance, as it usually is, through familiar appeals to “neutral” or “objective” governing rules and sources of evidence.<sup>169</sup> Despite the differences between the various constitutional interpreters, there was a significant degree of uniformity about how the Kosovo constitutional debate should be conducted and about the range of permissible interpretative tools. All agreed that the relevant tools were extremely narrow – legal texts, directly related policy and intent-based arguments, prior institutional practice, and a very limited number of interpretative principles (such as interpretation in “good faith”). Overtly “political” arguments such as, for example, the need to destabilize Milosevic’s regime or improve regional European stability, were excluded, as being outside the terms of relevant constitutional discourse.

The legal debates over NATO’s actions are instructive. They show us that constitutional discourse is a process of justification that seeks to engage others in, and presumes that others are willing to engage in, an artificially constricted dialogue embedded in the historical practices and proclaimed standards of the international legal community. Because it avoids an appeal to either the speaker’s or the listener’s idiosyncratic interests and preferences, constitutional discourse implies recognition of the existence of a world beyond the speakers’ “immediate subjectivity.”<sup>170</sup> As even the prime critic of the “politics” of law, Koskenniemi, has pointed out, legal discourse, of which constitutional discourse is a prime example, involves a kind of “situational ethics” that extends beyond agreement on rules and principles but encompasses a “fairness of process, an attitude of openness, and a spirit of responsibility that implicitly or expressly means submission to critique and dialogue with others about the proper understanding of the community’s principles and purposes.”<sup>171</sup> As Koskenniemi indicates is the case with all legal argument, the debates about the constitutionality of NATO’s action are quintessentially legal because of the terms in which these have been conducted: that is, “by open reference to rules and principles, instead of in secret and without adequate documentation; by aiming towards coherence and consistency, instead of selective bargaining between old boys; by an openness to revision in light of new information and accountability for choices made, instead of counting on getting away with it.”<sup>172</sup> The arguments over the legality of NATO’s actions assume what the critical disinterested perspective outlined above denies – the communal situatedness of the debaters. By engaging in these arguments on legal terms, the debaters were both making public the normative basis and objectives of their actions, and presuming that even military actions in the arena of “high politics” must involve accountability to the relevant “interpretative community.”

Constitutional discourse is, as Ian Johnstone has argued more generally, a structure of self-imposed constraints that appeals to an interpretative community as the ultimate source of authority.<sup>173</sup> It is a form of social communication that both shapes and is shaped by states' behaviour. It supplies a common frame of reference that is all the more important in those IOs, like the United Nations, that lack an authoritative interpreter and that operate in the context of a charter filled with vague "purposes" and "principles." Far from rendering the meaning of charters radically indeterminate, constitutional discourse, while facilitating a more fluid interpretation that would apply with respect to more static contractual arrangements between states, nonetheless signals to all that certain analogies from the practices of nation-states will still be used to constrain interpretative discretion. By suggesting that the interpretative principles are those of a constitutional community, those engaged in constitutional debates enter what Ian Johnstone has characterized as a process of "intersubjective interpretation" – where "the interpretative task is to ascertain what the text means to the parties collectively rather than to each individually."<sup>174</sup> Even the United States understands that the legitimacy of its arguments about the legality of NATO's action will depend on whether these arguments will reflect shared understandings and expectations – and not merely by other governments, but also by the legal appraisals of other IOs, academics, NGOs, and other organs of public opinion. And, because of the intersubjective nature of these arguments, as well as, more precisely, the law's needs for consistency and coherency, even the United States understands that whatever it argues about the legality of NATO action will necessarily have to apply to other communal responses that are deemed comparable in the future – or, as Johnstone puts it, that "the interpretative process is shaped and thereby constrained by the conventions and practices of an enterprise characterised by reciprocity."<sup>175</sup>

Whether because of a failure to meet one of Thomas Franck's elements of legitimacy,<sup>176</sup> Koskeniemi's "fight against politics," Johnstone's "intersubjectivity" of meaning, or perhaps more simply due to actors' self-interested desires for stability and predictability, it seems that both policy makers and commentators avoided justifications for NATO's actions that would be perceived to be in "bad faith," blatantly "political," or unduly dismissive of accepted shared Charter values. The arguments over the legality of NATO's bombing suggest that, as Ian Johnstone puts it, "law is not infinitely manipulable" but is constrained by the need to remain faithful to its accepted process and sources of authority; that is, to maintain its credibility before its intended addressees.<sup>177</sup> Even member states most interested in justifying NATO's actions seemed concerned about setting a "bad precedent" that would unduly weaken the constitutional



strictures against the use of force or the authority of the Security Council.<sup>178</sup> From Clinton to Simma to Cassese, all sought to avoid establishing expansive legal precedents that, given inherent reciprocity, could prove troublesome in the future.

The constraining power of constitutional discourse is perhaps best exemplified by those seeking to escape its confines. Simma's efforts to brand NATO's actions as a singular exception, Cassese's attempts to cast it as the seed for a potential new rule, and Lobel and Ratner's view of genocidal intervention as a form of civil disobedience authorized by a "moral imperative" are all more or less candid attempts to treat NATO's actions as not subject to the demands of faithful constitutional interpretation, including its insistence that an IO be both grounded in its prior practice and treated as capable of casting a shadow over the future. These debaters' attempts to avoid the burdens of constitutional precedent, the most sophisticated yet to emerge concerning Kosovo, suggest the constraining nature of the United Nations' constitutional order for those who take constitutional interpretation seriously. In their differing ways, all these commentators conclude that NATO's action is inconsistent with the existing Charter scheme. All of these Western commentators, despite their sympathy for NATO's goals, cannot find a way to credibly conclude that what NATO did is legal or constitutional under existing law. The respective views of Simma, Cassese, and Lobel and Ratner suggest that despite the manipulable nature of language and the fluidity of its interpretative rules, constitutional interpretation, like other forms of legal discourse, can manage to be both concrete and normative – indeed, that is its defining characteristic and perhaps its principal value. The Kosovo case demonstrates, to paraphrase Simma, that even "hard cases" involving "high politics" remain subject to the "power of rules."<sup>179</sup>

## Conclusion

Although the tools used to interpret IO charters vary with particular IOs and with the nature of the forum in which interpretation occurs, generally such charters are not interpreted as mere bilateral contracts among states. The IO interpretative enterprise is not driven, as it would be in the context of a contract, by an effort to give effect to the parties' "original intention," and even the plain meaning of the charter's text may be only the beginning of the interpretative exercise. Some of the differences in interpretative approaches may be attributable to the fact that IO charters create a third "party": an institution to which the parties have delegated certain functions, both express and implied. Lawyers and policy makers assume that when such an institution is created, parties intend to make it

effective, and that common sense proposition has led to the more controversial idea that charter provisions need to be read in light of a “principle of effectiveness” whereby no charter power, once granted, ought to be rendered ineffective. “Original intent” arguments are eclipsed by contentions that charter provisions need to be read to effectuate an organization’s (usually broad, vague, and expansive) “objects and purposes,” with the doctrine of “implied powers” used to fill the gaps. The practice of the organization, even if initially the outcome of a decision by a non-state actor such as an international civil servant like the organization’s legal counsel, is accorded a presumption of legality, with the burden of proof put on those who would contend that an institution (or one of its organs) has acted outside the scope of its powers. Institutional practice is readily transformed into “precedent” to be cited in support later, as needed, out of deference to consistency and stability. The silence of members in the face of institutional practice is usually treated, fairly or unfairly, as acquiescence.

Non-lawyers frequently misunderstand the nature and value of law. While the law includes some clear substantive rules, it is, more significantly, a method of thinking. As Johnstone has pointed out, a commitment to legal discourse involves something more than an agreement to abide by substantive rules; it is also a “commitment to a process of constructing the meaning of the relationship together.” As outlined above, the “rules” governing constitutional interpretation are as vague as the charters themselves. While charter interpretation remains couched in text(s), its “context” may point in the opposite direction. A charter’s “plain meaning” is rarely “plain” and is often determined through the use of highly manipulable “canons of interpretation,” subject to arguments premised on the overall “structure” of an instrument. Finally, all the interpretative evidence – text, intent, practice – is filtered through idiosyncratic interpretative philosophies, most prominently the belief that interpretation requires “dynamic” reinterpretation in light of changing “community needs.”<sup>180</sup>

Yet, in all these respects, lawyers generally treat IO charters much as they would national constitutions and often, though perhaps not always, definite conclusions about the legality of actions emerge over time when these are accepted as consistent with the “constitutional” order established by the IO. The “meta-norms” contained in such charters are usually elevated to a higher plane than those in “ordinary” treaties. The interpretations favoured by institutional organs often prevail, particularly over the long term, and, at times, even in spite of opposition by a significant minority of members.

This “constitutionalization” of IO charters, while falling far short of the level of constitutionalization evident among nation-states, has had an

important impact on the international law-making process. Despite the ebbs and flows that occur with respect to IOs described by Klabbers in this volume, international law-making in the twentieth century continues to be characterized by the “move to institutions.”<sup>181</sup> Since 1945, thanks in significant part to the ways IO charters have been (flexibly) interpreted, most changes in international law have occurred within the framework of international organizations.<sup>182</sup> IOs have radically transformed the most traditional sources of international law – treaties.<sup>183</sup> They have also contributed to steady innovation in alternative “rule”-making techniques, characterized, unlike the traditional sources of international law, by a continuum of binding authority.<sup>184</sup> The evolving interpretation of substantive provisions within IO charters, particularly the UN Charter, has, in some instances, dramatically transformed the meaning of customary rules. Thus, since 1945, the meaning given to the “domestic jurisdiction” of states has been radically transformed by the proliferation of human rights norms and their enforcement, including by the Security Council and, if the Kosovo action is a harbinger of things to come, perhaps by other multilateral executors of force. Similarly, the many “soft” and hard law obligations of good conduct governing everything from monetary relations to the standards of civil aviation contained in national laws and treaty obligations can scarcely be understood without an account of the work of such entities as the IMF and ICAO respectively.<sup>185</sup> To modern lawyers, the contention that the evolution of custom remains dependent on the initiative and subsequent reaction of individual states seems strikingly out of date, since it ignores the way in which states have had to react to IO activity, and the way in which even their inaction in the face of that activity has affected the relevant rules.

Quite apart from the impact on the substantive rules, the use of constitutional analogies within IOs is a tangible manifestation of the degree to which the international system is now characterized by a “kind of order, in which patterns repeat, institutions accrete, and practices are stable.”<sup>186</sup> Despite the very real distinctions between the national and international “constitutional” orders,<sup>187</sup> the developments discussed here suggest that international actors have accepted a structure of authority or legitimized power that many wrongly associate exclusively with nation-states.<sup>188</sup>

## Notes

1. This essay is adapted from portions of a book in progress.
2. See, for example, Arangio-Ruiz, G., 1997. “The ‘Federal Analogy’ and UN Charter Interpretation: A Crucial Issue.” *European Journal of International Law* 1: 1. (Critiquing the prevalence of federal constitutional analogies.)

3. Ress, G., 1995. "The Interpretation of the Charter," in Simma, B. (ed.), *The Charter of the United Nations: A Commentary* Oxford: Oxford University Press, 27. See also Sloan, B., 1961. "The United Nations Charter as a Constitution," *Pace Year Book of International Law* 1: 61, 114–126. (Arguing that the terms of the UN Charter and the open-ended intent of those who drafted it permit flexible interpretation without the need to adopt explicitly "non-interpretive" approaches.) Janis, M. W., 1993. *An Introduction to International Law* (2nd ed.). Boston: Little, Brown, 13–14. (Distinguishing between "contractual," "legislative," "constitutional," and "aspirational" types of treaties.)
4. See, for example, Hexner, E., 1964. "Teleological Interpretations of Basic Instruments of Public International Organisations," in Engel, S. (ed.), *Law, State, and International Legal Order*. Knoxville: University of Tennessee Press, 119. (Surveying "teleological interpretations" within various IOs.) Amersinghe, C. F., 1994. "Interpretation of Texts in Open International Organisations." *British Year Book of International Law* 65: 175. (Surveying interpretative models in IOs that aspire to universal membership.) Fawcett, J. E. S., 1960. "The Place of Law in an International Organisation." *British Year Book of International Law* 36: 321. (Examining interpretative processes within the IMF.) Mann, F. A., 1968/9 "The 'Interpretation' of the Constitutions of International Financial Organisations." *British Year Book of International Law* 43: 1.
5. Ress, G., "The Interpretation of the Charter" (see note 3, above), 27.
6. *Ibid.*, 35–39.
7. See, for example, Halberstam, M., 1966. "The Right to Self-Defence Once the Security Council Takes Action." *Michigan Journal of International Law* 17: 229. (Arguing for an originalist interpretation of Article 51 of the UN Charter.)
8. "Dusko Tadić," Case No. IT-94-1-AR72, October 2 1995, para. 44; see also *ibid.*, Separate Opinion of Judge Sidhwa, para. 67–69 (arguing that the Tribunal was established by "popular will").
9. See, for example, GA Res. 47/62 of 10 February 1993 (recognizing the need for "equitable representation" and an increase in the membership of the Security Council). See also Koskeniemi, M., 1996. "The Place of Law in Collective Security." *Michigan Journal of International Law* 17: 455, 485–488.
10. See, for example, chapter 8 of this book. See also Franck, T. M., 1992. "The 'Powers of Appreciation': Who is the Ultimate Guardian of UN Legality." *American Journal of International Law* 86: 519. Herdegen, M. J., 1994. "The 'Constitutionalisation' of the UN Security System." *Vanderbilt Journal of Transnational Law* 27: 135. Alvarez, J. E., 1996. "Judging the Security Council." *American Journal of International Law* 90: 1. In this literature, commentators, even those outside the United States, have persistently compared Libya's ICJ challenge to the sanctions imposed on it for the Lockerbie bombing to "Marbury v. Madison," the US Supreme Court decision establishing the propriety of judicial review. For discussions among judges of the ICJ, see, especially, the separate opinions, concurring and dissenting, in "Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK; Libya v. US), Provisional Measures," 1992 ICJ Rep. 3 (henceforth referred to as the Lockerbie Case). See also "Dusko Tadić" (see note 8, above).
11. See, for example, Perez, A. F., 1996. "On the Way to the Forum: The Reconstruction of Article 2(7) and the Rise of Federalism Under the United Nations Charter." *Texas International Law Journal* 31: 353. For other attempts to find limiting principles, implicitly or explicitly grounded in constitutional analogies, on the scope of IOs' powers, see the chapter 6 of this book.
12. See, for example, "US v. Curtiss-Wright Corp." 299 US 304 (1936) (approving a Congressional delegation of authority to the President). For an exhaustive examination of

- the scope of permissible delegation, attempting to draw coherent principles from the extensive institutional practice of the UN Security Council, see Sarooshi, D., 1999. *The United Nations and the Development of Collective Security*. Oxford: Clarendon Press. For a critique of the Council's "contracting out" the use of force, see, for example, John Quigley, "The 'Privatization' of Security Council Enforcement Action: A Threat to Multilateralism." *Michigan Journal of International Law* 17: 249.
13. See UN Charter, Articles 10, 13, 14 (outlining the powers of the General Assembly); Articles 24–25; and Chapter VII (on the Security Council).
  14. See UN Charter, Articles 97–101.
  15. See UN Charter, Article 92 (stating only that the ICJ is the "principal judicial organ"). Thus, Arangio-Ruiz argues that the court's statute does not create a "'judicial community' in any proper sense of the term." Arangio-Ruiz, G., "The 'Federal Analogy'" (see note 2, above), 13.
  16. See Statute of the Court, Articles 65–68 (on advisory opinions) and Article 34 (on contentious cases brought by states). States are legally obligated to abide by decisions issued in contentious cases to which they are parties. See UN Charter, Article 94; Statute of the Court, Article 59. With respect to the enforcement of opinions issued in contentious cases, Article 94(2) of the UN Charter provides that the Security Council "may" (not "shall"), and only "if it deems necessary," take action to give effect to the Court's judgements.
  17. Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Rep. (1980) 89–90, para. 37 (citing the Court's own dictum in "Reparations for Injuries Suffered in the Service of the United Nations").
  18. Arangio-Ruiz, G., "The 'Federal Analogy'" (see note 2, above), 4. While Arangio-Ruiz concedes that Charter provisions providing for the direct availability of armed forces to the United Nations might in theory lessen the gap between the Charter scheme and a confederal pact, he notes that the failure to implement Article 43 agreements renders this "exception" debatable. *Ibid.*, 5.
  19. Schachter, O., 1995. "The Charter's Origins in Today's Perspective." *Proceedings of the 89th Annual Meeting, American Society of International Law*: 45.
  20. The UN Charter begins: "We the Peoples of the United Nations ..." UN Charter, Articles 1 and 2. As W. Michael Reisman has stated, "[t]he 'deadest letters' in the UN Charter are in its very first words: 'We the Peoples of the United Nations'." Reisman, W. M., 1994. "Amending the UN Charter: The Art of the Feasible." *Proceedings of the 88th Annual Meeting, American Society of International Law*: 108–109. See also Arangio-Ruiz, G., "The 'Federal Analogy'" (see note 2, above), 17 (calling the phrase a "bold lie").
  21. See Arangio-Ruiz, G., "The 'Federal Analogy'" (see note 2, above), 18–19.
  22. *Ibid.*, 18.
  23. *Ibid.*, 6–9.
  24. See UN Charter, Article 2(7).
  25. UN Charter, Articles 2(7), 39.
  26. See Arangio-Ruiz, G., "The 'Federal Analogy'" (see note 2, above), 10–11.
  27. *Ibid.*, 14.
  28. Schachter, O., "The Charter's Origins in Today's Perspective" (see note 19, above), 47 (emphasis in original).
  29. See, for example, Bowett, D. W., 1982. *The Law of International Institutions* (4th ed.). London: Stevens and Sons, 17–22.
  30. Grewe, W. G., 1995. "The History of the United Nations," in Simma, B., (ed.), *The Charter of the United Nations* (see note 3, above), 9.

31. Arangio-Ruiz, G., "The 'Federal Analogy'" (see note 2, above), 20.
32. See, for example, *ibid.*, 22–25, and chapter 6 of this book.
33. Ress, G., "The Interpretation of the Charter" (see note 3, above), 27; Bernhardt, R., 1995. "Article 104," in Simma, B., (ed.), *The Charter of the United Nations* (see note 3, above), 1125. Article 103 of the Charter has been cited to permit the Council to take action which would otherwise violate the charters of other organizations. See, for example, SC Res. 748, S/RES/748 (1992) (imposing sanctions on Libya in connection with the Lockerbie bombing); the Lockerbie Case, para. 42 (indicating that the Council resolutions imposing sanctions on Libya prevail over other treaties and citing Article 103). The superior status of the UN Charter is also recognized in Article 30(1) of the Vienna Convention on the Law of Treaties, 1155 UNTS 331 (concluded 23 May 1969). There have been suggestions that these provisions, as well as Article 2(6) of the Charter and the possible connections between certain norms in the Charter and *jus cogens*, give the UN Charter a superior hierarchical status to all other treaties. How this relationship would be applied, given "safeguard" clauses in other IO charters, gives rise to some interpretative difficulties. See, for example, Lauwaars, R. H., 1984. "The Interrelationship Between United Nations Law and the Law of Other International Organisations." *Michigan Legal Review* 82: 1604.
34. The argument that the UN Charter is entitled to superior status under US domestic law, so that, for example, it must be given effect even over subsequent federal law, has been rejected by at least one US court. See, for example, "Diggs v. Schultz," 470 F.2d 461, 465 note 4 (DC Cir. 1972).
35. Cf. Petersmann, E., 1997. "How to Reform the UN system? Constitutionalism, International Law, and International Organisations." *Leiden Journal of International Law* 10: 421, 426–437.
36. For a forceful reminder of the WTO's limitations in this respect, see chapter 6 of this book.
37. There appear, at the extremes, to be two incompatible models for the European Union. As one commentator has put it:

On the one hand, it may be viewed as an entity created by international treaties entered into by sovereign states, an entity with its own courts and legal system, but one founded on the Treaties, which constitute its supreme law. On the other hand, one can see it as an embryonic federation, inherently committed to a process of growth by which it will become an actual federation.

Hartley, T. C., 1996. "The European Court, Judicial Objectivity and the Constitution of the European Union." *Law Quarterly Review* 112: 95, 109.

38. Arangio-Ruiz, G., "The 'Federal Analogy'" (see note 2, above), 2.
39. See, for example, Petersmann, E., "How to Reform the UN System?" (see note 34, above).
40. See, for example, chapters 7 and 8 of this book for examples. See also Weston, B. H., 1991. "Security Council Resolution 678 and Persian Gulf Decision-Making: Precarious Legitimacy." *American Journal of International Law* 85: 516.
41. Constitution of the Food and Agriculture Organization, 12 UST 980, TIAS 4803 (adopted 16 October 1945), Article 17; Convention on the International Maritime Organization, 289 UNTS 48 (as amended through 1991, adopted 6 March 1948), Article 65; Charter of the Organization of African Unity, 479 UNTS 39 (25 May 1963, entered into force, 13 September 1963), Article 27; Convention on International Civil Aviation, 15 UNTS 295 (adopted 7 December 1944), Article 84. See also Constitution of the

- World Health Organization, 14 UNTS 185 (as amended through 1991, opened for signature 22 July 1946), Article 75; and Convention of the World Meteorological Organization, 77 UNTS 143 (signed 11 October 1947), Article 29.
41. See, for example, Articles of Agreement of the IMF, 2 UNTS 39 (as amended through 1992, adopted 27 December 1945), Article XVIII (section 4); See also Mann, F. A., "The 'Interpretation' of the Constitutions of International Financial Institutions" (see note 4, above).
  42. On the OAU, see the Charter of the Organization of African Unity, Article 27. On ICAO, see the Convention on International Civil Aviation, Article 84. For a case that found that an appeal can only be sought from a final and not an interim decision by the ICAO Council, see 1972 ICJ Rep. 56 (*India v. Pakistan*).
  43. See, for example, Constitution of the International Labour Organization, 15 UNTS 35 (as amended through 1991, adopted 9 October 1946), Article 26.
  44. For a review of early discussions within the context of the planned charter for an International Trade Organization to submit trade disputes to the ICJ, see Rubin, S. J., 1949. "The Judicial Review Problem in the International Trade Organisation." *Harvard Law Review* 63: 78. The ITO never emerged and the formal institutionalization of the GATT did not occur until the creation of a WTO in the Uruguay Round. While GATT disputes were always capable of being submitted to internal GATT dispute settlement processes, under the WTO's Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO members have formally agreed to submit interpretative disputes to GATT dispute settlement processes and to abide by the result. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 (esp. Article 23).
  45. See Schermers, H. G. and Blokker, N. M., 1995. *International Institutional Law* (3rd ed.). The Hague: Martinus Nijhoff, 829–861.
  46. See Statute of the Court, Articles 34–36 (providing for jurisdiction to issue binding decisions only in cases brought by states); Articles 65–68 (providing for jurisdiction to issue non-binding advisory opinions at the request of certain IOs).
  47. Doc. 2, G/7(k)(1), 3 UNCIO 335, 336.
  48. Doc. 664, IV/2/33, 13 UNCIO 633.
  49. See, for example, Watson, G. R., 1993. "Constitutionalism, Judicial Review, and the World Court." *Harvard International Law Journal* 34: 1.
  50. See, for example, Amerasinghe, C. F., "Interpretation of Texts" (see note 4, above), 195–96.
  51. See UN Charter, Article 94(1); Statute of the Court, Article 60.
  52. *Ibid.*, 174.
  53. See, for example, Sloan, B., "The United Nations Charter" (see note 3, above), 74–77 (indicating that the General Assembly has sanctioned resort to the Court for purposes of Charter interpretation and that ICJ advisory opinions have involved interpretations of the Charter).
  54. See notes 40–44, above, and accompanying text.
  55. There is even less resort to the other alternative identified in the San Francisco decision above: charter amendment. See note 65, below.
  56. As the ICJ later affirmed in an advisory opinion which queried the legality of action by the General Assembly, the presumption of legality only applies "when the Organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations." "Certain Expenses of the United Nations," 1962 ICJ Rep. 151, 168.
  57. Sohn, L., 1995. "Interpreting the Law," in Schachter, O. and Joyner, C. C. (eds), *United Nations Legal Order*. Cambridge: Cambridge University Press, 204.
  58. These limits are required because IOs, at least under positivist legal theory, have only

those powers conferred upon them by states. Thus, the leading legal treatise on IOs indicates that “states are sovereign in the sense that their powers are not dependent on other authority” but “the powers of international organisations are limited to whatever is necessary to perform their functions which their constitutions have defined.” Schermers, H. G. and Blokker, N. M., *International Institutional Law* (see note 45, above), 141.

59. See notes 87–102, below, and accompanying text.
60. On occasion, even national courts participate in the interpretation of IO charters. See, for example, Schermers, H. G. and Blokker, N. M., *International Institutional Law* (see note 45, above), 836–841.
61. Some have even suggested that such an approach is inconsistent with the premise of a single “authoritative” interpretation. See, for example, Goodrich, L. et al., 1969. *The Charter of the UN: Commentary and Documents* (3rd revised edn.). New York: Colombia University Press, 15–16.
62. But the degree of deference accorded to particular interpretations, issued or requested, of the legal department of secretariats varies among IOs. In the IMF, interpretations issued in his personal capacity by Sir Joseph Gold, long-time legal adviser to that organization, have been extremely influential. See, for example, Schermers, H. G. and Blokker, N. M., *International Institutional Law* (see note 45, above), 844. In the ILO, the International Labour Office has stated that “when an opinion given by the Office has been submitted to the Governing Body and published in the Official Bulletin and has met with no adverse comment, the Conference must, in the event of its subsequently including in another Convention a provision identical with or equivalent to the provision which has been interpreted by the Office, be presumed, in the absence of any evidence to the contrary, to have intended that provision to be understood in the manner in which the Office has interpreted it.” Quoted in *ibid.*, 844–845. Respect for the opinions issued by the UN’s Office of Legal Affairs has been more equivocal. See, for example, Kirgis, F. L. Jr, 1993. *International Organisations in Their Legal Setting* (2nd edn.). St. Paul: West Publishing, 32–33.
63. For one concrete example, see, for example, “Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276,” 1971 ICJ Rep. 16, 22 (turning to past Council voting practices in order to help determine the meaning of Article 27(3) of the Charter); “Đuško Tadić” (see note 8, above) (turning to prior Council practices with respect to various issues). More generally, it is quite common, for example, for GATT panels to cite prior GATT panel decisions, and for other international adjudicative bodies to accord deference to prior rulings by the same adjudicative body, much like common law courts.
64. See, for example, de Aréchaga, J., 1958. *Derecho Constitucional de las Naciones Unidas*. 204. (“... few national constitutions have undergone in the process of their application such important and rapid changes as the UN Charter.”) See also Sohn, L., “Interpreting the Law” (see note 57, above), 227 (noting that the UN Charter, like “the Constitution of the United States, is almost immutable as far as its text is concerned, but over less than fifty years, its interpretation has changed as much as those of the Constitution of the United States in two hundred years”).
65. Although this has been commonly noted with respect to the constitutive instruments of the European Union, the same is true with respect to many IOs. Although IO charters have undergone a number of formal amendments, only a small number of these amendments have concerned the powers and duties of these organizations; the de facto changes in normative effect brought about by changes in the interpretation of charter provisions are not often reflected in changes in charter text. For a summary of amendments to IO charters, see Schermers, H. G. and Blokker, N. M., *International Institutional Law* (see note 45, above), 720–737. Although the UN Charter has only been



amended twice, it has undergone many de facto changes without triggering the formal amendment processes contained in its Article 108. For example: the United Nations has deployed UN force without having Article 43 agreements in place and without the strategic direction of the Military Staff Committee (foreseen in Article 47); has resorted to budget-making by consensus instead of the two-thirds vote envisioned in Article 18; has created peacekeeping out of an imagined “Chapter VI and one half” or insisted on forceful implementation of sanctions pursuant to a non-existent “Article 41 and one half”; and has managed to sit Russia instead of the Soviet Union as a Permanent Member despite the wording of Article 27. Meanwhile, the Security Council has delegated away important functions to a variety of judicial and quasi-judicial bodies such as an international criminal court, a compensation commission and sanctions committees; has taken purportedly binding action under Chapter VI; and has resorted to “peacekeeping with teeth” in situations probably never contemplated by the framers – to assist in humanitarian crises (UNISOM II in Somalia, UNPROFOR in Croatia) or in response to prior aggression (UNIKOM in Iraq). For other examples in the context of the United Nations, see Sohn, L., “Interpreting the Law” (see note 57, above), 226–29. See also Kirgis, F. K. Jr., 1995. “The Security Council’s First Fifty Years.” *American Journal of International Law* 89: 506. For a summary of some of the transformations wrought by institutional innovations in the GATT, many of which are now formally incorporated as part of the Uruguay Round agreements for a WTO, see, for example, Petersmann, E., 1995. “The Transformation of the World Trading System Through the 1994 Agreement Establishing the World Trade Organisation.” *European Journal of International Law* 6: 161. See also Demaret, P., 1995. “The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organisation.” *Columbia Journal of Transnational Law* 34: 123. For institutional innovations within the ICAO, see generally, Buerghenthal, T., 1969. *Law-Making in the International Civil Aviation Organisation*. Syracuse: Syracuse University Press.

66. Jackson, J. H., Davey, W. J., and Sykes, A. O. Jr., 1995. *Legal Problems of International Economic Relations: Cases, Materials and Text* (3rd edn.). St. Paul: West Publishing 333–335.
67. For an example under the pre-WTO system, see *ibid.*, 347 (describing the problems with compliance with a GATT panel report in a case between Nicaragua and the United States).
68. See, for example, Petersmann, E., 1994. “The Dispute Settlement System of the World Trade Organisation and the Evolution of the GATT Dispute Settlement System Since 1948.” *Common Market Law Review* 31: 1157. While rule-based approaches are, of course, prominently applied in arbitral or adjudicative settings such as the ICJ, the Court of Justice of the European Community, the European and Inter-American Commissions and Courts of Human Rights, GATT/WTO panels, or ad-hoc arbitrations, more avowedly “politicized” arguments are more prominent in fora where lawyers are not regularly consulted, as in the plenary or “executive” organs of IOs such as the General Assembly or the Security Council. Even the latter “political” institutions are characterized by arguments couched in recognizably “legal” terms. See, for example, Koskeniemi, M., “The Place of Law in Collective Security” (see note 9, above). For differing views of the prevalence of “lawyerly” approaches to charter interpretation in financial organizations such as the IMF, see, for example, Fawcett, J. E. L., “The Place of Law in an International Organization” (see note 4, above). See also Hexner, E. P., 1959. “Interpretation by Public International Organisations of Their Basic Instruments.” *American Journal of International Law* 53: 341. See also Mann, F. A., “The ‘Interpretation’ of the Constitutions of International Financial Institutions” (see note 4, above).

69. Vienna Convention on the Law of Treaties. These rules are widely considered to reflect, in substantial part, customary international law as well. See, for example, Tunkin, G. I., in Dupuy, R. 1988. *A Handbook on International Organisation*. Dordrecht: Martinus Nijhoff, 265–269.
70. See, for example, Restatement of the Law, Third, Foreign Relations Law of the United States, sec. 335 (1986). Washington: American Law Institute.
71. See, for example, “Reparation for Injuries Suffered in the Service of the United Nations,” 1949 ICJ Rep. 178 (henceforth referred to as the Reparations Case) (ignoring the negotiating history described in Sohn, L. 1967. *Cases on United Nations Law* (2nd ed). Brooklyn: Foundation Press, 32–33.
72. Ress, G., “The Interpretation of the Charter” (see note 3, above), 35–39.
73. The ILC, in its commentary to the Convention, denied that Article 32 draws a “rigid line” between the “supplementary” means of interpretation and the tools permitted under Article 31. The ILC stated that by admitting recourse to supplementary means for the purpose of “confirming” the meaning, they were intended to establish “a general link between the two articles” as well as “the unity of the process of interpretation.” Report of the International Law Commission on the Work of the Second Part of the Seventeenth Session, Monaco, 3028 January 1966, UN Doc. A/6309/Rev. 1, *Yearbook International Law Commission* 2: 169, 354, reprinted in *American Journal of International Law* 61: 248, 349 (1967). See also Frankowska, M., 1988. “The Vienna Convention on the Law of Treaties Before United States Courts.” *Virginia Journal of International Law* 28: 281, 335. As Professor Frankowska suggests, and the US Restatement on Foreign Relations confirms, US courts, for example, commonly resort to the negotiating history of a treaty, often at the outset of their inquiry and without a demonstration of the inadequacy of text and context. See Restatement, Third, Foreign Relations Law of the United States, comment g, 198 and reporters’ notes, 198–99 (1987).
74. See, for example, Chayes, A. and Chayes, A., 1995. *The New Sovereignty*. Cambridge, Mass.: Harvard University Press 10–11. On the more general issue of ambiguity of language, see, for example, Kennedy, D., 1976. “Form and Substance in Private Law Adjudication.” *Harvard Law Review* 89. Further, as Sloan notes, even if original intent arguments are ultimately rejected, advocates commonly resort to the travaux and such arguments are therefore at least considered in the course of interpretation even if not cited in the adjudicators’ final decision. Sloan, B., “The United Nations Charter as a Constitution” (see note 3, above), 104.
75. This is especially the case given the text of Article 31, which licenses such interpretation “in light of its object and purpose.” Just what the “object and purpose” of an IO – such as the United Nations, whose Charter identifies various potentially conflicting “purposes and principles” (in Articles 1 and 2) – is, may be a matter of considerable dispute. See chapter 3, above (discussing the issue in the course of the debate over the legality of NATO’s bombing of Kosovo). Quite apart from this difficulty, the license accorded by Article 31 potentially opens the door to expansive teleological approaches such as the one advocated by Ress (see note 3, above). Finally, Article 31’s permission to consider the “general rules of international law,” and not merely those rules “in force at the time of a [treaty’s] conclusion” as was originally proposed, is a further refutation of “static interpretation.” Sloan, B., “The United Nations Charter as a Constitution” (see note 3, above), 106.
76. Schachter, O., 1964. “Interpretation of the Charter in the Political Organs of the United Nations,” in Engel, S. (ed.), *Law, State and International Legal Order* (see note 4, above), 274.
77. *Ibid.*, 274–277.

78. For one survey of these, see Antieau, C. J., 1982. *Constitutional Construction*. This work surveys 50 canons of construction used by constitutional courts around the world. As Sloan notes, one can find within Antieau's canons, a "maxim for almost every side and nuance of a question." Sloan, B., "The United Nations Charter as a Constitution" (see note 3, above), 92.
79. See, for example, Zoller, E., 1987. "The Corporate Will of the United Nations." *American Journal of International Law* 81: 621.
80. For an application of the alleged principle in favour of state sovereignty, see "The S.S. 'Lotus' (France v. Turkey)," PCIJ, Ser. A. No. 10 (1927). More generally, Edward Gordon, for example, has noted the possible inconsistencies of the Court's oft-cited "twin-forked rule of interpretation" whereby "a treaty must be read as a whole to give effect to all of its terms and avoid inconsistency" while rendering "no word or provision . . . superfluous"; as Gordon argues on some occasions it may well be that the "best or only way of avoiding inconsistency is to treat a particular phrase as superfluous, or to render priority to one of the apparently conflicting words or clauses." Gordon, E. 1965. "The World Court and the Interpretation of Constitutive Treaties." *American Journal of International Law* 59: 814. Others, such as critical legal scholars, have argued that all treaty interpretation questions, as well as all legal doctrines, are inherently manipulable and internally inconsistent. See Koskenniemi, M., 1989. *From Apology to Utopia: The Structure of International Legal Argument*. Helsinki: Lakimiesliiton Kustannus.
81. Tribe, L. H., 1995. "Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation." *Harvard Law Review* 108: 1221, 1235–48.
82. Vienna Convention on the Law of Treaties, Article 33(1).
83. See, for example, "Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US)," 1984 ICJ Rep. 392 (Jurisdiction), para. 30 (addressing the French and English language versions of Article 36(5) of the Statute of the Court).
84. Indeed, some consider the attempt in the Vienna Convention on the Law of Treaties to codify "rules" as to treaty interpretation in Articles 31 and 32 to be an exercise in futility. Consider, by contrast, Schwarzenberger's view that there is only one such "rule": namely, that treaties should be interpreted in a spirit of equity, in accordance with good faith, common sense, and reasonableness. Quoted in Sloan, B., "The United Nations Charter as a Constitution" (see note 3, above), 97.
85. Amerasinghe, C. F., "Interpretation of Texts" (see note 4, above), 182.
86. See, for example, Tunkin, G., *Handbook on International Organization* (see note 69, above), 274.
87. For a survey of the many instances in which the Permanent Court of International Justice (the predecessor court to the ICJ under the League of Nations) and the ICJ have relied on such practice through 1967, see Engel, S., 1967. "'Living' International Constitutions and the World Court (The Subsequent Practice of International Organs Under Their Constituent Instruments)." *International and Comparative Law Quarterly* 16: 865. Engel calls attention to several instances in which international judges hint that such practice is not only persuasive evidence but possibly even "binding"; Engel calls the process "legislation by accumulation." Ibid., 908–909.
88. Koskenniemi, M., "The Place of Law in Collective Security" (see note 9, above), 470–81.
89. See Gordon, E., "The World Court" (see note 80, above), 827–28. See also Croley, S. P. and Jackson, J. H., 1996. "WTO Dispute Procedures, Standard of Review, and Deference to National Governments." *American Journal of International Law* 90: 193, 208–209.

90. Similar rationales have played a role in some organizations' decisions to rely on purely internal processes for the interpretation of charters, as opposed to "judicial review" by an external body such as the ICJ. For early division of views in the context of trade, see Rubin, S. J., "The Judicial Review Problem in the International Trade Organisation" (see note 44, above).
91. Thus, the ICJ has turned to institutional practice when this has been accepted by the "great majority" of members, despite dissenting minorities, abstentions, or qualified assents. Sloan, B., "The United Nations Charter as a Constitution" (see note 3, above), 110. Compare the need, at least in theory, for uniformity when such practice is used *by itself* to arrive at an authoritative interpretation; see Sohn, L., "Interpreting the Law."
92. As discussed, institutional practice might be said to reflect members' intent, more broadly construed; at least, their intent to submit to an organization's decisions on some issues. See, for example, Ress, G., "The Interpretation of the Charter" (see note 3, above), 40. Note that even those positivist lawyers who have resisted the use of institutional practice in constitutional interpretation concede that some practice should be given weight. See, for example, Tunkin, G. I., *Handbook on International Organisation* (see note 69, above), 275 (accepting the relevance of Security Council practice on "abstentions" for purposes of the interpretation of a "concurring" vote in Article 27 of the Charter).
93. "Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276," 1971 ICJ Rep. 16, 153–54 (Separate Opinion of Judge Dillard). See also Judge Spender, Separate Opinion, "Certain Expenses" (subsequent conduct "can hardly control the language or provide a criterion of interpretation of a text which is not obscure").
94. Judge Azevedo, Dissenting Opinion, "Competence of the General Assembly for the Admission of a State to the UN," 1950 ICJ Rep. 4, 23 (March 3) ("The Charter is a means and not an end. To comply with its aims one must seek the methods of interpretation most likely to serve the natural evolution of the needs of mankind"), 15–19.
95. Under the traditional view, a *détournement de pouvoir* may occur if an organization "imposes conditions upon any of its members which are not necessary or appropriate to achieve the object for which the power was granted" or if it "takes any administrative action which, though not forbidden by the founding instrument, is inconsistent with or outside the scope of the objects of the organisation." Fawcett, J. E. S., 1957. "Détournement de Pouvoir by International Organisations." *British Year Book of International Law* 33: 311, 316.
96. See, for example, Tunkin, G. I., *A Handbook on International Organisation* (see note 69, above), 274–75 (suggesting that the General Assembly's "Uniting for Peace" Resolution is illegitimate on these grounds).
97. See, for example, Dissenting Opinions of Judge Krylov and Hackworth, "Reparations Case," 198–219 (accusing the majority of improperly legislating from the bench).
98. Thus, for example, a former General Counsel of the World Bank, Aron Broches, once opined that the Bank's authority extends to any matter not prohibited in or positively inconsistent with its basic instrument if the matter achieves the Bank's purposes. Broches, A., 1959. "International Legal Aspects of the Operations of the World Bank." *Recueil des Cours* 98: 304. As Hexner notes, this conception seems based on "an extreme teleological approach." Hexner, E., "Teleological Interpretations" (see note 4, above), 128.
99. This is likely to be an effective argument especially where the organization has entered into contracts or other arrangements which impact on the rights of third parties.
100. But see Ciobanu, D., 1975. *Preliminary Objections Related to the Jurisdiction of the*

- United Nations Political Organs. The Hague: Martinus Nijhoff, 173–179 (arguing for the “right of last resort” by member states to ignore illegal actions).
101. See, for example, Teson, F. R., 1996. “Collective Humanitarian Intervention.” *Michigan Journal of International Law* 17: 323.
  102. As many lawyers have noted, the Security Council, particularly in the immediate post–Cold War period, has not been reticent about using this power to expand the scope of its powers. See, for example, Gordon, R., 1994. “United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond.” *Michigan Journal of International Law* 15: 519. See also Koskeniemi, M., 1995. “The Police in the Temple: Order, Justice and the UN: A Dialectical View.” *European Journal of International Law* 6: 325.
  103. See, for example, Schermers, H. G. and Blokker, N. M., *International Institutional Law* (see note 69, above), 158–163; Sloan, B., “The United Nations Charter as a Constitution” (see note 3, above), 70, note 45; Gordon, E., “The World Court” (see note 80, above), 816–821. Even a strict constructionalist like Tunkin acknowledged that implied powers “really exist.” Tunkin, G. I., *A Handbook on International Organisation* (see note 69, above), 268.
  104. Of course, in practice, a constitutional interpreter may turn to subsequent practice in order to justify that a particular “implied” power was “always” intended. Thus, the opinion of Aron Broches with respect to the Bank’s powers (see note 98, above) might apply equally with respect to the Bank’s “customary practices” as with respect to the scope of its “implied powers.” Today, those who attempt to justify, for example, the legality of the General Assembly’s “Uniting for Peace” Resolution (GA Res. 337A (1950)) (authorizing the Assembly to recommend the establishment of peacekeeping under certain conditions) would point to its arguable justification as a proper “implied power” given Charter purposes and the wide scope of the Assembly’s duties. They would also, however, defend that resolution today on the grounds that it is now “customary practice” for the Assembly to authorize such missions. (This is particularly the case since the ICJ has itself sanctioned such Assembly-authorized missions in the *Certain Expenses Case* (see note 56, above).) That the then Soviet Union, as well as many of those who initially challenged the legality of obligatory arrearages for these peacekeeping expenses, have since paid their assessments for those expenses would also be cited to support the “general acceptance” of Assembly-approved peacekeeping.
  105. See, for example, Treaty Establishing the European Community, 7 February 1992, Article 308 (formerly Article 235), *International Legal Materials* 37: 56 (entered into force 1 November 1993):

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.

See also ECSC, Article 95; Euratom, Article 203.

106. Case 8/55, *Fedchar*, ECR 1954–1956, 299, quoted in Schermers, H. G. and Blokker, N. M., *International Institutional Law* (see note 45, above), 160. Similar principles have been applied within the US Supreme Court. See, for example, “*United States v. Classic*,” 313 US 299, 316 (1941) (“we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose”).
107. This interpretation might also be justified by the terms of Article 31 of the Vienna Convention. As the ILC put it: “When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good

- faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.” ILC Report (see note 73, above), 351. For ICJ cases expressly citing the principle of effectiveness, see Sloan 113–114; Fitzmaurice, G. G., 1951. “The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points.” *British Year Book of International Law* 28: 18–20.
108. See, for example, SC Res. 221 (1966) (empowering the United Kingdom to use force to implement sanctions against Rhodesia). Similarly, the Council might cite the same justification to threaten “secondary” sanctions on states that do not themselves pose a threat to the peace but whose failure to implement existing sanctions against states initially targeted by Council action threatens the effectiveness of those sanctions. See, for example, Kirgis, F. L. Jr, *International Organisations in Their Legal Setting* (see note 62, above), 630. The Secretary-General, in turn, has justified certain decisions as “necessary” to carry out directives of other UN organs, such as the Council. See *ibid.*, 764–785 (discussing, among other things, the latitude of the Secretary-General in interpreting Council mandates in the course of UN peace operations).
  109. But see Dissenting Opinion, Judge Hackworth, “Certain Expenses,” 198 (differing from the majority on the grounds that implied powers should be limited to those “necessary to the exercise of powers expressly granted”). In one case, the PCIJ denied implying a power. “Competence of the ILO,” PCIJ, Ser. B., No. 3 (denying the ILO’s request to permit it to examine proposals for the organization and development of methods of agricultural production).
  110. See, for example, Dissenting Opinion, Judge Krylov, “Certain Expenses.”
  111. “Reparations Case,” 182.
  112. Dissenting Opinion, Judge Hackworth, “Reparations Case,” 198. Similar tensions have appeared in the context of the US Constitution. Thus, for example, there were venomous attacks on Chief Justice Marshall’s opinion in “*McCulloch v. Maryland*” on the grounds that “necessary” in the Necessary and Proper clause meant absolute necessity. See Gunther, G., 1969. *John Marshall’s Defence of McCulloch v. Maryland*. Stanford: Stanford University Press, 64, quoted in Sloan, B., “The United Nations Charter as a Constitution” (see note 3, above), 71.
  113. See GA Res. 365 (IV), UN GAOR, 4th Sess., UN Doc. A/Res/365 (1949).
  114. See, for example, UN Charter, Article 2(7); OAS Charter, Article 1, second para.; League of Nations Covenant, Article 15.8; UNESCO Constitution, Article I.3; Charter of the OAU, Article III.
  115. Thus, the UN Secretariat, as well as other UN members, faced with the United States’ attempts to challenge budgetary assessments for particular UN expenses, has repeatedly protested these and affirmed the illegality of selective or contingent payments of assessed contributions. See, generally, Alvarez, J. E., 1991. “Legal Remedies and the United Nations’ A La Carte Problem.” *Michigan Journal of International Law* 12: 229.
  116. See SC Res. 940, 1 August 1994, para. 2 (Haiti); SC Res. 794, preamble (Somalia). Sometimes, this attempt is made by UN members attempting to limit the precedential value of what the organization is trying to do. Thus, some UN members attempted, unsuccessfully, to assert a disclaimer in SC Res. 687 (applying sweeping sanctions to post-Gulf War Iraq) that would have provided that the Iraq circumstances were unique and not intended to “set undue precedents.” See Kirgis, F. L. Jr, *International Organisations in Their Legal Setting* (see note 62, above), 676.
  117. See, for example, Teson, F. R., “Collective Humanitarian Intervention” (see note 101, above), 354 (dismissing the ostensibly “unique” character of the Council’s Somalia actions).
  118. But as Fitzmaurice has noted, domestic analogies with respect to “intent” need to be considered with caution. Domestic courts usually face the need for interpretation when

a private citizen questions the legislature's intended meaning. Except for rare cases in which a domestic legislator is a party to a dispute, domestic courts do not have elements of the legislature itself on opposite sides of a dispute. Those who passed legislation are usually not in court themselves maintaining that they had particular intentions. Yet international judges are usually in exactly such a position – as the parties to dispute may themselves be those who expressed views during the negotiations. Fitzmaurice, G. G., "The Law and Procedure of the International Court of Justice" (see note 107, above), 17, note 4.

119. See notes 69–74, above, and accompanying text.
120. See, for example, Gordon, E., "The World Court" (see note 80, above), 823–826; Fitzmaurice, G. G., "The Law and Procedure of the International Court of Justice" (see note 107, above), 6–7, 15–17.
121. Thus, as is suggested in notes 75–85, above, and accompanying text, intent-based arguments, as well as arguments grounded in treaty text, have given all UN organs, and not merely the ICJ, the de facto authority to interpret, with authoritative effect, the UN Charter.
122. UNCIO XI, 711 (justifying Permanent Members' use of the "double veto" on both procedural and substantive questions before the Council). As one commentator suggests, because this agreement can be traced back to the Yalta Conference, use of this document suggests that even the preparatory work relating to the Charter prior to San Francisco is relevant. See Ress, G., "The Interpretation of the Charter" (see note 3, above), 38, note 116. But recourse to such "agreed statements" produced in the course of a negotiation might not be the functional equivalent to resort to more ordinary forms of negotiating history.
123. The perceived unfairness is compounded by the lack of established rules concerning the keeping or establishing of travaux. Customary treaty interpretation rules say nothing about the relative weight of "formal" statements made in the course of a multilateral negotiating conference by a committee, as opposed to the views of one member; of statements made by respective representatives of parties' executive branches when agreements are submitted for domestic parliamentary approval, as compared to statements made by the same branches at the international conference; of the motivations of a country or group of countries that dominate a negotiation but do not ultimately ratify, as compared to the views of a silent majority who do ratify; or of the single international record of the negotiations, as opposed to summaries contained in national digests that are perhaps more detailed regarding certain points. There are no uniformly accepted rules about the relative weight of or the need to distinguish "political" grandstanding from "principled" comments backed by lawyerly briefs; comments intended to reflect "consensus" views from "isolated" statements inserted only to placate domestic constituencies; or remarks made early in a negotiation from solemn proclamations made as part of a "package deal" on various provisions. Such rules do not exist not merely because it has been assumed that leaving such issues to case-by-case determination is preferable, but also because international negotiations, even within the same organization, do not adhere to one model or a single set of procedural rules for record-keeping, discussion, pre-voting consultations, or voting.
124. Cf. Ress, G., "The Interpretation of the Charter" (see note 3, above), 38 (advocating resort only to "accessible" preparatory works).
125. For an argument that this is all that it is, see, for example, chapter 6 of this book ("Most of the rules and principles reproduce, upon analysis, the very same oscillation, the result being that whenever a decision has to be made, it is usually made on the basis of a policy preference masquerading as a legal rule").

126. Dissenting Opinion, Judge Weeramantry, "Case Concerning Legality of Use of Force (Yugoslavia v. Belgium)," 2 June 1999, 7–8.
127. See, for example, Simma, B., 1999. "NATO, the UN and the Use of Force: Legal Aspects." *European Journal of International Law* 10.
128. But see D'Amato, A., May 1999. "International Law and Kosovo," 2 Translex 1 (arguing that the NATO bombing did not come within the Article 2(4) prohibition). Paust, J. J., May 1999. "NATO's Use of Force in Yugoslavia," 2 Translex 2 (semble). Cf. Kirkpatrick, J. J. and Gerson, A., 1991. "The Reagan Doctrine, Human Rights, and International Law," in Henkin, L. et al., 1991 *Right v. Might*. New York: Council on Foreign Relations, 25–26 (arguing that the UN Charter, "which was essentially American in design, was neither created nor viewed as providing a protective shield for the expansion of repressive dictatorships or empires").
129. See, for example, Carey, J., May 1999. "Editorial Comment," 2 Translex 6 (suggesting that the NATO attack on Kosovo constitutes a dangerous precedent for "veto nullification" that may come back to haunt NATO members). See also Henkin, L., 1991. "The Use of Force: Law and U.S. Policy," in Henkin, L. et al., *Right v. Might* (see note 128, above), 40–44 (rejecting the Brezhnev and Reagan doctrines in favour of the rules against the use of force and on behalf of national autonomy). See also Lobel, J. and Ratner, M., 1999. "Bypassing the Security Council: Ambiguous Authorisation to Use Force, Cease-Fires and the Iraqi Inspection Regime." *American Journal of International Law* 93: 124 (discussing the same fundamental values).
130. This seems implicit in President Clinton's speech on Kosovo on 25 March 1999, particularly in the passage suggesting that Serbian actions in Kosovo were threatening to its neighbours, including Macedonia and Albania, and were required to "prevent a wider war." *New York Times*, 25 March 1999: A15.
131. See, for example, Simma, B., "NATO, the UN and the Use of Force" (see note 127, above), 3 and 5.
132. Article 5 of the NATO treaty, basing itself expressly on Article 51 of the UN Charter, permits NATO collective action in case of attack upon a member state. North Atlantic Treaty, 34 UNTS 244 (4 April 1949). The absence of a clear attack on a NATO member made this article, in the views of most commentators, inoperative.
133. See, for example, Goshko, J. M., "U.S. Allies Inch Closer to Kosovo Intervention." *Washington Post*, 23 September 1998: A21. Bucker, T. and Hibbs, J., "Blair Attacks West's Disunity on Kosovo." *Daily Telegraph*, 9 October 1998: 17 (reporting views of US Secretary of State Albright).
134. For a survey of these prior instances, see Lobel, J. and Ratner, M., "Bypassing the Security Council" (see note 129, above), 131–134, 154. Paul Rutkus has suggested a different justification for some forms of NATO use of force within the Former Yugoslavia, also premised on Security Council authorization or delegation. See Rutkus, P., May 1999. "Licensing of Armed Force: NATO's Attack Upon Yugoslavia," 2 Translex 4 (arguing that NATO has the power to act as an "international constabulary" on behalf of the ICTY pursuant to SC Res. 827). Under Rutkus' view, it would seem that a judicial body has been delegated authority to license the use of force, albeit in limited circumstances.
135. See Simma, B., "NATO, the UN and the Use of Force" (see note 127, above), 10.
136. *Ibid.*, 6–14.
137. *Ibid.*, 11.
138. *Ibid.*, 12.
139. *Ibid.*, 14–22.
140. Cassese, A., 1999. "Ex iniuria ius oritur: Are We Moving Towards International



Legitimation of Forcible Humanitarian Countermeasures in the World Community?" *European Journal of International Law* 10: 23.

141. *Ibid.*, 24.
142. Lobel, J. and Ratner, M., "Bypassing the Security Council" (see note 129, above), 133.
143. *Ibid.*, 126, 134–36.
144. See, for example, Clinton speech (see note 130, above).
145. See Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, 9 December 1948, Article 1.
146. Article 1 of the Genocide Convention would, given the Convention's principle focus, more sensibly appear to commit all states to prevent genocide by extending their criminal jurisdiction to cover such offences.
147. Compare Simma, B., "NATO, the UN and the Use of Force" (see note 127, above), 2 (suggesting that genocide was not committed), to Kai Ambos, commenting on Simma's and Cassese's views (<http://www.ejil.org/journal/vol10/no1/coma.html>) (suggesting that genocide was indeed committed).
148. See Article VI, Genocide Convention (permitting states in the territory in which genocide is committed, as well as international tribunals, to try perpetrators). For background on this provision, see Damrosch, L. F., 1998. "Genocide and Ethnic Conflict," in Wippman, D. (ed.), *International Law and Ethnic Conflict*. Ithaca: Cornell University Press, 256.
149. See, for example, Clines, F. X., "Crisis in the Balkans." *New York Times*, 30 March 1999: A1.
150. Lobel, J. and Ratner, M., "Bypassing the Security Council" (see note 129, above), 136.
151. *Ibid.*
152. *Ibid.*
153. Cassese, A., "Ex iniuria ius oritur" (see note 140, above), 25.
154. *Ibid.*, 25 and 29. See also Megret, F., May 1999. "Kosovo: Different Course in Reconciling Legality or Legitimacy," 2 *Translex* 4 (suggesting that NATO's action may be an attempt to reformulate the law but worrying that NATO is itself "setting the very standards by which its legality will be judged"). Cassese attempts to establish objective standards by which to judge the legality of NATO's actions based on "nascent" trends, including increasing acceptance of human rights as erga omnes obligations, aggravated forms of state responsibility for systematic atrocities, and IO interventions in internal conflicts. *Ibid.*, 26–29. For Cassese, a humanitarian exception to the use of force, should it arise, would require certain strict preconditions, including the existence of gross and egregious governmental breaches of human rights involving the loss of life of hundreds or thousands, the inability or refusal of the responsible governmental authorities to terminate these violations, a stalemate within the Security Council, the exhaustion of peaceful avenues for resolution, or a multilateral response strictly limited to stopping the atrocities and restoring respect for human rights. *Ibid.*, 29–30.
155. "Case Concerning the Legality of the Use of Force (Yugoslavia v. Belgium), Request for Indication of Provisional Measures," ICJ Order, 2 June 1999 (henceforth referred to as "Yugoslavia v. Belgium").
156. See, for example, Dissenting Opinion, Judge Weeramantry, "Yugoslavia v. Belgium," 5 (identifying specific examples, such as the bombing of an embassy, a TV station, a passenger train, a school, and a power station).
157. *Ibid.*, 6.
158. *Ibid.*, 3 and 15.
159. Koskeniemi, M., "The Place of Law in Collective Security" (see note 9, above), 489 (quoting Kennan, G. F., 1951. *American Diplomacy*. Chicago: Chicago University Press.).
160. See, generally, Koskeniemi, M., *From Apology to Utopia* (see note 80, above). See

- also Koskenniemi, M., 1990. "The Politics of International Law." *European Journal of International Law* 1: 4.
161. Ibid., 7.
162. See notes 78–79, above, and accompanying text.
163. See, for example, Clark, B., "Rapporteur's Report on Policy Roundtable on NATO, the UN, and the Use of Force," UN Association, New York City, 11 March 1999. <<http://www.unausa.org/issues/sc/nyrapporteur.ntm>>.
164. See prior discussion in note 12, above, and accompanying text.
165. See, for example, Saunders, K. M., 1994. "Law as Rhetoric, Rhetoric as Argument." *Journal of Legal Education* 44: 567.
166. Cf. *ibid.*, 573.
167. Johnstone, I., 1991. "Treaty Interpretation: The Authority of Interpretative Communities." *Michigan Journal of International Law* 12: 418.
168. Cf. Koskenniemi, M., "The Politics of International Law" (see note 160, above), 5.
169. See, for example, *ibid.*
170. See Koskenniemi, M., "The Place of Law in Collective Security" (see note 9, above), 478.
171. Ibid. (Adapting Robert H. Jackson's concept of "situational ethics.")
172. Ibid.
173. Johnstone, I., "Treaty Interpretation" (see note 167, above).
174. Ibid., 381.
175. Ibid., 384.
176. See Franck, T., 1990. *The Power of Legitimacy Among Nations* (defining the components of legitimacy as consisting of determinacy, symbolic validation, coherence, and adherence).
177. Johnstone, I., "Treaty Interpretation" (see note 167, above), 418.
178. See, for example, Daalder, I. H., 1990. "NATO, the UN, and the Use of Force," paper prepared for the Policy Roundtable on NATO, the UN, and the Use of Force, convened by the UN Association in Washington DC on 12 March 1999. <<http://www.unausa.org/issues/sc/399/rtables.htm>>.
179. For a sustained discussion of the "power" of customary international rules to constrain even powerful states, see Byers, M., 1999. *Custom, Power, and the Power of Rules*. Cambridge: Cambridge University Press. For a more empirical attempt to demonstrate the consistency of legal forms of interpretation across different types of international tribunals, see Charney, J. I., 1998. "Is International Law Threatened by Multiple International Tribunals?" *Recueil des Cours* 271.
180. This is particularly true to the extent that those doing the interpreting subscribe to what David Kennedy has called an "internationalist sensibility"; that is, they belong to his "informal priesthood of believers" in international law and institutions. See Kennedy, D. M., 1994. "A New World Order: Yesterday, Today, and Tomorrow." *Transnational Journal of Law and Contemporary Problems* 4: 332–336.
181. See, for example, Kennedy, D., 1987. "The Move to Institutions." *Cardozo Law Review* 8: 841.
182. See, for example, Schermers, H. G. and Blokker, N. M., *International Institutional Law* (see note 45, above), 6.
183. An increasing portion of today's treaties are initiated, formulated, negotiated, and/or implemented through the efforts of IOs, under their auspices, within their fora, or involving them as parties. In recent years, approximately half of the 20–25 multilateral treaties concluded each year originate within UN system organizations. See, for example, Alvarez, J. E., 1993. "Organisational Insights," in *Proceedings of the 87th Annual Meeting, American Society of International Law*: 400.
184. For a description of these mechanisms, see Chayes, A. and Chayes, A., *The New Sov-*

ereignty (see note 74, above), 135–249. The variety of these methods, including codes of conduct that are “enforced” through information exchanges, explains the purposeful use in this chapter of such interchangeable terms as “norms,” “rules,” or “law” to describe the work product of IOs. For a description of some of these methods within the context of the UN specialized agencies, see Kirgis, F. L., 1995. “Specialised Law-Making Processes,” in Schachter, O. and Joyner, C. C. (eds), *United Nations Legal Order* (see note 57, above), 109. The significance of institutional development has not been lost on legal reformers. See, for example, Palmer, G., 1992. “New Ways to Make International Environmental Law.” *American Journal of International Law* 86: 259 (proposing a new institution in order to enhance compliance).

185. See, for example, Zamora, S., 1989. “Is There Customary International Economic Law?” *German Year Book of International Law* 32: 9 (discussing, among other things, the IMF). See also Buerghenthal, T., *Law-Making in the International Civil Aviation Organisation* (see note 65, above).

186. Hurd, I., 1999. “Legitimacy and Authority in International Politics.” *International Organization* 53: 400.

187. See notes 13–35, above, and accompanying text.

188. See Hurd, I., “Legitimacy and Authority” (see note 186, above).

## The rationality of the use of force and the evolution of international organization

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### Introduction

One of the many achievements of modernism is the submission to the requirement of rationality in the use of force in international relations. While the process of rationalization in this area began only relatively recently, in the mid-nineteenth century, it evolved rapidly, culminating in the establishment of the United Nations after the Second World War and in the concurrent prohibition of the use of force in Article 2(4) of the United Nations Charter. In this sense, the story of the rationalization of the use of force can be read as a story of the evolution of international organization, and inversely, the evolution of international organization can be understood as a story of the various, increasingly organized attempts to subject the use of force in international relations to the requirement of rationality.

As a result of the gradual modernization of international politics and the corresponding increase in the level of international organization, it became possible to assess rationally the legitimacy of the use of force. The differentiation of the criterion of rationality from the metaphysical, imaginary background in which war had previously been embedded allowed for a distinction between uses of force that were organized – and therefore rational and legitimate – and those that were unorganized or unauthorized – and therefore irrational and non-legitimate. This distinction is most clearly set out in the contrast between the prohibition of the

use of force as embodied in Article 2(4) of the UN Charter on the one hand, and the collective security system envisaged in Article 43 of the Charter on the other. The purpose of the former Article is to eliminate the irrational and illegitimate use of force, whereas the latter serves to identify the purpose – the maintenance of international peace and security – for which force can be legitimately used.

However, as international organization evolved in the course of the modernization of international politics, so did the criteria by which the legitimacy of the use of force was assessed. The distinction between legitimate and illegitimate uses of force created a tension within modernism, which eventually resulted in the division of modern rationality into two competing and, in practice, often conflicting concepts of rationality – formal and communicative. The former focused on attempts to establish a permanent collective security structure, whereas the latter sought to institutionalize procedures for the peaceful settlement of international disputes. International political organizations such as the League of Nations and the United Nations testify to the success of the politics of collective security, while the International Court of Justice and the various other legal and arbitration fora that exist today reflect the achievements of the policy of peace.

Recent developments in the field since the end of the Cold War suggest that modernism is being replaced by a more complex and technical, “post-modern,” concept of rationality. According to this emerging concept, use of force in international relations is no longer in opposition to diplomacy, but is viewed as inseparably merged with other, more peaceful means of managing international crises. These developments signal the end of the modern era in international relations – and the beginning of a new, post-modern era of “international crisis management.”

This chapter seeks to outline the evolution of modernism and its concept of rationality as it concerns the use of force in international relations. The story of modernism in international relations is tracked from its dawn in the early nineteenth century, through the development of international organization following the experiences of the First and Second World Wars, up to the present-day, post-modern concept of international crisis management.

There are three main theories developed during that era that can be applied to assess the legitimacy of the use of force in international relations: instrumental rationality; formal rationality; and communicative rationality. The theory of instrumental rationality has been set out most elaborately by Carl von Clausewitz in his magnum opus, *Vom Kriege*. The two other theories are reflected in, or can be derived from, more general theories regarding the legitimacy of political and social action as elaborated by Max Weber (formal rationality) and Jürgen Habermas (com-

municative rationality). A fourth, post-modern concept of rationality is outlined in this chapter, based on the current understanding of international crisis management.

The various criteria of rationality applied in international relations have evolved as a function of the level of international organization. The classic, nineteenth-century, nation-state-based system – where the rationality of international political action was judged on the basis of a Clausewitzian, instrumental concept of rationality; that is, by assessing the effectiveness of the use of force as a means to achieve a given political end – has transformed itself into a modern, dual concept of rationality. The modern concept consists of two separate and mutually exclusive theories: a formal concept of rationality, which seeks to eliminate illegitimate forms of force by regulating its use and by establishing a collective security system to monopolize the authority to use legitimate force; and a concept of communicative rationality, which prefers to resolve international disputes through peaceful means and to ban the use of force in international relations.

The post-Cold War concept of rationality introduces a more technical approach to the issue, reflecting a more complex and pluralistic socio-political structure. In the post-modern approach, the focus is on the technical, case-specific or “customized” management of international crises, rather than on high-level structural and normative issues.

### Clausewitz’s war machine and the theory of instrumental reason

Clausewitz’s *On War*,<sup>2</sup> or *Vom Kriege*,<sup>3</sup> is the first systematic attempt to understand war, and consequently the use of force, in international relations in squarely rational terms; that is, in terms of means and ends. In Clausewitz’s celebrated words, “War is nothing but continuation of [politics]<sup>4</sup> with other means.”<sup>5</sup> Or, more elaborately:

It is clear ... that war is not a mere act of policy but a true political instrument, a continuation of political activity by other means. War in general, and the commander in any specific instance, is entitled to require that the trend and designs of policy shall not be inconsistent with these means. That, of course, is no small demand, but however much it may affect political aims in a given case, it will never do more than modify them. The political object is the goal [*Zweck*], war is the means of reaching it, and means can never be considered in isolation from their purpose [*Zweck*].<sup>6</sup>

For Clausewitz, war is a machine. In order to know how to use this machine, one has to understand its nature and its functioning. By nature, war is

simply “a duel on a larger scale.”<sup>7</sup> In order to create a duel – in order to make the war work, or to use the machine – one has to apply physical force. Given the nature of war as a duel, it follows that the natural goal of the use of physical force becomes one of “compel[ling] the other to do [one’s] will.”<sup>8</sup> As a result of this analysis emerges the very definition of war: “War is thus an act of force to compel the enemy to do our will.”<sup>9</sup>

The pure, absolute concept of war knows no limitations on the intensity of the use of force. Such limitations are simply incompatible with the very nature of war:

Kind-hearted people might of course think there was some ingenious way to disarm or defeat an enemy without too much bloodshed, and might imagine this is the true goal of the art of war. Pleasant as it sounds, it is a fallacy that must be exposed; war is such a dangerous business that the mistakes which come from kindness are the very worst. The maximum use of force is in no way incompatible with the simultaneous use of the intellect. If one side uses force without compunction, undeterred by the bloodshed it involves, while the other side refrains, the first will gain the upper hand. That side will force the other to follow suit; each will drive its opponent toward extremes, and the only limiting factors are the counterpoises inherent in war . . . The thesis, then, must be repeated: war is an act of force, and there is no logical limit to the application of that force. Each side, therefore, compels its opponent to follow suit; a reciprocal action is started which must lead, in theory, to extremes.<sup>10</sup>

In theory, then, war is an absolute machine, and as such has a tendency to lead to extremes when used. And because war is a duel, there are always two sides to it, which means that the goal of both sides is to destroy the other – meaning, in turn, that there will always be resistance in war. Like the application of force, this leads, in theory, to another extreme, as does the exertion of strength to overcome the resistance.<sup>11</sup> While in practice these extremes hardly ever materialize – there are always frictions, or moderating forces in war, due to human imperfection, lack of information, political factors, and so on – Clausewitz stresses that it would be a mistake to forget that, in theory, war is absolute, and that there may be actual wars that approach the ideal concept.<sup>12</sup>

However, although Clausewitz analyses war in rational terms – in terms of means and ends – not all aspects of war are susceptible to rational analysis. While the goal of war is, in theory, to compel the enemy to do one’s will, this does not mean that, apart from that goal, wars have a rational reason behind them, or that nations and people wage wars for such reasons. Wars are fought for political reasons, and for Clausewitz, politics is not a matter that is fundamentally subject to rational analysis.

Rather, the political origin of war belongs to the imaginary, metaphysical order of social passion, or emotions:

Two different motives make men fight one another: *hostile feelings* and *hostile intentions* ... Even the most civilised of peoples ... can be fired with passionate hatred for each other. Consequently, it would be an obvious fallacy to imagine war between civilised peoples as resulting merely from a rational act on the part of their governments and to conceive of war as gradually ridding itself of passion, so that in the end one would never really need to use the physical impact of the fighting forces – comparative figures of their strength would be enough. That would be a kind of war by algebra.<sup>13</sup>

While passion thus serves as the legitimating social basis of war, this basis does not reflect a rational calculus, but an unreflected mass of power and survival instincts; it consequently remains irrational. In these circumstances, the role that remains for politics is that of riding the wave of social passion by setting a political goal for the war that is sufficiently ambitious to satisfy the intensity of the underlying social passion, and then pursuing that goal with all available means. Consequently, although the political goal of war is set so as to satisfy the irrational requirements stemming from the imaginary order, war as such has no rational purpose apart from its political goal. The actual political goal of war may more or less coincide with the theoretical goal of all wars – to destroy the enemy – but the extent of that coincidence depends on the intensity of the passion fuelling the war.

Wars do not last forever – the flames of passion, like material resources, are likely to consume themselves over time, in the course of the war. As a result, the political goal of the war, which is originally established to accommodate the underlying social passion, will reassert itself. This reassertion will open the door for a political take-over of the war:

[A]s this law [that is, the law of extremes] begins to lose its force and as this determination [to overcome the enemy] wanes, the political aim will reassert itself. If it is all a calculation of probabilities based on given individuals and conditions, the *political object*, which was the *original motive*, must become an essential factor in the equation. The smaller the penalty you demand from your opponent, the less you can expect him to try and deny it to you; the smaller the effort he makes, the less you need make yourself. Moreover, the more modest your own political aim, the less importance you attach to it and the less reluctantly you will abandon it if you must. *This is another reason why your effort will be modified.* The political object – the original motive of the war – will thus determine both the military objective to be reached and the amount of effort it requires.<sup>14</sup>



As it progresses, war takes on a less imaginary and a more political and, consequently, more rational character. Ironically, while the ideal concept of absolute war gets corrupted in this process, the outcome is a gradual rationalization of the war. This is the original political compromise – a compromise that rationalizes the war by compromising its ideal, absolute nature.

But because the intensity of warfare is a function of the social passion fuelling the war, the intensity of wars may vary, and consequently there may be wars that are more political – and rational – to begin with:

Sometimes the *political and military objective is the same* – for example, the conquest of a province. In other cases the political object will not provide a suitable military objective. In that event, another military objective must be adopted that will serve the political purpose and symbolise it in the peace negotiations . . . The less involved the population and the less serious the strains within states and between them, the more political requirements in themselves will dominate and tend to be decisive. Situations thus exist in which the political object will almost be the sole determinant. Generally speaking, a military objective that matches the political object in scale will, if the latter is reduced, be reduced in proportion; this will be all the more so as the political object increases its predominance. Thus it follows that without any inconsistency wars can have all degrees of importance and intensity, ranging from a war of extermination down to simple armed observation.<sup>15</sup>

In practice, then, despite its theoretically absolute nature, war must always be understood and rationalized as an instrument of politics. Although it springs from social passion, its goal is established in a political process, and its course is shaped by political decisions. To the extent that the course of war is subject to politics, it is a rational process; and inversely, the more the war approaches its ideal concept, the less political, and by extension less rational, it will become:

The more powerful and inspiring the motives for war, the more they affect the belligerent nations and the fiercer the tensions that precede the outbreak, the closer will war approach its abstract concept, the more important will be the destruction of the enemy, the more closely will the military aims and the political objects of war coincide, and the more military and less political will the war appear to be. On the other hand, the less intense the motives, the less will the military element's natural tendency to violence coincide with political directives. As a result, war will be driven further from its natural course, the political object will be more and more at variance with the aim of ideal war, and the conflict will seem increasingly *political* in character . . . As a total phenomenon, its dominant tendencies always make war a remarkable trinity – composed of primordial violence, hatred, and enmity, which are to be regarded as a blind natural force; of the play of chance and probability within which the creative spirit is free to roam; and of its element of subordination, as an instrument of policy, which makes it subject to reason alone.<sup>16</sup>

In Clausewitz's thinking, war is a machine; not a man-made machine but, rather, a natural machine, driven by natural rather than by rational forces. This machine is comprised of three elements: the people, whose natural passion fuels the war and provides its social basis and primordial, primitive legitimation; the army, which serves as its professional, technical, and logistical body; and the government, which sits on the driver's seat and determines the political goal of the war, and seeks to guide the process towards that goal, thus injecting an element of reason into the process.<sup>17</sup> Clausewitz saw it as his task to "develop a theory that maintains a balance between these three tendencies, like an object suspended between three magnets."<sup>18</sup>

As war lacks a rational social basis, however, it is beyond the rational analyst's competence to attempt to understand war as a social institution. In these circumstances, the role of the rational analyst – the military man – is limited to clarifying the elements and internal workings of the war machine, keeping in mind its nature as an instrument of politics. Accordingly, Clausewitz proceeds to develop a systematic account of the structure and function of war – strategy, tactics, engagement, battle, attack, defence, war plans, and so on.

Clausewitz's theory of war – use of force in international relations – is "instrumental" in the sense that it seeks to understand and analyse war in terms of means and ends – as an instrument of politics. Built into the theory is the instrumental requirement of effectiveness: if war as a means does not serve the achievement of the political goal, it makes no sense and must be discontinued:

Since war is not an act of senseless passion but is controlled by its political object, the value of this object must determine the sacrifices to be made for it in *magnitude* and also in *duration*. Once the expenditure of effort exceeds the value of the political object, the object must be renounced and peace must follow.<sup>19</sup>

Yet because war originates from irrational passion, a rational analysis of war has its limits. Because for Clausewitz, the question of whether war makes sense – whether it has a rational purpose, apart from its political goal – itself makes no sense, the question of the legitimacy of the use of force as an instrument of politics never arises.

Not that Clausewitz had a choice. The world he lived in was organized around nation-states, and in that world instrumental thinking – thinking in terms of means and ends – was perfectly legitimate. But the grandeur of his theory lies in the fact that it not only accurately reflects the world he lived in, but also exposes its ambivalence *vis-à-vis* war. War is an absolute machine, whose laws must be respected in order to properly use

it; but the more those laws are corrupted by political compromises, the more rational it becomes.

### Formal rationality: From regulation to institutionalization of the use of force

#### *The politics of collective security*

The Clausewitzian concept of unlimited, absolute warfare materialized in Europe in the early nineteenth century, when compulsory military service was introduced and large national armies were created.<sup>20</sup> As recognized by Clausewitz, the replacement of small professional armies by national war machines was one of the consequences of the French Revolution, and one of which Napoleon took full advantage.<sup>21</sup> Along with the creation of national war machines, new arms were introduced and existing weapons improved. As a result, the nature of warfare changed substantially and it became increasingly difficult to limit the consequences of the use of force to the warring parties alone. Civilians also suffered, as did incapacitated members of the armed forces, including the wounded and the sick, and prisoners of war. As not all of this suffering was necessary from a military point of view, the rationality of the means and ways of warfare that caused these side-effects was increasingly questioned towards the end of the nineteenth century.

This is when systematic efforts to regulate the use of force and to prohibit certain types of arms or ways to use force were initiated. The Red Cross was founded in 1864, creating a momentum for further conventions on the laws of war. These developments reached their peak before the First World War, when the two Hague Peace Conferences were convened and a number of international conventions regulating the use of force were concluded.<sup>22</sup> A number of important distinctions were established in these regulations, including those between combatants and civilians, belligerents and neutrals, the sick and wounded on the one hand and non-incapacitated members of armed forces on the other. Emphasizing that “the only legitimate object which States should have in view during war is to weaken the enemy without inflicting upon him unnecessary suffering,”<sup>23</sup> and that “[t]he laws of war do not recognise in belligerents an unlimited power in the adoption of means of injuring the enemy,”<sup>24</sup> it was forbidden, *inter alia*, to employ “arms, projectiles or material calculated to cause unnecessary suffering,”<sup>25</sup> even against the enemy.

As a consequence of these regulations, the Clausewitzian concept of absolute, unlimited warfare was replaced by another concept. According to this new paradigm, the use of force in war was to be limited to that

which was absolutely necessary from a military point of view. The systematic regulation of the use of force to eliminate militarily unnecessary, and consequently irrational, ways to wage war meant the emergence of a new type of thinking about the rationality of the use of force in international relations. Unlike Clausewitz, who viewed any limitations on warfare as contradictory to its nature and therefore unnecessary,<sup>26</sup> even harmful,<sup>27</sup> the new thinking recognized the political evil of unregulated, or extreme, use of force to achieve political ends, and sought to control such consequences by setting standards for waging war.

The new thinking introduced a third, neutral viewpoint to warfare by seeking to impose a regulatory scheme on both sides of the conflict. The new viewpoint is critical from an evolutionary point of view – even though it refrained from addressing the causes of war and thus implicitly recognized, like Clausewitz, that substantive political issues such as the origins of war could not be discussed rationally, it represented a break with the past in the sense that, unlike Clausewitz, it believed in the rationality of regulation. While war was still seen, as with Clausewitz, as a “duel,”<sup>28</sup> there were now rules to the game.

But, as shown by experience, the new thinking turned out to be wishful. As wars were, and were recognized to be, grounded in irrational emotions, it was unfounded optimism to think that those emotions would go away during the war, and that one could legitimately expect that the warring parties would behave rationally and would fully respect any regulations. The political presumption about the social basis of war – its grounding in the irrational imaginary order – pre-empted the full effectiveness of rational regulation to begin with, at the very source. The inefficiency of the new regulations became painfully clear during the First World War, which served as a rude awakening for the international community. It was acknowledged that a system of international organization based on regulation had a major weakness: so long as there was no international organization to ensure the effectiveness of war regulations, their application was likely to remain ineffective, subject to the “good will” of the warring parties. In the irrational heat of war, such good will was not necessarily always forthcoming.

The response of the international community to the perceived inefficiency of war regulations was the further institutionalization of international politics. An international organization, the League of Nations, was set up in the aftermath of the First World War to coordinate the reaction of the member states to illegitimate forms of international aggression. Agreeing to “promote international cooperation and to achieve international peace and security,”<sup>29</sup> the member states in Article 10 of the Covenant of the new organization undertook to “respect and preserve as against external aggression the territorial integrity and existing political

independence of all Members of the League,”<sup>30</sup> and declared that “[a]ny war, or threat of war, whether immediately affecting any of the Members of the League or not, [was] a matter of concern to the whole League, and [that] the League [should] take any action that may be deemed wise and effectual to safeguard the peace of nations.”<sup>31</sup> In Article 16 of the Covenant, the members agreed to apply economic and military sanctions against any Covenant-breaking state.<sup>32</sup>

As is well known, like the war regulations adopted prior to the First World War, the undertakings of the Covenant that the member states entered into proved ineffective. The system never worked particularly well in practice, and collapsed on the eve of the Second World War. In the end, instead of emerging as an international monopoly of political power, the League of Nations became the symbol of the weakness of international organization. Despite its founders’ good intentions, the League remained an artificial and lifeless creature, an administrative entity without political independence or the resources to be capable of legitimately dealing with international aggression.

After the war, lessons were drawn from the collapse of the League, and a brand new organization, the United Nations, was established to fill the institutional void. The purpose of the new organization was not simply to replace the League. A collective security system that explicitly sought to monopolize the authority to use force in international relations,<sup>33</sup> and thus did not rely solely on automatic, *ipso facto* sanctions or the member states’ good will in providing armed forces in case of a crisis, was set up by the Charter of the new organization. The cornerstone of the new security system was Chapter VII of the Charter, in particular Article 43, which envisaged the creation of an international military force, operating under the executive arm of the organization, the Security Council, to deal with “threats to the peace, breaches of the peace, and acts of aggression.”<sup>34</sup> Although the Cold War prevented the new collective security system from ever becoming operational, the ideal lying dormant in Article 43 of the Charter became the symbol and criterion of a new form of institutional rationality at the international level.

### *The rationality of institutionalization*

The new thinking that emerged in the mid-nineteenth century in the form of war regulation, which subsequently evolved into the League of Nations and eventually became institutionalized in Chapter VII of the UN Charter, can be understood in terms of, and as an embodiment of, formal rationality as outlined by Max Weber in his contemporaneous masterpiece, *Economy and Society*.<sup>35</sup> Although Weber, like Clausewitz, draws a clear distinction between purposive, proactive, and as such rational action on the one hand,

and reactive, emotive, and as such irrational action on the other,<sup>36</sup> his analysis of the concept of rationality is not limited to an instrumental understanding of the relationship between the means and ends of social and political action. He derives his concept of formal rationality – which he regards as the highest and most developed form of social rationality<sup>37</sup> – from an analysis of legal regulation and bureaucratic administration, as embodied in the concept of the modern Western state.<sup>38</sup>

But the concept of formal rationality also shares something in common with Clausewitzian instrumental reason. Like Clausewitz, Weber also presumes that politics, deriving its substance as it does from the imaginary order of peoples' fundamental interests and concerns, is not a matter for rational discussion. Accordingly, the legitimacy of a formally rational organization is based on the neutrality and efficiency of the bureaucratic structure that services the political decision-making process by turning political decisions into formal, official regulations and by implementing and enforcing those regulations, by force if necessary. The bureaucratic administrative structure is neither interested in nor concerned with the substance of the regulations; indeed, the efficiency, and consequently the very legitimacy, of the system is guaranteed by the neutral, disinterested implementation and enforcement of the regulations agreed upon in the political process, whatever their substance.

The legitimacy of a formally rational system rests on “a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands.”<sup>39</sup> Accordingly, “obedience is owed to the legally established impersonal order ... [which] extends to the persons exercising the authority of office under it by virtue of the formal legality of their commands and only within the scope of authority of the office.”<sup>40</sup> Therefore, the formal rationality of the system requires the monopolization of political power in the hands of the central organizational authority, in order to ensure the effectiveness of the regulations.<sup>41</sup> And because the order is (formally) rational, the monopolization of power forms part of a legitimate, legal order:

Today the most common form of legitimacy is the belief in legality, the compliance with enactments which are *formally* correct and which have been made in the accustomed manner. In this respect, the distinction between an order derived from voluntary agreement and one which has been imposed is only relative.<sup>42</sup>

Accordingly, formal reason, being formal, is not interested in nor concerned with a substantive assessment of the goals pursued by the regulations generated by the political process. It also assumes, because of its formality, that whoever holds the political power and thus enjoys the exclusive authority over the enforcement machinery is legally – that is,

formally – entitled to exercise such authority and use force, if necessary, to ensure compliance with the regulations. A substantive assessment of the value of the ends pursued is a matter of subjective political assessment, and as such is (formally) irrational.

Applied to the regulation of the use of force at the international level, this concept entails a distinction between two forms of force: unorganized or decentralized, and as such, by definition, illegitimate; and organized or centralized, and as such, by definition, legitimate. In other words, under the concept of formal rationality, the distinction between legitimate and illegitimate force is not based on any substantive theory about the nature of the goals pursued; the distinction lies simply in the fact that one is centralized and the other is not. The distinction derives its legitimacy from the presumption that those in power have the authority to be there because they have gained the upper hand in the political power struggle; no further legitimation needs to be provided, nor can be provided.

Setting up an international system with the authority to regulate the use of force and impose sanctions in case of non-compliance became the great project of international institution-building in the twentieth century. The Weberian idea, which was conspicuously missing from the international system in the early part of the century – as also noted by Weber himself<sup>43</sup> – was finally realized in Article 43 of the Charter.

However, while the establishment of the United Nations organization represented a culmination in the institutionalization of formal rationality at the international level, it proved as ineffective as had its predecessor, the League of Nations. Although the formal authority was there – institutionalized in Article 43 of the Charter and thus available to those who held the power in the international community, the great powers – they chose not to use the newly established system and never gave it control over the means, or resources, necessary to effectively exercise its formal authority. As is generally known, Article 43 of the UN Charter remained a dead letter and, consequently, serves as living proof of the functional dependency of formal rationality on substantive politics, or, in other words, on irrationality.

### Communicative rationality: International understanding through diplomacy and peaceful means

#### *The policy of peace*

Along with the system of formal rationality, another strand of modernism developed. Unlike formal reason, which was concerned and preoccupied with international organization, the other strand was more interested in

promoting, and developing procedures for, the settlement of international disputes and conflicts through peaceful means. Accordingly, recognizing the need to “gently civilize” international politics,<sup>44</sup> the other strand of modernism sought to institutionalize a policy of peace in international relations.

The institutionalization of the policy of peace began in the mid-nineteenth century, when the first experiments were made to settle international disputes through peaceful means. A number of significant international arbitrations were held during the era from the mid-nineteenth century until the First World War, when arbitration became the dominant technique of international dispute settlement. Perhaps the most celebrated of these was the Alabama arbitration, which was held to resolve disputes between the United States and the United Kingdom arising out of the American Civil War.<sup>45</sup> The composition of the arbitration tribunal provided the Alabama arbitration with an “international” stamp that had been absent from certain earlier, more “provincial” arbitrations, such as those conducted in the late eighteenth century under the Jay Treaty between the United States and the United Kingdom.<sup>46</sup>

Arbitration was eventually institutionalized as the dominant technique of international dispute settlement at the Hague Peace Conference of 1899, when a Convention for the Pacific Settlement of International Disputes was signed.<sup>47</sup> Inspired by their “strong desire to concert for the maintenance of the general peace”<sup>48</sup> and “resolved to second by their best efforts the friendly settlement of international disputes,”<sup>49</sup> the parties to the Convention agreed, “with a view to obviating, as far as possible, recourse to force in the relations between states . . . to use their best efforts to insure the pacific settlement of international differences.”<sup>50</sup>

A series of means were listed in the Convention that could be used by the parties to resolve their disputes peacefully, including good offices and mediation, international commissions of inquiry, and arbitration. To institutionalize the latter, a Permanent Court of Arbitration was established, with the goal of resolving international disputes “on the basis of respect for law.”<sup>51</sup> Arbitration was promoted as the “most effective . . . and equitable . . . means of settling disputes which diplomacy has failed to settle.”<sup>52</sup> In the second Hague Peace Conference, held in 1907, the Convention for the Pacific Settlement of International Disputes was replaced by a fresh convention with the same name and essentially the same substantive content.<sup>53</sup>

After the hiatus created by the First World War, the policy of peace was revived in the Covenant of the League of Nations, and was effectively adopted as the official policy of the newly established organization. Declaring a war against war, and accepting an obligation in the Covenant of the new organization “not to resort to war,”<sup>54</sup> the member states



committed themselves to seeking the peaceful settlement of international disputes. This commitment was incorporated in Article 12(1) of the Covenant, as follows:

The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council.

In Articles 13 and 14 of the Covenant, the members agreed to settle all legal disputes peacefully, and an international court, the Permanent Court of International Justice, was set up to institutionalize the policy of peaceful settlement of disputes of a legal nature. Other, political disputes were to be submitted to the Council for settlement.<sup>55</sup>

Along with promoting the peaceful settlement of international disputes, the policy of peace was further strengthened by outlawing the use of force as a means of national politics. This aspect of the policy was codified in 1928, when the General Treaty for the Renunciation of War as an Instrument of National Policy, or the Briand-Kellogg Pact,<sup>56</sup> was entered into by the major powers. Emphasizing their conviction that “all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process,” the parties “condemn[ed] recourse to war for the solution of international controversies, and renounce[d] it as an instrument of national policy in their relations with one another.”<sup>57</sup> Consistent with this obligation, the parties agreed that “the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.”<sup>58</sup>

The policy of peace quickly recovered from the temporary setback that it suffered in the Second World War and was reaffirmed in the Charter of the United Nations.<sup>59</sup> According to the preamble of the Charter, the establishment of the new organization was inspired by the determination to “save succeeding generations from the scourge of war”<sup>60</sup> and “to practice tolerance and live together in peace with one another as good neighbours.”<sup>61</sup> This general policy was imposed upon the international community as a general norm in Article 2(4) of the Charter, in which member states agree to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”<sup>62</sup>

The promotion of the policy of peace was further institutionalized in Chapter VI of the Charter, which set out procedures for the peaceful settlement of international disputes. Diplomatic (negotiation, enquiry,

mediation, conciliation, resort to regional agencies or arrangements) as well as legal means (arbitration, judicial settlement) were listed in Article 33 as those available for the parties to a conflict, and the services of the Security Council and the General Assembly were put at the disposal of those parties to promote the peaceful settlement of differences. In Article 92 of the Charter, the International Court of Justice was established as “the principal judicial organ of the United Nations,” to replace and continue the work of the Permanent Court of International Justice.

The achievements of the policy of peace during the era from mid-nineteenth century up to the establishment of the United Nations and its institutionalization as the official policy of international organization look impressive on paper. On the ground, however, the picture looks somewhat different, particularly in regard to the most institutionalized and sophisticated form of international dispute settlement – legal procedure. The international status of both the Permanent Court of International Justice and its successor, the International Court of Justice, has been affected by the fact that only a handful of countries have agreed to the Court’s compulsory jurisdiction. As a result, the cases brought before the Court have often dealt with boundary disputes and other, similar “technical” disputes of limited international political significance. In the rare instances where a case brought before the Court has had a serious international crisis in the background, either the claim has failed for jurisdictional reasons<sup>63</sup> or the Court’s decision has had no practical impact on the resolution of the crisis.<sup>64</sup> Eventually, when forced to face the issue squarely, the Court had to effectively declare *non liquet* and concede the essentially undecidable and irrational nature of substantive political issues.<sup>65</sup>

The role that the Court and other international legal institutions have had in the peaceful settlement of serious international crises suggests that the expectations that were placed on legal procedure by the policy of peace were somewhat misplaced. While legal means of resolving international disputes seem to work well when there is a sufficient degree of good will, or international civility, between the parties to resolve their disputes peacefully, and where the subject matter of the dispute relates to a “technical” issue,<sup>66</sup> they tend to prove inadequate in instances where substantial political interests and concerns are at stake and, consequently, in instances that must be seen in terms of a “crisis” rather than a “dispute” or “difference”; that is to say, in situations where armed force is being used, or where recourse to armed force is being contemplated, between the parties. Consequently, such legal means fail precisely when a policy of peace would be most urgently needed.

From the point of view of the policy of peace, the fact that the international legal system seems capable of resolving civil and “ordinary” dis-

putes but incapable of dealing with “uncivil” or extraordinary disputes, or international crises proper, is, of course, less than satisfactory. But it is hardly surprising. The very fact that international crises tend to be extraordinary in the sense that they involve strongly felt political passions, interests, and concerns simply confirms a presumption that the policy of peace itself, as a form of modern political thinking, also subscribes to: that politics is not a realm of rational discourse. If the interests and concerns that are at stake in politics were subject to rational analysis, one would legitimately expect that rational legal procedures could be employed to resolve international crises that flared up when the intensity of the underlying conflict reached boiling point; but if that is not the case, the suspension of reason pending the resolution of the crisis logically follows from, and reflects, the political nature of the conflict.

### *The rationality of proceduralization*

The story of the policy of peace recounts a familiar story in the realm of theory. As a form of thought, the policy of peace represents communicative rationality, a form of rationality that constitutes formal reason’s competing and conflicting counterpart and thus represents the other, softer and gentler side of modernity. The elements and structure of communicative rationality are comprehensively elaborated by Jürgen Habermas, in particular in his *Theory of Communicative Action*.<sup>67</sup> Consistent with Habermas’ theory of communicative rationality, the policy of peace seeks to resolve, and promote the resolution of, international conflicts through uncoerced communication – diplomacy and legal argument. The goal is to create a forum for an ideal “speech situation” where the parties can freely argue their case and present the evidence that they wish to rely on – an ideal that diplomacy and legal procedure also share, the latter with the addition of a third party – arbitrator, or judge – who has the final and binding say in resolving the case. Or, in Habermas’ words:

In contexts of communicative action, we call someone rational not only if he is able to put forward an assertion and, when criticised, to provide grounds for it by pointing to appropriate evidence, but also if he is following an established norm and is able, when criticised, to justify his action by explicating the given situation in light of legitimate expectations ... [T]he rationality of those who participate in th[e] communicative practice is determined by whether, if necessary, they could, *under suitable circumstances*, provide reasons for their expressions. Thus the rationality proper to the communicative practice of everyday life points to the practice of argumentation as a court of appeal that makes it possible to continue communicative action with other means when disagreements can no longer be repaired with every day routine and yet are not to be settled by the direct or strategic use of force.<sup>68</sup>

Also, as with the policy of peace, which seeks to reintegrate the international legal system and the realm of international politics through the peaceful intervention of a neutral third party, one of the main goals of communicative rationality is to reintegrate “system” and “life-world,” the two levels of society that, according to Habermas, are inadequately coordinated in the late-modern socio-economic system. Although for Habermas, because of his focus on developments within the Western welfare state, the problem is the opposite – how to decolonize a life-world colonized by the system<sup>69</sup> – the strategy adopted by the policy of peace is essentially the same: connecting system and life-world in such a way that the fundamental nature of both areas is respected. Accordingly, the strategy that the policy of peace devised was to bridge the gap between the two realms, the international legal system and the life-world of international politics. Recognizing that politics, as a theatre of battle over political power and survival, is not a matter of reason or a subject that could be rationally (that is, without passion) discussed,<sup>70</sup> communicative rationality nevertheless seeks to rationalize politics. Its chosen means of rationalization is proceduralization: introduction and development of procedures, diplomatic and legal, to create opportunities for and to promote the settlement of international disputes through peaceful means. Its goal is the gentle civilization of international politics and the elimination of the need to use force in international relations in the long run, and thus to carry forward the modern project of Enlightenment.

Apart from the attempt to reintegrate politics and law, the policy of peace also introduced another element into the structure of the modern theory of rationality: a sense of purpose. In addition to means and ends, it also analysed the rationality of a course of action in terms of its purpose. International action, in order to be rational, has to have as its purpose the promotion of the policy of peace. The official purpose of international diplomacy and international law – the promotion of the policy of peace – had a limiting effect on the means that could be chosen to pursue substantive political goals. Use of force, in any event, would not be a rational means to pursue the policy of peace; hence its exclusion from the toolbox of available means. International understanding had to be reached through uncoerced communication – diplomatic and legal means. Consequently, under this concept, the effectiveness of the chosen means of achieving political goals is no longer the sole criterion of rationality. Or, in other words, seeking the settlement of an international conflict with all available means is no longer rational; the chosen means have to be consistent with the policy of peace. Even if the exclusion of force means that the resolution of the dispute takes longer than it would if force were used, for the policy of peace, the resulting inefficiency does not comprise sufficient grounds to use force and circumvent diplomatic and legal means.

Trading effectiveness for peace is the Faustian bargain of the policy of peace. The prioritization of the use of rational – non-forcible – means over forcible means signifies that, if necessary, the achievement of the substantive political goal – the settlement of the dispute – has to be suspended. Ends no longer justify means; means rather justify the end – the suspension of dispute settlement.

The resulting efficiency – and legitimacy – deficit following from the prioritization of means over ends becomes the grand dilemma of the policy of peace. Although the prioritization of peace over efficiency may turn out to be a politically wise compromise in the long run, the problem with serious international crises – and there can be, practically by definition, no international crisis that is not serious, at least from the point of view of those involved in it – is that the time required by diplomacy and legal procedure to work tends to be too long. At a time of international crisis, unfortunately, there is rarely time to wait until diplomacy and legal procedure have run their course, and peace has returned. Hence the relative marginalization during the modern era of diplomacy and international law as means of resolving international crises.

### Post-modernism: The rise of technocratic reason

The modern era included in itself, or was pregnant with, another form of “rationality,” which foreshadowed modernism’s dissolution. Initially introduced as a temporary tool pending the completion of the two great projects of modernism – the enforcement of Article 43 of the UN Charter, or the implementation of the policy of peace – the concept of international peacekeeping took root as an alternative way of dealing with international political problems.

Unknown to both the UN Charter and international law and diplomacy, peacekeeping was not introduced as a result of academic or intellectual thinking about international political problems, but rather developed from ad-hoc arrangements, attempts to deal with burning problems that required attention, in the absence of a collective security system or because of the lack of willingness of the parties to resort to legal procedure or other peaceful means of dispute settlement. Partly reflecting its improvised origin, the concept of peacekeeping embodies a conceptual paradox: a military operation, yet one that can only be launched with the consent of all the parties concerned.<sup>71</sup> Hence, the concept of peacekeeping is a difficult one for the modern mind to grasp: it seems neither an embodiment of an attempt to institutionalize international politics (formal rationality), nor an expression of the policy of peace (communicative rationality). As an arrangement that neither seeks to impose the

will of the international community upon the parties to the conflict, nor is deployed with the specific purpose of settling the differences between them, the concept of peacekeeping represents a more modest way of thinking. Instead of an authoritative final solution or a legal closure, it settles on a consensual and provisional, yet operative, measure, thus incorporating elements of both military and diplomatic thinking.

The main shortcoming of the concept of peacekeeping is its limited scope of application: by definition, the deployment of a peacekeeping operation requires the consent of all relevant parties to the conflict. If such consent is not forthcoming, or is withdrawn after deployment, the peacekeeping operation cannot be launched or has to be discontinued. These limitations, as well as the paralysis of the Security Council during the Cold War, reinforced the view that peacekeeping is only a second-best option, and one which can be abandoned once the collective security system is eventually revived or, alternatively, once the policy of peace is firmly entrenched.

Following the end of the Cold War, however, a number of other, similar means of international crisis management have evolved to complement peacekeeping operations – and indeed, international crisis management has evolved as a term in itself to describe these new tools. These tools include, but are not necessarily limited to, preventive diplomacy (including disarmament), sanctions, peacemaking (or peace enforcement), peacekeeping, and peacebuilding.<sup>72</sup> Being both more and less consensual and/or military than peacekeeping operations, but always incorporating both aspects, these tools can be used to customize a response to different types of international crises, thus allowing the adjustment of the measure to fit the type of crisis at hand.

The new means constitute a series, or a continuum, of crisis management tools. Consequently, while preventive diplomacy is best suited to situations where an existing international dispute has not yet matured into an international crisis,<sup>73</sup> sanctions are appropriately used in circumstances where an international crisis is looming large, and where more forceful, coercive measures are required to convey the message that interests involving the maintenance of international peace and security are being affected by the crisis.<sup>74</sup> Peacemaking (or peace enforcement), which includes, *inter alia*, military operations to protect civilian populations, is designed to deal with situations where sanctions have proved ineffective and the crisis has already erupted, and where force is being used or is about to be used.<sup>75</sup> As experience shows, peacekeeping operations (including operations such as truce observation) are most effectively used when a cease-fire has already taken effect and, consequently, when there exists a minimum of consensus between the parties.<sup>76</sup> Peacebuilding, in turn, constitutes the final stage of managing an international crisis through

its lifecycle, referring to the stage where governmental, administrative, and other structures of civil society are being rebuilt to lay a foundation for a lasting peace.<sup>77</sup>

As a continuation of modern international politics by other means, the concept of international crisis management includes within itself the use of both force and diplomacy. But they are not separated from each other – they are inseparable elements of one technical, managerial approach. The question is not whether the use of force or of diplomacy should be preferred, but rather what the appropriate tool is under the particular circumstances. This may result in a mix of force and diplomacy (for example, peacemaking operations to protect civilians while seeking a diplomatic solution with the conflicting parties). The post-modern approach to international crises is an exercise in project management: is there evidence of an international crisis emerging in a particular region? What kind of project organization should be set up to deal with the crisis? What are the resources required? How should the crisis management plan be marketed in order to get the required/desired political support?

The post-modern approach differs from the modern approach in a number of ways. Unlike formal reason, post-modernism is not interested in setting up a permanent collective security system. Given its flexible project management approach, post-modern reason is intellectually prepared to operate within a much more decentralized and pluralistic institutional structure. Military and political organizations such as NATO, the Western European Union (WEU), and the European Organization for Security and Cooperation (EOSC), which are not part of the United Nations system, or regional and non-governmental organizations, private corporations and associations, or even research and other academic institutions, if necessary or appropriate, are all potential business partners, the appropriate institutional design depending on issues such as the nature of the crisis, the parties involved, or the tasks to be accomplished. Instead of setting up a massive, permanent international organizational structure, post-modernism sees as one of its main challenges the establishment, on an ad-hoc basis, of appropriate project management structures, to allow for individualized treatment of international political crises and to allow for a swift dismantling of such structures once the crisis is over.

Nor is post-modernism unnecessarily hampered by a moralistic approach to peace. Armed conflicts are no longer necessarily viewed as resulting from intentional acts, or deliberately delinquent behaviour, a harmful substance that needs to be banned. International crises are viewed, indeed, as crises – as a social condition, if not a disease, that must be managed or worked through, even “cured” if possible, which may require limited military operations, even “surgical” use of force. Prioritizing limited,

surgical use of force over large-scale military operations requires, in turn, delegation of decision-making power over the use of force to the “micro” level, or the operative level of international crisis management. As a result, use of armed force takes on a different, less passionate and more clinical character, resulting in a professionalization, or “civilization,” of the decision to use force. Paradoxically, then, while being the most “cold-blooded” of the various theoretical legitimations for the use of force in international relations in the sense that it approaches the use of force squarely as a matter of rational policy choice, post-modern thinking is also the most “peace-oriented” in its strategic and operational modesty.<sup>78</sup>

Unlike the two strands of modernism – the politics of collective security and the policy of peace – international crisis management is not pre-occupied with grand issues of international institutional or political design. Its concern, or interest, is limited to the question of how to manage a situation where a country or region is undergoing a process of political change that may constitute a threat to international peace and security. Whether or not a particular crisis is of such a magnitude is, by definition, a matter of appreciation. It is thus an issue of policy that has to be decided on a case-by-case basis; but making this determination is the only “political” – or rather, policy – aspect of international crisis management. It is a policy rather than a political issue in the sense that, from the point of view of international crisis management, it does not matter whether the decision is justified on the basis of (the politics of collective) security or (the policy of) peace, or both. Beyond that, the decision as to which of the various tools in the toolbox of international crisis management should be used remains a management issue – a decision based on an analysis of the nature and developmental state of the crisis, the parties involved, their military strength, the risks posed by the crisis to the civilian population, the resources required to deal with the crisis, or the resources currently available.

While post-modern thinking shares with modernism the concept of politics as the realm of the irrational, its approach to international political problems is more technical, or “managerial,” than that of its modernist counterparts. Accordingly, the post-modern international crisis manager seeks to “depoliticize” international political problems, rather than find a political solution to them. So long as an international crisis is properly managed, it does not matter whether the politics of collective security or the policy of peace should be given the credit for its successful management. The role of “politics” becomes one of international macro-management; that is, supervision and monitoring of the use of delegated authority to ensure the consistency of micro-managerial operations with the composite institutional goal of international macro-management – maintenance of international peace and security.



The “rationality” embodied in the concept of international crisis management is not derived from a grand political theory; rather, it is based on a simple appreciation of professional competence and expertise. According to post-modern rationality, the important thing is to get the job done and to get it done well, based on the best professional standards, given the operational circumstances. Rather than the question of whether the crisis can be or has been “resolved,” the measure of success is the degree to which the management of the crisis reflects best professional standards. As international crises may be, like diseases, “terminal” or too serious to be cured, the “resolution” of all crises cannot be rationally required or legitimately expected. What can be rationally required or legitimately expected is that the best effort be made, in the circumstances, to deal with the crisis; for example, by seeking to protect the civilian population from its spillover effects. If the warring parties cannot be separated by diplomacy or surgical use of force, they must be left to fight it out among themselves, if necessary. The assumption is that members of armed forces must know what they are doing, and why, and what the consequences of armed force may be.

But although the post-modern concept of rationality can be understood in evolutionary terms, such a theoretical understanding should not be confused with an empirical assessment. This is particularly so because the merger of diplomatic and military thinking that post-modern reason has managed to forge at the conceptual level remains acutely problematic as applied on the ground. The military assets – arms and ammunition – that post-modern reason finds in its toolbox of available means still largely reflect the nineteenth-century Clausewitzian thinking: they have been designed to serve the war machine. Their functional purpose, rather than the protection of civilians in armed conflict, or the peaceful but forceful separation of the warring parties, remains that of destroying the enemy. The resulting gap between the concept of crisis management, which seeks to harness the use of force for peaceful purposes, and the technological tools that actually lie at its disposal, tends to create unmanageable difficulties in extreme situations where preventive diplomacy has already failed and peacekeeping is still premature – in other words, in instances where peacemaking proves necessary. In such extreme situations the logic of crisis management tends to break down – and the war machine breaks loose.

## Conclusion

The evolution of international organization, from the nation-state-based system predominant in the early nineteenth century to the establishment of international political organizations and the adoption of the policy of

peace as their official policy, as well as the eventual emergence of the pluralistic, post-modern international institutional structure, embodies different concepts of the rationality of the use of force in international relations. During the modern era, international politics is dominated by attempts to rationalize, monopolize, ban, or suspend the use of force. During the post-modern era, however, the use of force has turned into a management issue that is no longer identifiable as a separate, politically charged issue; it is embodied and included in a wider context of international crisis management tools. As a result, the use of force is viewed much less passionately and “politically” than it was during the early modernist, Clausewitzian era, or during the modern era of international institution-building and the promotion of peace.

While international institutions, and the promotion of international peace and security as their official policy, still serve as the received criteria of rationality and legitimacy of international politics and law, the centre of gravity of international politics has shifted from the macro level to the micro level and, as a consequence, a more managerial and technical approach has displaced intellectual debates about rational international organization and the legitimacy of the use of force. Indeed, the very terms of rationality and legitimacy seem out of place in the post-modern discourse about international crisis management. Competence, expertise, and professionalism have entered into discussions in their stead. While the resulting debate may be less rewarding intellectually, it nonetheless seems more focused and less passionate – and thus, perhaps, also more “rational.”

To recognize the theoretical rationality of post-modern thinking is not to suggest that any action taken under the cover of international crisis management must, by definition, be “rational” or “legitimate.” The concept of crisis management would be incapable of serving as a criterion of rationality if its sole purpose were to legitimate and it could not also be used to assess and criticize. While the purpose of this chapter is not to engage in empirical analyses, it is arguable that, in actual practice, the application of concepts such as “clinical” or “surgical” use of force has often remained relatively non-technical, if not blunt. Taking these concepts literally, one could imagine other, more innovative and sophisticated ways and means of dealing with international crises. While a surgeon can perform an operation with or without anaesthesia, an operation performed with it is likely to cause much less noise, pain, and resistance than one without.

In any event, given the remaining gap between the concept and the available means, or between logic and technology, it seems premature to write off the era of modernism in international relations. Modernism, with its innovative technology, may have to provide us with one last service. Ironically, the way to breaking into the Clausewitzian war machine

may not lie in disarmament, but in rearmament. Without such further development, the technology of crisis management, its know-how, risks remaining a “know” without a “how.”

## Notes

1. This chapter has benefited from discussions with Miia Aro, Jan Klabbers, Martti Koskenniemi, Jarna Petman, and contributors to this book.
2. Clausewitz, C. von, 1984. *On War* (ed. and trans. Howard, M. and Paret, P.). Princeton: Princeton University Press.
3. Clausewitz, C. von, 1980. *Vom Kriege*. Nineteenth printing. Ferd. Dümmlers Verlag. Unless otherwise indicated, references made hereafter will be to the English version.
4. In German: “*Politik*.” The English translation uses the term “policy,” which distorts the meaning.
5. Clausewitz, C. von, *On War* (see note 2, above), 69, 87.
6. *Ibid.*, 87.
7. *Ibid.*, 75.
8. *Ibid.*
9. *Ibid.* (Emphasis in original.)
10. *Ibid.*, 75–77.
11. *Ibid.*, 77.
12. According to Clausewitz, Napoleon reached the absolute perfection in warfare, in part because after the French Revolution, “[s]uddenly war again became the business of the people – a people of thirty million, all of whom considered themselves to be citizens ... The people became a participant in war; instead of governments and armies as heretofore, the full weight of the nation was thrown into the balance. The resources and efforts now available for use surpassed all conventional limits; nothing now impeded the vigor with which war could be waged, and consequently the opponents of France faced the utmost peril.” *Ibid.*, 592.

Clausewitz acknowledges that the popularization of war after the French Revolution and the resulting change in the nature of warfare allowed him to develop his theory of absolute war:

Since Bonaparte, then, war, first among the French and subsequently among their enemies, again became the concern of the people as a whole, took an entirely different character, or rather closely approached its true character, its absolute perfection. There seemed no end to the resources mobilised; all limits disappeared in the vigor and enthusiasm shown by governments and their subjects. Various factors powerfully increased that vigor: the vastness of available resources, the ample field of opportunity, and the depth of feeling generally aroused. The sole aim of war was to overthrow the opponent. Not until he was prostrate was it considered possible to pause and try to reconcile the opposing interests. War, untamed by any conventional restraints, had broken loose in all its elemental fury. This was due to the peoples’ new share in these great affairs of state, and their participation, in turn, resulted partly from the impact that the Revolution had on the internal conditions of every state and partly from the danger that France posed to everyone.

*Ibid.*, 592–93.
13. *Ibid.*, 76 (emphasis in original).
14. *Ibid.*, 80–81 (emphasis in original).

15. Ibid., 81 (emphasis in original).
16. Ibid., 87–89 (emphasis in original).
17. Ibid., 89: “The passions that are to be kindled in war must already be inherent in the people; the scope which the play of courage and talent will enjoy in the realm of probability and chance depends on the particular character of the commander and the army; but the political aims are the business of government alone.”
18. Ibid.
19. Ibid., 92.
20. See Schindler, D. and Toman, J., 1988. *The Laws of Armed Conflicts*. Dordrecht: Nijhoff; Geneva: Henry Dunant Institute, vii.
21. See note 12, above.
22. Ibid. Conventions concluded during this era, from the mid-nineteenth century up to the two Hague Peace Conferences, include the following:
  - Declaration Respecting Maritime War. Signed at Paris, 16 April 1856;
  - Convention on the Amelioration of the Condition of the Wounded in Armies in the Field. Signed at Geneva, 22 August 1864;
  - Additional Articles relating to the Condition of the Wounded in War. Signed at Geneva, 20 October 1868;
  - Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Signed at St Petersburg, 29 November/11 December 1868;
  - Brussels Declaration of 1874;
  - St Petersburg Declaration of 1868;
  - Final Act of the International Peace Conference. Signed at The Hague, 29 July 1899;
  - Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864. Signed at The Hague, 29 July 1899;
  - Declaration (IV, 1) to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature. Signed at The Hague, 29 July 1899;
  - Declaration (IV, 2) concerning Asphyxiating Gases. Signed at The Hague, 29 July 1899;
  - Declaration (IV, 3) concerning Expanding Bullets. Signed at The Hague, 29 July 1899;
  - Convention for the Exemption of Hospital Ships, in Time of War, from the Payment of All Dues and Taxes Imposed for the Benefit of the State. Signed at The Hague, 21 December 1904;
  - Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Signed at Geneva, 6 July 1906;
  - Final Act of the Second International Peace Conference. Signed at The Hague, 18 October 1907;
  - Convention (III) relative to the Opening of Hostilities. Signed at The Hague, 18 October 1907;
  - Convention (II) with Respect to the Laws and Customs of War on Land. Signed at The Hague, 29 July 1899;
  - Convention (IV) respecting the Laws and Customs of War on Land. Signed at The Hague, 18 October 1907;
  - Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. Signed at The Hague, 18 October 1907;
  - Convention (VI) relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities. Signed at The Hague, 18 October 1907;
  - Convention (VII) relating to the Conversion of Merchant Ships into War-Ships. Signed at The Hague, 18 October 1907;

- Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines. Signed at The Hague, 18 October 1907;
  - Convention (IX) concerning Bombardment by Naval Forces in Time of War. Signed at The Hague, 18 October 1907;
  - Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention. Signed at The Hague, 18 October 1907;
  - Convention (XI) relative to Certain Restrictions with regard to the Exercise of the Right of Capture in Naval War. Signed at The Hague, 18 October 1907;
  - Convention (XII) relative to the Creation of an International Prize Court. Signed at The Hague, 18 October 1907;
  - Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War. Signed at The Hague, 18 October 1907;
  - Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons. Signed at The Hague, 18 October 1907;
  - Additional Protocol to the Convention relative to the Establishment of an International Prize Court. Signed at The Hague, 19 September 1910;
  - Declaration concerning the Laws of Naval War. Signed at London, 26 February 1909. See also *Instructions for the Government of Armies of the United States in the Field*. Prepared by Francis Lieber, promulgated as General Order No. 100 by President Lincoln, 24 April 1863; *The Laws of War on Land*. Manual published by the Institute of International Law (Oxford Manual). Adopted by the Institute of International Law at Oxford, 9 September 1880; *The Laws of Naval War Governing the Relations Between Belligerents*. Manual adopted by the Institute of International Law at Oxford, 9 August 1913.
23. Final Protocol of the Brussels Conference of 1874, Preamble.
24. *Ibid.*, Article 12.
25. *Ibid.*, Article 13(e).
26. “Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it.” Clausewitz, C. von, *On War* (see note 2, above), 75.
27. “To introduce the principle of moderation into the theory of war itself would always lead to logical absurdity.” *Ibid.*, 76.
28. “War is nothing but a duel on a larger scale.” *Ibid.*, 75.
29. Covenant of the League of Nations, Preamble.
30. *Ibid.*, Article 10.
31. *Ibid.*, Article 11.
32. Article 16 of the Covenant of the League of Nations reads as follows:
1. Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.
  2. It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.
  3. The Members of the League agree, further, that they will mutually support one another in financial and economic measures which are taken under this Article, in order

to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number of the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.

4. Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all other Members of the League represented thereon.

33. See the Charter of the United Nations, Preamble, which states that the new organization was set up with the purpose "to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest."
34. Chapter VII of the UN Charter. Article 43 provides as follows:
  1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
  2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
  3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to the ratification by the signatory states in accordance with their respective constitutional processes.
35. Weber, M., 1978. *Economy and Society* (I–II) (eds Roth, G. and Wittich, C.). Berkeley and Los Angeles: University of California Press.
36. *Ibid.*, 6–7:

For the purposes of a typological scientific analysis it is convenient to treat all irrational, affectually determined elements of behavior as factors of deviation from a conceptually pure type of rational action ... In all the sciences of human action, account must be taken of processes and phenomena which are devoid of subjective meaning, in the role of stimuli, results, favoring or hindering circumstances. To be devoid of meaning is not identical with being lifeless or non-human; every artifact, such as for example a machine, can be understood only in terms of the meaning which its production and use have had or were intended to have; a meaning which may derive from a relation to exceedingly various purposes. Without reference to this meaning such an object remains wholly unintelligible. That which is intelligible or understandable about it is thus its relation to human action in the role either of means or of end; a relation of which the actor can be said to have been aware and to which their action has been oriented. Only in terms of such categories is it possible to 'understand' objects of this kind. On the other hand processes or conditions, whether they are animate or inanimate, human or non-human, are in the present sense devoid of meaning in so far as they cannot be related to an intended purpose. That is to say they are devoid of meaning if they cannot be related to action in the role of means or ends but constitute only the stimulus, the favoring or hindering circumstances.

37. "Experience tends universally to show that the purely bureaucratic type of administrative organisation – that is, the monocratic variety of bureaucracy – is, from a purely technical point of view, capable of attaining the highest degree of efficiency and is in this sense formally the most rational known means of exercising authority over human beings." Ibid., 223.
38. Ibid., 223.
39. Ibid., 215.
40. Ibid., 215–16.
41. Ibid., 34–35: "An order will be called ... *law* if it is externally guaranteed by the probability that physical or psychological coercion will be applied by a *staff* of people in order to bring about compliance or avenge violation ... As is well known, it has often been denied that international law could be called law, precisely because there is no legal authority above the state capable of enforcing it. In terms of the present terminology this would be correct, for we could not call 'law' a system the sanctions of which consisted wholly in expectations of disapproval and of the reprisals of injured parties, which thus guaranteed entirely by convention and self-interest without the help of a specialised enforcement agency."
42. Ibid., 37 (emphasis in original).
43. Ibid., 35: "As is well known, it has often been denied that international law could be called law, precisely because there is no legal authority above the state capable of enforcing it. In terms of the present terminology it would be correct, for we could not call 'law' a system the sanctions of which consisted wholly in expectations of disapproval and of the reprisals of injured parties, which is thus guaranteed entirely by convention and self-interest without the help of a specialised enforcement agency."
44. See Kennan, G., 1951. *American Diplomacy 1900–1950*. Chicago: University of Chicago Press, 54 (describing international law as having the "unobtrusive, almost feminine, function of the gentle civiliser of national self-interest"). For further elaboration of the idea see Koskenniemi, M., 1995. "International Law in a Post-Realist Era." *Australian Year Book of International Law* 16: 16–19.
45. See *The Alabama Arbitration: Geneva 1872* (trans. Turner, F. B., 1988).
46. The Alabama tribunal was composed of arbitrators of five different nationalities (Brazil, Italy, Switzerland, United Kingdom, and United States).
47. Convention (I) for the Pacific Settlement of International Disputes (29 July 1899).
48. Ibid., Preamble.
49. Ibid.
50. Ibid., Articles 15 and 20.
51. Ibid., Article 15.
52. Ibid., Article 15.
53. Convention for the Pacific Settlement of International Disputes (18 October 1907). The main goal of the new Convention was to ensure "the better work in practice of Commissions of Inquiry and Tribunals of Arbitration." Ibid., Preamble.
54. Covenant of the League of Nations, Preamble.
55. Ibid., Article 15.
56. LNTS 94, 57.
57. Ibid., Article 1.
58. Ibid., Article 2.
59. See note 33, above.
60. Charter of the United Nations, Preamble.
61. Ibid., Preamble.
62. See also the Preamble to the UN Charter, according to which, one of the premises of the new system was to "save the succeeding generations from the scourge of war."

63. See, for example, "South West Africa Cases (Eth. v. S.A.; Lib. v. S.A.)" (Second Phase), 1966 ICJ 6 (Judgment of 18 July).
64. See, for example, "Legality of Use of Force (Yug. v. Belg., Yug. v. Can., Yug. v. Fr., Yug. v. Ger., Yug. v. Italy, Yug. v. Neth., Yug. v. Por., Yug. v. U.K., Yug. v. U.S.)," Request for the Indication of Provisional Measures, 1999 ICJ (unpublished) (Orders of 2 June); "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. v. Yug.)," 1993 ICJ 325 (Order of 13 September); "Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)," 1986 ICJ 14 (Judgement on Merits of 27 June); "United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)," 1980 ICJ 3 (Judgment of 24 May).
65. See "Legality of the Threat or Use of Nuclear Weapons," 1996 ICJ 1 (Advisory Opinion of 8 July), concluding that, while "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law ... in view of the current state of international law ... the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."
66. As evidenced by the success story of international commercial arbitration.
67. Habermas, J., 1984. *The Theory of Communicative Action: Reason and the Rationalization of Society* (I) (trans. McCarthy, T.). Boston: Beacon Press; Habermas, J., 1985. *The Theory of Communicative Action: Lifeworld and System – A Critique of Functionalist Reason* (II) (trans. McCarthy, T.). Boston: Beacon Press.
68. Habermas, J., *The Theory of Communicative Action* (I) (see note 67, above), 15, 17–18 (emphasis in original).
69. Ibid., xi (stating that one of his goals was to develop "a theory of modernity that explains the type of social pathologies that are today becoming increasingly visible, by way of the assumption that communicatively structured domains in life are being subordinated to the imperatives of autonomous, formally organized systems of action.")  
See also *ibid.*, xii. "The contemporary-historical motive behind the present work is obvious. Since the end of the 1960s, Western societies have been approaching a state in which the heritage of Occidental rationalism is no longer accepted without argument. The stabilisation of internal conditions that has been achieved on the basis of a social-welfare-state compromise ... now exacts increasing socio-psychological and cultural costs. And we have become more conscious of the instability of the relations among the superpowers, which was temporarily repressed but never mastered."
70. In Habermas' terms, believing in the possibility of rational (objective) politics would amount to "foundationalism." See *ibid.*, 2. "To the goal of formally analysing the conditions of rationality, we can tie neither ontological hopes for substantive theories of nature, history, society, and so forth, nor transcendental-philosophical hopes for an aprioristic reconstruction of the equipment of a nonempirical species subject, of consciousness in general. All attempts at discovering ultimate foundations, in which the intentions of First Philosophy live on, have broken down" (footnote omitted).
71. See *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, A/47/277–S/24111 (17 June 1992), 4 ("Peace-keeping is the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well").
72. Ibid. See also *Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, A/50/60–S/1995/1 (3 January 1995).



The Secretary-General's list of available means also includes those of the policy of peace; that is, the peaceful means of international dispute settlement, including legal procedure.

73. "Preventive diplomacy is action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts and to limit the spread of the latter when they occur." *An Agenda for Peace*, 4.
74. Ibid., 8. See also *Supplement to An Agenda for Peace*, 11–12: "Under Article 41 of the Charter, the Security Council may call upon Member States to apply measures not involving the use of armed force in order to maintain or restore international peace and security. Such measures are commonly referred to as sanctions. This legal basis is recalled in order to underline that the purpose of sanctions is to modify the behaviour of a party that is threatening international peace and security and not to punish or otherwise extract retribution."
75. *Supplement to An Agenda for Peace*, 12–13. While focusing on the modernist idea of "enforcement action," this document also notes that "[i]n Bosnia and Herzegovina, the Security Council has authorised Member States, acting nationally or through regional arrangements, to use force to ensure compliance with its ban on military flights in that country's air space, to support the United Nations forces in the former Yugoslavia in the performance of their mandate, including defence of personnel who may be under attack, and to deter attacks against safe areas." Ibid., 13.

See also *ibid.*, 4:

A second qualitative change is the use of United Nations forces to protect humanitarian operations ... This has led, in Bosnia and Herzegovina and in Somalia, to a new kind of United Nations operation. Even though the use of force is authorised under Chapter VII of the Charter, the United Nations remains neutral and impartial between the warring parties, without a mandate to stop the aggressor (if one can be identified) or impose a cessation of hostilities. Nor is this peace-keeping as practised hitherto, because the hostilities continue and there is often no agreement between the warring parties on which a peace-keeping mandate can be based. The 'safe areas' concept in Bosnia and Herzegovina is a similar case. It too gives the United Nations a humanitarian mandate under which the use of force is authorised, but for limited and local purposes and not to bring the war to an end.

76. See note 71, above, and accompanying text.
77. "[P]ost-conflict peace-building ... [is] action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict ... Peace-making and peace-keeping, to be truly successful, must come to include comprehensive efforts to identify and support structures which will tend to consolidate peace and advance a sense of confidence and well-being among people. Through agreements ending civil strife, these may include disarming the previously warring parties and the restoration of order, the custody and possible destruction of weapons, repatriating refugees, advisory and training support for security personnel, monitoring elections, advancing efforts to protect human rights, reforming or strengthening governmental institutions and promoting formal and informal processes of political participation." Ibid., 4, 10–11.
78. The new thinking also reflects developments on the ground – the changing nature of armed conflicts during the post-modern era. See *Supplement to An Agenda for Peace*, 4:

The new breed of intra-state conflicts have certain characteristics that present the United Nations peace-keepers with challenges not encountered since the Congo operation of the early 1960s. They are usually fought not only by regular armies but also by militias

and armed civilians with little discipline and with ill-defined chains of command. They are often guerrilla wars without clear front lines. Civilians are the main victims and often the main targets. Humanitarian emergencies are commonplace and the combatant authorities, in so far as they can be called authorities, lack the capacity to cope with them ... Another feature of such conflicts is the collapse of state institutions, especially the police and judiciary, with resulting paralysis of governance, a breakdown of law and order, and general banditry and chaos. Not only are the functions of government suspended, its assets are destroyed or looted and experienced officials are killed or flee the country. This is rarely the case in inter-state wars. It means that international intervention must extend beyond military and humanitarian tasks and must include the promotion of national reconciliation and the re-establishment of effective government.



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## Current issues: The changing environment of international organizations

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## International organizations in a period of globalization: New (problems of) legitimacy

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*G. C. A. Junne*

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[G]lobalization suggests the need for global economic management, but existing international institutions were designed to co-ordinate a system of nation states in which each state was supposed to be sovereign over its own domestic economy.<sup>1</sup> There is thus an inherent disjuncture between the process of globalization and international institutions, establishing the potential for a transformation of global governance.<sup>2</sup>

### Introduction

The legitimacy of international organizations has never been undisputed. But with the end of the Cold War, it seemed for a while that international organizations really had assumed the task they had been constructed for.

With the Earth Summit in 1992 and a large-scale military intervention under the UN flag in the Gulf War in 1991, a new era seemed to have started in which international organizations would play a much more prominent role than before. But a few years later, all this has become much more dubious. International environmental treaties are followed up outside the UN framework. The United Nations has been bypassed by NATO, which intervened in Kosovo without the initial blessing of the United Nations. The financial crisis in Asia has given rise to fundamental questions with regard to the future functions of the IMF. Obviously, the legitimacy of international organizations is something that is much more volatile than one might assume.

Besides a kind of conjunctural reason for the ups and downs in the appreciation of international organizations by national governments, the media, and the larger public, there are also some more structural determinants. One of the secular developments with a strong impact on the future role of international organizations is the ongoing process of “globalization.” The different aspects of this process will be discussed below. Two different sets of expectations can be formulated with regard to the impact of globalization on international organizations:

- On the one hand, globalization might strengthen the role of international organizations. With more and more interaction taking place on a global scale, it becomes more obvious that international institutions are needed to create a framework in which all these interactions can expand smoothly.
- On the other hand, the role of international organizations might just as readily be weakened. If many societal actors get organized at a global level, they may need the traditional international organizations less and less as a forum to meet and debate. With everybody wired to the Internet, some functions of international organizations may become obsolete. Furthermore, the process of globalization may be beset by many new conflicts, which could eventually undermine international organizations as well.

This chapter will elaborate upon the multiple impacts of globalization on the legitimacy of international organizations. In order to do this:

- It will first try to clarify the concept of legitimacy itself. The term is already problematic when used for institutions at the national level. It becomes even more complex when applied to international organizations.
- Secondly, present-day changes will be put into a long-term perspective. A number of far-reaching changes have taken place during the last two decades that form the backdrop for the form that globalization actually takes.
- Thirdly, the process of globalization itself will be discussed in some detail. Its many different aspects have different and often contradictory impacts on the legitimacy of international organizations.
- Finally, some of the consequences and alternatives will be discussed. It is probable that international organizations will acquire a number of new tasks. But at the same time, some functions of international organizations will be taken over by other types of organization.

### The volatility of legitimacy

“Legitimacy” is a complex phenomenon when it is applied to a national government. It is even more problematic when used in the context of

international organizations. In the national context, it means various things. It signifies the acceptance of a government by the (majority of) citizens as being the “true” government of a territory. Legitimacy is thus a highly subjective concept. Some will regard a government as legitimate, while others will deny the legitimacy of the same government. For international organizations, the situation is even less obvious, because it is not immediately clear who forms the constituency that could regard international organizations as legitimate or illegitimate. Would this constituency consist of governments or individual citizens?

### *Sources of legitimacy*

The difficulties of defining legitimacy even at the national (or subnational) level stem from the fact that the acceptance of a government by its citizens may be based on very different reasons. At least five different sources of legitimacy can be distinguished in this respect:

- Justice: a government can be regarded as legitimate because its policy is based on the right norms and values, and the government is regarded as acting in a just and honest way.
- Correct procedure: legitimacy can be bestowed upon a government through the process by which it has been formed. If this process has been carried out according to the law, a government is accepted as legitimate.
- Representation: a government can be seen as legitimate if it represents different societal groups in a fair way.
- Effectiveness: a government is seen as legitimate if it exercises power in most, if not all, parts of the national territory. Here, the question is not how a government came to power, but whether it can exercise its authority effectively to deliver results.
- Charisma: charismatic leadership<sup>3</sup> can provide legitimacy to a populist government. People can identify emotionally with their leaders, even if these leaders came to power in an unconstitutional way, do not represent the interests of the majority of citizens, and do not deliver tangible results.

It is obvious that a government can be legitimate according to one of these criteria, but illegitimate according to another. Factions in civil conflict and civil wars often base their contradicting claims on different criteria of legitimacy.

### *The legitimacy of international organizations*

For international organizations, the situation is still more complicated. Such organizations deal with a multi-level audience. They are created by governments, so their legitimacy depends to a large extent on how they



perform in the eyes of those governments. But at the same time, different groups in the public at large also have an opinion about the legitimacy of intergovernmental organizations (IGOs) which, in the long run, will have an impact on government perceptions and actions. There is also, thus, a question of legitimacy in the eyes of the public at large.

International relations theory has conceptualized world society in different ways. According to one perspective, it is dominated by an "international society" formed by the community of states. From that perspective, the relevant constituency for international organizations is the national states and their governments. If they are satisfied with and accept the role international organizations play, these organizations can be regarded as "legitimate."

A broader concept of world society is the "global society," formed by manifold interactions among all kinds of actors in different parts of the world. "International society," constituted by inter-state relations, is just a part of "global society." But there are many more relevant actors that play a role in "global society": multinational corporations, all types of non-governmental organizations, social movements, influential individuals. Although the network of relations between these actors makes them increasingly interdependent, they have not yet developed a strong sense of a "community" in the sense that they would really care what happens to each other as a result of more intensive interaction.<sup>4</sup> From this perspective, the legitimacy of international organizations depends not only on the perception and attitude of governments, but also on the views and visions of the many other actors in global society. With a rapidly increasing number of actors becoming relevant to global developments, chances are very high that they will hold different perceptions with regard to the legitimacy of international organizations.

The "public at large" is much more diverse in the case of "global society" than in the case of a national society. The whole architecture of present-day UN organizations was created at the end of the Second World War by the Western members of the war alliance. The nations around the Atlantic Ocean have a number of cultural similarities, share a certain historical experience, and have similar historical political traditions. But what seems to be legitimate for the Western successors of the founding fathers is not necessarily regarded in the same way when viewed from the perspective of other cultures. The intense debate about specific Asian values that are clearly distinct from those of the Western world is a good example of this point.

With an increasingly global reach, IGOs face a highly diverse constituency. What is legitimate in the eyes of part of this constituency may therefore be illegitimate in the eyes of others.

Within the UN system, the United States has an especially prominent

role, in spite of the one-country-one-vote rule in most UN organizations. Since the United States pays about 25 per cent of the budget of many organizations (though it continually lags behind on the payment of its assessed contributions), it can exert tremendous pressure on the decisions taken. The more the United States succeeds in putting its stamp on decisions, the higher the legitimacy of UN organizations may be in the eyes of the Western public. However, at the same time, such a policy alienates governments and the larger public in many developing countries that cannot identify with the procedures followed and the results achieved. If, on the other hand, the majority of developing countries push through decisions that are not welcome to the United States and other Western countries, it may boost the legitimacy of the organizations in the eyes of the majority of the world's national governments, but decisions will be difficult to implement and this lack of effectiveness will undermine the legitimacy of these organizations in the long run, even in the eyes of those governments who supported the controversial decisions.

How much does all this change with the process of globalization? Will one dominant culture create the famous "global village" in which national differences wither away? Will the urgency of worldwide environmental management make supra-national institutions more acceptable to all? Or will the speed and complexity of international developments demonstrate the inadequacy of the present international structures?

In order to answer such questions, some more clarity is needed with regard to the concept of "globalization," one of the most frequently used terms in present discussions, but at the same time an extremely vague concept with many different connotations.

### *The impact of globalization on legitimacy*

One of the most successful efforts to bring some clarity to this discussion has been made by David Held and others.<sup>5</sup> They broadly distinguish three positions in the present debate on globalization: the hyperglobalist thesis, the sceptical thesis, and the transformationalist thesis.

The "hyperglobalizers" share the conviction that economic globalization is constructing new forms of social organization that are supplanting traditional nation-states.<sup>6</sup> The sceptics point out that national states still play a dominant role, that they use the discussion on globalization to get unpopular measures accepted, and that inequalities are not vanishing internationally; on the contrary, they are on the rise. According to the transformationalists, globalization is a driving force behind rapid social, political, and economic changes. The direction of these changes, however, remains open-ended and replete with contradictions.

According to the same authors,<sup>7</sup> five principal issues constitute the

major sources of contention among these approaches. These concern matters of conceptualization, causation, periodization, impacts, and the trajectories of globalization. To make a constructive contribution to this debate, they offer four spatio-temporal dimensions that allow a more precise qualitative and quantitative assessment of the unique attributes or dominant features of different historical forms of globalization:

- the extensiveness of global networks;
- the intensity of global interconnectedness;
- the velocity of global flows; and
- the impact propensity of global interconnectedness.

In Table 1, these four dimensions (reach, intensity, speed, and impact) are used to assess four different sources of legitimacy, to get an initial idea of the relevance of the globalization process for the legitimacy of international organizations. Later in the chapter, different material facets of globalization (trade, investment, migration, and so on) are discussed in order to assess their impact on legitimacy. Table 1 summarizes what a high and increasing extensity of global networks means for the different sources of legitimacy, and what the implications are of a higher intensity of global flows, higher speed, and greater impact propensity.

It is obvious that the different aspects of globalization have a contradictory influence on the legitimacy of international organizations. While the growing intensity of international flows may strengthen legitimacy, the higher velocity of these flows tends to undermine it. The influence of a larger reach of interaction and a stronger impact of global interconnectedness is somewhat mixed. To arrive at a clearer picture, a more detailed analysis is desirable. To achieve a better understanding of globalization and its consequences, we must first put it into a long-term perspective.

## Fundamental changes in international relations

Many authors argue that “globalization” is not a new phenomenon. They are right, to the extent that there have been earlier waves of globalization. But they are wrong if they assume that the present stage of globalization does not entail anything new.

Table 2 depicts some characteristics of earlier extensions of the “global” economy. It shows how, in the past, new means of transport repeatedly integrated previously unconnected areas into an international division of labour. From the time of the Renaissance onwards, a “world economy” came into being, but the costs of land transport long limited its reach to the areas near navigable waterways. The expansion of railway networks in the nineteenth century led to the inclusion of large inland areas. But access to the world market remained limited to areas not too far away from a railway station. It was only in the twentieth century that practi-

Table 5.1 Dimensions of globalization: Their impact on sources of legitimacy

Dimensions of globalization	Sources of legitimacy			
	Justice	Correct procedure	Representation	Effectiveness
<b>Reach</b> (extensity of global networks)	Influence of global networks striving for “good government” increases, but so does the reach of criminal networks.	With global networks extending, it becomes increasingly dubious what the correct procedure is.	Representation can be broadened, which may increase legitimacy (at least in hitherto unrepresented areas).	A more global organization may make IGOs more effective (but can increase internal differences).
<b>Intensity</b> (of global flows)	A higher intensity of global flows could lead to more common norms and values and thus increase legitimacy.	With increasing global flows, pressures increase to accept common procedures.	The intensity of global flows may undermine representation of any existing group.	The relative effectiveness of IGOs (compared to national governments) may increase.
<b>Speed</b> (velocity of global flows)	Where decisions have to be taken at high speed, only the strongest interests can be considered.	If decisions have to be taken under time pressure, it is more probable that correct procedures will be violated.	Fast decision-making demands the creation of a small executive body that would reduce representation.	In a period of rapid change, chances are high that decisions will lag behind real developments and become less effective.
<b>Impact</b> (of global interconnectedness)	The higher the impact of global events, the less it becomes possible to realize specific norms and values.	With the higher impact of outside events, correct procedures become less relevant.	The higher impact of external events reduces the value of representation.	IGOs may be able to channel the impact of global interconnectedness.

Table 5.2 Historical waves of globalization

Period	Means of transport	Area integrated into the world economy
Before the nineteenth century	Ships	Areas near coasts and large rivers
Nineteenth century	Railways	Inland areas near railway lines
Second half of twentieth century	Trucks, aeroplanes	Other inland areas
Twenty-first century	“Information superhighway”	Hitherto national service economies

cally all places became connected to the world economy, when trucks could reach those villages that had remained out of the reach of the railway network. The expansion of air traffic during recent decades has increased the speed of connections, but it did not extend the reach of the international division of labour in the same way as the railway system and the introduction of trucks had.

At the turn of the century and the beginning of a new millennium, we are in the middle of a similar expansion of the world economy. The reach of the international division of labour has been extended as a result of the end of the Cold War. The formerly socialist countries have opened up to the world economy. The introduction of the “information superhighway” contributes to a tremendous intensification of international flows, although in this instance not so much of physical goods but of information. This allows the integration of much of the service sector into the international division of labour, which accounts for more than half of economic activities in most countries. Most professional services do not offer goods; they provide information. As long as information travelled slowly, local actors had a considerable advantage over foreign competitors. With information becoming instantly available around the globe, this advantage is dramatically reduced, and the competitiveness of firms with a global network increases tremendously.

This worldwide opening of the service sector (or half of the world economy) is one of the new aspects of the present forms of the globalization process. Three other closely related, recent, fundamental changes will be discussed here in order to demonstrate the specific characteristics of present-day globalization.

### *The increasing speed of technological change*

The world economic crisis in the second half of the 1970s and the early 1980s, the worst since the Great Depression of the 1930s, gave a boost to a new wave of technological development, mainly centred around infor-

mation technology. This wave of technological development is far more fundamental than the earlier waves of innovation that gave rise to new leading sectors of the economy (such as the textile industry in the early nineteenth century, the steel industry in the second half of the nineteenth century, the electrical and chemical industry around the turn of the century, and the petrochemical and automobile industry after the Second World War). The basic difference with earlier cycles of innovation is that in this instance, the way new knowledge is created and disseminated is itself fundamentally changed.

Modern information technology makes it possible to take all the technological insights of the past into account in the development of new ideas. It makes it possible for specialists in different (sub-)disciplines to cooperate more closely than ever before. More information can easily be stored at a very low cost. More powerful search engines give immediate access to this wealth of information. Modern telecommunication makes it possible to shift the information around the world at the speed of light. This makes the probability of new creative combinations much greater than it has been in the past. All this has accelerated the speed of technological innovation. It is not only the case that as a result of the economic stagnation in the second half of the 1970s and the first half of the 1980s, more money is spent on research and development; the money spent also has a larger impact than it used to.

Technological development has speeded up, and this acceleration is here to stay. It will not recede as in earlier cycles, when new prosperity as a result of the application of new technologies and the rise of new sectors led to a slowing down of innovations. In the years to come, companies will be forced to introduce new technologies as they are developed, instead of shelving them for future use – even if new products and processes make earlier products of the same firms redundant. If they do not do so, competitors will do it instead. Strong international competition will ensure that inventions are expeditiously put to use.

Thus, the application of information technology and the expansion of global competition will fundamentally change the pattern of global accumulation. Since the start of the Industrial Revolution, a pattern of long cycles can be distinguished. In the discussion as to whether we are heading towards a “new economy,”<sup>8</sup> the hypothesis is often put forward that we will no longer experience this type of cycle. The advocates of these expectations might be right (though for different reasons than they put forward). They base their expectations on the fact that most investment is actually no longer in buildings and machinery with a life-cycle of 30–40 years, but in knowledge that has to be updated continuously. The long cycles of the past, it is argued, belong very much to the industrial age, not the information age.<sup>9</sup>

The acceleration of technological development has a very far-reaching

impact on all types of organizations – companies, states, and international organizations. The acceleration creates uncertainty; innovations introduce something unexpected; uncertainty leads to the need for more flexibility. This implies that all large hierarchical organizations experience difficulties. Their inherent strength, which is based on the central coordination of far-flung activities, is much less in demand than in the past. Other forms of organizations are becoming more prominent. As a result, centrally planned economies, large government bureaucracies, and bureaucratic corporate headquarters are running into difficulties. Smaller innovative companies, public-private partnerships, rapidly shifting alliances, and complex networks of organizations are becoming more important. This chapter will return to this aspect later, since it has important ramifications for international organizations.

Shifts in the speed of innovation have made an important contribution to the other two fundamental changes that characterize the present globalization process: the U-turn in the development strategies of the “third world,” and the collapse of centrally planned economies.

#### *From import substitution to export orientation*

In the post-decolonization era, most third world countries followed a development strategy based on the expansion of industry, state intervention, high tariffs, and import substitution. At the level of international organizations, the United Nations Conference on Trade and Development (UNCTAD) was the main protagonist of such a strategy. This model was quite successful in many cases. Most industries actually producing in third world countries were built up as the result of such a strategy. However, the longer it was practised, the more a number of internal contradictions came to the fore (small series, high prices, heavy investment in imported machinery and raw materials, difficulties in paying for unavoidable imports (especially after the rise in oil prices), and increased smuggling and corruption). As a result of the moderately successful industrialization strategy, a new middle class came into being that was interested in importing cheaper consumer products from abroad, while successful entrepreneurs started to look toward foreign markets.

As a consequence, the dominant strategy of import substitution was already under discussion by the late 1960s. The acceleration of technological development from the 1970s onwards, however, added an additional element. Bhagavan<sup>10</sup> argues that by 1975, the more developed third world countries had largely caught up with technological development elsewhere. That does not mean that they had realized the same level of development – but they were well aware of what the state of the art was, they could get access to the latest technologies if they wanted to, and if

they could pay for them, and the direction of future developments seemed largely foreseeable. Fifteen years later, this was no longer the case.

Industry in the OECD countries did undergo tremendous change as a result of advances in information and communication technology. Many factories became highly automated. Computer-aided design and computer-aided manufacturing (CAD/CAM) shortened the introduction period for new products and made production lines more flexible. In a knowledge-based economy, companies started to concentrate their efforts on those activities in the production chain at which they were most proficient, and bought from specialized suppliers, who were cheaper. All of this gave them a new competitive advantage in comparison to the industries that had been built under the programmes of import substitution.

This change-over to new means of production, a new organization of production, and a new division of labour among companies and countries had a strong impact on economic and political actors in developing countries and international organizations. Strategies of import substitution lost much of their credibility and were replaced by export-led industrialization in one country after another. This transition is one of the crucial aspects of the present globalization process. After decades of colonial and post-colonial protection of national markets, most of these markets are actually opening up to the world market for trade and foreign direct investment. This has tremendously increased the reach, intensity, and impact of globalization.

It has also dramatically changed the decision-making processes in international organizations. As long as import substitution was the dominant developing strategy, individual developing countries had parallel interests that did not conflict with each other. They had a common interest in a “new international economic order” (NIEO), as officially accepted by the UN General Assembly in 1973 and 1974. But when more and more countries switched to a strategy of export-led growth, their interests became more contradictory. Different developing countries became each others’ competitors on the world market and as alternative destinations for foreign direct investment. The NIEO rhetoric, however, continued to dominate discussions in international organizations for almost two decades. This seriously undermined the legitimacy of international organizations, because the gap between rhetoric and reality widened and IOs were regarded as less and less effective in the West.

### *The end of the Cold War*

The end of the Cold War is, to some extent, an extreme example of the switch from import substitution to export orientation. After decolonization, many third world countries opted for an industrialization strategy



inspired by the economic policy of the Soviet Union, which had succeeded in turning itself into a highly industrialized country within a few decades. For a while, there seemed to be a chance that the Soviet Union would even catch up with the United States. When Sputnik was launched, Khrushchev announced that the Soviet Union would outperform – indeed, “bury” – America. This expectation was maintained far into the Brezhnev era.

However, from the mid-1970s onwards, it became increasingly clear that the Soviet Union had tremendous difficulties in applying the new technologies outside the military sector. Castells goes so far as to identify “the inability of Soviet statism to adapt to the technological and economic conditions of an information society” as “the most powerful underlying cause of the crisis of the Soviet system.”<sup>11</sup> It was impossible to introduce information technology on a large scale into the economy without loosening at the same time the tight grip on internal communications. Every personal computer could have been used to store and duplicate material critical to the regime. The Soviet Union was thus unable to join the Western world in the large-scale introduction of information technology, and fell behind again. At the same time, the new media made it easier to look across the borders and to realize what had been accomplished in other countries. This strongly undermined the legitimacy of the communist system and contributed to its demise.

The “implosion” of the communist regimes and the end of the Cold War opened the former socialist countries to the world market. Without this opening, the term “globalization” would never have found such widespread use.

## Forms and impact of globalization

Globalization is a multi-faceted phenomenon. In this section, eight facets of globalization will be discussed. All of them are closely related to the rapid technological development that has taken place, while they contribute, at the same time, to maintaining or even accelerating the speed of technological change. This section will discuss the following aspects of globalization and their impact on the legitimacy of international organizations:

- worldwide media coverage;
- expansion of world trade;
- explosion of foreign direct investment;
- integration of financial markets;
- the rise of the internet;
- international labour migration;
- global environmental problems;
- the globalization of crime.

*Worldwide media coverage*

People are much better informed about developments in other parts of the world than they used to be. James Rosenau even took this phenomenon as a starting point for a new wave of theory on international relations.<sup>12</sup> Though the international circulation of newspapers has increased as well, it is, primarily, international access to satellite television that has brought almost instant information on developments around the globe into practically every living room.

International news normally concentrates on “bad news” – wars, civil strife, natural disasters, hunger, and turmoil – rather than positive achievements, structural imbalances, or everyday life. Many people would like, in principle, to react to such news and to contribute to an improvement of the situation, but they cannot (besides by donating money to a fund for emergency relief now and then). It is probably reassuring for them to know that there are international organizations that mediate between warring parties, police international agreements, support refugees, and provide technical assistance and credit for reconstruction and development. The more people are aware of international problems, the more they will probably support the existence of the international organizations that deal with them, even if they do not know much of their concrete policies and actions.

International news coverage also includes news about the failures of international organizations (as in Somalia or Rwanda). The actions of international forces become highly visible. Also, the unintended consequences of intervention become known (such as ethnic cleansing before the arrival of peacekeeping forces). Many of those who follow the news will notice that the problems that have brought about intervention often persist afterwards. In the long run, this can undermine support for international organizations.

The internationalization of the media is not restricted to the coverage of international news. Held et al. describe how “a series of technological and political changes have transformed the televisual landscape and have contributed to the globalization of television as a medium and as an industry.”<sup>13</sup> The number of television sets per 1,000 inhabitants has increased on all continents. The number of channels in each country has increased as well, with national film production capacity unable to keep pace with the increase in the number of channels and hours of broadcast. This has increased the foreign content of most national TV stations, dominated chiefly by films produced in the United States. The poorer the country in question, the higher the percentage of foreign films tends to be. This cultural dominance has made a considerable contribution to the international demand for consumer goods and to the increase of interna-

tional migration, indirectly leading to a stronger demand for international governance.

### *Expansion of world trade*

It is especially the expansion of world trade that has made countries so dependent on what happens outside their borders. Since the end of the Second World War, the growth of world trade has continuously outpaced the growth of world production. Countries depend on developments elsewhere for their own production to a much larger extent than ever before.

With more and more economic activity becoming dependent on uninhibited access to foreign supplies, the constituency supporting a worldwide system of free trade has increased in many countries. As a result, stricter trade rules were accepted with the metamorphosis from the GATT to the World Trade Organization.

The more intensive the network of international trade relations becomes, the stronger the need to harmonize all kind of standards to further ease international trade flows becomes. Pressures for further harmonization, however, can also undermine the legitimacy of specific international organizations in a number of countries. If the WTO exerts pressure on the EU to accept growth hormones in beef, this can lead to a considerable decrease in the legitimacy of the WTO in Europe, which could also affect other areas of trade.

The most spectacular growth in world trade in recent years has been the growth in the trade of services. Most governments of developing countries in the 1980s were highly sceptical of Western efforts to include the trade of services in the GATT system. A complicated structure of international trade negotiations had to be found during the Uruguay Round to keep the discussion on services formally outside the GATT framework. During the negotiations in the second half of the 1980s, however, it proved to be much less of a stumbling block than had originally been expected. Authorities in developing countries realized that access to professional services would be crucial for them in order to expand their own share of world trade. Much of the opposition against the inclusion of services was therefore dispelled.

The expansion of international service industries, then, has served as a kind of lubricant for the expansion of world trade in manufacturing as well, by spreading marketing information, easing market access, financing world trade, expanding international advertising, ensuring legal services, and so on. At the same time, the international expansion of services has strongly increased the demand for the international harmonization of regulation, especially of financial institutions, to make sure that foreign partners are as reliable as traditional domestic partners.

Much of the international expansion of trade has taken place in a regional context. For all world regions, the share of international trade taking place within the region itself has increased in recent years. This has had an ambivalent impact on international organizations at the world level. On the one hand, regional institutions can be regarded as rivals for the global institutions, regulating many aspects at the regional level so that there is no longer any need to tackle them at the global level. On the other hand, they can be seen as facilitating a process of global governance. To organize the relations among the different regional blocs, global organizations are still necessary. They can also become more effective thanks to the regional blocs, as regional institutions help to aggregate different national positions, filter out extremes, and, in this way, smooth global negotiations. This may, however, not always be the case. The EU provides numerous examples of how negotiations within a regional organization can lead to a complex compromise which leaves little space for later concessions in a global forum. (The EU position on agriculture in the final phase of the Uruguay Round was a typical case in point.) The difficulties of renegotiating such an internal compromise can even be consciously used as a bargaining strategy in international negotiations.

### *Explosion of foreign direct investment*

The rise of foreign direct investment (FDI) in recent years has been even faster than the rise of international trade. From the second half of the 1980s onwards, FDI has skyrocketed. In the five years from 1986 on alone, more FDI took place than in the whole of prior world history. The same can be said for a number of five-year intervals in the years that followed. There has been a truly exponential growth of FDI as companies, scrambling to internationalize, have realized mergers and acquisitions.

This has contributed to a shift in the function of international organizations. Within this framework, the shift in the role of the former United Nations Centre on Transnational Corporations (UNCTC) is very interesting. This agency was formed in the early 1970s after investigations on the role of transnational corporations in South Africa and the complaints of Chile's President Allende in a famous speech to the General Assembly, in which he claimed that transnational corporations had conspired against his legitimate government.

The UNCTC was created in a period when governments with a Keynesian economic policy were trying to steer their national economies, and was aimed at controlling any outside influence as effectively as possible.<sup>14</sup> One of the main original aims of the Centre was to collect and spread information on transnational corporations (TNCs) in such a way that the bargaining position of (mainly developing) countries *vis-à-vis* these cor-

porations would be strengthened. The other original aim was to prepare a code of conduct for transnational corporations to ensure that they did not interfere unduly with national economic objectives.

In the 25 years since then, a change of 180 degrees has taken place. The former UN Centre has now become a part of UNCTAD. It no longer advises developing countries on how to control TNCs, but on how to create an economic and political environment that attracts foreign direct investment. While the UNCTAD secretariat was formed to help developing countries to elaborate and underpin their economic policies, which could not easily be accommodated within the GATT framework, it has become an organization that facilitates policy shifts within developing countries in the direction of structural adjustment and integration into the world economy.

To some extent, the UN organizations have thus become more homogeneous. Fewer contradictions within the system can enhance its overall legitimacy. But at the same time, governments or political groupings looking for an alternative to the "Washington consensus" may feel alienated from the system as a result.

A dramatic shift has taken place in the relationship between international organizations on the one hand and transnational corporations on the other. Throughout the 1970s and the early 1980s, efforts had been made by the United Nations to reach an agreement on an international code of conduct for corporations. In the mid-1980s, these plans were dropped when it was realized that no meaningful code could be established that would go beyond the one already accepted by OECD countries, which had been put forward in the 1970s to pre-empt regulation at the global level with much stricter obligations for TNCs. With the end of the Uruguay Round, an agreement on trade-related investment measures (TRIMs) was reached that obliges governments to allow foreign direct investment deemed necessary to support the free flow of trade.

But a number of OECD governments went even further and drafted the "Multilateral Agreement on Investment" (MAI), which was to become a kind of code of conduct for state governments and would have limited governments' authority to restrict the activities of transnational corporations. Efforts to regulate the activities of transnational companies had turned into efforts to regulate the activities of states with regard to these same companies. There is hardly any other example that illustrates so well how the tables have turned politically in recent decades.

The very fact that the MAI was drafted within the OECD rather than a global organization showed the limited trust that the governments concerned had in the UN framework. On the other hand, they knew that had the MAI been accepted by OECD countries, most other countries would

not have seen an alternative to signing it as well. Given the preponderance of OECD countries in the world economy and the competition among all countries for foreign direct investment, other governments would have signed to avoid potential damage to their country's competitiveness.

The whole exercise has underlined a triple threat to the legitimacy of global international organizations: (1) it has shown the immense strength of private corporations to influence the development of public international law; (2) it has shown that initiatives by the OECD can override activities at the global level – in many cases, it is the OECD that sets global standards, rather than UN organizations with a global membership; and (3) even the fact that the MAI, in the end, was not adopted had little to do with any deliberation in a UN organization, but was due to the very active protests of many NGOs, mainly from the OECD area itself, which had been mobilized via the internet and used the worldwide web very efficiently to articulate their protests and to influence decision makers. It demonstrated the increased strength of NGOs, which has an ambivalent impact on the legitimacy of international organizations (see below).

### *Integrated financial markets*

The globalization of the world economy has also led to a new relationship between FDI and portfolio investments. In the nineteenth century, and up until the Second World War, international investment mainly took the form of portfolio investment. Though some transnational corporations had already expanded their international activities during the first half of the century, the big expansion of transnational corporations came only after the war, with the rapid expansion firstly of American companies all over the world, joined by European companies from the 1960s on, and by Japanese firms in the 1970s. Foreign direct investment became the dominant form of international investment.

During the last 25 years, this has changed. Although FDI has risen tremendously, portfolio investments again exceed FDI by a very large margin. The relative decline of development aid, deregulation of financial markets in many developing countries, the privatization of a large proportion of former state enterprises, and the liberalization of capital controls have triggered an enormous upsurge of international short-term investment. Flexible exchange rates since the demise of the Bretton Woods system have opened up another opportunity for short-term gains from currency speculation.

Since the introduction of the telegraph in the late nineteenth century, money can be transmitted within seconds from one country to another.

This in itself is not new. But computerized cash management in large corporations allows the mobilization of vast amounts of money at very short notice. International telecommunications and computer programs make the real-time monitoring of different markets all over the world possible. Pre-programmed computer routines trigger large international financial flows wherever an opportunity for arbitrage arises. This development has linked different financial markets to each other in a more intensive way than before.

The impact of this development on the legitimacy of international organizations is, again, ambivalent. When the Bretton Woods system collapsed in 1973, the IMF barely survived. For years, it was uncertain what the future role of the IMF would be. Only as the result of the international debt crisis in 1982 did the IMF gain a new legitimacy as a watchdog for developing countries, to keep them on a policy track that would help them repay most of their debts and to open their markets for international investors.

The recent international financial turmoil has underlined the importance of the existence of an institution like the IMF, which can monitor financial flows and, if necessary, help to mobilize funds to stabilize monetary relations. However, the concrete policies of the IMF have been strongly criticized. There is a hot debate over whether IMF policies have contributed to and aggravated the financial crisis of Asian countries, and over which policies would have best helped these countries to weather the storm. While the importance of the IMF's existence is no longer questioned, the policies chosen have given rise to severe doubts.

It has also become obvious that better coordination of banking regulation is necessary, but governments and central banks have different opinions as to the most suitable organization for this purpose. The IMF and the Bank for International Settlement in Basle compete for turf in this regard.

At a more general level, the recent financial crises have given rise to doubts as to whether the reign of unrestricted markets really does lead to an optimal development of the world economy and its different constituent parts. Since the strongest international organizations have committed themselves to a neoliberal policy, this criticism immediately affects these organizations. But it probably does not really undermine their legitimacy. If a choice for more international regulation is made instead, this would lead to additional tasks for the very same international organizations. Their position would probably be even stronger. If more regulation is enacted at the national level, these organizations would still gain importance, because they would have to coordinate these national measures in order to avoid unintended consequences that could result from different forms of regulation.

*The Internet*

The introduction of e-mail and the Internet has created the opportunity of practically instantaneous communication, at a low price, with all corners of the globe. Organizations can make large amounts of information available to a larger public. This is a service that obviously creates good will among all the professionals who can use such data. In particular, the IMF and the WTO have made use of this opportunity. They provide very extensive documentation on international financial and trade relations, and on their own activities, on their websites. In this way, they add to the transparency of the organization; this normally contributes to an organization's legitimacy.<sup>15</sup>

But the very availability of large amounts of information on the Internet and the ease of communication among actors somewhat undermines international organizations at the same time. International organizations in their present form mostly date from the period at the end of the Second World War, although some have precursors from the time of the League of Nations in the interbellum. In that period it was still inconvenient to travel internationally, and messages were dispatched in pretty much the same way as they were at the beginning of the century. International organizations were founded in order to create a place where information could be brought together and where delegates from member countries could meet and coordinate their policies. With the increasing availability of information from national governments, banks, professional associations, and so on, much of this information is easily available (though the need to aggregate this information internationally remains). National governments can easily communicate with each other and exchange information, without depending on international organizations to create a forum for such interaction. English has become the world language, with much less need than there was in the past for the vast international translation services that international organizations provide.

Not so long ago, much of the information needed for international policy coordination was collected by government statistical offices and then brought together by international organizations. With the development of civil society in most industrialized countries, a vast body of data has been compiled by professional organizations, companies, consulting agencies, and so on. This information is often more detailed, more up to date, more comprehensive, and better conceptualized than the data that government offices provide. So international organizations (just like national governments) increasingly rely on outside sources for information, rather than compiling it themselves.

Governments at the national and the local level have seen that policy-making can profit enormously from contributions by all sorts of organi-



zations who put forward ideas and arguments to develop comprehensive policies that are supported by societal actors and create fewer unintended consequences. Such a participatory policy style would also be desirable for most international organizations.

The Internet has made it possible to incorporate opinions and suggestions from a large number of actors into policy-making and, in this way, to formulate more adequate policy measures in a relatively short time.<sup>16</sup> Doing this at more than an experimental scale, however, could fundamentally change the work of international organizations. They would become much less intergovernmental organizations, and might develop in the direction of a new type of international association or network with a mixed membership (see below).

### *The internationalization of the labour market*

The expansion of low-cost international electronic communication tends to create an international labour market, at least for workers in the information sector. Since many services can be provided via the Internet, it does not really matter where the person delivering the services is actually located. Talk of the “death of distance” may be premature, though, since physical proximity still plays an important role. (Most e-mail messages are exchanged between people who regularly see each other face to face.)

International service provision by “back offices” in foreign countries for insurance companies, call centres, or software development firms is developing rapidly. This will probably create a tremendous demand for international regulation of credit transfers, liability, acknowledgement of professional qualifications, certification of security, taxes, telecommunication standards, and so on.

Although the growth of this new sector may cause a number of people who otherwise might migrate abroad to remain in a specific region or country, the overall effect may not be a reduction in migration. Migration may, on the contrary, increase as a result. People working at a distance for a foreign client enter into a network that increases their awareness of job opportunities, pay differentials, differences in working conditions and access to further education, leisure activities, face-to-face contacts, and career possibilities; they may, therefore, feel compelled to move, and this may be encouraged by their employers. Employers will more easily hire somebody from abroad if they have already cooperated with the candidate at a distance.

The desirability of occasional face-to-face contacts (to improve contacts, increase the information on the “other side” to harmonize activities, and strengthen mutual commitment) also increases mobility and reduces the obstacles to permanent migration.

An increase in migration probably increases the legitimacy of interna-

tional organizations which spread information, strive for international standards, and facilitate international exchanges. People on the move experience the benefits of international coordination and harmonization. They are probably more aware of the activity of IOs than other people, because they have a higher chance of coming into contact with, or benefiting from, the work of these organizations.

### *Global environmental problems*

Few developments have made the necessity of global cooperation so obvious as the discovery of truly global environmental problems during the 1980s. When environmental consciousness rose in the 1960s, pollution was mainly perceived as a local problem. The solution to local air pollution was often to build higher chimneys so that the wind would blow away emissions. As a result, emissions reached higher strata of the atmosphere and caused transboundary air pollution and acid rain. This was the main reason for convening the “United Nations Conference on the Human Environment” (UNCHE) in Stockholm in 1972. The Conference did not give rise to the foundation of new organizations, however. When negotiations started on the institutional framework for worldwide environmental governance in the early 1970s, developing countries were very much afraid not only that a strong institution would cause a reduction of development aid, but that more stringent environmental rules might strangle development efforts altogether. Instead of a fully fledged UN organization, the 1972 UNCHE conference gave rise only to the United Nations Environment Programme (UNEP), which had a very small budget. UNEP, however, was instrumental in concluding a large number of regional environmental treaties and concluding the Vienna Convention and the Montreal Protocol on the Protection of the Ozone Layer.<sup>17</sup>

International environmental problems were still regarded mainly as regional problems, linking countries on the same continent or bordering the same sea. It was only during the 1980s that the world became conscious of truly worldwide environmental problems, when the damage to the world’s ozone layer was discovered and when the discussion on global warming began. The discovery of worldwide ecological problems had at least three implications.

- It stressed the importance of some form of global governance. The existence of global environmental problems underlined the urgent need for international coordination. If national governments cannot be sure that other governments are taking parallel action, they are not inclined to take the first step either, because the measures taken might only inhibit the competitiveness of their economy or increase costs for their own citizens, without any definite impact on the environment.
- Global environmental problems do lead to global action, but this does

not imply the creation of new international organizations. The negotiation of global conventions made it clear that the task of coordination could be fulfilled in other ways than by the founding of permanent organizations. The conventions are normally governed by conferences of the parties involved and supported by a small secretariat. Different countries can take turns hosting this secretariat. In this way, no permanent machinery is created that could evolve a bureaucratic interest of its own. The research necessary for the further development of the different protocols is done by a multitude of different organizations, public and private. Monitoring is achieved partly via reports from national governments; these reports, in turn, are scrutinized by NGOs.

- The Commission on Sustainable Development has been created within the UN Secretariat, which has as its task the coordination of actions within the UN system; and the Global Environment Facility has been added to the World Bank (together with the United Nations Development Programme (UNDP) and UNEP) as administrator of the redistributive task incorporated in the global conventions.

The very fact that, step by step, what is nearly an alternative network of international institutions has been created alongside the system of international organizations can be regarded as a strong criticism of these organizations. Obviously, they were not the most suitable forum for addressing the new challenges, and governments of member countries did not regard them as capable of handling the new problems. The alternative framework is a permanent demonstration that international coordination can be achieved in a different way.

### *The globalization of crime*

The various forms of globalization have, on the one hand, created many new opportunities for white-collar crime. On the other hand, increased exposure to the world market has also led to processes of povertization that have left many people with few choices but to engage in criminal activities (drug production and trade, prostitution, child labour, arms trade, poaching, money laundering, and so on). Traditionally, intelligence agencies participate in such transactions, partly to infiltrate the relevant networks in order to control them or to use them for their own purposes, partly to earn additional means to continue activities so secret that their own governments would not want to know about (or finance) them.

The many civil wars that have broken out in the 1990s, often as a result of a fight over the remaining resources (raw materials, development aid) to earn a living, have created an additional incentive to engage in such activities on a large scale. To fight a war, the conflicting parties need large amounts of arms and money, and the easiest way to acquire these is through the narcotics trade.

Recent years have seen the rise of well-organized and highly sophisticated international criminal organizations. It is obvious that to fight such organizations, close international cooperation is necessary. In general, the challenge presented by global criminal networks increases the legitimacy of international organizations. Politicians fear, however, that any single international organization charged with this task might become too powerful. As a result, they try to achieve similar results with close cooperation between national institutions. Even within the European Union, it has been especially difficult to get “Europol” off the ground.

It has become obvious that the different aspects of globalization have a different (and often contradictory) impact on the legitimacy of international organizations. The traditional IOs have often been found not to be the most suitable organizations to cope with new challenges. Instead, alternative avenues have often been chosen to handle these problems.

## New trends

Globalization has created a great demand for international coordination, but it has at the same time undermined the capacity of international organizations to respond adequately to this demand. This section will point to a number of failures by international organizations to react adequately to the globalization process. It will then look at the alternatives; which other institutions have been created that carry out some of the coordination tasks instead of, or in addition to, international organizations?

### *Deficiencies of international organizations*

International organizations are beset by a number of problems that are exacerbated by the process of globalization.

- Life-cycle of organizations: like individuals, organizations have a kind of life-cycle. At some point in history, they become more backward-than forward-looking; they respond with ingrained reflexes rather than to the real challenges of the outside world. The very advantage of an organization's use of pre-programmed routines for handling different situations eventually turns against it. The burden of more than 50 years of history of UN institutions is reflected in operating standards, bureaucratic routines, employment practices, age of clerical staff, office equipment, and so on. This means that in a process of rapid global change, reactions are not always adequate.
- Bureaucracy: international organizations developed traditional bureaucracies after their foundation. To some extent, they became even more bureaucratic than national organizations. Since they had to recruit civil servants from many countries, they had to spell out clear routines and

procedures for the work to be done. In order to avoid any misgivings because of alleged discrimination or nepotism, job descriptions had to be very precise. As a result, IOs have had more than an average share of red tape. Given the lack of financial means available, there was less opportunity than there was in OECD government bureaucracies to automate some of the bureaucratic routines. In the present information age, these traditional bureaucracies face difficulties in carrying out their tasks efficiently.

- Posturing: the agenda of international organizations is full of such items as resolutions, programmes, and meetings. These are rarely concerned with real actions to be carried out in the field. It is normally a long, intricate process for resolutions to “trickle down” and have any concrete, real impact. This situation invites a specific style of discussion, often more oriented towards “posturing” than towards taking action in the real world, and often attracts a specific type of person and alienates others.
- Lack of coordination: there has been a proliferation of agencies. In order to react to new challenges, new agencies and units have been formed. This has, to some extent, counteracted the life-cycle of IOs and contributed to some renewal and mobility. In a highly interdependent world, it is obvious that different UN organizations will have overlapping mandates, which implies a tremendous demand for internal coordination. The Administrative Committee for Coordination tries to play this role (and bodies such as the Commission on Sustainable Development perform a very useful coordinating task in their specific field), but the demand for coordination remains much greater than its supply. As in the case of ministries in a national government, considerable energy is spent on the fight for turf, rather than on the pressing issues of the outside world.

The process of globalization affects this process in a contradictory way. On the one hand, it may help to improve coordination. In the past, coordination was sometimes difficult because different UN agencies had somewhat different orientations. Developing countries felt more at ease with UNCTAD and the UNDP than with the World Bank and the IMF. However, with the spread of neoliberal ideas and the decline of explicit alternatives to the present international order as part of the globalization process, individual UN organizations have fallen more in line. Coordination might thus become easier. At the same time, the continuous pressure on budgets may enforce a more rigorous division of labour among agencies.

However, all this comes at a cost. Confronted with the more unified vision of world order now held by IOs, governments (and individuals) with a different orientation may feel alienated from the UN system

altogether. Better coordination may go hand-in-hand with a lack of inclusion.

These are some factors that reduce the legitimacy of IOs and increase the reluctance of national governments (and other organizations) to deal with new problems within the framework that IOs offer. But with the need for international coordination continuously rising, what other alternatives have developed?

### *Alternative forms of international coordination*

A number of alternatives have developed and will be discussed below. Special attention will be paid to new, hybrid international networks that bring together actors from the public and the private sphere: national governments, international organizations, NGOs, and private corporations.

#### *A new unilateralism*

With the end of the Cold War and the demise of Russia as a global superpower, and less optimistic prospects for Japan to become a serious economic rival of the United States, the United States faces less of a challenge to its position as the world's only remaining superpower than ever before in its history.

The position of the United States has been further strengthened by the increasing importance of information technology and the internet. The internet gives a boost to English as the world's dominant language, to the free access of information, and to the international acceptance of the American way of doing business. The United States has again become the dominant source of ideas (especially management literature) and of higher education.<sup>18</sup> What is now described as "globalization" often used to be depicted as "Americanization" in the 1950s and 1960s.

This unchallenged position encourages efforts by American politicians to "go it alone." The US government tries to use international organizations where it can; but if this does not deliver quick results, the United States can often rely on its own direct influence to achieve the desired outcome.

It is, on the other hand, exactly this enormous unilateral predominance that leads other national governments to look to multilateral agreements.<sup>19</sup> The erroneous implication is that in this way, unilateral action leads back to multilateral regulation.

#### *The rise of regional organizations*

The wave of new (or newly active) regional organizations is another form of response to the need for increased international coordination. It can be explained not only as the result of economic mechanisms (growing com-

panies seeking larger yet somehow protected markets); it is also a political response to the lack of worldwide coordination and to the danger of foreign domination.<sup>20</sup> Where national institutions are undermined in the globalization process, and where international organizations cannot come into their place, regional institutions tend to fill the vacuum.

However, while regional arrangements can temporarily reduce the demand for global coordination, they will only increase it in the long run. The patchwork of regional and bilateral arrangements in any individual sector will ultimately increase the demand for global multilateral rules (as suggested by the efforts to conclude a Multilateral Agreement on Investment).<sup>21</sup>

#### *The increasing importance of NGOs*

The number of internationally active non-governmental organizations has increased even faster than the number of regional trade arrangements. NGOs have gained importance and formal status in the international arena. Many of them have become professionally managed, well-financed institutions which can mobilize considerable expertise. They do not cover all fields of international activity equally, but have become especially prominent in the field of the environment, development, human rights, and health.

NGOs have become increasingly important as interacting partners of international organizations, but they do not tend to replace them. They make an important contribution to international coordination by increasing public awareness and education, by putting problems on the international agenda, by providing negotiators with additional information, and by monitoring the implementation of agreements by governments and other actors. NGOs also make a contribution to the legitimacy of negotiators and international organizations. The public often does not believe politicians any more, whether they represent national governments or international organizations. But it does believe and accept what NGOs have to say about the same topics. Politicians who can align themselves with NGOs can thus benefit from this increased credibility (and legitimacy).

However, closer association with politicians (and often corporate leaders as well) and integration into national and international policy formation has been a mixed blessing for many NGOs. It has plunged some of them into a severe crisis, because it has led to a split in the constituency between those who want to play a constructive role in national and international negotiations, and those who fear that integration into established policy networks will lead to a softer stand on many issues, incorporation into mainstream politics, political deals behind closed doors, and an increasing gap between the leaders of the organization and its rank-and-file mem-

bers. With absorption into mainstream politics, NGOs would inevitably lose some of the credibility built up in the past and would become less attractive for many of their members.

This crisis has led to intensive conflicts in some large NGOs and has nearly triggered their decline. NGOs, too, go through a life-cycle, in the same way that international organizations do. Organizations which once held great public appeal may, a few years later, hardly attract public attention any longer.

NGOs are not an alternative to IOs. They play an important role in opening up the policy formation process in IOs to a larger public. They can make the work of IOs more effective (less posturing, more up-to-date information, more intensive monitoring of the implementation of agreements), but they do not replace IOs (nor do they have the ambition to do so). They need IOs as institutions they can focus on. Without IOs with the formal mandate to take binding decisions, NGOs would have no addressee for their demands (beside national governments and international corporations). Since NGOs do have to work together with IOs, and certainly cannot replace them, it is interesting to take a closer look at those nascent forms of organization that combine IOs, NGOs, national governments, and sometimes also private corporations.

### *The formation of international networks*

In the national context, very good results have sometimes been achieved when different stakeholders with an interest in a specific problem have come together and developed a common approach to the issue at hand. This is only possible if the earlier interaction has not led to an antagonistic polarization between the actors, but such a situation is the exception rather than the rule. Different stakeholders together can not only come to a decision much more quickly (because they share the same underlying information and have a better understanding of each other's objectives and fears), they can also facilitate and accelerate the implementation process, if the decision is supported by the different parties involved and does not meet hidden resistance or tacit non-cooperation.

NGOs in recent years have engaged in ever-closer contact with IOs and with national governments. The positive experience gathered from this cooperation has sometimes led to more permanent forms of organization, in which the different institutions could work together. These forms of cooperation might be better able to react to some of the challenges engendered by the globalization process.

Different types of organizations bring different assets into these networks (see Table 3). Below, four examples of these networks are mentioned, and some strengths and weaknesses are discussed.



Table 5.3 Contribution of different actors to international public/private networks

National governments	International organizations	NGOs	Private corporations
budgets, authority	international standing, formal representation	detailed information, stakeholder contacts, credibility	detailed information, immediate implementation

### *The Global Water Partnership*

The Global Water Partnership (GWP) is an international network in which government water departments of both developing and developed countries, UN agencies, multilateral banks, professional associations, research organizations, NGOs, and the private sector cooperate. It was formed in 1996 in order to translate a number of fundamental principles for water resources management into practice.<sup>22</sup>

The GWP combines the knowledge and experience of its member institutions and uses this to facilitate initiatives at a regional, national, and international level. It is neither a donor organization, nor does it carry out projects itself. The GWP secretariat helps to develop ideas into fundable projects. It has access to a growing network of internationally recognized water experts and close working contacts with many of the large bilateral and multilateral aid agencies. It can help to improve and prioritize projects, speed up the planning process, and facilitate implementation. By having no direct interests of its own, it can easily mediate between different organizations and help to coordinate their efforts and avoid duplication. It makes the experience of different organizations available to each other. It can operate in a highly flexible way, with a small secretariat that can draw upon experts from the member institutions whenever needed, without having to build up a bureaucracy of its own.

Such a network does not replace existing organizations for water resources management, but it acts as a means of lubrication for the work of these other institutions by:

- creating a forum for communication;
- facilitating their access to state-of-the-art information;
- taking and encouraging initiatives;
- matching project demands with suppliers of money, knowledge, and experience;
- coordinating activities of different organizations and avoiding duplication.

*The Global Biodiversity Forum*

The Global Biodiversity Forum (GBF) has a similar function. The GBF is an umbrella organization for all actors interested in the conservation of biodiversity, including NGOs, national governments, and private industry. Most funding is provided by the World Resources Institute, the International Union for Conservation of Nature and Natural Resources (IUCN), and in particular the Global Environment Facility. Founded in 1992, it offers a forum in which industry and international environmental organizations can participate. It is a spin-off of the Global Biodiversity Strategy proposed by the World Resources Institute, the United Nations Environment Programme, and the IUCN. The GBF describes itself as a “mechanism to foster analysis and unencumbered dialogue and debate among those interested in priority ecological, economical, institutional and social issues” that relate to biodiversity.<sup>23</sup>

*The Children's Vaccine Initiative*

The Children's Vaccine Initiative (CVI) grew out of a recognition of the central role that private industry has come to play in determining the availability of new and improved vaccines. It has sought to build new partnerships between industry and public health institutions, and to reconcile their inherently different goals and objectives. In the 1997 Children's Vaccine Initiative strategic plan, the role of the initiative is described as follows:

The Children's Vaccine Initiative is a global coalition of organizations from the public, non-governmental and private sectors, including the vaccine industry, working together to maximize protection against infectious diseases through the development and utilization of safe, effective, easy-to-deliver and widely available vaccines. The CVI is co-sponsored by the United Nations Development Programme (UNDP), the World Health Organization, the World Bank and the Rockefeller Foundation and UNICEF.

The CVI has not received large amounts of funding, but has rather been effective in bringing together a broad coalition of agencies and industries with a stake in developing new and improved vaccines, and encouraging their introduction. “Immunization has ceased to be an entirely public sector matter. A mix of private and public funding, and the negotiation of common ground and common priorities, is seen to be the way forward.”<sup>24</sup>

*The Reinventing Bretton Woods Committee*

The Reinventing Bretton Woods Committee (RBWC) was created 50 years after the foundation of the Bretton Woods institutions to study the

changes that must be made to the existing economic institutions if they are to remain effective in today's global economy. It is an elite forum of private-sector participants, high-ranking government officials, renowned scholars, and representatives from international institutions. Its sponsors include the World Bank, national central banks, and private financial institutions. It takes initiatives to elaborate an International Bankruptcy Code, makes proposals for the world monetary system for the twenty-first century, and studies the impact of the European Monetary Union on the world economy.

These few examples will suffice to illustrate the new type of organization that has arisen in the 1990s. Since they do not depend on government mandates, they are more free to explore new ideas and to elaborate creative approaches to pressing world problems. They are probably faster than IOs at elaborating new proposals. The resulting proposals tend to have a higher chance of acceptance, since they have come about in close contact with the most important stakeholders. They are probably less formulated in vague diplomatic language than many documents that result from negotiation processes within IOs, and probably address the problems at hand more adequately. Given the actors that have been involved, chances are great that the proposals will not only be accepted, but also relatively quickly implemented. The whole process might be less expensive than a process leading to similar results within IOs would have been.

Such networks thus have a very important function; they can help to streamline IO activities. But IOs might also become marginalized by the same process. The very fact that there is a cheaper and faster alternative might make member countries more reluctant to finance IOs. The more informal and flexible networks do incorporate important additional stakeholders, but they are, at the same time, more exclusive as far as representation of countries is concerned. Smaller and poorer countries will seldom be incorporated into the process, with the exception of situations in which they are prominent victims of a specific problem. There is also the problem of continuity; as it is relatively easy to create such organizations, it is equally easy to dissolve them.

## Conclusion

The process of globalization has had a mixed impact on the legitimacy of international organizations. The demand for international coordination and common action has obviously increased. But at the same time, the effectiveness of IOs has diminished, for a number of reasons. Sometimes

the effectiveness of these organizations depends on that of member governments, which is undermined by the globalization process in a number of fields. Sometimes, effectiveness is inadequate because IOs have relatively large bureaucracies that move slowly.

The biggest challenge in the last decade has been the rise of more informal networks, which often incorporate IOs. These networks introduce new ideas, contribute to coordination among different organizations, improve public-private cooperation, and shorten the time necessary for implementation of international programmes. They offer very flexible structures that can easily be adapted to quickly changing challenges. They can draw upon the resources of member institutions or associated organizations and therefore keep their own expenditures at a low level. Given the fact that they do not give rise to the existence of a new bureaucracy, they also do not create new organizational interests that conflict with proper solutions for the problems at hand.

It is the rise of such alternative structures as a result of the globalization process that might prove to be a bigger challenge to the legitimacy of IOs than the direct impact of globalization on the demand for IO activity and on the effectiveness of their actions.

## Notes

1. Emmerly, L., cited in Mittelman, J. M., 1996. *Globalization: Critical Reflections* (IPE Yearbook 9). Boulder: Lynne Rienner, 89.
2. Mittelman, J. M., *Globalization* (see note 1, above), 89.
3. See Haldenwang, C. van, 1999. "Government Action and Political Regulation. The Legitimacy of Political Orders in the 21st Century." *Politische Vierteljahresschrift* 40(3) (September): 372.
4. Shaw, M., 1994. *Global Society and International Relations*. Cambridge: Polity Press.
5. Held, D., McGrew, A., Goldblatt, D., and Perraton, J., 1999. *Global Transformations. Politics, Economics and Culture*. Cambridge: Polity Press, 9–28.
6. This group comes from different ends of the political spectrum. It unites neoliberals who welcome this process with radicals or neo-Marxists, who protest against it.
7. Held et al., *Global Transformations* (see note 5, above), 10.
8. Kelly, K., 1999. *New Rules for the New Economy*. London: Fourth Estate.
9. The main reason may be the different nature of the innovation process rather than the nature of the assets created by the investment, with which actual innovations are realized.
10. Bhagavan, M. R., 1990. *The Technological Transformation of the Third World. Strategies and Prospects*. London: Zed Books.
11. Castells, M., 1998. *End of Millennium. The Information Age: Economy, Society and Culture* (III). Oxford: Blackwell, 38.
12. Rosenau, J. N., 1990. *Turbulence in World Politics. A Theory of Change and Continuity*. Princeton: Princeton University Press.
13. Held et al., *Global Transformations* (see note 5, above), 357.
14. Junne, G. C. A., 1989. "Rise and Fall of Critical Research on Multinational Corporations," in Elsenhans, H., Junne, G. C. A., Kiersch, G., and Pollmann, B. (eds), *Frankreich*,

*Europa, Weltpolitik. Festschrift für Gilbert Zieburg.* Opladen: Westdeutscher Verlag, 400–410.

15. Transparency does not always contribute to legitimacy. When increased transparency makes it obvious that the organization is inefficient, corrupt, or torn apart by internal conflicts, increased visibility undermines the legitimacy of the organization.
16. In cases where this is not done, policy makers run the risk that an international mobilization of protest may take place via the internet, which might de-legitimize their action and finally cause governments to withhold their support for the measures planned.
17. Benedick, R. E., 1991. *Ozone Diplomacy. New Directions in Safeguarding the Planet.* Cambridge, Mass.: Harvard University Press.
18. American education draws some 450,000 foreign students each year. See Nye, J. S. Jr and Owens, W. A., 1996. "America's Information Edge." *Foreign Affairs* 75(2) (March/April): 29.
19. An example can be found in the reasons why Canada is looking to the WTO to create an international investment regime (rather than the OECD or NAFTA): "It is WTO, in Canada's view, which has the capacity to create binding global rules on investment with its more global membership and strengthened dispute resolution system. Canadian decision makers have seen such rules as the best protection against unilateral actions on the part of its largest trading partner and a counterweight to the enormous asymmetry of its bilateral economic relationship with the United States." Smythe, E., 1998. "Your Place or Mine? States, International Organizations and the Negotiation of Investment Rules." *Transnational Corporations* 7(3) (December): 115.
20. In a recent survey of the political factors behind the new regionalism, the phenomenon is associated with the decline of US hegemony: "Much recent interest has been expressed in whether declining US hegemony has contributed to the latest wave of regionalism. Although the available evidence suggests that PTAs [preferential trading arrangements] did become more pervasive as hegemony eroded, what underlies this relationship, how it bears on regionalism's welfare consequences, and whether receding hegemony affected prior episodes of regionalism remain matters of dispute." Mansfield, E. D. and Milner, H. V., 1999. "The New Wave of Regionalism." *International Organization* 53(3) (Summer): 620. It can be argued, rather, that the present form of regionalism is not only perfectly compatible with renewed American hegemony, but also constitutes a partial answer to it.
21. See Smythe, E., 1998 and Chahoud, T., 1999. "After the Failure of MAI: Setback or Chance for Developing Countries?" *Entwicklung und Zusammenarbeit* 40(7/8) (July/August): 196–197.
22. These principles are (see <<http://www.gwp.sida.se>>):
  - fresh water is a finite and vulnerable resource, essential to sustaining life, development, and the environment;
  - water development and management should be based on a participatory approach, involving users, planners, and policy makers at all levels;
  - women play a central part in the provision, management, and safeguarding of water;
  - water has an economic value in all its competing uses and should be recognized as an economic good.
23. Pistorius, R. and Van Wijk, J., 1999. "The Exploitation of Plant Genetic Information. Political Strategies in Crop Development." Ph.D. dissertation: University of Amsterdam, 130.
24. Hardon, A., Blume, S., and Justice, J., 1999. "Beyond the Slogans: Global Immunization Efforts Revisited." Lecture at the Amsterdam School of Social Science Research, 22 November 1999, 16.

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## 6

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# The changing image of international organizations

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*Jan Klabbers*<sup>1</sup>

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The United Nations was “not created in order to bring us heaven, but in order to save us from hell.”

Dag Hammarskjöld (1954)

The United Nations “is now expected to function as the public service sector of a world community that does not exist as a political entity.”

The Independent Working Group on the Future of the United Nations (1995)

## Introduction

Hannah Arendt, arguably the most *étatiste* among internationalists, once observed: “The solidarity of mankind may well turn out to be an unbearable burden, and it is not surprising that the common reactions to it are political apathy, isolationist nationalism, or desperate rebellion against all powers that be.”<sup>2</sup> The reason for this, she suggested, is that the creation of “a global present without a common past” tends to be too artificial to be of much use and, what is more, “threaten[s] to render irrelevant all traditions and all particular past histories.”<sup>3</sup>

In recent years, Arendt’s insight – that bounded and formal political communities such as the state are proper institutions for the conduct of politics – has been met with support from various corners. For some, following Kelsen, the state facilitates political debate by being essentially form without content.<sup>4</sup> Others, more Hegelian in their inspiration, still

conceive of the state as more or less decisively shaping identity,<sup>5</sup> while yet others have, more functionally perhaps, outlined the practical advantages of the state over other forms of political organization.<sup>6</sup> Still others have argued that the state is the only thing that can keep the emerging civil society in check,<sup>7</sup> and eventually even the most ambitious recent attempt to formulate a world beyond the nation-state, Andrew Linklater's *The Transformation of Political Community*, somehow ends up advocating a form of political organization uncannily similar to a system of states.<sup>8</sup>

By contrast, the other main late-modern form of political organization, that of the formal international or intergovernmental organization, has fared less well in recent times. At least in the thoughts and actions of those most directly concerned with formal international organizations, a tangible backlash seems to have developed. Once, organizations were the embodiment of the dream of "legislative reason," to use Bauman's phrase,<sup>9</sup> leading inexorably to global governance and the fundamental unity of mankind.<sup>10</sup> Organizations, thus, were long considered to be a good thing.<sup>11</sup>

While international organizations have not come to be viewed as a negative concept, there appears to be a marked change in their image and this is, to some extent at least, cause for reflection. In much the same way as states, international organizations represent a formalized style of politics, complete with decision-making in accordance with previously established rules, rules outlining the effects of decisions once taken, and even rules on decisions wrongly taken. What is more, these organizations tend to take on the sort of functions typically associated with states and may indeed, in the end, even be indistinguishable from states. Why, then, is it that the image of international organizations has deteriorated, whereas the state has, by and large, managed to regain its image?

In part, the move away from institutions may be the result of wider political developments, in particular the move away from big government and from politics based on comprehensive grand schemes and blueprints.<sup>12</sup> Organizations, after all, have come to embody many of the characteristics traditionally associated with big government: where the welfare state has crumbled and been replaced by leaner versions, welfare functions have typically been taken over by organizations.

Another factor may be the increasing anti-formalization (if this is the proper term to use) of politics.<sup>13</sup> As some of the other contributions to this book make clear,<sup>14</sup> our post-modern concept of politics insists on seeing to it that problems are solved, perhaps prevented, by the best technical means available. Ironically, the very process of internationalization may contribute to this state of affairs by creating space for uncontrolled executive power.<sup>15</sup> And often formal institutions, not to mention constitutional safeguards, are seen to stand in the way of problem-solving.

To some extent, organizations themselves may be to blame. Perhaps

inspired by the imperial designs of their leadership, perhaps inspired by the bureaucratic tendency for self-sustenance or self-aggrandizement, organizations have usurped tasks and competencies as if there were no tomorrow. Brian Urquhart, a former high-ranking UN official, paints a vivid picture as to how such usurpation may take place:

Cockeyed ideas from member states or other sources begot studies which produced reports which set up staffs which produced more reports which were considered by meetings which asked for further reports and sometimes set up additional bureaucratic appendages which reported to future meetings. The process was self-perpetuating.<sup>16</sup>

Indeed, even during the 1980s, the decade of deregulation, the UN family managed to create a massive 173 new agencies, while putting 73 existing ones to rest.<sup>17</sup> And it is not just the case that new agencies and organs have been created, but also that the general scope of activities has seen a steady expansion. As Righter sums up, “[E]ach UN specialised agency has expanded the range of its activities far beyond anything envisaged in 1945.”<sup>18</sup> And the UN family is far from unique in this respect; constitutional sedimentation, as one observer has called it, appears to have taken place across the board.<sup>19</sup>

The purpose of this chapter is to investigate whether and to what extent the image of international organizations is indeed undergoing change, as well as to briefly explore the legal mechanisms conducive to the working of international organizations. The first section will describe in general terms the legal concept of international organization. The next section will chart the development of the law of international organizations, with particular reference to what many hold to be its centrepiece: the doctrine of implied powers. The following section will suggest that the image of international organizations is indeed changing, and the final section will contain a brief plea for a reappraisal of the status and role of international organizations.

Three preliminary remarks are in order. Firstly, this chapter concentrates largely on the changing image of international organizations amongst international lawyers (both scholars and those working for or with organizations), for at least two reasons. One reason is, quite simply, that it is the only academic discipline about which the author can claim to have a sufficient overview to make any statements at all; fortunately though, it is also, for better or worse, the discipline most closely associated with the study of formal international organizations. In other words, it may be hypothesized, however loosely, that a change in attitude amongst international lawyers will, to paraphrase Axelrod, cast something of a shadow of the future.<sup>20</sup>



Secondly, much of the analysis in this chapter is based on developments within the European Union and the United Nations family. This is almost inevitable,<sup>21</sup> for those are the two clusters of organizations most widely published about, most widely analysed, and most widely commented upon. Few people will have heard of, say, the *Office Franco-Allemand pour la Jeunesse*,<sup>22</sup> let alone have devoted time and attention to following developments within this organization. Fortunately, this state of affairs can be rationalized – if, perhaps, in a somewhat tongue-in-cheek way – by pointing out that the importance of the UN family, as the only example of universal organizations, needs no further explanation, and that no matter how *sui generis* the European Community might be, it is often considered as the most highly developed specimen of the species, and as a model for many other international organizations to emulate. Thus, developments within the UN family and the EC may well be at the vanguard of a more general trend.

Thirdly, this chapter shall focus on the image of international organizations, without laying any claim as to whether this image adequately represents reality, largely for two reasons. One of them is that the legitimacy of political authority depends to a large extent on perceptions and images.<sup>23</sup> The second is somewhat more intricate perhaps, and follows from the way international organizations are traditionally studied and analysed. The prevailing mode of analysis is to think of the relationship between organizations and their members as a zero-sum game, where one's wins are the other's losses. This circumstance, for better or worse, almost by definition imposes a focus on the way realities are imagined and perceived. As Pierre Schlag has observed, law is "at once a concrete social form embedded in institutional practices and an abstract conceptual representation of those institutions and practices," and legal analysis tends to slip inevitably into an analysis of such representations: constructing law is a matter of "collective, projected objectification."<sup>24</sup>

## Toward a legal concept of international organization

International organizations are strange creatures. Generally thought to have been set up by their member states in order to facilitate the pursuit of a common goal, or even the common good, the precise nature of the relationship between organizations and their member states has always remained nebulous. For some, international (that is, intergovernmental) organizations are generally not much more than vehicles for their members, doing whatever the members tell them to do, with hardly any input of their own. In this view, typically held by neo-realist analysts of international relations, organizations exercise little influence on the behaviour

of their members, at least not on those issues where it really matters. Instead, organizations (or institutions more generally)<sup>25</sup> only create a “false promise,” as a prominent political scientist put it some years ago.<sup>26</sup>

Most international lawyers would have problems with the neo-realist position, for at least two reasons. One of those reasons is normative in nature: international lawyers have generally considered (and generally still consider) international organizations to be good things, which should be present in greater numbers for the greater good of mankind.<sup>27</sup> Left to their own devices, states are liable to get up to all sorts of nasty tricks, state sovereignty being, as a prominent international lawyer put it famously, a “bad word.”<sup>28</sup> Only internationalization, of which organizations constitute supreme examples, can protect mankind from itself. This normative position derives from what David Kennedy once referred to as our “international project”: anything international is good, as long as it is international.<sup>29</sup> States, we tend to think, are bad; international organizations, on the other hand, are good.<sup>30</sup>

Ironically, both the neo-realist scepticism and the lawyers’ hopes stem from the same source: a conception of the world as, in the traditional image, a loose collection of billiard balls, interacting more or less at random. Each is out to improve its own position, and presumably to do so to the detriment of all others. While the role of law in this framework has traditionally been subject to different assessments, the underlying premise is in essence the same: the natural state of affairs is the Hobbesian state of nature.<sup>31</sup>

Indeed, it is no coincidence that historically, the “move to institutions” (another happy phrase coined by Kennedy)<sup>32</sup> coincided with the heyday of man’s attempts to create an ever more perfect world. The spirit of the late nineteenth century in these matters is perhaps most adequately phrased by novelist and historian H. G. Wells, writing that many of the disasters that have plagued Europe due to the activities of leading politicians and statesmen (*Realpolitiker*, typically):

might very well have been avoided altogether had Europe but had the sense to instruct a small body of ordinarily honest ethnologists, geographers, and sociologists to draw out its proper boundaries and prescribe suitable forms of government in a reasonable manner.<sup>33</sup>

US President Wilson had a similar conception in mind when including historians, geographers, and ethnologists in the US delegation to the Peace Conference at Versailles: an attempt to settle certain problems, in this particular case that of drawing boundaries while respecting the idea of self-determination, on the basis of science, or as Wilson himself put it, “on a basis of facts.”<sup>34</sup>

But even as recently as 1995, the optimism of social engineering informed the report emanating from the so-called Independent Working Group on the Future of the United Nations (chaired by Qureshi and Von Weizsäcker), proposing *inter alia* that a newly established economic council “should summon the leading world’s economists and engage them in the process of re-evaluating global economic policies.”<sup>35</sup> And this suggests that, at least as a practical matter, there is an inextricable link between creating or reforming organizations and the blissful thought that the world can be shaped according to whatever blueprint we may have in mind.<sup>36</sup>

Still, perhaps in the realization that the mere normativity of good intentions does not necessarily come with explanatory power, international lawyers also reject neo-realist scepticism for another reason: if it is true that organizations are but vehicles for their member states, as neo-realism typically holds, then it follows that their very *raison d’être* and conceptualization rest on shaky foundations. If they are only vehicles for member states, then organizations are, in the end, indistinguishable from treaty organs and even, to put the matter in extreme terms, indistinguishable from spokespersons.<sup>37</sup> Yet clearly, not only does this ignore Ernst Haas’s early insight that the fate of organizations may well be influenced by their learning capacities and the qualities of leadership,<sup>38</sup> it also creates problems in instrumental terms: why would states create elaborate bureaucracies if the appointment of a single common spokesperson would suffice?

In short, lawyers usually insist, and arguably have to insist,<sup>39</sup> that organizations are more than mere vehicles for the aggregate will of their member states. Instead, they are considered to have a will of their own, a *volonté distincte*, which renders it conceptually feasible to distinguish them from other forms of inter-state cooperation, and to lift them beyond the mere sphere of cooperation. The international organization, in this view, is not merely a forum for cooperation, but is something more than that: it is an actor in its own right, with its own agenda, its own goals, and its own role to play.

The one problem, then, is to find out how this *volonté distincte* manifests itself; but this is typically treated as an empirical rather than a conceptual problem. And that is, perhaps, for the best,<sup>40</sup> for at the end of the day, empirical evidence of a *volonté distincte* remains scarce; few organizations (with the notable exception of the EU) provide for the taking of decisions binding on all members by anything less than unanimity.

The intriguing picture can thus be painted of a conception of international organizations as legally distinct from their members, based on a largely fictitious *volonté distincte*, without much empirical backing in terms of the legal powers of the organizations nor in terms of the influence each organization exercises upon its members. And the reason for

this is largely twofold: a conceptual need to come to terms with the existence of international organizations, in conjunction with the normative position that such organizations are generally a good thing.

In other words, the main theoretical problem, when it comes to understanding international organizations and many aspects of the law relating to them, is the problem of the relationship between an organization and its members. Yet, as will be demonstrated below, this relationship is, so to speak, schizophrenic: international organizations and states tend, eventually, to fade into each other so as to become indistinguishable. Whatever *volonté* distincte international organizations may possess, it derives, eventually, from a *volonté* not their own; and however much states may wish to control organizations, their very creation involves a loss of control. Organizational acts can always be dissected into acts of states acting together, while acts of states *en groupe* may always be ascribed to some entity composed of, but distinct from, the individual participating states.

This constant oscillation between the organization and its members has given rise to a rather volatile set of legal rules and principles: the law of international organizations. Most of those rules and principles reproduce, upon analysis, the very same oscillation, the result being that whenever a decision has to be made, it is usually made on the basis of a policy preference masquerading as a legal rule. The hypothesis underlying this chapter is that those policy preferences are undergoing change: it is no longer the case that the side which the organization will take is decided automatically.

Instead, while on occasion the state seems to be regaining ground, on other occasions options are preferred that seem to suggest changes on other levels: informal politics is being substituted for the formal style of both the state and the traditional international organization; single-issue politics are being substituted for the more traditional comprehensive approach characteristic of politics within both states and international organizations; and technocratic management is being substituted for politics *tout court*. Thus, while the instrumental relationship of international organizations, for purposes of the law, is the relationship between the organization and its members, other relations and phenomena distort the convenient but ultimately deceptive zero-sum symmetry.

### Towards a law of international organizations

Despite their existence in some form or another for well over a century and a half, international organizations continue to puzzle us. The very first occasions on which their functioning was submitted to the (then) Permanent Court of International Justice indeed suggest as much. The

first time the Court had to occupy itself with the powers of an organization was in 1922. The International Labour Organization (ILO) had placed agricultural matters on the agenda, something to which the French government objected with the argument that the constituent document of the ILO did not make specific mention of agricultural workers. The Court, in an advisory opinion, was not yet able to take a principled stand. Wavering somewhat, it started off by saying:

It was much urged in argument that the establishment of the International Labour Organisation involved an abandonment of rights derived from national sovereignty, and that the competence of the Organisation therefore should not be extended by interpretation. There may be some force in this argument, but the question in every case must resolve itself into what the terms of the Treaty actually mean, and it is from this point of view that the Court proposes to examine the question.<sup>41</sup>

Subsequently, the Court headed towards an interpretation that allowed for the unmitigated competence of the ILO in agricultural matters, pointing out that it was hardly likely that the drafters had wished to exclude this important sector of the economy and that, at any rate, there were no intrinsic differences between agriculture and other branches that would warrant a restrictive reading of the treaty.

Still, realizing that this would do little to alleviate French concerns, the Court felt compelled to point to the existence of certain escape mechanisms. Thus, the Court's decision served as a reminder that as a practical matter, certain limitations on the ILO's competence could follow from other legal rules; that strict uniformity in labour conditions had never been expected; and that special circumstances ought to be taken into account when drafting recommendations or conventions.<sup>42</sup> The latter remark, moreover, served as a subtle reminder that at any rate, the ILO would be unable to impose obligations upon a member without that member's consent.

On the same day, the Court also issued an advisory opinion on the related question of the precise scope of the ILO's competence in agricultural matters.<sup>43</sup> It is one thing to say (and not too difficult to justify, on the basis of the ILO's constituent document) that the ILO is generally competent in agricultural matters. It is quite a different thing, however, to assess the scope of that competence with some degree of precision. The Court was asked whether the ILO was competent to examine proposals for the organization and furthering of agricultural development; it found no such competence to exist, presumably aided by the consideration that the ILO itself declared that it lacked competence in those matters.

The Court reached its conclusion by looking at the object for which the

ILO was founded, concluding that neither the organization nor the development of the means of production was explicitly committed to the ILO.<sup>44</sup> Instead, the general object of the ILO was “the amelioration of the lot of the workers and the adoption of humane conditions”<sup>45</sup> in a number of matters.

Nonetheless, the Court had to acknowledge that matters related to the means of production could affect the workers. Thus, it reached the following, somewhat Delphic, conclusion:

[B]roadly speaking, any effect which the performance by the organisation of its functions under the Treaty may have on production is only incidental. On the other hand, it is evident that the Organisation cannot be excluded from dealing with the matters specifically committed to it by the Treaty on the ground that this may involve in some aspects the consideration of the means or methods of production, or of the effects which the proposed measures would have upon production.<sup>46</sup>

The net result is that there is no result. Every activity the organization plans to undertake is vulnerable to the charge that it is outside the organization's competence; and at the same time, every charge that an activity is outside the organization's proper competence can be met with the argument that, in reality, it isn't. It turned out to be impossible to fix a more reliable dividing principle, and the lack of such a guiding principle refers the matter back to the realm of power struggles.

The problems of the existence of powers of international organizations (in this case, the League of Nations) also arose in two subsequent advisory opinions concerning the relationship between Poland and its German minorities after the First World War.<sup>47</sup> In both these opinions, however, the Court could find an easy way out by pointing to the authority of the League of Nations bestowed by the Minority Treaty concluded with Poland. It was on the basis of this treaty that the Court could safely decide that the League was competent to occupy itself with questions arising out of the treatment of German minorities by Poland; a more general statement on the law of international organizations could therefore be avoided.

After these tentative beginnings, however, the Court gradually developed a perspective on the powers of international organizations. This was to be contained in two different doctrines, set out in two different advisory opinions.

Faced with the question as to whether the competence of the ILO encompassed the competence to regulate, incidentally, the activities of employers, the Court laid the groundwork for what was later to become the “implied powers” doctrine.<sup>48</sup> Having read the ILO's constituent

document, the Court opined that the ILO had been given a very broad competence to regulate the activities of salaried workers, and thought it inconceivable that the drafters could possibly have intended:

to prevent the Organisation from drawing up and proposing measures essential to the accomplishment of that end. The Organisation, however, would be so prevented if it were incompetent to propose for the protection of wage-earners a regulative measure to the efficacious working of which it was found to be essential to include to some extent work done by employers. If such a limitation of the powers of the International Labour Organisation, clearly inconsistent with aim and scope of Part XIII [of the constituent Versailles Treaty], had been intended, it would have been expressed in the Treaty itself.<sup>49</sup>

The Court here found inspiration in Sherlock Holmes, looking for the dog that did not bark. It presumed a power to be present, unless the opposite would be indicated.<sup>50</sup> In such a case, everything depends on the reasonableness of the presumption: is it reasonable to presume a power to incidentally regulate the activities of employers under regulations whose main aim is to regulate the activities of wage-earners?

In the Court's view it was eminently reasonable to presume such a power to exist, but realizing that additional arguments would not hurt, it invoked, above all, considerations of practice: the ILO had earlier undertaken activities in fields not clearly within its scope of competence (relating, for instance, to the use of materials in manufacturing certain products), and those activities had not met with resistance, but rather with approval.<sup>51</sup> Moreover, just to be on the safe side, the Court also observed that at any rate, the ILO constitution provided for certain methods to ascertain whether or not the Organization was attempting to extend its competencies: the parties control the agenda-setting, as well as the adoption of any recommendations or draft convention.<sup>52</sup>

In its next advisory opinion, issued some nine months later, the Court formulated the counterpart to its still embryonic implied powers doctrine, which has subsequently become known as the principle of speciality or attribution. In reference to the question of the scope of powers of the European Commission for the Danube, the Court remarked:

As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute [its constituent document] with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.<sup>53</sup>

Here too, then, the Court laid down a presumption, but this time starting from the opposite vantage point. The ILO-employers opinion lent itself

to evolution into the implied powers doctrine, since it created a presumption in favour of the organization; the Danube Commission opinion, on the other hand, seems to create a presumption against the organization, and therewith lent itself to be referred to, almost 70 years later,<sup>54</sup> as authority for the proposition that the powers of organizations are limited to those bestowed upon them.

The curious thing is that both sets of doctrines feed off each other: the implied powers doctrine has to make clear that even powers not explicitly granted may nonetheless have been intended by the drafters, and can thus be deemed attributed to the organization; the attribution doctrine, on the other hand, necessarily refers to the fulfilment of the organization's purpose, and therewith becomes practically indistinguishable from the implied powers doctrine. Indeed, the structural unity of the two is clearly visible through juxtaposition of the ILO-employers opinion and the European Danube Commission opinion: in both cases, the Court ends up claiming that the organization can do as it pleases, as long as no restrictions are placed upon its powers. And thus, in both cases, initial appearances notwithstanding, the Court ultimately takes sides with the organization: organizations, after all, are good; and states, after all, are bad.

In later cases, international tribunals would broaden the scope of the implied powers doctrine, and would develop the doctrine along two lines.<sup>55</sup> One line was what might be called a "weak" version of the doctrine, under which the doctrine simply came to mean that the power to do a thing necessarily implies the power to do what is necessary to realize that thing. Here, the doctrine concerns merely a principle of effective interpretation that does not require any further justification. An early example can be found in the PCIJ's Greco-Turkish Agreement opinion of 1928, where the Court held that even though the Agreement did not spell out which entity could resort to arbitration, it stood to reason to find that this power rested with the Mixed Commission established by the Agreement.<sup>56</sup> The European Court has come to similar findings in cases such as "Fédéchar,"<sup>57</sup> or, more recently, "Germany and others versus the Commission."<sup>58</sup> The weak version of the implied powers doctrine, then, amounts to finding a power implied in order to give effect to an explicit power, or, as Judge Hackworth put it in his famous dissent to the Reparation for Injuries opinion: an implied power needs an express power to be derived from.<sup>59</sup>

By contrast, the stronger version attaches an implied power not to any specific express power, but to the constituent document at large or, even more broadly, to the organization at large. Here, then, the implied powers doctrine serves as the justification for a finding, not unlike the magical feats of the famous Baron von Münchhausen, that implied powers may be justified with the help of the implied powers doctrine. The *locus classicus* is no doubt the Reparation for Injuries opinion, issued by the Interna-



tional Court of Justice in response to a request by the General Assembly to rule on whether or not the United Nations would have the capacity to bring claims against states. Nothing in the UN Charter would indicate as much, but that did not stop the Court from finding that such a power could be implied from the Charter: if the United Nations were to effectively fulfil its given functions, then such a power was indispensable. And true to tradition (and so as to prevent the Court from being seen to ignore the exigencies of power politics), the Court managed to observe that although formally absent, the power was nevertheless part of the intentions of the drafters of the Charter, a type of reasoning that would become customary in applications of the implied powers doctrine.<sup>60</sup>

The interplay between the principle of attribution and the implied powers doctrine then, perhaps more than anything else, displays the constant tension between a conception of international organizations as mere vehicles for the aggregate wishes of their member states, and a conception of the organization as a separate entity. In the end, they are merely each other's reflections: attribution thrives on reference to the organization's purposes, and therewith turns into implication; implication, in turn, can only truly be justified by pointing to the intentions of the founding fathers, and therewith turns into attribution.

Other staples of the law of international organizations paint a similar picture. There is, for example, the scope of the privileges and immunities granted to international organizations. Academic opinion is largely unanimous in holding that these do not derive from respect for sovereignty (after all, organizations are not sovereigns), or from ex-territoriality (after all, organizations have no territory of their own). Instead, those privileges and immunities are usually said to derive from "functional necessity" concerns.<sup>61</sup>

Predictably, this usually gives rise to debates on what exactly is functionally necessary for organizations to perform their functions, and which yardsticks to apply, and whether or not certain issues ought by definition to be excluded from the scope of the organization's immunities.<sup>62</sup> This, in turn, gives rise to a corollary issue: who shall decide on the scope of functional necessity in any given case?<sup>63</sup> The tension between the "vehicle" conception and the "distinct entity" conception materializes largely in the assumption of positions in these debates, the important point being that any position can be defended by invoking functional necessity. Indeed, it is difficult to find a better illustration of this fact than the 1953 case before the US Federal Communications Commission, "*In the Matter of International Bank for Reconstruction and Development and International Monetary Fund v. All America Cables & Radio, Inc., and Other Cable Companies*,"<sup>64</sup> where the contending parties both invoked functional necessity as the basis for their diametrically opposed claims.

The law on admitting new members to an organization is not free from this tension either. Where admittance is based on compliance with some standards, the question invariably arises as to who shall assess whether aspiring members live up to those standards. Usually, this task is left to one of the organs of the organization, which in turn usually prompts concern as to whether it is the organ as such that should review applications in good faith, or whether this extends to the member states represented in those organs (which may amount to all members, as with the United Nations). The first option reproduces the “distinct entity” conception, the second reproduces the “vehicle” conception of international organizations.<sup>65</sup>

The law on treaty-making by international organizations fares little better. Here, the dispute invariably turns into a conception of the member states as being parties to treaties concluded by “their” organizations (representing the “vehicle” conception), and a conception of the member states as being third parties (reproducing the “distinct entity” conception).<sup>66</sup> While the predominant position is presumably the view that the members are best seen as third parties,<sup>67</sup> this position has the serious drawback that it may well come to mean that an organization enters into commitments that it is unable to implement, as implementation is generally dependent on the cooperation of the member states. For that reason, some organizations have themselves decided to adopt the opposite position as a matter of their own internal legal order. The most prominent example is, no doubt, the European Community, whose constituent treaty (as amended) provides that treaties concluded by the Community shall be binding on the member states.<sup>68</sup>

The same problem comes back to haunt us when issues of the organization’s liability are at stake: does the organization incur responsibility for internationally wrongful acts, or can the members also, in some way or another, be held responsible? With the exception of the situation regarding most of the financial institutions (whose constituent documents generally provide for limited liability on the part of the member states), here too the familiar positions are being reproduced. The “vehicle” conception finds itself reflected in the position that members shall be held liable as a matter of course (a position that, in its extreme version, no longer has proponents of whom the author is aware);<sup>69</sup> the “distinct entity” conception is reproduced in the point of departure of limited liability. In practice (or rather, in scholarly writings),<sup>70</sup> a middle position usually ends up being defended, according to which member states shall be responsible either indirectly (that is, so as to enable their organization to remedy the situation), or secondarily (that is, if their organization fails to remedy the situation).<sup>71</sup>

The point to emerge from this fundamental tension in the structure of

the law of international organizations, then, is that there are few hard and fast rules. On most issues, the question is not simply one of which rule to apply and how to apply it, but rather of how to make an argument based on policy preferences. If every possible degree of immunity from legal action can be defended by pointing to functional necessity concerns, then all functional necessity tells us is that a political decision is either warranted or has just been taken. The law of international organizations, to paraphrase Koskenniemi, is little more than a not yet very elaborate framework for deferring substantive resolution elsewhere: into context and negotiation.<sup>72</sup>

There is one caveat, though, and that is that the law of international organizations seems to contain a built-in bias in favour of the organization. On this point, the appropriation of powers by international organizations may provide a useful illustration.

Usurpation of powers by international organizations can normally be justified in purely legal terms without too many problems. There is, as noted, the implied powers doctrine, which ultimately rests on a sort of fictitious consent of the member states. Other techniques may point to more or less real expressions of consent. Thus, power appropriation may be justified by claiming that resolutions or reports on the topic were adopted without a vote, by consensus, by acclamation, or without opposition. And when a resolution, a report, or an instrument is adopted, on any given topic and even in the mildest terms, a precedent is set: the very adoption illustrates that the organization cannot be devoid of the power to address the topic, for otherwise how could it have adopted the resolution without any objections? Thus, practice begets further practice, and it is deemed that any opponent should be stopped from raising an objection after the fact.<sup>73</sup>

Perhaps as a consequence of the sheer steamrolling force of usurpation arguments, the legal mind has yet to develop a cogent defence mechanism against the usurpation of powers by international organizations. The most often mentioned legal doctrine in this regard is the doctrine of *ultra vires*, borrowed from administrative law<sup>74</sup> and holding, in a nutshell, that organizations shall not exceed their powers. Where they do, the resulting actions shall be invalid, or shall at least be voidable, or perhaps deemed inapplicable.<sup>75</sup>

Useful as this may seem as a brake on the development of organizational activities, in practice the doctrine of *ultra vires* has some serious limitations. For one thing, an *ultra vires* finding presupposes a sharp separation of powers, sharper perhaps than the constitutions of many organizations can be seen to support. One can only make an argument that someone has exceeded his or her powers if those powers are clearly delimited; where the lines are fuzzy, the argument faces an uphill battle.

Moreover, in many cases an *ultra vires* allegation may, often successfully, be recast as simply a difference of interpretation, in much the same way as most arguments relating to breach of treaty can be reformulated as differences of interpretation.<sup>76</sup>

More fundamental still is that *ultra vires* activities can always be legitimized by pointing to the acceptance or (more likely) acquiescence thereof by the members of the organizations concerned and, where appropriate, other organs.<sup>77</sup> And where acceptance or acquiescence takes place, *ultra vires* arguments lose their teeth,<sup>78</sup> except in those cases where it is expressly stipulated that acceptance or acquiescence cannot change existing rules.<sup>79</sup>

The situation is complicated by the absence of any general prohibition on *ultra vires* acts in international law. Acts that fall outside the scope of activities of an organization need not be illegal as a matter of general international law. Quite the opposite: many of the *ultra vires* activities that organizations engage in have received a warm welcome.<sup>80</sup>

In those circumstances, it is more than understandable that the International Court of Justice proved unable to provide the doctrine of *ultra vires* with any definable shape when it came to international organizations. Confronted with the argument that in authorizing peacekeeping missions, the General Assembly had acted *ultra vires*, the Court observed that in the first instance at least, any organ determines the scope of its own powers, and the Court continued in typical fashion by concluding that the General Assembly had not acted *ultra vires*.<sup>81</sup> In other words, it appears to be practically inevitable that with international organs, there is a strong presumption that organizations or their organs act *intra vires*, and the presumption may be so strong as to be, in practice, immune to rebuttal.<sup>82</sup>

The only remaining defence against usurpation, then – most prominent perhaps within the European Community – is to insist that formal amendment procedures be followed. These procedures in turn implicate all member states, so as to guarantee the legality of change, and arguably also the legitimacy thereof.<sup>83</sup> As a matter of principle, the European Court has taken a firm stand on amendments, repeatedly insisting that the treaties cannot be changed as the result of a mere practice.<sup>84</sup> As a matter of practice, the Court's principled position is perhaps not always followed with scrupulous care, not even by the Court itself. To give but one example, the Court has given a general stamp of approval to the de facto extension of the repertoire of legal instruments used by the European Community.<sup>85</sup>

The law of international organizations, then, contains few certain rules, and for all its uncertainty has traditionally been characterized by a built-in bias in favour of organizations. This bias still exists, but there appear to

be signs that a change is occurring, and that this bias is either being circumvented or perhaps even overcome.

### Towards a changing image

Traditionally, in light of internationalists' distaste for anything related to the state, and their instinctive realism favouring internationalism, legal disputes were usually decided in favour of the organization. After some hesitant beginnings,<sup>86</sup> the doctrine of implied powers was permitted to develop to the full (or beyond, as some would say), with other doctrines following suit. And where in the early days of international organizations it was by no means clear whether international organizations possessed the international capacity to engage in such acts as concluding treaties, the post-war discussion concerned solely the modalities and limits of treaty-making by international organizations; the preliminary issue of treaty-making capacity was no longer a subject of debate.<sup>87</sup> Recent developments, however, both in law and in scholarship,<sup>88</sup> seem to mark a shift. Much of the evidence is anecdotal; indeed, how could it be otherwise? Some of it, moreover, lends itself to interpretation in various ways. Yet, taken together, the details of a developing picture, however grainy, can be seen to emerge.

### *Law*

Perhaps the most conspicuous illustration of a shift occurring in law is the curious circumstance that organizations tend increasingly to be created on what might be called the "legally subliminal level,"<sup>89</sup> thus marking a shift away from formal organization. The Organization for Security and Cooperation in Europe (OSCE) operates (or aspires to operate) entirely outside the realm of law, with its legal status being the topic of debate. Indeed, the OSCE is based, ultimately, on what many consider to be the textbook example of a non-legal instrument: the 1975 Helsinki Final Act.<sup>90</sup> Another example of a loosely structured body, recently created, is the Asia-Pacific Economic Cooperation (APEC) forum.<sup>91</sup> The status of the G7 or G8 (it is telling that we are unable to properly distinguish between the two) is highly circumspect, and the organization to control sensitive exports to sensitive areas, the Wassenaar Arrangement, appears to be even beyond debate.<sup>92</sup> Cross-border banking takes place under the auspices of the Basle Committee, occupying a spot in the same twilight zone in which the Bank for International Settlements operates.<sup>93</sup> Most prominently, the structure and personality of the European Union defy legal thinking, or any thinking, for that matter.<sup>94</sup>

By the same token, quite a few existing organizations have started to make use of informal instruments (ostensibly non-binding declarations and the like) in order to chart their future activities.<sup>95</sup> Organizations such as NATO and the Western European Union have adapted to the post-Cold War security situation not by formal amendment of their constitutions, not even by formal decision-making, but by adopting informal declarations.<sup>96</sup> So too has the Security Council, meeting for once at the level of heads of state and government, seen fit to dramatically expand the possible scope of the concept of "threat to the peace" as used in Chapter VII of the UN Charter; it has done so, once again, in an instrument of uncertain legal status.<sup>97</sup>

The upshot of such informalization (paradoxically, perhaps, as the invention of the legally subliminal is meant to do justice to our political sensibilities in a way that law cannot do) is that it becomes almost impossible to structure and channel political debate: there are few guarantees that results generated by such political debate will really be acted upon; dialogue is being replaced by power; and activities pursued will lack at least one of the elements deemed crucial for legitimacy, what Thomas Franck refers to as "symbolic validation."<sup>98</sup>

There are possible contradicting examples, of course, with the juridification of the international trade regime in the form of the World Trade Organization perhaps being *primus inter pares*. Even here, though, the situation may not be quite as straightforward as it seems at first sight. The old General Agreement on Tariffs and Trade was traditionally criticized for the indeterminacy of many of its substantive rules, and this indeterminacy of substance has been carried over into the new WTO. While the dispute settlement mechanism has indeed been streamlined and juridified, here too, all is not as well as it seems: panel reports can still be set aside by political decision,<sup>99</sup> and what is more, access to the WTO's dispute settlement mechanisms is still limited to states and the EC. In other words, companies, businesses, and traders all still have to go to the WTO via their states. Moreover, whereas a determination of the possibly self-executing nature of a treaty provision is a matter traditionally left to the courts, two of the main trade blocs have stipulated that under no circumstance shall the WTO rules be construed as self-executing,<sup>100</sup> which seriously hampers the utility of international rules in domestic settings and safeguards entities from too much interference by international organizations. In other words, to shut off direct effect and direct access is to keep the WTO on a short leash; it is to keep it under the tight control of executive power.<sup>101</sup>

In addition, relying on dispute settlement amounts by definition to bilateralization rather than communalization; increased reliance on dispute settlement mechanisms may well, therefore, be regarded as de-

organizationalizing, to coin a phrase. Indeed, in the more general terms of its functions, the WTO is a rather exceptional organization to begin with. While generalizing about international organizations is always risky, they are typically created with a view to filling a void: where states are reluctant or unable to legislate, for whatever reason, the organization steps in, as the ultimate *deus ex machina* of welfare. Many organizations have indeed taken on functions normally associated with the welfare state, rather than with the proverbial “night watch” state.

With the WTO the situation is, rather, the reverse: the idea is not to regulate, but to deregulate, to put it in simple yet evocative terms.<sup>102</sup> Indeed, intuitively as well as rationally, there is nothing incongruent about the observation that early cases decided by the WTO’s Appellate Body were coloured by “the important political imperative of giving assurances to [member states] that the WTO understood and was protecting their interests,”<sup>103</sup> whereas such an observation would be more difficult to accept with other organizations. And the reliance on the Appellate Body itself places an enormous amount of hardly controllable power in the hands of seven appointed individuals.

A similar move away from organizations can be witnessed on less obvious levels. Thus, the European Court of Justice has displayed a distinct tendency in recent years to step down from its integrationist heights. The far-reaching rules on the free movement of goods, extensively interpreted in 1974 in the *Dassonville Case*,<sup>104</sup> have been relaxed in cases such as that of *Keck and Mithouard*.<sup>105</sup> National prerogatives in the field of external relations have been honoured in opinions 1/94<sup>106</sup> (on accession to the WTO) and 2/94<sup>107</sup> (on possible accession by the EC to the European Convention on Human Rights); opinions that are difficult to reconcile with the previously wide construction of the implied powers doctrine. In the *Kalanke Case*,<sup>108</sup> the Court arguably put a stop to the idea of affirmative action, itself the paragon of welfarism.

The EC’s member states, in the meantime, also seem to have put at least a partial stop to further integration. The Maastricht Treaty introduced, famously, the principle of subsidiarity;<sup>109</sup> less famously, the same treaty article introduced, for the first time in written form, the principle of attribution discussed above. The practice of establishing opting-out provisions, and the very introduction of the notion of flexibility in the Amsterdam Treaty, also indicate a desire to be liberated from the organization’s shackles, as does the (seemingly ever-increasing) addition of all sorts of protocols and declarations to European treaties.<sup>110</sup> So too does the introduction of two intergovernmental pillars at Maastricht, jealously guarding sovereign prerogatives, while the absorption of the Schengen-acquis in the Amsterdam Treaty signifies a codification of a Europe *à la carte*, as does the creation of the Economic and Monetary Union. And

this in itself evidences a resistance to too much institutionalism, while facilitating the collective exercise of executive power.

The precise modalities of the Economic and Monetary Union, moreover, signal a surrender to technocracy rather than anything else: parliamentary control, judicial control, even governmental control, are largely excluded. Europe's central bankers reign supreme, and while this may be justifiable from the economic or monetary points of view, it hardly contributes to the possibility of engaging in political debate on economic or monetary matters.

On the domestic level too, significant steps have been taken concerning the European Union. The highest courts of several of the Union's member states have felt the need expressly to reserve the right to test the legality of EC law against their own constitutions,<sup>111</sup> a position which in theory is difficult to reconcile with the proclaimed supremacy of EC law.<sup>112</sup>

Other member states have installed a brake on organizational prerogatives in other ways. The Second Chamber of Dutch Parliament, for example, has reserved the right to approve binding decisions taken within the framework of the Justice and Home Affairs Ministries' cooperation within the Union, thus underlining not only the intergovernmental nature of that form of cooperation but also stipulating that the limits to that form of cooperation are ultimately subject to parliamentary, not merely governmental, approval. A similar mechanism was installed with a view to binding decisions emanating under the Schengen agreement,<sup>113</sup> and the parliaments of various other member states have followed this example or are about to do so.<sup>114</sup>

In other contexts too, organizations have received some blows. Some of those occurred recently, through the International Court of Justice. First, faced by a request from the World Health Assembly for an advisory opinion on the legality of nuclear weapons, the Court refused to render such an opinion for the first time since the 1920s, holding that the World Health Organization (of which the Assembly is an organ) does not have the power to entertain questions on the legality of nuclear weapons, or any other weapons for that matter. As the Court wryly observed, the health effects of nuclear weapons are not dependent on whether they are legal or illegal, and as the WHO is only supposed to be concerned with public health, it does not have the power, not even by implication or "necessary intendment," to ask such a question.<sup>115</sup> While it may be true to suggest that the Court clutched at straws to avoid having to answer the request, and found such a straw in the principle of speciality or attribution, the resulting opinion will nonetheless be seen as authoritative in this matter.<sup>116</sup>

Secondly, in its 1998 decision on preliminary objections in the *Lockerbie Case*,<sup>117</sup> the Court eagerly lifted the organizational veil in which the United Kingdom had clad its argument. Underlying much of the UK



argument was the notion that Libya's complaint was really directed at sanctions ordained by the Security Council; hence, Libya ought to address its complaints to the Security Council and not simply to the Council's members, either separately or jointly. The Court, however, largely ignored this argument.<sup>118</sup>

And in the recent controversy regarding the scope of the privileges and immunities bestowed upon one of the United Nations' special rapporteurs, the International Court did not, contrary to popular expectation, hold that the UN Secretary-General was the sole judge of the privileges and immunities of special rapporteurs. Instead, the opinion of the Secretary-General merely created a strong presumption in this matter.<sup>119</sup> Moreover, the Court underlined in its closing paragraph that agents of the United Nations "must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations."<sup>120</sup> This is, if nothing else, a thinly veiled reminder that the need to let organizations prosper does not constitute a blank cheque for these organizations.

Other courts have also seen fit to come to a more down-to-earth view of international organizations. A typical issue arising before courts occurs when an organization is alleged to have violated some of its obligations and invokes immunity from legal action. Where case law wavers, there appears to be a tendency to abandon earlier conceptions of absolute or almost absolute immunity<sup>121</sup> and to resort to more limited ascriptions of immunity.<sup>122</sup> Much the same principle applies to the tax exemptions granted to officials of organizations: here, too, the generosity of the past is replaced by a more austere interpretation of what are often the same provisions.<sup>123</sup>

Finally, it is also worth noting that the arrangement establishing the International Seabed Authority, itself not above legal debate,<sup>124</sup> explicitly limits the potential scope of the implied powers doctrine, thus indicating an awareness on the part of the parties involved that the implied powers doctrine, left to its own devices, facilitates an uncontrollable, and nowadays apparently undesirable, appropriation of powers.<sup>125</sup>

### *Literature*

The literature on this subject illustrates similar developments, in two ways. The first is an increased recognition that intergovernmental cooperation is taking on all sorts of forms and characteristics. It is not just the case that organizational structures are kept to a minimum, it is also the case that establishing formal structures becomes a less and less obvious way to establish cooperation. Thus, within the European Union, Joseph Weiler has noted the rise of what he calls "infranationalism" in recent

years: cooperation among functional agencies and departments and organs being substituted for intergovernmental or even supra-national structures.<sup>126</sup> Outside the context of the EU, a similar view has been welcomed by Anne-Marie Slaughter under the heading of “transgovernmentalism”: informal cooperation based on functions rather than legal or political responsibilities.<sup>127</sup>

Perhaps the novelty here resides not so much in the observation of increased functional cooperation outside the regular channels (therewith providing a convenient example of the flight into informality), but in the idea that these forms are now being recognized by lawyers and deemed worthy or capable of legal analysis, as well as, perhaps, in the circumstance that lawyers are among the first to recognize and describe, and even welcome, such developments.<sup>128</sup>

Almost by the same token, it is remarkable that, for the first time since the late 1950s and early 1960s, international relations scholars are starting to take formal international organizations – indeed, international law itself – seriously as entities and norms that are potentially capable of exercising some influence on the course of events.<sup>129</sup> While the constructivist school in international relations theory has always displayed a certain sensitivity to formal organizations as being at least helpful in the construction of society,<sup>130</sup> other schools have hitherto steered clear. Indeed, regime theory, so popular in the United States during much of the 1970s and 1980s, may well be regarded as an attempt to describe and analyse the behaviour and work of organizations while attempting to bracket the organizations themselves.<sup>131</sup>

The mere circumstance, then, that even in more or less realist circles, formal organizations are starting to be deemed topics worthy of study seems to be an expression of the fact that these organizations have come down to earth. No longer promising the almost proverbial “world peace through world law,” released from its sanctimonious aura or, if you will, having fallen from grace, the study of formal organization is no longer deemed completely irreconcilable with realist or neo-realist premises.

From the reverse angle, the move towards constitutionalization exemplifies, ultimately, much the same notion: the very idea that such a move is required indicates that all is not yet very well with international organizations. Where formerly the existence of an organization provided its own justification, nowadays more is required.<sup>132</sup> As Petersmann puts it:

The legitimacy of international law and international organisations . . . depends, at least from a citizens’ [sic] perspective, on their democratic function to protect the individual interests and equal rights of the citizens through the supply of public goods which neither citizens nor individual governments can secure without international law and international organisations.<sup>133</sup>

But also on a second, different level, the tone has changed: organizations in general, and some of the more popular items of the law of international organizations in particular, have come to be subjected to criticism from within. It would have been unthinkable not so long ago for EC law professors in any of the member states, in particular those who had worked for one of the EC institutions,<sup>134</sup> to devote their inaugural lectures to painting a picture that was critical of the Community. Yet, with Alan Dashwood at Cambridge devoting his inauguration to the limits of EC powers,<sup>135</sup> and Deirdre Curtin at Utrecht providing an insightful critique of the Community's lack of legitimacy,<sup>136</sup> this may herald the beginning of a new way of looking at the EC.<sup>137</sup>

It would have been equally unthinkable, not so long ago, for a textbook on the EC's external relations to state bluntly, on the basis of the attribution principle, that "the presumption of competence lies with the member states."<sup>138</sup> And it can only be described as surprising to find a prominent member of the International Court of Justice lecturing publicly that while there may be a need for a new international financial architecture, "international institutions, with all their cumbersome and slow decision-making, seem inappropriate to this task."<sup>139</sup>

Indeed, the very idea of global governance by international organizations, once the sacrosanct and undisputed destiny of planet Earth, has in the aftermath of the Gulf War become subject to vigorous criticism. Zolo put it, in what appears to be an unprecedented point of view, like this:

[T]he entire structure of the existing international institutions which are devoted to the maintaining of peace lends itself in reality to a very different end: the diplomatic preparation for, and formal legalisation and legitimation of, war.<sup>140</sup>

But perhaps the most telling (if not necessarily the catchiest) illustration is the *Werdegang* of the notion of implied powers in the law of international organizations. The doctrine has come under fire, particularly in the context of the external relations of the European Community. In this context, the doctrine was first elaborated in the 1971 ERTA Case. Here, the Court held that the EC possessed the competence to enter into agreements with third parties on the topic of road transport, due to the fact that the Community had an express competence to pass legislation on the topic that covered its member states, and had already made good use of that internal power. The Court held that the power to act externally could be implied from this express internal power, in that without an external power for the EC, member states could conceivably act externally in ways that would possibly undermine the Community's exercise of its internal competence. The Court ultimately bolstered its reasoning under reference to Article 5 EC (now Article 10), which imposes an obli-

gation of solidarity on member states, and implied that members ought not to take unilateral or joint action outside the Community framework.

The ERTA reasoning was never fully convincing (the jump from community solidarity to a transfer of powers is far from persuasive),<sup>141</sup> neither on its own nor in its classification as an implied power exercise. Recently, it has come under fire,<sup>142</sup> the gist of the attack being that indeed, ERTA cannot be explained as a case of implied powers, but must be based on something else. While this “something else” is not immediately apparent,<sup>143</sup> what matters for present purposes is that the received wisdom is becoming unreceived; the entire relationship between organizations and their member states is in the process of being reconsidered, which in turn signifies a shift in the image of organizations.

In conjunction with the marked reluctance, of late, of the European Court to find powers to be implied in the EC Treaty, and the ICJ’s eager reliance on the doctrine’s opposite number in order to release itself from a thorny request, it would seem that the doctrine of implied powers has passed its sell-by date. And where even the centrepiece of the law of international organizations becomes subject to scrutiny and even revision, we can only conclude that our very image of international organizations has become subject to scrutiny and revision.

### Towards a reappraisal of the formal

The demise of international organizations in the view of those most closely associated with their workings (legal scholars and practitioners) may indicate a shift away from a formal style of politics altogether. After all, it is not the case that the relation between organizations and their members is a zero-sum game; the organization’s loss is not automatically the state’s gain, nor *vice versa*, for that matter.

Instead, the organization’s loss may eventually also be the state’s loss, in that both stand for the same thing and are even, taken to the extreme, indistinguishable. Whatever leash organizations are kept on, then, opens the field for other actors, and the most dominant of these may well be that elusive non-entity known as civil society, occupying the “wide political space between constituted authority and the practical life of people.”<sup>144</sup>

Where regulatory policy is caught up in a vicious circle, as Offe has argued, and is structurally unable to execute its own imperatives,<sup>145</sup> then the most easily conceivable way out is to deregulate, to give up all regulatory ambitions. As a result, the entities most closely associated with regulation will become tainted, and the most readily available alternative is “prudent, disciplined and responsible self-regulation.”<sup>146</sup>

It is here, of course, that civil society comes in; indeed, we seem to have

chosen civil society as the next site upon which to project our aspirations and hopes for the future; we seem to have nominated civil society, largely in the shape of non-governmental organizations, as the next emanation of our international project.

Yet an unleashed civil society is likely, at best, to merely reproduce power configurations and, at worst, to be a fig leaf for the exercise of raw power.<sup>147</sup> Without further elucidation, it remains unclear whether all of us are somehow represented by civil society, just as it remains unclear who is represented by whom, let alone who shall be accountable, democratically or otherwise.<sup>148</sup> And then there are some more practical concerns as well, such as the question of which elements of civil society shall be allowed to participate in intergovernmental decision-making, who is to determine such issues, and what procedures should be followed.<sup>149</sup> Hence, a forceful case can be made for keeping civil society in check by some sort of procedural framework, by formalizing political relations.<sup>150</sup>

Indeed, it is no surprise that some of the hallmarks of the legitimacy of authority are formal in nature, guaranteeing decision-making according to correct process rather than by virtue of its substance. Thus, for Thomas Franck, one of the ingredients of legitimacy is what he refers to as “symbolic validation,” a belief that a prescription or institution has come about in accordance with proper procedure.<sup>151</sup> And he suggests that legitimacy, in turn, is the procedural aspect of fairness: the fairness of any legal system will be judged not just by the normative contents of its rules, but also “by the extent to which the rules are made and applied in accordance with what the participants perceive as right process.”<sup>152</sup>

If Franck is correct, it would seem to follow that we cannot, with impunity, do away with our formalized style of politics just yet.<sup>153</sup> Hence, even if agreement on the “good life” were within reach on a global level, we would still require formal institutions and procedures to turn our broad agreement into workable and working prescriptions. And where the good life remains elusive, the relative importance of institutions in channeling our political debates increases, if only to offset the totalitarian side-effects of any claim concerning the good life.

In short, we may need to re-establish the international organization, to reconstruct its image, in order to create a useful abstraction in which political debate can take place beyond national boundaries. This is not a proposal to replace the state with the organization; rather, it is a plea to reinvigorate bounded political communities alongside the state. This is not an easy task; in much the same way as it has been observed recently that the ontological status of the state is unsettled,<sup>154</sup> it is also unclear exactly what organizations are and what makes them tick. But what is clear is that the legitimacy of political authority depends at least in part on formalities; whether these are organized within the state or within inter-

national organizations appears to be less immediately relevant, if only because the two have a tendency to lapse into each other.

In doctrinal terms, it would seem that international organizations have in the end fallen victim to their own success. Being accustomed to acting independently and getting away with it, perhaps partly because the idea of their inherent goodness held sway for such a long time, they may have succumbed to the arrogance of power. Moreover, there is a built-in bias in the law of international organizations favouring such expansion and usurpation. While ostensibly neutral when it comes to the relationship between organizations and their members, the law of international organizations has a hard time putting obstacles in the way of organizational wishes to expand and procreate; this derives from the combination of the ideological position that international organizations are inherently good, and the practical circumstance that they operate within a field (international law) that is in itself relatively unencumbered by regulation and has left organizations free to blossom and prosper.<sup>155</sup>

While it may be a useful consequence that the inherent goodness of international organizations and all they traditionally stand for is increasingly being questioned, the change in their image comes at a price: the demise of political arenas where politics can be conducted unimpeded, unconcerned with the bare necessities of survival while being devoted to the modalities of living together. And without politics, as Hannah Arendt has already forcefully observed, we are virtually defenceless against evil.<sup>156</sup>

## Towards a conclusion

The early modern state has been said to be a lawyer's creation.<sup>157</sup> Much the same holds true with respect to international organizations; they are to a large extent, if not in design then at least in the nuts and bolts of their everyday operations, the creation of the imagination of lawyers,<sup>158</sup> often conforming to the typical lawyerly trait of solving problems *ad hoc*, on a case-by-case basis.<sup>159</sup> And unbound imagination, left to its own devices, is bound to meet with some resistance sooner or later, no matter how pragmatic and practical.

With that in mind, it should come as no surprise that the legal imagination has recently started to reconsider the phenomenon of international organizations. As argued above, many traditional elements of the law of international organizations are subject to reconsideration; most fundamentally, perhaps, that part of the law that is central to organizations' operations: the implied powers doctrine.

What seems to be reasonably clear is that the very modalities of politics

are changing: from formal to more informal modes, from decision-making following time-honoured procedures to decision-making behind smoke-screens. With this in mind, it is perhaps not such a bad thing that organizations are forced to tone down the scope of their ambitions and may be forced to reconsider their own style of doing things while attempting to position themselves anew; this time as guarantors and facilitators of public debate, rather than as the embodiment of legislative reason.

## Notes

1. This chapter has benefited greatly from discussions with Miia Aro, Catherine Brölmann, Veijo Heiskanen, Martti Koskenniemi, Anja Lindroos, Jarna Petman, and the authors of this book.
2. Arendt, H., no year. *Men in Dark Times*. San Diego: Harvest, 83. The original text was first published in 1957.
3. Ibid., 84. In a similar vein, see Oakeshott, M., 1975. *On Human Conduct*. Oxford: Clarendon Press.
4. Koskenniemi, M., 1994. "The Wonderful Artificiality of States." *Proceedings of the American Society of International Law* 88: 22–29. See also Koskenniemi, M., 1991. "The Future of Statehood." *Harvard International Law Journal* 32: 397–410.
5. Frost, M., 1996. *Ethics in International Relations: A Constitutive Theory*. Cambridge: Cambridge University Press.
6. Spruyt, H., 1994. *The Sovereign State and Its Competitors*. Princeton: Princeton University Press.
7. Walzer, M., 1995. "The Concept of Civil Society," in Walzer, M. (ed.), *Toward a Global Civil Society*. Providence: Berghahn Books, 23.
8. Linklater, A., 1998. *The Transformation of Political Community*. Cambridge: Polity Press. Linklater's proposed dialogic society, where decisions rest upon consent, is the spitting image of today's (perhaps even yesterday's) system of states.
9. Bauman, Z., 1991. *Modernity and Ambivalence*. Cambridge: Polity Press, 20.
10. See Harold Nicolson's nostalgia for the sincerity of the League of Nations, compared to the more technically accomplished but less utopian United Nations. Nicolson, H., 1948. *Comments 1944–1948*. London: Constable and Co., 209. Somewhat wistful with respect to the necessary compromises for the sake of faithfully reflecting power configurations was Verzijl, J. H. W., 1945. *The New Union of the United Nations*. Amsterdam: Vrij Nederland.
11. As Caron puts it, "Although international organizations are not world government and a realist's recognition of power is built into their constitutive documents . . . organizations hold the promise of something more than politics as usual." See Caron, D. D., 1993. "The Legitimacy of the Collective Authority of the Security Council." *American Journal of International Law* 87: 560.
12. Beck, U., 1997. *The Reinvention of Politics: Rethinking Modernity in the Global Social Order* (trans. Ritter, M.). Cambridge: Polity Press.
13. As envisaged by Unger a quarter of a century ago. See Unger, R. M., 1976. *Law in Modern Society: Toward a Criticism of Social Theory*. New York: Free Press, esp. 192–242.
14. See, in particular, chapter 4 of this book.
15. Observers have also noted the relative increase in executive empowerment following internationalization processes. See, with respect to the European Union, Curtin, D.,

1997. *Postnational Democracy*. The Hague: Kluwer, esp. 41–42, 45. See also Kennedy, D., 1994. "Receiving the International." *Connecticut Journal of International Law* 10: 22 (depicting the EU as "a broad political culture with a technocrat and legal face, in which politics is treated as having somehow already happened elsewhere").
16. Urquhart, B., 1987. *A Life in Peace and War*. New York: Harper and Row, 108.
17. Shanks, C., Jacobson, H. K., and Kaplan, J. H., 1996. "Inertia and Change in the Constellation of International Governmental Organizations." *International Organization* 50: 602–603.
18. Richter, R., 1995. *Utopia Lost: The United Nations and World Order*. New York: The Twentieth Century Fund Press, 43.
19. Eijssbouts, T., 1996. "Constitutional Sedimentation." *Legal Issues of European Integration* 1: 51–60. The term unfortunately (but significantly, perhaps) suggests that all this is the result of natural, rather than man-made, processes.
20. Axelrod, R., 1984. *The Evolution of Co-operation*. New York: Basic Books.
21. It is no exaggeration to state that this applies equally to most textbooks in the field. Compare, for example: Bowett, D. W., 1982. *The Law of International Institutions* (4th ed.). London: Stevens and Sons; Schermers, H. G. and Blokker, N. M., 1995. *International Institutional Law* (3rd ed.). Dordrecht: Martinus Nijhoff; White, N. D., 1996. *The Law of International Organisations*. Manchester: Manchester University Press; Reuter, P., 1967. *International Institutions*. Paris: Presses Universitaires de France, 183–318. A relative exception is Amerasinghe, C. F., 1996. *Principles of the Institutional Law of International Organizations*. Cambridge: Cambridge University Press. This work contains very little on the European Union.
22. Established in 1963, and subject to legal proceedings before the Paris Court of Appeal in 1968. See "Klarsfeld v. Office Franco-Allemand pour la Jeunesse," reported in *International Law Reports* 72: 191.
23. As seen in Weber, M., 1968. *Economy and Society*. Berkeley: University of California Press, 31–38. Also compare, generally, Franck, T. M., 1990. *The Power of Legitimacy among Nations*. Oxford: Oxford University Press; Hurd, I., 1999. "Legitimacy and Authority in International Politics." *International Organization* 53: 379–408.
24. Schlag, P., 1997. "Law as the Continuation of God by Other Means." *California Law Review* 85: 427–440. The quotes are taken from pp. 440 and 439, respectively.
25. This chapter is limited to the study of formal organizations, excluding the more fluid category once referred to as regimes.
26. Mearsheimer, J. J., 1994–95. "The False Promise of International Institutions." *International Security* 19: 5–49.
27. It is hardly a coincidence that a stated objective of one of the leading textbooks on the law of international organizations is to contribute to improvements in the structure and functioning of international organizations. See Schermers, H. G. and Blokker, N. M., *International Institutional Law* (see note 21, above), 3.
28. Henkin, L., 1989. "International Law: Politics, Values and Functions." *Recueil des cours* 216: 24.
29. Kennedy, D. W., 1994. "A New World Order: Yesterday, Today, Tomorrow." *Transnational Law and Contemporary Problems* 4(4): 1–47.
30. In particular, the UN system has been characterized as the result of a struggle for a better society. At its basis lay the 1941 Atlantic Charter, "an embryonic programme for a liberal and open international order that was to stand as a rallying cry to a world seeking to escape from totalitarian suppression and divisiveness." See Clark, I., 1997. *Globalisation and Fragmentation: International Relations in the Twentieth Century*. Oxford: Oxford University Press, 113.
31. See, for example, Klabbbers, J., 1998. "The Undesirability of Soft Law." *Nordic Journal of International Law* 67: 381–391.



32. Kennedy, D., 1987. "The Move to Institutions." *Cardozo Law Review* 8: 841–988.
33. As quoted in Croce, B., 1933. *History of Europe in the Nineteenth Century* (trans. Furst, H.). New York: Harcourt, Brace and World, 256–257. Compare also Robert Owen's plea, made earlier, for "a world convention to emancipate the human race from ignorance, poverty, division, sin and misery," as quoted in Oakeshott, M., 1962. *Rationalism in Politics and Other Essays*. London: Methuen and Co., 6.
34. Quoted in Franck, T. M., *The Power of Legitimacy among Nations* (see note 23, above), 154.
35. See the report of the Independent Working Group on the Future of the United Nations. The text of the report has been drawn from the internet: <www.library.yale.edu/un/UN\_Report.txt>, 17.
36. It has been observed that the post-war American order "sought to project the experience of the New Deal regulatory state into the international arena." Ruggie, J. G., 1998. *Constructing the World Polity: Essays on International Institutionalization*. London: Routledge, 126, with further references.
37. An awareness of this is already present in 1920s scholarship. See, for example, Rapisardi-Mirabelli, A., 1925. "General Theory of International Unions." *Recueil des cours* 7: 345–393.
38. Haas, E. B., 1964. *Beyond the Nation-State*. Stanford: Stanford University Press, esp. part I.
39. On the need for a *volonté distincte* for much of the theorizing on international organizations, see Klabbers, J., 1998. "Presumptive Personality: The European Union in International Law," in Koskenniemi, M. (ed.), *International Law Aspects of the European Union*. The Hague: Kluwer, 231–253.
40. After all, to conclude that an empirical problem exists is to leave open the possibility that upon further research, the problem might disappear.
41. "Competence of the International Labour Organisation with respect to Agricultural Labour," Advisory Opinion of 12 August 1922, PCIJ, Series B, nos. 2 and 3, 23.
42. *Ibid.*, 31.
43. "Competence of the International Labour Organisation with respect to Agricultural Production," Advisory Opinion of 12 August 1922, PCIJ, Series B, nos. 2 and 3.
44. *Ibid.*, 57.
45. *Ibid.*
46. *Ibid.*, 59.
47. "German Settlers in Poland," Advisory Opinion of 10 September 1923, PCIJ, Series B, no. 6; and "Acquisition of Polish Nationality," Advisory Opinion of 15 September 1923, PCIJ, Series B, no. 7.
48. Indeed, somewhat loosely, the ICJ referred to this particular opinion as authority for a finding of implied powers in its advisory opinion in "Reparation for Injuries Suffered in the Service of the United Nations," 1949 ICJ Rep. 174, esp. 182–183.
49. "Competence of the International Labour Organisation to Regulate, Incidentally, the Personal Work of the Employer," Advisory Opinion of 23 July 1926, PCIJ, Series B, no. 13, 18.
50. And it is this circumstance that makes it dubious authority for the implied powers doctrine as developed in "Reparation for Injuries"; for the implied powers doctrine is not so much based on an effective interpretation of the treaty text, but rather on reading something into a treaty that is not there. See also Skubiszewski, K., 1989. "Implied Powers of International Organizations," in Dinstein, Y. (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*. Dordrecht: Martinus Nijhoff, 855–868.
51. "Competence of the International Labour Organization" (see note 49, above), Advisory

- Opinion no. 13, 19 and 20. The Court, felicitously, even felt the need to justify its resort to the ILO's practice.
52. *Ibid.*, 17.
  53. "Jurisdiction of the European Danube Commission between Galatz and Braila," Advisory Opinion of 8 December 1927, PCIJ, Series B, no. 14, 64.
  54. In the WHA opinion, to be discussed later (text accompanying notes 115 and 116, below).
  55. See, for example, Rouyer-Hameray, B., 1962. *The Implied Powers of International Organizations*. Paris: Librairie Générale de Droit et de Jurisprudence. For a useful discussion see also Lauterpacht, E., 1976. "The Development of the Law of International Organization by the Decisions of International Tribunals." *Recueil des cours* 152: 379–478.
  56. "Interpretation of the Greco-Turkish agreement of December 1, 1926 (Final Protocol, Article IV)," Advisory Opinion of 28 August 1928, PCIJ, Series B, no. 16, 20.
  57. Case 8/55, "Fédération Charbonnière de Belgique v. High Authority," 1954–56 ECR 292, 299.
  58. Joined cases 281, 283–285 and 287/85, "Germany and others v. Commission," 1987 ECR 3203, para. 28.
  59. "Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are 'necessary' to the exercise of powers expressly granted." "Reparation for Injuries," Dissenting Opinion of Judge Hackworth, 198. Note that Hackworth could not escape using the same vocabulary.
  60. Thus the ICJ observed, for example, that the power of the General Assembly of the United Nations to create an administrative tribunal, while not expressly provided for in the Charter, arose "by necessary intendment" out of the Charter. "Effect of Awards of Compensation Made by the United Nations Administrative Tribunal," 1954 ICJ Rep. 47, 57.
  61. The most sophisticated doctrinal elaboration is Bekker, P. H. F., 1994. *The Legal Position of Intergovernmental Organisations: A Functional Necessity Analysis of Their Legal Status and Immunities*. Dordrecht: Martinus Nijhoff. It is widely held that this finds its theoretical basis in a short article by Virally, M., 1974. "The Notion of Function in the Theory of the International Organization," in Bastid, S. et al. (eds), *Mélanges offerts à Charles Rousseau*. Paris: Pedone, 277–300.
  62. Compare, for example, Singer, M., 1995. "Jurisdictional Immunities of International Organizations: Human Rights and Functional Necessity Concerns." *Virginia Journal of International Law* 36: 53–165.
  63. This question was at the heart of the recent Cumaraswamy dispute before the International Court; see text accompanying notes 119–120, below.
  64. Reproduced in *International Law Reports* 22: 705.
  65. Conforti's discussion on admittance to the United Nations is illustrative on this point. See Conforti, B., 1996. *The Law and Practice of the United Nations*. The Hague: Kluwer, esp. 33–37.
  66. For a lucid analysis, see Brölmann, C. M., 1998. "The 1986 Vienna Convention on the Law of Treaties: The History of Draft Article 36bis," in Klabbers, J. and Lefeber, R. (eds), *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag*. The Hague: Martinus Nijhoff, 121–140.
  67. This is, eventually, the position favoured in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations, reproduced in 1986, *International Legal Materials* 25: 543.
  68. Article 300(7) EC (previously 228(7)).
  69. But see Eagleton, C., 1950. "International Organization and the Law of Responsibility."

- Recueil des cours* 76: 319–425. It was inconceivable for Eagleton (literally) that organizations could incur international responsibility in their own right.
70. Judicial practice, so far, is scarce and wavering, and as much influenced by considerations of domestic law as by international law. The prime example of this is the litigation before the English courts following the bankruptcy of the International Tin Council in the mid-1980s. See, in particular, volumes 77 and 80 of the *International Law Reports*.
  71. For an example, see Hirsch, M., 1995. *The Responsibility of International Organizations toward Third Parties: Some Basic Principles*. Dordrecht: Martinus Nijhoff.
  72. Koskeniemi, M., 1990. "The Politics of International Law." *European Journal of International Law* 1: 28.
  73. Schachter observes with respect to the United Nations that by the practice of "treating most interpretive decisions as acts of political choice, majority coalitions can play fast and loose with Charter precepts and limits on competence." See Schachter, O., 1997. "The UN Legal Order: An Overview," in Joyner, C. C. (ed.), *The United Nations and International Law*. Cambridge: Cambridge University Press, 11. Small wonder, then, that doctrine has somewhat desperately attempted to safeguard the rights of the minority; see, for example, Zoller, E., 1987. "The 'Corporate Will' of the United Nations and the Rights of the Minority." *American Journal of International Law* 81: 610–634.
  74. Compare, for example, the general discussion in Wade, H. W. R., 1977. *Administrative Law* (4th ed.). Oxford: Clarendon Press, 40–46.
  75. For a general discussion, see Osieke, E., 1983. "The Legal Validity of Ultra Vires Decisions of International Organizations." *American Journal of International Law* 77: 239–256.
  76. This last point derives from Rosenne, S., 1985. *Breach of Treaty*. Cambridge: Grotius, 121.
  77. An illustrative discussion is that on out-of-area activities of NATO. Compare Dekker, I. and Myjer, E., 1996. "Air Strikes on Bosnian Positions: Is NATO Also Legally the Proper Instrument of the UN?"; Blokker, N. M. and Muller, S., 1996. "NATO as the UN Security Council's Instrument: Question Marks from the Perspective of International Law?"; Dekker, I. and Myjer, E., 1996. "Postscript." *Leiden Journal of International Law* 9: 411–424.
  78. Compare also Morgenstern, F., 1976–77. "Legality in International Organizations." *British Yearbook of International Law* 48: 241–257.
  79. This is reminiscent of the once popular *acte contraire* doctrine, according to which a legal act may only be superseded by an act of the same standing. The doctrine has largely been discarded due to its inability to accommodate flexibility.
  80. Compare the PCIJ in its "ILO and Employers" opinion. Note also that in other legal systems, *ultra vires* is often regarded as a doctrine of judicial review, so much so that it seems that without review, the doctrine is left meaningless. Compare, for example, Elliott, M., 1999. "The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law." *Cambridge Law Journal* 58: 129–158.
  81. "Certain Expenses of the United Nations," 1962 ICJ Rep. 151, 168; see also the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in "Prosecutor v. Dusko Tadic," reproduced in 1996, *International Legal Materials* 35: 32, esp. paras 26–39. For an analysis of some of the aspects involved, see Sarooshi, D., 1996. "The Legal Framework Governing United Nations Subsidiary Organs." *British Yearbook of International Law* 67: 413–478.
  82. In addition, the ICJ has specified: "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of decisions taken by the UN organs." See its advisory opinion on "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)," 1971 ICJ Rep. 16, para. 89.

83. See generally De Witte, B., 1994. "Rules of Change in International Law: How Special is the European Community?" *Netherlands Yearbook of International Law* 25: 299–333.
84. Thus, for example, in case 43/75, "Defrenne v. Sabena," 1976 ECR 455.
85. See generally Klabbers, J., 1994. "Informal Instruments before the European Court of Justice." *Common Market Law Review* 31: 997–1023.
86. Perhaps most clearly visible in the Permanent Court's response to an early request for it to deliver an advisory opinion. Unfamiliar with the notion of advisory opinions, the Court had initial difficulties in distinguishing them from contentious proceedings, resulting in the dismissal of the request. "Status of Eastern Carelia, Reply to Request for Advisory Opinion," 23 July 1923, PCIJ, Series B, no. 5.
87. See, for example, Hungdah Chiu, 1966. *The Capacity of International Organizations to Conclude Treaties, and the Special Legal Aspects of the Treaties so Concluded*. The Hague: Martinus Nijhoff.
88. This distinction is used merely for purposes of organizing materials, without prejudice to any substantive concerns.
89. In gratitude to Stephen Neff for coining this useful phrase when describing the legal status of CoCom. See Neff, S. C., 1990. *Friends but no Allies: Economic Liberalism and the Law of Nations*. New York: Columbia University Press, 145–146.
90. For an analysis, see Bertrand, C., 1998. "The Legal Nature of the Organization for Security and Cooperation in Europe (OSCE)." *General Review of Public International Law* 98: 365–406.
91. For an analysis, see Castan, M., 1996. "APEC: International Institution? A Pacific Solution." *University of Tasmania Law Review* 15: 52–76.
92. For an analysis, see Hoelscher, C. and Wolffgang, H., 1998. "The Wassenaar Arrangement between International Trade, Non-proliferation, and Export Controls." *Journal of World Trade* 32: 45–63, esp. 51–58.
93. For more details, see Lee, L. L. C., 1998. "The Basle Accords as Soft Law: Strengthening International Banking Supervision." *Virginia Journal of International Law* 39: 1–40.
94. The best analysis of the European Union's structure remains Curtin, D., 1993. "The Constitutional Structure of the Union: A Europe of Bits and Pieces." *Common Market Law Review* 30: 17–69.
95. As regards their status in international law, see, generally, Klabbers, J., 1996. *The Concept of Treaty in International Law*. The Hague: Kluwer.
96. The question of their status in law has given rise, as was to be expected, to some legal difficulties. See the German Bundesverfassungsgericht's "International Military Operations (German Participation)" case, reproduced in *International Law Reports* 106: 319.
97. Security Council summit statement concerning the Council's responsibility in the maintenance of international peace and security, 31 January 1992, reproduced in 1992, *International Legal Materials* 31: 758. The relevant part reads: "The absence of war and military conflict amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security." On the Council's recent activities generally, see chapter 8 of this book.
98. See, in particular, Franck, T. M., *The Power of Legitimacy among Nations* (see note 23, above).
99. It takes negative consensus to achieve this – something that appears, admittedly, rather unlikely. For more details, see, in particular, chapter 9 of this book.
100. The US government notified Congress of as much on 15 December 1993, as reported in 1994, *International Legal Materials* 33: 8. With respect to the European Union's position see, for more details, Kuyper, P. J., 1995. "The Conclusion and Implementation

- of the Uruguay Round Results by the European Community.” *European Journal of International Law* 6: 222–244, esp. 236–237.
101. The European Court itself even foreclosed the possibility of testing the legality of EC measures against the backdrop of the GATT, just prior to the entry into force of the WTO agreements, in Case C-280/93, “Germany v. Council,” 1994 ECR I-4973.
  102. It has been noted, in a similar vein, that immediately after the Second World War, the United States most forcefully pressed a vision of order concentrated on free trade, being “a vision of order that would require very little direct American involvement or management. The system would be largely self-regulating.” See Ikenberry, G. J., 1998–99. “Institutions, Strategic Restraint, and the Persistence of American Postwar Order.” *International Security* 23: 63.
  103. Behboodi, R., 1998. “Legal Reasoning and the International Law of Trade: The First Steps of the Appellate Body of the WTO.” *Journal of World Trade* 32(4): 84.
  104. Case 8/74, “Procureur du Roi v. Benoit & Gustave Dassonville,” 1974 ECR 837.
  105. Joined cases C-267/91 and C-268/91, “Criminal Proceedings against Bernard Keck and Daniel Mithouard,” 1993 ECR I-6097.
  106. 1994 ECR I-5267.
  107. 1996 ECR I-1759.
  108. Case C-450/93, “Eckhard Kalanke v. Freie Hansestadt Bremen,” 1995 ECR I-3051. The Court later toned down its position to some extent in Case C-409/95, “Hellmut Marschall v. Land Nordrhein Westfalen,” 1997 ECR I-6363.
  109. Ward concludes, moreover, having noted the open-textured character of the principle, that most commentators have “tended to favour a decentralising, pluralist, definition of subsidiarity.” Ward, I., 1996. *The Margins of European Law*. London: MacMillan Press, 94.
  110. For a useful early analysis, see Toth, A. G., 1986. “The Legal Status of the Declarations Annexed to the Single European Act.” *Common Market Law Review* 23: 803–812.
  111. The Danish Supreme Court did so on 6 April 1998 in Case I 361/1997, “Carlsen et al. v. Rasmussen,” which can be found at <http://www.um.dk/udenrigspolitik/europa/domeng/> (in unofficial English translation). It noted that Danish courts “cannot be deprived of their right to try questions as to whether an EC act of law exceeds the limits for the transfer of sovereignty.” Hence, “Danish courts must rule that an EC act is inapplicable in Denmark if the extraordinary situation should arise that with the required certainty it can be established that an EC act which has been upheld by the EC Court of Justice is based on an application of the Treaty which lies beyond the transfer of sovereignty.” As for Germany, see the Bundesverfassungsgericht’s decision in the 1993 Maastricht Treaty 1992 Constitutionality Case, reproduced in *International Law Reports* 98: esp. 225–226.
  112. Going back, of course, to Case 6/64, “Flaminio Costa v. ENEL,” 1964 ECR 585.
  113. See, for example, Besselink, L., 1995. *Constitutional Law and Foreign Policy* (2nd ed.). Nijmegen: Ars Aequi, esp. 39–40.
  114. See, for more details, Curtin, D. and Dekker, I., 1999. “The EU as a ‘Layered’ International Organization: Institutional Unity in Disguise,” in Craig, P. and De Búrca, G. (eds), *The Evolution of EU Law*. Oxford: Oxford University Press, 83–136, esp. 120.
  115. “Legality of the Use by a State of Nuclear Weapons in Armed Conflict,” Advisory Opinion of 8 July 1996, available at the ICJ’s website, <http://www.icj-cij.org>.
  116. For an early example, see Amerasinghe, C. F., 1997. “The Advisory Opinion of the International Court of Justice in the WHO Nuclear Weapons Case: A Critique.” *Leiden Journal of International Law* 10: esp. 535–536.
  117. “Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK),” Preliminary Objections, available at the ICJ’s website, <http://www.icj-cij.org>.

118. Arguably, the UK's apparent reluctance to invoke it in a very explicit manner can itself be ascribed to the fear that hiding behind the corporate veil might be deemed too contrived. And as its invocation was not terribly explicit, the Court did not have to reject it explicitly either. Hence, the most explicit reference is contained in paras 37 and 38, on the Court's jurisdiction.
119. "Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights," Advisory Opinion of 29 April 1999, available at the Court's website, <<http://www.icj-cij.org>>, para. 61.
120. *Ibid.*, para. 66.
121. See, for example, the classic 1954 decision of the Italian Court of Cassation in "Branno v. Ministry of War," *International Law Reports* 22: 756; the 1978 decision of the District Court of the District of Columbia in "Broadbent v. Organisation of American States," partly reproduced in *International Law Reports* 63: 162; and the 1978 decision of DC's Court of Appeals in "Weidner v. International Telecommunications Satellite Organisation," reproduced in *ibid.*, 191.
122. As, for instance, in the case of the "European Molecular Biology Laboratory" arbitration of 29 June 1990, reproduced in *International Law Reports* 105: 1.
123. The European Court of Justice noted, with apparent disapproval, the "very broad" scope of exemptions in case C-191/94, "AGF Belgium v. EEC and others," 1996 ECR I-1873. See also the presumably unprecedented explicit connection made in Article 53 of the Agreement establishing the European Bank for Reconstruction and Development, between the Bank's tax exemptions and its official activities, and the equally innovative proposition that the exempt income of the Bank's officials may be taken into account when assessing income from other sources (para. 6). The text of the Agreement is reproduced in 1990, *International Legal Materials* 29: 1077.
124. Compare the discussion at the 1995 Joint Conference of the Nederlandse Vereniging voor Internationaal Recht and the American Society of International Law, recorded in Heere, W. P. (ed.), 1996. *Contemporary International Law Issues: Conflicts and Convergence*. The Hague: Kluwer, esp. 315.
125. Article 1 of Section 1 of the Annex to the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, reproduced in 1994, *International Legal Materials* 33: 1309.
126. Weiler, J. H. H., 1999. *The Constitution of Europe*. Cambridge: Cambridge University Press, esp. 96–101.
127. Slaughter, A., 1997. "The Real New World Order." *Foreign Affairs* 76: 183–197. See also similar observations by De Sousa Santos, B., 1987. "Law: A Map of Misreading. Toward a Postmodern Conception of Law." *Journal of Law and Society* 14: 279–302.
128. Indeed, in particular the analyses by Slaughter (see note 127, above) and Lee (see note 93, above) seem to illustrate that transgovernmentalism is rapidly becoming one of the new locations for our "international project."
129. See, for example, Ikenberry, G. J., "Institutions" (see note 102, above); Abbott, K. W. and Snidal, D., 1998. "Why States Act through Formal International Organizations." *Journal of Conflict Resolution* 42: 3–32. Compare also the so-called "new institutionalism" adopted by a new British school comprising lawyers and political scientists, as reflected in parts of Shaw, J. and More, G. (eds), 1995. *New Legal Dynamics of European Union*. Oxford: Clarendon Press. A useful general overview is Raymond, G. A., 1997. "Problems and Prospects in the Study of International Norms." *Mershon International Studies Review* 41: 205–245.
130. Perhaps the main exponent of such an approach is John Gerard Ruggie (see note 36, above).
131. The seminal volume is Krasner, S. D. (ed.), 1983. *International Regimes*. Ithaca: Cornell University Press.

132. Compare, generally, chapters 2 and 3 of this book.
133. Petersmann, E., 1997. "How to Reform the UN System? Constitutionalism, International Law, and International Organizations." *Leiden Journal of International Law* 10: 467.
134. And there are many of these. See Schepel, H. and Wesseling, R., 1997. "The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe." *European Law Journal* 3: 165–188.
135. Dashwood, A., 1996. "The Limits of European Community Powers." *European Law Review* 21: 113–128.
136. Curtin, D., *Postnational Democracy* (see note 15, above).
137. It can hardly be a coincidence that 1995 saw the launching of a journal specifically devoted to European law "in its social, cultural, political and economic contexts." See Snyder, F., 1995. "Editorial." *European Law Journal* 1: 1. This contextualization itself signifies, if nothing else, that the European project ought to be judged on its merits rather than its aspirations.
138. McGoldrick, D., 1997. *International Relations Law of the European Union*. London: Longman, 42. Compare also Kaniel's none-too-subtle claim that the existence of exclusive implied powers of the European Community amounts to a fundamental violation of the sovereignty of the member state. See Kaniel, M., 1996. *The Exclusive Treaty-Making Power of the European Community up to the Period of the Single European Act*. The Hague: Kluwer, 101.
139. Higgins, R., 1999. "International Law in a Changing International System." *Cambridge Law Journal* 58: 89.
140. Zolo, D., 1997. *Cosmopolis: Prospects for World Government* (trans. McKie, D.). Cambridge: Polity Press, 43. A similar point, noting US hegemonic use of institutions, is vigorously made by Sur, S., 1997. "The State between Fragmentation and Globalisation." *European Journal of International Law* 8: 421–434.
141. On this point, see Klabbers, J., 1998. "On the Doctrine of Implied Powers in the Law of International Organizations," in Steenbergen, H. (ed.), *Ongebogen recht: opstellen aangeboden aan Prof Dr H. Meijers*. The Hague: Sdu Uitgeverij, 1–11.
142. See Dashwood, A., 1998. "Implied External Competence of the EC," in Koskenniemi, M. (ed.), *International Law Aspects of the European Union* (see note 39, above), 113–123. See also Steyger, E., 1995. *Europe and its Members: A Constitutional Approach*. Aldershot: Dartmouth, 38–40. This work gives a critical assessment of the implied powers doctrine.
143. Dashwood tries to overcome the lack of cogency of the implied powers explanation by positing ERTA as a case of inherent powers. The problem, then, is that such an approach circumvents any discussion of powers: if something is inherent it requires no justification, and cannot be justified. In the context of international organizations generally, the idea that some powers are inherent to any organization has been revived by White, N. D., *The Law of International Organizations* (see note 21, above), esp. 131–133.
144. Cox, R. W., 1999. "Civil Society at the Turn of the Millennium: Prospects for an Alternative World Order." *Review of International Studies* 25: 13.
145. Offe, C., 1996. *Modernity and the State: East, West*. Cambridge: Polity Press, esp. 84–85.
146. *Ibid.*, 85.
147. For better or for worse, the defeat of the planned Multilateral Agreement on Investment, largely credited to an amorphous civil society, illustrates just how immensely powerful civil society can be.
148. See the occasionally jocular debate recorded under the heading "Plenary Theme Panel: The Challenge of Non-state Actors" in 1998, *Proceedings of the American Society of International Law* 92: 20–36.

149. A similar realization underlies Clark, A. M., Friedman, E. J., and Hochstetler, K., 1998. "The Sovereign Limits of Global Civil Society: A Comparison of NGO Participation in UN World Conferences on the Environment, Human Rights, and Women." *World Politics* 51: 1–35.
150. As Unger (see note 13, above, 205) argued, formality and equity form each other's natural counterparts. Where the search for authenticity embodied in the popularity of civil society signifies a turn to equity (or justice, or morality), the formalist views equity as "amorphous because it cannot be codified as a system of rules and as tyrannical because all moral judgements are subjective even if they are widely held."
151. See Franck, T. M., *The Power of Legitimacy among Nations* (see note 23, above).
152. Franck, T. M., 1995. *Fairness in International Law and Institutions*. Oxford: Clarendon Press, 7.
153. If the author has read him correctly, a similar thought underlies Ankersmit, F. R., 1996. *Aesthetic Politics: Political Philosophy beyond Fact and Value*. Stanford: Stanford University Press.
154. Ringmar, E., 1996. "On the Ontological Status of the State." *European Journal of International Relations* 2: 439–466.
155. As exemplified by Article 5 of the 1969 Vienna Convention on the Law of Treaties, allowing organizations the freedom to deviate from the Convention's rules.
156. The thought colours much of Arendt, H., 1994. *Eichmann in Jerusalem: A Report on the Banality of Evil*. Harmondsworth: Penguin, first published in 1963. A very useful introduction to some aspects of Arendt's political philosophy is McGowan, J., 1998. *Hannah Arendt: An Introduction*. Minneapolis: University of Minnesota Press.
157. See Stuurman, S., 1995. *State-building and Political Theory*. Amsterdam: Uitgeverij Bert Bakker, 98.
158. It is difficult, for example, to overstate the influence of practitioners such as C. Wilfred Jenks and, nowadays, C. F. Amerasinghe, on a range of practical topics. See, amongst others, Jenks, C. W., 1961. *International Immunities*. London: Stevens and Sons; Jenks, C. W., 1962. *The Proper Law of International Organisations*. London: Stevens and Sons. See also Amerasinghe, C. F., 1988. *The Law of the International Civil Service* (2 volumes). Oxford: Clarendon Press; Amerasinghe, C. F., *Principles of the Institutional Law of International Organizations* (see note 21, above). Note also the deference textbook writers generally pay to the opinions emanating from the legal departments of international organizations.
159. Toulmin, for one, applauds the absence of grand theory amongst lawyers. See Toulmin, S., 1990. *Cosmopolis: The Hidden Agenda of Modernity*. Chicago: University of Chicago Press.



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## International democratic culture and its sources of legitimacy: The case of collective security and peacekeeping operations in the 1990s

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*Jean-Marc Coicaud*

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In recent years, a number of developments have prompted observers to speak about the deepening sense of solidarity and responsibility at the international level.<sup>1</sup> International readiness to intervene in internal conflicts is one such development. Under various conditions and through different modalities, international intervention has indeed generated much activity in recent years, especially within the framework of the United Nations. It has become one of the key features of international life in the 1990s. Arguably, this is one of the latest expressions of the progressive extension of the realm of democratic concerns and the stand it takes in favour of human rights and humanitarian issues.

Such an increase in the sense of solidarity and responsibility at the international level is not taking place, however, without generating controversy and opposition. Far from unfolding in a consensual atmosphere, it is the object of heated polemics, involving decision makers as well as analysts of international affairs. This is especially the case when it comes to international involvement in internal conflicts.<sup>2</sup> The heated character of these debates is particularly fuelled by the fact that no clear and coherent answers present themselves to the questions at the core of this involvement, which concern, in one way or another, the issue of its legitimacy – questions such as: who should initiate and conduct international involvement in internal conflicts? In which situations and under what forms and modalities should they take place? How far should they

go? What should be the priorities for action? What should be the criteria for selecting the correct areas for intervention?

Nothing illustrates this state of affairs more clearly than the United Nations peacekeeping operations in the 1990s and the international involvement in internal conflicts with which these operations came to be identified. On the one hand, the United Nations' responsibilities regarding the maintenance and restoration of peace and security required it to act. On the other hand, the various sources of legitimacy that gave the United Nations and its actions a framework of meaning and validity were also sending mixed signals about what should be done, and how. Hence the often ambiguous and contradictory character of the measures taken and implemented in the context of peacekeeping operations in the 1990s, and the negative influence they ended up having on the credibility and legitimacy of the United Nations.

This is largely the case because, as part of an evolutionary process that is still unfolding, the extension of international solidarity remains beset by a number of tensions, if not contradictions, that appear to be at the core of the current international democratic culture. To put it simply, the imperatives of action generated by the sense of international responsibility still have a long way to go before they supersede the demands of national politics. As a result, international solidarity tends to be manifested through dilemmas that show not only the extent to which democratic values have gained influence at the international level, but also the degree to which they continue to be constrained by domestic considerations.

It is precisely this state of affairs – the exposure of the United Nations to the danger of marginalization in an area that was initially meant to be its territory, collective security – that this chapter intends to analyse. In this context, five major aspects of the problem will be examined.

In the first section, this chapter shall examine very briefly the various aspects of the issue of legitimacy in the context of the United Nations.

The second section will review how, over the years, peacekeeping operations have become a major feature of the United Nations' responsibilities for maintaining and building peace. The section shall also look into how, as a result, peacekeeping operations have come to play a substantial part in the United Nations' claims to legitimacy.

The third section will analyse the way in which the United Nations' handling of the security crises that marked the 1990s ended up being perceived as having produced more failures than successes, and how this perception contributed greatly to the erosion of the United Nations' legitimacy.

In the fourth section, the argument will be made that the erosion of the United Nations' legitimacy during the 1990s does not originate solely

from its administrative inefficacy as an international institution. Rather, the failures of peacekeeping operations and the resulting loss of credibility are largely due to the various sources upon which the United Nations has relied for its legitimacy, and to the problematic implications that they have had for its outlook and actions. In this context, the chapter will not address the link between peacekeeping operations and the legitimacy of the United Nations by examining the legality and legitimacy of the Security Council resolutions in connection with the issues they deal with and the decision-making process followed for their adoption.<sup>3</sup> Rather, it shall focus on the way in which Council resolutions and the types of actions they trigger on the ground are the products of demands originating from the sources of legitimacy of the United Nations, and how problems in the coherence of these demands account largely for the shortcomings of the United Nations' peacekeeping operations and ultimately for its endangered legitimacy in the field of security.

Finally, the fifth section of the chapter will engage in a hypothetical exercise, speculating briefly on what the future is likely to bring to the United Nations, in terms of both its legitimacy and its handling of security crises.

In doing so, the author hopes to show that the political culture shaping international life, as a mixture of the national and international dimensions, has a strong influence on the actions that the United Nations initiates in the field of peacekeeping operations, but also, more broadly, on the legitimacy of the United Nations and on the evolution of the international system as a whole. In this context, the author plans to demonstrate that the problematic coherence of the various sources of legitimacy of the United Nations accounts for shortcomings in its peacekeeping operations in the 1990s, and eventually for the debilitation of its legitimacy as an international organization. Further, he also intends to demonstrate that this problematic coherence of the various sources of legitimacy indicates the variety of political paths that are currently offered to the international community and its actors, and the tensions that their sometimes difficult cohabitation generates. Resolution of these tensions would require that the international community overcome its internal discord, reflected in the partly compatible, partly conflicting and competing sources of legitimacy of the international community.

## Political legitimacy and the United Nations

At this point, it is necessary to say a few words on the notion of legitimacy itself and the way it relates to the United Nations. This chapter is not intended to give a full account of the various aspects of the question

of political legitimacy and its ramifications for the United Nations;<sup>4</sup> rather, it will limit itself to a few key points.

It should first be noted that legitimacy is the process through which political differentiation – the fact that there are people who govern and others who are governed – is justified. It is a recognition of the right to govern. The recognition of this right is based specifically upon a number of core values that shape the identity of the collectivity – certain fundamental values with which members of the collectivity identify, concerning what they think they are and what they aspire to be. These values contribute to a collective description of the state of a society's affairs; they also serve as a prescriptive dimension, in the form of beliefs, deliberations, and guidelines for action. In this context, they establish what is just and unjust, and define the responsibilities that political institutions and leaders must perform to legitimate their holding of power. The ability of the latter to fulfil these responsibilities in a reasonable manner is a test of their ability to achieve legitimacy – to implement and embody a sense of political justice and of justice *per se*, to express and convey this idea, and to act for the public good. Obviously, the more strongly people identify with these core values and take them seriously, the more legitimacy is conferred and the more thorough its institutionalization through establishment of successful and efficient institutions. Conversely, the weaker the identification with these core values and the more lightly they are taken, the more political institutions tend to slip outside the realm of legitimacy.

While the issue of legitimacy tends to affect political organizations in which political differentiation plays a role, and in which rulers are not simply exercising power through raw force but are somehow recognizing the importance of organizing a sense of reciprocity between political institutions and the governed (as well as various specific actors in society), legitimacy takes on a special importance in the context of democratic politics. The fact that democratic culture puts so much emphasis on individual rights, on the legitimacy of individual claims *vis-à-vis* political institutions, and on the evolving process of the recognition and validation of these claims – furthering the responsibilities of political institutions, and giving people mechanisms to question and challenge the holders of power, namely through elections and deliberative processes, in the process of institutionalizing the principle of the consent of the people – can only make the issue of legitimacy a central theme of democracy.<sup>5</sup> This centrality of legitimacy in democratic culture is what confers upon democratic power its primary feature – its eternal revisability – especially when it comes to the principle that the holders of power may be removed if they are unable to carry out their duties satisfactorily.

Such a definition of political legitimacy as the right to govern<sup>6</sup> applies primarily to national political institutions and leaders. This is not because

political legitimacy is, by its nature, an issue concerning national political institutions and leaders. This is because it is at the national level that political integration has primarily taken place thus far, and it is therefore at this level that a process of legitimation for the political differentiation of power is most needed. Such a legitimation process calls upon political institutions to fulfil as satisfactorily as possible the responsibilities assigned to them both by the core values of society and by its level of integration. Indeed, this dual process – political differentiation between governed and governing and a high level of social and political integration at the national level – has led to a high level of institutionalization of power, and the need to offer some justification for it. Hence the need for processes and procedures of political legitimacy.

On the other hand, at the international level, legitimacy is still in its infancy. This is so because global political integration and political differentiation are themselves still nascent. The level of political integration is quite low at the international or global level. It echoes the difficulty of building up a sense of identification with values and principles, a sense of belonging and participation at the most global level. These ideals, beyond national identities and loyalties, would express and contribute to the establishment of a real global community. In a true global community, a real constituency would exist which would feature a shared sense of community and destiny, allowing it to address, accommodate, and transcend conflicts of interest within an integrated and inclusive framework.

Since such a community does not yet exist, the powers and responsibilities of international organizations manifest four major characteristics.<sup>7</sup>

Firstly, they remain relatively insubstantial, at least in comparison to the political institutions that, in developed countries, are in charge of political expression, organization, and monitoring.<sup>8</sup>

Secondly, they do not work systematically and consistently enough to be part of the kind of integrated system described above.

Thirdly, they suffer from major differences in perception of what they are and what they should be among their national constituencies, differences that are nothing like the variations in perception of political institutions within a well-integrated political regime. There is, indeed, a curious and seemingly schizophrenic attitude towards international organizations, especially when one compares the powerful developed countries with the poorer countries.<sup>9</sup> The ambiguous attitude of poor countries *vis-à-vis* international organizations – consisting on the one hand of prestige and respect,<sup>10</sup> and suspicion and resentment on the other – has to be understood in light of the huge internal and outwardly projected powers, both operational and normative-ideological, that such organizations have *vis-à-vis* developing countries in comparison to these countries' own national

administrations. On the other hand, powerful developed countries – particularly the United States and France<sup>11</sup> – tend to look down on international organizations for the precise reason that, while these countries exercise the greatest power within these international organizations, the organizations still cannot compete with them in terms of internal and projected powers.<sup>12</sup>

Fourthly, these differences indicate that, beyond a rather loose and rhetorical agreement on general ideals and principles, there is no real shared understanding, nor any institutionalized, open, and universal method – that is, one that permits all members of the international community equal access to and participation in deliberations – for conducting debates and realizing changes<sup>13</sup> concerning what specific global democratic model these international organizations should be expressing and implementing.

Hence, the political differentiation displayed at the international level between the governing and the governed is not part of a highly integrated “cosmopolity.” It is not as accepted, recognized, structured, operational, and meaningful as it is in most developed and integrated countries. The international system has not yet overcome the competition it faces from the legitimacy and political organization of the national dimension. And further, it has a lesser need to legitimize what international political differentiation of power exists in terms of international organizations, and thus has weaker claims to legitimacy.

Nothing better illustrates this state of affairs at the international level than the fact that international organizations are derived institutions, created by the will of national governments and remaining largely under their control. Such derivation and control, and the fact that member states are eager to maintain it, accounts for the fact that while modern national democratic legitimacy is based, at least in principle, on the people’s consent, international organizations are mainly the voice of governments. Even if the democratic character of many member countries and the democratic values of the international organizations themselves permit the existence of a connection between people and the organizations, it is still a very mediated and remote connection. This contributes to people’s weak level of identification with international organizations.

All this cannot help but affect the state of the United Nations, as the international organization meant to express, defend, and promote the building of a community at the global level. Indeed, the level of institutionalization of United Nations power, and therefore of its legitimacy, is still weak. It is weak compared to the institutionalization and legitimacy of national powers, especially those of powerful nation-states, and even more particularly those of the major Western democratic powers. The United Nations, for better or worse, is a creation and a projection of

many of the core values of these states, such as universalism and individualism. This dependency, and hence the weak legitimacy of the United Nations, can be seen, for instance, in the reiterated refusals by UN member states to have the state monopoly of armed force curtailed at the international level and somehow shared with the United Nations via the establishment of a standing military force.<sup>14</sup> It can also be seen in the low level of global governance achieved by the United Nations to date, because of its low level of institutionalization. Indeed, the lack of proportionality between the goals of the United Nations (peace, development, and so on) and the means to achieve them is a striking one. This can only indicate that the recognized validity of these global goals, and of the legitimacy of the institutions supposed to express, defend, and promote them, remains problematic, not yet envisioned and entrenched in the deliberations and actions of political actors.

We may expect to see the future legitimacy of the United Nations affected, however, by the fact that the almost exclusive access that governments have had to the organization so far is rapidly changing, mostly under pressure from NGOs. Provided that the United Nations is successful in widening the base of its constituency, and thus its representativeness and ability to increase participation, this change could mean increased inclusiveness and stronger legitimacy. Of course, strengthened legitimacy would, perhaps, exist only in the eyes of non-public actors, not necessarily from the perspective of traditional international actors like states. Indeed, states – once again, especially the most powerful ones – however committed they might be to democratic values at the national and international levels, remain eager to hold on to their powers, especially in areas and functions that they view as sovereign, such as security.

Hence the ambiguous, stop-and-go, half-hearted attitude that member states display toward UN management of security issues. And hence the ambiguous, if not negative, consequences that this attitude has had on the handling of crises by the United Nations. A good illustration is offered by the fate of peacekeeping operations in the 1990s in connection with the evolving legitimacy of the United Nations. But before examining this matter, it is necessary to begin with an overview of the role of peacekeeping operations in the overall security policies and legitimacy of the United Nations before the 1990s.

### Peacekeeping as a contribution to the legitimacy of the United Nations

Maintaining and restoring international peace and security has been a major responsibility of the United Nations since its inception, along with

the twin objectives of promoting development and supporting democratization, if not democracy *per se*. Along with development and democracy, peace and security are the founding values with which the international community so strongly identified after the Second World War that they entrusted the United Nations with the mandate to express, promote, and implement them.<sup>15</sup> Thus, the United Nations' ability to maintain and restore peace constitutes a test of its authority, and ultimately of its legitimacy.

In any case, in the field of security, the responsibility to ensure international peace and security has established an expectation of action – one that the United Nations must struggle to meet if it wishes to establish its legitimacy. Yet, on examination, it is mainly through peacekeeping operations – a type of action that passes without mention *per se* in the UN Charter's delineation of what are, in principle, the proper areas and modalities for action regarding security issues – that the United Nations has addressed most of the security crises it has faced.

*The pacific settlement of disputes and collective measures to deal with threats to peace*

Deciding when and how to act to maintain and restore international peace and security is the foremost task of the Security Council. While the Secretary-General is entitled to call emerging or existing crises to the attention of the Security Council, and even to offer suggestions on how to resolve them, the final decision belongs to the Security Council and its Permanent Members. In this context, the Council enjoys two types of authority: the power of interpretation, or qualification, and the power of decision. The power of interpretation/qualification arises from the Council's authority to qualify a situation as dangerous, peace-threatening, or even belligerent. The power of decision concerns choices about how to act in a particular situation.

The two functions assigned by the Charter to the Security Council to handle situations of tension and conflict are the pacific settlement of disputes, mentioned in Chapter VI, and action with respect to threats to the peace, addressed in Chapter VII.

In Chapter VI, what the Charter calls “pacific settlement” is the process by which the Security Council is to resolve “any dispute, the continuance of which is likely to endanger the maintenance of international peace and security.”<sup>16</sup> Even before that stage is reached, the Charter authorizes the Council to look into any situation that might lead to international friction or give rise to a dispute, and to take appropriate steps to address a dispute or prevent a situation from deteriorating. In pursuing pacific settlement, the Council is given a number of options. It may call



upon the parties involved to “seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”<sup>17</sup> The Council can undertake its own investigation to determine whether a dispute or situation is actually likely to endanger the peace, and may “recommend appropriate procedures or methods of adjustment” to the parties involved.<sup>18</sup> It can also “recommend such terms of settlement as it may consider appropriate” if the continuance of the dispute “is in fact likely to endanger the maintenance of international peace and security.”<sup>19</sup>

Chapter VII charges the Council with the task of organizing collective resistance to aggression. Here the Charter authorizes the Council to act boldly, taking action with respect to “any threat to the peace, breach of the peace, or act of aggression,” including, if necessary, “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations,”<sup>20</sup> as well as “such action by air, sea, or land forces as may be necessary,” including “demonstrations, blockade, and other operations.”<sup>21</sup> The Charter further indicates that once it has decided to use force, the Council may call upon the Military Staff Committee to plan for the deployment of armed force, and may notify the countries likely to contribute forces to the military intervention.

Chapter VIII completes Chapters VI and VII, in that it envisions the possibility of cooperation between the United Nations and regional arrangements or organizations, both for the pacific settlement of local disputes, and enforcement action. Concerning enforcement action, Article 53 of Chapter VIII specifies that the Security Council has the authority of decision over regional arrangements.

Although the pacific settlement of disputes and collective measures to deal with threats to peace have been, from the start, at the core of the United Nations’ mandate, constituting an important element of its legitimate areas and modalities of responsibility in the field of security, they have not really enjoyed the expected level of activity and success.<sup>22</sup>

During the Cold War and throughout the 1980s, the East-West competition and the North-South divide that helped prolong it largely hampered the Security Council from taking action in the area of security through the envisioned modalities. The elevation of numerous local tensions and conflicts to a global level, with the military, political, and ideological control of as much territory as possible at stake, froze most of what could and should have been the initiatives of the United Nations and the Security Council in these domains.

Thus, for more than forty years, the United Nations has had to employ other means to play a role in maintaining and restoring peace. Hence the invention and the *bricolage* of peacekeeping operations.

*Peacekeeping as an alternative source of legitimacy for the United Nations in the field of security*

To the extent that the United Nations has succeeded in the field of security, it has done so through its peacekeeping functions. Yet, these peacekeeping operations were never envisioned by those who drafted the Charter.

Logically, considering the modalities of action envisioned and legitimated by the Charter for maintaining and restoring peace, the notion of peacekeeping operations should have included the full range of diplomatic and coercive measures available to the Council for use against violators of global peace and security. However, the very factors that, until the 1990s, made it impossible for the Security Council to call upon and fully use the means envisioned in the Charter, explain the form that peacekeeping operations came to take – that is to say, the form of a peaceful inter-positioning of UN personnel, in response to invitation by the disputants, to oversee an agreed cease-fire.

In adopting such modalities, peacekeeping operations presented a threefold advantage. They did not disrupt – at least not greatly – the established culture of competition and conflict among the leading global powers. They made it possible to address crises whose relative importance or lack thereof required or permitted action.<sup>23</sup> And they gave a sense of purpose, and thus of legitimacy, to the United Nations at a time when two major ideologies were fighting globally to assert and expand their respective legitimacy.

In this context, it became understood that the key to peacekeeping was the agreement of the disputants to the United Nations' role. In conflicts, a sense of stalemate, fatigue, or overwhelming danger sometimes eventually induced the parties to seek respite. At that moment, the United Nations could step in, posting blue berets along the line of conflict. The United Nations could thus intercede in such a way as to make it more difficult for the combatants to re-engage on the ground, and therefore to make it easier for negotiators to find a diplomatic solution. Under these terms, peacekeeping operations became an important part of the legitimacy of the United Nations, signalling its ability to have some positive effect in the field of security. This somehow became the trademark of the United Nations, contributing substantially to its legitimacy.

During the Cold War, the Security Council was able to lessen a number of conflicts by initiating inter-positional peacekeeping operations. Between 1948 and 1988, 13 such missions were initiated, in New Guinea, Palestine, Kashmir, Suez and Gaza, Lebanon, Jordan, the Congo (Zaire), Yemen, Cyprus, India, Pakistan, and Syria.

To establish a precise picture, however, it is imperative to qualify these

operations, to speak of their relative success. A number of these operations were unable to avoid certain dysfunctionalities. In addition, not all of them, despite the military respite that they brought on the ground, have been concluded. Out of the 13 missions, only eight have so far been concluded. This means that for the five remaining conflicts, peacekeeping operations have become synonymous with frozen battle lines and unresolved conflicts. At the moment, such peacekeeping operations are still going on in Cyprus and Gaza.

In any case, the collapse of the Soviet Union in the late 1980s and the end of the Cold War triggered a renewal of activity for United Nations peacekeeping operations. Firstly, it did not take long before the dissolving of the geopolitical, military, financial, and political cement of the Cold War began generating international instability. The relative and highly armed stability that had prevailed during the Cold War vanished as quickly as the hopes for peace and security that the opening of the new period had brought to governments and peoples alike. Secondly, the Gulf War, which at one point was seen by a number of political leaders and experts as a tone-setter for multilateral cooperation in the post-Cold War era, proved to be an extravagant exception.

The combination of factors that made the Gulf War such a clear-cut and “pure” case<sup>24</sup> did not reoccur, preventing this type of international intervention from being reproduced elsewhere. The international community was left to address situations of grey-area conflict by calling upon peacekeeping operations. “Messy” became the word of the day. As a result, in the 1990s, it seemed that the moment had finally come when the United Nations would step forward to demonstrate, enhance, and capitalize on the expertise it had built up over the years in the field of peacekeeping operations. The renewed legitimacy that this whole state of affairs would mean for the United Nations was to be matched only by the even greater legitimacy which would be gained through successful actions.

This optimism for a new start for the United Nations proved to be part of a series of false expectations<sup>25</sup> and calculations.

### Peacekeeping operations and the erosion of the United Nations’ legitimacy

Due to the dramatic conditions in which they are established – usually following tensions or even a war – peacekeeping operations have become the most visible trademark of the United Nations, not just in the field of security but in all areas.<sup>26</sup> This is even truer for the period from 1992 to 1996, which is the period on which this analysis really focuses.

*Peacekeeping operations in 1992–1996: A qualitative change*

This five-year period, which corresponded with Boutros Boutros-Ghali's tenure as Secretary-General of the United Nations, constituted a decisive moment for the history of peacekeeping operations, and also for the United Nations' legitimacy as a whole and for the evolution of the international system in the post-Cold War era. This is because of the perception generated by the peacekeeping operations launched during this period concerning the actions and the role of the United Nations as an international organization.

The years 1992–1996 are important because they constitute, first of all, a period of intense activity for the United Nations in the field of peacekeeping operations. The number of peacekeeping operations deployed at that time is an indication of this: in the spring of 1995, the United Nations was in charge of almost 20 peacekeeping operations established in Africa, the Middle East, Asia, Europe, and Central America. The military personnel involved in these operations numbered 70,000.

In addition, in comparison to the operations of past, the 1992–1996 operations represent a qualitative evolution, in that they were characterized by four specific features.

Firstly, while before the end of the Cold War peacekeeping operations dealt mostly with inter-state conflicts, during 1992–1996 the United Nations was mainly involved in intra-state conflicts. With the exception of two operations, all the peacekeeping operations launched after 1992 addressed internal conflicts. This does not mean that there were more intra-state conflicts than before; on average there were probably as many intra-state conflicts during the Cold War as there were in the 1990s. But the United Nations, its member states, and the Secretary-General, partly under pressure exercised by the media and public opinion, became more sensitive to them in the 1990s, and no longer felt that they could leave such conflicts unattended.<sup>27</sup>

Secondly, following the distinction between peacekeeping and peacemaking made by the Secretary-General in his 1992 *Agenda for Peace*,<sup>28</sup> the most important and visible peacekeeping operations in the 1990s came to take the forms of peacemaking operations. These involved the authorization of the deployment of forces by the Security Council under Article 43 to “take military action to maintain or restore international peace and security,” or to “respond to outright aggression, imminent or actual.”<sup>29</sup>

Thirdly, the launch of peacekeeping operations took place while the fighting had not yet stopped, precisely in order to bring humanitarian assistance to the victimized populations.

Fourthly, this put at stake the delivery of humanitarian assistance,<sup>30</sup> and thereby transformed the importance of cooperation by the parties

to the conflict on the ground, rendering it almost unavoidable for the United Nations to call upon the use of force to guarantee humanitarian assistance.

As a result, the peacekeeping operations established during this period attempted a level of multi-functionality and complexity never reached before. In 1992–1996, the United Nations was worlds apart from the inter-positioning functions of operations conducted during the Cold War. It was also very far away from the operations launched in the late 1980s, such as those in El Salvador and in Cambodia,<sup>31</sup> which had gone beyond mere inter-positioning and begun to include in their mandate a number of responsibilities geared towards facilitating the return to peace: contributing to the demobilization of soldiers, de-mining, organizing elections, and rebuilding police and judicial institutions.

It should suffice to list here the substantial areas of involvement, based upon resolutions voted upon by the Security Council, of the United Nations peacekeeping operations between 1992 and 1996, in order to gain some idea of the set of issues they addressed.

To start with, there were war and spillover prevention measures, as illustrated by the preventive deployment of troops in Macedonia during the Bosnia crisis. Then there were measures taken while crises unfolded, either to stop the war or to alleviate suffering on the ground. These measures can be broken down into five main areas: peacekeeping deployments, like those that took place in Somalia, Bosnia, Angola, Mozambique, and Haiti; humanitarian and human rights protection, entailing food and medicine delivery; sanctions (economic, diplomatic, and other) like those imposed upon Serbia during the events in the Former Yugoslavia; military pressures and interventions, which were mainly used in Somalia and Bosnia; and the establishment, while crimes were still being committed in Bosnia, of the International Tribunal for the Former Yugoslavia.<sup>32</sup> On the last point, it should be recognized that the tribunal was created as much to bring criminals to court and justice to the victims, as to give the impression that the crimes committed would not go unpunished.

Finally, there were the aftermath measures, designed to bring closure to the crises and put the countries on the path to reconstruction and reconciliation. In addition to prosecutions conducted at the established international tribunals, two other measures stood out: the formal agreements ending the war and outlining various arrangements – constitutional, political, military, economic – for the reconstruction of the countries involved (for instance, the Dayton Accords and the Guatemala Peace Agreements); and the various financial arrangements made between governments and international organizations to ensure the reconstruction of the economic infrastructure of these countries.

So, it is clear that the measures taken within the context of peace-

keeping operations during these five years covered a lot of ground. Their results, however, were far less impressive.

*The results of peacekeeping operations between 1992–1996 and their negative impact on the legitimacy of the United Nations*

A sense of failure sets in when one reviews the actual outcomes of peacekeeping operations from 1992 to 1996. Indeed, the failures certainly outnumber the successes, with one important consequence being the undermining of the credibility and legitimacy of the United Nations.

If one wishes to be generous, it is possible to find a number of peacekeeping operations that the United Nations can present as success stories. This is specifically the case for the El Salvador, Mozambique, and Guatemala operations. However, reservations must be expressed even in one of these cases. The El Salvador operation was initiated at a time, in a context, and with goals that were different from operations launched after 1992. As a consequence, it does not really enter into the category of the post-1992 operations. In addition, while these operations were able to end the wars in the areas concerned, their long-term results remain problematic to say the least.

A number of cases are neither clear successes nor clear failures. The United Nations operations in Cambodia and Haiti<sup>33</sup> can be viewed in this light.

The failures of certain United Nations operations between 1992 and 1996 are all too well-known: that is, the cases of Somalia, Angola, Liberia, and Bosnia. The fact that these operations turned out to be failures became even more damaging for the credibility of the United Nations considering that, for a period of three years between 1992 and 1995, at least two of them, together or successively – those in Somalia and the Former Yugoslavia – received almost constant attention from the media and public opinion. They held the interest of the public to the point that the actions and identity of the United Nations in these years were largely reduced to, and evaluated through the lens of, its handling of these two crises.

Regarding Somalia, the deaths of the 18 US soldiers on 3 October 1993 proved to be a turning point. It put an end to the American and European involvement in Somalia and, de facto, to the peacekeeping operation.<sup>34</sup> But it also profoundly modified the attitude of the United States towards the multilateral management of crises.<sup>35</sup> Although the United Nations had little responsibility for the death of the American soldiers – the soldiers killed were part of a force that acted more or less autonomously in Mogadishu – the Clinton Administration, eager not to take the blame for the casualties and not to be caught again in a similar situation, dis-

associated itself from the United Nations. From then on, US selective engagement was to prevail over assertive multilateralism, which had been the Clinton doctrine until that time.

After the major undermining of credibility that the United Nations experienced in the Somalia operation, the handling of the war in Bosnia was destined to be another major disaster.

There is no point in entering here into a detailed account<sup>36</sup> of the various factors that led the United Nations presence in Bosnia to end in massive failure. It will suffice to mention the lamentable episode of the fall of the “safe areas” and the massacre of their populations in mid 1995<sup>37</sup> to give an idea of the dead end in which the United Nations found itself after three years in the Balkans. While the Dayton Accords gave the United Nations a number of responsibilities in implementing the peace process,<sup>38</sup> the fact that the United Nations was only present as an observer at the Dayton negotiations was in itself a good indication of the degree to which the United Nations was marginalized in the aftermath of its involvement in Bosnia.

Finally, the lack of any real effort by the United Nations to prevent the genocide in Rwanda,<sup>39</sup> and then the various scandals attached to the mismanagement of the tribunal established in Arusha to prosecute the perpetrators of the crimes committed, were the final straw for the United Nations.

As a result, by the end of 1995 and the beginning of 1996, the credibility of the United Nations was at stake. The legitimacy of the United Nations, which in the early 1990s was viewed as being considerable by nearly everybody,<sup>40</sup> and which it was hoped would be enhanced even further through its activism in the field of security, had plummeted to its lowest point ever. The United Nations was being vilified from all sides. Among member states, not only the major powers but also medium-level powers and small countries tended to focus exclusively on the recent failures of the United Nations. In areas where the United Nations had established peacekeeping operations, both the actors who had welcomed its presence and those who had been opposed remained dissatisfied with the actions conducted. This was very much the case in the Former Yugoslavia. Public opinion and the media viewed the inability of the United Nations to prevent human rights violations as unforgivable. Even among officials within the United Nations Secretariat, there was a clear feeling of missed opportunity.

### *An institutional explanation for the failures of the United Nations peacekeeping operations*

How could such failures happen, and hence undermine so greatly the legitimacy of the United Nations? At first sight, the institutional expla-

nation seems to be the most attractive and accurate. It can be broken into three complementary analyses.

*The United Nations as an inefficient bureaucracy*

After it appeared that most of the peacekeeping operations were encountering major difficulties and then failing, it did not take long before the opinion was heard that these disasters had to be attributed to the United Nations bureaucracy, with its embedded inefficiency.<sup>41</sup> Coming under particular fire were both the United Nations Secretariat – more specifically, the departments in charge of peacekeeping operations, including the Department of Peacekeeping Operations, the Department of Political Affairs, the Department of Humanitarian Affairs, and the Executive Office of the Secretary-General – and United Nations personnel in charge of operations on the ground.<sup>42</sup> The headquarters-centred character of the United Nations, an organization that was supposed to act as a global institution,<sup>43</sup> was vilified and blamed for the inability of the organization to deploy troops in the theatres of operation promptly and with adequate support.

*The inadequate technical functioning of peacekeeping operations*

It was partly to acknowledge these criticisms that in January 1995, Secretary-General Boutros Boutros-Ghali published the *Supplement to An Agenda for Peace*.<sup>44</sup> Indeed, as early as the winter of 1994–1995, he was aware that most of the peacekeeping operations that the United Nations had initiated in the two previous years were not working. As a result, the *Supplement to An Agenda for Peace* was meant to evaluate the shortcomings of the operations and suggest a number of solutions.

The Secretary-General argued that the success of peacekeeping operations was based upon six conditions: a clear and feasible mandate; the cooperation of the parties involved with the execution of the mandate; sustained support from the Security Council; the will of the member states to give adequate civilian and military support;<sup>45</sup> a unified military command; and satisfactory financial and logistical support.

The solutions that he suggested were of both a technical and a general nature. There were three technical solutions: the creation of a rapid response force, to be deployed in case of urgent need;<sup>46</sup> a reserve stock for the logistical materials needed for peacekeeping operations;<sup>47</sup> and proper means of communication to explain to the populations on the ground the mandate of the United Nations. On a more general level, the Secretary-General first suggested an improvement in how peacekeeping operations were directed, recommending that three levels be distinguished: overall political responsibility, to rest with the Security Council; the executive direction of the operation, to rest with the Secretary-General; and oper-



ational direction on the ground, to rest with the Representative of the Secretary-General.<sup>48</sup> Secondly, he suggested avoiding the juxtaposition of two logics: one of peacekeeping, and one of peacemaking. Thirdly, he insisted on the importance of preventive diplomacy.

*The Security Council decision-making process: What went wrong?*

The third aspect of the institutional explanation for the failures of UN peacekeeping operations between 1992 and 1996 concerns the Security Council and the decision-making process. Here, three main elements have to be taken into account.

Firstly, one has to consider the difficult division of labour between the Secretary-General and the Security Council regarding the decision-making process. The fact that the Secretary-General has only a power of suggestion when it comes to the modalities of actions to be conducted within the context of peacekeeping operations,<sup>49</sup> and that the views of Security Council members, and especially those of the most powerful members, always tend to prevail even though they are motivated by specific national interests, proved to be at the core of the shortcomings of peacekeeping operations on various occasions. This was the case in Somalia: the Secretary-General and the United States had totally different views on how to conduct Operation “Restore Hope.” The disagreements between the two and the mismanagement that followed account greatly for the ultimate failure of the operation.<sup>50</sup> In Bosnia, the fate of the “safe areas” could have been different in 1995 if the members of the Security Council had not rejected the proposal of the Secretary-General to have 30,000 troops protecting them, and had not decided on the deployment – purely formal and “rhetorical” – of only a few thousand soldiers.<sup>51</sup> Finally, the constant struggle in the Bosnian case over who was really in charge, between the Secretary-General, the Security Council, and the military command on the ground, undermined the viability of the operation.

Secondly, one has to consider the attitude of the members of the Security Council. Here it is possible to identify three main characteristics that, in the end, greatly affected the smooth functioning of the peacekeeping operations. The divisions within the Security Council are one of these characteristics. In the case of Bosnia, the lack of agreement among the permanent members, especially between France and the United Kingdom on the one hand and the United States on the other – for instance, on the issue of air strikes – created an atmosphere of confusion and indecision.<sup>52</sup> Mistrust between France and the United States on what should be done in the case of Rwanda certainly delayed action.<sup>53</sup>

Fluidity and the reversibility of the permanent members’ positions also generated difficulties. The point here is not to deny actors the possi-

bility of changing their views on an issue, either because a situation has changed or for reasons of political pragmatism. But between 1992 and 1996, the fluidity and reversibility of the positions taken by France, the United Kingdom, and the United States, particularly with respect to Bosnia, was reflective more of indecision than anything else. This could not promote an efficient and clear handling of the problems on the ground. It is unsurprising, then, that from a weak consensus among the Security Council on the issues to be addressed, there followed a weak leadership. The difficulties created by such a situation were worsened by the fact that the gravity of the problems of this period required a focused and strong leadership within the Council.

Thirdly, it is not surprising in this context that the resolutions produced by the Security Council between 1992 and 1996, and more precisely up to 1995, gave an impression of confusion and incoherence. It is possible to decipher four major trends in these resolutions.

There is, to start with, a recurring confusion between peacekeeping and peacemaking. In the case of the Former Yugoslavia, for instance, a number of resolutions, while envisioning and calling for the use of force – peacemaking – continued to ask for the respect of previous resolutions aimed at peacekeeping activities. To outline and conduct these two tasks at the same time was impossible in practice. The same confusion was also seen in the case of the United Nations operation in Somalia: in late spring and summer of 1993, resolutions outlining peacekeeping activities co-existed with others calling for the capture of General Aidid.

In addition, considering the confusion of the peacekeeping and peacemaking dimensions, a large part of the humanitarian initiatives and actions in favour of human rights is missing from these resolutions.

Such discrepancies between the humanitarian goals of the missions, and the confusion between peacekeeping and peacemaking in the Council resolutions, are even more damaging when an additional element is taken into consideration. Very often, the members of the Security Council adopted resolutions with a Chapter VII component, without really being committed to the use of force.

Finally, there is the constant hesitation and oscillation between intervention and non-intervention. In Somalia, Bosnia, and Rwanda, the problem, and the hesitation involved, was essentially the same: is it necessary to intervene? If so, when, and under which modalities? No clear answers were ever given to these questions.

In any case, these problems of decision-making within the Security Council could only have a cumulative effect in conjunction with the bureaucratic shortcomings of the United Nations and the technical and operational difficulties encountered in peacekeeping operations. They thus led inexorably to the negative net results of the peacekeeping oper-

ations of 1992–1996, and, consequently, to the erosion of the United Nations' credibility and legitimacy that followed.

Do these aspects of the institutional explanation of the failures of the United Nations tell us the whole story of the failure of peacekeeping operations and the subsequent erosion of UN legitimacy? Not entirely. If we are to be comprehensive and systematic in our analysis, we must add to these aspects the influence of decision makers' personalities and relationships, which is quite often crucial in the handling of particular issues. We also have to take into account the importance of domestic factors, particularly in the major powers, to UN life. These two elements are stressed in Boutros Boutros-Ghali's book, as well as in Richard Holbrooke's.<sup>54</sup> But there are also deeper, more structural factors which interplay with the elements mentioned above.

Indeed, the general failure of the peacekeeping operations during the period 1992–1996, the institutional factors that made such a failure possible, and even the following decline of UN legitimacy, are merely the tip of the iceberg. They have to be understood in connection with the various sources of legitimacy of the United Nations, and their problematic coherence. These sources of legitimacy originate in political (and partly normative) cultures that give to the United Nations its framework of meaning and validity. As such, they originate in the diverse constituencies who inhabit and shape, both concretely and ideally, the emerging international community, making it a mixture of global concerns and parochial interests. Hence the often divided loyalties that are the source of problems for the coherence of the United Nations' legitimacy, and of which these sources of legitimacy appear to be the expression and reflection, the extension and projection.

### The problematic coherence of the United Nations' sources of legitimacy and the handling of security crises

While the factors mentioned above have a certain amount of validity, they cannot, by themselves, account for all of the shortcomings of United Nations peacekeeping operations. Rather, for these elements to assume their full significance, they have to be viewed in connection with the ambiguities and tensions generated by the normative and political sources of the United Nations' legitimacy, and the way these sources affect the decision-making processes of its members, especially in the Security Council. These are ambiguities and tensions that originate in the very ambiguities and tensions of the international law and the international system that the United Nations, as an international organization, is expressing, projecting, and implementing. While the principle of responsibility seems

to apply more and more to the international realm, echoing as such the unfolding of an ever-larger process of integration, its exercise is certainly not constraint-free. It remains shaped by representations that indicate the continuation of sociological and political attachments to national realities, to national tropisms and belongings,<sup>55</sup> even when these allow for the very possibility and projection of international responsibility, as is the case with the major Western democratic powers.

Such ambiguities and tensions were inexorably stretched to breaking point in 1992–1996 by the nature of the issues that the United Nations peacekeeping operations attempted to address.

*The normative issues of international law raised by the 1992–1996 peacekeeping operations*

The list of normative issues which the Security Council took on between 1992 and 1996, in the context of peacekeeping operations, is quite breathtaking. They are breathtaking because of the range of problems and the high level of complexity they represent, as well as the significance that any answer to them would have for the future of international life. These issues include the following: the secession of states and disputes over territorial possessions, namely in the Former Yugoslavia; self-determination and the recognition of new states emerging from the disintegration of old states; the collapse and factionalization of states; and the establishment of international judicial procedures for the prosecution of human rights violators.

It is not necessary to elucidate at length the complexity and amplitude of each of these issues,<sup>56</sup> except to say that they introduce major questions that are essential for the international system. Three such questions are listed here:

- What is a nation-state? That is to say, when does a nation-state appear? What are its attributes? When does it disappear?
- How can one build a national unity and entity out of an ethnically divided context?
- How far should obligations extend beyond borders?

The fact that these issues became issues during 1992–1996 and, more importantly, the fact that the United Nations agreed to address them through its actions, to make them part of its agenda of debate and action, is in itself no small event. This is a major turn of events, in fact, that required the political fluidity and ultimately the volatility of the post–Cold War era. At least at the beginning of the period, a certain political naiveté and innocence on the part of the major member states and the Secretary-General<sup>57</sup> permitted a wave of grievances to be taken up as issues – even if this meant freely interpreting the Charter, as the reference to and the

use of the notion of “threat to peace” show. Indeed, while between 1992 and 1996 most security crises had, first and foremost, humanitarian and human rights violations dimensions, it is by arguing that they represented a threat to peace that the Security Council justified the United Nations’ involvement. This procedure was an adaptation of the Charter to new circumstances and new issues (or an interpretation of the Charter in light of unfolding events about which it was felt that something had to be done). It thus legitimated, though not without controversy and polemics, an extension of interpretation of the Charter with respect to the meaning of “threat to peace” and the mandate of the Security Council.<sup>58</sup> It also legitimated a way to introduce and enhance the strategic character of humanitarian and human rights issues.<sup>59</sup>

*Normative issues and the difficult political integration of the international system*

It remains the case that the addressing of these issues took place within a constrained context, largely because of the structural character that the international system gives to its problematic coherence. Hence the paradoxical character of the international system: on the one hand, a number of concerted elements favour and enhance the development of democratic ideals and a sense of responsibilities and duties beyond borders; on the other hand, the international system does not give up the attributes and the guidelines of action attached to the principle of sovereignty. Since both tendencies constitute the foundation and horizon of legitimacy of the United Nations, the ambiguities and tensions entailed in their relationships can only have disruptive effects on the capacity of the United Nations to act in a focused and coherent manner.

The barely implicit hierarchy of principles at the core of international law, and of the international system it organizes and legitimates, is a telling illustration of this situation, and of the constraints upon action by the United Nations in the 1990s.<sup>60</sup> So are the dual identity of member states and the extent and limits of international solidarity which result from the political culture of the major Western democratic powers.

*International law and human rights: A problematic cohabitation of sources of legitimacy*

Since the end of the Second World War, the development of international law has largely meant the deepening, both in extension and in detail, of the consideration of human rights. However, this phenomenon does not at all imply the establishment of an idyllic situation, with full convergence and coherence among human rights, international law, and the international community.

Among the major principles<sup>61</sup> that constitute the fundamental structural standards of international law – establishing the overall legitimacy of the international system, in terms of both value and modalities of action, and spelling out for state actors the main rules of the game of international life – the respect for human rights still struggles to be viewed as a categorical imperative. Other major principles include the following: sovereign equality of states; self-determination of peoples; prohibition of the threat or use of force; peaceful settlement of disputes; non-intervention in the internal or external affairs of other states; respect for human rights; international cooperation; and good faith.

Although each of these principles is essential for the global equilibrium of international law and of the international system inspired and organized by it, they do not really make sense taken separately. It is when they are considered together that the relationships between them are most telling. Indeed, it is mainly possible to understand the part they play in the international system by approaching them as part of a systemic ensemble.<sup>62</sup> And although they share a relationship of compatibility, they are also related to one another through competition and an ever-changing hierarchy.<sup>63</sup> The juxtaposition of these relationships of compatibility, competition, and hierarchy in international law echoes the evolution of the various demands that must be recognized and served by the international system as regulated by international law, and as it expresses the major values that shape the international political and democratic culture. These relationships are, thus, never written in stone. The products of historical and political evolution, they continue to evolve along with the changes affecting the structural parameters of the identity of the international system and international law.<sup>64</sup> In the end, the more or less explicit and entrenched hierarchy that emerges from the relationships of compatibility and competition among the principles of international law<sup>65</sup> tends to indicate the priorities of the international system – the elements to which it gives most value<sup>66</sup> – and of the institutions meant to express and implement it, among them the United Nations itself.<sup>67</sup> In any case, it appears that within the context of this hierarchy and competition, respect for human rights is still not an obvious priority.

The mechanism of recognition and legitimization of governments is becoming more and more linked to democracy, or at least democratization, pursuant to the expectations of international organizations as well as emerging new actors within civil society such as NGOs and, increasingly, public opinion and the media. All these elements may favour human rights;<sup>68</sup> however, this does not automatically make human rights the sole and most strategic motivation for action on the international stage. As a matter of fact, human rights are only one aspect of the plurality of motivations of international actors, orienting their deliberation and echoing

the plurality of elements that shape the identity of contemporary international politics. Human rights are only one aspect, and not necessarily the most compelling, of the sources of political legitimacy at the foundation and horizon of the international community, and hence of the United Nations. As a result, ambiguities and tensions arise when the United Nations acts in the name of human rights.

While it is true that human rights have gained importance as a motivating factor in recent years, they do not have the status of a categorical imperative in the deliberations of international actors. In acting in the name of human rights, especially in the multilateral management of security crises and in particular in the context of peacekeeping operations, the United Nations does not act only in the name of human rights. There are other issues involved which can obscure and tame the concern for human rights. Such other issues account for the reversible, variable, and conditional importance attributed to respect for human rights.

*The “Dr Jekyll and Mr Hyde” syndrome and the dual identity of member states*

In Victor Fleming’s cinematographic adaptation of Robert Louis Stevenson’s novel *Dr Jekyll and Mr Hyde* (1941), Spencer Tracy is Dr Jekyll during the day, a medical doctor who enjoys a good reputation in his hometown and his daily activities, but he is Mr Hyde at night, a reckless criminal who kills women. Secretary-General Boutros Boutros-Ghali must have liked the film and received some inspiration from it. While posted in New York, he would describe the essence and attitude of the member states as Dr Jekyll and Mr Hyde: two personalities – one good and one bad – in one body; two world visions in one entity.

From this standpoint, the duality of identity of member states is at the core of the mechanics of the contemporary international system, and largely explains their behaviour on the international stage and in relation to the United Nations. On the one hand, states, as members of the United Nations and of multilateral agreements and arrangements, are concerned with international cooperation, multilateral management of international issues, and long-term issues linked with global interests. As such they are the “good guys,” eager to comply with the rules of partnership, reciprocity, rights and duties, accommodation, and compromise. On the other hand, states, as national actors, first and foremost have their own national interests in mind. This is perhaps less the case for the small and medium-power countries, for whom involvement in multilateral diplomacy and institutions is very often the only way to exist internationally.<sup>69</sup> But it is certainly very much the case for the major powers. The fact, for instance, that the major Western powers have historically been the main architects of internationalism and multilateralism does not invalidate their commit-

ment to their own national interests. Very often they include these as tools in a wider portfolio of political options, a portfolio adapted to a changing international context to whose transformation they themselves have greatly contributed.<sup>70</sup>

As a result, states tend to play on at least two boards: the domestic and the international.<sup>71</sup> They tend to be both a blessing and a curse, an asset and a liability. Could it be otherwise? Probably not.<sup>72</sup> In any case, this can only be uncomfortable for the United Nations, since it makes the commitment and support of member states highly conditional.<sup>73</sup> The conditionality of this support becomes an especially great source of difficulty when it comes to the role of the three major Western democratic powers: the United States, the United Kingdom, and France. The paradox here is that because they are the states on which the United Nations most depends, politically, financially, and ideologically (without whom nothing major could be undertaken, especially in the field of collective security, particularly activist collective security), they are also the states whose conditional support creates the biggest problems. Support can be taken away, since these powers tend to have the possibility of deploying alternative strategies to UN actions.<sup>74</sup> Moreover, when support is given, it has conditions and constraints attached, with consequences for the viability of the United Nations' initiatives. Such conditions can undermine the United Nations' ability to follow up and implement its decisions, or can introduce into UN actions an agenda more attached to the specific vision and interests of particular member states than those of the United Nations as a whole.<sup>75</sup>

Another example of this dual identity phenomenon and the impact that it has on the United Nations is the influence that the national political culture of these major powers has on their involvement, constituting an additional element of uncertainty.

*The political culture of major powers, the hierarchy of goods, and political deliberation*

The term "political culture" is intended here to refer to the aggregation of values, beliefs, and attitudes of a country that, in defining the collective identity of a society in its social and political aspects, contributes also to determining the identity of its members. This political culture shapes how they relate to themselves, how they define who they are and what they aspire to, in dealing with the various institutions that are monitoring their political environment.

Political culture also establishes the responsibilities of political institutions, whether for domestic or foreign policies. As a matter of fact, while national political culture tends to emphasize the domestic dimension of these responsibilities, the political culture of certain regimes leads to a



broad recognition of the importance of foreign policy and the desire to make it a defining element. This is often the case for democratic regimes, especially major Western democratic regimes. The *de facto* involvement in international affairs that their power brings upon them is enhanced by the sense of international responsibility produced by their core national democratic values and their implicit extension to the international level.<sup>76</sup> Indeed, universalism and individualism, understood in a generic manner<sup>77</sup> – once classically key national democratic values – along with the power positions enjoyed by the major Western democratic powers, largely account for the institutionalization of a culture of international cooperation (multilateralism) and of a sense of community at the global level.

Thus, it would probably be quite accurate to describe those portions of the foreign policy of Western democratic powers that are most concerned with global and international issues not simply as “foreign policy,” but as “international policy.”<sup>78</sup> In any case, it is in this context that the United Nations constitutes an institutionalized extension of the liberal concerns of the major Western democratic powers.<sup>79</sup>

As such, the gains that the major Western democratic powers bring to the making of the international community should not be overlooked. It is the universalist and cosmopolitan outlook of their political culture that also renders it possible for them to recognize the necessity and, if not the categorical imperative then at least the hypothetical one, of exercising empathy, identification, and solidarity at the international level.<sup>80</sup> These elements lead to partial recognition of the international dimension as one to which political responsibility applies. However, this does not signify that the United Nations’ mandates are in parity with these powers. Nor does it mean that there is a levelling of priorities among the respective concerns of these states in similar areas.

The issue of the international defence of human rights is a telling illustration of the hierarchization of goods and the limits of external solidarity exercised by Western democratic powers. International defence of human rights does not enter into the category of patriotism for major Western democratic powers. It tends never to override their concerns for the safety of the nationals that they commit to international operations. In other words, while the international defence of human rights is part of the political culture of the major Western democratic powers and, as such, is part of the agenda of the United Nations, this defence is constrained by their concern to limit casualties for their own nationals as much as possible.<sup>81</sup> In stressing this point, it is not the author’s intention to imply that casualties within the context of peacekeeping operations should be viewed as normal; only that, when faced with a choice between putting the lives of nationals at risk in a peacekeeping operation and saving lives on the ground, the former choice is usually taken.<sup>82</sup>

It should be added here that the priority attached to the domestic good, and the limitations thus placed on external solidarity, take on particular features within the political culture of each of the major Western democratic powers. This is illustrated by the tension noted above between the international defence of human rights and concern for the lives of nationals involved in UN peacekeeping operations. While France is eager to preserve the lives of the soldiers it sends on each mission in the context of international solidarity, it is less obsessed by this matter as the United States seems to be. This difference in attitude certainly affects the way each country deliberates a course of action and positions itself in the Security Council.<sup>83</sup> That said, in fairness it should also be noted that France, while less concerned with nationals' lives, is less eager to act decisively. On the other hand, while obsessed with its nationals' lives, the United States has at times enough leadership to act decisively.

It can be said that the culture of individualism of the major Western democratic powers, along with their universalist and cosmopolitan outlook, makes it possible to extend their goals to solidarity at the international level in favour of human rights. However, these same elements also lead to the establishment of a hierarchy of priorities, limiting the risk that major Western democratic countries are willing to assume in the defence of human rights within the United Nations framework. In a way, we should not be surprised by the duality of direction made possible by the democratic culture of individualism. It is almost natural that, in an international context that remains rife with strong nation-state tropisms, a hierarchy of priority is being established first on a "we versus them" basis. In addition, the limited commitment displayed by major Western democratic powers can only be accentuated by the fact that the very local political leaders who are calling upon universalist and cosmopolitan ideals to justify their claims as legitimate and to garner their defence by the international powers do not necessarily intend, once in power, to conform to the democratic principles of which universalism and cosmopolitanism are a part.<sup>84</sup> Indeed, the danger of having the international community taken for a ride by local warlords – who disguise themselves as leaders of a liberation movement but are in fact pursuing primarily ego-power goals, and/or are inclined to favour an ethnic vision of the nation in contradiction to the elective vision put forward by the Western democratic countries in some fashion or other<sup>85</sup> – is certainly not an incentive for Western democratic powers to engage in more than a limited commitment.<sup>86</sup>

Another example of the influence that specific political cultures have on the way Western democratic powers relate to the crises on which they have to decide and take action in the context of the United Nations is the issue of national integrity, or self-determination. The differences of position displayed by the French and American governments on the parti-

tion of Yugoslavia present an excellent illustration. Both France and the United States were concerned with the human rights situation, the viability and the sovereign status of the newly created entities, and the stability of the region in the long term. However, on the one hand, France was less willing than the United States to accept the partition of Yugoslavia. This was not chiefly because of its alleged historical and political links with Serbia. It was largely due to the Jacobin and centralized dimension of a heritage that still inhabits its political culture and makes it uneasy about accepting the renunciation of the idea of national integrity. On the other hand, the lack of idolatry towards political centralism in the United States certainly prepared that country to go along more easily with the idea of partition.<sup>87</sup>

In other words, while the foreign policy of the three major Western democratic countries within the setting of the United Nations (the United States, the United Kingdom, and France) is a projection of the cosmopolitan and universalist values that are at the core of their domestic political culture,<sup>88</sup> and as such make international action possible, it is also the weight of the domestic dimension of their political culture that limits international action. The cosmopolitan and universalist dimension of the political culture of major Western democratic powers, while certainly attenuating the divide between “we” and “them,” still has not eliminated it. “International common sense”<sup>89</sup> has not yet gone that far. As a result, this divide continues to influence the actions, if not the representations, of the United Nations. If democratic and individualist culture is on the path to becoming the meta-culture of modern times,<sup>90</sup> favouring mainly, but not exclusively, the emergence of a meta-law enhancing itself through the emergence of a “*droit des droits de l’homme*,”<sup>91</sup> it has not yet reached the post-national level – not even speaking here of the transnational cultural level<sup>92</sup> – nor detached itself from the national structuring of political personality. So long as the identification process at the international level does not entail exposure to major risk for the international powers, and so long as they have a relative strategic interest in not letting the situation deteriorate further, these powers are willing to intervene, though always within certain limits. Hence we see a progressive but also conservative exercise of international solidarity within the context of the United Nations.

In this context, the debates and policies initiated via Security Council resolutions do not only reflect and project the normative and political mixture from which international democratic culture is formed. Internalizing and projecting the core elements of the major nations of democratic culture, they also respond to demands from the ground, and their interplay with media and public opinion in the Western countries is likely to have a role in the initiation of international intervention.<sup>93</sup> In sum, these

policies are both active and passive, a product of the positioning of the various actors involved in the crises and the influences that act upon them. As such, they can introduce changes, even though these changes might not be entirely wanted, nor all their consequences foreseen. In the end, the transformative capacity triggered by international empathy tends to go as far as the pressure of domestic environments ultimately allows it to go, and as far as the established framework of meaning and validity of which these environments are a part permits change to remain relatively controllable and structured. Beyond that lies unknown territory, into which the Security Council is reluctant to venture. The forming of a new international landscape would require and signify a new systemic legitimacy altogether.

These factors, and the juxtaposition of the diverging imperatives they represent, greatly influenced the debates that took place in the Security Council and the policies that the United Nations was asked to implement. While making international solidarity possible, they also tamed it through the ambiguities, tensions, and confusion they introduced. Watered down and translated into the often vague consensus of Security Council resolutions, they made the implementation of peacekeeping operations a difficult and risky exercise.

*The dilemmas resulting from international political culture and its conflicting legitimacies*

In this constraining context, the Security Council was slow in its willingness to act. It was certainly not willing to make the protection of human rights and the demands of the challengers of the established local and regional orders the sole criteria for its decisions and actions. The best that it was willing to do was to address the issues that it agreed to view as problems to be solved within a series of dilemmas. This series of dilemmas was the expression of the existing and conflicting legitimacies then at work at the national and international levels, and of their weight on the actions of the United Nations.

Extending international solidarity while preserving, as much as possible, the lives of the national and UN personnel involved in the operations was the first dilemma to be addressed. The balance between these two goals would prove difficult to strike. Several times, it would lead to the adoption by the Security Council of resolutions calling for the use of Chapter VII, especially in Somalia and Bosnia, and designed more to protect the international forces involved than the populations of these countries.

Striking the right balance between the protection of human rights, even if it meant accompanying and endorsing national partition, and continuing to uphold as one of the cornerstones of the international system the

principles of national integrity and national sovereignty, was another dilemma.<sup>94</sup> Some of the debates that took place at the time of the establishment of the International Tribunals for the Former Yugoslavia and the International Tribunal for Rwanda were very much cast in this light.<sup>95</sup>

Evaluating how far international intervention should go and how much political risk should be taken in light of the strategic interest of the region of intervention was another dilemma. Such an evaluation of strategic interest took place in connection with elements that were both fluid and structured. Their structured quality had to do with the more or less established parameters that formed the equation: the history of the area of conflict, the geostrategic interest of the region, the history of the relationship between the region and the potential intervening powers, the political culture of these powers, and their domestic features (cultural proximity or distance and the correlated level of empathy and identification, public opinion, media coverage, and so on). Their fluid quality had to do with the evolution of the evaluation of this strategic interest in light of the evolution of the situation on the ground. (After Srebrenica, for instance, it was clear that if the Serbs were not stopped, the disgrace would fall not only on the United Nations but also on the Western democratic community as a whole.)<sup>96</sup>

More generally, and embracing the above dilemmas, the members of the Security Council had to weigh, very often under the pressure exercised by unfolding events and without much information or time for reflection,<sup>97</sup> the political and normative appropriateness of being either conservative or progressive in their evaluation of the situations put on the agenda of the Security Council. What was at stake in this weighing process was not only the fate of the populations in the areas of conflict. It was also the standing and reputation of the major democratic powers themselves. It was also an issue of setting the tone for the era, along with the consequences that the decisions and recommended actions could have for the future of the international system itself.

### *Half-measures and the net result for the legitimacy of the United Nations*

Faced with the dilemmas in which these issues were cast, the Security Council – which is to say, the United Nations as well – was not willing to choose a decisive course of action among the various legitimacies that formed the umbrella under which it was working. It refused to choose decisively, namely because the international system itself had not yet chosen. The Security Council did not choose because, at the time, the international system was unwilling to have one source of its legitimacy taking precedent over the others, preferring to preserve the normative mixture in which we still live.<sup>98</sup>

One outcome of these conflicting interests and legitimacies was a certain level of indeterminacy that characterized the resolutions adopted by the Security Council. Another outcome were the half-measures and often incoherent course of action that characterized the overall picture of the resolutions adopted by the Security Council between 1992 and 1996. As such, these resolutions echo, endorse, and fuel the “in-between” nature, the unclear essence, of the crises to which they applied.

In addressing dilemmas without transcending them, through the conduct of rather contradictory policies, the Security Council was reflecting the plurality of imperatives, of motivations, and ultimately of legitimacies that are part of contemporary international life. In its deliberations, in its resolutions, and in the actions that it recommended that the United Nations implement, the Security Council was internalizing and externalizing the orders and disorders of the contemporary world.<sup>99</sup> It was echoing both resistance to change and demand for change, and as such was participating with its hesitant and reluctant volition in the transformation of international life.

However, as has been noted before in this chapter, this relative normative indeterminacy and the problematic coherence of Security Council resolutions had a damaging effect on the ground, at the operational level of the peacekeeping operations. The ad-hoc international law that Council resolutions somehow represent had a confusing effect on the concrete operations of the United Nations. While making them possible, they also made them quite difficult to run in a focused and successful manner.

The net result of this hesitant semi-volition was that the half-measures made nobody happy: neither the victimized populations, nor the bystanding populations in the areas where the crimes were committed; neither the local and regional challengers of the established order, nor the establishments being challenged; neither the powerful member states, nor the small ones. Nor was there satisfaction in the United Nations itself, which ultimately took the blame. Hence we saw the United Nations being sidelined and losing legitimacy. Hence, also, the inability of the Security Council, after the failures encountered by the peacekeeping operations during these years, to continue to be “innovative” and bold in its interpretation of its mandate, a boldness that had initially allowed it to move into grey areas, areas that were previously beyond the Security Council’s mandate as it had traditionally been understood. The loss of legitimacy suffered by the United Nations from the failure of the peacekeeping operations meant a reduction of its interpretative powers of its mandate, a reduction of what the Council was entitled, or authorized, and duty-bound to do to address unfolding crises. The fact that the initiatives of 1992–1996 had ended in disaster encouraged the Security Council to stick to a narrow interpretation of what it could do and what it could successfully initiate on the ground, and thus what it should do in terms of the

interpretation of its duties and mandates. From now on, a more prudent course would be adopted by the Security Council, at least for a few years. In other words, it is also this level of legitimacy of the United Nations that establishes the level of latitude permitted to the Security Council in terms of its power to interpret its mandate: when legitimacy is high, the power of interpretation of its mandate is strong and tends to give it wider responsibilities; when legitimacy is weak, the power of interpretation is itself narrowed, and so therefore is the Security Council's realm of action.<sup>100</sup>

From this there comes a need to re-evaluate the United Nations' marginalization after 1995 and its loss of legitimacy in light of the conflicting legitimacies that animate its normative foundations and actions. Indeed, and without overlooking the institutional shortcomings of the United Nations and its own responsibility for the failures encountered in the field of peacekeeping operations during 1992–1996, it seems accurate to speak here of co-responsibility.

Co-responsibility means the sharing of responsibilities between the United Nations and its member states, especially the most eminent of them, the Western democratic powers. This is the case not only because of their substantial participation in the decision-making process, but also because, ultimately, the United Nations' shortcomings are largely a reflection and a projection of the international political culture of the time, at the centre of which lie the major Western democratic powers.

Perhaps more than anything else, the conflicting sources of loyalty and legitimacy – with the various positive and negative effects entailed by their juxtaposition – of the contemporary international democratic culture, as institutionalized and crystallized in the mechanisms, decisions, and actions of the United Nations, account for the failures of the multi-lateral management of the 1992–1996 crises.<sup>101</sup>

### The search for a renewed international legitimacy and the future of peacekeeping operations

The issues examined above have to be viewed as part of an evolving process, that of the formulation of the international community and the role played in it by the United Nations and some of its most important members, and of the ambiguities and difficulties that the process is encountering. The dilemmas in which the extension of international solidarity and responsibility are cast in areas of internal conflict are an illustration of this state of affairs. They are an illustration of the competing, although related and not entirely incompatible, representations – being linked themselves to the various sources of legitimacy – that shape the

actions of the main actors on the international scene, and the dilemmas that follow. They are also an illustration of the internal discord that inhabits international political life. On the one hand, there is a continuum between the leading national democratic cultures – and the internal values and beliefs they entail – and the international dimension of democratic culture, a continuum that makes possible an identification with a destiny that transcends borders, and hence with international solidarity. On the other hand, the sense of community that such a continuum expresses does not exclude altogether the existence of a hierarchy, a prioritization that continues to favour national demands over international responsibilities, when a hard choice has to be made between the two in a critical situation.

It is this state of affairs that largely accounts for the ways in which peacekeeping operations were envisioned and deployed between 1992 and 1996, and ultimately for their ambiguous outcomes. As such, the loss of legitimacy that the United Nations had to suffer because of the shortcomings of its peacekeeping operations is an indication of the problematic coherence of its normative foundation, and of the ways in which this foundation influences the various options that it faces. In addition, it is an indication of the stage of development that contemporary democratic culture has now reached; something has to be done at the international level to address human rights issues in areas of conflict, but such international interventionism remains limited in its modalities, let alone in its areas of application.<sup>102</sup>

If such a state of affairs still appears very unsatisfactory to some, the progress that it represents should not be overlooked. After all, international actors no longer disregard these dilemmas altogether as parameters for their actions, as they often did in the past. Drastic changes are taking place in a gradual and rather structured manner,<sup>103</sup> and it is likely that such dilemmas will not be overcome quickly but will continue to frame the horizon of deliberation and action by international actors for quite a while. However, in the shorter term, the fact that they are being used as parts of the guiding principles of international actions leaves pending a number of issues *vis-à-vis* the United Nations – issues that must be addressed, if not answered, in order to assess the likely evolution of the legitimacy of the United Nations in connection with collective security and peacekeeping operations.

### *The future of peacekeeping operations: Revisiting the past*

In principle, compared to national governments, the United Nations' legitimacy is both weaker and stronger. It is weaker, especially compared to major powers, because, as indicated earlier in the chapter, it is not an



autonomous entity. It is a derivation of national sovereignty, of the willingness of each member state to share with each other and with the United Nations a part of their power. But it is also stronger, in principle, through its global mandate, making it imperative for the United Nations to try to transcend the particular interests of each member state.

In the end, however, reality has not allowed the United Nations to maintain an equilibrium between these two tendencies. The heteronomous nature of the United Nations has led its weakness *vis-à-vis* states to become the overwhelming feature of its activity and legitimacy. As a result, the legitimacy, the political and normative weight carried by the United Nations, is quite low. This is less the case when it comes to contributing to the establishment of a worldwide legal framework meant to ensure multilateral cooperation on core values. It is in this field of international law that the contribution of the United Nations, although not so dramatically visible, has been the most cogent, regular, and important.<sup>104</sup> But this is certainly the case in the field of security, where the United Nations' contribution has been relatively marginal.

This is quite unlikely to change in the coming years. Even if the democratization of international life and of its state actors continues and encourages the member states to hand over more responsibility to international organizations, there is little chance that the United Nations will benefit from it. It is not entirely impossible to foresee an increase in the importance of a number of international organizations, more or less in tune with the ideology of the day.<sup>105</sup> However, such an increase in importance seems out of the question for the United Nations, especially in operational areas having to do with security issues, such as peacekeeping operations.

The main use that the powerful member states initially envisaged for the United Nations in the field of security, besides its legal contribution to disarmament through the adoption of conventions and treaties,<sup>106</sup> was as a global political regulator of international conflicts via the Security Council, either by making international action legitimate or by preventing it from happening in a unilateral manner. Beyond this, the United Nations was never really meant to be involved in the operational details of the conduct of war *per se*. At most, once the use of force was approved by the Security Council, the United Nations was meant only to be an institutional umbrella for military operations, implemented in fact by the major military powers.<sup>107</sup> This is precisely why inter-positional peacekeeping operations emerged in the 1950s and became, over time, the trademark of the United Nations. Inter-positional peacekeeping operations allowed the United Nations to claim that it was doing something for peace in areas of conflict, without itself engaging in the conduct of a war.

The constant confusion between peacekeeping and peacemaking in which the United Nations became trapped during 1992–1996 ran contrary

to this inter-positional philosophy. More importantly, it unveiled in a dramatic manner the reluctance of member states to work with the United Nations at the operational level in the handling of war situations, as well as the crippling effect of tensions among the sources of the United Nations' legitimacy. This will not be forgotten. As a result, peacekeeping operations are likely to have inter-positioning as their main function in the future, to which will probably be added a number of reconstruction responsibilities. Such a movement is already at work in the inter-positioning and reconstruction responsibilities given to the United Nations in Bosnia by the Dayton Accords in the autumn of 1995, and more recently in Kosovo and East Timor.

In this context, if there is a war to conduct or peacemaking operation to deploy, the operational responsibility for it, and possibly even the decision to initiate it, will go not to the United Nations but to regional organizations – at least if they are strong and developed enough to handle the conflict. The NATO involvement in the Kosovo crisis is a prime example of this new direction.

That such a course will be enough to reinvigorate the legitimacy of the actions of the United Nations in the field of security in particular, and of the United Nations in general, is anything but certain. Indeed, in trying to solve the difficulties encountered in the years 1992–1996, this course introduces and poses a new set of questions and issues to consider. These issues concern not only the future role of the United Nations in the field of security, but also the reorganization of collective security.

*International redistribution of power and the fictionalization or transformation of the United Nations' legitimacy*

Firstly, what will happen to areas of conflict that fall outside of the range of action of major powers and efficient regional organizations? For instance, what will happen in Africa, where the major powers are less and less willing to intervene unilaterally and where regional and subregional organizations are too weak and certainly not operational enough to make a difference? Is the United Nations going to be led to endorse explicitly a “laissez-faire” policy, which has already been, in fact, the more or less implicit position of the past two or three years, and let most of the African continent go to hell? And what effect will this have on the legitimacy of action by the United Nations in the field of security, and on the legitimacy of the United Nations overall? Cynics will surely point out that the fate of Africa and the inability of the United Nations to alleviate conflicts and tensions in that part of the world have never really been decisive criteria for evaluating whether the United Nations is fulfilling its responsibilities, or for its legitimacy.<sup>108</sup> It remains certain, nonetheless, that more or

less formalizing the writing off of its mandate will not help the United Nations.

If this is the way things are going to go in the future, one can only wonder what will become of the meaning of “global security.” Here, as in other areas, the selectivity of issues being tackled cannot become standard practice without affecting the legitimacy of the United Nations’ role. While it is true that there is always a certain amount of selectivity in political initiatives, focusing most often on the crises and the populations that have relative strategic importance for the future of the community and the evaluation of the legitimacy of its political organization and rule, this cannot become a systematic approach, even if not officially endorsed. The questions concerning the representativeness of the United Nations, already critical, would become easy to answer for a number of the forgotten countries. The universal dimension, and thus the core of the United Nations’ legitimacy, would go out of the window. The inconsistent applicability and application of principles meant to be universally applicable and applied – a phenomenon with a downside, since it encourages an historical and formalistic response to problems, ignoring local realities, and thus generates dismissive, alienating, and failing policies, as in Somalia – will not take place without undermining the validity of these principles, and of the institutions and system that are supposed to express and implement them. To be systematically inconsistent *vis-à-vis* the discourse of legitimacy – to make it somehow the new consistency – would either undermine the current general legitimacy of the United Nations, or call for the establishment of a new form of legitimacy adapted to this inconsistency. But what would such a new legitimacy be?

Secondly, any division of labour that left the handling of conflicts to capable regional organizations, and gave to the United Nations either the responsibility for initially approving intervention by regional organizations<sup>109</sup> or for a number of duties during the period of post-conflict transition, would mean a regionalization of global security. It would mean the *de facto* end of the global character of the United Nations’ mandate in the field of security. Perhaps this is not a bad thing; but if this is the direction that international life is taking now, it is a change that is important enough to require some reflection, especially regarding its consequences firstly for the overall mandate and legitimacy of the United Nations, and secondly, for the evolution of the international system.

Thirdly, does this regionalization of the initially global security mandate of the United Nations mean a furthering of the process of selective action, of its marginalization, and, ultimately, of its third-worldization?<sup>110</sup> If so, what credibility should then be given to its claim to international legitimacy? Can the universal dimension of the United Nations’ principles and their validity withstand the fact that their selective implementation

seems to negate its substantial content? In other words, does the marginalization of the United Nations also mean the marginalization of the principles it was initially supposed to express and implement? And will the limitation of these principles to a merely rhetorical dimension fulfil the demands of legitimacy?

Also, what kind of division of labour, based on the compatibilities and added value of each of the various actors, would be established between the regional and the global level? Would it be horizontal and decentralized, or would it be a vertical division of labour, putting the United Nations at the top – in terms of decision-making, at least formally – and leaving regional organizations to do the operational work, then giving it back to the United Nations for the follow-up (as we have seen in the Kosovo context)?

Fourthly, it does not seem very wise to marginalize the United Nations at a time when the international balance of power has disappeared and has put the United States in a position of hegemony. It is wise neither for the international system nor for its member states; and indeed, not for the United States itself.

It is unwise for the international system because if there is any area in which issues will continue, for a while at least, to be handled via official diplomatic and political channels, it is the area of security. In this field, public actors still have a long future and a good chance of retaining monopoly of power, even if it evolves and becomes democratized over time. As a result, one should not dismiss too quickly the institutional tools available.

It would be unwise for UN member states because, while the perception of the legitimacy of the United Nations varies to some degree with the point of view of each member state, oscillating between negative and positive evaluations among both powerful countries and poor countries, there is no plethora of alternative diplomatic and political channels that could lead to the dismissal of the multilateral dimension. This dimension cannot readily and entirely be replaced by bilateral or regional links. Therefore, especially at a time when global integration is increasing, it is surprising that what seems to be good for economic and financial areas – the need to enhance multilateral cooperation *vis-à-vis* international organizations – often seems to be undermined in the case of security issues.

Finally, the marginalization of the United Nations would not even be good for the United States; in the end, it would probably be both a blessing and a curse. Indeed, the United States, while enjoying a worldwide domination, would then also have to bear most of the responsibility and the burden of this domination. Such a situation would present the following disadvantages: it would be contrary to the spirit of reciprocity meant to animate international political liberalism, and would therefore

require a reconceptualization of some of the most important aspects of the American world vision and foreign policy; there would be no insurance that the United States would be able to force other countries to share the cost of world regulation on its own terms; and although hegemony would allow the United States to be the main agenda-setter, the United States would also bear most of the blame if things went wrong.<sup>111</sup> In other words, while hegemony (at both the national and international level) can be a factor of political stability,<sup>112</sup> absolute hegemony could contribute to the development of a worldwide public backlash, an accumulation of resentment towards the United States, a radicalization of political opponents, and a desire to react to and get rid of American domination. As such, in the long run, it could trigger structural international instability and a loss of the possibility of establishing a sense of legitimacy at the international level: after all, submission is not a substitute for legitimacy.

It is highly improbable that such issues will be addressed in the open, at least in the near future, in diplomatic circles, or will lead to an official revision of the status of the security policies of the United Nations. The end of the Cold War and the transition that it has opened for the international system have not been seen as enough of a major change in situation to generate the need for a systematic reflection upon and institutional reorganization of the international system. When this need has been expressed, it has only been in a velleitary manner. As a result, the formal and universal outlook of the Charter – the “gauge” of impartiality and fairness of the United Nations – will probably remain, in this domain as in others, the *fonds de commerce* of the United Nations. The formal and universal outlook on “global security” and the possibilities that it has created for inter-positional peacekeeping operations will probably continue to constitute the United Nations’ basis for policy and action, in spite of its enduringly selective application, and in spite of its persistent gap with reality.

While a gap between principles and reality can and should never be entirely resolved,<sup>113</sup> it has now reached a point where this gap has grown so wide that the world of norms and principles seems removed and detached from reality. Such a gap will persist within the United Nations context as long as international legitimacy, the legitimacy of the United Nations, continues to be inhabited by divided and conflicting legitimacies. One wonders, however, how much principles can bend before being perceived as a fiction or a deceit? How much does it take before the principles themselves are changed, before reality itself is transmuted? To go from utopia to reality is certainly not something that happens easily and overnight, if at all. Nevertheless, at this point, we are left to ask ourselves the following questions: are the difficulties encountered by the United

Nations only the normal setbacks that any process of change is meant to encounter on its path, especially when one considers the challenge of the United Nations' task (that is, going from the national community to a global community, expressing a sense of universal justice that prevails over national destinies and horizons)? Or are the current difficulties the sign of a change of orientation of the political culture, a change that would mean the abandonment of the ideals and goals placed on the agenda of democratic culture as early as the eighteenth century?

This is a question that the sociology of social and political evolution will have to answer concerning the future of global legitimacy. Indeed, it is partly in looking into the sociology of international organizations, of the political cultures of the major democratic powers and the way they influence the making of international democratic culture, that we will be able to decipher the future of international legitimacy and its corresponding institutions of governance.

## Notes

1. See, for instance, Franck, T. M., 1995. *Fairness in International Law and Institutions*. Oxford: Oxford University Press, 83.
2. For an account of these debates, see, for example, Koskeniemi, M., 1996. "The Place of Law in Collective Security." *Michigan Journal of International Law* 17.
3. This avenue is being explored elsewhere in this book by Tetsuo Sato, in chapter 8. See also Caron, D. D., 1993. "The Legitimacy of the Collective Authority of the Security Council." *American Journal of International Law* 87: 552.
4. For a theoretical and historical discussion of legitimacy and international organizations in general, and the United Nations in particular, see the Introduction and the Conclusion to this book.
5. For the sake of accuracy, it is important to add here that legitimacy is more an issue in the political tradition of democratic continental Europe than in the Anglo-American context, especially in the United States. In the political tradition of the United States, legitimacy is, indeed, not much of an issue. Justice is more of a concern. There are a number of reasons for this. Firstly, in the United States, there is an almost ontological suspicion *vis-à-vis* the state. The state is not to be trusted on principle and is, therefore, presumed to tend naturally towards illegitimacy. Secondly, this is echoed by the fact that the strong emphasis on individual rights – hence on society and its political and moral values – tends to undermine the importance of individuals' potential duties *vis-à-vis* political institutions. Thirdly, the tendency of liberalism to present itself as an ahistorical and non-ideological world-view, and therefore as almost naturally the best way of organizing society, is an obstacle to the very possibility of challenging it as a premise; this opportunity is the very essence of the legitimacy discourse. Fourthly, all these elements amount to a depoliticization of the political organization of activity. Two effects follow from this: a tendency to dilute the assignment of social responsibility to political institutions; and a tendency to disqualify the validity of political claims made with respect to the way in which society organizes the socially excluded. In other words, in a rather paradoxical way, the questioning and suspicion of the state embedded in

American liberalism, and the tendency that liberalism has to view itself as being naturally the best option, prevents the issue of legitimacy from occupying centre stage. In democratic continental Europe, on the other hand – in France, for instance – it has been the normative and political tradition to believe that the state is essential for bringing democracy to the people. This starting point speaks for the fact that the state is not viewed as being illegitimate almost by nature. The state benefits from its initial connection with the expression, defence, and enforcement of democratic ideals. However, the ability of political institutions has to be checked and evaluated constantly. Hence the intellectual and political centrality of the issue of legitimacy in the European context. The importance of legitimacy can only be enhanced, finally, by the discontinuous and tumultuous course of continental democratic European regimes.

6. For a more systematic analysis of political legitimacy, see Coicaud, J., 1997. *Legitimacy and Politics. A Contribution to the Study of Political Right and Political Responsibility*. Paris: Presses Universitaires de France, published in English by Cambridge University Press (2002).
7. For a general examination of the various types of international organizations and their legitimacy, see the Introduction to this book.
8. It is obviously a different story when it comes to comparing such organizations to institutions in destitute countries in Africa or other regions of the developing world.
9. In between, there are also countries with a whole range of attitudes and differences.
10. Along with much better conditions of remuneration, health coverage, and retirement, this explains why the elite of developing countries tends to be so eager to work for international organizations.
11. There are obviously differences among the developed countries on this point.
12. In cases where these countries do not look down on international organizations, it is too often because these organizations personify and are the instruments of their own ideological and operational power. This is particularly the case with respect to the IMF in the financially conservative circles of major developed countries.
13. On the contrary, the changes tend to happen in an ad-hoc manner, under the pressure of events.
14. Max Weber and Norbert Elias see the monopoly of violence as the foreseeable outcome of institutionalized and recognized political differentiation.
15. As Jose E. Alvarez indicates in chapter 3 of this book, the UN Charter is the product of *Realpolitik* bargaining based on what sovereign states would tolerate in 1945. States are its main addressees. It gives pride of place to the protection of nation-states from each other, rather than to the human rights of individuals from their own government (a bill of human rights was not attached to the Charter). As such, it does not provide any mechanism for the exercise of direct democratic control or participation by the people themselves. It is namely these elements that lead Alvarez to criticize the use of constitutional analogies when it comes to the UN Charter, to see them as “inappropriate.” But it is also true that the democratic creed is part of the normative and political agenda of the Charter – perhaps not the exclusive and primary one, but still present – a fact that certainly explains the contribution of the United Nations to the subsequent development of democratic principles, namely in the field of international law. Had the Charter not created a normative horizon in favour of democratic ideals, it would be difficult to see how the development of the conventions of human rights could have taken place.
16. Charter of the United Nations, Article 33.
17. Ibid., Article 34.
18. Ibid., Article 36(1).

19. Ibid., Article 37(2).
20. Ibid., Article 41.
21. Ibid., Article 42.
22. On this point, see the assessment made by Franck, T. M., 1985. *Nation Against Nation: What Happened to the UN Dream and What the US Can Do About It*. Oxford: Oxford University Press, 168.
23. During the Cold War, from the standpoint of the major powers, the possible – if not precisely legitimate – realm of action of the United Nations in the field of security, but also in other areas, was largely connected with the relative strategic importance of the regions affected by the tensions and conflicts involved. A relative strategic importance was still, de facto, one of the requirements for United Nations involvement in the 1990s, although the content and the understanding of what constituted a “relative strategic level” changed somewhat.
24. It required exceptional circumstances indeed – the end of the Cold War, the willing cooperation of the two presidents George Bush and Mikhail Gorbachev, the presence of highly strategic interests at stake, and a clear-cut case of aggression by Iraq against Kuwait – to render possible the concerted and largely consensual international response to Saddam Hussein’s aggression. These exceptional circumstances allowed the international community to respond to the analytical clarity of the Kuwait invasion with decisive and clear-cut political and military action.
25. See, for instance, Thakur, R. and Thayer, C. A. (eds), 1995. *A Crisis of Expectations: UN Peacekeeping in the 1990s*. Boulder: Westview Press.
26. The extent to which the public and even experts are aware of UN activities in the fields of development, democratization, or even international law, is very small compared to the attention given to peacekeeping operations. This is certainly not due to the lesser importance of UN activities in these other domains, at least when it comes to international law. Although the legal work accomplished by the United Nations concerning conventions, treaties, and so on, does not receive much attention on a daily basis, it is probably one of the areas in which the most has been accomplished by the United Nations in the past 50 years.
27. See below, on the evolution of the international political culture and its impact on the United Nations’ actions.
28. Boutros-Ghali, B., 1992. *An Agenda for Peace*. New York: The United Nations.
29. Ibid., para. 43.
30. This was a major issue. Indeed, during the period considered, civilian casualties were not a side-effect of the conflicts. Rather, civilian populations very often became the primary victims, if not the intended and main target of aggression, as the practice of ethnic cleansing shows. In addition, the UN High Commissioner for Refugees indicated in 1995 that the number of refugees had risen from 13 million in 1987 to 26 million at the end of 1994. The UNHCR also stated that the number of persons displaced within their own countries was higher.
31. For a full account of the peacekeeping operations in El Salvador and in Cambodia, see *The United Nations and El Salvador (1990–1995)*. New York: Department of Public Information, United Nations, 1995; and *The United Nations and Cambodia (1991–1995)*. New York: Department of Public Information, United Nations, 1995.
32. The author does not include the International Tribunal for Rwanda in the list of measures taken within the context of peacekeeping operations, simply because the Security Council refused to initiate a peacekeeping operation when there was still time to do so, and because the tribunal was established only after the genocide had taken place.
33. For a description of the United Nations involvement in Haiti, see Coicaud, J., 1995.



- “La communauté internationale et l’impératif démocratique en Haïti.” *Le Trimestre du Monde* (winter 1995) 1(29); and Malone, D., 1998. *Decision-Making in the UN Security Council: The Case of Haiti, 1990–1997*. Oxford: Oxford University Press.
34. After the announcement by President Clinton that the United States would withdraw all of its combat personnel and the bulk of its logistical units by 31 March 1994, the European powers engaged in the peacekeeping operation decided to pull out their contingents as well.
35. Although the United Nations has little responsibility for the death of the American soldiers, it is probably from this event that it is possible to date the deepening of the Clinton Administration’s mistrust towards the United Nations in general and towards Secretary-General Boutros Boutros-Ghali in particular.
36. For a good account of the United Nations’ involvement in Bosnia, see Rieff, D., 1996. *Slaughterhouse: Bosnia and the Failure of the West*. New York: Touchstone Books.
37. See Rohde, D., 1997. *The Betrayal and Fall of Srebrenica*. New York: Farrar Strauss and Giroux.
38. See Coicaud, J., 1996. “La communauté internationale et l’Accord de Dayton.” *Le Trimestre du Monde* (spring 1996) 2(34).
39. During the winter of 1993–1994, Secretary-General Boutros Boutros-Ghali received a number of alarming news reports to the effect that the tensions in Rwanda were spiralling out of control and could lead to major violence. He asked several times that the Security Council take action to prevent the crisis, unfortunately without success.
40. When the author mentions here that the legitimacy of the United Nations was quite high in the early 1990s, it is simply to state that the high expectations of the United Nations then indicated a view that the United Nations had a real role to play and responsibilities to fulfil, and that it was thus recognized as one of the major, credible, and necessary international actors. This does not imply an evaluation of the legitimacy of the United Nations in comparison with other international actors, whether major member states or regional organizations. As matter of fact, as seen earlier in this chapter, in comparison to its rivals (especially major member states like the United States), the United Nations’ legitimacy is quite low, as indicated by its low level of institutionalization, the lack of proportionality between its posted goals and the means to achieve them (after all, the United Nations is a rather small bureaucracy, with quite limited core staff and operating budget for an organization that ostensibly has a global mandate), the reluctance of major powers to cede part of their power to it, and the still-nascent dimension of the international community.
41. The criticism addressed to the United Nations as an “inefficient bureaucracy” is not a new one. It is partly a legacy of Cold War views of the organization. It is also connected with the dismissiveness with which public organizations, national and international, came to be viewed in the 1980s, as part of a relative loss of credibility of political institutions in general. The ascendant wave of liberalism and the emphasis it put on flexibility only made things worse in the 1990s. This marks a great distance from the view of civil servants as prestigious professionals, the “functionaries of the Universal,” as Hegel called them at the beginning of the nineteenth century.
42. Remember the critical evaluations given in newspapers to Yasushi Akashi, Special Representative of the United Nations Secretary-General in the Former Yugoslavia. From a general point of view, it is true that United Nations officials have sometimes tended to walk away from responsibility and to second-guess the reactions of member states, especially of those in powerful positions. Hence there is a structural tendency to shy away from difficult choices and to avoid taking real decisions that could be followed up by action. The United Nations is very often a world of polished fictions in this regard.

43. The United Nations is more a headquarters structure than a global institution. Contrary to what it is supposed to be – an institution looking outwards and trying to reach out to the world – the United Nations is largely an inward-looking institution, consumed by itself and its inner politics. This is partly due to its low level of institutionalization as an international organization (illustrated by external political interventions to secure positions for nationals and by the lack of real human resources management and development encompassing, for instance, established career tracks). The gap that exists between the Headquarters in New York and the other duty stations, and the even greater gap between New York and the field, is a telling illustration of this situation. This can only detract from the capacity of the United Nations to act efficiently in operations deployed in the field, especially if one considers, on top of that, the logistical and financial dependency of the United Nations upon its member states.
44. *Agenda for Peace. Second Edition, with a Supplement*. New York: United Nations, 1995.
45. The operational dependency of the United Nations, in terms of financial, logistical, military, and human resources, was indeed a major obstacle to the establishment of timely and adequate peacekeeping operations. As a matter of fact, the relative poverty of the technical means at the disposal of the United Nations forms a remarkable contrast to the affluence of the means at the disposal of NATO.
46. This type of rapid response force was used in the late spring of 1995, in Bosnia.
47. The delays with which governments provided the necessary materials to the United Nations for the deployment of peacekeeping operations in the 1990s proved to be a major problem.
48. These suggestions for the modalities and direction of peacekeeping operations ended up being rejected, especially by the United States.
49. The Secretary-General makes his suggestions on the conduct of peacekeeping operations primarily via the reports that he presents to the Security Council.
50. On this point, see Coicaud, J., 1994. "Les Nations Unies en Somalie: entre maintien et imposition de la paix." *Le Trimestre du Monde* (winter 1994) 1(25).
51. It is not certain, however, that the lack of protection from which the "safe areas" suffered was due only to the number of soldiers deployed.
52. Russia and China also disagreed on a number of points with the other Permanent Members of the Security Council. But due to the fact that these two countries were not major players in the handling of the Bosnia crisis, these disagreements were not as important as those among the other powers.
53. In addition to the fact that France was supporting the Hutu government while the United States was supporting the Tutsi rebels, France suspected the United States of trying to expand its influence in Central and Western Africa.
54. See Boutros-Ghali, B., 1999. *Unvanquished: A US-UN Saga*. New York: Random House. See also Holbrooke, R., 1999. *To End a War*. New York: The Modern Library. Indeed, the impact of leaders' personalities and relationships should not be overlooked, as these factors very often play a major role.
55. On this issue, see for instance Elias, N., 1991. *La société des individus*. Paris: Éd. Fayard, traduit de l'allemand par Jeanne Etoré, 295.
56. Martti Koskenniemi outlines some of the difficulties attached to the issue of self-determination in the context of the conflict in the Former Yugoslavia in Koskenniemi, M., 1994. "National Self-determination Today: Problems of Legal Theory and Practice." *International and Comparative Law Quarterly* 43. See also, for the problem of disputes over territorial possessions, Kohen, M. G., 1997. *Possession contestée et souveraineté territoriale*. Genève: Presses Universitaires de France, Publication de l'Institut Universitaire de Hautes Etudes Internationales, 415–416 and 459–460.

57. At United Nations Headquarters in New York, such angelicism and innocence were certainly long gone by January 1997. While a number of people from the United Nations Secretariat and the diplomatic missions rejoiced at the departure of Boutros Boutros-Ghali and the arrival of Kofi Annan, there was certainly not the same atmosphere of political new beginnings and challenges that had characterized the early months of 1992.
58. Law and its interpretation can change with the evolution of the community's needs, as defined by the values with which the community identifies. Conversely, law and its interpretation are not infinitely manipulable: as much as possible, interpretation must reflect a process of inter-subjective interpretation. Dynamic reinterpretation must take into account the points of view of the various parties committed to the community and its imperatives of reciprocity. On these questions, see Johnston, I., 1991. "Treaty Interpretation: The Authority of Interpretive Communities." *Michigan Journal of International Law* 12: 418.
59. The free interpretation of the Charter by the Security Council and the extension of its domain of responsibilities led Mohamed Bedjaoui, at that time President of the International Court of Justice, to question the legitimacy of these self-appropriated responsibilities. He wondered whether it would be judicious to establish legal controls over acts by the Security Council. See Bedjaoui, M., 1995. *The New World Order and the Security Council: Testing the Legality of Its Acts*. The Hague: Kluwer Law International. See also, in this book, Tetsuo Sato and Jose Alvarez's comments on the interpretation of its powers and mandates by the Security Council, and on the issue of judicial review. Finally, see chapter 4 of this book, for Veijo Heiskanen's argument that so far, most of the cases brought to the International Court of Justice have had to do with boundary disputes of little political significance, and that for the very few with a background of a serious crisis, not only has the Court's decision had no impact on the crisis, but the Court has in fact stated that the matter was of an undecidable character (on nuclear weapons, for instance), which is surely not very helpful.
60. It is not in itself the hierarchy that is a source of problematic coherence for international law and the international system. A sense of harmony and order can be very well produced by hierarchy. As a matter of fact, hierarchy is a classic way to produce harmonious political, social, and legal order. Here, the hierarchical dimension is problematic because it is more or less implicit, and because there is a growing sense of competition, and even mutual exclusivity or incompatibility, among a number of the principles involved; for example, the principle of sovereignty and the principle of respect for human rights. On these questions see, for instance, Delmas-Marty, M., 1994. *Pour un droit commun*. Paris: Seuil, 90ff.
61. Not everybody would agree to these as major principles in international law. However, there is enough literature that mentions them as the pillars of international law for them to be endorsed here. For a detailed account of these principles and their intertwining, see Cassese, A., 1986. *International Law in a Divided World*. Oxford: Clarendon Press, 126–165.
62. It is a common mistake to assess the meaning of a legal principle, in national as well as international law, as a discrete element that one can grasp apart from the others. This mistake often leads to a formal, positivist, externalized, and ahistorical reading of what a legal principle is about. From the legal and historical point of view, taking into account changes and evolution in a principle, its meaning should be sought at the systemic level.
63. Without a sense of compatibility, the functioning of the system as a whole would be at stake. Compatibility among the principles has two aspects. Firstly, it is necessary that

there be no inherent opposition or contradiction between principles. Secondly, there must be the possibility of adjustment and flexibility, if required by conflicting demands or emerging claims. The difficulty here is to know how far the flexibility can go without invalidating the principle involved. The key to this issue has to do with the validity of the claim, and whether or not the claim is important enough to undermine a given principle and thus engender change.

64. Positivism in international law – this is also true of positivism in the field of national law – tends to favour an ahistorical approach to law. While rejecting for law a connection with a substantial-value dimension, the positivist approach to international law views the law itself as a given, on the basis of which the legitimacy of actions should be evaluated. In order to be judged legitimate, these actions have to appear to conform to established international law. This conception of law fails to understand, firstly, the interpretative dimension that any legal evaluation entails – an evaluation that is not necessarily made in light of expediency and/or opportunistic considerations, but that can integrate and create room in the established legal framework for emerging demands to be recognized as reasonable and legitimate. It also fails to grasp the historical dimension of law, the evolution through which it goes in adapting to and guiding the changing realities of the international system. As a result, positivism in international law is a rather weak way to handle the issue of the guiding principles by which law may evaluate international realities, or may evaluate the legitimacy of actions at the international level in a changing context. It is no surprise, then, that such a conception exposes law to the risk of adopting the wrong kind of formality, one that tends to be detached from reality and unable to tackle it – one that, in the end, leads to irrelevance. Rather than benefiting from an embracing and universal formal dimension that allows the law to sort out and validate or invalidate the manifestations of international reality, such a positivist legal formalism deprives itself of the ability to address the international system in a speculative, imaginative, historically conscious, and evolving way that reflects the emerging issues of the living identity. It is partly in this state of affairs that it is possible to find an explanation for the growing marginalization of international lawyers from continental Europe. The loss of influence that their commitment to positivism brings about is only furthered by the Anglo-American tradition of jurisprudence and its influence on international law, the less closed and system-oriented conception of law in the Anglo-American world, the rather strong intertwining of international law and international relations in the United States, and the fact that the superpower position of the United States allows it great influence over the international political and legal-intellectual agenda (along with the Americanization and privatization of a number of sectors of international law).
65. The hierarchy is also partly what can make possible compatibility and cohabitation among the principles of law. This presupposes, however, that its use avoids the development of a sense of inconsistency, and therefore of incoherence among principles. Indeed, when a sense of injustice, inconsistency, and incoherence prevails, it gives the impression that partiality, expediency, and self-serving practices are the rule. This ultimately endangers the very idea of rule, of the overall credibility of international law and the international system it monitors. A number of conditions are therefore required so that the existence of a hierarchy among principles does not undermine their compatibility. The most important of all is probably the universality of use of and access to all the other principles for all countries in a conflict situation. In other words, no unilateral use of principles by any given country should be permitted. For instance, the principle of respect for human rights should not be used selectively and unilaterally by the developed countries to challenge the developing countries, without ever allow-

ing the developing countries to really challenge the developed countries on other points. In other words, a true multi-directional reciprocity of use, access, and application of principles is the key.

66. See Johnston, I., "Treaty Interpretation" (see note 58, above), on the interpretation of international law.
67. Neither a legal text, nor the overall system constituted by the relationships among such texts and the values they represent, can envision every situation. In the end, it is important for the credibility of the interpretation of international law (that is to say, the interpretation of each text and its relationship with other texts and values), and for the organ or institution that is endorsing or implementing it, that the interpretation and consequent actions strike the right balance between being too narrow and rigid – running the risk of being unable to tackle newly emerging issues not envisioned in the original text – and being too broad to resonate with its audience because it is overly progressive or is a misreading of the value-needs of the community. The ability of international law to appear and remain relevant and valid depends upon this balance. If such a balance is absent on issues that are not central to the functioning of the community, the discrepancy can nonetheless continue without major consequences: local dissonances do not have systemic consequences. But if a balance is absent on core issues for the evolving identity of the community (whether national or international), and there is insistence on the part of the institutions on sticking to the interpretation, then it is not only the interpretation but also the law and institutions themselves that run the risk of losing their social validity; first in normative terms and then, if the occasion arises, in political terms.
68. See Franck, T. M., *Fairness in International Law and Institutions* (see note 1, above), 83.
69. A number of small- and medium-power countries – for instance the Nordic countries, the Netherlands, Canada, and New Zealand – are often presented, and present themselves, as more moral than the major powers because of their commitment to multilateral cooperation. It is true that their own political culture tends to gear them towards a rather ethical approach to political relations and to the international relations among them. However, it is also the case that for them, this is a "Hobson's choice": multilateralism is a way for them to advance their national cause and enhance their national interests. In other words, structural commitment to multilateralism and internationalism is not necessarily the sign of a higher moral position. It can also be a form of political realism and pragmatism. A somewhat analogous argument could be made concerning the contemporary politics of multiculturalism and its customary use by the elites of developing countries. They display a liberal and multicultural outlook when it comes to integrating developed societies, and they ask these societies to favour this outlook. But is not necessarily echoed by a similar liberal and multicultural attitude towards their own societies, where very often they have been the beneficiaries of closed and hierarchical social systems.
70. Compare, for example, Iriye, A., 1997. *Cultural Internationalism and World Order*. Baltimore: Johns Hopkins University Press.
71. There are more layers to international political life than the national and international layers. These two layers are only mentioned here for the sake of simplicity.
72. See Coicaud, J., 2000. "Solidarity vs. Geostrategy: Kosovo and the Dilemmas of Contemporary International Democratic culture," in Schnabel, A. and Takhur, R. (eds), 2001. *Kosovo: Selective Indignation, Collective Intervention and the Changing Contours of World Politics*. Tokyo: United Nations University Press.
73. The author is not suggesting here that support should be unconditional. This would not be desirable. After all, conditionality of support, in the most optimistic terms, can

be viewed as a form of accountability of the United Nations *vis-à-vis* member states. However, the question then arises of how to ensure the accountability of the major member states *vis-à-vis* the United Nations' ideals and goals.

74. If necessary, the United States has the recourse, for instance, of masterminding a NATO operation without the endorsement of the Security Council. France has the recourse, although less and less, of deploying, more or less officially, a unilateral operation in Western Africa, as it has done many times in the past.
75. The political instrumentalization of the United Nations via the introduction of items from a member state's agenda is common, if not standard, practice.
76. Totalitarian regimes can also be characterized by having a foreign policy constituting a defining element of their identity, as demonstrated by the cases of Nazi Germany and fascist Italy. However, their involvement in international affairs does not take place under a real sense of global responsibility, one that perhaps encompasses national interest but also transcends it. For these regimes, it is essentially a matter of national power projection and domination, regardless of any sense of reciprocity or international public good.
77. Notwithstanding the different versions of universalism and individualism within democratic culture.
78. It should also be added here that, in this context, the multilateral policies of the major Western democratic powers can also become their national-interest policies. Being the primary conceptualizer and implementer of multilateral rules, they are also in a position to be among the rules' primary beneficiaries; they project and implement an international culture that is in phase with their domestic culture. This gives them an incentive to play the game well – they have the means to play it, and their international standing, the political and normative recognition that they gain from it, serves their national interest. It enhances their ability to project and enjoy even further influence without being perceived as threatening or imperialistic. In other words, this leadership status with respect to multilateral rules can be seen as national interest adapted to the democratic *goût du jour*, the very one that they themselves have encouraged. It leads them to move away from raw displays of power towards a softer, but perhaps no less efficient, form of power.
79. In a way, there remains to be written a history of the United Nations and of international society in general, in connection with the universalist values of the major Western democracies – continental Europe (France) and the Anglo-Saxon world (the United States and the United Kingdom) – and aimed at helping to create a sociology of contemporary democratic political culture and the international society. This history would certainly be a major departure from the still rather nascent state of scholarship from which the study of international organizations currently suffers. For the most part, the studies involved are either a mere external description of international organizations as institutions or of their actions, or a critique of their actions based on the moral principles they are supposed to express. They are rarely studied by combining views from afar and within, as a study of international society in the making. It should also be noted that the low level of scholarship on international organizations is also a reflection of its low level of prestige in the academic field of international relations, a field that remains highly power-oriented and therefore pushes international organizations and their study to the margins of the field.
80. Along with a permanent position on the Security Council.
81. The versatility and volatility of public opinion, and the ability of the media to impose its own rhythms and its own temporality on the issue of human rights (media time is very different from political time; media sound and visual bites call for instant reaction and resolution, while the diplomatic search for a solution may require weeks or years,

thus making journalists and diplomats poor bedfellows) while pushing Western democratic governments to act, has at times further accentuated the reluctance of such governments to have the international defence of human rights override their concerns for the fate of their nationals.

82. The modalities for NATO intervention in Kosovo in the spring of 1999 (especially the decision to choose a high-altitude air bombing campaign, increasing the risk of mistaking civilians for Serb military, in order to minimize the risks taken by NATO pilots) are only the latest illustration of this phenomenon. On this point, see Coicaud, J., 2000. "Solidarity vs. Geostrategy: Kosovo and the Dilemmas of Contemporary International Democratic Culture," in Schnabel, A. and Thakur, R. (eds), 2001. *Kosovo and the Challenge of Humanitarian Intervention. Selective Indignation, Collective Action, and International Citizenship*. Tokyo: United Nations University Press. On the other hand, it should be recognized that this tendency was facilitated by the fact that a significant number of the political leaders in the Balkans who benefited from the backing of the international community very quickly after the end of the conflict proved to be eager to use their new position of power for their own benefit, rather than being primarily committed to the welfare of their people. Such developments, like the problems of corruption in Croatia and Bosnia and the violent path encouraged by the KLA in Kosovo after the war, though not very surprising, are hardly encouragement for Western powers to put the lives of their nationals on the line.
83. The French acceptance or tolerance of possible casualties in international operations conducted in the name of international solidarity boils down to a relatively low social level of individual entitlement, especially as applied to military personnel, compared to that found in the United States. The fact that the state still dominates society, that the culture of citizenship has not yet been totally eradicated from the political landscape, that the French army is a conscript army, that French military officers traditionally demonstrate a certain lack of consideration for the lives of regular soldiers, and that France also needs to convince itself and demonstrate to other countries that it still has an international role; these are some of the factors that come into play in this context. In the United States, on the other hand, the high level of individual entitlement explains the almost total absence of tolerance for casualties. It seems that even the professional and voluntary character of the US army echoes this sense of entitlement. In certain developed countries that also have a professional army – for instance, in the United Kingdom, which also has to demonstrate to itself and others that it still plays a role in the international arena – the possibility of casualties is part of the equation, and therefore a zero casualty rate is not the main goal alongside military victory. In the United States, by contrast, the values of society seem to have infiltrated those of the army to the point that embracing a military career is tantamount to no more than pursuing a job opportunity as good as any other, one from which individuals expect as many social benefits and as few costs as possible.
84. One of the dramas of the Balkans conflicts involved the fact that the authoritarian character of Milosevic's power did not confine itself to the Serb camp but migrated and was echoed in other Yugoslav republics. Allowing personalities who had formerly been active under communist Yugoslav rule to attain power facilitated the rise of local authoritarian leaders. Had Milosevic been more democratically minded, not only would the chances of avoiding war in the Balkans have been greater, but the emergence of more democratically minded liberation and government leaders in Croatia, Bosnia, and Kosovo would have been more likely. Hence the importance of working on the democratization of the central power as a way to eliminate oppression in a federal structure, rather than thinking of secession as the only option. Too often, indeed, secession only replaces a relatively distant oppressive regime with a suffocatingly close and indigenous oppressive rule.

85. On the distinction between the elective theory of the nation and the ethnic theory of the nation, see Dumont, L., 1995. *German Ideology: From France to Germany and Back*. Chicago: University of Chicago Press.
86. The fact that certain local leaders challenging Serb power, such as Tudjman in Croatia, were calling for respect for cosmopolitan values like human rights in order to further their own nationalist goals and even to establish a more or less ethnically based nation, could only make the Western powers wary of any immediate endorsement of the option of partition. Projecting externally universalist and cosmopolitan values to attract and solicit the good graces of the international community, while internally favouring an ethnic theory of nationhood, is certainly an old trick, one that liberation armies of various sorts have not hesitated to use at various times. The Balkans of the 1990s are not proving an exception in this respect. This being said, in a sense, one should not be surprised by this non-integrative vision of political order and justice in contested areas. The legacy of unresolved rights claims and the resulting accumulation of resentment tend to lead over time to a political culture that no longer recognizes the necessity of reciprocity and mutuality of rights – a culture of hatred and revenge. It is understandable that implementing the elective theory of the nation may not always be an option, at least immediately, in regions with heavy and violent ethnic legacies, where local cultures have been repressed but not entirely eradicated and replaced by mutually satisfactory procedures and values of identification. In such regions, the unresolved contesting of rights claims has prevented the establishment of a secure, inwardly open culture of territorial sovereignty that is tolerant to the “other,” one where the “other” is accepted as a member of the pluralist community (because it is a part and an expression of the mutually recognized and integrated polity). These unresolved claims have therefore left problematic the status of both the nation and the people who, *volus nolens*, are part of it, and has led the way to insecurities, fears of uncertainties, a paranoid psyche, and, hence, violence. As the saying goes: “In every terrorist, there is a terrorized person.” After all, even established and fully recognized nations are not always entirely immune to the sirens of ethnic nationalism when themselves threatened in their international standing, as demonstrated by the cases of modern Germany. However, in the end, ethnic nationalism cannot be presented as the only viable and legitimate political option in the long run, from a democratic point of view. Indeed, this leaves the door too open to the establishment of authoritarian and corrupted polities of the kind that international democratic culture claims to oppose. To find a balance permitting the defence of the human rights of individuals in a region crippled by ethnic nationalist pathologies without enhancing the cause of the proponents of these pathologies is certainly a major issue today, and a difficult one to tackle and solve. The situation is complicated by the fact that the “activism” of these local leaders, the military challenge that they present to the established powers in the region of the conflict, is also what brings a polarization of the tensions on the ground and leads, ultimately, to the involvement of the international community. Without this polarization, experience shows that it is difficult to get the international community’s attention.
87. This is not to say that considerations connected with the principle of self-determination – the international community did not explicitly cast the issue of the partition of Yugoslavia in terms of self-determination – play no guiding role in these countries’ deliberation. Such considerations play a role in conjunction with the factors having to do with the political – hence, the legal – culture of these countries. In addition, it should be added here that the principle of self-determination was largely conceptualized and envisioned in practice after the Second World War (for a full history of the concept, see Cassese, A., *International Law in a Divided World* (see note 61, above), 131ff) in the context of decolonization, to be applied to countries (such as those in Africa and South-East Asia) that stood outside the “ring” of developed and Western countries.



In some sense, the fact that self-determination issues in the 1990s arose in a quite different context also influenced the way in which major Western powers addressed them. While secession and self-determination were viewed as ways to put a stop to human rights violations incurred during violence among communities in the Balkans, they were also viewed as a possible source of regional instability – one claim of self-determination could generate more such claims and even lead to “rapprochement” among identical or similar ethnic communities divided by political borders. The Western powers were uneasy about creating political entities along the lines of “natural communities.” Hence the Western powers were mainly reluctant to recognize claims of self-determination, as was seen in Bosnia, and as was shown in Kosovo with regard to discussions over its future status (independence, autonomy, and so on). In the end, however, self-determination was indeed what happened.

More generally, one of the questions left pending out of the experience in the Balkans regarding self-determination is how to ensure that calling upon the principle of self-determination does not favour the development of an undemocratic nationalism. How is it possible for the relatively cosmopolitan commitment of the Western democratic powers – who, wielding international solidarity, were hoping to contribute to the establishment of democratized polities in the Balkans – to take part in the management of ethnic conflicts and still avoid unwillingly favouring the rise of local semi-authoritarian polities? One way to do so is to try to democratize the oppressive elements in the established political structure, as noted above – in other words, not to prejudge self-determination as the easiest and most obvious solution. Indeed, self-determination has an ambiguous historical and conceptual relationship with democracy: on the one hand, self-determination echoes the democratic notions and values of autonomy, self-government, and so on; on the other hand, it has a strong relationship with the notion of “*peuple*” – a notion that, defined, loosely, made possible the recognition of the coalescence of ethnicities as a *peuple*, at least formally for the needs of post-colonial politics, in the context of decolonization in South-East Asia and Africa. Between such ethnic communities the lines of differentiation did not necessarily appear strong enough, at least to outside legislators and key members of the international community of the time, to make a case for national demarcation and identification – hence the multi-ethnic and multi-religious societies which emerged in the waves of decolonization during the post-Second World War period and the 1960s. Out of this coalescence, however, also came the problems that most of them are now encountering. However, in the case of the Balkans, the lines of differentiation already existed and were clear enough for both inside actors (especially when reactivated by local leaders) and external actors. This was due to the very historically charged character of the ethnic question in the region, but also due to the fact that within the Yugoslav federation there were already federal “borders” between the republics. It is in this context that the international community was led to endorse the claims of ethnic groups, hoping then that national polities would not discriminate against the minorities within their borders; after all, a nation often has an ethnic basis, but an open one that is oriented towards integration and granting newcomers or people of other ethnicities full rights and participation in the community.

The fact that this is not happening in the Balkans offers two lessons that should be considered. Firstly, a minority is better off in a structure where there are a lot of minorities (multi-ethnicity, plurality of religions, and so on), as is the case in a number of countries in South-East Asia and Africa. A confrontation between one majority and one minority makes it difficult for the rights of the minority to be protected. The second lesson is that the international community contributed to the establishment of polities along ethnic and discriminatory lines which were against the very principle of self-determination. See Browlie, I., 1990. *Principles of Public International Law*. Oxford: Oxford University Press, 597.

88. This does not exclude the existence of a number of differences in the universalist and individualist aspects of their national political culture and the ways they project this culture at the international level in multilateral settings.
89. This expression is borrowed from Dumont, L., *German Ideology* (see note 85, above), 16.
90. To give a complete picture of the culture of democratic individualism as the modern meta-culture, it would be necessary to account for the social, economic, and political pathologies it also conveys.
91. See Delmas-Marty, M., *Pour un droit commun* (see note 60, above), 119–120.
92. The limitations of international action are even greater when applied to Africa. Here, the identification process, and therefore the solidarity reflex, have more difficulty in finding their way.
93. As mentioned earlier, the claims of the actors on the ground – be they the challengers of the established power or the challenged – are often reacting and tailored to the semi-fluidity or relative malleability of international democratic culture. They quickly learn to play the margins of manoeuvre that such a culture encompasses.
94. On this point, see Hoffmann, S., 1996. “Sovereignty and the Ethics of Intervention,” in *The Ethics and Politics of Humanitarian Intervention*. Notre Dame: University of Notre Dame Press.
95. The concerns expressed by several Permanent Members of the Security Council at the moment of the establishment of these two ad-hoc tribunals anticipated the strong reservations manifested – namely by the United States – on the occasion of the signature, in Rome in the summer of 1998, of the text establishing the International Criminal Court. This is logical, since the establishment of the ad-hoc tribunals accelerated and facilitated the creation of the International Criminal Court.
96. Unfortunately, this sense of disgrace seems to be forgotten very quickly, since such events do not seem to serve as lessons for the future. This is shown by the East Timor situation in the summer of 1999.
97. The elements of pressure and lack of time tend to be overlooked by commentators on United Nations affairs. This is highly undesirable, because they are crucial issues. Although the United Nations and the Security Council are criticized and stigmatized for the slowness of their procedures, often for good reason, this is not always the case. Nor do they always have all the time in the world to make up their minds. At least during the period of 1992–1996, the Security Council had to react quickly to unfolding events. Obviously, acting in urgency did not necessarily mean that the Security Council generally acted in a clear-cut and timely fashion; between 1992 and 1996, the contrary was, in fact, the case. This proved to be a major problem in the long run, because the answers that the Security Council often meant to be provisional, formulated to address the problem of the day, ended up going on record, in the books and on the ground, for better or for worse. The fact that the Security Council is very often under time pressure is one of the factors that makes it difficult to envision judicial review, namely by the International Court of Justice, as a way to evaluate and state the legality and legitimacy of the decisions and resolutions that it adopts. If, as Jose Alvarez indicates (see chapter 3 of this book), there is disagreement among international lawyers on many of the issues with which the Security Council has to deal, it is hard to imagine how judicial review would be able to quickly generate help for the Security Council, speed very often being essential in a crisis situation. Assuming that the Court would even be able to concur on a position, it is likely that by the time the decision was issued, it would probably be too late. In a way, while media temporality is too fast for political decisions, legal temporality is too slow. Political temporality, having to react to unfolding crises, stands in between. That is why, in the end, institutional and customary practice tends to be the rule, and is in a sense legal and constitutes precedent as long as it

appears to be within the (usually broad) purposes of the organization (see chapter 3 of this book). Hence, Alvarez also states: "Since 1945, thanks in significant part to the ways IO charters have been (flexibly) interpreted, most changes in international law have occurred within the framework of international organizations. IOs have radically transformed the most traditional sources of international law – treaties."

98. Indications of this can be seen in the handling of the Kosovo crisis through high-altitude and high-technology air bombing – to avoid military casualties – and the reluctance of Western powers to make the independence of Kosovo an explicit clause in the peace agreement.
99. I owe this conceptualization of the Security Council as an entity internalizing and externalizing the problematic coherence of the international system to the ideas explored by Philip Allott. See Allott, P., 1990. *Eunomia: New Order for a New World*. Oxford: Oxford University Press. At a more general – historical and systemic – level, it is possible to add the following observations.
  - The externalization process of the culture of the major democratic powers influences the shaping of international democratic culture.
  - This externalization process is not systematic in the sense that it does not elevate to the international level all the internal aspects of the national democratic cultures. Also, it does not mean the eradication of a sense of hierarchy or priority for democratic powers between their commitment to the international level and their commitment to their own national realm.
  - The selective and prioritized externalization and internationalization of the national level ensures, at the international level, that the decision-making process is structurally inhabited by a number of dilemmas.
  - The implementation of international action in response to these dilemmas accounts for the conservative/reproductive/transformational (and if failure is encountered, possibly regressive) dimension of the United Nations' actions.
  - The international dimension comes back to the national internal dimension, and eventually affects it in a boomerang effect. For instance, the involvement of France in peacekeeping operations, and the modalities and outcomes of this involvement, can influence, in return, France's national political culture, in terms of its self-image, and so on.
  - The process returns to the first point mentioned above, and starts a new cycle of action and interaction.
100. On this point, see chapter 8 of this book. At a more general level, the power of interpretation of a constitutional organ varies with its level of legitimacy, and this legitimacy is itself affected by the concrete outcomes of decisions taken on the basis of this power of interpretation. When the outcome is positive, this can strengthen the legitimacy of the organization, and enhance further its powers of interpretation; when the outcome is negative, this can weaken the legitimacy of the organization, and further reduce its power of interpretation.
101. The lessons learned from past peacekeeping operations in terms of logistics, military deployment, and so on, are extremely important (see the recent "Report of the Panel on United Nations Peace Operations," UN Doc. A/55/305-S/2000/809, August 2000). However, one cannot expect from these lessons the solution to all the problems of peacekeeping operations. After all, the well-documented mistakes made in Bosnia and Rwanda did not prevent the United Nations from putting itself in embarrassing situations in Liberia and East Timor. This should not come as a surprise, since it is primarily from normative and legitimacy ambiguities that operational shortcomings derive.
102. As the selectiveness of intervention shows.

103. In terms of historical evolution, nothing happens out of the blue. Political and normative imagination is largely the product of a maturation process.
104. This does not exclude resistance from powerful member states, as the attitude of the United States *vis-à-vis* the International Criminal Court shows.
105. This could be the case for international organizations dealing with trade, finance, or development issues, such as the World Trade Organization, the World Bank, and the International Monetary Fund (this is not necessarily the case, however, for the OECD, which is more on the side of the welfare state tradition at the international level). However, even this is not certain. The participation now taken in these areas by the private sector and the incapacity of these institutions to anticipate the recent waves of financial crises have triggered numerous questions about what could and should be their role in the coming years. See, for instance, *The Architecture of Multilateral Financial Institutions: From Bretton Woods to the 21<sup>st</sup> Century*. New York: The Reinventing Bretton Woods Committee, March 1997.
106. Nonetheless, even in these areas, one should not exaggerate the role of the United Nations; for example, the organization had hardly any role in the disarmament negotiations that took place between the United States and Soviet Union in the 1970s and 1980s.
107. The Military Staff Committee, besides the fact that it was never used, was envisioned more as an advisory unit than as an operational body. On the other hand, as Jose Alvarez indicates in chapter 3 of this book, the United Nations has deployed forces without having Article 43 agreements in place, and without the strategic direction of the Military Staff Committee.
108. In daily political life, the main criteria for evaluating the legitimacy of the United Nations tend to be linked with the issues that the major member states value as strategic. In spite of the declared formality and universality of application of the United Nations' principles, there is a selective process applied to UN actions. This selectivity echoes the strategic priorities – themselves connected with international balances of power and the political cultures of the countries involved – assigned by major member states to one crisis over another.
109. As we have seen in the case of Kosovo, the need to get the approval of the Security Council to launch the air bombing operation could not really be imposed. This was more due to NATO's direction by major powers than to the fact that NATO was a defence alliance – during the Cold War, its defence alliance character justified the idea that NATO could, in principle, react to an Eastern attack without the formal approval of the Security Council. Meanwhile, since the end of the Cold War, the nature of NATO has changed to the point where it is no longer, at least in a strict sense, a defence alliance. As a result, one would think that Security Council approval would now be a requirement. It is also hard to believe that any regional intervention conducted by developing countries in peripheral areas would not need the endorsement of the UN Security Council. (See chapter 3 of this book on this question; note 132 for example: “Article 5 of the NATO treaty, basing itself expressly on Article 51 of the UN Charter, permits NATO collective action in case of attack upon a member state. North Atlantic Treaty, 34 UNTS 244 (4 April 1949). The absence of a clear attack on a NATO member made this article, in the views of most commentators, inoperative.”).
110. It seems that the more the United Nations became a forum to give voice to developing countries in the 1960s and 1970s, leading to the loss of control of the United Nations by the main Western powers, the more a number of powerful member states – especially the United States – deprived the United Nations of the importance they had initially attached to it. The low level of institutionalization of the United Nations as an organization – compared, for instance, to the World Bank and the International

Monetary Fund – must be seen largely in this light; for example, the United Nations' extremely poor management of human resources.

111. The fact that the United States is the main international actor leads to a situation in which, even when it is unenlightened on the right policy to conduct – even when making policy mistakes – its ignorance and mistakes become a point of reference; other countries have to position themselves in relation to actions by the United States. The American policies, national (as with the international propagation of the domestic American debates on liberal democracy) and international, are necessarily of global importance, since they come from the dominating power.
112. No one dares to challenge the hegemony, and the hegemony is secure enough to be benevolent and generous in sharing goods and generating public goods.
113. Axiological principles are both descriptive and prescriptive. The combination of these two qualities allows them to play a role in the enhancement of reality. Unless they are somehow real and descriptive, reality and its actors do not relate to them. But unless they do more than simply reflect existing realities, they cannot improve reality. Hence, a reasonable distance and dialogue must be maintained between the level of principles and that of reality.

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## The legitimacy of Security Council activities under Chapter VII of the UN Charter since the end of the Cold War

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*Tetsuo Sato\**

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### Introduction

The provisions relating to the Security Council in the United Nations Charter of 2000 do not look much different to those in the Charter of 1945. Articles 23 and 27 were amended in 1965 to increase the membership of the Security Council from its original 11 members to the present 15, with a corresponding change from seven to nine votes for the adoption of resolutions. No change was made in the five Permanent Members' veto power over substantive matters.<sup>1</sup>

However, the practice of the Security Council, particularly the enforcement activities based upon the powers enjoyed by the Security Council under Chapter VII of the UN Charter, have changed dramatically since the end of the Cold War.<sup>2</sup> And with this change, a series of new legal problems have appeared. Kirgis succinctly summarized the controversial situation of the Security Council as follows:

The most serious legal or quasi-legal issues surrounding the post-Cold War Security Council have so far been of the sort an observer during the Cold War would hardly have dreamt could reach centre stage. They have had much more to do with the possible abuse of power than with abdication of it. The Council has invoked Chapter VII when the threat to international peace was not self-evident, and has for the most part omitted any justification for finding such a threat. It has

invoked Chapter VII to authorise member states to use armed force to preserve or restore peace, without relying on Article 42 and without any Article 43 agreements in place.

On the quasi-legislative front, the Council has established war crimes tribunals and in connection with them has issued directives to member states to co-operate. It has created a compensation commission to determine claims against an aggressor state. It has empowered the tribunals and the commission to apply norms that do not necessarily reflect pre-existing international law.

The Council has made quasi-judicial determinations that go well beyond those inherent in its express authority to determine threats to the peace, breaches of the peace and acts of aggression. It has also gone beyond its readily implied authority to interpret and apply relevant Charter provisions or to interpret its own resolutions. It has done so despite its own nonjudicial character, and without procedural safeguards.<sup>3</sup>

The intended purpose of this chapter is threefold. It is, firstly, to give, as a preliminary observation for the following analysis, an overall idea of the possible position to be given to the Security Council in the United Nations and in the international community as a whole; secondly, to demonstrate that the Security Council has stepped into legally grey areas from the perspective of the UN Charter, while most of the cases could be legally justified; and finally, to emphasize the importance and role of legitimacy in these legally grey areas.

## Chapter VII of the UN Charter and practice during the Cold War period

### *Interpretation of the Charter*

International organizations are functional entities established by states on the basis of agreements (constituent instruments). Since the purposes, functions, powers and competence, organizational structures, activities, and all other important matters of international organizations are, in essence, provided in their constituent instruments, any legal analysis of their structures and activities should logically start with analyses and interpretations of those constituent instruments. In fact, many of the disagreements and disputes concerning their structures and activities, when discussed in the organs of international organizations or referred to the International Court of Justice, have been argued on the level of interpretation of their constituent instruments. On the other hand, the interpretation of law always leaves some room for discretion, and involves

a value judgement by the interpreter in selecting one of several possible meanings within the framework of the norm concerned. In this sense, the matter of who is to interpret and apply a norm is decisive in determining its content. Treaties are generally interpreted and applied by the states parties themselves. In the case of constituent instruments, the organs of international organizations also interpret and apply those provisions related to their activities as an inseparable process of their operation.

There is no provision concerning interpretation in the Charter of the United Nations. To indicate the conclusion of discussions in the San Francisco Conference, there exists only the final report of Committee IV/2 (Legal Problems) of the Conference, a part of which is as follows:

In the course of the operation from day to day of the various organs of the Organisation, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers. It will be manifested in the functioning of such a body as the General Assembly, the Security Council, or the International Court of Justice. Accordingly, it is not necessary to include in the Charter a provision either authorising or approving the normal operation of this principle.

Difficulties may conceivably arise in the event that there should be a difference of opinion among the organs of the Organisation concerning the correct interpretation of a provision of the Charter. Thus, two organs may conceivably hold and may express or even act upon different views. Under unitary forms of national government the final determination of such a question may be vested in the highest court or in some other national authority. However, the nature of the Organisation and of its operation would not seem to be such as to invite the inclusion in the Charter of any provision of this nature . . . In brief, the Members or the organs of the Organisation might have recourse to various expedients in order to obtain an appropriate interpretation . . .

It is to be understood, of course, that if an interpretation made by any organ of the Organisation or by a committee of jurists is not generally acceptable it will be without binding force . . .<sup>4</sup>

It can be seen from this report that the possibility was clearly rejected that an organ (such as the ICJ or the General Assembly) of the United Nations be given the power to authoritatively interpret the Charter either in whole or partially, its interpretation binding all the other organs and all the member states of the United Nations.<sup>5</sup> As a consequence, each member state could question an interpretation of the Charter made by one of the organs in taking a specific measure. In so doing, a member state questions whether the measure is in accordance with the Charter, and therefore whether it is lawful.<sup>6</sup>



*What role does the UN Charter give to the Security Council, particularly under Chapter VII of the Charter?*

The United Nations was conceived by the four great powers – the Soviet Union, the United Kingdom, the United States of America, and China – at the Dumbarton Oaks Conference in 1944. The goal was primarily to create an organization that would serve as a mechanism for post–Second World War international security.<sup>7</sup> The Dumbarton Oaks plan was refined by Stalin, Churchill, and Roosevelt at Yalta in early 1945, and was moulded into the Charter at San Francisco later that year.<sup>8</sup>

Article 1 of the Charter, “The Purposes of the United Nations,” refers in paragraph 1 to the effort to “maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.” Article 24 of Chapter V, “The Security Council,” confers on the Security Council primary responsibility for the maintenance of international peace and security.

Chapter VII of the Charter enables the Security Council to adopt economic sanctions and military measures where there is a “threat to the peace, breach of the peace or act of aggression,” thereby equipping it with enforcement powers in disputes or situations that are particularly serious.<sup>9</sup> To bring Chapter VII into play, Article 39 states that it is for the Security Council to determine that the necessary conditions are present; that is, that one of the three situations above exists. Once such a determination has been made under Article 39, it is open to the Security Council to make recommendations, or to decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security. Article 41 is primarily concerned with economic sanctions. Article 42 is concerned with military sanctions, and Article 43 provides for member states to conclude agreements with the United Nations under which their forces will be available for use when needed.

With these provisions, the Security Council could be considered as a primarily executive organ equipped with policing power and the capacity to use coercive force in the form of military and non-military sanctions.

*What role did the Security Council play during the Cold War period?*

The long period that we generally identify as the “Cold War” has meant an almost total paralysis of the Security Council in the exercise of its enforcement powers under Chapter VII. The Council has been crippled by its ideological polarization and the abuse of the veto power of the Permanent Members. During this period, only three enforcement actions have been

taken under Chapter VII: the attack upon the Republic of Korea, the situation in Southern Rhodesia, and the internal situation in South Africa.<sup>10</sup>

*The attack upon the Republic of Korea*

The Security Council, through Resolution 82 (1950), determined that the armed attack by North Korea constituted a breach of the peace, and called upon the North Korean authorities to withdraw their forces to the 38th parallel. Through Resolutions 83 (1950) and 84 (1950), it recommended that member states assist Korea in repelling the armed attack, and that they make such assistance available to a unified command under the United States, which was authorized to use the United Nations flag and was obliged only to report to the Security Council. The collective military action undertaken against North Korea was led by the United States with troops contributed by 16 states. The Security Council had no authority over the conduct of military operations. As soon as the representative of the Soviet Union came back to the Security Council, it ceased to play an active role. The General Assembly, however, played this role and buttressed its position by adopting the "Uniting for Peace" Resolution.

*The situation in Southern Rhodesia*

Against the unilateral declaration of independence by the authorities of Southern Rhodesia, which was a non-self-governing territory, the Security Council, in Resolution 216 (1965), declared the annulment of this declaration of independence. Furthermore, after determining the existence of a threat to peace, in Resolution 221 (1966), it "call[ed] upon" the United Kingdom "to prevent by the use of force if necessary the arrival at Beira" (Mozambique), which is connected to Rhodesia by pipeline, of ships presumably carrying oil destined for Rhodesia, and "empower[ed]" it to arrest a tanker concerned. The Security Council also imposed economic and other sanctions, in stages, under Article 41.

*The internal situation in South Africa*

The Security Council had been beset by questions related to the racial policy of South Africa since 1963, and it had condemned the apartheid policy several times and called for an arms embargo in Resolution 181 (1963). It was only in Resolution 418 (1977) that the Security Council actually imposed such a weapons embargo. Here the Security Council found the existence of a threat to peace only in relation to South Africa's acquisition of weapons and materiel, rather than in the apartheid policy itself. However, it seems clear that the Security Council was motivated by considerations concerning the apartheid policy, which were already sufficiently aggravated at that time.

*Some comments*

Concerning Article 39, “Threat to Peace,” despite its clear, direct allusion to an armed conflict, the concept of a threat to peace evolved in the practice of the Security Council to refer to something broader than that. The Security Council could be considered to have included in this concept such cases as the denial of self-determination to the black majority in Southern Rhodesia, and the large-scale, systematic denial of basic human rights in South Africa.

Concerning Article 39, “Recommendations,” and Article 42, in the Cold War period, one of the crucial questions was whether the Council could take military enforcement actions under Article 42 in the absence of the agreements and the machinery provided for in Articles 43–47. The prevalent opinion at that time was that Article 42 was not applicable without special agreements to be concluded under Article 43.<sup>11</sup> Thus, the Korean action and possibly the action called for in the Resolution on Southern Rhodesia were considered to have been taken on the basis of a “recommendation” by the Security Council under Article 39.<sup>12</sup> It is true that these were scarcely the kinds of “recommendations” that the drafters of the Charter had in mind when they adopted Article 39. At the time, however, this concept of military measures on the basis of a Council “recommendation” was accepted by a great majority of members, with the major exception of the Soviet bloc.<sup>13</sup>

The actions of the Security Council in the two cases of Korea and Southern Rhodesia were not explicitly based upon relevant articles of the Charter. To that extent, the resolutions mentioned above worked as a legitimizing factor for the use of force by recommending or delegating forcible actions to individual states for specified purposes.

Apart from a few examples, the rule of the Security Council during the Cold War period was characterized by virtual paralysis, deep disagreements and mistrust among the Permanent Members, and an inability to prevent, manage, or redress the many conflicts with which it was faced.<sup>14</sup>

### Security Council activities under Chapter VII of the UN Charter since the end of the Cold War

What have been the main activities of the Security Council under Chapter VII of the UN Charter since the end of the Cold War? Are they legal in the sense that they are in conformity with international law, and constitutional in the sense that they are in conformity with the Charter, which is the constitution of the United Nations? Some of the main and particularly controversial cases will be discussed below.

*Article 39*

*Interference into internal affairs of member states by the United Nations on humanitarian grounds in the case of the Kurds (Resolution 688 (1991)), of Somalia, and other cases*

The notion of “threat to the peace” is now interpreted as including essentially internal situations that might degenerate into an international conflict. The Security Council referred to “the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions which threaten international peace and security in the region,”<sup>15</sup> and “the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitut[ing] a threat to international peace and security.”<sup>16</sup> One should also consider the civil war in Liberia, in regard to which the Security Council determined “that the deterioration of the situation [in this region] constitute[d] a threat to international peace and security, particularly in West Africa as a whole”;<sup>17</sup> the civil war and genocide in Rwanda, in regard to which the Security Council determined “that the magnitude of the humanitarian crisis [in this region] constitute[d] a threat to peace and security in the region”;<sup>18</sup> and the coup against the elected President of Haiti.<sup>19</sup> In this context, all of these cases were seen in a similar light by the Security Council.<sup>20</sup>

This evolution was defended from the viewpoint of the real-life dynamics of ethnic and similar conflicts as follows:

*Ethnic conflict blurs the line between domestic and international, state and non-state actors, as well as that between Chapter VI and VII.* Ethnic conflict has also made a mockery of the doctrine that only interstate conflict can be a “threat to international peace and security” (Article 39). Conflicts in which more than half a million people get killed and hundreds of thousands of people have to flee are a threat to international peace and security in a highly interdependent world. The Security Council was absolutely right to decide accordingly in the case of Somalia, Liberia, Angola, Rwanda, etc.<sup>21</sup>

The Appeals Chamber of the International Tribunal for the Former Yugoslavia acknowledged this in the Tadic Case by saying:

[E]ven if [an armed conflict in the territory of the Former Yugoslavia] were considered merely as an “internal armed conflict”, it would still constitute a “threat to the peace” according to the settled practice of the Security Council and the common understanding of the United Nations membership in general. Indeed,

the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a “threat to the peace” and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia. It can thus be said that there is a common understanding, manifested by the “subsequent practice” of the membership of the United Nations at large, that the “threat to the peace” of Article 39 may include, as one of its species, internal armed conflicts.<sup>22</sup>

*The Libyan case: Resolutions 731 (1992) and 748 (1992)*

Security Council Resolution 731 of 21 January 1992, *inter alia*, called upon Libya to extradite two suspects allegedly linked to the bombing of an American airliner over Lockerbie to either the United States or the United Kingdom for trial. In response, Libya brought an action before the International Court of Justice and requested the Court to indicate provisional measures to prevent the United States from taking coercive actions against Libya, and to ensure that no steps were taken that would prejudice Libya’s rights. Three days after the close of oral hearings in the case, the Security Council adopted Resolution 748 as a binding decision requiring Libya to extradite the persons in question and imposing sanctions upon it should it fail to do so by 15 April of that year.

Graefrath criticized this action as follows:

With due respect to the wisdom of the Security Council, it seems to me rather doubtful whether a failure to fully respond to [the] United States’ requests to surrender suspects to the United States or the United Kingdom and to pay compensation can be interpreted, within the meaning of Article 39 of the Charter, as a threat to international peace; especially when it has not been established that Libya violated international law.<sup>23</sup>

A serious and cautious consideration is required on the matter of whether the Security Council could reasonably determine the existence of a threat to international peace and security three and a half years after the Lockerbie bombing, simply because Libya had not surrendered the suspects.

*Article 41*

*The Libyan case: Resolutions 731 (1992) and 748 (1992)*

Graefrath further points out that “the Security Council by Resolution 748 (1992) transformed the terms of settlement recommended by Resolution 731 (1992) under Chapter VI into a binding dispute settlement under Chapter VII, a procedure that is not provided for in the Charter,”<sup>24</sup> citing the following statement by G. Arangio-Ruiz:

As stipulated unambiguously in the Charter, the Security Council's powers consisted of making non-binding recommendations, under Chapter VI, which dealt with dispute settlement, and also binding decisions under Chapter VII, which dealt with measures of collective security. The main point was that, according to the doctrinal view – which did not appear to be seriously challenged either in the legal literature or in practice – the Security Council would not be empowered, when acting under Chapter VII, to impose settlements under Chapter VI in such a manner as to transform its recommendatory function under Chapter VI into binding settlements of disputes or situations.<sup>25</sup>

This is a rather delicate and controversial point, and will be further dealt with later in this chapter.

*Post-war settlement in the Gulf War, including the destruction of Iraq's chemical and biological weapons, and the delimitation of the boundary between Iraq and Kuwait (Resolution 687 (1991))*

Resolution 687 of 3 April 1991 provides for the inviolability of the international boundary between Iraq and Kuwait, the demarcation of that boundary and the establishment of a UN observer unit (UNIKOM), the destruction of Iraq's chemical, biological, and nuclear weapons and long-range ballistic missiles, and an undertaking by Iraq not to develop any such weapons in the future. A Special Commission (UNSCOM) and the IAEA were to monitor and verify Iraq's compliance. Iraq was to return Kuwaiti property and was declared liable for loss and damage as a result of its unlawful invasion and occupation of Kuwait. A fund to pay compensation was to be established. Sanctions against Iraq were to be maintained until it had fulfilled its disarmament obligations under the resolution. Kuwaiti and third-country nationals detained in Iraq were to be repatriated. Finally, the Security Council declared, "upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the provisions above, a formal cease-fire is effective between Iraq and Kuwait and the Member States co-operating with Kuwait in accordance with Resolution 678 (1991)."

Graefrath criticized this in the following terms:

[A]s the different structures of Chapter VI and Chapter VII demonstrate, the Security Council under Chapter VII has a policing function only ...

Therefore, when acting under Chapter VII the Security Council action normally is confined to stop[ping] military activities or avert[ing] a specific danger for the maintenance of peace, in order to allow the functioning of peaceful dispute settlement procedures to solve the conflict which led to the breach of the peace.<sup>26</sup>

To accept that the Security Council could impose its reparation scheme on Iraq and other member States of the United Nations would run completely against the system of the Charter. It would not only confuse political and judicial powers vested intentionally in different organs, but also endow the Security Council with legislative powers which States never have transferred to any United Nations organ.<sup>27</sup>

*Establishment of an International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law (Resolution 827 (1993) and Resolution 955 (1994))*

The Security Council, in Resolution 827 (1993), established the “International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.”<sup>28</sup> Similarly, the Security Council, in Resolution 955 (1994), established the “International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994.”<sup>29</sup>

The establishment of these tribunals by resolutions of the Security Council gave rise to reservations and criticism. It was argued that the authority to establish a tribunal to try offences being committed in the territory of any state was essentially to be left to the state(s) with jurisdiction over the individuals concerned; that the Charter, when adopted, constituted treaty obligations that did not include the establishment of a compulsory criminal jurisdiction; and that neither had the member states given such jurisdiction to the UN thereafter.<sup>30</sup>

However, the Appeals Chamber of the International Tribunal for the Former Yugoslavia affirmed its legality in the Tadic Case, saying:

The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its functions or the exercise of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, *i.e.*, as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.<sup>31</sup>

*Article 42*

*Authorization of the use of force by member states in the Gulf War (Resolution 678 (1990)) and other cases*

The Security Council resorted to a formula authorizing or calling upon member states generally to act with the Security Council’s blessing but without its control. In the Gulf War, it authorized “Member States co-

operating with the Government of Kuwait ... to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.”<sup>32</sup> In different contexts of a lesser scale, the Security Council resorted to this formula in such cases as Somalia,<sup>33</sup> Bosnia-Herzegovina,<sup>34</sup> Rwanda,<sup>35</sup> and Haiti.<sup>36</sup> There occurred, particularly in relation to Security Council Resolution 678 (1990), a great deal of controversy over their legality, constitutionality, and possible legal grounds.

The arguments against this formula can be summarized as follows:

[C]haracterising an action as taken under Article 42 should depend on whether the Council gave itself the means to exercise control and direction over the measures adopted. The resolution in question contradicts the basic premises of Article 42, for the total lack of direction and control by the Council over the actions it authorises. The vagueness of the delegation of authority provided by paragraph 2 is striking; the wide discretion enjoyed by the States concerned as to the “necessary means” to use, the lack of any indication about the command and co-ordination of the military operation, the vagueness of the purpose of the authorisation, and the lack of even a clear reporting obligation for the coalition States make Desert Storm an operation external to the United Nations, as the former Secretary-General himself has taken pains to underline on a few occasions.<sup>37</sup>

The majority of legal scholars, however, although more or less reluctantly, are ready to accept this formula as realistically practical and acceptable. This position seems to be based upon several elements.<sup>38</sup> Some provisions in the Charter, such as Articles 48 and 53, expressly envisage the Council authorizing action by others. As the Secretary-General acknowledged, the United Nations is not equipped to take command of a major military operation involving the use of force against an aggressor. To exclude the possibility of authorization would mean no possibility of the United Nations taking military enforcement action on any substantial scale. It is generally considered as “unlikely that in the near future any operation of importance will be conducted otherwise than by means of a force that is authorised by the Security Council or is totally outside the UN system.”<sup>39</sup>

#### *Unilateral use of force for the implementation of Resolution 687 (1991)*

The United Nations ran into serious difficulties over the implementation of Resolution 687 (1991). This resolution assumed Iraqi cooperation, and the main problems with the implementation of the resolution came out of its enforcement against an unwilling Iraq. In this sense, one could say that the Security Council paid for the decision of the coalition not to destroy Saddam Hussein’s regime under the cover of the authorization to use “all necessary measures ... to restore international peace and security.”



However, it is doubtful whether it would have been politically feasible at the time of the adoption of Resolution 687 to provide for the issue of enforcement. Those critical of the open-ended authorization of the use of force in Resolution 678 (1990) were not likely to accept a general authority to use force to secure compliance with Resolution 687.<sup>40</sup>

Among the various incidents related to Iraq, the matters of disarmament and weapons inspections are particularly relevant to the implementation of Resolution 687. Iraq obstructed the implementation by denying access to the IAEA and the UNSCOM weapons inspectors. The Security Council unanimously adopted Resolution 707 (1991), in which it condemned Iraq's serious violation of a number of its obligations under Resolution 687. It also adopted Resolution 715 (1991) to supplement Resolution 687. Iraq, on the other hand, continued its obstruction and finally informed UNSCOM that the UN weapons inspectors would no longer be allowed to use their own aircraft. The president of the Security Council issued a statement in which it was determined that Iraq was in material breach of Resolution 687 and its related resolutions, and warned Iraq of the serious consequences that would flow from such continued defiance. Furthermore, the United States, the United Kingdom, and France started air strikes on sites in southern Iraq.<sup>41</sup>

Thus, a question is posed as to whether Resolution 687, the cease-fire resolution, allowed the unilateral use of force without any further Security Council resolution in order to secure the implementation of the cease-fire regime, even in the absence of any use of force by Iraq. The Security Council, in Paragraph 1 of Resolution 687, affirmed all 13 prior resolutions, including Resolution 678, "except as expressly changed below to achieve the goals of this resolution, including a formal cease-fire," and declared, in Paragraph 33, that a formal cease-fire was effective upon official acceptance by Iraq. The authorization to use force in Resolution 678 is therefore no longer in force. Thus, one commentator concluded:

In the absence of express and formal Security Council authorisation the cease-fire must remain in force. The UK Minister's argument that, "in the light of Iraq's continued breaches of Security Council Resolution 687 and thus of the cease-fire terms, and of the repeated warnings given by the Security Council and members of the coalition, their [the USA] forces were entitled to take necessary and proportionate action in order to ensure Iraqi compliance with those terms" is not legally convincing.<sup>42</sup>

A series of crises ensued, particularly in 1997 and 1998, concerning the implementation of Resolution 687. The United States announced that it was prepared to use military force as a last resort. Secretary-General Kofi Annan went to Baghdad in February 1998 and announced an agreement

confirming full compliance by Iraq with all relevant resolutions, including Resolution 687. The Security Council endorsed this Memorandum of Understanding in Resolution 1154 (1998), adopted under Chapter VII, in which the Security Council warned that “any violation would have the severest consequences for Iraq.”<sup>43</sup> However, while the United States asserted that unilateral forcible action in response to violations remained possible, a number of Council members, including Russia, China, and France, stated that this resolution could not be relied upon as automatically authorizing the use of force against Iraq.<sup>44</sup> The Security Council, again, adopted Resolution 1205 (1998), in which it condemned the decision by Iraq to cease cooperation with the Special Commission as a flagrant violation of Resolution 687 (1991) and other relevant resolutions, but did not authorize the use of force against Iraq.

One month later, however, when Iraq again restricted inspections by UNSCOM, the United Kingdom and the United States carried out massive air strikes against Iraq without trying to acquire authorization to use force. Concerning this series of air strikes against Iraq, the following conclusion, reached by Krisch, seems reasonably accurate:

[N]either the interpretation of Resolution 678 (1990), 687 (1991), 1154 (1998) and 1205 (1998) nor state practice since 1991 give indications for United Nations authorization of the threat or use of force in order to enforce Iraq's post-war obligations ... Thus, the reliance on United Nations authority seems motivated by the desire to enhance the appearance of legitimacy despite obvious illegality.<sup>45</sup>

### *The Security Council stepping into legally grey areas*

The brief analysis above of the main and controversial activities of the Security Council under Chapter VII of the UN Charter since the end of the Cold War implies that some of the actions of the Security Council might be ambiguous in terms of their legality and constitutionality. Two important issues will be considered below.

#### *Whether the Security Council has the legal power to impose a binding dispute settlement under Chapter VII*

The essence of the role of the Security Council in maintaining international peace and security lies in its ability to act quickly and decisively to prevent or punish a threat to or breach of the peace, or an act of aggression. Such executive action and enforcement activity could not be accomplished if accompanied, for example, by rigorous and lengthy evidentiary processes involving complicated procedures for gathering facts and hearing witnesses, nor if delayed due to some form of legal appeal mechanism.<sup>46</sup> Thus, Kelsen, for example, argued that the Council need not act

in accordance with existing international law when it is acting to maintain or restore international peace and security. He stated:

The purpose of the enforcement action under Article 39 is not: to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law ... [When it is acting under Chapter VII,] the Security Council would be empowered to establish justice if it considered the existing law as not satisfactory, and hence to enforce a decision which it considered to be just though not in conformity with existing law. The decision enforced by the Security Council may create new law for the concrete case.<sup>47</sup>

The argument that legal rights of states may be infringed upon or suspended by the Security Council in the application of collective enforcement measures is supported by the Charter and the *travaux préparatoires* of the Charter, as well as the practice of the Security Council.<sup>48</sup> Article 1(1) of the Charter provides as follows:

Article 1. The purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

This provision divides the means for maintaining international peace and security into collective measures and peaceful settlement, and it is only in the context of the latter that the Security Council is subject to the constraints of international law and justice. Furthermore, it could be contended that the very notion of enforcement measures implies that the Council has the authority to impinge upon, restrict, or suspend the rights that states are normally entitled to exercise under both customary and conventional international law. Such authority for the Council could be implicit in Chapter VII of the Charter, specifically Articles 39, 41, 42, and 48.<sup>49</sup> Thus, the practice of the Security Council clearly demonstrates that a trade embargo imposed by it could affect rights to engage in commerce as well as rights of free movement by ships on the high seas.

However, it is incorrect to contend that the Security Council is completely unrestrained by the principles of justice and international law when it is taking collective measures under Chapter VII of the UN Charter.<sup>50</sup> To the contrary, it could reasonably be contended that the founding states of the United Nations gave this extraordinary power to the Security Council only on the condition that the scope of this power would be limited to enforcement activities necessary for the purposes of maintaining

international peace and security, excluding adjustment or settlement of international disputes or situations, as is implied in the structure of Article 1(1) of the UN Charter. What is unclear and unresolved is where and how the boundary should be drawn between the two – that is, enforcement activities necessary for the purposes of maintaining international peace and security on the one hand, and adjustment or settlement of international disputes on the other – and not the fact that such a boundary actually exists. As regards this dichotomy, it has been suggested that:

It could well be argued that ... secondary level actions after the initial response has been taken to restore international peace and security should not also fall within the wide discretion of the Council, but should be tested also against the prevailing principles of international law. The further a Security Council action is from its primary activity of maintaining or restoring international peace and security, the more important it is to reassert the key role of international law.<sup>51</sup>

The Security Council resolutions that in effect amount to a determination or characterization of a legal situation are extensive. They include: those that assert that particular acts are illegal and null and void; those demanding international non-recognition; those imposing arms embargoes; those dealing with and recognizing as an authority an ousted regime, rather than the regime in actual control; those imposing peace conditions, defining and guaranteeing boundaries, and determining state responsibility issues; and those establishing international criminal tribunals. Although it might be difficult to draw a clear line between enforcement activities and settlement of international disputes, it must be emphasized that the further a Security Council action is from its enforcement activity for maintaining or restoring international peace and security, the more consideration is to be given to the principles of justice and international law.

*Whether the Security Council could delegate the use of force to member states*

While a general analysis on this point has already been made above, the basic idea underlying the opinions of a majority of legal scholars on this point could be summarized in the following terms:

Article 42 does not itself tie Security Council armed action to Article 43 and does not necessarily depend on a strong Military Staff Committee. Article 42 does contemplate that member states will take armed action deemed necessary by the Council. Thus, one could argue that when the Council has authorised the use of armed force under chapter VII without specifying which article it has relied on, the source of its authority is Article 42. The argument is a pragmatic one, treating the Charter as a constitution capable of growing to meet changing circumstances. By the same token, the Council's power to authorise the use of armed force under

chapter VII may be seen as an implied power that is not literally tied to Article 42, but is consistent with the purpose of that article and emanates from the functional necessity to make the Council's enforcement authority effective.<sup>52</sup>

Criticism, however, persists. Sarooshi, for example, asserts that the Security Council does not possess the competence to delegate to member states the power to decide that a threat to, or breach of, international peace and security has either started or ceased to exist, for several reasons. Firstly, that decision is the very *raison d'être* of Chapter VII, as an Article 39 determination is the gateway to action under Chapter VII. States have delegated this authority to the Security Council on the condition that the Security Council would be the only entity to exercise this power. Secondly, the institutional safeguard of the veto is attached to the Council's decision-making processes. This ensures that states exercise delegated Chapter VII powers only in order to achieve the objectives of the United Nations, and not solely to further their own self-interest in a particular situation. Thirdly, Article 53, on regional arrangements to carry out military enforcement action in order to maintain international peace and security, provides that such action cannot be carried out "without the authorisation of the Security Council." One cannot argue, Sarooshi continues, that the Security Council is allowed to delegate its Article 39 power of determination to individual member states but not to regional arrangements, since a regional arrangement is, after all, only a collection of UN member states. In the case of the Gulf War, Resolution 678 set two objectives: namely, to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions, and to restore international peace and security in the area. Sarooshi considers that the second objective involves delegating to member states the competence to decide when international peace and security in the region have been restored, and that the purported delegation by the Council of this broad power to member states is thus unlawful.<sup>53</sup>

Persistent criticisms seem to indicate Resolution 678's fragile constitutionality and the necessity of legitimacy in this new area of enforcement power delegation. It had already been pointed out that this mechanism may be: "Legal? Yes, technically. But legitimate? A borderline proposition at best."<sup>54</sup>

### Legitimacy in the light of the UN Charter as the constitution of the international community

Having briefly analysed some of the main cases of Security Council activities under Chapter VII of the UN Charter since the end of the Cold War in

the light of their legality and constitutionality, this chapter will now discuss the legitimacy<sup>55</sup> of these and other activities of the Security Council. This discussion will be based upon the following two basic themes:

- The more the Security Council steps into legally grey areas, the more legitimacy is required for its activities to be effective and acceptable.
- Legitimization of Security Council activities in the light of the UN Charter as the constitution of the international community needs a higher degree of support in terms of separation of powers and judicial review which aims at preventing abuse of and ensuring proper exercise of powers. As the Security Council has more occasions to exercise its strong powers, it is necessary to examine whether, and if so, to what extent, separation of powers and judicial review as fundamental mechanisms for preventing abuse of and ensuring proper exercise of powers in centralized national governing systems can be applied to the United Nations system.<sup>56</sup>

*The UN Charter as the constitution of the international community*

There have been two streams of thought that regard the UN Charter as a constitution.<sup>57</sup> One regards it as the constitution of the United Nations. The Charter as the constituent instrument of the United Nations contains the constitution defined as those provisions that provide for the legal foundation and framework of an international organization. The core of the constitutional nature of constituent instruments lies in the fact that constituent instruments provide the legal foundations and framework for the structures and activities of international organizations on the basis of their evolutionary and teleological interpretations so that, despite changing international relations, international organizations can continue to function efficiently, and effectively perform their given purposes and functions. International organizations have been created because their purposes and functions cannot be achieved by the creation of simple norms of conduct by means of treaties, including multilateral law-making treaties. Their purposes and functions can be achieved only by the permanent operation of organizational entities. This implies that constituent instruments will always need to be adapted to changing circumstances for the purposes of the efficient functioning and effective activities of international organizations.<sup>58</sup> This stream of thought is fairly well established by the practice of states and international organizations.<sup>59</sup> It would be possible to argue that, based upon the doctrine of the interpretation of constituent instruments as the constitutions of international organizations, most, if not all, of the above-mentioned activities of the Security Council are legal; this is demonstrated, for example, by the discussion concerning the legality and constitutionality of Resolution 678 (1990).<sup>60</sup>

The other school regards the Charter as the constitution of the international community. After the end of the Cold War, many authors began to refer to this idea. It is an idea that is clearly promoted by the impressive activities of the Security Council in the 1990s. Opinions vary, however, on whether the Charter can be regarded as a “constitution” of the international community<sup>61</sup> in a sense comparable to the function of domestic constitutions.

Some are quite positive. Tomuschat, for example, takes the position that it has “become obvious in recent years that the Charter is nothing else than the constitution of the international community.” He elaborates on this point as follows:

[T]o enter the United Nations differs profoundly from accepting a treaty of the usual type. A State which becomes a member of the world organisation consents not just to a series of well-defined and easily identifiable obligations, it agrees to a changed status under international law ... [T]he Security Council is authorised to impose binding obligations on every member State whenever issues of “international peace and security” are at stake. This is an extremely broad formula. Nobody can foresee with any degree of precision in what sense it will be interpreted by the Security Council ... Whoever joins the United Nations gives blanket powers to the Security Council.<sup>62</sup>

Some are more cautious. Dupuy, for example, draws attention to “the sharp contrast still existing between, on the one hand, the exigencies of normative and organic integration attached to the idea of constitution and, on the other hand, the persisting dissemination of power among competing and formally equal sovereign states, which still characterises the international society in spite of the importance now taken by the action of hundreds of international organisations.”<sup>63</sup> He concludes:

The international legal order remains more characterised by the spreading of sovereignty than by the overall normative and organic subordination of states to an international public order embodied in the text of a Charter that would at the same time provide a central authority aimed at enforcing the “constitutional” rules characterising that public order. What the ICJ said in 1949 remains true: the United Nations is not a “super-State”.<sup>64</sup>

Other observers are more critical. Arangio-Ruiz, for example,<sup>65</sup> is quite negative in assuming that the doctrine of implied powers is applicable as an interpretive tool of the Charter for the determination of the powers of the political organs of the United Nations, the Security Council in particular; he rejects this as being more dangerous for the preservation and development of the rule of law in the “organised international community.” He states:

[A]lthough the UN is without doubt an organisation, having its legal statute in the Charter (and in that sense a constitution of its own), the Charter is not “the constitution” or “a constitution” of the community of the member States or of the community of all existing states, let alone the community of mankind. In other words, the UN is not an organisation *of* the member States themselves, almost as if they were in some measure absorbed or dissolved in it; nor is it, despite the bold lie with which the text of the UN Charter begins – “We the Peoples” – an organisation of the peoples of the member States, as a single people. The member States remain, under the Charter, the separate, independent political entities they were beforehand, in their mutual relations, as well as in relation to the UN; and they remain also – this is of paramount importance – subject to general international law and endowed with the rights deriving therefrom.<sup>66</sup>

The contention of each school contains some truth; it is probably wisest to try to synthesize those appropriate points, aiming at some consistent doctrine. It could at least be concluded that:

The constitutional system set up for the international community in the United Nations Charter is of course far from being perfect. It has only a limited capacity to enforce compliance with its basic rules. This, however, should not detract our attention from the fact that we live in an international legal system rather different from the one existing before 1945.<sup>67</sup>

### *The Security Council: Between fairness and effectiveness*

The Security Council can be conceptually located on a continuum between two poles: fairness and effectiveness. While these two elements are not inherently contradictory, they seem to exclude each other to some extent with regard to the Security Council in the decentralized power structure of the world today.

Franck defines “legitimacy” as it applies to the rules applicable among states. “Legitimacy,” he writes, “is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.”<sup>68</sup> Legitimacy, he says, can only be accorded to rules and institutions, or to claims of right and obligation, in the circumstance of an existing community. It is only by reference to a community’s evolving standards of what constitutes right process that it is possible to assert meaningfully that a law, or an executive order, or a court’s judgment, or a citizen’s claim on a compatriot, or a government’s claim on a citizen, is legitimate.<sup>69</sup>

Franck developed his analysis from the viewpoint of fairness; he argues that fairness “is a composite of two independent variables: legitimacy and



distributive justice.” “Fairness discourse,” he continues, “is the process by which the law, and those who make law, seek to integrate these variables, recognising the tension between the community’s desire for both order (legitimacy) and change (justice), as well as the tensions between differing notions of what constitutes *good* order and *good* change in concrete instances.”<sup>70</sup> Having analysed from this viewpoint the collective security of the UN Security Council, Franck points out:

[With the Charter of the United Nations,] we see a dramatic return to just war theory and, since the end of the cold war, of just war practice. In future one might reasonably expect to see UN peacekeeping and peace-enforcing contingents largely pre-empt the *right* justly to engage in war. All other war will be unjust. This enforcement monopoly makes it extraordinarily important that the institutional process by which the system resorts to military force is not merely formally legitimate but is seen to be fair. Fairness in this context means (1) that the Security Council engages in open fairness discourse – for example, about treating likes alike and about fault and proportionality – before making a decision to deploy force; (2) that power within the Security Council itself be perceived to be allocated fairly in accordance with the equal rights, balanced against the unequal distribution of responsibility among states for carrying out the Council’s tasks; and (3) that all decisions to use force allocate costs and benefits (in lives, resources, and outcomes) in a manner which does not exacerbate the gap between advantaged and disadvantaged states.<sup>71</sup>

Effectiveness, on the other hand, derives from the recognition that “it is not at all self-evident in today’s world that ‘fair’ and ‘genuinely collective’ decision-making by the Security Council is a sensible approach for global conflict management.”<sup>72</sup> Realistically effective collective security comes from the concept of relating responsibility for the maintenance of peace and security to the self-interest of the major powers. The League of Nations’ collective security mechanism had proven inadequate in that it purported to impose responsibilities on states that they were unwilling to undertake in practice, because of the serious consequences such responsibilities could have for them. The Security Council was constituted so as to reflect the special interests and responsibilities of its principal contributors. In this sense, the roots of the Security Council lie less in the Council of the League of Nations than in the nineteenth-century Concert of European Powers.<sup>73</sup> Murphy makes the following persuasive point in this regard:

The most realistic means of achieving a credible threat or use of power by the United Nations is through close co-operation among the major military powers of the world. Those powers must be convinced to leave aside the option of exercising unilateral action in favour of the collective process that forces them to take account of each other’s interests. To do so, the major powers must be permitted to

bring into the process those matters they consider vital to their own interests and to push for those matters to be addressed in a satisfactory manner. In doing so, each power is forced to take into account the concerns of the other major powers, thereby minimising the likelihood of an escalation of conflict. On the other hand, each power will only be willing to participate in the process if it is capable of protecting its own vital interests from collective action and of avoiding the commitment of its military forces when it so chooses. For both reasons, the system should not aspire to treating all threats to the peace equally through automatic and reliable responses.<sup>74</sup>

It seems undeniable that this contention of effectiveness contains some important truths. However, our analysis of Security Council activities under Chapter VII of the UN Charter since the end of the Cold War demonstrates that the contention of effectiveness needs to be modified by the consideration of fairness.<sup>75</sup>

*Functional separation of powers as a factor for legitimization*

The Appeals Chamber of the International Tribunal for the Former Yugoslavia, in the Tadic Case, set the correct starting point for discussion on the matter of separation of powers:

It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organisation such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. Regarding the judicial function, the International Court of Justice is clearly the "principal judicial organ" (see United Nations Charter, art. 92). There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.

It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the national law of States. Indeed ... the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions.<sup>76</sup>

Thus, the question of legality and constitutionality of Security Council activities cannot be approached on the basis of analogies and presumptions based upon national governing systems, but only by interpreting the United Nations' constituent instrument, the Charter, and its practices.

However, the question of legitimacy of Security Council activities can be better analysed by classifying whether the Security Council is acting in an executive, legislative, or judicial capacity. In another words, it is

possible to evaluate more accurately whether, and if so, to what extent, the Security Council is acting properly by adopting a frame of reference based on the type of decisions the Council makes.<sup>77</sup> For example, when the Security Council steps into the judicial, rather than executive, function, it is possible to use such frames of reference as independence from political influences, and requirements inherent in judicial function (such as due process, publication of justified reasoning, principle of *nemo iudex in sua causa*, equality of the parties). When the Security Council steps into the legislative function, frames of reference such as the question of to what extent a Security Council action belonging to the legislative function is necessary and useful in achieving the original purpose of maintaining or restoring international peace and security, and some requirements inherent in the legislative function (such as conformity with principles of justice and international law, respect of fundamental consideration of humanity), can be used.

We have started from the basic theme that the more the Security Council steps into legally grey areas, the more legitimacy is required for its activities to be effective and acceptable. In the light of this legitimacy of Security Council activities, it is important, if not expressly provided in the Charter of the United Nations, for the Security Council to analytically separate executive, legislative, and judicial functions to avoid an undesired mixture of two functions. Separation of powers in the centralized national governing system is fundamentally organizational in the sense of attributing different functions to different organs. The separation of powers in this organizational sense is, as was pointed out above in the Tadic Case, not adopted in the United Nations. However, the idea of analytically separating Security Council activities into executive, legislative, and judicial functions to judge their propriety in the light of the frame of reference appropriate for each function can be considered a functional, if not organizational, separation of powers in the less strict sense of the word. Thus, we can conclude that more attention should be paid to the requirements of a functional separation of powers in evaluating Security Council activities. From this viewpoint, we will examine some of the controversial Security Council activities related to either judicial or legislative function.

#### *Quasi-judicial powers*

Graefrath points out that:

The Security Council remains a political organ that takes political decisions. Even if the Council decides legal disputes and exercises “quasi-judicial functions” it neither applies judicial methods nor reaches judicial results, and its conclusions never attain the quality of a judicial decision. Its decisions therefore cannot replace rulings of the Court or make them superfluous. The Security Council should leave

to the Court what belongs to the Court. It should not take decisions in matters that are already before the Court or which should be dealt with by the Court, unless there is a threat to peace entailing an urgent need for immediate action.<sup>78</sup>

However, it could be contended that the Security Council can exercise a quasi-judicial function by establishing a judicial organ. The Court, in the *Effect of Awards Case*, found that the General Assembly did not itself, under the Charter, possess the judicial function exercised by the Administrative Tribunal that the General Assembly had established. However, it considered that the General Assembly possessed the power to establish the Administrative Tribunal, this power being implied from its competence to regulate staff relations. The Court stated:

[T]he Charter does not confer judicial functions on the General Assembly . . . By establishing the Administrative Tribunal, the General Assembly was not delegating the performance of its own function: it was exercising a power which it had under the Charter to regulate staff relations.<sup>79</sup>

This use of the power to establish subsidiary organs to perform functions that the principal organ cannot itself exercise is quite important in determining the legality and constitutionality of recent activities by the Security Council. Several examples are given below.

#### *The International Tribunal for the Former Yugoslavia*

The Appeals Chamber of the International Tribunal for the Former Yugoslavia acknowledged, in the *Tadic Case*, that the Council possessed the power to establish the War Crimes Tribunal to exercise judicial functions, implied by its express powers in Article 41, because it is a measure necessary for the effective exercise of its powers to maintain or restore international peace.

Prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia is quintessentially a judicial matter. It needs to be exercised not through arbitrary punishment by a political organ, but by an independent judicial organ. The Statute of the Tribunal included in Security Council Resolution 827 (1993) clearly indicates that this judicial function is exercised by a judicial, although ad-hoc, organ, in accordance with judicial procedures.

#### *The United Nations Compensation Commission*

Another example is the United Nations Compensation Commission contemplated in Resolution 687 (1991), to evaluate losses suffered as a result of Iraq's invasion of Kuwait and to resolve disputed claims as to Iraq's

liability for those losses, and established by Resolution 692 (1991) based upon the report by the Secretary-General. The Commission's principal body is the Governing Council, which is composed of representatives of the current members of the Security Council at any given time. The Governing Council is the policy-making organ and administrator of the United Nations Compensation Fund for payment of claims against Iraq; as such, it has responsibility for establishing guidelines on matters such as the administration and financing of the Compensation Fund, and the procedures to be applied in the processing of claims. The Governing Council is assisted by a number of commissioners, who are experts in fields such as finance, law, insurance, and environmental damage assessment, and act in their personal capacity. While the Commission is said not to be a court or an arbitral tribunal, it performs at least a quasi-judicial function in the sense that it examines individual claims, verifies their validity, evaluates losses, and assesses payments. Given the nature of this function, it is essential that some elements of due process be built into the procedure, and that the Governing Council establish the guidelines regarding the claims procedure. Panels normally composed of three commissioners implement these guidelines in respect of claims that are presented and resolution of disputed claims. They make the appropriate recommendations to the Governing Council, which in turn makes the final determination.

While the Commission could be legally based upon the implied power under Chapter VII to provide justice and resolve outstanding issues after a devastating armed conflict, Kirgis critiqued its establishment as follows:

In one important respect, however, the mechanism lacks essential procedural safeguards. The whole procedure is supervised by a Governing Council, which consists of the representatives of the Security Council's members at any given time, acting not as independent individuals, but in their governmental capacities. The Governing Council establishes rules and interpretations for application by the commissioners (who do act in their personal capacities) and serves as the appellate body for the review of damage assessments. The legitimacy of this mechanism is thus open to question, not because it was unforeseen in 1945 or the Security Council lacked the implied power to create a compensation commission after an armed conflict, but because the Council hedged some basic principles of procedural fairness when it created a commission lacking independence from political influence.<sup>80</sup>

In the light of legality and constitutionality, it is possible to conclude that the Security Council can establish the Compensation Commission for processing the claims against Iraq under Chapter VII. Furthermore, it would not have been realistic and suitable to adopt a traditional arbitral procedure to deal with the claims, because the huge number of claims and

the differences between them constitute an insurmountable obstacle to the adoption of a classic arbitral approach. However, it is not desirable that the Governing Council acting as a political organ is engaged in the performance of judicial functions to the extent that processing the claims against Iraq entails the basically judicial tasks of examining individual claims, verifying their validity, evaluating losses, and assessing payments. It will not possess sufficient legitimacy considered against the requirements of a functional separation of powers with a view to preventing abuse of and ensuring proper exercise of powers.

*The United Nations Iraq-Kuwait Boundary Demarcation Commission*

The duty of the Security Council to respect the territorial integrity of states was another issue bound up in Resolution 687 (1991). Since the Security Council was set up to maintain the political independence of states and has no adjudicatory powers to permanently allocate rights or impose the terms of a settlement of a dispute or situation on any state, it consequently follows that it has no right to permanently allocate title to territory, or to detach or transfer sovereignty over a portion of a state's territory, without the consent of that state.<sup>81</sup> With respect to the demarcation of the Iraq-Kuwait boundary indicated in Resolution 687, the Secretary-General, at the request of the Security Council, established the United Nations Iraq-Kuwait Boundary Demarcation Commission. The Commission was composed of one representative each from Iraq and Kuwait and three independent experts appointed by the Secretary-General, one of whom would serve as chairman. The Security Council, acting under Chapter VII of the Charter, unanimously adopted Resolution 833, in which it endorsed the Commission's report and affirmed that the Commission's decisions on the demarcation of the boundary were final. The Security Council asserts that this operation was a demarcation of an existing boundary and not a delimitation of what the boundary was; in other words, that the Commission was not reallocating territory between Iraq and Kuwait, but was simply carrying out a technical task.

In the light of legality and constitutionality, it is true that there existed the Agreed Minutes of 4 October 1963, setting out the international boundary between Iraq and Kuwait, and that Iraq accepted Resolution 687 in which the Security Council demanded that Iraq and Kuwait respect the inviolability of the international boundary between them. In this sense, it seems hardly possible to critique the legality and constitutionality of the actions that the Security Council took.

However, it is also true that there existed a dispute between Iraq and Kuwait on the validity of the Agreed Minutes. It was also pointed out, after a careful analysis, that "to say that the Commission was merely

engaged in a technical demarcation exercise is a considerable [oversimplification], even if it is also true that the Commission was not reallocating territory.”<sup>82</sup>

Under these circumstances, while the determination of where the boundary lay between Iraq and Kuwait was necessary for the restoration and continued maintenance of international peace and security, it could be contended that this should have been carried out by an independent judicial tribunal to be established under the authority of the Council. Also, the Security Council, as the main guarantor of international order, has in such cases a responsibility to ensure that justice is seen to be done between the parties by referring the matter to the International Court of Justice or establishing a judicial tribunal that can decide the matter through judicial process. Concerning this matter, Sarooshi makes the following point:

The point is that the choice of institutional response is of crucial importance also in determining the long-term effectiveness of the Council's actions. A tribunal would have provided the appropriate judicial safeguards to ensure that the arguments of both States were fully heard and given due weight in a subsequent decision. This would contribute significantly to the perception by the parties that justice was in fact done between them, and, it is thus submitted, a significant contribution would be made to the legitimacy of any subsequent enforcement action by the Council that may be necessary to enforce the decision of the tribunal.<sup>83</sup>

The Charter confers different powers upon United Nations organs, consistent with the composition of those organs. The Security Council is composed of the most powerful states (at least at the time of its establishment), and consequently maintains the inherent capacity to coerce compliance with its decisions. For the Security Council, however, the resolution of issues of law in a dispositive manner is not consistent with its role as executive enforcer, nor is the Security Council equipped with the composition and process suitable for the exercise of such powers. The Security Council, even when acting under Chapter VII of the Charter, is not a judicial organ capable of adopting final decisions on the rights of parties. Unlike the decisions of judicial organs, its decisions are therefore not entitled to *res judicata* effect.<sup>84</sup> In the same way, when the Security Council makes legal determinations, it should not incorporate political considerations into its decision-making. Considering political factors is inappropriate because law, unlike politics, is primarily based on considerations of fairness and normative applications of rules.<sup>85</sup> Thus, when the Security Council steps into the judicial, rather than executive, function, it is important to fulfil such requirements as independence from political influences and requirements inherent in judicial function (such as due

process, publication of justified reasoning, principle of *nemo iudex in sua causa*, and equality of parties).

#### *Quasi-legislative powers*

Whether the Security Council has quasi-legislative powers depends upon the definition of “legislative powers.” An affirmative conclusion might follow if we start from a widely accepted definition of legislative authority in the UN setting; that is, that “legislative acts have three essential characteristics: they are unilateral in form, they create or modify some element of legal norm, and the legal norm in question is general in nature, that is, directed to indeterminate addressees and capable of repeated application in time.”<sup>86</sup> Kirgis, from this viewpoint, makes the following assessment:

UN Charter Articles 41 and 42, buttressed by Articles 25 and 48, clearly authorise the Security Council to take legislative action in the [above] sense. Thus, economic sanctions under Article 41 have been unilateral in form (adopted by the fifteen-member Security Council rather than agreement of all UN members); they have created or modified legal norms (binding rules); and they have been general in nature (directed to all member states and sometimes even to non-members, although Article 48 (1) permits them to be directed more selectively).<sup>87</sup>

It is debatable whether one can consider as legislative the nature of the powers exercised under Chapter VII, particularly Article 41, as Kirgis does. It would rather be considered as concrete execution, as these powers are normally exercised with regard to particular cases in the context of maintaining or restoring international peace and security.<sup>88</sup> However, many of the norms of conduct embodied in, for example, Resolution 661 (1990) adopted under Article 41 are general in nature, directed to all member states as addressees, although limited to their relationship with Iraq or Kuwait. Such concepts as legislation or execution are not strictly defined in the context of Security Council powers, nor are they given legally normative effects. These powers can, therefore, simply be described as quasi-legislative.<sup>89</sup>

The disarming of Iraq, one of the main objectives of Resolution 687 (1991), might be described as a case of quasi-legislation, not in the above sense, but in the sense of creating new obligations for Iraq that had not existed prior to the enactment of this resolution.<sup>90</sup> For example, although the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare only restricts the “use” of such materials, Resolution 687 required the “destruction” of those weapons and prohibited Iraq from even possessing the necessary agents. However, the Security Council, in the preamble to Resolution 687, laid out evidence supporting its finding that Iraq continued to be a threat to international peace; specifically, Iraq’s proclivity



toward aggression, evidenced by its threats to use outlawed weaponry and its past instances of aggression. Thus, one commentator concluded: "These increased obligations were logical and reasonable extensions of the Geneva Protocol, especially given the Iraqi propensity to use and threaten to use these weapons."<sup>91</sup>

The conclusion reached in the above section, concerning the matter of whether the Security Council has the legal power to impose a binding dispute settlement under Chapter VII, will apply to these and other cases<sup>92</sup> of quasi-legislation. That is to say, the further a Security Council action, an exercise of quasi-legislative powers, is from its enforcement activity for maintaining or restoring international peace and security, the more consideration is to be given to such requirements as conformity with principles of justice and international law, and respect of the fundamental consideration of humanity. This is in accordance with the proper interpretation of the UN Charter, particularly Chapter VII, as well as with the expectation or anxiety that most of the member states have with regard to the exercise of quasi-legislative powers by the Security Council.

*Judicial review by the Court as a factor for legitimization*

Neither the UN Charter nor the Statute of the International Court of Justice directly addresses the question of judicial review. Thus, Graefrath points out:

The founders of the Charter did not find it necessary to explicitly formulate a mandate for the Court to review the legality of General Assembly or Security Council resolutions. They thought that the system of the veto would suffice as a check and balance device against the plenitude of the Security Council's powers. They were of the view that the different political interests of several superpowers would prevent decisions of the Security Council from going beyond the Charter, and that this political device would ensure that the UN was not reduced to a tool of one superpower.<sup>93</sup>

Similarly, the Court, in the *Certain Expenses Case*, had the following point to make:

In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in the course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction.<sup>94</sup>

However, it now seems probable that the Court could interpret the Charter and judge the legality of a Security Council resolution both in advisory opinions and in contentious cases. Firstly, the General Assembly and the Security Council have competence to request an advisory opinion on any legal question, whether or not it arises within the scope of their activities. The Court, in the Namibia Case, made this point clear by stating:

Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The questions of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.<sup>95</sup>

Secondly, in the Lockerbie Case, the Court held that: “Whatever the situation previous to the adoption of [Security Council Resolution 748 (1992)], the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures.” The majority opinion thus relied on the Council resolution without addressing the question of whether it might be *ultra vires*. However, several judges clarified their belief that the rejection of Libya’s application for provisional measures did not imply that the Court was “abdicat[ing]” its role as the principal judicial organ of the United Nations. A number of judges, furthermore, believed that the Court should consider whether the Council’s actions were valid. One commentator concluded as follows:

In sum, the *Libya* decision marked the first time a significant portion of the World Court intimated it could exercise a power of judicial review in contentious cases. This development is important not simply because a contentious case has arguably greater precedential value than an advisory case; it also suggests that the Court does not think judicial review should be exercised only when implicitly or explicitly endorsed by a UN organ seeking an advisory opinion on the effect of that “organ’s acts”.<sup>96</sup>

However, the present mechanism of judging the legality of Security Council resolutions, either in advisory opinions or in contentious cases, is very limited. In a contentious case, the matter depends on whether two states accept the jurisdiction of the Court in a case where the issue between them is essentially related to the legality of a Security Council resolution. This could be a very rare incident. As for the advisory opinion, neither

the General Assembly nor the Security Council has been active in utilizing this mechanism.

It has been correctly pointed out that the question of judicial review should not be approached from an all-or-nothing viewpoint, since the Court is only one of many (de)legitimizers. Alvarez had the following point to make:

[T]he World Court's right to critique the Council should not be premised on the proposition that the Court is the "only institution" capable of verifying the law. As the drafters of the Charter conceded, the usual test for constitutionality is "general acceptance", and, given the paucity of cases that reach the Court and the need for day-to-day decisions, each UN organ is usually in charge of "verifying legality" and typically does so without incident. As US constitutional scholars have noted, institutional practices have had as much (or more) to do with certain constitutional developments in the United States as the US Supreme Court. Given the huge lacunae in case law and its haphazard nature, it is unwarranted to assume that constitutional development or innovation necessarily relies on a judicial imprimatur or that the legitimization of such developments requires a court's blessing. That notion is particularly problematic in the context of the United Nations and the Security Council – where the Court's involvement, given its jurisdictional limits, is necessarily attenuated when it comes to judging the Council's acts, where some chasms in the law of the Charter are wider than any gaps in US constitutional law, and where many of the constitutional innovations in practice have not involved the Court's participation.<sup>97</sup>

This current situation leads to the conclusion that if the Security Council is to be effective in the long run, it needs to demonstrate that it is using its powers judiciously.

On the other hand, according to Bowett, the current case for providing the Court with a direct power of judicial review rests on three considerations. Firstly, in most democratic societies, governmental (and sometimes legislative) acts are reviewable by the established courts so as to ensure that they are valid under the constitution; why should this not be the case in the United Nations? The second is that with the termination of the Cold War, the Security Council can now operate without political or legal controls. And the third is that, where such organs are not plenary organs, the states not represented in them need some means to ensure that what is done in their name is constitutional.<sup>98</sup> Based upon these considerations, Bowett reached the following conclusion:

It must be conceded that there are few signs that, at present, the members of the Security Council are prepared to contemplate judicial review by the Court: the Western powers would see this as a hindrance and neither Russia nor China display[s] any great confidence in the Court. But in the long-term interests of the UN the idea is worth pursuing.<sup>99</sup>

While, as noted, the Court is not given the full-fledged institutional power of judicial review, it could certainly be utilized more extensively in interpreting the Charter and judging the legality and constitutionality of a Security Council resolution. Here, however, it is wise to keep in mind some of the difficulties that the Court would have to deal with. Firstly, there are no clear legal standards given to the Court, for example, as to what constitutes a threat to the peace, a breach of the peace, or an act of aggression, or as to whether a certain measure is likely or necessary to maintain or restore the peace. Although the Court may decide that a measure would be contrary to norms of *jus cogens* or fundamental human rights, its power, as was asserted by Judge Lauterpacht in the Bosnia Genocide Convention Case, would probably “not embrace any right of the Court to substitute its discretion for that of the Security Council in determining the existence of a threat to the peace, a breach of the peace, or an act of aggression or even the political steps to be taken following such a determination.”<sup>100</sup>

Secondly, active utilization of the Court in judging the Council’s actions might have some negative influence on the Court itself if administered carelessly. Alvarez gave the following admonition:

To the extent the World Court becomes more systematically involved in the partisan struggles of the Council, it may be “politicized” . . . increased judicial review may blur the present distinctions between the proper roles for Court and Council, politics and law. While the blurring of these distinctions may not pose so serious a legitimacy problem for domestic legal rules, which are backed by effective institutionalised sanctions, the consequences for the legitimacy of international law may be much graver. Given the tenuous legitimacy of ICJ judges, turning them into umpires of the Council’s political games is too risky.<sup>101</sup>

These problems, however, would probably not constitute insurmountable obstacles in promoting the legitimacy of Security Council actions by involving the Court to a reasonable extent with political wisdom.<sup>102</sup> It is true that there is little possibility for the full-fledged institutional power of judicial review, like that found in national governing systems, to be brought into the legal structure of the United Nations by a formal amendment of the Charter. However, the Court can judge the legality and constitutionality of a Security Council resolution within the present, although limited, legal framework described above. Furthermore, the three reasons that Bowett points out as grounds for his argument *de lege ferenda* of introducing the full-fledged institutional power of judicial review are also persuasive as grounds for the argument *de lege lata* of more actively involving the Court either in advisory opinions or in contentious cases. In the light of these considerations, the following point, made by Franck, is certainly justified:

While it would be foolhardy – and entirely improbable – for the Court to substitute its judgment of what constitutes a “threat to the peace” and what measures are appropriate in meeting such a threat, some degree of competence to review Council decisions is essential to maintaining the confidence of all the states that have freely chosen to delegate specific and limited powers to a supranational organ with restricted membership. Judicial review for “gross abuse of discretion” would enhance significantly the authority of the Council by assuring members of the UN – especially those not on the Council – that its actions remain accountable to the Charter and the membership.<sup>103</sup>

## Conclusion

An interesting fact is that for the past several years, international legal scholars have referred to the concept of legitimacy not only in those articles analysing the legitimacy of the Security Council, but also in those discussing the legality and constitutionality of various activities by the Security Council. As has been demonstrated in this chapter, the Security Council has increasingly stepped into legally grey areas from the perspective of the UN Charter. Increasing references to the concept of legitimacy in legal literature would be a clear indication that the legality or constitutionality of various activities by the Security Council is ambiguous or fragile at best.

More specifically, the Security Council has increasingly been performing quasi-judicial and quasi-legislative functions since the end of the Cold War. As was pointed out by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the Tadic Case, there is no organizational separation of powers in the United Nations. Thus, the legality or constitutionality of Security Council activities can only be judged in the light of the relevant provisions of the Charter and its practice. As was emphasized in this chapter, the more the Security Council steps into legally grey areas, the more legitimacy is required for its activities to be effective and acceptable. For this purpose to be achieved, much attention should be paid to the requirements of a functional separation of powers, even though this is not explicitly detailed in the UN Charter. The idea of analytically separating Security Council activities into executive, legislative, and judicial functions to judge their propriety in the light of the frame of reference appropriate for each function can be considered a functional, if not organizational, separation of powers in the less strict sense of the phrase.

It could certainly be argued that the legal rights of states may be impinged upon or suspended by the Security Council in the application of collective enforcement measures. It could furthermore be contended that some quasi-judicial and quasi-legislative powers are given to the Security Council in its enforcement activities deemed necessary for the purposes

of maintaining international peace and security, although not explicitly provided for in the UN Charter. However, once the Security Council steps into these legally grey areas, much attention must be paid to the requirements of a functional separation of powers.

On this point, however, the practice of the Security Council has not been highly commendable. Although the Security Council has increasingly adopted resolutions that in effect amount to a determination or characterization of a legal situation, it has not paid enough attention to the requirements of a functional separation of powers. In such cases, for example, as the United Nations Compensation Commission and the United Nations Iraq-Kuwait Boundary Demarcation Commission, the Security Council did not secure judicial independence, thus leading to the fragile legitimacy of these commissions and the Security Council itself. It could be concluded that the further a Security Council action is from immediate collective enforcement measures to prevent a threat to or breach of the peace or an act of aggression, the more legitimacy is required; hence, more attention must be paid to the requirements of a functional separation of powers.

Legitimacy, however, is an ambiguous and broad concept. It could be enhanced not only by fulfilling the requirements of a functional separation of powers, but also by recourse to the judicial review mechanism. In the legal framework of the United Nations, the International Court of Justice is not given a direct power of judicial review, and its role in judging the legality and constitutionality of Security Council resolutions is quite limited. However, the legitimacy of Security Council activities could be enhanced by actively providing recourse to the judicial review mechanism, especially when the legality or constitutionality of such activities is not clear. Here again, the more the Security Council steps into legally grey areas, the more legitimacy is required, hence the more active recourse, although within a reasonable scope, to the judicial review mechanism should be encouraged.

## Notes

1. Kirgis, F. L. Jr, 1995. "The Security Council's First Fifty Years." *American Journal of International Law* 89: 506. This is a good article analysing the development of the Security Council over the past 50 years.
2. It is now clear, however, that the new era since the end of the Cold War can be divided into two periods. The first is from the late 1980s to 1994, when the Security Council became dramatically revitalized and expanded its activities. The second is from 1994 onwards, when the Western Permanent Members became cautious following their experiences in Somalia and the Former Yugoslavia. Furthermore, Russia and China often opposed those three Permanent Members and prevented Security Council activities proposed by them.
3. Kirgis, F. L. Jr, "The Security Council's First Fifty Years" (see note 1, above), 537–538.

4. "Report of the Rapporteur of Committee IV/2, as Approved by the Committee," UN Doc. 933 IV/2/42 (2), 1945. *United Nations Conference on International Organisation Documents* 13: 645.
5. See, for details, Sato, T., 1996. *Evolving Constitutions of International Organisations*. The Hague: Kluwer Law International, 164–181.
6. Conforti, B., 1996. *The Law and Practice of the United Nations*. The Hague: Kluwer Law International, 16.
7. Benefiting from the League of Nations' experience, the United Nations strengthened its purposes in economic and social areas as well.
8. Kirgis, F. L. Jr, "The Security Council's First Fifty Years" (see note 1, above), 506–509.
9. Merrills, J. G., 1998. *International Dispute Settlement* (3rd ed.). Cambridge: Cambridge University Press, 245–249.
10. Burci, G. L., 1993. "The Maintenance of International Peace and Security by the United Nations: Actions by the Security Council under the Chapter VII of the Charter," in *Prospects for Reform of the United Nations System*, edited by the Italian Society for International Organisation. Padova: CEDAM, 123, 124–131.
11. See the authorities cited in Schachter, O., 1991. "United Nations Law in the Gulf Conflict." *American Journal of International Law* 85: 452, 464, notes 33 and 34. See also Kirgis, F. L. Jr, "The Security Council's First Fifty Years" (see note 1, above), 506–509.
12. Bowett, D. W., 1964. *United Nations Forces: A Legal Study of United Nations Practice*. London: Stevens and Sons, 34.
13. Goodrich, L. M., Hambro, E., and Simons, A. P., 1969. *The Charter of the United Nations* (3rd and revised ed.). New York: Columbia University Press, 301.
14. Burci, G. L., "The Maintenance of International Peace" (see note, 10, above), 129.
15. SC Res. 688 (1991) of 5 April 1991.
16. SC Res. 794 (1992) of 3 December 1992.
17. SC Res. 788 (1992) of 19 November 1992.
18. SC Res. 929 (1994) of 22 June 1994.
19. SC Res. 873 (1993) of 13 October 1993.
20. As for the peacekeeping operations in these cases, many were within single states where civil wars were raging, and some of them were without the consent of the government, if indeed there was a government. Kirgis correctly points out (Kirgis, F. L. Jr, "The Security Council's First Fifty Years" (see note 1, above), 535) that: "A legal purist would have trouble finding authority in the Charter for Security Council measures of this sort, but the international community has not objected to them on legal grounds"; and that objections to these operations "have been based instead on success/failure, or cost/benefit, grounds."
21. Kühne, W., 1995. "The United Nations, Fragmenting States, and the Need for Enlarged Peacekeeping," in Tomuschat, C. (ed.), *The United Nations at Age Fifty: A Legal Perspective*. The Hague: Kluwer Law International, 91, 99. See also Osterdahl, I., 1998. *Threat to the Peace: The Interpretation by the Security Council of Article 39 of the UN Charter*. Uppsala: Iustus Forlag.
22. "The Prosecutor v. Dusko Tadic," Case No. IT-94-1-AR72, Decision of 2 October 1995. 1996, *International Legal Materials* 35: 32, 43. Alvarez, however, criticized this point as follows (Alvarez, J. E., 1996. "Nuremberg Revisited: The Tadic Case." *European Journal of International Law* 7: 245, 256):

The appellate chamber's cursory treatment of the Council's determination of "threat to the peace" is not likely to be comforting to non-permanent members of the Council. At stake in this case is the legally binding nature of a quasi-legislative/quasi-judicial action

by the Council. While it may be “settled practice” that the Council has indicated, through prior quasi-legislative/quasi-judicial determinations, that “internal armed conflicts” constitute such threats, reliance on such findings to determine the legality of the particular finding in this case is circular and unhelpful.

23. Graefrath, B., 1993. “Leave to the Court What Belongs to the Court: The Libyan Case.” *European Journal of International Law* 4: 184, 199. One might say that the threat to international peace and security found by the Security Council was Libyan support for terrorism in general, not simply the failure to respond to the requests for surrender. However, judging from the position later taken by the Security Council – in paragraph 16 of Resolution 883 (1993) and paragraph 8 of Resolution 1192 (1998) – that the measures set forth in its previous resolutions should be suspended immediately if the two accused arrived in the Netherlands for trial, it is reasonable to assume that the request to surrender suspects was the core point.
24. *Ibid.*, 196.
25. Arangio-Ruiz, G., 1992. *Yearbook of International Law Commission* I: 150.
26. Graefrath, B., 1995. “Iraqi Reparations and the Security Council.” *Heidelberg Journal of International Law* 55: 1, 12–13.
27. *Ibid.*, 26.
28. SC Res. 827 (1993) of 25 May 1993.
29. SC Res. 955 (1994) of 8 November 1994.
30. Rao, P. S., 1995. “The United Nations and International Peace and Security – An Indian Perspective,” in Tomuschat, C. (ed.), *The United Nations at Age Fifty* (see note 21, above), 143, 158–159. See also the statement of Arangio-Ruiz, G., 1993. *Yearbook of International Law Commission* I: 16.
31. “The Prosecutor v. Dusko Tadic,” Case No. IT-94-1-AR72, Decision of 2 October 1995 (see note 22, above), 45. Kirgis also stated (Kirgis, F. L. Jr., “The Security Council’s First Fifty Years” (see note 1, above), 522): “[I]t is not farfetched to find an implied power to create war crimes tribunals if the conditions for applying chapter VII are met and principles of fundamental adjudicatory fairness are followed.”
32. SC Res. 678 (1990) of 29 November 1990.
33. SC Res. 794 (1992) of 3 December 1992.
34. SC Res. 816 (1993) of 31 March 1993 and SC Res. 836 (1993) of 4 June 1993.
35. SC Res. 929 (1994) of 22 June 1994.
36. SC Res. 940 (1994) of 31 July 1994.
37. Burci, G. L., “The Maintenance of International Peace” (see note 10, above), 134–135.
38. See, for example, Greenwood, C., 1995. “The United Nations as Guarantor of International Peace and Security: Past, Present and Future – A United Kingdom view,” in Tomuschat, C. (ed.), *The United Nations at Age Fifty* (see note 21, above), 59, 70.
39. Gaja, G., 1995. “Use of Force Made or Authorised by the United Nations,” in Tomuschat, C. (ed.), *The United Nations at Age Fifty* (see note 21, above), 39, 43. See also Kühne, W., *The United Nations* (see note 21, above), 106.
40. Gray, C., 1994. “After the Cease-fire: Iraq, the Security Council and the Use of Force.” *British Year Book of International Law* 65: 135, 136–137.
41. See, for these points, United Nations, 1996. *The United Nations and the Iraq-Kuwait Conflict, 1990–1996*. New York: United Nations, 79–87, 438, 512–513, 516.
42. Gray, C., “After the Cease-fire” (see note 40, above), 155.
43. SC Res. 1154 (1998) of 2 March 1998.
44. UN Doc. S/3858 (1998), 14, cited in Wedgwood, R., 1998. “The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq’s Weapons of Mass Destruction.” *American Journal of International Law* 92: 724, 728.



- See also Lobel, J. and Ratner, M., 1999. "Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime." *American Journal of International Law* 93: 124.
45. Krisch, N., 1999. "Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council." *Max Planck Yearbook of United Nations Law* 3: 59, 73. It could be argued that the unilateral enforcement of Security Council resolutions not by single states but by multilateral regional organizations has the merit of achieving the common good recognized by the Security Council. However, if it were justified in such a way, Council members would be much more cautious in adopting the original Security Council resolutions that might lead to unilateral enforcement in a similar way. After all, this simply seems to transfer the problem from the level of express authorization to that of adoption of resolutions, thus going into a vicious circle. *Ibid.*, 93–94.
  46. Shaw, M. N., 1997. "The Security Council and the International Court of Justice: Judicial Drift and Judicial Function," in Muller, A. S. et al. (eds), *The International Court of Justice: Its Future Role after Fifty Years*. The Hague: Kluwer Law International, 219, 225–6.
  47. Kelsen, H., 1951. *The United Nations: A Critical Analysis of its Fundamental Problems*. New York: Stevens, 294.
  48. See, for example, Gill, T. D., 1995. "Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers under Chapter VII of the Charter." *Netherlands Yearbook of International Law* 26: 33, 64–68; Goodrich L. M. et al., *The Charter of the United Nations* (see note 13, above), 27–28.
  49. *Ibid.*, 61–62.
  50. *Ibid.*, 72ff. See also Lamb, S., 1999. "Legal Limits to United Nations Security Council Powers," in Goodwin-Gill, G. S. and Talmon, S. (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie*. Oxford: Oxford University Press, 361; Zemanek, K., 1999. "Is the Security Council the Sole Judge of Its Own Legality?," in Yakpo, E. and Boumedra, T. (eds), *Essays in Honour of Judge Mohammed Bedjaou*. The Hague: Kluwer Law International, 629; Akande, D., 1997. "The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?" *International and Comparative Law Quarterly* 46: 309, 319ff.; Gardam, J. G., 1996. "Legal Restraints of Security Council Military Enforcement Action." *Michigan Journal of International Law* 17: 285; Golland-Debbas, V., 1994. "Security Council Enforcement Action and Issues of State Responsibility." *International and Comparative Law Quarterly* 43: 55.
  51. Shaw, N. M., "The Security Council" (see note 46, above), 227. He described this gradation from the immediacy and seriousness of the danger as follows (*ibid.*, 234):

The less immediate or serious the danger constituted by the predetermined threat to or breach of the peace, the more likely that one is concerned with peaceful adjustment or settlement and thus the consequential application of justice and international law.

Shaw was clearly inspired on this point by a similar distinction made by Lauterpacht (Lauterpacht, E., 1991. *Aspects of the Administration of International Justice*. Cambridge: Grotius Publications Limited, 44) as follows:

Though it may not be possible to draw the line with absolute precision, one may suggest that a distinction can be drawn between prescriptions of conduct that are directly and immediately related to the termination of the impugned conduct, such as calling upon the aggressor to withdraw, authorising collective forcible response or ordering the interruption of trade relations with him, and those findings that, though not related,

have a general and long-term legal impact that goes beyond the immediate needs of the situation. Into this category would fall legal findings that certain conduct is “unlawful” or is “invalid” or “null and void”.

52. Kirgis, F. L. Jr., “The Security Council’s First Fifty Years” (see note 1, above), 521. See also Frowein, J. A., 1994. “Reactions by Not Directly Affected States to Breaches of Public International Law.” *Recueil des cours* 248: 377.
53. Sarooshi, D., 1999. *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers*. Oxford: Clarendon Press, 33–34, 178–185.
54. Weston, B. H., 1991. “Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy.” *American Journal of International Law* 85: 516, 533. Weston pointed out four problems in this lack of legitimacy (ibid., 518): in the indeterminacy of the legal authority of Resolution 678; in the great-power pressure diplomacy that marked its adoption; in its wholly unrestricted character; and in the Council’s hasty retreat from non-violent sanctioning alternatives permissible under it.  
See also Quigley, J., 1996. “The ‘Privatization’ of Security Council Enforcement Action: A Threat to Multilateralism.” *Michigan Journal of International Law* 17: 249.
55. The concept of legitimacy will not be discussed here. See Caron, D. D., 1993. “The Legitimacy of Collective Authority of the Security Council.” *American Journal of International Law* 87: 552.
56. See, for domestic analogies particularly in relation to international organizations, Suganami, H., 1989. *The Domestic Analogy and World Order Proposals*. Cambridge: Cambridge University Press.
57. See also Suy, E., 1995. “The Constitutional Character of Constituent Treaties of International Organisations and the Hierarchy of Norms,” in Beyerlin, U. et al. (eds), *Law Between Change and Preservation. Commemorative Collection for Rudolf Bernhardt*. Berlin: Springer, 267.
58. See, for details, Sato, T., *Evolving Constitutions* (see note 5, above), 229–230.
59. The interpretative framework proper to the constituent instruments of international organizations based upon their evolutionary and teleological interpretations, on which the author elaborated in his work (ibid.), now seems to be widely accepted in doctrines. See, for example, Zemanek, K., 1997. “The Legal Foundation of the International System: General Course on Public International Law.” *Recueil des cours* 266: 9, 90–91; Zemanek, K., “Is the Security Council the Sole Judge of its own Legality?” (see note 50, above), 632–634.
60. Reference was made to the concept of “a constitution” in this connection by many legal scholars; see, for example Franck, T. M. and Patel, F., 1991. “UN Political Action in Lieu of War: ‘The Old Order Changeth’.” *American Journal of International Law* 85: 63, 66–67. See also the quotation from Kirgis in the text corresponding to note 52, above. The logic of this argument was later used by Franck as follows (Franck, T. M., 1995. *Fairness in International Law and Institutions*. Oxford: Clarendon Press, 299–300):

Peacekeeping is popularly attributed to an imaginary ‘Chapter 6½’ of the Charter, a replacement for the immobilised Article 43; but the Charter, being of the genus constitution, should be read as capable of regeneration and adaptation ...

Thus, while the framers may have mooted the collective enforcement system on the assumption that states would commit forces, in accordance with Article 43, to be at the disposal of the Council, this intention is not chiselled into the text. If Article 43 cannot be implemented in practice, that does not necessarily frustrate the Charter’s larger purpose. A cardinal purpose, made explicit in Article 42, is to enable the UN to

“take such action by air, sea, or land forces as may be necessary to restore international peace and security” deploying “air, sea or land forces of Members”. Article 42 does not mention Article 43, and it is therefore possible to conclude that the latter is merely one way to make such forces available and that the Charter does not preclude the Council devising other means to accomplish this paramount institutional purpose.

61. It is said that the majority of writers today see the specific meaning of the concept of a “constitution” in the combination of two elements (Simm, B., 1994. “From Bilateralism to Community Interest in International Law.” *Recueil des cours* 250: 260). On the formal side, a constitution enjoys priority over “ordinary” rules; with regard to substance, it lays down the basic rules governing the life of a community.

Dupuy clarified two meanings of the term “constitution” as follows (Dupuy, P., 1997. “The Constitutional Dimension of the Charter of the United Nations Revisited.” *Max Planck Yearbook of United Nations Law* 1: 1, 3). The constitution in the material or substantial sense of the term is “to be considered as a set of legal principles of paramount importance for every one of the subjects belonging to the social community ruled by it. It places all of them (including the different state’s organs) in a subordinate position and implies a hierarchy of norms, on the top of which are the legal principles belonging to the said constitution.” The constitution in the organic and institutional sense “points to the designation of public organs, the separation of powers and the different institutions which are endowed each with its own competencies.” The analysis in this chapter is related to this second sense.

62. Tomuschat, C., 1993. “Obligations Arising for States Without or Against Their Will.” *Recueil des cours* 241: 249. Tomuschat’s analysis is based upon the following understanding of international law and society (*ibid.*, 210–211):

One should bear in mind that answers, even if correctly provided on a given problem at some point in time, do not necessarily remain valid for ever. The fact is that the cohesive legal bonds tying States to one another have considerably strengthened since the coming into force of the United Nations Charter ...

Given the developments triggered by the UN Charter, today a community model of international society would seem to come closer to reality than any time before in history. According to this interpretation, States live, as from their birth, within a legal framework of a limited number of basic rules which determines their basic rights and obligations with or without their will, leaving them, however, sufficient room for self-responsible action within the openings of that legal edifice. One may call this framework, from which every State receives its legal entitlement to be respected as a sovereign entity, the constitution of international society or, preferably, the constitution of the international community, community being a term suitable to indicate a closer union than between members of a society.

See also the discussion by Fassbender in Fassbender, B., 1998. *UN Security Council Reform and the Right of Veto: A Constitutional Perspective*. The Hague: Kluwer Law International.

63. Dupuy, P., “The Constitutional Dimension” (see note 61, above), 2.
64. *Ibid.*, 30. Dupuy, however, is also positive in acknowledging the contribution by the United Nations, as he states as follows (*ibid.*, 30–31):

That being said, the assertion that the creation of the United Nations has introduced a radical change in the structure of international law, which was made by a series of authors including Friedman, Lachs, Schachter, Virally or R. J. Dupuy has likewise proved to be true over the last fifty years.

65. In addition to Arangio-Ruiz, Herdegen made a similar contention as follows (Herdegen, M. J., 1994. "The 'Constitutionalization' of the UN Security System." *Vanderbilt Journal of Transnational Law* 27: 135, 150):

[T]he constitutional perception is of doubtful heuristic value. The underlying analogy risks blurring fundamental differences between the nature of the UN system and classic issues of the separation of powers in a truly constitutional context. There is no solid basis for these analogies from which any persuasive conclusions may be drawn. In structural density, the United Nations Charter is still far from a closed system of competencies in which the application of constitutional concepts really makes sense. In light of the actual distribution of functions between the General Assembly and the Security Council and the ICJ, the invocation of a "separation of powers" is merely a form of speech.

66. Arangio-Ruiz, G., 1997. "The 'Federal Analogy' and UN Charter Interpretation: A Critical Issue." *European Journal of International Law* 8: 1, 16–17. See also Arangio-Ruiz, G., 1996. "The Establishment of the International Criminal Tribunal for the Former Territory of Yugoslavia and the Doctrine of Implied Powers of the United Nations," in Lattanzi, F. and Sciso, E. (eds), *From the Ad Hoc International Penal Tribunals to a Permanent Court*. Napoli: Editoriale Scientifica, 31. While it would not be wise to accept the whole argument of Arangio-Ruiz, some of his points are well worth quoting as admonitions:

[T]he real test as to whether the federal analogy thesis holds with respect to the UN is the degree, if any, to which the Charter affects the legal structure of the relations of the member States with each other. The problem is whether the rules laid down in the Charter and the organs operating in implementation thereof modify to any degree the kind of egalitarian, essentially horizontal relations existing among states under general international law and ordinary treaty rules. It is, in other words, a question of determining whether – and possibly to what extent – the Charter brings about any "verticalisation" in the relations of the member States *inter se* and with the UN that may justify the federal analogies assumed by the constitutional theories. (Ibid., 5.)

As far as international legal scholars are concerned, I find two tendencies dangerous ... The first is the tendency to justify in law anything that happens in the UN by assuming too easily either the modification or abrogation of Charter rules by tacit agreement or through the formation of customary rules; rules which, if need be, would change when the UN practice changes direction. I would feel more confident about the future of the UN if, every so often, one were to find that there had been no modification of the law, that the article of the Charter had not disappeared, but that it had suffered, purely and simply, a breach; and likewise, that no customary rule had come into being or vanished.

The second tendency [is related to] combining the privileged condition of certain states in the Security Council with the condition of strength they would also enjoy legally ... under general international law itself. These states would apparently operate, "*uti universi*", both on behalf of the international community as a whole, and on behalf of the UN. The fabric of international law ... would thus attain a considerable degree of ... "verticalisation" of international law inside and outside the UN ...

One wonders what encouragement to resist abuse can ever come, to the governments of the small or weak states, from theories according to which the strong would

have acquired the legal powers of a world directorate without being subject to all the obligations of common members, and without submitting to any duty to account for their actions to the states in relation to which they would exercise, through the Council, allegedly legislative and adjudicatory functions not contemplated in any provision of the Charter. (Ibid., 25–26.)

The crucial point is that it is very hard to conceive as a normal development of the “organism” created by the Charter the fact that the Security Council turn itself *proprio motu*, and without adequate control by the entire membership, from the *gendarme* that the founders are generally considered to have created, into the supreme legislative, judicial and executive organ of a super-state. It seems reasonable to assume that, had the founders envisaged the possibility of such a dramatic development, they would have provided for adequate guarantees. (Ibid., 28.)

67. Frowein, J. A., “Reactions” (see note 52, above), 358. Against the attitude taken by Weil that the international legal order should still be seen as mainly based on the will of the states as expressed in bilateral and multilateral treaties, Frowein stated (ibid., 365) that: “With public international law developing into much more than a law of bilateral and multilateral treaty relationships the threshold to a constitutional structure has long been crossed.”
68. Franck, T. M., 1990. *The Power of Legitimacy Among Nations*. New York: Oxford University Press, 24. Franck points out four criteria of legitimacy (ibid., chapters 4–11, and Franck, T. M., *Fairness* (see note 60, above), 30–46): determinacy, symbolic validation, coherence, and adherence.

Against these analyses, Williams critiqued legitimacy in these terms as a conservative principle, reflecting the conservatism of the states-systemic value of order. He pointed out (Williams, J., 1998. *Legitimacy in International Relations and the Rise and Fall of Yugoslavia*. London: Macmillan and New York: St. Martin’s Press, 12–13):

His criteria stress the need to be in touch with the past, to validate actions and actors against expectations and existing practice. Therefore the normative vision of what ought to be rests on the perfection of what already is, the more effective operation of international society rather than its transformation into something new built on different principles.

69. Franck, T. M., *Fairness* (see note 60, above), 26.
70. Ibid., 25–26.
71. Ibid., 313–314.
72. Murphy, S. D., 1994. “The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War.” *Columbia Journal of Transnational Law* 32: 201, 258.
73. Ibid., 256–257. Similarly, Goodrich stated as follows (Goodrich, L. M., 1974. *The United Nations in a Changing World*. New York: Columbia University Press, 21):

[T]he drafters of the Charter came to the conclusion that a form of organisation that followed the general lines of the League system, but incorporated the concert principle that peace could only be maintained so long as the major powers had an interest and were willing to co-operate in maintaining it, had at least a chance of success.

74. Ibid., 260. From this viewpoint, the method of authorizing states to use force to respond to threats to peace and security is considered well suited to the concept of major

powers acting by consensus. Murphy develops this point as follows (*ibid.*, 261–262):

When such situations arise, one or more powers will be the motivating force in securing Security Council authorisation for the action, and should be expected to carry the primary burden through the use of its military forces. Imposition of this burden makes it more likely that enforcement action will only be taken when there is a real commitment by one or more major powers, which is an essential element to the success of the action.

For similar reasons, the process of providing fairly open-ended authorisation to these national forces is appropriate . . . in most cases, it is simply not feasible for the Security Council to attempt to impose extensive constraints on the actions of those states conducting the enforcement action . . . Such constraints ultimately can be highly counterproductive to the conduct of the enforcement action . . . The Security Council must take seriously any authorisation for the use of force in light of the inevitably serious consequences that will result; at the same time, there must be a degree of faith and trust in the actions of the enforcing states to adhere to the basic goals established by the Security Council.

75. Caron made a similar point (Caron, D. D., 1993. “The Legitimacy of the Collective Authority of the Security Council.” *American Journal of International Law* 87: 552, 566–567):

Now that the Council is acting, legitimacy arguably is essential to ensuring its long-term effectiveness. But just as it seems wrong to gain effectiveness at too great an expense to legitimacy, so does it not make sense to increase legitimacy at the expense of a significant loss in effectiveness.

76. “The Prosecutor v. Dusko Tadic,” Case No. IT-94-1-AR72, Decision of 2 October 1995 (see note 22, above), 46–47.
77. Harper, K., 1994. “Does the United Nations Security Council Have the Competence to Act as Court and Legislature?” *New York University Journal of International Law and Politics* 27: 103, 156.
78. Graefrath, B., “Leave to the Court” (see note 23, above), 204. In this connection, Harper referred to several points (Harper, K., “Does the United Nations Security Council Have the Competence” (see note 77, above), 137–140). Firstly, a court is generally presumed to have procedural safeguards for due process. Secondly, it is required to explain its holdings on legal and factual issues in published opinions. Thirdly, if the Council is to act in a judicial capacity, it must not allow its members to adjudicate matters in which its members are interested parties.
- Similarly, Kirgis stated (Kirgis, F. L. Jr., “The Security Council’s First Fifty Years” (see note 1, above), 532): “The Council has no rules of procedure for fair adjudicative hearings; nor could it reasonably be expected to adopt or follow any such rules.”
79. 1954 ICJ Rep., 61.
80. Kirgis, F. L. Jr., “The Security Council’s First Fifty Years” (see note 1, above), 525. See also Kirgis, F. L. Jr., 1995. “Claims Settlement and the United Nations Legal Structure,” in Lillich, R. B. (ed.), *The United Nations Compensation Commission*. New York: Transnational Publishers, 103.

It is said, however, that the Governing Council has so far always approved without any change the recommendations of the Panels of Commissioners. Di Rattalma, M. and Treves, T. (eds), 1999. *The United Nations Compensation Commission: A Handbook*. The Hague: Kluwer Law International, 35–37.

81. Gill, T. D., “Legal and Some Political Limitations” (see note 48, above), 85ff.
82. Mendelson, M. H. and Hulton, S. C., 1993. “The Iraq-Kuwait Boundary.” *British Year*

*Book of International Law* 64: 135, 193. With regard to the position of the Security Council mentioned above, Mendelson and Hulton pointed out as follows (*ibid.*, 192):

Technically, this may have been correct, but substantively there was more to it.

In the first place ... this was not a demarcation exercise in the usual sense of the term. The Commission was not merely marking out on the ground a boundary which had already been defined with some precision in a treaty. So far as concerned the boundary in the Khowr Abd Allah, there was no treaty definition at all; and, as for the land boundary, the treaty definition was so vague as to require considerable elaboration (to use a neutral term).

83. Sarooshi, D., 1996. "The Legal Framework Governing United Nations Subsidiary Organs." *British Year Book of International Law* 67: 413, 471–472. Harper, K., "Does the United Nations Security Council Have the Competence" (see note 77, above), 146–147.
84. Martenczuk, B., 1999. "The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?" *European Journal of International Law* 10: 517, 533.
85. Harper, K., "Does the United Nations Security Council Have the Competence" (see note 77, above), 137, 141. Simma, particularly concerning the Former Yugoslavia and Rwanda tribunals and sanctions regimes, made a similar point. While such Security Council law-making or regulatory measures appear justified, and should be deemed legal if they limit themselves to specific cases of particularly huge dimensions – the underlying consideration being that international peace and security can only be restored if the factors that led to the Article 39 situations are redressed as thoroughly as possible – he pointed out as follows (Simma, B., "From Bilateralism to Community Interest" (see note 61, above), 277):

However, in such instances, the Council should be held to conform to general principles of law and elementary considerations of humanity. Thus the Yugoslavia and Rwanda Tribunals must certainly be regarded as obliged to accord due process of law, fair trial, and to respect the rights of the accused (as provided in their statutes). Similarly, sanctions régimes like that embodied in resolution 687 on Iraq must remain proportionate to the breaches of the law thus concerned.

86. Yemin, E., 1969. *Legislative Powers in the United Nations and Specialised Agencies*. Leyden: A. W. Sijthoff, 6.
87. Kirgis, F. L. Jr., "The Security Council's First Fifty Years" (see note 1, above), 520.
88. See, for example, Skubiszewski, K., 1965–66. "Enactment of Law by International Organizations." *British Year Book of International Law* 41: 198, 202.
89. Similarly, de Brichambaut stated (de Brichambaut, M. P., 2000. "The Role of the United Nations Security Council in the International Legal System," in Byers, M. (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law*. Oxford: Oxford University Press, 269, 275): "Although the Security Council does not have the power to create law, it does have the power to create rights and obligations for the member States of the United Nations."
90. Roberts, L. D., 1993. "United Nations Security Council Resolution 687 and Its Aftermath: The Implications for Domestic Authority and the Need for Legitimacy." *New York University Journal of International Law and Politics* 25: 593, 597–610: see also Harper, K., "Does the United Nations Security Council Have the Competence" (see note 77, above), 127–128.
91. *Ibid.*, 155.
92. Establishment of subsidiary organs could sometimes involve quasi-legislative functions

in such cases as the International Tribunal for the Former Yugoslavia, and for Rwanda, as well as the United Nations Compensation Commission. Concerning the former, it was pointed out (Kirgis, F. L. Jr, "The Security Council's First Fifty Years" (see note 1, above), 522): "These Statutes are legislative in nature even though each Statute applies to only one existing situation: each is directed to indeterminate addressees (individuals) and may be applied repeatedly until all justiciable cases have been tried." See also Kirgis' discussion with regard to the problems of applicable law and procedural provisions concerning the tribunals, as well as the directives to apply the *force majeure* defence concerning Resolution 687. Ibid., 523–525. However, concerning these tribunals, Kirgis acknowledged their legality (ibid., 523):

To be sure, the framers of the Charter do not seem to have contemplated the use of Article 29 in this fashion. Nevertheless, the objection seems legalistic because the Article 39 conditions are met, the Tribunal's decision makers are independent of political control, and the adjudicative procedure appears to be essentially fair.

93. Graefrath, B., "Leave to the Court" (see note 23, above), 203. Herdegen stated similarly as follows (Herdegen, M. J., "The 'Constitutionalization' of the UN Security System" (see note 65, above), 150):

Under the Charter, the primary safeguard against an unbalanced dynamism does not lie with judicial control, but rather with a political check – the veto . . . This element, and not dynamic intervention by the ICJ, is the main guardian of the Security Council's abstention from irrationality and abuse of powers.

94. 1962 ICJ Rep., 168.

95. 1971 ICJ Rep., 45.

96. Watson, G. R., 1993. "Constitutionalism, Judicial Review, and the World Court." *Harvard International Law Journal* 34: 1, 27.

97. Alvarez, J. E., 1996. "Judging the Security Council." *American Journal of International Law* 90: 1, 9. Herdegen made a similar point (Herdegen, M. J., "The 'Constitutionalization' of the UN Security System" (see note 65 above), 151):

Contrasted with the comprehensive powers of the European Court, the ICJ's intervention in the administration of the Charter and the occasions for it to pronounce upon the effect of Security Council resolutions depend on rather hazardous and incidental elements: a proper case brought by the proper parties under proper submission to the Hague. Because the International Court of Justice possesses no power of annulment, the impact of its reasoning regarding the illegality of a Security Council resolution will often be left to speculative guessing. In addition, the ICJ's decisions cannot claim binding effect *erga omnes*.

98. Bowett, D. W., 1996. "The Court's Role in Relation to International Organisations," in Lowe, V. and Fitzmaurice, M. (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*. Cambridge: Cambridge University Press, 181, 190–191.

See also the various discussions by Bedjaoui in Bedjaoui, M., 1994. *The New World Order and the Security Council: Testing the Legality of its Acts*. Dordrecht: Martinus Nijhoff.

99. Ibid. Lauterpacht is also positive and, in the context of "recourse against quasi-judicial decisions of political organs of international organisations," stated (Lauterpacht, E.,



*Aspects* (see note 51, above), 113–114):

In what direction then can we move to reduce or eliminate the problem of erroneous or improper institutional quasi-judicial activity? The answer would appear to lie in the direction of judicial review; in effect, in the direction of some kind of appeal. It should be open to a State or entity prejudiced by a Security Council resolution to insist on the submission of the disputed questions of law to an international tribunal.

See also the relevant discussion by the present author (Sato, T., *Evolving Constitutions of International Organisations* (see note 5, above), 177–178).

100. 1993 ICJ Rep., 439; *International Law Reports* 95: 159. See also the discussion on this point by Akande, D., “The International Court of Justice and the Security Council” (see note 50, above), 325–342.
101. Alvarez, J. E., “Judging the Security Council” (see note 97, above), 37. Another problem was pointed out by Greenwood as follows (Greenwood, C., 1999. “The Impact of Decisions and Resolutions of the Security Council on the International Court of Justice,” in Heere, W. P. (ed.), *International Law and the Hague’s 750th Anniversary*. The Hague: T. M. C. Asser Press, 81, 85–86):

The assertion of a generalised power of judicial review of Security Council resolutions and decisions could have a destabilising effect on the workings of Chapter VII of the Charter, if a decision taken by the Security Council, for example, to impose economic sanctions, could be challenged, perhaps many years after it was taken. That would induce an element of uncertainty which could hang like a sword of Damocles over every sanctions regime on which the Council might decide.

102. On this matter, Bowett continued as follows (Bowett, D. W., “The Court’s Role” (see note 98, above), 191):

The objection that this would invite the Court to question the Council’s political judgement, or discretion, is not compelling. Most legal systems have a tradition of judicial abstention from “political questions,” and it should not be expected that the Court would attempt to substitute its political judgement for that of the Security Council.

103. Franck, T. M., 1995. “The United Nations as Guarantor of International Peace and Security: Past, Present and Future,” in Tomuschat, C. (ed.), *The United Nations at Age Fifty* (see note 21, above), 37. See also Simma, B., “From Bilateralism to Community Interest” (see note 61, above), 282; Malanczuk, P., 1999. “Reconsidering the Relationship Between the ICJ and the Security Council,” in Heere, W. P. (ed.), *International Law* (see note 101, above), 87, 98–99.

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## Selected contexts: International organization in transition

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## The legitimacy of the World Trade Organization<sup>1</sup>

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*Robert Howse*

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### Introduction

“Humankind was born free but is everywhere in chains . . . How did this change happen? I am unaware of that. How can it be made legitimate? I believe I can resolve this question.”<sup>2</sup> Understood in these terms, the problem of legitimacy is the central political problem of Western modernity.<sup>3</sup> It arises from a consciousness that there is no higher authority to which the individual, or indeed the collectivity, naturally or self-evidently owes allegiance/obedience. The idealized synthesis of divine law and human political wisdom in medieval natural law theory had failed to offer a practical solution to the competition between throne and altar, sect and party,<sup>4</sup> and its Aristotelian metaphysics and scholastic logic became the target of a new spirit of scientific inquiry and investigation. As is most explicit in the ideas of Hobbes, the problem of legitimacy and its solution have, from the outset of modernity, been bound up with the construction of sovereignty, a kind of power that, once legitimated, is supposedly insulated from challenge by competing higher authorities, whether secular or religious.<sup>5</sup> Once this is appreciated, it becomes easier to understand the tortured, twisted path that the legitimacy question has taken in the sphere of international “order” – if sovereigns are themselves the exclusive object of legitimate obedience/allegiance, how is it possible to even think of the possibility of a legitimate power above and beyond the sovereign?

There is a time-honoured tradition of finessing this problem through

basing the legitimacy of international institutions on the consent of sovereigns themselves; this finesse gains its plausibility from an attractive analogy between the consent of sovereigns to institutions above them and the basis of the sovereigns' own legitimacy, namely the real or hypothetical consent of the individuals over whom they exercise power. But there is a problem with this analogy, for the second kind of consent is both necessary and sufficient, according to contractarian strands of modern political theory, to establish the sovereign's monopoly of violence or force over its citizens; it is a contract between the would-be citizens themselves to surrender the natural power and freedom of each to the sovereign. Yet in the case of consensual commitments of sovereigns to one another, there is no super-sovereign, as it were, to enforce the contract against a violating sovereign through the application of irresistible force. If such a super-sovereign were to come into being, then we would have, effectively, not an international institution but an empire – in the absence of which, what constitutes the consent of sovereigns is merely a kind of forbearance or attitude of aristocratic comity among equals.<sup>6</sup>

This explains the manner in which the issue of legitimacy often gets raised in contemporary discussions of international law and institutions by advocates of these institutions – namely, as a means of inducing, persuading, or seducing sovereigns to comply with what they have agreed to, not as a justification for a monopoly of irresistible force but as a palliative for its absence.<sup>7</sup> Yet the critics of international institutions also raise the issue of legitimacy, as a response to the perception not that these institutions have no, or little, power, but too much. Thus, cross-cutting the legitimacy issue is a question about the nature, salience, and location of power. Sovereigns use international organizations as a means of legitimizing their own power or transposing to another site the question of the exercise of sovereignty *within* the state – if the WTO or the IMF legitimates a certain policy choice by sovereigns, then what in turn legitimates the WTO or the World Bank? The bureaucrats within the organizations, or their technocratic friends on the outside, respond by putting the ball back in the court of the sovereigns – there is no power here, only consensual choices of sovereigns, the organization being a mere servant of its members, or an administrator of their *ex ante* choices.<sup>8</sup> We cannot, without further inquiry, be sure that the legitimacy question, posed to international organizations, is not a trap or a distraction from its urgency at the level of the sovereign state. And conversely, a finding that these organizations lack legitimacy need not result in pessimism or despair, even if we are inclined to support the kinds of policies which it is their rationale to further – the implication might simply be that the legitimacy question must be answered in a different place.

### Why does the WTO require legitimacy?

To understand the nature of the legitimacy question with respect to the WTO, it is first of all necessary to consider the kind of power that the WTO exercises. The WTO represents a transformation of the legal framework for multilateral trade liberalization that came into being in the late 1940s, the General Agreement on Tariffs and Trade. The GATT, in turn, was the “rump” or remnant of a far more grandiose post-war effort to create an organization that would exercise regulatory power over trading relations, including elements of international competition policy, the International Trade Organization (ITO). This last effort having been viewed as politically infeasible given the opposition in the United States to such a scheme, what survived was a set of rules and procedures for negotiating tariff concessions and preventing the possibility that some parties might cheat on them through other measures. This arrangement, the GATT, was in many respects a non-institution. Its secretariat did not have a formal status, much less actual supra-national regulatory powers, and no significant decision could be taken, in practice, without the consensus of the membership, including even the recourse to dispute settlement and the adoption of dispute settlement rulings as binding. In its early years, the core function of the GATT was to establish the procedures for successive rounds of tariff concessions voluntarily negotiated among the members of the GATT (contracting parties), including the principle of most-favoured-nation treatment. Through dispute settlement, there was some policing of domestic policies, chiefly by application of the national treatment rule that domestic laws, regulations, requirements, or taxation measures must not discriminate against imports – such a non-discrimination rule seems almost essential if parties are to provide concessions on border measures with assurance that other parties will not cheat, through enacting domestic policies with the same protective effect. Nevertheless, as already noted, for a dispute settlement ruling to have a binding effect on the losing party, it would need to be adopted by consensus. As the GATT became increasingly successful at providing a forum for tariff reductions, increased attention came to be paid to a wide range of domestic policies, not necessarily discriminatory in any obvious sense, that might, in some circumstances, be claimed to amount to cheating on, or undermining, negotiated concessions. Thus, issues such as subsidies, dumping, and technical “barriers” to trade became increasing preoccupations of the GATT system. In the absence of any agreed baseline for normal governmental policy-making,<sup>9</sup> the making of rules that could neatly distinguish an acceptable range of domestic regulatory autonomy from cheating on negotiated commitments became a vexing exercise. In this atmosphere of

greater explicit normative ambiguity, trade policy “experts,” diplomats, and bureaucrats in the GATT secretariat played an increasing role in maintaining the system. They brokered compromises of various kinds on these issues in particular disputes, based on an intuitive sense of what the system could bear, and they set the agenda for future rule-making, however difficult, through the proposal of solutions on issues such as subsidies, which displayed greater political subtlety than intellectual or juridical clarity. In fact, the GATT secretariat was notorious for actually drafting rulings in dispute settlement for the panelists, based less on rigorous treaty interpretation than on intuitive ideas about system maintenance.<sup>10</sup>

Thus, by the early 1990s, on the eve of its transformation into the WTO, the GATT could be said to be the site of two kinds of power. The first was obviously the formal legal power of rules and related commitments (tariff bindings) negotiated by consensus among the membership. The second kind of power, of a technocratic, epistemic, “*eminence grise*” nature, arose largely from the above-noted difficulty of managing certain normative divides or ambiguities (normal regulation versus impermissible “protectionism”) through the establishment of rules. It had no formal basis in the law of the GATT,<sup>11</sup> and so could be exercised non-transparently and often invisibly.<sup>12</sup>

The creation of the World Trade Organization in 1994 changed the balance between these two kinds of power and arguably added a third. Firstly, many of the areas of normative controversy were addressed by explicit new rules, in areas such as technical barriers, services, intellectual property, and subsidies. Unlike, in many respects, the skeletal legal framework of the original GATT text, these rules cannot easily be seen as general “standards” to be used by an expert bureaucracy in crafting dispute-specific solutions. They often have the character of detailed legal code, embodying trade-offs between regulatory autonomy and trade liberalization explicitly negotiated *ex ante*. Moreover, the failure to abide by these rules – and indeed the old rules as well – as interpreted in dispute settlement (discussed below) triggers a right to retaliation against the offending party, with the level of retaliation being subject to determination by arbitration. In this sense, the WTO represents a halt to the increasing “arbitrage” power of the trade policy elite and perhaps the beginning of its decline, with a corresponding greater power for rules themselves, as interpreted by the Appellate Body (whose troubled relationship with the traditional trade policy elite will be discussed below). Secondly, although heralded as a true “organization” or institution, unlike the GATT, the WTO treaty – the agreement establishing the World Trade Organization – does not confer any regulatory or executive functions on the WTO as an institution. It preserves as a prerogative of the

membership as a whole any binding decision that affects the rights and obligations of members; moreover, it reaffirms the notion that, wherever possible, such decisions should be taken by consensus. Thus, the General Council of the WTO, while it can, as a WTO organ, take binding decisions, is simply the collective voice of the members themselves, and not an independent decision-making institution.

The one exception to this is dispute settlement; here, under the WTO, panel rulings are to be adopted as binding settlements of disputes, with effective automaticity. The previous rule of consensus has been replaced by one of negative consensus, where a panel ruling will be adopted unless every member dissents from its adoption, including the winning party. Given the control of the trade policy elite over the dispute panel rulings, noted above, this feature of the WTO arrangement would seem to actually enhance the informal power of the elite. However, a further feature – perhaps the most important – of the WTO arrangement is the Appellate Body, which exercises juridical control over the panel process, reviewing for legal error the decisions of panels upon petition from the losing party or parties. Perhaps the AB might have been conceived by some as another layer of technocracy. Yet it has become, and arguably is by its very nature, a third kind of power: judicial power. Decisions reflecting the technocrats' consensus on a "sound" way of handling certain issues have been reversed or reworked by the AB, often (especially in the early days) provoking puzzlement and anger from the technocrats.

In discussing the legitimacy question in relation to the WTO, it is useful to consider these three forms of power separately, while recognizing that they are in fact to some extent permeable. For instance, technocratic power has a role in shaping what issues are on the agenda for new rule-making and for the architecture or design of these rules, and judicial power – that is, interpretive power – is crucially related to the power of rules themselves.

### Legitimacy and the power of rules

The consent of sovereigns provides a powerful basis for the legitimacy of the rules that constitute the WTO treaties. Or, perhaps more accurately, as suggested in the Introduction to this chapter, consent may seem to obviate the necessity to even ask the legitimacy question in relation to the formal rules. Yet the hard issue is, of course, why sovereigns should be bound to past acts of consent, if obedience to the rules no longer serves their perceived interests. Thus, in order to establish how consent creates obligation – the basic puzzle of all contractarian theories of legal order – one must establish the principle of *pacta sunt servanda* independent of



consent itself, if one is to avoid tautology. As Leah Brilmayer suggests: "... States might change their minds about whether they want to submit to some particular international norm. Why should they not be allowed to? It is easy enough to think of reasons for the principle that commitments must be honoured; the reliance of other actors in the system, the practical advantages of being able to bind oneself, and so on. What is clear, though, is that the principle is a normative judgement and that it cannot itself be explained in terms of prior consent without indulging in circular reasoning."<sup>13</sup> This is part of the reason why arguments for the legitimacy of the WTO that are based on consent to the rules by sovereigns are usually accompanied by some kind of substantive case as to why it is desirable to follow agreed-upon rules. These arguments are often grounded in economic welfare, but sometimes in what one might call a conception of higher or natural law – for instance, Ernst-Ulrich Petersmann's notion of the WTO rules as protecting property rights. These substantive conceptions of legitimacy will be discussed in turn below. However, it is important to consider the legitimating value of consent on its own terms, even if this value turns out to be inherently limited or insufficient.

Part of this legitimating value could be crudely described as negative; that is, deriving from the absence of *illegitimate* power – the unilateral exercise of force or coercion over weaker nations by stronger ones, which undermines the norm of sovereign equality.<sup>14</sup> Here, the WTO context poses a number of problems. The first relates to the complexity of the relationship between multilateral rule-creation, coercion, and sovereign inequality. In a number of cases, including services and intellectual property rights, it is highly unlikely that a large number of countries, particularly developing countries, would have agreed to new multilateral rules, except under the threat of unilateral action, largely from the United States. To what extent does this context of unilateralism or the threat of unilateralism vitiate the legitimating value of the consent of those countries? On the one hand, one can discern in the rules consented to a balance of values and interests that might not have been present had the law simply been imposed unilaterally, without any attempt to seek agreement from less powerful countries – for instance, the scope for compulsory licensing in the public interest in the patent protection provisions of the intellectual property (Trade-Related Intellectual Property (TRIPs)) Agreement. On the other hand, but for the threat of unilateralism, "consensual" rules would probably have been much less favourable to the interests of some powerful countries. This complexity is reflected in the approach of WTO advocates in their defence of the system – on the one hand, there is a considerable emphasis on consent; on the other hand, an often quite blunt admission that the WTO cannot, as a recent document by the secretariat

put it, “make all countries equal.”<sup>15</sup> Perhaps the most dramatic example of how consensus does not guarantee equal voice is the example of the conclusion of the Uruguay Round negotiations on trade in agriculture – the core deal on agriculture was negotiated in the final weeks and days of the negotiations between the United States and the European Union, and essentially presented to the rest of the membership as a *fait accompli* at the deadline.<sup>16</sup>

Another dimension of the legitimating value of sovereign consent derives from the notion that this consent stands as a surrogate for the democratic legitimacy of the rules in question. The WTO rules represent the wills of the various *demos*, to which sovereigns are accountable. The modern tradition of representative government, combining divided powers with an emphasis on the legitimating effect of procedures, yields a standard account of democratic legitimacy in terms of the following of procedures applicable to the exercise of power by each branch of government, these procedures being derived in turn from a constitution based on the real or hypothetical consent of the “people.” Besides this formal legitimacy, however, there is, as Joseph Weiler has argued, “social legitimacy” – “a broad, empirically determined, societal acceptance of the system. Social legitimacy may have an additional substantive, ‘teleological’ component: legitimacy occurs when the government process displays a commitment to, and actively guarantees, values that are part of the general political culture, such as justice, freedom, and general welfare ... Most popular revolutions since the French Revolution occurred in polities whose governments retained formal legitimacy but lost social legitimacy.”<sup>17</sup>

To the extent that, in binding themselves to the rules by consent, sovereigns follow domestic constitutional procedures that create formal domestic legality for such decisions, one may say that the WTO rules have formal democratic legitimacy. The link between sovereign consent and democratic legitimacy has been well-expressed by John Jackson, in advocating a rules-based international trading regime: in a “rules-oriented system,” according to Jackson, democratic legitimacy is obtained *ex ante*, because “various layers of citizens, parliaments, executives and international organisations will all have their inputs, arriving tortuously to a rule, which however, when established will enable business and other decentralised decision-makers to rely upon the stability and predictability of governmental activity in relation to the rule.”<sup>18</sup>

This, however, does not eliminate the possibility of a gap between formal and social legitimacy, in Weiler’s sense. One source of such a gap may be domestic constitutional or administrative arrangements in certain countries, whose formal procedures for treaty-making do not allow in fact for the process of consultation and dialogue evoked by Weiler. Certain features of the rule-making process endogenous to the WTO itself may

also contribute to such a gap – for instance, a practice of secrecy while drafts are being negotiated which frustrates ongoing democratic consultation during the treaty negotiation process itself, combined with the “package deal” approach, which tends to compel, at the end of the negotiation, democratic bodies such as legislatures either to accept the deal as a whole or be faced with the responsibility or blame for wrecking the entire multilateral trading regime.<sup>19</sup> One kind of possibility for addressing the defects of democratic control of the rule-creation process would be to bring “stakeholders” in the rules directly into the negotiating process, or to conduct the process as a dialogue with such stakeholders, mediated not by domestic democratic institutions and procedures, but rather through international civil society.<sup>20</sup> Can one rely upon international civil society to cure the defects of democracy within domestic polities? One ground of scepticism is what Ben Kingsbury refers to as “inequalities in access participation, power and accountability within this emerging transnational civil society.”<sup>21</sup> Another ground arises from the concern of whether democracy is really possible without a *demos*.<sup>22</sup> Even if one does not think a *demos* needs to be constituted by or through a pre-political bond such as race, culture, and language – and therefore that, for instance, Europe might constitute a *demos*<sup>23</sup> – it is still the case that as Eric Stein suggests, one cannot have a *demos* without a “certain community of a common good and common expectations of the people that bridges the cultural differences.”<sup>24</sup> If there is no transnational *demos*, then international civil society’s democratic pedigree must continue to be derived from its capacity to represent interests, values, and stakeholders that have salience within domestic polities, and which often are not adequately represented through formal party political mechanisms.<sup>25</sup> And it would be a huge mistake to take international civil society itself, a select and self-selecting melange of individuals and organizations, to be a global *demos*, or real democratic community, even in an embryonic form. Or, perhaps more precisely, before one could imagine doing so, it would be crucial to address the “inequalities” to which Kingsbury refers. Yet, despite these difficulties, it is nevertheless possible to imagine an important role for international civil society in rule negotiation, which can serve democratic social legitimacy. This is the role of monitoring the negotiating agents of the various *demoi*, to ensure that they represent the interests of those *demoi*, as evolved in domestic democratic deliberation, in an appropriate way. Also, and relatedly, international civil society may underpin deliberative democracy at the global level – a process of public justification in which all relevant claims and interests are discussed and weighed.<sup>26</sup> In this sense, NGOs do not have to get their democratic credentials from supposed representativeness of specific constituencies, but rather have a legitimate role to play just because they are effective advocates of ideas and arguments that

should be included in the process of deliberation. Another kind of gap that may arise between *ex ante* formal democratic legitimacy and social legitimacy is through an interpretation of what was agreed on *ex ante* by those who exercise either bureaucratic or judicial power, which are themselves not legitimate. Therefore, the social legitimacy of the rules themselves may depend upon, or be dependent upon, the legitimacy of bureaucratic and judicial power, to be discussed below. One further dimension to the gap between formal democratic and social legitimacy in the WTO context is the changing nature of rules and the manner in which they affect citizens in their daily lives. Trade rules and commitments have always had an explicit domestic politics attached to them, in that removal of trade barriers (tariffs and quotas, for instance) reciprocally creates winners and losers within each democratic community. But with these kinds of explicit border measures, the question of legitimacy, including social legitimacy, has been preoccupied as much with the redistribution through domestic policies of gains and losses from the rules, as it has with the rules themselves. The new era rules, however, tend to direct or constrain domestic public policy in an immediate fashion – whether, for instance, dictating a minimum level of intellectual property protection, prescribing the kind of process required for the formulation of health and safety regulation, or specifying the circumstances in which governments can provide research and development assistance to industry. The rules constrain or direct future exercises of sovereignty in broad regulatory fields. As the implications for the ability of governments to respond to citizens' needs become evident over time, there is a greater possibility of a gap between *ex ante* formal democratic legitimacy and *ex post* social legitimacy.

As Weiler suggests, social legitimacy is itself bound up with elements of substantive legitimacy; the empirical acceptance by citizens of formally valid rules as legitimate depends significantly on their conformity with values and interests broadly shared among those citizens. Traditionally, the main justification of multilateral trade rules has been in terms of economic welfare. To the extent that the rules remove or constrain barriers to trade, they allow countries to exploit their comparative advantage. The result is a reallocation of resources both domestically and globally to higher-valued uses, and a corresponding increase in domestic and global wealth. The original theory of comparative advantage was aimed at convincing sovereigns that removing barriers to imports would increase the national wealth; however, wealth and welfare are not the same.<sup>27</sup> Wealth is something that can be used for good or ill; for instance, greater wealth could allow a tyrant to more effectively oppress its subjects, or as Rousseau suggested, could corrupt the public-spirited virtue of a people.<sup>28</sup> Thus, very little, if any, substantive legitimacy can be won for free trade rules by showing that they tend to support the generation of wealth. Accord-

ingly, advocates of rule-based free trade today tend to rely upon claims about the welfare-enhancing effects of free trade rules. In the case of trade barriers such as tariffs that have direct price effects in the market of the importing country, removal of such barriers is claimed to be welfare-enhancing in that the gains to consumers can be shown to exceed the losses to producers/workers.<sup>29</sup> Even here, though, there is no guarantee of social legitimacy – there may be good reasons to place a higher value on the avoidance of catastrophic losses to a small vulnerable group (for example, textile workers in Quebec) than on gains dispersed among millions of consumers (slightly lower prices for shirts and blouses). One way of highlighting this issue is to state the excess of (aggregate) gains to consumers over (aggregate) losses to producer/workers in terms of the idea of Kaldor-Hicks efficiency – the gains to the winners would allow us to fully compensate the losers, insuring that they are no worse off while still retaining some of the winners' gains (as well as the allocative efficiency advantage from shifting resources to higher-valued uses). Thus, in earlier work, the author and co-authors, estimating from various empirical studies the cost to consumers per job saved from trade protection, argued that far cheaper policy instruments than trade protection could be deployed to address the effects on workers of loss of comparative advantage in certain industries.<sup>30</sup> However, as discussed in that study, these kinds of conclusions depend upon certain assumptions about the nature of welfare losses from employment dislocation. One assumption is that the loss of old jobs can be adequately (or more than adequately) compensated by new jobs, or by cash. Nevertheless, while alternative, non-trade-restricting policies may allow workers to find jobs elsewhere in the economy, they would not compensate those workers for the welfare losses resulting from having to leave the community in which they have lived and worked for much of their lives. Early retirement, even at full salary, might be less costly than continued trade protection, but will not compensate workers for the loss of the sense of value and dignity, and perhaps solidarity and community, that comes from productive labour. Finally, even if we believe that, with appropriate policy shifts, no one is worse off in absolute terms, the *relative* gains and losses that different groups in society experience may be relevant to social legitimacy. If the gap between rich and poor widens, even if the poor are no worse off in absolute terms of wealth, the mere presence of this greater inequality may offend relevant social values and be a problem for social legitimacy, as well as having quite concrete implications – for instance, eroding the social solidarity between classes needed to sustain certain redistributive policies.<sup>31</sup> Recent defences of trade liberalization acknowledge the significance of rising income inequality in and of itself, but also argue for alternative policy instruments, such as skills upgrading.<sup>32</sup>

Two additional features of the economic welfare-based case for free trade should be noted; these are relevant to the extent that this case, if proven, can provide a foundation for the WTO rules. Firstly, it should be observed that the welfare case for replacing trade protection with less costly policy instruments does not automatically translate into a case for multilateral rules – it is, in the first instance, an argument for unilateral trade liberalization. However, if the reciprocal removal of barriers by other countries leads to more export opportunities for one's own country, then at least potentially, the welfare case is strengthened – another domestic group, producers/workers who make goods for export, benefit, and there are more overall gains available to compensate losers. As well, reciprocity may reduce the dimensions of the adjustment problem for losers, if some of them can be relocated to industries that now have greater export opportunities. Secondly, the rules themselves may reflect to some extent the limits on the argument that there is always a less welfare-reducing instrument than trade restrictions. For example, Article XX of the GATT allows for justification of otherwise GATT-inconsistent measures that are necessary for various purposes, including the protection of human and animal health and life and the protection of public morals. Article XIX of the GATT, the so-called "safeguards provision," allows for temporary reneging on trade liberalization commitments where there is a sudden surge of imports, allowing breathing space to put in place other public policies to more adequately deal with the effects on domestic industry.<sup>33</sup>

In sum, the welfare-based case for trade liberalization can provide important, albeit limited and qualified, substantive legitimacy to multilateral trade rules, at least those such as tariffs and other border restrictions on imports that have direct, explicit, price-distorting effects in domestic markets, or even discriminatory regulatory policies that have indirect but clearly identifiable effects of this nature.<sup>34</sup> This is not the case, however, for many of the new era rules that characterize the WTO system, whether services rules related to the regulation of network industries, constraints on non-discriminatory food safety regulations, or requirements of minimum levels of intellectual property protection. Such rules are somehow understood or claimed to enhance market access for exporting countries, but have much more ambiguous welfare effects in the importing country than do reductions in or elimination of clearly price-distorting border measures such as tariffs and quotas, or discriminatory domestic regulation with analogous effects.<sup>35</sup> One example of this is the case of intellectual property protection – for developing countries in particular, it is easy to imagine that the gains from enhanced patent protection in terms of further incentives to efficient innovation, for example by multinational pharmaceutical firms, will be far outweighed by the welfare losses to consumers, such as those deprived of cheap generic pharmaceuticals. Some

countries gain from such rules, and some lose; aggregate global welfare may increase or decrease.<sup>36</sup> Requirements that food safety regulations be based on scientific assessment of risk, if they do not conform to international standards, could increase regulatory costs for some countries to a prohibitive level, leading to a sub-optimal regulatory outcome from the perspective of domestic welfare; in some cases, on the other hand, such a rule may lead to better and more effective regulation, producing a welfare-enhancing regulatory outcome. In sum, instead of being understood in terms of a win-win outcome for all countries (assuming appropriate domestic policy adjustments), these rules have to be understood as a negotiated compromise between conflicting, or potentially conflicting, values and interests in different countries, and among different stakeholder groups. But careful examination of the detailed content of the WTO rules does reveal such a balance – the permissibility of compulsory licensing for patents has already been mentioned as a balance or counterweight to the requirement that typically Western periods of patent protection be provided by all countries, which, it has already been suggested, would be welfare-reducing for a significant number of countries. Similarly, in the case of food safety regulation, a balance can be discerned – for instance, regulation on a precautionary basis is permitted in the case of certain kinds of perceived risks, provided further scientific inquiry is taken once the preliminary precautionary measures are in effect. But who can be sure that the negotiated balance represents or is likely to result in a welfare-enhancing outcome either within each country or globally? Even less clear is whether the negotiated balance represents, against any defensible conception of inter-state distributive justice, a fair division of gains and losses, benefits and burdens, from the rules. (Kaldor-Hicks efficiency can only expand on the distributive issue if we assume both that the gains to winners are more than enough to fully compensate losers, and that a redistributive policy apparatus exists to make such decisions legitimately, which is obviously not the case at the inter-state level.)

These difficulties heighten the relevance of attempts to ground the substantive legitimacy of the WTO rules in what has been called the “Washington consensus,” the view that a combination of specific policies or policy approaches – privatization, demonopolization, deregulation or regulatory reform (a shift to lighter-handed or more market-friendly regulation and regulatory instruments and, especially, flexibility in labour markets), tight monetary and fiscal policy, trade liberalization, free capital movements, protection of investor’s rights, and intellectual property rights generally – represents an optimal prescription for public policy regardless of the country or region of the world in question.<sup>37</sup> Thus, the WTO secretariat document “Ten Benefits of the WTO Trading System” lists “good government” as one of the benefits of the WTO system; by constraining

special interest groups from lobbying for public policies at odds with this optimal mix, the WTO plays a positive role in reinforcing and securing the Washington consensus. As a basis for the substantive legitimacy of the WTO rules, it is important to underline how much at odds the Washington consensus is with the traditional welfare case for free trade, which emphasizes precisely that free trade leaves enormous room for diversity in domestic regulatory/redistributive policies, allowing policy makers ample scope to achieve whatever legitimate public policy goals they may have by less costly means than trade restrictions. But precisely for this reason, the Washington consensus provides a tempting expedient for establishing the substantive legitimacy of the new WTO rules, which constrain or direct non-discriminatory domestic regulatory policies. Nevertheless, it is possible to articulate the Washington consensus as being solely about the optimal choice of regulatory instrument, and therefore as possessing much the same normative structure as the welfare-based case for free trade, which relies on the notion that there is always, or almost always, a regulatory instrument less costly, or more “efficient,” than trade protection to achieve any legitimate policy objective.<sup>38</sup>

Thus, the OECD suggests: “multilateral trade and investment agreements do not aim to put into question the *objectives* of national policies, or regulations, whether on trade, investment or any other matters. Nor do they regard *all* measures to implement them as *a priori* simply unnecessary barriers to doing global business.”<sup>39</sup> Yet whether the policy instruments recommended by the “Washington consensus” can usually attain the same social objectives or goals as those instruments that it would seek to constrain, regardless of context, is highly debatable.<sup>40</sup> One of the most pervasive Washington consensus prescriptions, which is the replacement of instruments that affect prices and competition directly with explicitly redistributive transfers, is itself undermined by the monetary and fiscal prescriptions of the consensus, which may well make “tax and spend” policies less feasible, especially when combined with the tax competition that may result between countries from implementation of the Washington consensus prescription for free movement of capital.<sup>41</sup> One might go even further – to the extent that countries are constrained by these last aspects of the Washington consensus, the scope assumed for non-trade-restricting domestic adjustment policies by advocates of the welfare case for the more traditional trade rules (constraining measures such as tariffs and quotas) may have to be rethought. At the same time, it must be appreciated that WTO rules themselves, even the new rules, stop short of imposing the full regulatory strait-jacket of the Washington consensus; this, of course, does not mean that the interaction of the WTO rules with aspects of the Washington consensus that are enforced or imposed through other institutions or forces of globalization does not raise problems for welfare-



based substantive legitimacy of the WTO rules, especially when the case for the rules themselves hinges so much on the wisdom of the Washington consensus overall. Finally, the first thoroughgoing attempt to justify *ex ante* a trade and investment arrangement on Washington-consensus-grounded substantive legitimacy was arguably not the Uruguay Round, where the problematic relationship between new WTO rules in areas such as intellectual property and the traditional case for trade liberalization was not that fully appreciated, but the Multilateral Agreement on Investment – the failure of the MAI at the hands of international civil society is a reminder that, while it is a powerful (if intellectually dubious) force as an elite ideology, the Washington consensus is a very fragile basis for the substantive legitimacy that Weiler describes as tied to social legitimacy. The matter of how few countries in which the Washington consensus has been broadly embraced by society, rather than accepted as a constraint or necessity imposed by the outside (IMF conditionality or the supposedly inevitable forces of globalization that one cannot afford to resist), should not be forgotten. Furthermore, the Asian crisis has knocked the wind out of the more extreme claims for the universal, unadulterated application of the Washington consensus.

The difficulties with welfare-based substantive legitimacy have led at least one prominent international trade law scholar, Ernst-Ulrich Petersmann, who was the legal director of the GATT for a number of years and is currently a consultant to the WTO, to attempt a deontological, or natural rights, justification for GATT/WTO rules. The rules protect economic freedom, which is a dimension of human autonomy, from depredation at the hands of politicians who are controlled by concentrated interest groups. Trade law rules allow politicians to tie themselves to the mast, as it were, so that they cannot be moved by these sirens.<sup>42</sup> Once we consider, however, free trade rules in the WTO as embodying or protecting rights, it is necessary to examine their relation to other internationally protected human rights, including equality rights, labour rights, cultural rights, and so on. Understanding the WTO rules in terms of a broader international legal order that protects a wide range of human rights is a promising goal; for Petersmann, however, it is primarily, if not exclusively, property and contractual rights that need to be protected against interest groups seeking payment of rent. There are, or seem to be, no positive rights (various government interventions are justifiable where the least trade-restrictive means are adopted, but only to correct market externalities).<sup>43</sup> A different issue raised by Petersmann's viewpoint is its relationship to democratic legitimacy. Petersmann recognizes that legitimate public policies may entail some limitations on property and contractual rights (albeit for rather narrow "market failure" reasons) – the case for establishing the legitimate scope of these limitations at the international level is that un-

constrained domestic politics yield intrusions far greater than those justifiable for legitimate reasons – but here Petersmann is interpreting the illegitimacy of the domestic political process from a substantive conclusion that actual observable domestic policy outcomes display greater interference with rights than that which is necessary to achieve a given outcome. If one didn't agree with him in the first place about the range of legitimate policy objectives, and the empirical capacities of different policy instruments to attain those objectives, one would not share his conclusion about the apparent defect in domestic politics that would make international rules to protect these rights necessary – even if one believed that there were a sound deontological foundation for the rights themselves.

Another alternative to welfare-based approaches to substantive legitimacy is what could be called the “conflict management” approach. This approach is reflected in the very first “benefit” of the WTO trading system described in the WTO secretariat document “Ten Benefits of the WTO Trading System”: “Peace is partly an outcome of two of the most fundamental principles of the trading system: helping trade to flow smoothly, and providing countries with a constructive and fair outlet for dealing with disputes over trade issues. It is also an outcome of the international confidence and co-operation that the system creates and reinforces.” Unquestionably, a major inspiration for the Bretton Woods architects of the original trading system was the belief that beggar-thy-neighbour protectionist spirals in the 1930s contributed to the depression and indirectly to the outbreak of the Second World War. A problem, however, is that any set of rules that effectively constrained such behaviour would be accorded substantive legitimacy by this approach; this does not go very far to legitimating the present-day scope of international trade law. For this reason, the idea of conflict management or containment has had to be combined with what John Jackson has described as the “bicycle theory” of trade policy: “unless there is forward movement the bicycle will fall over.”<sup>44</sup> The idea that unless there is a continuous increase in the number and scope of trade rules, even the basic framework will collapse, leaving open the abyss of unconstrained conflict, is both a powerful and a frightening one, which can lead to brinkmanship-style negotiating strategies that could ultimately heighten the risk of conflict. As Robert Keohane suggests, “precisely because [contemporary trade regimes] lessen discord, however, they may create incentives for actors to be exorbitantly demanding in their bargaining strategies, as De Gaulle was in the European community and as others have been since. Such actors may assume that a regime is sufficiently valued that their partners will make concessions to retain it.”<sup>45</sup> Would the United States and/or the European Union have simply walked away from the existing GATT had there not been a Uruguay Round deal on intellectual property, or agriculture, or services? Different theories of

state behaviour might yield quite different predictions – realists such as Joseph Grieco<sup>46</sup> would highlight the likelihood that a major power or powers would walk away from a system if they start to lose relative power within that system to other powers and fail to regain or even increase it through changes to the rules of the system; neoliberal theorists might argue that even if the relative power of the United States was declining under the existing rules, the failure to recapture relative gains with new rules would still not lead to the abandonment of a system that arguably still produces significant absolute gains for the United States, measured either in terms of the welfare analysis discussed above, or even in terms of conflict management itself. Moreover, as Keohane suggests, the choice between liberal cooperation and illiberal anarchy in trading relations may be misleading: when the existing multilateral rules did not seem to be able to cope with new trade conflicts in the 1970s and early 1980s, as Keohane notes, the response could be better described as an admittedly economically illiberal form of cooperation (managed trade, voluntary export restraints (VERs), and so on) rather than unconstrained conflict.<sup>47</sup>

Finally, combining certain elements in both the Petersmann natural rights approach and the conflict management approach is what one might call the approach of political liberalism. From this viewpoint, protectionism represents a xenophobic response to one's own political/economic challenges, a tendency to blame the "other" for our troubles, and to impose the costs of our own choices on the "other." Free trade rules find substantive legitimacy in disciplining such xenophobic, discriminatory responses. This understanding gains force from the character of anti-free-trade rhetoric, particularly on the right, but also from some elements of the "communitarian" left (Ross Perot's anti-NAFTA rhetoric; Goldsmith's diatribe against globalization in Britain; the anti-Americanism of Canadian left-leaning NGOs). This moral cosmopolitan outlook, elements of which can be discerned in Petersmann and especially his *Perpetual Peace*-inspired Kantianism, would tend, however, to provide substantive legitimacy primarily to WTO rules, such as the traditional GATT rules, that constrain or discipline discriminatory trade measures – it would be deferential to domestic democratic outcomes that result from a process where participatory rights and fair weight are given to the claims of outsiders as well as insiders. However, some of the newer rules, properly interpreted, could acquire substantive legitimacy from this moral cosmopolitan approach – thus, for example, rules relating to (even non-facially discriminatory) food safety regulation that specify a process of scientific justification for such measures, and that trade effects on outsiders be taken into account in designing the regulations in question, could be understood as structuring a democratic regulatory process that is fair to outsiders as well as insiders, and as countering the possibility of hidden or embedded discrimination.<sup>48</sup>

### Legitimacy and bureaucratic power

Bureaucratic power refers not only to the power of officials employed in the WTO secretariat, but the entire network of trade “experts,” former or current governmental trade officials, WTO-friendly academics who often sit on WTO dispute settlement panels and are invited to various conferences and meetings at the WTO, international civil servants in other organizations (particularly the World Bank, the OECD, and the IMF) preoccupied with trade matters, and a few private attorneys, consultants, and former politicians. As already noted, the WTO secretariat itself exercises little or no official power, and even has very few official duties or responsibilities explicitly set out in WTO treaties. One prominent exception is the nomination of panelists from rosters, which can include names provided by member governments; the parties to the dispute may only oppose the secretariat’s choices for “compelling reasons.”<sup>49</sup> Prior to the WTO, the secretariat, as already noted, exercised tremendous power over dispute settlement, not only through the choosing of panelists (mostly middle-level or junior diplomats, but also some academics and other “experts” friendly to the secretariat), but also through the influencing of the rulings themselves, in some instances drafting panel reports virtually in their entirety. Now that the Appellate Body has the final juridical control over dispute settlement, operating independently of the secretariat, and that almost all rulings are appealed, this power is diminishing in importance and indeed is less viable to exercise – even diplomats do not like to be overruled and fiercely criticized, and it is hardly an attractive role for secretariat officials to be responsible for someone else’s embarrassment at the hands of the Appellate Body. The power that the secretariat shares with other members of what can be called a “network” relates to the setting of agendas for future negotiations, through advice to committees such as the Trade and Environment Committee of the WTO, or issuing reports on “new” subjects such as, to take a recent example, “e-commerce,” which may be simple background documents but which have, in new fields, a kind of epistemic power to define what should and should not have attention in the WTO forum;<sup>50</sup> monitoring trade policies; and, to some extent, implementation of legal rules in domestic law (formally, of course, only as a matter of advice to the membership as a whole or to some other organization such as the OECD or World Bank, either in the role of official of that other organization or of independent consultant/expert). Often, these individuals will be directly or indirectly involved in the negotiations of new rules, so this is where bureaucratic power can in fact affect the rules themselves and their legitimacy, particularly *ex ante* democratic rules, in as much as negotiators or advisers from the “network,” while formally agents for sovereigns and their *demos*, may

well act according to their own interests/values, often at odds with those of their purported “principles.”

With the creation of juridical power, through the Appellate Body and its prescribed functions, the power of the “network” depends more than ever upon its capacity to identify more and more issue areas that cannot adequately be “managed” by existing rules, interpreted and applied by the judicial power. This creates a legitimate “need” for an arbitrage, policy development, or agenda-setting function of the kind described above; however, the emphasis, given the juridicization of dispute settlement, is more on policy development or agenda-setting than arbitrage of specific conflicts that somehow aren’t neatly addressed by existing rules. Since, with the Uruguay Round, the WTO rules already extend to many areas of “domestic” regulation, to sustain this kind of role as legitimate depends on something like a Washington consensus outlook – the view that the WTO is one of those international institutions responsible for implementing a comprehensive model of sound economic governance, eliminating in principle all “barriers” to the operation of open markets, regardless of their regulatory form, or whether they can be characterized in any conventional sense as discriminatory or protectionist. Alternatively, or additionally, the “bicycle theory” may be indicated as a basis of legitimacy – if it is not possible to move forward to these new issues then the existing system may collapse.

But of course, these are only sources of legitimacy for the role in question – which could easily be played by a much broader range of actors, including various domestic interests, international civil society, journalists, independent and critical intellectuals, and so on. So what is the source of legitimacy for these persons playing this role? One dimension to this legitimacy is that it is, in important ways, self-conferred (an idea beautifully depicted in David’s painting of the self-coronation of Napoleon). These individuals recognize each other as having the required qualities: greater far-sightedness and less emotivity than more demotic actors like politicians, NGOs and activists, or journalists; relatedly, an absence of nationalist attachment and a distaste for xenophobia; and high “technical” competence in a rather naïve, or straightforward, sense.<sup>51</sup> Clearly related to the legitimating potential of these various qualities are some of the substantive normative postures discussed when examining the legitimacy of the rules – for instance, Petersmann’s view of democratic pluralist politics as a depredation of rights, or the more general outlook of moral cosmopolitanism. Similarly, the idea of “technical” competence is akin to and entwined with the Washington consensus approach – the idea that economic science can generate a set of universally valid policy prescriptions, in which liberalization of trade and investment play a crucial role. But given the admitted power of the dark forces of demotic politics,

a “pure” technical competence of this kind would, on its own terms, be technical incompetence, for it would abstract from the need to (and perhaps lack the political sensitivity required to) make settlements or compromises that contain/appease these dark forces. WTO officials, unlike those at the World Bank or the IMF, cannot get by through a process of telling the “authorities” in a country what has to be done, and paying them to do it. Thus, although it gains legitimacy from the Washington consensus, the “network” tends to exclude, or marginalize as necessary but naive evangelists or prophets, those who, in Michael Trebilcock’s expression, “throw deep”<sup>52</sup> – that is, those who propose first-best, economically rational solutions, such as the abolition of anti-dumping laws, for instance.

Technical expertise, including political judgement in the sense just described, ultimately has to be oriented towards a *telos*, a goal. Economics plus public choice theory (the technical description of the attitude in question towards domestic politics)<sup>53</sup> provides the disciplinary foundation for the idea of the knowledge involved as an *expertise*: the goal might be described as the most economically rational trade regime consistent with regime stability, given the positive political economy generated by pluralist democracy. The notion that the rules of the system might reflect multiple *teloi*, establishing some kind of balance between them, would be profoundly destabilizing to this understanding of expertise – thus, it is not surprising that some members of the “network” would be at the forefront of efforts to keep environment or labour rights “out” of the WTO as substantive ends or values to be reflected in the rules and their operation, while discussing these issues “in” the WTO solely in the perspective of the pre-existing expertise of Washington-consensus-style economics and public choice political economy (environment has fared somewhat better than labour rights recently, because part of what is at stake there can at least be understood in terms of “externalities” and assimilated, broadly speaking, into the pre-standing expertise of the “network” without being lost or distorted as a value; but whatever cannot be easily assimilated in that way must be lost).<sup>54</sup>

The difficulty that bureaucratic power poses from the perspective of democratic legitimacy arises from the fact that the power is exercised with a view to affecting policies that implicate the interests and values of the various *demoi* by persons acting, in important senses, not as agents of those *demoi*. The response, as has already been noted, is to deny that this power is power at all, because all influence is channelled through representatives of the *demoi*. Advice, opinions, studies, reports, and so on are all, ultimately, contestable and rejectable by governments, and can be questioned by stakeholders themselves. But this contestability, particularly by stakeholders, does depend on transparency, which in the past has been largely lacking in the GATT/WTO. This has been changing under

pressure from the United States, with a decision on document derestriction, invitation of some NGOs to some meetings and conferences, and availability of a wide range of documents that are products of the “network” on the WTO website.

### Legitimacy and judicial power<sup>55</sup>

Under the WTO, members have access to dispute settlement as a matter of right; as already noted, unlike the original GATT, where a consensus of the member states was required in order for dispute settlement rulings to become binding, a ruling under the WTO will be adopted as binding unless all members, including the winning party, vote against its adoption (negative consensus); determinations of when and how the losing party must act to implement a ruling are subject to arbitration; and should the losing party not implement a ruling in accordance with the findings of the arbitrator, retaliation (a withdrawal of trade concessions to the losing party by the winning party) is automatically authorized. Moreover, legal determinations of the tribunal of first instance (known as a panel) may be appealed to the Appellate Body, a standing tribunal of seven jurists, three of whom sit on each case.<sup>56</sup>

As already discussed, under the GATT, there did not properly exist judicial power, since treaty interpretation in dispute settlement was controlled by the bureaucracy: the approach adopted is well summarized by Hudec, describing in particular an early era of GATT dispute settlement: “Legal rulings were drafted with an elusive diplomatic vagueness. They often expressed an intuitive sort of law based on shared experiences and unspoken assumptions. Because of policy cohesion within this community, the rate of compliance with these rather vague rulings was rather high.”<sup>57</sup> Here, as has just been suggested with respect to bureaucratic power generally, legitimacy depended heavily on a notion of technical expertise.

This kind of general strategy for legitimating international adjudication is well described by Richard Falk: “the authoritativeness of an interpretation derives, in part, from the cohesiveness of the elite creating an aura of objectivity for its interpretative claims and, thereby, soliciting voluntary acquiescence from the general public.”<sup>58</sup> Now, with an adjudicative institution separate, to some extent, from the technocratic culture of the secretariat, and empowered to openly review and scrutinize panel decisions, the myth – maintained even by many academic commentators in the past – that those decisions represent technical expertise underpinned by a consensus about competence rather than contestable legal interpretations, is no longer sustainable.

While the formal legitimacy of the new judicial power stems from its

explicit inclusion in a ratified treaty, the explicitness of contestability created by the institution of appeal raises the importance of social legitimacy for the judicial power. Despite formal democratic legitimacy, the social legitimacy of the rules themselves could easily be undermined by interpretations of those rules that do not themselves command legitimacy; but it is also possible that interpretations of the rules that command social legitimacy could compensate for a lack of social legitimacy *ex ante* with respect to the rules themselves, or actually be a building force for the social legitimacy of the rules – indeed, some have discerned in the history of the European Union such a role being played by the European Court of Justice, at least during a particular era. Perhaps the most ambitious attempt at understanding and addressing the problem of social legitimacy in WTO dispute settlement is to be found in the “stakeholder model” of WTO dispute settlement propounded by Richard Shell.<sup>59</sup> This model entails opening up the WTO dispute settlement process to all stakeholders, through extension of standing rules to include private parties, as well as incorporation of various social and environmental norms within WTO law, in such a way that stakeholders could actually use the WTO system to enforce such norms against member states. As Shell himself acknowledges, this proposal would entail very significant reforms in the law of the WTO, including the dispute settlement procedures themselves.<sup>60</sup> It has been the object of important criticisms, even from those who are sympathetic to the overall project of making the WTO system responsive to diverse stakeholders.<sup>61</sup>

A more moderate or institutionally conservative perspective on the legitimacy of judicial power – nevertheless incorporating the core normative idea of Shell’s stakeholder model that “trade policy must come to reflect trade-offs that citizens make among their needs as members of national communities and as consumers, workers, and investors participating in the merging global business civilisation”<sup>62</sup> – might begin with the observation that, in domestic public law litigation, contemporary regulatory theory and practice widely understands courts as engaged in the adjudication of competing values. This perspective may yield useful lessons as to how this may be done legitimately, especially where the tribunal understands itself as accountable to a far wider range of stakeholders than would normally exercise, or be able to exercise, a right to standing as a party to the proceedings.<sup>63</sup> It has often been assumed by international lawyers that the manner in which diversity of values and perspectives is managed in domestic litigation is not possible at the international level. Thus, Ian Johnstone suggests: “Because an international tribunal cannot fully reflect the value diversities of all States subject to it, it can never receive the degree of acceptance and confidence bestowed on domestic courts.”<sup>64</sup> However, this may wrongly assume that within domes-



tic polities there is a relatively high degree of homogeneity of values, which is certainly not the case for pluralistic liberal democracies. Thus, in the domestic context, Cass Sunstein defines the central question of law in terms of the reality that judges “must operate in the face of a particular kind of social heterogeneity: sharp and often intractable disagreements on matters of basic principle.”<sup>65</sup> The possibility that the legitimacy of adjudication at the international or supra-national level is not sharply distinguishable, or completely different, from legitimacy at the national level animates the recent work of Helfer and Slaughter on supra-national adjudication, which has been strongly influenced by the study of the European Court of Justice and the European Court of Human Rights.<sup>66</sup> This view of legitimacy and judicial power is reinforced by the analysis presented earlier in this chapter, which suggests the limitations of each of the substantive legitimacy approaches – whether economic-welfare-based or otherwise – as a comprehensive basis for the social legitimacy of the WTO rules themselves. Conversely, allowing for the idea that the rules reflect diverse and sometimes divergent values, and an attempted balance or synthesis of them, it is possible to draw on the normative power of a number of the different substantive legitimacy approaches, accepting what is sound without having to rely on what isn’t, since no one approach need carry the whole weight of the social legitimacy of the entire system.

There are three elements concerning legitimacy in the adjudication of competing values that stand out particularly: fair procedures; coherence and integrity in legal interpretation; and institutional sensitivity. These three elements can, in some respects, be understood as a grouping of the detailed “checklist” of Helfer and Slaughter. But as these writers themselves say of their own checklist, this kind of categorization is a “first step” towards a rigorous understanding of the challenge of supra-national adjudication.

Fair procedures can play an important role in the legitimation of adjudicative decisions, especially where conflicting public values are at issue. In the first place, it should be recognized that democratic theory, at least in its main contemporary liberal formulations, is proceduralist to a significant extent.<sup>67</sup> Democratic legitimacy for decisions, including those of the more directly representative organs, derives not simply, or even largely, from an authorization by crude majoritarian consensus, or mass will (the elected dictatorship of, for example, Carl Schmitt), but from the fact that complex procedures and institutional disciplines have been followed.<sup>68</sup> Generally, these procedures include requirements that deliberation occur before decision, opportunities for opposing sides or parties to be heard and to attempt to persuade one another, and some means of participation for those affected by the decision (at a minimum, publicity, so that they can be aware of how they are affected, and understand the manner in

which the decision itself was reached). And legislators and elected executives, as well as adjudicators, are constrained, in most liberal democracies, by rules on conflict of interest, and at a minimum, prohibitions on bribery or the taking of public decisions for purely personal advantage.

These rather obvious reflections suggest that there may actually be considerable common ground between the manner in which fair procedures function to legitimate adjudicative decisions where conflicting values are at issue, and the manner in which they contribute to the legitimacy of legislative and executive decisions in such cases. Thus, the overall democratic legitimacy of the system will depend to some extent upon how far the procedures for adjudication stray from the norms of procedural fairness that are also, in somewhat different form, essential ingredients in the validation of the latter, “democratic” decisions.<sup>69</sup> Indeed, one might even suggest that the farther removed the decision maker is from responsibility to a particular electorate, the greater the extent to which legitimacy depends on procedural fairness itself. The legitimating impact of fair procedures can, rather evidently, be seen in the willingness of those affected by a decision adversely, or who would have argued for a different kind of balance between conflicting values, to accept the decision as a fair outcome.<sup>70</sup> Such acceptance does not preclude, of course, the tendency to argue that the substance of the dispute was badly adjudicated by the tribunal, or that the law itself needs to be changed. But, in the international trade context, it does preclude a convincing claim that the deciding institutions themselves deserve to be rejected as having the authority to decide the question – a kind of claim often made in the past, and one that has threatened considerable damage to the world trading system.

Under the GATT, in the wake of the Tuna/Dolphin Rulings, the “democratic deficit” claim about dispute settlement was frequently expressed in terms of the illegitimacy of “three faceless bureaucrats in Geneva” deciding, for instance, the limits to which a democratic government can further goals of global environmental protection. It should be noted that the objection is not simply that this be decided in Geneva<sup>71</sup> (away from national democratic institutions), but that it be decided in a certain manner by certain kinds of persons. The decisions emanated from panels that deliberated in secret, largely unconstrained by procedural norms, and which systematically rejected participation from those affected, other than GATT member states, even when in the non-intrusive form of *amicus curiae* briefs. The results of this process, the panel decisions, were usually not de-restricted or made public until actual adoption by the membership, thereby precluding any broader public deliberation about their merits prior to adoption. At the same time, no mechanism for appeal of these panel rulings existed.

Within the GATT “insider” community, the lack of procedural con-

straints on decision-making has often been viewed with a great deal of pride, and frequently contrasted with the cumbersome legalism of domestic adjudicative processes.<sup>72</sup> Read narrowly, the WTO Dispute Settlement Understanding (DSU) represents only a modest departure from this anti-proceduralist bias.<sup>73</sup> Proceedings of panels remain secret (Article 14), including the pleadings of the parties to the dispute, and third parties (Article 18.2), and there is no mechanism for participation of affected non-governmental actors in the proceedings, such as formal intervenor status. Selection of panelists themselves remains controlled by the bureaucracy, now the WTO secretariat.

On the other hand, the DSU places on panels certain general duties, which could be taken to imply elements of fair procedure. The most important of these is the duty “to make an objective assessment of the matter before [the panel], including an objective assessment of the facts of the case” (Article 11). Also, the DSU continues the trend under the GATT concerning codification of certain customary working procedures, at least for efficacy or “housekeeping” purposes. For example, the practice of defining the panel’s mandate in its terms of reference is entrenched in Article 7.2 of the DSU. Perhaps most importantly, the DSU provides for appeal of panel decisions to the new Appellate Body, on grounds of error of law (Article 17.6). While the appellate decision is to take place rapidly following the release of the panel ruling (90 days), this nevertheless allows a space for deliberation and critique with respect to the panel ruling; this may be carried out by affected stakeholders, as well as governments, experts, and academics. This space is guaranteed by the recent practice of releasing decisions of panels publicly on the internet immediately following the release of the final panel report to the parties themselves; further, while deliberations and pleadings of panels remain secret, the arguments of parties and third parties are summarized *in extenso* in the introductory parts of panel reports, and the practice of reproducing in the published panel report expert testimony or advice, where it has formed part of the panel’s evidentiary record, has been followed. The practice of summarizing the pleadings did exist under the old GATT system – but of course, coming too late to play a role in the public scrutiny of the panel’s work (since this material was normally publicly available only after the adoption by the membership of the panel report as a binding settlement of the dispute), it was of little value in terms of procedural fairness. Obviously, the existence of appellate review changes this considerably.

The early decisions of the Appellate Body are in several respects encouraging from the perspective of the evolution of a conception of procedural fairness which can contribute to the legitimacy of WTO adjudication of conflicting values. Firstly, the Appellate Body has rapidly seized

on the codification of GATT working procedures in the DSU and interpreted these provisions in terms of an ideal of "due process," rather than technical efficiency or efficacy in the settlement of disputes. Thus, in "Desiccated Coconut," the AB held that Article 7.2 of the DSU, which on face value does little more than set out the practice of establishing the terms of reference of the panel and instruct the panel to address legal provisions cited by parties in the terms of reference, imposes a requirement that all claims that a party is intending to make in the dispute must be contained in the terms of reference, and that the claims which the complainant is making must in the first instance be contained in its request for a panel. Here, the AB referred to "an important due process objective," which is to "give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case."<sup>74</sup> In "Indian Patents," on similar due process grounds, the AB held that a party must specify the exact legal provision in a WTO agreement that it is relying on, in order for a claim related to that provision to be adjudicated, even if the claim itself has appeared in the terms of reference.<sup>75</sup>

Of course, implicit in these various rulings by the AB is the notion that conformity of the panel with WTO procedural rules is subject to appellate review. A narrow reading of the DSU provisions on appellate review could suggest that only a panel's substantive legal findings with reference to the claims made by the parties are reviewable. Article 17.6 of the DSU states that "an appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." "Issues of law" and "legal interpretations" might have been read to include only the "issues" and "interpretations" concerning whether a WTO member or members has violated a WTO Agreement, since it is these issues and interpretations that relate directly to the panel's jurisdiction as embodied in its terms of reference. In embracing a broader interpretation, the AB has clearly underscored the view of the DSU as embodying justiciable due process rights.

Perhaps the most dramatic example of this has been the manner in which the AB has breathed life into the duty of the panel "to make an objective assessment of the matter," and in particular an "objective assessment of the facts." As noted above, the scope of appellate review is limited to matters of law, but through understanding the duty of the panel to make an "objective assessment" as a legal duty, the AB has interpreted the DSU as establishing procedural disciplines on how the panel deals with the evidence before it. Thus, in the *Hormones Case*, the AB stated: "The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and make factual findings on the basis of that evidence. The deliberate disregard of,

or failure to consider, the evidence submitted to a panel is incompatible with an objective assessment of the facts.”<sup>76</sup> While the threshold for a finding of a breach of this duty was set relatively high by the AB, namely evidence of bad faith or egregious error, the AB also held in “Hormones” that where a panel decides to disregard evidence as irrelevant, this finding of non-relevancy is itself a finding of law, subject to appellate review (para. 143). Finally, in the Periodicals Case, the AB found that a lack of proper legal reasoning could “be based on” inadequate factual analysis, especially where the legal test being applied by a panel is highly contextual, requiring a case-by-case appreciation of specifics (in this instance, the determination of whether products are “like” for purposes of examining whether tax or regulatory treatment treats “like” foreign products as favourably as domestic products.) Thus, in “Periodicals,” the AB invalidated a legal finding of the panel because firstly, it had not made its finding based upon the evidence available to it on the record, and secondly, it had instead invented evidence, as it were, referring to a hypothetical comparison of two products not based upon the facts of the record.<sup>77</sup> In sum, even where its behaviour is not so egregious as to constitute a violation of the duty to make an “objective assessment” under DSU Article 11, a panel’s mishandling or disregard of the evidence on the record may well affect the sustainability of its legal conclusions upon appeal.

The significance of these developments for the legitimacy of dispute settlement outcomes where conflicting values are at stake must be appreciated in light of the pattern of behaviour of pre-WTO GATT panels in cases overtly or obviously implicating competing values, such as “Tuna/Dolphin.” In such cases, the legitimacy of the panels was further undermined by their explicit choice simply to disregard evidence that related to the impact of the measures in dispute on non-trade values and interests (in fact protected under the text of Article XX of the GATT through a series of exceptions to trade disciplines), thereby arbitrarily giving primacy to free trade over all the other values at issue in the dispute.<sup>78</sup> More generally, as Helfer and Slaughter suggest: “A guaranteed capacity to generate facts that have been independently evaluated, either through a third-party fact-finding process or through the public contestation inherent in the adversary system, helps counter the perception of self-serving or ‘political’ judgements.”<sup>79</sup>

A rather different, and more indirect, way in which the AB has strengthened the role of fair procedures in the legitimacy of WTO dispute settlement outcomes is through its decision that private legal counsel may attend and plead in WTO proceedings at the appellate level,<sup>80</sup> a right recently extended by a panel to include representation by such lawyers at the panel level.<sup>81</sup> Private attorneys, often trained in the context of domestic litigation processes, are more likely to discern and care about

due process than governmental lawyer/diplomats, much of whose “legal” experience may consist of treaty negotiations or informal resolution of disputes through arbitration and conciliation. Thus, the complainants, in opposing the notion that private counsel may plead before the WTO dispute settlement organs, argued that this would amount to a “fundamental change in the premises” underlying the WTO dispute settlement system, presumably the premises that dispute settlement is fundamentally a practical way for governments to manage their trade disagreements, as opposed to an adversarial litigation process with the corresponding procedural norms. Moreover, while the member seeking to be represented by private counsel (and others supporting its claim) argued the case for private lawyers in significant measure in the language of traditional diplomatic law – the sovereign prerogative to choose the delegates representing one’s country in any international conference or meeting – the Appellate Body, in the presence of textual silence about this matter in the DSU itself, chose to emphasize the right as a due process right in litigation, not simply a diplomatic prerogative or privilege.

Of great long-term significance, however, is another finding of the Appellate Body related to dispute settlement procedure, contained in the recent *Turtles Ruling*.<sup>82</sup> The AB reversed the panel’s decision that a panel is prohibited under the DSU from receiving information in the form of *amicus curiae* briefs from non-governmental organizations. Since these organizations may often speak for stakeholders concerned with the non-trade interests and values at issue in a dispute, the legitimacy of a decision that adjudicates competing values may well be enhanced by their input, to the extent that their voices can be seen to be taken seriously and weighed in the balance.<sup>83</sup> The relationship between *amicus* participation and democratic legitimacy in the international law context has been directly addressed by Dinah Shelton, who has argued for a more expansive view of such participation at the International Court of Justice: “... the long-term institutional interests of the Court may be best served by ensuring that its opinions are based upon the fullest available information and reflect consideration of the public interest, as well as the desires and concerns of the litigating parties.”<sup>84</sup>

The panel’s legal interpretation of the DSU was based on the simple and simplistic notion that, because the DSU explicitly authorizes panels to “seek” information from practically any source that it deems appropriate, the DSU must, by implication, prohibit a panel from accepting non-requested information (other than submissions of the parties or third parties, which are entitled to consideration by virtue of other provisions of the DSU). But of course, there is nothing inconsistent logically between an explicit authorization to seek information and an implicit permission to consider non-solicited information that is provided or brought to the

panel's attention. Since, as Palmeter and Mavroidis note, "few formal procedural rules govern the operation of panels,"<sup>85</sup> if the DSU were really to limit a panel's powers to those specifically authorized, its ability to function would be largely hobbled. That the right to seek information would be among the few prerogatives explicitly set out in the DSU is understandable; one of the fundamental differences between the two main kinds of domestic legal system (civil and common law) concerning the powers inherent in an adjudicators' fact-finding role is whether these extend to the "inquisitorial" function of seeking information not brought to the attention of the adjudicator by the litigants, or through the briefs of intervenors. In civil law systems, crudely speaking, such an inquisitorial role is generally assumed as a normal judicial power, whereas in most kinds of litigation it would not be seen as appropriate in the common law world. In the presence of such divergent understandings of the appropriateness of an adjudicator "seeking" information, an explicit authorization was clearly appropriate, given the choice of members of the WTO to opt for the inquisitorial model.

In the case of amicus briefs, by contrast, there is a wide range of domestic and international practice that suggests, in contemporary circumstances, that the discretion to consider such briefs has become widely (if not entirely universally) assumed as an appropriate judicial right, implicit in the function of the tribunal to make a judgement having heard all the relevant facts and arguments.<sup>86</sup>

In the *Turtles Case*, in holding that panels may consider unsolicited information in the form of amicus briefs, the AB found that an appropriate interpretation of the meaning of the right to "seek" information must logically include the right to consider unsolicited information: when a panel grants leave to an intervenor to file an amicus brief, it is "seeking" the information in that brief (para. 107). In effect, the intervenor is presenting "unsolicited" or "unrequested" information only in the attenuated sense that they are the first mover, as it were, in a process by which the panel may, through the explicit act of granting leave, "seek" the information. This interpretation of the amicus brief as "sought" information is consistent with general practice both in domestic and international tribunals, where the granting of leave by the tribunal is a necessary precondition to its consideration of any information that may be offered by the amici.<sup>87</sup>

The AB, however, went considerably beyond this (in itself quite sound) basis for finding that panels can accept amicus briefs from non-governmental organizations, and read the meaning of the right to "seek" information in Article 13 of the DSU in light of a panel's duty to make an objective assessment of the facts in Article 11. The AB noted: "the thrust of Articles 12 and 13 taken together, is that the DSU accords to a panel

established by the Dispute Settlement Body (DSB), and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to ‘make an objective assessment of the matter before it, including an *objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements*’” (para. 106). The notion that a panel might not be able to discharge its duty under Article 11 but for the *full* breadth of its authority to obtain information under Articles 12 and 13, suggests that in some circumstances, the consideration of amicus briefs may actually be necessary to a panel discharging its Article 11 duty to make an objective assessment. Thus, while the AB has clearly indicated that only submissions of the parties and third parties to panels are to be considered by the panels as a matter of right (para. 101), the panel’s discretion to decide to grant leave for an amicus to submit, and to consider or not consider the information provided once leave has been granted, will nevertheless be subject to the panel’s general duty to make an objective assessment of the matter before it. For instance, if an amicus submission provides crucial information about environmental effects in a dispute that concerns competing free trade and environmental issues, a panel’s failure to give leave, or to consider the information, could well be a violation of a duty to make an “objective assessment,” which must take into account the competing values and interests at stake in the interpretation of the treaty. Similarly, a choice in such a dispute to give leave to a pro-export lobby group to file, but not an environmental group with equally or more crucial information or arguments, might well be an abuse of discretion, amounting to a violation of the duty to make an objective assessment. Further, along the lines of the Periodicals Ruling, discussed above, once leave has been granted there is little doubt that the information contained in an amicus submission forms part of the record of the case – in some circumstances, a panel’s legal analysis may be defective because of its failure to base its factual analysis, at least in part, on the information in question. In sum, it is arguable that the Appellate Body has legal tools available to it to preserve the legitimacy of the dispute settlement system in the adjudication of competing values against the risk that panels will selectively silence or marginalize non-governmental voices that may speak most credibly or competently to some of the competing values at issue in the legal dispute.

Integrity and coherence in legal interpretation contribute to the legitimacy of a tribunal adjudicating competing values, through providing assurance that the tribunal’s decisions are not simply a product of its own



personal choice of the values that should prevail in a given situation. Nichols suggests: "One area in which it will be particularly difficult for the World Trade Organization to reach consensus is the interface between promoting free trade, on the one hand, and other societal values, such as protecting the environment, labour standards or human rights, on the other. As complex as the interface may be . . . the World Trade Organization must address it if the organisation is to become a credible institution . . . It is almost certain that these questions will come before the Appellate Body; coherent answers by the Appellate Body will do much to legitimise the organisation."<sup>88</sup> There are both stronger and more modest versions of this claim. The stronger claim is that by "applying" the law in a rational and coherent way the tribunal rises above politics, proves its "neutrality," and in effect largely dispenses with the need to engage in actual explicit trade-offs between conflicting values.<sup>89</sup> The more modest claim would be that coherence and integrity contribute to the tribunal's legitimacy not by obviating the need to adjudicate conflicting values but by making such adjudication transparent;<sup>90</sup> the offering of reasons for decisions based on the legal materials, and consistent with the reasons given in other cases, provides a transparent, public basis for critique and contestability of the manner in which the tribunal has handled the legal materials in the presence of competing values. But for the doctrine produced by the aspiration of adjudicators to coherence and integrity, the critical project of exposing to democratic contestability the policy choices that adjudicators make indirectly or more or less covertly would never get off the ground.<sup>91</sup>

Traditionally, what has been referred to as the "network" in this chapter tended to view the actual legal text and doctrine of the GATT as a flexible means to achieve whatever result in a particular case could be understood to support the system and its *telos*; the negative legitimacy effects of this practice were particularly visible in the "Tuna/Dolphin" panel decisions. In the first decision, the panel invented a territorial limitation on the ability of a state to justify otherwise GATT-inconsistent unilateral environmental trade measures under Article XX of the GATT – such measures could only be justified where necessary to protect the domestic environment of the country taking the measures. After much criticism by environmentalists of the legal *bona fides* of the first ruling, in the second Tuna/Dolphin Case, the panel stated that such a territorial limitation was without a basis in the text or the negotiating history of the GATT, but then invented a new limitation to get the same result: measures could only be justified under Article XX if their environmental impact did not depend on other countries changing their own policies. Then, finally, a panel dealing with a more recent unilateral measure, a US embargo to prevent the import of shrimp fished in a manner that threatens endangered species of sea turtles, invented yet another different limitation on Article XX justification in order

to exclude such environmental measures – the panel claimed that these measures constituted *per se* an “abuse” of GATT rights that fell afoul of the *chapeau* of Article XX, which requires that to be justified under any part of that Article, measures should not be applied in a manner that causes unjustified or arbitrary discrimination between countries where the same conditions prevail. The panels, in effect, turned GATT doctrine into a moving target, eluding a sustained critique of any given manipulation.

The Appellate Body, in the first few years of its jurisprudence, has done much to address the problem of lack of coherence and integrity in panel legal interpretation. Firstly, it has insisted that panels must take seriously the wording of the treaty text, and especially that they must neither impose limitations on members’ rights that are not based in the text, nor interpret the text in such a way as to render actual wording irrelevant or unusable.<sup>92</sup> The tendency of panels to assume that they understood the general purpose of a provision, and to read it in light of that purpose without regard to the individual words and phrases, almost always resulted in rulings tilted towards one particular value among the competing values at stake, namely that of liberal trade – since the purpose invariably understood by the panel was the greatest possible discipline on barriers to trade. Thus, in the *Hormones Case*, the panel interpreted a requirement that members not take trade restrictive sanitary and phytosanitary measures unless they are “based on” international standards to mean that such measures must conform with such standards, assuming that the stricter meaning was intended given the purported purpose of the treaty to eliminate trade-restrictive effects of regulatory diversity through harmonization. True to the fast and loose approach described above, the panel picked out the stricter language of conformity with international standards from a quite different legal provision in the same treaty, and then read that meaning into the less strict requirement that measures be based on international standards, in light of the panel’s view of “purpose.” In reversing this finding, the Appellate Body noted one of the main reasons why attention to the details of the text is important to legitimacy when competing values are being adjudicated: the detail of the text itself may reflect a “delicate and carefully negotiated balance . . . between these shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings.”<sup>93</sup>

The emphasis of the AB on the exact wording of the WTO treaty texts could, at first glance, and especially in light of the debate about “textualism” in statutory interpretation in domestic law,<sup>94</sup> be understood as a sweeping rejection of teleological reading of treaty language in favour of rigid literalism. However, it is important to read the textualism of the Appellate Body in light of its more fundamental jurisprudential choice to understand the WTO Dispute Settlement Understanding as incorpo-

rating the canons of treaty interpretation in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Article 3 of the DSU states that the purpose of the WTO dispute settlement system “is to clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law” (3.2). According to the Appellate Body, this language mandates the application of Articles 31 and 32 of the Vienna Convention to the interpretation of the WTO treaties.<sup>95</sup> Article 31 of the Vienna Convention stipulates that provisions of a treaty be given their ordinary meaning in context and in light of the treaty’s object and purpose; thus, in emphasizing the importance of the exact words, the AB is not endorsing narrow literalism and eschewing teleological interpretation; rather, it is taking the words as the necessary beginning point for an interpretive exercise that includes teleological dimensions. Most importantly, it is rejecting the tendency of the panels to assume a certain purpose prior to careful textual interpretation, thereby taking a shortcut to the establishment of treaty meaning that bypasses the exact text. This prevents the interpreter from having to “test” their view of purpose against the exact words used in the treaty, a necessary safeguard against the importation or prioritization of a single purpose into a legal text which is crafted to balance diverse and possibly competing values.<sup>96</sup>

In some sense, the very decision to follow these general public international law interpretative norms enhances the legitimacy of the dispute settlement organs in adjudicating competing values – this is because these norms are common to international law generally, including regimes that give priority to very different values, and are not specific to a regime that has traditionally privileged a single value, that of free trade.<sup>97</sup> This significance is highlighted by another interpretive issue in the *Hormones* Case. A traditional GATT-specific canon of interpretation<sup>98</sup> was that where a provision of the treaty allows an “exception” to a trade-liberalizing obligation, the burden of proof falls on the party invoking the “exception” – an approach that clearly privileges free trade over other, competing values, assuming that the latter, embodied in the exception, cannot easily dislodge the former, regardless of the nature of the matter in dispute. In “*Hormones*,” the panel applied this traditional GATT-specific approach to a provision of the Sanitary and Phytosanitary Agreement, but the Appellate Body reversed its finding on burden of proof, instead emphasizing that “merely characterising a treaty provision as an ‘exception’ does not by itself justify a ‘stricter’ or ‘narrower’ interpretation of the provisions than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in light of the treaty’s object and purpose” (para. 104). Because, as Palmeter and Mavroidis note, the Vienna Convention rules “do not give grounds for preferring one portion of the

text over another, construing the former broadly and the latter narrowly,” they are likely to result in interpretations that do not unduly or unjustifiably privilege one of the competing values at issue over the others.<sup>99</sup>

A further respect in which the adoption of the Vienna Convention rules for the interpretation of the WTO treaties is likely to enhance the legitimacy of adjudication of competing values is suggested, in particular, by Article 31(3)(c) of the Vienna Convention, which provides that “any relevant rules of international law applicable in the relations between parties” shall be brought to bear on the interpretation of a treaty. This mandates the consideration of non-WTO international legal rules in the interpretation of WTO treaties – rules that may reflect or prioritize other values and interests than those of trade liberalization, thus countering the undue privileging of the latter in WTO interpretation. In the *Turtles Case*, the AB referred in a number of important respects to international environmental law in interpreting the provisions of Article XX of the GATT as it related to the possibility of justifying otherwise GATT-inconsistent trade measures aimed at the protection of endangered species (in this case, sea turtles). Faced with the interpretive question of whether living species of animals (in this case, endangered species of sea turtles) could be considered “exhaustible natural resources” within the meaning of Article XX (g) of the GATT, the AB referred to a range of international environmental agreements, including the 1982 United Nations Convention on the Law of the Sea, The Convention on Biological Diversity, and the Convention on the Conservation of Migratory Species of Wild Animals. Perhaps more importantly, in assessing the implications of the unilateral nature of the US measures for the consistency of their application with the “chapeau” of Article XX – which requires that application not result in “unjust” or “arbitrary” discrimination or a “disguised restriction on international trade” – the AB, unlike the “Tuna/Dolphin” panels, did not simply invent its own limitation on unilateralism as a means of protecting the environmental commons; instead, it referred to a baseline in actual international environmental law, that contained in the Rio Declaration. Since, among other international legal instruments, Principle 12 of the Rio Declaration called for the avoidance of unilateral measures, with a solution based on consensus being preferred whenever possible, the AB could find that, against this baseline, the failure of the United States to negotiate seriously with the complainants towards a consensus-based solution, while having already negotiated successfully with other members, constituted “unjustified” discrimination (para. 168–172).

Yet another important aspect of the deployment of international environmental law in this case is the AB’s decision to provide interpretation of the treaty language (in this case, the term “exhaustible natural resources”) based on evolving international law, rather than the purported original

understanding of the negotiators of the 1947 GATT, as reflected in the negotiating history. This preference for dynamic or evolutionary interpretation over originalist interpretation is reflected in the structure of the Vienna Convention itself; subsequent agreements and understandings between the parties, as well as any relevant rules of international law (obviously including custom, which is necessarily evolutionary)<sup>100</sup> are primary, obligatory sources of treaty interpretation according to Article 31, whereas travaux, according to Article 32, are optional and secondary sources, which may only be resorted to when the application of Article 31 results in a remaining ambiguity, or a “manifestly absurd or unreasonable” interpretation of the treaty text.

In justifying evolutionary or dynamic interpretation in “Turtles,” the AB did not, however, explicitly refer to the structure of the Vienna Convention; instead, citing an advisory opinion of the ICJ on Namibia, the AB suggested that some provisions of treaties are “by definition, evolutionary” (para. 130). The AB thought that “natural resources” fell into this category, because the preamble to the WTO Agreement envisaged future action “in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so.” It thus seemed logical that, from the perspective of WTO law, the interpretation of a generic expression like “natural resources” should track the evolving effort to define the meaning and scope of sustainable development to which the members had committed themselves in the preamble.<sup>101</sup> The text-specific grounds for the choice of an evolutionary or dynamic interpretation of the text in this case arguably obscured the more general rationale for applying dynamic as opposed to “static” originalist interpretation.

Retrospective, originalist interpretation almost inevitably privileges the supposed intentions and expectations of a fairly narrow “interpretive community” – that of the treaty negotiators – over the broader community affected by interpretive decisions, the community implicated in the notion of democratic or social legitimacy.<sup>102</sup> Traditionally, under the GATT, resort to the travaux constituted a pervasive and largely uncontroversial interpretive practice.<sup>103</sup> Despite the pronouncements of the Appellate Body about following the Vienna Convention approach rigorously, so ingrained is the originalist instinct that John Jackson pronounces scepticism about whether in actual practice recourse to the negotiating history will be any less pervasive or unconstrained in the future.<sup>104</sup> Originalism duplicates in the exercise of judicial power the legitimacy problem arising from the defective *ex ante* democratic control over the rules themselves, which was discussed earlier in this chapter.

Given this democratic defect in rule-creation, social legitimacy in rule interpretation may exist as democratic social legitimacy, where the exer-

cise of judicial power properly handles a conflict of values held by diverse stakeholders, taking into account, in an even-handed way, the actual understandings and expectations of those diverse stakeholders as they evolve in social practice. In some cases, these evolving understandings and expectations will often find expression in the kind of subsequent understandings and agreements, and (necessarily evolving) international legal rules, referred to in Article 31 of the Vienna Convention.<sup>105</sup> This may include international environmental law, international labour law,<sup>106</sup> and international human rights law, as it is developing in light of what Saskia Sassen refers to as an “equity-oriented agenda ... focused ... on equity and distributive questions in the context of a globally integrated economic system with immense inequalities in the profit-making capacities of firms and the earning capacities of households.”<sup>107</sup> WTO interpretation which reflects the emerging law of the “other” agenda of globalization, as reflected in the already-noted invocation of various international environmental conventions by the AB in “Turtles,” also serves a “structural” coherence function, assuring that WTO law evolves in a manner that reduces, rather than enhances, conflict and inconsistency with evolving law in other international legal regimes.<sup>108</sup>

In “Turtles,” the AB actually followed the sequence prescribed by the Vienna Convention, resorting to the drafting history of the GATT only after it interpreted the chapeau of Article XX employing the means of interpretation prescribed by Article 31 of the Vienna Convention (para. 157 and accompanying footnote). The AB thus examined the exact wording of the chapeau in order to come to the conclusion that its effect was to make the individual exceptions listed in paragraphs (a) to (j) of Article XX limited and conditional in nature. Then, and only then, did it resort to the travaux to “confirm” its textual interpretation of the chapeau of Article XX. In the earlier Reformulated Gasoline Case, the AB also resorted to the negotiating history to interpret the chapeau of Article XX as addressing itself to the avoidance of “abuse” of the various exceptions permitted within individual paragraphs of Article XX. However, it did so only after having interpreted the “express terms” of the chapeau to support this conclusion. Thus, the invocation of the negotiating history here, just as would subsequently be the case in “Turtles,” was merely for the purposes of confirming an interpretation according to Article 31 of the Vienna Convention – a use of travaux explicitly authorized by Vienna Convention Article 32.

Another way in which the AB has strengthened legitimacy of dispute settlement through coherence and integrity is through strengthening the precedential weight of panel and Appellate Body reports. As Palmeter and Mavroidis suggest: “Continuity and consistency are valuable attributes in any legal system: application of the same rules to the same factual

issues, independently of the parties involved – treating like cases alike – is an important source of legitimacy for any adjudicator.”<sup>109</sup> Traditional GATT practice was that previous panel reports need not be followed, although they could be considered, by panels; this was based on the notion that an adopted panel ruling constituted a legal binding settlement only of the particular dispute between the particular parties. The lack of *stare decisis* allowed panels a great deal of freedom in manipulating the law to achieve a given result that they had intuited to be desirable from their professional appreciation of the needs of the “system.” This chapter has already alluded to the “moving target” that constituted panel jurisprudence on trade and environment, with panels shifting legal grounds for the result (exclusion of trade measures to protect the global environment from GATT justification) from one case to another, in order to diffuse scrutiny or criticism of how the adjudication of conflicting values was handled in the previous case. A related example, which perhaps illustrates a further dimension of the discipline that *stare decisis* can impose on an adjudicator’s inappropriate privileging of one value over another in the adjudication of competing values, is that of the finding, also in the Tuna/Dolphin Cases, that products cannot be considered “unlike” within the meaning of Article III of the GATT, and thus cannot be treated differently without violating the non-discrimination obligation of Article III, on the basis of their production methods, but only on the basis of some characteristic of the product as such. This ruling produced the result, which the panels clearly desired, that trade measures based on environmental externalities created in the production of a product would be considered not as “internal regulations” within the meaning of Article III, but as *per se* violations of Article XI of the GATT (quantitative restrictions), regardless of whether domestic products creating similar externalities were equally banned from the market. This was because imported products creating the externalities could not be considered “unlike” to domestic products that did not create the externalities. Had a principle of *stare decisis* been in operation, the panels would, at a minimum, have been forced to explain their deviance from a suggestion of a different panel just a few years before that process and production methods might indeed be one respect in which products might be considered “unlike” for purposes of Article III,<sup>110</sup> and of another panel, which held that Article III applied to measures that were based not on any physical or other “essential” characteristics of a product, but rather the juridical circumstances of their production (namely the violation of intellectual property rights of US nationals).<sup>111</sup>

While falling short of creating a strict rule of *stare decisis*, the AB has nevertheless held that panels “should” take into account previous adopted panel reports, which create “legitimate expectations” concerning future

dispute settlement outcomes.<sup>112</sup> As Palmeter and Mavroidis suggest, the implication of this rule is that panels are bound to follow previous panel jurisprudence, unless they provide a reasoned explanation for a departure in approach.<sup>113</sup> This is arguably close to the practical significance of *stare decisis* in those domestic legal systems that recognize the principle: in such systems, courts sometimes do reverse their approach to a legal question, but will explain the reasons for overruling themselves with care and explicitness when they do so. From the perspective of legitimacy, this attenuated justificatory meaning of *stare decisis* is in any case the most significant – the aim is to discipline results-oriented manipulation of the law, which the requirement of explaining for a deviation from previous reasoning should suffice to serve.

A third ingredient in the legitimacy of WTO dispute settlement understood as the adjudication of conflicting values is, arguably, institutional sensitivity. In the course of interpreting provisions of the WTO Agreements, panels and the AB will be required to subject to interpretation and scrutiny a wide range of laws and policies, both domestic and international, which address a range of diverse values and interests. In approaching these laws and policies, the panels and the AB should be sensitive to their institutional strengths and weaknesses in relation to other actors who may have particular expertise or a particular stake in these laws and policies. Often this is expressed as a general exhortation to deference or “restraint”<sup>114</sup> in adjudication. Jackson suggests that “there should be *some* measure of deference, at the international dispute settlement level in the dispute settlement process, to national government decisions.”<sup>115</sup> These formulas are not very helpful for several reasons. Firstly, they give little guidance as to how far restraint or deference should go in a given interpretive context. Secondly, the notion of deference, as is explicitly evidenced in Jackson’s formula, tends to imply that what is at stake is the international level of decision-making yielding to the domestic. Yet in some very important contexts, the relevant institution with a claim to superior legitimacy may not be domestic at all, but some other international regime (international environmental legal regimes, for instance, in cases surrounding trade measures to protect endangered species). Thirdly, the notion of deference or restraint suggests that when the panel or AB’s institutional analysis points to some other institution having some particular competence or credibility in dealing with a factual or legal issue, the only option in WTO dispute settlement is simply to yield to the determination of that body. This tends to exclude other, important options, such as that of the panel making its own determination nevertheless (which may be different from that of the other institution), but giving special weight to aspects of that other institution’s analysis which draw on its particular competency or legitimacy.



In order to understand the need for institutional sensitivity as an ingredient in legitimacy of WTO judicial power, one should be aware of the manner in which, traditionally, bureaucratically directed GATT panels failed to display such legitimacy – this is deeply connected to the assumption that they were enforcing a single value, free trade, from which perspective it would be hard to imagine that any other institution would have anything relevant to say that could compete, in terms of competence and authority, with the GATT itself. A particularly good illustration of this attitude is to be found in the summary dismissal of environmental information from other organizations in the Tuna/Dolphin Case, including information on international environmental law. But perhaps an even more egregious example was the panel's rejection of an explicit attempt by another international organization, the World Health Organization, to bring its competence to bear upon issues of health regulation as they emerged in the Thai Cigarette Case.

In "Thai Cigarette," Thailand sought to defend import restrictions and discriminatory tax treatment with respect to American cigarettes as justifiable under Article XX(b) of the GATT as "necessary" for public health reasons.<sup>116</sup> Thailand argued that American cigarettes posed a particular health risk, because of their attractiveness to young people who might otherwise not take up the habit – an attractiveness in part due to advertising and marketing campaigns carefully targeted at youthful populations in developing countries. Thailand had sought to deal with the problem by a variety of measures, which included advertising bans, public information campaigns, and health warnings on cigarette packages, as well as the *prima facie* GATT-inconsistent measures at issue.<sup>117</sup> In finding that these less restrictive alternatives were adequate for Thailand's public health purpose, the panel simply ignored evidence from the World Health Organization that opening up markets to American cigarettes in a number of Latin American and Asian countries has led to increased smoking. The WHO had found that in the real world regulatory context faced by these developing countries, US multinationals had the resources to circumvent advertising bans, either finding loopholes in the laws or evading compliance efforts.<sup>118</sup>

This case illustrates not only one dimension of institutional insensitivity but two; not only insensitivity to the competence of the WHO, but also to the local knowledge of the Thai regulators, attempting to achieve regulatory goals in a real world environment known intimately to them, but not known at all to the panel. The panel felt perfectly confident that it could assess what alternatives might be available to achieve the regulatory objective in question by a purely abstract analysis, without any openness to what institutions with relevant local knowledge had found about the "real world" in which they were attempting to regulate.

Looking at the recent decision-making of the WTO Appellate Body, it is possible to see a contrasting trend towards institutional sensitivity emerging, although perhaps not as consistently as would be desirable from the perspective of legitimacy. In “Hormones,” as well as the early case of “Underwear,”<sup>119</sup> the Appellate Body rightly rejected any crude or rigid rule in favour of deference to findings of national authorities. In “Hormones,” the AB went on to suggest a spectrum of deference which, with respect to fact finding, lay somewhere between *de novo* review of the facts at issue and “total deference to national authorities” (para. 117). In itself this seems as imprecise as Jackson’s formula of “*some* deference.” However, in establishing its notion of a spectrum on the duty to “make an objective assessment of the facts,” the AB seems to be pointing towards the more adequate notion that the weight to be given to factual determinations of other institutions will depend on some assessment of the relative competence and credibility of those institutions in the handling of the particular facts at issue. Similarly, with respect to legal interpretation, the AB suggested that the law “directly on point” was the Article 11 duty to make “an objective assessment of the matter before [the panel].” This is really the notion of institutional sensitivity within the discharge of the panel’s duty to “make an objective assessment” – not the delegation of a part of that duty to some other institution.

It is instructive to examine the actual deployment in the Hormones Case of this incipient notion of institutional sensitivity. In “Hormones,” The AB was, in part, considering provisions that left open to some extent the degree of compatibility required between an assessed risk and the domestic regulatory measure in question. These provisions required that SPS measures be “based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health.”<sup>120</sup> The general aspect of institutional sensitivity that the AB was applying here is stated somewhat earlier in the report: “a panel charged with determining, for instance, whether ‘sufficient scientific evidence’ exists to warrant the maintenance of a particular measure may, of course, and should bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned” (para. 124). One should give weight here to these representative institutions, since in the context of risk regulation (as opposed to academic scientific discussion), their responsibility to protect their citizens gives a particular weight to their determinations, in contrast to the abstract scientific discourse. Similarly, this last finding is a further illustration of the reasons why deference is an inadequate notion to reflect the taking into account of relative institutional competence and credibility in dispute settlement. Here, the choice was not simply between the panel imposing its own, more limited concep-

tion of “risk assessment” on a WTO member’s internal institutions on the one hand, and deference to the “domestic” on the other – it was also a choice between one of two different alternative institutional authorities outside the WTO, the one represented by science/technocracy and the other by democratic regulation that responds to the manner in which ordinary people perceive and handle risk in the everyday world.<sup>121</sup> The AB chose to understand science as playing a role within democratic justification of regulation; it was prepared to show some institutional sensitivity to internal regulatory authorities, while not simply excusing them from the need to show that their regulation can be understood as the product of public justification, in which science would have some role to play.

Of course, these various applications of institutional sensitivity in “Hormones” illustrate the important insight that the particular competence of an institution to which weight must be given in a particular interpretive context need not be (technocratic/scientific) expertise-based – true to the conception of what is required for legitimacy when competing values are being adjudicated, it may just as likely be based on the institution’s particular responsibility to, or claim to representivity of, stakeholders or constituents whose values and interests are at issue in the dispute (social/political/cultural knowledge). Here, in as much as domestic or internal institutions are generally more capable of democratic representation, institutional sensitivity will cash out in terms of an appreciation of the need to allow domestic institutions to effectively respond to their constituents. This is something akin to a notion of subsidiarity<sup>122</sup> – the idea that presumptive normative weight should be afforded to outcomes of lower levels of authority on the assumption that those levels are closer to the people whose values and interests are at stake. In treaty interpretation, this would translate into the tendency to adopt the interpretation of a given treaty provision that is least constraining of regulation that is “closer to the people.” In “Hormones,” the AB expressed this idea through the international law notion of *in dubio mitius*: in the presence of two plausible interpretations, the one that is less onerous, or constraining of the party accepting the obligation, should be adopted (para. 165 and accompanying footnote). In other cases, the AB has rejected interpretations of obligations under WTO treaties that were based not on the strict language of the treaty, but rather on an expansive notion of the complainant’s “reasonable expectations” from a provision of the treaty.<sup>123</sup> The author would prefer to understand these interpretive moves as representing the subsidiarity aspect of institutional sensitivity, since the legacy of *in dubio mitius* is that of deference to sovereignty, which is increasingly questionable as a value in itself; democracy is arguably less contestable as a value in itself,<sup>124</sup> or at least as a value which is closely tied to social legitimacy.

## Conclusion

In the ending to his classic article on GATT doctrine, Nichols – drawing on the example of the European Court of Justice – makes the bold suggestion that legitimacy in legal interpretation by the WTO dispute settlement organs may serve to legitimize the World Trade Organization as a whole; in other words, it may help to close the gap between formal and social legitimacy that exists even in the rules themselves. One certainly cannot underestimate the importance of judicial power to the overall legitimacy of the WTO. Nevertheless, even the most sensitive exercise of judicial power cannot rule out the possibility of a broader crisis of legitimacy, based upon doubts about the wisdom and justice of the kind of economic liberalization that provides an important dimension to the substantive legitimacy of the WTO. The original 1947 GATT, as noted in this chapter, had a modest scope, with the text of the agreement providing a great deal of room to manoeuvre for domestic policy-making in almost all fields, and flexibility in trade policy as well, in situations of economic crisis or difficulty. Through the evolution of this original understanding into a much more ambitious undertaking to achieve global economic liberalism, the stakes have been raised tremendously. Not only has the substantive legitimacy of the trading system become more evidently important to its effective operation, given the range of its potentially conflictual interactions with the nation-state, but the basis of this substantive legitimacy has also become much more fragile, or at least more complex. The case for welfare gains to the participating countries in the removal of protectionist measures – the classical and neo-classical case for free trade – was a strong enough one that, when made with the appropriate social and political caveats, it was acceptable to progressives such as Keynes, as well as to economic liberals. Forgetting or marginalizing the social and political caveats, impatient to resolve claims about fairness in trade in an economically liberal fashion, and willing to allow new rules to be driven by ideological fashion rather than trade theory (intellectual property rights and investor protection in the failed MAI negotiations), many of today's advocates for multilateral free trade have made the system more vulnerable to substantive critique and attack by its enemies than at any time in its history. Now, on the verge of a new round of WTO negotiations, and after the Asian crisis and the MAI failure, many of these voices have become both more cautious and more open-minded about the WTO and its limitations. Some would say that it is too late. The question is whether concerns about democracy, inequality, and instability, to the extent that they affect the substantive legitimacy of the WTO, can be dealt with through moderation and new-found modesty in rule-making and rule-

interpretation, or whether they now point to an inevitable and decisive crisis for global economic liberalism. The author tends to lean towards the former view, if only because, while the problems the critics point to are real and their arguments are effective in displaying the over-reaching of liberal economic ideology, they do not have, individually or collectively, a plausible alternative model of human social and economic organization premised on protectionism and discrimination in trade.<sup>125</sup> Caution or even a standstill on issues like investment and intellectual property; a direct or implicit endorsement of institutional sensitivity in dispute settlement on issues such as food safety and environment, as well as intellectual property; attention to transparency, publicity, and broader participation in the operations of the WTO; more direct engagement with the human rights dimension of the operation of global economics, through relationships with other institutions such as the International Labour Organization, and with NGOs as well – some or all of these suggestions could conceivably be part of an effort to enhance the legitimacy of the WTO.<sup>126</sup> After building a house very high, it is sometimes wise to stop, and pay careful attention to what has happened to the foundations.

## Notes

1. This chapter was largely conceived and written while the author was a visiting professor at Harvard Law School. The author is greatly indebted to the students in his class and seminar there, engagement with whom helped enormously in understanding and framing the issues involved, as well as to a number of colleagues there, including Bill Alford, Duncan Kennedy, Eyal Benvenisti, David Charny, and Ben Kingsbury, for helpful conversations. The author also continues to learn much from ongoing conversations about these issues with Bill Davey, David Kennedy, Brian Langille, Petros Mavroidis, Kalypso Nicolaidis, Uli Petersmann, Kerry Rittich, Craig Scott, and Michael Trebilcock. Mavroidis and Nicolaidis read the chapter with great care and provided extremely helpful suggestions. The author is also grateful for useful comments from participants in the UNU Project on The Legitimacy of International Organizations. Bob Hudec provided useful suggestions on the penultimate version of the manuscript.
2. Rousseau, J., *Social Contract* I: 1, author's translation.
3. Dan Bodansky begins his fine forthcoming study of legitimacy in international environmental law in a similar manner, citing Rousseau: see Bodansky, D., forthcoming, "International Environmental Law's Legitimacy: Is There a Democratic Deficit." *European Journal of International Law*, 1–2.
4. See, generally, Machiavelli, N., *Prince and Florentine Histories*; Unger, R., 1976. *Law in Modern Society: Toward a Criticism of Social Theory*. New York: Free Press.
5. The remarks that follow on sovereignty throughout this chapter have benefited enormously from the author's reading of Kingsbury, B., forthcoming, "Sovereignty and Inequality." *European Journal of International Law*.
6. As Alexandre Kojève remarks concerning international law, "Up until this very day, international *Droit* has never been a *Droit in actuality*. By definition, this *Droit* is related to interactions between *sovereign* States. Now the very notion of sovereignty excludes

- the possibility of an irresistible constraint coming from the outside. Therefore the Third in international *Droit* does not have any means to *impose* his intervention on the litigants, who can always opt out.” Kojeve, A., 2000. *Outline of a Phenomenology of Right* (trans. Frost, B. and Howse, R.). Lanham MD: Rowman and Littlefield, 506.
7. See, for instance, Franck, T., 1995. *Fairness in International Law and Institutions*. Oxford: Clarendon, chapters 1 and 2.
  8. See also the exchange between Judith Hippler Bello and John Jackson in the *American Journal of International Law*, 1997; Bello argues that ultimately the WTO does not constitute a threat to the exercise of US sovereignty because the United States can always disobey its legal obligations as interpreted by the dispute settlement authority, albeit at the price of suffering some retaliation. Jackson’s rejoinder is compelling – as he argues, there are real costs, short- and long-term, to important US interests from non-compliance with the law of the WTO. Jackson, J. H., 1997. “Editorial Comment: The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligation.” *American Journal of International Law* 1: 60. And indeed, since the establishment of the WTO dispute settlement system, the United States has found itself in several cases in the position of being a winning party seeking the compliance of the loser.
  9. Tarullo, D., 1987. “Beyond Normalcy in the Regulation of International Trade.” *Harvard Law Review* 100: 546; see also Kennedy, D., 1994. “The International Style in Postwar Law and Diplomacy.” *Utah Law Review* 7: 7.
  10. The “Tuna/Dolphin” cases being the most notorious examples, where the panel reports invented a number of legal distinctions to exclude from GATT-legality even non-discriminatory environmental measures to address a commons problem; this and related examples are discussed in the final part of this chapter on legitimacy and the judicial power. “United States – Restrictions on Imports of Tuna” (1991), *International Legal Materials* 30: 1594; “United States – Restrictions on Imports of Tuna” (1994), *International Legal Materials* 33: 936. See Kingsbury, B., 1995. “The Tuna-Dolphin Controversy, the World Trade Organization, and the Liberal Project to Reconceptualise International Law.” *The Yearbook of International Environmental Law*, 1995. Oxford: Oxford University Press, 1. See also Trebilcock, M. J. and Howse, R., 1999. *The Regulation of International Trade* (2nd ed.). London and New York: Routledge, 56–58, 406–412; Howse, R. and Regan, D., 2000. “The Product/Process Distinction – An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy.” *European Journal of International Law* 11: 249–289.
  11. To this very day, in fact, the WTO Secretariat denies that any power at all is exercised by the Secretariat. See WTO Secretariat, “10 common misunderstandings about the WTO”, “1. The WTO dictates government’s policies”: “As for the WTO Secretariat, it simply provides administrative and technical support for the WTO and its members.” See <<http://wto.org/wto/10mis10mis01.html>>.
  12. In understanding this kind of power, the author has found work by international relations theorists Robert Keohane and John Ruggie very helpful, as well as the work of Anne-Marie Slaughter on international “networks.” Slaughter, A., 1997. “The Real New World Order.” *Foreign Affairs* 76: 183. And see the response to Slaughter by Susan Marks in chapter 1 of this book.
  13. Brilmayer, L., 1994. *American Hegemony: Political Morality in a One Superpower World*. New Haven: Yale University Press, 93.
  14. Kingsbury suggests that, in international institutions generally, there is a trend away from an equal formal decision-making voice for each state: “Inequality between member states has become relatively common in intergovernmental organisations: requirements of unanimity in voting, conferring a veto on all, are now rare, despite the frequent

- use of consensus: systems designed to reflect major interests through weighted voting or specially defined functional majorities have become more common; and a few organisations are able to make intrusive demands on member-states." Kingsbury, B., "Sovereignty and Inequality" (see note 5, above), 611. The WTO does clearly stand as an exception to this trend; weighted voting, or any other formal recognition of unequal power, is completely absent from the system, as well as any privileged role for major powers in governance institutions; and, as already noted, there are no decisions that the WTO can impose on the membership without either a consensus or a supermajority vote of equal members (with the exception of dispute settlement rulings under the agreed-upon rules). Nevertheless, innovations of the kind noted by Kingsbury featured in some prominent proposals for structural reform of the GATT: see, for instance, John H. Jackson, who proposes an executive committee for a new international trade organization, dominated by the major powers. At the same time, the rejection of formal recognition of inequality has gone hand in hand with widespread acceptance of tremendous *de facto* inequality of voice, as described below. Jackson, J. H., 1990. *Restructuring the GATT System*. London: Pinder/RIIA, 97. For a detailed discussion of these recommendations and their fate, see Howse, R., 1999. "The House that Jackson Built: Restructuring the GATT System." *Michigan Journal of International Law* 20: 107.
15. "Ten Benefits of the WTO Trading System," WTO Secretariat, Geneva, 1999. See <http://www.wto.org/wto/10/ben/>, "3. A system based on rules rather than power makes life easier for all."
  16. On the history of these negotiations, see Trebilcock, M. J. and Howse, R., *The Regulation of International Trade* (see note 10, above), chapter 10, "Trade in Agriculture."
  17. Weiler, J. H. H., 1999. "The Transformation of Europe," in *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration*. Cambridge: Cambridge University Press, 80–81.
  18. Jackson, J. H., *Restructuring the GATT System* (see note 14, above), 53–54.
  19. If endogenous to the WTO, these difficulties may be endogenous to many other international regimes as well. Writing about treaty law generally, Benvenisti suggests that the ratification process "permits very little public scrutiny of the negotiators' acts and omissions, because ratification does not allow for amendments and lets alternatives remain unexplored. And even parliamentary debate on ratification often remains clouded. The access of the public to information concerning the international negotiations is invariably very limited. Little is known of which options were offered and discussed, as negotiators have little incentive to provide accurate information to the general public on their performance [footnote omitted]." Benvenisti, E., forthcoming. "Exit and Voice in the Age of Globalization." *Michigan Law Review*, 50. With respect to the WTO in particular, in an important recent essay, Marco Bronckers has suggested that WTO rules have been drafted in such a fashion that it is very difficult to appreciate and deliberate democratically *ex ante* on their implications. He suggests that: "Responsibility means that WTO negotiators have to ensure that Parliaments, citizens and companies can verify *beforehand* what the implications of WTO rules are"; and that where the level of consensus among negotiators is not high enough to generate rules of such precision, it may be better to agree to disagree. Bronckers, M.C.E.O., 1999. "Better Rules for a New Millennium: A Warning Against Undemocratic Developments in the WTO." *Journal of International Economic Law* 2: 4.
  20. For a flavour of the debate on this issue, see Shell, R., 1996. "The Trade Stakeholders Model and Participation of Nonstate Parties in the World Trade Organization." *University of Pennsylvania Journal of International Economic Law* 17: 331; Esty, D., 1998. "Linkages and Governance: NGOs at the World Trade Organization." *University of Pennsylvania Journal of International Economic Law* 19: 709; Charnovitz, S., 1998.

- "Two Centuries of Participation: NGOs and International Governance." *Michigan Journal of International Law* 18: 183. It should be noted that these articles deal extensively with NGO participation in the bureaucratic/diplomatic and dispute settlement processes of the WTO, which will be dealt with later in this chapter.
21. Kingsbury, B., "Sovereignty and Inequality" (see note 2, above).
  22. Bodansky, D., "International Environmental Law's Legitimacy" (see note 3, above), 36–40.
  23. See Weiler, J. H. H., 1999. "To be A European Citizen: Eros and Civilisation," in *The Constitution of Europe* (see note 17, above), 324–357.
  24. Stein, E., 2000. "Panel Statement on 'Democracy without 'a People','" in Stein, E., *Thoughts from a Bridge: A Retrospective of Writings on New Europe and American Federalism*. Ann Arbor: University of Michigan Press, 335ff.
  25. And where international civil society's legitimacy is arguably greatest is where the stakeholders are simply not represented in any meaningful way within domestic polities – refugees, aboriginal peoples without a self-governing polity of their own, and other oppressed minorities.
  26. See Gutmann, A. and Thompson, D., 1996. *Democracy and Disagreement*. Cambridge, Mass.: Harvard/Belknap.
  27. Irwin, D. A., 1996. *Against the Tide: An Intellectual History of Free Trade*. Princeton: Princeton University Press, chapter 12, "The Welfare Economics of Free Trade."
  28. *Discourse on Science and the Arts*.
  29. This is because a tariff will always price some consumers out of the market altogether.
  30. Trebilcock, M. J., Chandler, M. A., and Howse, R., 1990. *Trade and Transitions: A Comparative Analysis of Adjustment Policies*. London and New York: Routledge.
  31. See Reich, R., 1991. *The Work of Nations*. New York: Vintage, chapter 25, "Who is 'Us'."
  32. OECD, 1998. *Open Markets Matter: The Benefits of Trade and Investment Liberalisation*. Paris: OECD, 67.
  33. This breathing space is more frequently found by members in the permissibility of imposing anti-dumping duties in response to supposedly unfair price discrimination by the foreign firm than in the explicit safeguard remedy; on the importance of safeguards, see Rodrik, D., 1997. *Has Globalization Gone Too Far?* Washington DC: Institute for International Economics.
  34. See Sykes, A., 1999. "Regulatory Protectionism." *University of Chicago Law Review* 66: 1.
  35. Ibid.
  36. A study by Keith Maskus, a trade economist, suggests that the losses to consumers and producers in developing countries would so outweigh the gains from increased intellectual property protection in those countries, including gains realized abroad, that simply extending such protection to those countries could reduce global aggregate welfare. Maskus, K., 1991. *World Economy* 13: 387. See also Deardorff, A., 1990. "Should Patent Protection be Extended to all Developing Countries?" *World Economy* 13: 497.
  37. See Pieper, U. and Taylor, L., 1998. "The Revival of the Liberal Creed: the IMF, the World Bank, and Inequality in a Globalised Economy," in Baker, D., Epstein, G., and Pollin, R. (eds), *Globalisation and Progressive Economic Policy*. Cambridge: Cambridge University Press, 37–63. Pieper and Taylor trace the expression "Washington consensus" to an article by John Williamson; see Williamson, J., 1989. "What Washington Means by Policy Reform," in Williamson, J. (ed.), *Latin American Adjustment: How Much Has Happened?* Washington DC: Institute for International Economics.
  38. This point was driven home to the author in a conversation with Duncan Kennedy.
  39. OECD, *Open Markets Matter* (see note 32, above), 116.



40. For a sustained argument that one cannot rank the supposedly market-friendly policy instruments ahead of more traditional "command and control" instruments in terms of efficiency and effectiveness in achieving given public goals, regardless of regulatory context, see Howse, R., 1992. "Retrenchment, Reform or Revolution? The Shift to Incentives and the Future of the Regulatory State." *Alberta Law Review* 31: 455.
41. See Avi-Yonah, R., 2000. "Globalization, Tax Competition and the Fiscal Crisis of the State." *Harvard Law Review* 113: 1575.
42. Petersmann, E., 1991. *Constitutional Functions and Constitutional Problems of International Economic Law*. Boulder: Westview.
43. Petersmann has pointed out that he is not in principle opposed to the protection of other rights, if one can show that they are grounded ontologically in a (Kantian) conception of autonomous human personality. The author actually believes that many positive rights, and indeed many core labour rights, could be grounded in this way. See also Petersmann's recent work: Petersmann, E., 1999. "From Negative to Positive Integration in the WTO: The Impact of TRIPS on the Multilateral Trading System." Paper presented at World Trade Forum, Berne, Switzerland, 27 August 1999; Petersmann, E., 1999. "How to Constitutionalise International Law and Foreign Policy for the Benefit of Civil Society?" *Michigan Journal of International Law* 20: 1.
44. Jackson, J. H., 1998. *The World Trade Organization: Constitution and Jurisprudence*. London: Pinter/RIIA, 24.
45. Keohane, R., 1984. *After Hegemony: Co-operation and Discord in the World Political Economy*. Princeton: Princeton University Press, 214.
46. See, among other works, Grieco, J., 1990. "Anarchy and the Limits of Co-operation: a Realist Critique of the Newest Liberal Internationalism." *International Organization* 42: 485.
47. Keohane, R., *After Hegemony* (see note 45, above), 213–214.
48. The author attempts such an interpretation in Howse, R., 2000. "Democracy, Science and Free Trade: Risk Regulation on Trial at the World Trade Organization." *University of Michigan Law Review*, forthcoming.
49. Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 8.6 (this instrument has the status of basic WTO treaty law).
50. This should not be understood, however, as a formal "*droit d'initiative*"; the undertaking of such studies and their release are subject to member approval in various ways. At least members in some committee must be persuaded of the undertaking; but in practice, Secretariat officials can influence these discussions and outcomes, if they are persuasive. In referring to the "network" of trade policy specialists, the author wishes to disassociate himself strongly from certain "conspiratorial" views of globalization. The author's own observations of the "network" are that its members, to the extent that they perform official duties, are very attentive to the formal mandate they possess and its limits, and take seriously their accountability to their political masters. But this does not mean that the kind of influence they are able to exercise entirely within the proper formal bounds of their duties cannot give rise to issues of democratic legitimacy, as explained below.
51. And see, generally, Kennedy, D., "The International Style in Postwar Law and Policy" (see note 9, above).
52. Trebilcock, M. J., 1990. "Throwing Deep: Trade Remedy Laws in a First-Best World," in Trebilcock, M. J. and York, R., (eds), *Fair Exchange: Reforming Trade Remedy Laws*. Toronto: C.D. Howe Institute, 235–273.
53. To get a sense of what is meant by this kind of combination it is useful to look at the work of Alan Sykes, a leading trade law academic, as well as a trained economist –

Sykes has written brilliant work on the economic irrationality of certain unilateral trade remedies, particularly countervailing duties. More recently, he has written equally brilliant work suggesting the political or political economy rationality of apparently economically irrational elements in domestic trade remedy law, or particular interpretations of that law. See, for example, Sykes, A. O., 1996. "The Economics of Dumping in Anti-Dumping and Countervailing Duty Cases." *International Review of Law and Economics* 16: 5.

54. Thus, while the "network" controlled the dispute settlement process, it hardly allowed a single claim under the exceptions provisions of the GATT, particularly Article XX. By interpreting the idea that the exception must be "necessary" – for example, for the protection of human health and life – as meaning that no hypothetically less trade-restrictive policy instrument was available to achieve the objective, the need was obviated to engage in a complex assessment of the relationship of free trade commitments to diverse public values in a particular regulatory context. See Howse, R., 1999. "Managing the Interface Between Trade Law and the Regulatory State: What Lessons the WTO Should (and Should Not) Draw from US Dormant Commerce Clause Jurisprudence," in Cottier, T., Mavroidis, P. C., and Blatter, P. (eds), *Regulatory Barriers and the Principle of Nondiscrimination in World Trade Law: Past, Present and Future*. Ann Arbor: University of Michigan Press. The practice of reading exceptions so narrowly as to make them inutile dovetails with the approach to substantive legitimacy of free trade rules is based in the notion that there is always some less welfare-reducing policy instrument than trade restrictions available to achieve any legitimate public policy objective, if one can only think of it. Ironically, the explicit legal text of the GATT, in containing exceptions, suggests an insight into the limits of this view, making the actual rules less vulnerable to the problematic character of this form of substantive legitimacy, as discussed earlier in this chapter. But limits tend to threaten the notion of "expertise" in its crudest sense.
55. This part of the chapter is a redaction of earlier work. See Howse, R., 2000. "Adjudicative Legitimacy and Treaty Interpretation in International Trade Law," in Weiler, J. H. H. (ed.), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade (Collected Courses of the Academy of European Law)*. Oxford: Oxford University Press.
56. These procedures are codified in the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (or Dispute Settlement Understanding). This, along with all the other "covered agreements" under the WTO umbrella, as well as related legal instruments such as various ministerial decisions and declarations associated with the various treaties, may be found in World Trade Organization, 1995. *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*. Geneva: WTO.
57. Hudec, R., 1993. *Enforcing International Trade Law: The Evolution of the Modern GATT System*. Salem, New Hampshire: Butterworths, 12.
58. Falk, R., 1967. "On Treaty Interpretation and the New Haven Approach: Achievements and Prospects." *Virginia Journal of International Law* 8: 323, 326.
59. Shell, R., 1995. "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization." *Duke Law Journal* 44: 829, reprinted in Howse, R. (ed.), 1998. *The World Trading System: Critical Perspectives on the World Economy* (II). London and New York: Routledge, 333–416.
60. *Ibid.*, 370ff.
61. See, for example, the extended critique of Phillip Nichols. Nichols, P., 1996. "Participation of Non-Governmental Parties in the World Trade Organization: Extension of

- Standing in World Trade Organization Disputes to Non-Government Parties.” *University of Pennsylvania Journal of International Economic Law* 17: 295. One not insignificant criticism of Shell’s reliance upon standing is that “Only those interest groups whose resources were not exhausted at the domestic level could take advantage of standing before the World Trade Organization. In other words, rather than resulting in a democratisation of trade policy-making, expansion of standing might instead be a boon to a select group of well-moneyed interest groups” (ibid., 318–319).
62. Shell, R., “Trade Legalism and International Relations Theory” (see note 59, above), 381.
  63. See, for instance, Chayes, A., 1976. “The Role of the Judge in Public Law Litigation.” *Harvard Law Review* 89: 1281.
  64. Johnstone, I., 1991. “Treaty Interpretation: The Authority of Interpretive Communities.” *Michigan Journal of International Law* 12: 371. But see, for a contrary view, Scott, C., 1998. “Bodies of Knowledge: A Diversity Promotion Role for the UN High Commissioner for Human Rights,” in Alston, P. and Crawford, J. (eds), *The Future of UN Human Rights Monitoring*. Cambridge: Cambridge University Press.
  65. Sunstein, C., 1996. *Legal Reasoning and Political Conflict*. New York: Oxford University Press, 3.
  66. Helfer, L. and Slaughter, A., 1997. “Toward a Theory of Effective Supranational Adjudication.” *Yale Law Journal* 107: 273.
  67. The most sophisticated exploration of the relationship of legal procedure to democratic legitimacy in the contemporary literature is Habermas, J., 1996. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trans. Rehg, W.). Cambridge, Mass.: MIT Press. A different account of liberal democratic justice, more liberal (in the traditional sense) and less democratic than that of Habermas, is Rawls, J., 1970. *A Theory of Justice*. Cambridge, Mass.: Harvard Belknap. This work also emphasizes the relationship of fair procedures to legitimacy. This illustrates that the manner in which fair procedures can contribute to legitimacy is itself subject to philosophical dispute. The author’s own discussion will emphasize elements in fair procedure that tend to be common, at least in a broad sense, to these different, divergent accounts.
  68. Franck, T., 1992. “The Emerging Right to Democratic Governance.” *American Journal of International Law* 86: 50.
  69. In the European Union, one observes that concerns about the “democratic deficit” are much more frequently, or at least vehemently, directed at the activity of the European Commission and Council, rather than the European Court of Justice or European Court of Human Rights. The author believes this “puzzle” can be explained at least in part by the fact that the former institutions embody or are seen to embody elements of non-transparent bureaucratic *diktat* and secretive elite bargaining, while the latter follow procedures that embody norms of publicity, transparency, deliberation, justification, and participation, which are closely linked to the legitimacy of “democratic” outcomes.
  70. Helfer, L. and Slaughter, A., “Toward a Theory of Effective Supranational Adjudication” (see note 66, above), 284.
  71. And indeed, since the choice that this decision be made in Geneva was an explicit choice of the membership, as well as the choice for secrecy in proceedings, the democratic deficit here is, in one sense, that of the rule-making power, discussed above. However, as shall be argued in this section of the chapter, there are a number of respects in which legitimacy in adjudication can serve as a (partial) corrective to shortcomings in the legitimacy of the rules themselves.
  72. See, for example, Hudec, R., *Enforcing International Trade Law* (see note 57, above).

73. For a detailed guide to the Dispute Settlement Understanding, see the excellent new work of Palmeter, D. and Mavroidis, P. C., 1999. *Dispute Settlement in the World Trade Organization: Practice and Procedure*. The Hague: Kluwer.
74. "Brazil – Measures Affecting Desiccated Coconut," Report of the Appellate Body, WT/DS22/AB/R, 21 February 1997.
75. "India – Patent Protection for Pharmaceutical and Agricultural Chemical Products," Report of the Appellate Body, WT/DS50/AB/R, 19 December 1997, para. 92.
76. "EC Measures Concerning Meat and Meat Products (Hormones)," Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, para. 133.
77. "Canada – Certain Measures Concerning Periodicals," Report of the Appellate Body, WT/DS31/AB/R, 30 June 1997, 22–23.
78. See Nichols, P., 1996. "Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority." *New York University Journal of International Law and Politics* 28: 711.
79. Helfer, L. and Slaughter, A., "Toward a Theory of Supranational Adjudication" (see note 66, above), 303.
80. "European Communities – Regime for the Importation, Sale and Distribution of Bananas," Report of the Appellate Body, AB-1997-3, WT/DS27/AB/R, 9 September 1997.
81. "Indonesia – Certain Measures Affecting the Automobile Industry," Report of the Panel, WT/DS54,55,59 64/R, 2 July 1998.
82. "United States – Import Prohibition of Certain Shrimp and Shrimp Products" ("Turtles"), Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998. In the more recent case of "United States – Imposition of Countervailing Duties on Certain Steel Products" (2000), the AB explicitly confirmed that it had the discretion to accept briefs directly at the appellate level, even where not attached to submissions of parties or third parties.
83. Trocker, N., 1989. "L' 'Amicus Curiae' nel giudizio davanti alla Corte Europea dei Diritti Dell'Uomo." *Revista di Diritto Civile* 35: 124.
84. Shelton, D., "The Participation of Nongovernmental Organisations in International Judicial Proceedings." *American Journal of International Law* 88: 625. In this sense, the possibility of amicus intervention addresses the relationship between stakeholder participation and legitimacy that is crucial to Shell's "stakeholder model" of dispute settlement, but without some of the risks of moving to a system where non-governmental actors have full standing as parties before the WTO dispute settlement organs; excellent amicus may well be within the financial reach of NGOs that would likely be bankrupted by the need to participate in proceedings as parties in order to counter the arguments of "deep pocket" non-governmental actors, such as multinational corporations.
85. Palmeter, D. and Mavroidis, P., *Dispute Settlement in the World Trade Organization* (see note 73, above), 73.
86. For practice with respect to amicus submissions in various domestic and international tribunals, see Laurin, Y., 1992. "L'amicus curiae." *La semaine juridique: doctrine – jurisprudence – textes* 3603: 345–348; Trocker, N., "L' 'Amicus Curiae'" (see note 83, above); Shelton, D., "The Participation of Nongovernmental Organisations" (see note 84, above).
87. Shelton, D., "The Participation of Nongovernmental Organisations" (see note 84, above), 618: "As a procedural step, potential amici generally must request leave of the court to file ..."
88. Nichols, P., 1993. "GATT Doctrine." *Virginia Journal of International Law* 36: 463–464.

89. With some nuances and qualifications, Helfer and Slaughter tend to adopt this stronger version. Helfer, L. and Slaughter, A., "Toward a Theory of Effective Supranational Litigation" (see note 66, above), 312–314.
90. Nichols, P., "GATT Doctrine" (see note 88, above), 383–384.
91. What the critical theory of Duncan Kennedy, for instance, does not seem to fully appreciate is that by rendering possible the critique and (democratic) contestability of the policy and value choices that judges make through, in the first instance, a critique of doctrine against its own aspiration of rationality and coherence, the critical project may render adjudication more – not less – democratically legitimate, through providing insurance against the risk that judges will be able to make, under the guise of rationality, policy choices that are non-transparent and non-(democratically) contestable. Compare Kennedy, D., 1997. *A Critique of Adjudication (fin de siècle)*. Cambridge, Mass.: Harvard University Press.
92. "United States – Standards for Reformulated and Conventional Gasoline," Report of the Appellate Body, WT/DS2/AB/R, adopted 20 May 1996, 22; "Japan – Taxes on Alcoholic Beverages," Report of the Appellate Body, WT/DS8, 10–11/AB/R, 4 October 1996, 12.
93. "EC – Measures Concerning Meat and Meat Products (Hormones)," Report of the Appellate Body (see note 77, above), para. 177.
94. See, generally, Eskridge, W., 1990. "The New Textualism." *UCLA Law Review* 37: 621.
95. "Japan – Taxes on Alcoholic Beverages," Report of the Appellate Body (see note 92, above); "United States – Standards for Reformulated and Conventional Gasoline," Report of the Appellate Body (see note 92, above), 17.
96. As Cass Sunstein notes in the context of domestic public law adjudication: "Statutory terms – not legislative history, nor legislative purpose, nor legislative 'intent' – have gone through the constitutionally specified procedures for the enactment of law. Largely for this reason, the words of a statute provide the foundation for interpretation, and those words, together with widely shared conventions about how they should be understood, often lead to uniquely right answers, or at least sharply constrain the territory of legitimate disagreement. Resort to the text also promotes goals associated with the rule of law: the statutory words are available to affected citizens, and it is in response to those words that they can most readily order their affairs. An emphasis on the primacy of the text also serves as a salutary warning about the risks of judicial use of statutory purpose and of legislative history, both of which are, as we will see, subject to interpretive abuse." Sunstein, C., 1990. *After the Rights Revolution: Reconceiving the Regulatory State*. Cambridge, Mass.: Harvard University Press, 114.
97. Nichols discusses some of the GATT-specific interpretive canons that evolved before the WTO adoption of customary interpretive rules in public international law: for instance, an exception to trade liberalizing obligations is to be interpreted narrowly and whenever an exception is at issue the party that seeks to invoke it bears the burden of proof that it meets the specific criteria for the exception. Clearly, in both these cases, these canons assume the primacy of trade liberalization as a value in treaty interpretation. Nichols, P., "GATT Doctrine" (see note 88, above), 434–435.
98. For an early critique of the tendency to seal off GATT law from public international law more generally, see Mavroidis, P., 1991. "Das Gatt als self contained Regime." *Recht der internationalen Wirtschaft* 6.
99. Palmetier, D. and Mavroidis, P., *Dispute Settlement in the World Trade Organization* (see note 73, above), 84–85.
100. Thus, a dispute settlement panel under the North American Free Trade Agreement, when faced with the issue of whether a reference to GATT rights and obligations in NAFTA meant only those rights and obligations that existed at the time the NAFTA

was negotiated, rejected such a “frozen” interpretation, insisting that it would be contrary to the evolutionary nature of the GATT system. The panel also noted a reference to customary international law in NAFTA, suggesting that, given that custom is inherently and inevitably evolutionist, a “frozen rights” approach to the incorporation of international law into NAFTA was simply not viable. “In the matter of Tariffs Applied by Canada to Certain US-Origin Agricultural Products,” Final Report of the Arbitral Panel Established Pursuant to Article 2008 of the North American Free Trade Agreement, 2 December 1996, see esp. para. 134.

101. A similar argument for dynamic interpretation from the generality of the actual treaty language can be found in Van Alstyne, M. P., 1997. “Dynamic Treaty Interpretation.” *University of Pennsylvania Law Review* 146: 687, discussing the Convention on the International Sale of Goods: “Notions such as ‘reasonableness’, ‘co-operation’ and ‘good faith’ mean little in isolation. They take on substantive meaning only through a consensus in the relevant interpretive community on the appropriate context for their application” (776). However, as is suggested in this passage, the underlying issue is the scope and nature of the appropriate “interpretive community,” as discussed below.
102. The distinction between the “narrow” interpretive community constituted by the treaty’s drafters and the broader interpretive community concerned with subsequent effects and practice is drawn by Johnstone, I., “Treaty Interpretation: The Authority of Interpretive Communities” (see note 64, above), 385–393. Johnstone, however, remains within the technocratic understanding of interpretive legitimacy challenged in this article, so he draws even the broader interpretive community in terms of claims to expert knowledge, rather than to a stake in the values and interests affected by the interpretation of the treaty.
103. Nichols, P., “GATT Doctrine” (see note 88, above), 430.
104. Jackson, J. H., 1998. *The World Trade Organization: Constitution and Jurisprudence*. London: Pinder/RIIA 94–95. It should be noted, however, that Jackson’s approach to the role of travaux is a complex and nuanced one; in some contexts, such as trade and environment, he has tended to discount the significance of the negotiating history; Jackson, J. H., 1992. “World Trade Rules and Environmental Policies: Congruence or Conflict?” *Washington and Lee Law Review* 49: 1227.
105. Of course, these rules themselves may suffer from a democratic deficit in their creation; for the case of international environmental law, see Bodansky, D., “International Environmental Law’s Legitimacy” (see note 3, above).
106. See Howse, R., 1999. “The WTO and the Protection of Worker’s Rights.” *Journal of Small and Emerging Business Law* 3: 139.
107. Sassen, S., 1996. *Losing Control: Sovereignty in an Age of Globalization*. New York: Columbia University Press, 26.
108. Advocating for dynamic interpretation of statutes in the domestic public law context, William Eskridge suggests that even seemingly originalist contemporary approaches, like that of Antonin Scalia, acknowledge that dynamic or evolutionary interpretation may be required for horizontal coherence: “reconciling many laws enacted over time, and getting them to ‘make sense’ in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.” Eskridge, W., 1994. *Dynamic Statutory Interpretation*. Cambridge, Mass.: Harvard University Press, 119, quoting judge Scalia in “United States v. Fausto,” 484 US 439 (1988), 453.
109. Palmeter, D. and Mavroidis, P., *Dispute Settlement in the World Trade Organization* (see note 73, above), 41.
110. “Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages,” BISD 34S/83, 1987, para. 5.7.

111. "United States – Section 337 of the Tariff Act of 1930," BISD 36S/345, 1989.
112. "Japan – Taxes on Alcoholic Beverages," Report of the Appellate Body (see note 92, above), 11ff.
113. Palmeter, D. and Mavroidis, P., *Dispute Settlement in the World Trade Organization* (see note 73, above), 40–42.
114. Nichols, P., "GATT Doctrine" (see note 88, above), 464: "If panels within the World Trade Organization do not exhibit restraint, they could undermine public confidence in the organisation."
115. Jackson, J. H., *The World Trade Organization* (see note 104, above), 90.
116. "Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes," Report of the Panel, 37 BISD 200, 1990.
117. *Ibid.*, para. 24.
118. "The WHO representatives stated that the experience in Latin America and Asia showed that the opening of closed cigarette markets dominated by a state tobacco monopoly resulted in an increase in smoking. Multinational tobacco companies had routinely circumvented national restrictions on advertising through indirect advertising and a variety of other techniques." *Ibid.*, para. 55.
119. "United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear," Report of the Appellate Body, WT/DS24/R, 8 November 1996, 7.8–7.10.
120. WTO, Agreement on the Application of Sanitary and Phytosanitary Measures, Article 5.1.
121. On the difference between technocratic and democratic perspectives on risk and its regulation, see Sunstein, C. and Pildes, R., 1997. "Experts, Economists, and Democrats," in Sunstein, C., *Free Markets and Social Justice*. Oxford: Oxford University Press. Sunstein and Pildes argue that expert scientific judgement can play a role in "an appropriately structured deliberative process" for democratic regulation – for example, in correcting actual empirical error or prejudice about the facts – but that many factors that would not play a role in expert scientific judgement about risk have a legitimate place in risk determinations from a democratic perspective. The AB's approach to the meaning of "scientific" risk assessment within the process of democratic regulation, and to the meaning of the requirement that regulations be "based on" a scientific assessment of risk, seems highly consistent with this insight of Sunstein and Pildes.
122. See Cogianesi, C. and Nicolaidis, K., 1999. "Securing Legitimacy: Subsidiarity and the Allocation of Governing Authority," in Woolcock, S., *Subsidiarity in the Governance of the World Economy*. Cambridge: Cambridge University Press.
123. See, for example, "India – Patent Protection for Pharmaceutical and Agricultural Chemical Products," Report of the Appellate Body (see note 75, above). This interpretive approach also demonstrates how textualism may act as a constraint or discipline on the tendency of panels to interpret the WTO agreements in light of the single value of free trade, understanding the text of the treaty not as reflecting a balance of values but as a springboard for a liberalizing, integrationist trajectory.
124. Franck, T., "The Emerging Right to Democratic Governance" (see note 68, above).
125. Consider Roberto Unger's recent bold and imaginative attempt at reconstructive progressive social theory; see Unger, R., 1999, *Democracy Realised: The Progressive Alternative*. London: Verso. Despite a section of his book entitled "The False Necessity of Comparative Advantage," Unger ends up proposing coordinated, step-by-step liberalization of people and capital. The problem with economic globalization is that the mobility of goods and capital has happened at a much faster pace than has the mobility of people. He recommends slowing down liberalization of capital movements and speeding up liberalization of personal mobility. He does not recommend replacing free trade in goods with protectionism, and basically all of his concrete ideas for social and

economic renewal, however imaginative and radical, would be entirely consistent with a moderate reading of the original GATT and even a modest, scaled-back version of the more ambitious WTO edifice. Most critics of globalization do not even attempt to be as specific as Unger about needed social and economic changes, and so they avoid actually having to face the question of whether a system of multilateral free trade, moderate and modest in dealing with domestic and international institutions of governance, would in fact be in tension with their progressive proposals.

126. These ideas are fleshed out in Howse, R. and Nicolaidis, K., "Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far." Paper presented at the Kennedy School of Government, Conference in Memory of Ray Vernon, Harvard University, 1–2 June 2000.



## The process towards the new international financial architecture

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*Marc Uzan*

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### Introduction

In the second half of 1997, four East Asian countries – Thailand, Malaysia, the Republic of Korea, and Indonesia – experienced a massive reversal of the large foreign capital inflows that they had enjoyed throughout much of the 1990s. The swing from net inflows to outflows amounted to more than US\$100 billion and exceeded some 11 per cent of their GDP. This capital flight precipitated large falls in their currencies, severe stock market and other asset price declines, deep domestic financial crises, and severe output declines, rivalling those in the worst years of the debt crisis in Latin America. In a matter of months, countries within a region that had experienced unprecedented growth and prosperity over the past three decades were suddenly in deep trouble.

Subsequent events in the world economy were no less remarkable. With surprising speed, the Asian crisis spread, in succession, to Russia and the former Commonwealth of Independent States (CIS) countries, the Middle East and other oil-producing countries, and then Brazil and the rest of Latin America. The effects of the Asian crisis were most severe in countries that were heavily dependent on private capital inflows to finance current account deficits, or on primary commodities for export earnings, as commodity prices plummeted some 30–40 per cent in 1997–1998, and/or in countries that relied on manufactured exports to Asian markets. Adding to these problems, the continuing recession and financial turmoil

in Japan caused 1998 to record a significant decline in aggregate growth in developing countries. The Asian crisis demonstrated once again how interconnected the global economy had become. Interventions by international financial institutions and G7 governments were notable in their failure to stem the general contagion. A central question is that of what caused the failure of the global economic architecture to prevent and/or deal with the consequences of the crises.

Although the Asian crisis was similar to previous crises (like those in Chile and Mexico) in some respects, most notably the negative consequences flowing from overvalued, pegged exchange rates, there were elements of a new pattern of pathology. The Asian crisis was a capital crisis as opposed to a crisis caused by fundamental, general, macro-level imbalances.

The trigger event of massive portfolio investment outflow reflected a loss of confidence in the countries affected, resulting in a depression of currency values and asset prices, and a staggering increase in non-performing assets in the indigenous financial sectors, as a result of private-sector defaults on foreign and domestic debt obligations. It became evident that the crisis in confidence was compounded and magnified by weakness in the financial systems of affected countries, owing to a lack of transparency, inadequate risk management disciplines, inappropriate lending to local corporations, and currency and maturity mismatches in liability structures. The ensuing deep recessions in the affected countries followed on from the depressed currencies, punitively high domestic interest rates, cessation of credit extension, and corporate and financial sector defaults, bankruptcies, and liquidations.

In the months following the crisis, the deficiencies in the international financial architecture were scrupulously analysed by thoughtful participants and observers in the public and private sector. A general consensus emerged concerning the problems involved, as well as a general sense of future areas of remediation.

There is agreement that any understanding of the general crisis must start with careful analysis of specific national conditions, to ascertain the causes of the problems at that level. No one pattern prevails; the pattern of crisis at the national level has not moved from one broad paradigm to another. This chapter will first look at the differences between countries to explain the Asian financial crisis. It will try to formulate a *tour d'horizon* encompassing the key, principal ideas for reform that have been put forward by the international financial community, by first providing an evaluation of the Bretton Woods institutions.

The emerging consensus reaffirms a world economy based on free market mechanisms – on open trade and capital movements – buttressed by sound national financial systems and by good public and corporate

governance. This would be a system that fosters the private sector – both domestic and foreign on a truly equal footing – as the primary source of investment and growth. It requires the establishment of an arm's-length relationship between governments and markets, neither too close nor too distant. It is a partnership that demands good governance, transparency, and disclosure of information, and a respect for standards and codes of good practice that are consistent across countries.

The second part of the chapter will set parameters for the debate in terms of legitimacy, as well as in light of the idea that what the world is trying to establish is mainly the creation of national architectures or the know-how to build a market economy. The debate over global governance and the role of the private sector will not be resolved until the next financial crisis.

## Explanation of the Asian crisis and the importance of differences between countries

### *A capital crisis*

Before trying to draw similarities between countries, it is first necessary to look at each country in its proper economic, historical, and political context. These differences can lead to widely different reactions to similar phenomena, and can thus require different policy actions. An example of this can be seen in the monetary policy reaction to the crises in Poland and Brazil. After the Russian default in August 1998, due to regional contagion effects and liquidity requirements of portfolio investors, foreign investors pulled out approximately 25 per cent of their holdings in government securities and the main index in the Warsaw stock exchange fell 30 per cent, putting considerable downward pressure on the zloty. Despite this pressure, the National Bank of Poland did not increase interest rates to stem capital outflow and, indeed, went ahead with a scheduled cut in their benchmark rate in September, at the height of the crisis. By doing this, they signalled to the market that they had confidence in the zloty, and the zloty actually strengthened after the rate decrease, precisely because it was seen as such a sign of confidence. Poland was in effect telling the markets to judge it on its fundamentals, not the regional contagion effects. It should be noted that Poland had been very successful in reorienting its trade towards the European Union and away from Russia and the CIS, so their limited export exposure lessened the transmission of the crisis through the trade mechanism.

In the Brazilian case, history dictated that raising interest rates in the face of downward pressure on the currency was simply not an option. Brazil

had experienced bouts of hyperinflation until the implementation of the Real Plan and the fixing of the exchange rate as the nominal anchor in 1994. Due to these inflationary episodes, the market has a built-in expectation of high inflation in Brazil. Therefore, when the Brazilian government was forced to devalue the real in January, it had to tighten monetary policy to convince the market that the government was serious about fighting inflation to avoid a return to the vicious cycle of inflation and devaluation.

A version of this process of expectations can also be seen in the case of Argentina. Like Brazil, Argentina also experienced cases of hyperinflation until it implemented its current currency board arrangement in the early 1990s. Given these previous cases of hyperinflation, a currency board was the only arrangement strict enough to kill the inflationary expectations in the Argentine currency.

Another important factor is that it is not only necessary simply to raise or lower rates, but also to raise or lower them by the right amount. Clearly, there is a limit to how far rates can be lowered before capital flight increases as investors seek a better rate of return. During the Brazilian crisis, the National Bank of Poland lowered rates a second time in response to the continued strength of the zloty and weakening of economic activity. At that point the zloty weakened sharply, although this depreciation helped to improve economic activity. Brazil's experience with raising rates offers an example of a country getting a rate rise correct. The monetary policy authorities initially raised rates to 45 per cent and have since systematically lowered them to around 20 per cent. Clearly, with a rate increase of this magnitude, there is substantial scope for error. Raise rates too little and capital flight continues, pushing the currency down further. Raise rates too much and the economy is pushed into a worse recession than that which would probably result from a "correct" rate increase. In Brazil's case, the currency stabilized and inflation fell, allowing interest rates to be lowered, and while the economy did fall into recession, the length and size of the downturn were not nearly as large as predicted.

A second context in which countries can vary a great deal is that of the prevailing political situation during a crisis, or as contagion threatens a crisis. Two examples of this were seen in the Indonesian and South Korean cases. In Indonesia, during the crisis, President Suharto, Indonesia's leader for 32 years with no chosen successor, became ill. Around the same time, the central bank lost control over monetary policy. While it is difficult to say exactly why this loss of control over the money supply took place, it is not unrealistic to assume that some of it had to do with the uncertain political environment. As for South Korea, it was facing its first competitive election in its transition from authoritarian to democratic rule, and a series of bribery scandals had split the ruling party under Kim Young

Sam. This gave a much better chance of winning to the opposition candidate Kim Dae Jung, which led to even greater uncertainty because of the unknown, and potentially radical, platform of the opposition under Kim Dae Jung. This led to uneasiness among foreign investors and banks, who began to call in existing loans and declined to extend new ones. In addition, the lame-duck nature of Kim Young Sam's government led to a lack of policy coordination between the Bank of Korea and the Ministry of Finance, hampering the government's response to the surge in outflows of foreign capital. Again, as in the case of Indonesia, it is difficult to measure the actual effect of the political situation on the crisis in Korea, but a strong response and coordinated policy can be key in overcoming a crisis early (for example, rather than defending the peg of the won through massive intervention, they could have floated and maintained foreign exchange reserves at adequate levels, as Taiwan did successfully).

### *The collapse of the financial infrastructure*

A further area of concern involves the institutional framework within a country. One example of this is the regulation of the domestic banking system. Several of the countries affected by the Asian financial crisis had recently and rapidly opened their capital accounts. Since there has been a great deal of discussion recently over capital account sequencing and prudential regulation, this report will not analyse each of the countries in these terms. However, what generally arose from the case studies clearly indicated that less developed countries tend to have less regulated financial systems, less transparent financial practices, and more prevalent moral hazards in the form of "crony capitalism," and that the problems of asymmetric information tend to be most pervasive in these countries. These problems are greatly exacerbated during times of massive capital inflow and outflow. During the times of massive inflow, as more and more capital flows in, it will go to less and less financially sound investments. Thus, capital is not allocated by the market. Then, as capital flows out, these problems contribute to a herd mentality among investors as the lack of accurate information casts doubt on most investments within the country, rather than just the least viable.

Another characteristic of the institutional framework is the exchange rate system. All of the countries affected by the Asian financial crisis had some form of a fixed exchange rate. While there are some benefits to be had from a fixed exchange rate, such as inflation control through the nominal anchor and stability in economic transactions, adhering to a fixed exchange rate with an open capital account in the face of a speculative attack can be very difficult, as the Asian crisis shows. Without massive and

usually unsustainable intervention in the foreign exchange markets, countries are faced with either large devaluation (sometimes several devaluations, along with overshooting), a painful tightening of monetary policy, or both. In addition, the fixed exchange rates can lead to expectations that cause domestic actors and institutions to ignore the risk of currency devaluation and thus not hedge currency exposure. This was seen both in the case of firms not hedging exchange risk appropriately, and even in that of governments committing substantial amounts of currency in long forward positions on a weakening currency, as in the Thai case.

A final institutional characteristic of interest that emerged involved the history and track record of the country in question. It was pointed out in the discussion on Australia that many countries, both developed and developing, experience a financial crisis soon after deregulation of their financial system. Australia was no exception, going through a severe crisis in the late 1980s. However, this time Australia avoided a crisis. What had changed in the Australian context was that in the decade since its crisis, Australia had had time to build up both a history within the market for the Australian dollar and the experience within the central bank to handle difficult economic manipulations in response to external problems. Regarding the former, it has been well established that the Australian dollar fluctuates in a band at around US\$0.70/A\$1. Therefore, as the currency weakened, the Reserve Bank of Australia was able to intervene at US\$0.60 and US\$0.55 in order to ease the downward pressure, with some confidence that these were appropriate levels at which to intervene. The assessment proved correct when the Australian dollar strengthened at US\$0.55. The ability of a currency to form a history presupposes, of course, a floating exchange rate, and this is perhaps one reason why there were several rounds of devaluations in the Asian crisis countries: there was no sense of a historically “correct” level for these previously pegged currencies.

On the second point, no matter what the history of a currency, poor macroeconomic decisions at times of downward pressure can send the currency into a significant depreciation or even free fall. Therefore, the Australian authorities still had difficult decisions to make and implement during the period of crisis in Asia. This can be seen in their decision to intervene in the markets, but not to raise interest rates in response to this pressure. The decision not to raise rates may have had something to do with the confidence factors discussed earlier in reference to Poland, but, more importantly, the decision was taken in order to avoid a recession in the face of a weakening economy and continued weakening in commodity prices. Thus, it is not enough simply to have floating exchange rates; it is necessary to have some basis of judgement of the relative

strength of the currency at a given level, as well as the technical expertise to defend and manipulate the currency in times of pressure or in response to sudden problems.

### *Understanding the policy framework*

A related issue involves the policy framework within a given country. Often there is an effort to control many economic variables at one time under an open capital account. Such a policy is impossible to achieve and can be counterproductive. A good example is Indonesia, which has consistently tried to control a variety of these variables, including the exchange rate, interest rates, inflation, money supply, and current account deficit. Clearly, the measures needed to keep these figures at government targets are at odds with each other and simply lead to confusion when attempting to coordinate a response to an economic shock. The more appropriate method of macroeconomic management is to select one variable as a nominal anchor and focus on that variable. This is the case in most developed countries, which select the inflation rate, money supply, or exchange rate, and focus on that variable (with some interventions in other variables, such as the exchange rate). The notable exception is the United States, which has no specific targets, but responds as conditions dictate. The unambiguous selection of one target is especially vital for countries with a history of hyperinflation or poor macroeconomic management; hence the currency board arrangement with Argentina and other countries.

One of the major features of the Asian financial crisis was that it took nearly every institution and government by surprise. Indeed, economic growth had been so strong for so long, and the fundamentals of the countries in question were so positive, that any suggestion of a major crisis did not seem credible. Inevitably, this has since led to the questioning of the fundamentals by which a country's economic position is judged. This is certainly not to say that the "old" fundamentals are not relevant. Clearly, a large current account deficit, large fiscal deficit (particularly if monetized), low domestic savings rate, and so on, are good indicators of the economic health of an economy. They are, in fact, just as important as they were previously, and are effective in evaluating the position of a country as regards the kinds of crises that they have been used to predict in the past – that is, the first and second generation financial crises. The Asian financial crisis was a different kind of crisis; rather than a traditional balance of payments crisis or a government-induced crisis, it was more of a private-sector crisis. With the open capital account and limited prudential regulation, most of the bad economic decisions were made by the private sector, for a variety of reasons, and the indicators of these problems were not picked up by the traditional fundamentals. What is needed is to sup-

plement the old fundamentals with a new set of indicators more suited to picking up on possible imbalances in the position of the private sector.

The first of these “new fundamentals” is the ratio of foreign exchange reserves held by the central bank to the level of short-term debt within the economy. While there is clearly some difficulty in determining what capital is short-term and what is long-term, there does seem to be some capital that tends to stay in a country even during massive capital outflows (see below). A major reason for capital flight is the fear of a large depreciation. If foreign (and domestic) investors see that the central bank cannot cover even the short-term debt within a country and defend an exchange rate peg or prevent a massive depreciation, they will revise their expectation of a devaluation and pull out of the country. This can happen regardless of the other fundamentals within an economy: one factor in the contagion that swept the world after the devaluation of the Thai baht was investors withdrawing their money from unaffected countries in order to cover margin requirements. Indeed, in all of the countries in which devaluations took place during the Asian financial crisis, there was a low level of foreign exchange reserves relative to short-term obligations.

While comparing foreign exchange reserves to the level of short-term investment within an economy is relatively straightforward, the next two fundamentals are more difficult to measure. The first of these is the strength of the domestic banking system. If a country is unable or unwilling to defend its currency with adequate foreign exchange reserves, its next option is to increase interest rates. This strategy is limited, however, by the strength of the domestic banking system. If the banking sector has a large number of institutions with a high level of non-performing loans and low levels of capital adequacy, an increase in the interest rate will cause a credit crunch, leading to bank failures and business bankruptcies. Thus, the strength of an economy’s banking system is a key indicator of the ability of a country to maintain its exchange rate at a certain level. Once again, if investors feel that a country will be unable or unwilling to undergo a recession in order to maintain this level, they will revise their expectation of a devaluation and pull their capital out. All of the Asian crisis countries experienced credit booms in the period before the financial crisis, which led to a fall in productive loans and a weakening of the financial sector.

The third area of concern is the real exchange rate. In many of the countries affected, both within and outside of Asia, there was a steady appreciation of the real exchange rate unrelated to a corresponding increase in productivity. An appreciation of the real exchange rate puts significant pressure on the export sector, which will show up in the current account. This will put pressure on the government to lower the nominal exchange rate, causing investors to fear devaluation. Unlike the previous



two factors, an appreciation of the real exchange rate may show up in one of the “old” fundamentals: the current account. In addition, the real exchange rate is difficult to measure and depends on what price indices are used and whether the appreciation is warranted by conditions within an economy.

*Capital crisis and its consequences for the international financial system*

The recent crises in the international financial system have brought debate on the international financial architecture to the forefront. Prior to the onset of these latest crises, the trend was towards ever-greater liberalization, particularly in respect to opening the capital account. The rationale for this reform is compelling and rather straightforward. Developing countries that are seeking rapid development often lack the capital necessary to fund their desired level of investment. By opening their countries to capital inflows, they are able to invest beyond their given level of savings. The providers of this capital presumably benefit by gaining a greater return than they would in their domestic markets. All is well as long as the flows continue; but as has become painfully clear, when those flows are suddenly reversed, devastation is left in their wake.

The risks and rewards of financial flows are inexorably linked. Capital inflows allow countries to run large current account deficits, but this increase in external indebtedness leaves the recipient vulnerable to a change in investor sentiment. The whiplash from the withdrawal of funds is especially acute when those funds were provided in the form of short-term foreign currency denominated debt. According to the Institute for International Finance, the five crisis-hit Asian countries (Indonesia, Malaysia, the Philippines, South Korea, and Thailand) experienced an aggregate swing of \$124 billion in their current accounts between 1996 and 1998, from deficits of \$55 billion to estimated surpluses of \$69 billion. Behind this adjustment was a \$130 billion shift in the net supply of private finance over the two years.

On the question of capital controls there is a wide range of views and no clear consensus. The first distinction concerns what aspect of capital the controllers seek to influence. Controls on outflows generally have fewer supporters because they are easily avoided by, for example, using trade transaction manipulation. In a crisis situation, even supporters of free capital movement are more apt to support temporary control measures. These measures are nearly universally recognized to be only short-term measures. One reason for this is that the longer capital controls remain in place, the less effective they become, as actors become more adept at avoiding them. Also, in prosperous economic conditions, the desire for

capital controls is dramatically lessened. In fact, the earlier dismantling of capital controls in the crisis countries was because they were seen as an impediment to economic growth. A more fundamental question to address is the sequencing of capital account liberalization and the role of institutions and regulations in ensuring stability.

The fact that capital flows can become problematic for receiving countries is beyond question. The debate that has yet to be resolved concerns what the response should be in order to lessen the volatility of international finance. More specifically, can capital flows be controlled, and would such interference so hamper the functioning of international capital markets that it would also destroy their benefits? Those against controls argue that at best, capital controls only mask underlying problems. In light of recent events, however, a consensus seems to be forming that some limits on short-term capital flows may be called for as a short-term emergency response in crisis countries. However, empirical evidence of capital control effectiveness has not overwhelmingly supported this view.

Proponents of capital controls point to the success of controls in lessening volatile short-term flows. There is agreement that foreign direct investment-type inflows are more stable than speculative short-term flows. In a crisis situation where investors are facing great losses, however, all capital is potentially mobile. For example, if the potential loss from currency depreciation is greater than the capital loss in selling an asset on short notice, then even FDI may be vulnerable to capital flight. That said, there is no disagreement with the point that the promotion of more long-term inflows is prudent for maintaining sustainable growth. Several scholars point to empirical studies that show that the imposition of a Tobin tax or similar mechanism could shift capital flows to the longer end of the spectrum.

One country that has made use of short-term capital controls is Poland. Such controls have been credited with helping Poland to maintain a very low level of short-term debt relative to foreign currency reserves, which was one of the fundamentals mentioned earlier. The majority of Poland's large current account deficit is financed by FDI inflows. The Polish central bank requires a foreign exchange permit to either lend or receive credits abroad for less than one-year maturity. There has been use of non-deliverable forwards on the zloty, which is a way to circumvent the controls on the zloty. However, these transactions do not seem to have lessened the overall effectiveness of the capital controls. Nevertheless, in accordance with its OECD agreement, Poland was required to fully liberalize its capital account; it was implemented on 1 January 2000. But Poland is allowed to impose restrictions very quickly in emergency situations. Recognizing that capital controls can be circumvented over time, these restrictions will be limited to no longer than six months in duration.

India also attributes its success in avoiding the Asian financial crisis to its use of capital controls. The capital account regime has been liberalized in the 1990s, but important restrictions have remained in place. In particular, controls on short-term debt flows are credited with creating very low short-term debt relative to foreign exchange reserves. Before the crisis broke, India was considerably less vulnerable by this measure than those countries that were more directly affected. Likewise, Malaysia, which is probably the most talked-about capital control case, seems pleased with the results of its experiment with capital controls. Originally, there was a 12-month withholding period related to short-term capital and portfolio capital. There were also various controls on foreign investment by domestic firms and households, and foreign bank borrowing. These controls were used as part of a larger macroeconomic expansion programme, and they have since been largely removed. This underscores the point that capital controls are, at best, a short-term crisis measure.

An important caveat for the conclusion that short-term capital controls encourage longer-term investment can be seen by looking at other possible causalities for this observation. Countries that used capital controls during the 1990s did see a change in the composition of their capital flows. However, there has been an increase in the amount of FDI as a percentage of GDP across countries irrespective of their use of capital controls. The point has also been made that another factor that could contribute to this growth in FDI is the privatization that has accompanied liberalization in many developing countries. Studies done on capital controls in Latin America have shown a change in the composition of capital flows, but these have not controlled for privatization. The evidence from those countries also shows that controls did not slow down total flow of capital. In the case of Brazil, there were controls during all of the 1990s and yet there has recently been a major currency crisis. Chile, a country that is often cited as a capital control success story, has also struggled lately with economic growth problems.

A complicating factor is that as international investors perceive a crisis to be likely, short-term finance increasingly becomes the only avenue open for attracting foreign capital. In the case of Brazil, fixed rate debt had practically disappeared by mid-1998 and was replaced by short-term indexed or dollar-linked debt. So when the crisis came and there was devaluation, the value of the indexed or dollar-linked debt increased. However, stronger controls on short-term capital would not have prevented the crisis but would, rather, have seen the crisis occur sooner. A similar situation prevailed in the ruble-denominated Russian Treasury Bonds (GKO) market. Therefore, the more important question concerns the condition of the internal environment in the economy and, more specifically, the money flowing into the country funding sustainable projects.

In the Asian crisis, financial liberalization directly contributed to the build-up in foreign capital flows, through domestic banks and other financial institutions borrowing offshore to finance much of the domestic credit expansion. The government's regulation and supervision of the financial sector was not adequate to keep up with these rapid changes. Banks also had a difficult time allocating the increased flow of funds efficiently. This is reflected in the deterioration of loan quality prior to the crisis. As stated earlier in discussing the new fundamentals, weaknesses in the financial sector were a key pre-condition of the crisis. The effectiveness of capital controls are affected by prior conditions. It is much easier for a country with a closed or partially liberalized capital account to maintain the status quo than for a country with an open capital account to undo the forces of capital mobility. This comes back to the point made about the sequencing of capital account liberalization and the prudential regulation of the domestic banking sector.

Policies towards emerging market economies have been dominated by the "Washington consensus," which stressed financial liberalization. However, critical reassessments of this view have found the emphasis on sequencing of reforms lacking. It is much easier to open a country up to capital flows than it is to ensure that the prudential regulatory regimes are in place to handle the increased volume of capital moving through the economy. The result has been that in practice, open capital movements have preceded effective regulation in many emerging market countries. The international community, in stressing the need to rapidly move to developed country norms and standards for the free movement of capital, has overlooked the lack of institutional framework to sustain such a regime. At the height of the liberalization fashion, the IMF even proposed that capital account liberalization become one of the purposes of the Fund.

In light of recent crises around the globe, a more sober evaluation of the rapid liberalization model has been undertaken. This is not to say that the fundamental efficiencies associated with an open global economy are in question. In the long run, all economies will benefit from the free movement of trade and capital. However, in areas where the institutional settings are not in place to cope with the complexities of regulating a globally integrated financial sector, the emphasis should shift to building a sustainable regulatory framework. The most potentially damaging distortion in under-regulated financial markets comes from the moral hazard created by the explicit or implicit guarantees on bank deposits by the government. Short-term capital flows from global capital markets can enormously magnify these problems, leading to financial and economic crises with major economic costs. Given that crises can be precipitated by a flight of capital where there is poor regulation and supervision of the

domestic banking sector, it is reasonable to conclude that an improved domestic financial sector is necessary in order to enjoy the full benefits of capital liberalization. A model developed by Lei Zhang and Marcus Miller suggests that the best response would be to condition capital account liberalization on the quality of bank regulation. What they come up with is a timeline that minimizes the potential losses from capital account liberalization and thereby better ensures that the potential benefits are realized. Liberalization would proceed in such a way that only after adequate regulations were in place would the economy become open to the more volatile short-term and portfolio inflows.

In hindsight, there has been much discussion about the prescriptions the IMF made as a condition for providing assistance to crisis-stricken countries. The conventional IMF remedy was to advocate tight monetary and fiscal policy to restore investor confidence and improve the external balance. There was a sense, however, that while that may have helped to a point, the damage done to the real economy was often greater than the benefit gained in the improvement of external and government deficit measures. In addition, the goal of improving investor confidence backfired when investor confidence collapsed with the fall in economic activity brought about by the austerity programmes. This path was often taken out of an over-emphasis on the importance of maintaining a fixed exchange rate peg.

There is a widespread consensus that the use of a nominal exchange rate anchor for stabilizing inflation has dangerous implications as the real exchange rate appreciates. Real exchange rate appreciation leads to deterioration in the current account balance, and tight monetary policy and high real interest rates are used to attract capital. As the debt build-up reaches some critical level (perhaps relative to foreign exchange reserves), there is a run on the currency and a financial crisis ensues. This is the chain of events that has been used to explain the crisis in Brazil and also in Russia. The Asian case is perhaps more complicated, but fixed exchange rates also contributed to these crises in so far as they encouraged unhedged foreign borrowings. Mixed with under-regulated and what some have called “crony capitalistic” systems, there was a high vulnerability to crisis.

A vindication for the view that lending to support over-valued exchange rates was unwise came after the Russian crisis, where large IMF loans were used for that purpose and were unable to prevent a currency collapse. The IMF has since disavowed the practice of lending for exchange rate defence. Besides the method of IMF lending, there was also criticism of the conditionality placed on those loans. No one could deny the vast scope for reform in many of these crisis countries. However, the IMF often tried to accomplish more with its loans than could be reasonably expected in areas such as environmental policy.

For the last two years, a number of suggestions on ways to prevent such crises as the one in Asia (and its spread by contagion) have been debated in international fora. These also suggest that the existing system – comprised of the Bretton Woods international financial institutions and backed by the direct or indirect interventions of the most powerful industrialized countries – does not work well in preventing or dealing with crises. And the lack of much progress despite innumerable committee reports and meetings suggests that it is not easy to develop an international consensus on what improvements need to be made. At present, proposals for change in the global financial system originate almost exclusively in G7 governments and Western universities. There does not as yet appear to be any detailed discussion among developing countries regarding their own interest in international financial architectural issues.

### The new role of the international economic institutions as a standard-setter and the limits of this approach

The international community has passed through phases in thinking about appropriate future changes to the international financial architecture. Some initial, radical thoughts – a global central bank, a global bankruptcy court, and so on – while worthy of some consideration, have been rejected as impractical. Subsequently, a coalescence of thinking on more pragmatic measures has occurred.

Short-term, feasible proposals, advanced by Barry Eichengreen and the Institute of International Finance, propose steps such as limiting short-term borrowing to the extent covered by free exchange of reserves, improved creditor clauses in debt financing, avoidance of fixed exchange rates during crises, establishment of investor relations functions by emerging market countries, and so on.

Beyond this set of short-term “fix” initiatives, some desirable medium-term initiatives that are arguably worthy of pursuit include: improved transparency and disclosure; measures to strengthen financial systems in emerging markets; strengthening prudential regulation in the developed countries; sequencing or temporary limitations on capital account liberalization; more involvement by the private sector in crisis prevention/management; strengthening and reforming the IFIs with augmented resources and more contingency financing programmes together with the private sector; and more appropriate exchange rate regimes in emerging market countries.

To move this agenda forward, the G7 has adopted a pragmatic path of change. The group has maintained its strong commitment to an open global economy, supported by free movement of capital, technology, and

skill, and reinforced by increasingly liberalized foreign trade and investment regimes, as the most desirable course to maintain global growth under stable conditions. It proposes an approach that involves the establishment of comprehensive standards, representing best global practices towards which all countries participating in the global system would strive. With the immediate crises abating, a reduced sense of urgency has slowed progress to a degree. The recently issued G7 communiqué strongly endorses this approach to the improvement of the global architecture. There is enough agreement to suggest that the path of architectural reform has now been established.

In that context, a new role for the Bretton Woods and other international institutions is starting to emerge as a result of the crisis in emerging economies. Tremendous effort is under way to establish standards and codes of good practice at the international level that build on and offer the potential to globalize the standards that exist within the most advanced nations. New standards are being defined and existing ones refined. The IMF has been formulating standards or codes of good practice for governments in its core domain of responsibilities, which are already well advanced or being implemented. Many agencies have been working to develop standards in their areas of expertise: accounting, auditing, corporate governance, payment and settlement systems, insurance, and bankruptcy.

In the critical area of financial sector strengthening, the IMF and the World Bank are cooperating closely to help promote stronger financial systems, based on the internationally accepted Basic Core Principles. The Financial Stability Forum that has just been established to encourage dialogue among the many relevant national and international agencies will make a contribution to harmonizing global standards for regulation/supervision.

Firstly, the Fund began to formulate standards for data dissemination shortly after the onset of the Mexican crisis. These are now fully operational, and the more demanding Special Data Dissemination Standard has now been adopted by about a quarter of the membership, the large majority of those countries participating in capital markets.

Secondly, the Fund – working together with the BIS, a representative group of central banks, the World Bank, and the OECD, among others – has prepared a draft Code of Good Practices on Transparency in Monetary and Financial Policies. In addition to the work under way by the International Organization of Securities Commissions (IOSCO) on securities markets standards, work is being done by the Basle Committee on Banking Supervision (BCBS) on banking practices and supervision; the International Association of Insurance Supervisors (IAIS) on insurance; the International Accounting Standards Committee (IASC) and the Interna-

tional Federation of Accountants (IFAC) on accounting and auditing; the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank on corporate governance; and the Committee on Payment and Settlement Systems (CPSS) on payment systems.

Looking to the future, new priorities are emerging. With many agencies now preparing or updating their standards, principles, and codes of good practice, attention is shifting to the challenge of implementation. Although the Fund does not yet have the expertise to assist in implementing many of the new standards, the Fund's mandate does enable it to have regular – usually annual – contacts with all member countries for policy discussions. International institutions will need to play a significant role in encouraging the implementation and monitoring of the new standards.

In executing these new tasks, it is quite evident that the Bretton Woods institutions will have to enhance and supplement their in-house expertise by relying heavily on the skills, resources, and advice of the many agencies engaged in defining standards, and on the private sector, to implement these standards. The standards-based path to systemic enhancement is the most practical of conceivable alternatives. To improve the possibilities for success, the present process to date must be modified. Non-G7 countries have not been as involved in the main standards fora as they should be. As a result, their point of view is under-represented. If the proposed standards are to be effective, the non-G7 countries must accept them, or modify them as appropriate, flesh them out, and, most importantly, adopt a path of implementation to achieve compliance within a specific time frame. Another open question is the extent to which the non-G7 countries will be prepared to disclose their position with regard to the proposed standards and their chosen path of implementation for the edification of investors, lenders, underwriters, and so on. It is not inappropriate that the G7 take the initiative in proposing standards. These countries (and the G10/G22) control a preponderance of the resources (capital, people, and technology) needed by the non-G7 countries to support long-term growth and development. The G7 countries have a right to propose, initially, the standards-based conditions that they require to be involved and exposed in the non-G7 markets. But it is equally appropriate that the non-G7 countries have the option to stipulate the terms, conditions, and time frames for their acceptance of the proposed standards. To date, a robust process for involving the non-G7 countries in these discussions, and for negotiating differences between what is proposed and what can be complied with, is lacking. Until this gap is remedied, it is unrealistic to expect that the proposed standards will be accepted generally.

A second deficiency in the process is the modest involvement of the private sector. This omission is significant because, by consensus, private sector resources are the only adequate resource pool to accomplish the



task of effectively supporting positive growth in the world. To attract private sector support, the standards must positively motivate various segments of private sector activity, ranging from trading to portfolio and strategic investment, to take positive risk positions in non-G7 markets. The architecture discussion needs to focus more explicitly on the relationship between the proposed standards and private sector motivation to stay actively involved in non-G7 markets.

### *Market discipline and compliance with standards*

It should be recalled that, prior to the crisis periods of 1994–1995 and 1997–1998, the private sector tended to base positive decisions to invest in non-G7 markets on favourable self-assessments of political stability, macro-policy, and evidence of a reasonably positive attitude towards domestic and foreign private investment by host countries. In countries in which transparency was lacking, and legal remedies and protection of contract and property rights by local institutions was uncertain, the private sector relied on an ability to access local authorities to pragmatically resolve problems or disputes that would arise. In many instances during the crisis periods of the 1990s, the private sector found recourse to local authorities and local institutions to be ineffective and unresponsive to problem-resolving needs. It is not surprising that the current initiative to establish standards seeks remedies in the form of explicit commitments to transparency and institutional reforms to address issues involving contract and property rights.

If the above description is a reasonable illustration of where the process of systemic reform stands today, the way forward can be deduced with a fair degree of certainty. Effective systemic reform requires years of sustained effort in non-G7 countries to manage their affairs towards compliance with the emerging global standards. As various countries visibly embrace this path of reform and record significant progress towards this goal, they will simultaneously obtain greater support from the global community, especially the private sector, for their development.

Assuming that the current process results in the promulgation of standards that are generally agreed (at least initially by the G7/10 and the key multilateral institutions), future developments can be anticipated. Once again, the significance of the proposed standards for non-G7 countries is that they represent the conditions required for meaningful participation in the global economic and financial system. The incentive to manage towards and ultimately achieve compliance is that countries will be able to access global resources, particularly from the private sector, on increasingly advantageous terms in support of national growth. The penalty for non-acceptance of and non-compliance with the standards is exclusion or restricted participation in the global economic and financial system. As

and when this standards-driven environment emerges, non-G7 countries will have a binary choice to accept and comply or not to do so. There is no escaping the fact that these standards derive mainly from the market-based, capitalist Anglo-Saxon experience. This reality, in and of itself, causes understandable resentment and accusations of a new economic imperialism. But the truth is that the Anglo-Saxon market-based economies, driven by the private sector as the primary agent for wealth creation, represent the best known model for long-term growth. Command economies and state-dominated socialistic economies are bankrupt as workable alternatives.

### *The limits of the approach*

The international system should help governments by giving space and tolerating national variations in capitalism, and through limited measures to cushion the domestic impact of the world economy. No two countries will come to the same conclusion concerning the best way to organize an economy and link up with the international system. Value and interest trade-offs are bound to differ from country to country. An open global economy must accommodate these differences. The proposals for standards should be seen as a statement from the “ask side” of the global critical input market. But the dialogue cannot be one-sided – it cannot ignore the “bid side” of the market; that is, what the key emerging-market countries on the receiving side can accept and practically accede to within a realistic time frame. The inducements, if any, that would be necessary to ensure the commitment of these emerging market countries will need to be taken into consideration as well.

Additionally, the specifics of the standards must be stipulated and accepted. For example, the following questions will need to be answered: by accounting standards, do we mean the proposed standards of the major US accounting firms? What specific bankruptcy regime is to be embraced as a new standard – the US regime, a European regime, or another arrangement? And what inducements are needed by the receiving countries to move to accept the new standards? For example, if improved debt re-scheduling is accomplished through majority voting, burden sharing, and collective representation clauses in loan agreements, can borrowers insist on and obtain a lower spread on financing? Can the respective countries command lower spreads on external borrowing?

Receiving countries should have input on the standards they will and can accept, the time frame involved, and the incentives they believe are fair to reward them for compliance with the new standards. In other words, the receiving countries should stipulate the “bid side” of the critical input market.

This is the link, from the author’s perspective, with the international

financial architecture. Designing the international financial architecture as if political institutions inside the countries involved are perfect and are going to deliver as one thinks they should deliver is not going to be enough. In fact, in the author's assessment, the international financial architecture should be thought of and designed as an institutional mechanism to give incentives for better performance by domestic political institutions. Concerning transparency, reform of the financial system, and so on, the real solution is to induce the domestic political institutions to better manage the various trade-offs and conflicts of interest involved.

The increased risks of financial crises are due to the interaction of many factors; it cannot be said that there is one defining factor of financial crisis. Examination of any one of the crises, especially the recent ones, reveals that they stem from the interaction of many factors: macro-management and the domestic financial system, the regulation and supervision of the domestic system, capital flows, capital account liberalization, and so on. The fact that these interactions exist makes the trade-offs and conflicts even more intricate and complex for the policy makers and the political system to deal with. The discussion about capital account liberalization is not simple because it is not capital account liberalization itself, or capital flows themselves, that are the cause of any crisis. Crises are caused by the way in which capital account liberalization and capital flows interact with macroeconomic management, and the way that they interact with domestic financial systems to make the situation unsustainable. The presence of these interactions is crucial; when they are present, and for some policy makers new and having not been dealt with before, trade-offs and management become much more difficult.

The trade-offs in macro policies are known; with regard to exchange rate regimes, if we choose a fixed exchange rate regime, we know the benefits. The country will have a nominal anchor that will reduce volatility of the nominal exchange rate, which is supposed to be good for predictability of the exchange rate for trade. We also know that there are costs and risks: expansion of domestic money supply if reserves increase very quickly with surges of capital inflows; cost of reserve accumulation that the country will have to bear, which might create domestic booms and, in turn, weaken the domestic financial system; loss of competitiveness if the real exchange rate appreciates; and reduced perception of risk on the exchange rate, producing excessive borrowing.

#### *Reconciling legitimacy and efficiency: the trade-off*

The country has to deal with these trade-offs and decide what is most important. And each one of these trade-offs has behind it some conflict of interest with some group of people: exporters versus domestic pro-

ducers, rural versus urban, and so on. All these interest groups are really competing for the favour of the policy makers to choose the policy that they prefer. Consider, for example, the exchange rate regime; there is no regime that is really superior to any other. What this means is that crises happen as often under a fixed exchange rate regime as under a flexible exchange rate regime. Thus, there is no one regime that is going to solve the problem, because it is not the exchange rate regime itself that is the problem. It is really how a country manages the conflicts and trade-offs behind this regime. There is no one exchange rate regime that is generally superior, even though the international financial community thinks today that flexible exchange rate regimes are less likely, other things being equal, to produce crises.

Another example lies in domestic financial liberalization. We know that it is desirable, and we know that it has significant long-term benefits. Some work at the World Bank shows that going from a repressed financial system towards financial liberalization can yield a gain of as much as 1 per cent in GDP growth in the long run; these are major benefits. On the other hand, vulnerability from the domestic financial system has often led to crisis just after liberalization. This vulnerability can stem from excessive competition, higher interest rates or more risk-taking by the banks, or more borrowing abroad and more exposure. The fact of the matter is that often, financial liberalization has led to financial crises.

So, what is the best way to deal with these trade-offs? It is clear that adequate regulations are needed, along with good supervision of the domestic financial system, but the problem is that domestic regulations and good supervision take time to develop. And in addition, regulation itself has its own implicit trade-offs and conflicts of interest. Some groups do not like it; some powerful groups may find it undesirable because it constrains their ability to use the domestic financial system for their own interest. In cases where there is a strong and large public sector – a large state-owned enterprise sector, for instance – any regulation to limit the exposure of the banks to some sectors or groups will have to confront their limitations and the way domestic financial systems can be used to finance public enterprises.

Liberalization is beneficial and should be done. But there are crucial issues in terms of process, timing, and where a country should start with the regulation and supervision. This is much more complicated when the capital account liberalization issue is also considered. That is where the international financial architecture comes in, because it is all about creating incentives for domestic political systems to deliver the good policies and institutions that are considered necessary to prevent financial crises. The focus is on the tension between the harmonizing pressures of global financial integration led by the advanced financial centres, and the pre-

vailing diversity of financial systems and corporate practices throughout the global system, particularly in emerging market economies.

*The nature of global financial integration: to what end?*

There are a number of dimensions to this policy problem that further research would need to explore: crisis management; the nature and process of global financial integration itself; its impact on global and national macroeconomic management; and other policy domains such as social policy. This implies normative concerns about the financial system: to what end and for whom does global finance exist? What balance should be struck between financial and monetary imperatives and other, broader policy objectives of economic development for advanced and emerging market economies alike?

These dimensions of the problem can be subdivided into more specific policy issues. The first issue concerns the significance for policy of the co-existence of distinct national and regional financial system variants, with the acceleration of the trend towards the global integration of these once distinct markets. The old distinctions between the national and the off-shore have been disappearing rapidly, but contrasting national or regional variants of financial systems seem likely to persist for at least a generation. Nonetheless, global financial integration and management appear to presume a more uniform environment than is actually to be found. Even the most well-meaning of policies can suffer a “compatibility deficit” when applied across a range of national systems. Concepts such as “transparency” and “supervision” do not enjoy universal definition, especially at the implementation stage, an important question for the IMF among others. There is also a further complication; national policy makers remain accountable to domestic constituencies and parliaments despite the global dimension of the policy problems. Often, the individual responses of states make sense in their own peculiar context, which one can hardly ask these states to ignore, but taken in a wider context there is considerable room for dissonance and major error in crisis management.

How do we manage, or indeed formulate, global financial integration and monetary policy on these terms? How do we ensure adequate supervision of global financial institutions on the basis of national jurisdictions, or devise adequate patterns of cooperation? How do we devise robust policies for international institutions that are compatible with contrasting national systems and the imperatives of domestic political legitimacy and accountability, especially where international policy aims to promote democratization in volatile economic times? Writing more laws consistent with those in the dominant financial centres probably will not do. Furthermore, if the policy mix is simply left to the dominant states or to private interests, then the legitimacy and much-advertised benefits of global inte-

gration may prove less acceptable over time, particularly in the wake of a crisis.

Another issue of particular importance is the relationship between the regulatory and prudential supervisory aspects of policy on the one hand, and the macroeconomic (particularly exchange rate and monetary) policy aspects on the other. Regulatory change in favour of liberalization implies an opening of the capital account, with a necessary impact on supervisory practice, macroeconomic management, and the finance of social and health policies. Nonetheless, regulatory policies are typically made in considerable isolation from discussions on the management of the global macroeconomy or other policy domains. The exception appears to be in small, open economies such as Hong Kong or Singapore, where vulnerability to capital flow volatility links regulatory, supervisory, and monetary/exchange rate management and government finance in the minds of policy makers. More systematic and policy-oriented discussion of these questions seems desirable as the legitimacy of governments and patterns of international cooperation often depends on the success of macroeconomic policies.

#### *Public interest and the pace of global financial integration*

A final question concerns the nature of the public interest in the face of global financial integration. What are the (by nature contestable) goals that public policy seeks to achieve in the domain of financial system and monetary management? What role should the financial system and (particularly external) financial constraints play in the development process, especially where social and humanitarian issues are concerned? What balance should be struck in crisis management between the interests of investors and the interests of debtor countries, of creditor countries and intergovernmental organizations? This, in turn, invites discussion of the institutional framework and content of international cooperation (the IMF, the Basle process, central bank collaboration, and so on). What asymmetries of power and distribution might throw a global system operating through international institutions into disrepute?

However, the greatest pressures in favour of the convergence of national economic development models are not directly related to the regulatory policy process at all. The more important force in favour of convergence is the impact of changes in the global financial system upon the capacity of states to formulate independent and distinct macroeconomic adjustment policies, and changes in the role of the state itself under conditions of financial globalization. This chapter has made it clear that regulatory permissiveness and overt reform programmes in the dominant economies launched financial globalization. In this sense, it is a crucial part of the globalization story.

Particularly interesting is the position of states in a situation of accel-

erating global financial integration. States in the market economy have always been financially interdependent to one degree or another. Short of autarchy, states must manage the current and capital account and their effects on the value of the national currency, and also manage the domestic consequences of adjustment to these external constraints; the benefits of interdependence imply that there are also costs. As the authorities in the dominant financial centres of the global system have purposely implemented regulatory policies that fundamentally transform financial space and the international monetary system, other states have been drawn into more constraining networks of interdependence. Though all are affected, financial globalization particularly draws in those national political economies reliant on externally generated capital.

If these states wish to benefit from foreign capital, they must provide a policy framework that is sufficiently attractive. States thus become, in one sense, a buffer or mediator between the domestic and the global. They are simultaneously participants in the international political economy (and significant players in global financial markets), yet are accountable to and focused on the problem of their domestic legitimacy. In this sense, states are schizoid institutions. The globalization of financial structures, resulting in the greater openness of domestic financial space, places important pressures on states' management of their macroeconomic policy variables, pressures that do not exist in more closed financial systems.

In fact, financial market structures have a considerable, and some argue determinant, influence on the capacity of states to manage the process of economic development, and on the nature of government policies. The character of the global financial system will be vital to the process of economic development and management in the long run. It is argued that the increasing transnationalization and marketization of finance, combined with growing short-term capital mobility, significantly reduces state policy-making autonomy and constrains states to follow policies amounting to embedded austerity in the neoliberal mode.

There is little doubt that capital mobility and a liberal financial system are increasingly prevalent features of the global economic order. There is considerable literature that establishes the effects of capital mobility on state capacities to control the national economic space and make crucial macroeconomic and other policy choices.

Mobile capital also limits the ability of governments to make independent macroeconomic decisions concerning fiscal, monetary, and exchange rate policy. Interest rate differentials linked to attempts by governments to affect domestic macroeconomic conditions can lead to perverse and contradictory results. The rise of the euromarkets and associated short-term capital flows were largely responsible for the breakdown of the old Bretton Woods fixed exchange rate system and the subsequent increase

in exchange rate volatility since the 1970s; since then, exchange controls have been rendered essentially ineffectual. All of this has put considerable pressure on states to cooperate to realize macroeconomic policy goals in view of reduced policy-making autonomy linked to changes in the financial system.

This means, however, that states must further compromise their domestic autonomy in the name of effective cooperation. Furthermore, in order to be effective, international policy coordination must involve more than “external” adjustment policies through the exchange rate, to include fiscal and monetary policies; this is a much more intrusive type of policy coordination, since it demands that governments alter macroeconomic policies central to their domestic political programmes. Finally, the dynamics of “regulatory arbitrage” in competing financial markets have put pressure on states to relax restrictions on economic activities through deregulatory policies in a number of sectors, and to reduce corporate and individual tax burdens. Pressure has also mounted on states to adopt liberal market-oriented policies with respect to economic adjustment over time.

There are, therefore, important pressures at work in the international financial system that propel governments to “marketize” their economic policies over time. This has led to the emergence and promotion of greater levels of domestic and transnational competition in national economies, thus limiting the ability of states to intervene effectively in the management of industry and the wider process of economic development. State policies are aimed at ensuring that national markets are attractive to investors and that national financial institutions remain competitive and relatively free of encumbering regulatory restrictions. The result has been more liberal or market-based systems of economic regulation, and corresponding pressure on social policies of the welfare state.

In a more marketized environment, greater levels of autonomy are necessarily conferred upon market actors. In distributional terms, the consequences of this are far from neutral; some general remarks on distributional effects are possible here. Distributional consequences will occur among social groups, firms, and economic sectors within particular economies, and among states in the global system itself. Firstly, more market-oriented policies will lead to intensified competition among individual firms. Competition will be further intensified as economic openness encourages a wider range of transnational activity in terms of trade, investment, and production. Thus, the national firms embedded in national models of economic development and welfare provision will increasingly compete in global, as opposed to international, market structures. This will result in considerable restructuring, which some may well argue is beneficial in an aggregate and long-term sense, but involves important



short-term costs for the more vulnerable market players. Major market actors will also seek out the most favourable regulatory and market environments in which to place their market operations and raise capital, the phenomenon known as “regulatory arbitrage.” This has considerable implications for levels of market activity and employment in national financial sectors.

Finally, capital mobility affects various sectors of the economy in different ways, as Frieden has argued. Multinational corporations with relatively mobile assets benefit more than those without similar options; exchange rate fluctuations linked to short-term capital flows and the related interest rate fluctuations induce holders of financial assets to move to more remunerative jurisdictions; and changes in the availability and price of capital affect the competitiveness of domestically oriented firms in the productive sector. It can be argued that financial deregulation and transnationalization put considerable pressures on the industrial manufacturing sector, with capital flows reflecting less and less the structure of trade in merchandise and services. The increased capital mobility that results from the liberalization of the financial services sector, and the consequent integration of financial markets, thus has consequences for the pattern of gains and losses among actors in the market and society in general. States are less able to influence the process of economic development and adjustment in line with policy priorities as state control over the investment process dwindles in favour of market forces, yet state responsibilities in terms of managing the domestic consequences of this ongoing restructuring remain undiminished.

In short, the ability of states to make independent decisions concerning important elements of economic policy-making and development has been considerably constrained by increased capital mobility and transnational financial integration. There have also been important distributional consequences for particular sectors of economic activity, which will be explored in more detail, with respect to securities markets, below. Where the desire of states to adopt an independent economic strategy emerges from the internal democratic processes of states – such as the desire to maintain and enhance an elaborate welfare state, with the corporate tax burdens, labour market restrictions, and high wage levels which that implies – the effects of capital mobility have a clear impact on the democratic legitimacy of governments.

To summarize, the most substantive pressures on states leading to a convergence of national or regional forms of capitalism stem not from specific regulatory provisions in financial markets as such, but from the constraints on independent macroeconomic adjustment policies that short-term capital mobility places on states.

What seems absolutely clear is that the recent outbreak of financial

crises in the global economy, beginning with the Asian collapse of mid-1997, is seen by the interests supporting the Washington consensus as an ideal opportunity to drive home their advantage. The crisis has greatly increased the constraints that individual states experience on their macroeconomic and indeed microeconomic policy-making autonomy. As the need for capital, debt rescheduling, and the re-establishment of currency stability increases, dependence on the global financial system is directly enhanced. The conditions that accompany financial assistance from international organizations and creditor governments compound these constraints. International organizations are now, more than ever, involved at the micro level of policy-making, looking at questions such as local corporate practice, banking supervisory policies, and the networks of relationships which characterize the development of industrializing economies. The author does not wish to imply that all or even most of this intrusion into domestic autonomy is necessarily negative, but it does represent an ongoing and very real pressure for convergence among national economic development models.

The orthodox policy prescriptions put forward in the context of the Washington consensus, in line with the preferences of global investors who (in aggregate) command international capital flows, suggest that timely attention to the economic bottom line in national economies will yield a new equilibrium and dynamism on a global scale. Failure to attend to the bottom line lies behind the crises that erupted in Asia; crucial flaws in Asian economic development models are responsible for the problems. The policy model insists that the bottom line consists of “prudent” macroeconomic policy; open, liquid, and transparent financial markets; open trade policies; and market-led economic adjustment strategies. Regardless of the differences among states, the prescription is seen as having an essentially universal application. If the political programme represented by the “consensus” continues to be applied successfully both locally and globally, then it will represent a genuine convergence of forms of capitalism over time. Corporate practice and state-industry relations will always remain embedded in the fabric of local societies; these factors are, for the most part, nationally defined at the moment. Differences among national forms of capitalism will always exist to some degree as each local economy continues to refract the constraints of global integration in its own way. Yet convergence will be real and significant.

The real bottom line is in terms of political legitimacy. The challenge to political legitimacy lies in the ongoing patterns of distributional conflict that are a part of any market system, or indeed any system of social organization at all. Complex political systems and cultures have emerged over time to manage these patterns of conflict with varying degrees of success in different historical epochs. However, the contemporary instability of

continuous and accelerating structural adjustment to global market pressures risks disturbing these complex systems too rapidly for them to survive without major convulsions of the sort that wracked Tsarist Russia in 1917 or Germany in the 1920s and 1930s. Constant adjustment to these global pressures can systematically sap political economies of their domestic legitimacy and certainly contributes to undermining established patterns of accountability in democratic societies.

## Conclusion

What can be expected by way of responses to agreed-upon standards from the non-G7 countries? Let us make the slightly bold assumption that compliance with the emerging standards, together with sound macro-performance, would bring a country to investment grade status relative to the global community. Assuming that all non-G7 countries have knowledge of the published standards, each country will react in one of seven ways.

1. There will be a group of countries that have not adopted increasing national growth as a primary priority, preferring instead to optimize an ideological or power maintenance priority; these countries will reject or ignore the standards.
2. Another group of countries will reject compliance with the standards because the standards are deemed to be inappropriate for them.
3. Another group of countries will acknowledge the appropriateness of the standards, but profess a lack of resources to accomplish compliance in any reasonable time frame.
4. Another group of countries will embrace some or most of the standards, but will modify and/or choose to maintain some local standards that are at variance with the proposed global standards.
5. Another group will embrace the core of the proposed standards and initiate and manage a serious, visible programme to achieve compliance.
6. There will be another group of countries that will declare themselves at or near compliance with the standards and commit to achieving full compliance in a reasonably short period of time.
7. There may be a small number of countries that will achieve substantially complete compliance shortly after full consensus on the standards is realized and published.

It is possible to group all countries into these seven categories. In the author's view, this initial categorization can be the basis for evolving a new scheme for sovereign risk ratings (as well as derivative ratings for institutions within countries) by the public sector and the for-profit private sector. Category 1 and 2 countries will be declared far below investment grade and essentially unsupportable by the global community,

particularly the private sector, in any broad, market-based financial and commercial sense. Because their circumstances are so far removed from the standards, category 3 countries will also be declared non-investment grade and largely unsupportable on practical considerations, even though a positive attitude to achieve compliance may be professed. Category 4 countries, depending on the degree to which the global standards are modified or substituted, could achieve the equivalent of supportable non-investment grade status, provided the political will to embrace growth and foreign and private-sector investment is credibly expressed in word and deed. Category 5, 6, and 7 countries represent the gradations of investment grade countries that will emerge, again provided the political will and commitment to market-based, private-sector-led growth is credibly professed and executed. As time and experience accumulate, countries may move up or down in category as their profile changes for better or worse. As country ratings improve, they will experience positive rewards from their interface with the global economy and *vice versa*. As this process gains momentum, we can expect that the international institutions, the rating agencies, and the private sector will converge to this standards-based perspective in evaluating countries and counterparts within countries for their own purposes.

Which institutions should monitor compliance with the standards and publish progress or lack of progress reports? It is clear that the IMF, World Bank, and BIS intend to play this role and are being encouraged to do so. There are political issues, issues of confidentiality, and issues of competence being raised in regard to a broadened surveillance role for these institutions, but doubtless they will rise to the challenge and embrace this role in some form. The private sector will also play a significant role in surveillance through rating agencies, private institutions such as think tanks, and leading private enterprises. A multiplicity of surveillance activity is all to the good. There is and will be no barrier to entry into the surveillance game by any party who chooses to be involved. It is important for the non-G7 countries to understand that their respective positions on compliance with emerging global standards will be a matter of public record; information on these matters already is and will remain in the public domain. Even if a non-G7 country chooses to ignore the standards, that fact will be readily ascertainable and counted as a negative factor in its ratings. Becoming comfortable with more objective, regular, and visible evaluation, particularly by the private sector, will be difficult for many non-G7 countries. Constructive reform of the global financial system – if it comes – will be the result of improved standards of management in all countries desirous of participating in the global system. The path is difficult, but there is a path that is realistic. It is ironic that obtaining direct private support and access to the resources that the pri-

vate sector controls is at the discretion of countries that lack and need these resources to grow. A realistic analysis of the state of the global economy yields this conclusion: there is no other effective option available. Major, formal overhaul of the global financial system is not needed; the successful path to future progress has been established and is practically implementable. There are grounds for optimism that emerging markets and other countries can re-establish and sustain stable growth.

## REFERENCES

- Bank for International Settlements, 1999. 69th Annual Report.
- Bank for International Settlements, 1998. 68th Annual Report.
- Camdessus, M., 1999. *Global Financial Reform: The Evolving Agenda*. International Monetary Fund.
- Camdessus, M., 1997. *Lessons from Southeast Asia*. International Monetary Fund.
- Camdessus, M., 1998. *The IMF and Its Programs in Asia*. Council on Foreign Relations.
- Camdessus, M., 1998. *Reflections on the IMF and the International Monetary System*. International Monetary Fund.
- Cooper, R., 1999. *The Evolving Exchange Rate Regime*. Paper presented at the Federal Reserve Bank of Boston Conference on Rethinking the International Monetary System. Conference Series 43, June 1999.
- Eichengreen, B., 1999. *Towards a New International Financial Architecture*. Institute for International Economics.
- Fischer, S., 1999. *On the Need for an International Lender of Last Resort*. International Monetary Fund.
- Fischer, S., 1998. "How the IMF Responded to the Asian Crisis." *Finance and Development*, June 1998.
- Hak K. Pyo, 2000. "Excess Competition, Moral Hazard, and Industrial Trauma in Korea," in Uzan, M. and Dasgupta, D. (eds), *Private Capital Flows in the Age of Globalization*. Aldershot and Brookfield: Edward Elgar.
- Chang, R. and Velasco, A., 1998. *The Asian Crisis in Perspective*. Federal Reserve Bank of Atlanta and NYU.
- Esquivel, G. and Larrain, F., 2000. "Latin America Confronting the Asian Crisis," in Uzan, M. and Dasgupta, D. (eds), *Private Capital Flows in the Age of Globalization*. Aldershot and Brookfield: Edward Elgar.
- Feldstein, M., 1999. "A Self Help Guide for Emerging Markets." *Foreign Affairs*, March/April 1999.
- Feldstein, M., 1998. "Refocusing the IMF." *Foreign Affairs*, April 1998.
- Federal Reserve Bank of Kansas City, 1997. *Maintaining Financial Stability in a Global Economy*. A Symposium Sponsored by the Federal Reserve Bank of Kansas City, Jackson Hole, Wyoming.
- Garnaut, R. and Wilson, D., 2000. "Dealing with Financial Crises: Regional or Global Approach," in Uzan, M. and Dasgupta, D. (eds), *Private Capital Flows in the Age of Globalization*. Aldershot and Brookfield: Edward Elgar.

- Chote, R., 1998. *Financial Crises and Asia*. CEPR Conference Report.
- G7 Report, May 1998. *Strengthening the Architecture of the Global Financial System*.
- G22 Report, October 1998. *Working Group on Transparency and Accountability, Working Group on Strengthening Financial Systems, and Working Group on International Financial Crises*.
- Group of 10, 1996. *The Resolution of Sovereign Liquidity Crises*. Basle, May 1996.
- Institute of International Finance, January 1999. *Financial Crises and Emerging Markets*.
- Krugman, P., 1998. *What Happened to Asia?* Mimeo, MIT.
- Miyazawa, K., December 1998. *Towards a New International Financial Architecture*. Japan: Ministry of Finance.
- Sheng, A., 1998. *The Crisis of Money in the 21st Century*. Hong Kong Monetary Authority.
- Hurlock, J., 1995. *A Chapter 9 Process for the Global Financial System*. Reinventing Bretton Woods Conference, Montreal. Unpublished manuscript.
- Stiglitz, J., 1998. *More Instruments and Broader Goals: Moving Towards the Post-Washington Consensus*. The United Nations University.
- United Nations, 1999. *Towards a New International Financial Architecture: Report of the Task Force of the Executive Committee on Economic and Social Affairs of the United Nations*.
- Underhill, P., 1999. *Transnational Financial Markets and National Economic Models: Global Structures versus Domestic Imperatives*. Paper presented to the Annual Conference of the International Studies Association.
- Uzan, M., 1996. *Financial System Under Stress? A New Architecture for the World Economy*. New York and London: Routledge.
- Uzan, M. and Dasgupta, D. (eds), 1999. *The Aftermath of the Asian Crisis*. Aldershot and Brookfield: Edward Elgar, forthcoming.
- Yoshitomi, M., 1999. *Capital-Account Crisis and Credit Contraction*. ADBI Institute Working Paper No. 2.

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## Distributive justice and the World Bank: The pursuit of gender equity in the context of market reform

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*Kerry Rittich*

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### Introduction

Since the 1980s, the international financial institutions have been among the principal architects of a set of market-centred economic development policies often referred to as neoliberalism or the “Washington consensus.”<sup>1</sup> The World Bank, as the largest and most influential source of development research, finance, and policy advice in the world, has played a major role in the development of market reform in the neoliberal style. In the course of its adjustment lending and through its research and policy advice to developing economies and those in transition from plan to market economies, the Bank has generated recommendations on a wide range of domestic regulatory and policy issues. In the process, it has both expanded the reach of its influence and participated in a reconceptualization of the domain of “economic” matters.

The basic thrust of these policy recommendations is to further the commitment, shared with the International Monetary Fund, to market-centred development allied with global economic integration, and to promote the view that open markets are the primary vehicle through which economic development objectives must now be pursued. What began as a response to what were perceived as failed or inadequate development alternatives – in particular, plan or administered economies and import substitution models of development – has emerged in recent years as a general thesis

about the elements of good economic governance and appropriate forms of state action and regulation in a globalized economy.<sup>2</sup> The basic tenets of the Bank's view of the route to economic development are by now well known. On the one hand, the Bank is motivated by a belief in the virtues of the market as an engine of growth, a commitment to increasing private and reducing public provision of services, and a desire to facilitate efficient economic transactions in a globalized economy. On the other, it is informed to a significant degree by an image of the state as a locus of waste and inefficiency, if not corruption, with persistent vulnerability to capture by special interests.<sup>3</sup>

Over time, these core commitments have been consolidated into a standard set of fiscal, policy, and regulatory recommendations. Through both its lending practices and policy advice, the Bank routinely advocates a realignment of state policies and budgetary expenditures and a structural transformation of domestic economies along the following lines: liberalization of capital flows; "deregulation," better understood as re-regulation of markets (in particular, labour markets); elimination of subsidies and the move to market pricing of goods and services; liberalization of internal and external trade; reduction or elimination of budget deficits; replacement of broadly based social programmes or entitlements by poverty reduction efforts targeted at the most needy; reduction of the size of the public sector; and privatization of publicly held enterprises and services. These basic recommendations may be supplemented by other policies aimed at increasing the role of the private sector and foreign direct investment in economic development.<sup>4</sup>

These policy recommendations gain their force in part through the conditions and performance guarantees typically attached to the Bank's loans. They are intended to alter, sometimes to a considerable extent, the internal structure of the economies of recipient states. However, the international financial institutions, through their endorsement of a standard set of reforms, exert a degree of normative influence that exceeds their ability to exact regulatory and policy conformity from the states with whom they contract. With the collapse of the plan economies, neoliberalism has become the residual economic claimant on the horizon,<sup>5</sup> wielding significant if not dominant influence in policy debates in both industrialized and developing states.

At the centre of neoliberalism stands a particular understanding of the state's role in economic growth.<sup>6</sup> Indeed, in an important way, neoliberalism can be thought of as a transformative project that aims to normalize a particular culture of the market and set of relationships among market actors, through the standardization of a canonical set of policies, practices, institutions, and regulations. One of its central goals is to organize markets



around the pursuit of efficiency and the facilitation of transactions, free from the incursions of competing social and political values and the demands of special interests.<sup>7</sup>

As a by-product of the debt relief projects in Latin America and sub-Saharan Africa, the Bank began to move beyond project funding and discrete policy recommendations to set out a more general view of the links between economic development and social and political institutions. Early efforts, visible in Bank policy documents of the 1980s, reflect a preoccupation with the minimal state and an elaboration of the justification for market-centred growth through macroeconomic stabilization, privatization, deregulation, and trade liberalization.<sup>8</sup> In the 1990s, however, the Bank has become increasingly concerned with the properties of the “effective” rather than the simply minimal state. Although the Bank now claims that national ownership of the development process is key to its success,<sup>9</sup> it has a well-developed position of its own on the importance of the various institutional requirements of good governance in a global economy.<sup>10</sup> Indeed, it seems safe to say that institutional and governance issues are among the chief preoccupations of the World Bank, rather than a mere adjunct to the generation of economic growth. This is a preoccupation that shows no signs of abating; in the president’s recent draft, “A Proposal for A Comprehensive Development Framework,”<sup>11</sup> the first elements of the framework are “good and clean government” and “an effective legal and justice system.”<sup>12</sup>

Good management in the eyes of the Bank is management that facilitates transactions and trade and capital flows, and management that secures investments, particularly foreign investments. This can be achieved principally through the adoption of “best practices”; that is, the emulation of the institutional and regulatory models thought to best secure economic growth. However, good governance also requires rooting out corruption and curtailing the “arbitrary” power of the state. These concerns have led the Bank to assign heightened importance to the presence of the rule of law and the strength and adequacy of legal institutions. To promote good governance, the Bank has begun to fund numerous legal and judicial reform projects – projects fostering civic participation and civil society and promoting the devolution of power from central to local governments.<sup>13</sup>

In an attempt to advance the objectives of open markets and liberal trade, the Bank maintains the position that there are distinct functions for different institutions and spheres in market societies. Foremost among the tasks facing many developing and transitional economies is to effect a radical separation of the state from the market. One of the principal ways that this can be achieved is by refashioning and sharply containing the role of the state. The primary role of the state is to support and enhance

the operation of markets and to facilitate private economic activity.<sup>14</sup> “Intervention” in the market can be justified to the extent that it is demonstrably efficiency-enhancing. However, there is a presumption against rules and policies that do not meet this test, on the basis that they are likely to impede the functioning of the market by interfering with the efficient allocation of productive resources.<sup>15</sup>

The legitimacy of neoliberalism as a development model has been called into question in recent years, and an array of criticisms have been levelled at the international financial institutions. In part, these criticisms are a response to the evident limitations of neoliberal policies in promoting development and human well-being where they have been implemented. Development has languished in spite of, and perhaps because of, the adoption of market discipline and stringent fiscal measures in order to service debt repayment obligations in much of sub-Saharan Africa. Production and output have collapsed and failed to recover in some of the states in transition to a market economy. States in East Asia that have opened their markets have proved to be intensely vulnerable to the vagaries of capital flows. Enormous human costs and declines in welfare have been associated with all of these events.

However, resistance to market reforms is also a result of the apparent effects of these reforms on particular social groups. While the bases of such complaints may vary and sometimes even conflict, in general they are rooted in the perception that neoliberal policies do not function in the public interest and are tilted against the interests of large sectors of society, while unreasonably and unfairly advantaging certain economic elites. Whatever their ability to generate economic growth and further global economic integration, market reforms often fail to generate the promised gains in human welfare. Instead, inequality is growing, real wages are stagnant or declining, and many people are working longer and struggling harder to provide for basic necessities. Workers, environmentalists, feminists, and social activists in a variety of areas have all raised specific claims about the real losses and disadvantages that flow from the commitment to neoliberalism; these claims are not answered simply by the argument that a rising tide will lift all boats.

Despite the debate around the neoliberal path, and even the forceful criticisms that have been voiced from time to time within the Bank itself,<sup>16</sup> the institution’s adherence to its core elements appears to remain unshaken and its basic stance toward market reform has not yet altered appreciably. At the same time, the Bank has not been unresponsive to arguments that women may be disproportionately disadvantaged or harmed in the process of economic reform, nor to the earlier observations that specific development projects were frequently designed in ways that benefited men at the expense of women. In recent years, largely because

of sustained criticism on this front, the Bank has embraced the task of promoting gender equity as a development objective, and engaged in a variety of projects to ameliorate the status of women. The official position is that gender equity is good for economic growth.<sup>17</sup> However, the Bank also now claims that growth promotes gender equity.<sup>18</sup>

The relationship between growth and equity is thus one of the most pressing and troublesome questions on the development agenda. The question of gender equity is a particularly telling context in which to examine the intersection of equity concerns and market-centred economic growth, both for its intrinsic importance and for its capacity to illuminate the relationship between distributive outcomes and the adoption of particular market structures. This type of analysis attempts to shed light on this relationship by exploring the possibility that particular forms of disadvantage to women might predictably result from the package of state and market reforms to which the Bank, so far, remains committed. There is a broad range of factors at work; outcomes will inevitably depend on context and vary among different groups of women. However, the picture that emerges suggests that a commitment to gender equity, in particular one that includes economic equality for women, is not easily reconciled with market-centred policies as they now stand. Indeed, taking seriously the manner in which economic returns are distributed, rather than merely accepting the presence of growth as a development objective, places the commitment to unfettered markets and a minimal, non-interventionist state in question. Such policies appear to pose clear challenges, if not barriers, to the pursuit of greater equity and broader participation in the fruits of development, challenges that are particularly evident with respect to women.

To the extent that continued, if not increased, disadvantage for particular groups and sectors can be attributed to the structure of reforms, the overall desirability and legitimacy of these economic strategies deserves rethinking. Rather than a marginal issue to be dealt with after the fact, the presence of powerful and persistent distributional inequalities raises fundamental questions about the Bank's continued attachment to this trajectory of economic development.

Exploring the distributive effects of market reforms, however, also raises another issue. The Bank is formally constrained by its Articles of Agreement from interference in the internal political affairs of states, and is restricted to economic considerations in pursuing the purposes set out in these Articles.<sup>19</sup> While the Bank is conscious of the boundary it places on the activities that can legitimately be engaged in, this language has proved to be sufficiently abstract and elastic over time to permit the Bank to justify linking loans to numerous domestic policy and regulatory reforms within erstwhile sovereign states. As it has moved from project-

based lending to adjustment and policy-based lending, the Bank has increased the areas in which it has found itself to have a legitimate interest,<sup>20</sup> funding projects and formulating policy advice in an ever-broader number of fields, from social welfare policy to taxation and law reforms. Yet at the same time, the limitation on involvement in political activities has enabled the Bank to avoid particular issues. Questions of distribution and equity have historically been regarded by the Bank as internal matters for states.<sup>21</sup> How and to what extent this permits the Bank to distance itself from the distributive effects of its own policies is the question that now needs to be addressed.

Determining what constitutes a political issue as distinct from an economic issue is often a difficult, if not arbitrary, exercise. Indeed, it is the ineluctable ambiguity and overlap in these categories that has provided the Bank with the margin for increasing its involvement and interest in the structure of domestic economies. The explicit focus that the Bank now places on the role of the state and issues of governance in development,<sup>22</sup> matters which are, by any logic, quintessentially political, arguably demonstrates the collapse of any remaining barrier, or at least considerable ease on the part of the Bank in negotiating and circumventing its limits.<sup>23</sup>

However, the pervasive involvement of the international financial institutions in the terrain of domestic governance and institutions is surely also assisted by the view that economic development can be understood primarily as an issue of management and technical expertise. Indeed, it is arguably the conceptualization of development as a generalized, discrete phenomenon that permits economic development to be approached as a "problem" to be solved and facilitates the move from limited, discrete interventions in the economic affairs of states in need of resources to a detailed specification of the practices and institutions that are likely to either impede or enhance development. Hence, the dilemma of distinguishing the political from the economic is intimately, if not inextricably, tied up with the entire attempt to elaborate a comprehensive approach to the question of development.<sup>24</sup>

Nonetheless, it is now difficult to avoid the conclusion that market reforms frequently operate so deeply on social institutions and political priorities as to be inseparable, in many cases, from a range of contestable norms and visions about the aims and purposes of the organization of social life. If the legitimacy of the Bank's development policies rests on the contention that these policies are essentially neutral, devoid of either distributive effects or controversial political choices, it is now clear that these are unsafe assumptions.

The adherence to neoliberal reforms thus raises deeply intertwined issues of legitimacy for the Bank around substantive outcomes of reform for particular groups and incursions into the political priorities and choices

of states. The question that this chapter attempts to begin to unravel is why these issues have not been, and are unlikely to be, resolved simply by a renewed focus on poverty reduction, adding gender equity to the list of development objectives, or inviting broader local ownership and participation in the design of development projects. What is required in addition is an exploration of distributive outcomes and their relationship to basic questions of market design.

### Neoliberal market reform and (re)distribution

The links between development policies and distributional concerns surfaced in the 1980s; the ground for challenges to the legitimacy of the Bank's lending practices was set when it emerged that the Bank's structural adjustment programmes appeared to be exacting profound social costs.<sup>25</sup> These programmes, originally developed in response to the debt crises in Latin America and, later, sub-Saharan Africa, characteristically imposed stringent fiscal austerity measures. These, in turn, induced states to make deep cuts in spending on social provisioning and budgets for health and education. The result was frequently increased poverty and widespread deterioration in living conditions; hardship was particularly marked in the poorest sectors of society.

In the 1990s, concerns around poverty and equality also emerged in much of Central and Eastern Europe and the CIS during the transition from plan to market economies in conjunction with the implementation of neoliberal policies. Most of the economies in that region experienced a sharp deterioration in the standard of living and an increase in inequality over a very short period of time;<sup>26</sup> this was a result of dramatic falls in output, unprecedented levels of unemployment, and sharp drops in other social and economic indicators.<sup>27</sup> There, too, the deteriorating conditions were associated with the implementation of economic reforms that had been designed to move these societies in the direction of ideal market economies.

Although the results of reform and restructuring efforts have been mixed, disparities in the benefits from neoliberal reforms are pervasive; moreover, reforms appear to produce not simply short-term hardship, but identifiable winners and losers. For example, it is now relatively uncontroversial that structural adjustment programmes disproportionately disadvantaged women and made it more difficult for women to discharge their obligations for the support of their families.<sup>28</sup> The process of reform and transition from plan to market economies in Central and Eastern Europe and the CIS also appears to have produced a significant deterioration of the position of women within the labour market.<sup>29</sup> For example,

prior to reforms, states and enterprises both provided and subsidized day care on a widespread basis; women also had access to extensive maternity and leave provisions to discharge their family responsibilities.<sup>30</sup> However, in the interests of increasing productivity and on the advice of institutions such as the Bank, one of the first moves made by many enterprises was to eliminate such “unproductive” expenditures and activities as the provision of day care.

However, reforms have often produced a general increase in inequality and a deterioration in the position of workers, some of which was intentional. Increased wage inequality among workers was explicitly promoted as part of the package of economic reforms aimed at rewarding greater effort and promoting productivity.<sup>31</sup> Incomes policies that had the effect of suppressing wage growth while prices were decontrolled were instituted in order to contain the threat of inflation.<sup>32</sup> Indeed, the reduction of real wages has been described as one of the “pillars” of transition policies.<sup>33</sup> Similar adverse effects on workers have been identified elsewhere; there is evidence that the strongest effects of structural adjustment programmes in Latin America over time have been the absolute and relative reductions in labour’s share of income.<sup>34</sup>

The Bank has now acknowledged the risk of transitional or frictional hardship as a consequence of economic restructuring and reforms. However, its general position remains that the potential gains of reform far outweigh the short-term costs and adverse effects,<sup>35</sup> and that adopting the appropriate economic reforms constitutes the real solution to problems of distribution and equity, as economic growth is ultimately the only safety net for the poor. As a result, the measures that the Bank has been prepared to contemplate to mitigate the effects of economic restructuring are those that can be accommodated within the established framework for economic reform. There has been no general reconsideration of the basic path of reform and no detailed assessment of the (re)distributive properties of particular policies, institutions, and regulations. Instead, the main response of the Bank to the criticism that its programmes were undermining social welfare has been the addition of social safety nets to the standard reform package. These programmes provide exceptional relief for the most vulnerable members of society.<sup>36</sup> However, they were originally designed as temporary measures to fill the gap until the resumption of growth, and are not intended to compensate for all of the effects of reform and restructuring. Moreover, concern for poverty alleviation was not the only motivation for the development of safety nets. Instead, it appears that the Bank’s main concern was to contain the growing popular resentment that adjustment and restructuring programmes tended to produce and the resulting political threat to reforms.<sup>37</sup>

To recapitulate, reforms appear to routinely produce distributive effects

among different social groups and sectors, increasing inequality and often worsening the position of women and workers in particular. However, one of the most significant aspects of market-centred reform has been the attempt to simultaneously transform and lower expectations about the state as an instrument of redistribution. On the one hand, the international financial institutions maintain that tax-and-transfer mechanisms, rather than structural reforms to the market, are the preferred way of pursuing distributive goals, because they avoid “distorting” the incentives of economic actors and thus the operation of markets. Yet at the same time, a broad range of protective and redistributive functions of the modern state are now regarded not only as inefficient and costly, but also as simply undesirable state functions in a globalized, post-industrial economy.<sup>38</sup>

The result is that, at best, there remains considerable equivocation and contradiction around the issue of redistribution and how it might be effected in societies organized around neoliberal markets. While the Bank maintains that the degree of redistribution is an internal matter for states, it also takes the position that it is both impossible and normatively undesirable for states to guarantee the living standards of all. Instead, they should foster greater individual responsibility for income and welfare.<sup>39</sup> Through its policies as a whole, the Bank attempts to persuade developing states to eschew the welfare state model, promote individual self-reliance wherever possible, and rely on market solutions to problems of poverty and inequality. In addition, states are reminded that regulatory competition poses a threat of capital flight to jurisdictions more favourable to the interests of capital; this idea is invoked to persuade states to lower taxes and reduce the burden on the productive sector. The Bank also promotes a broad range of reforms in the operation of the public sector that are designed to make the public sector behave more like the private. The combined effect of these initiatives is constant pressure to reduce or avoid state expenditures, downsize the state sector, eliminate subsidies on goods and services, and privatize many services formerly provided by the state – in short, the effective elimination of many of the classic mechanisms of redistribution.

The justification for market-centred reforms has always been that, in the long term if not immediately, states could expect to enjoy greater aggregate economic growth through the embracing of a standard package of efficiency-enhancing measures than through any of the alternatives. The legitimacy of this path lies in the assumption that any normative concerns can then be satisfied through the pursuit of Kaldor-Hicks efficiency, understood as a state in which gains to the winners are sufficient to permit them to compensate the losers. However, the presumption that there is a common interest in neoliberal reforms also requires a serious exploration of the relationship between such reforms and the distribution of economic

gains. Numerous conditions, many of which frequently turn out to be unfulfilled, may be required in order to establish the link between the pursuit of efficiency and welfare enhancement in any given case. Where reforms affect the relative positions of different groups, a fundamental condition may be the presence of the institutional mechanisms and the political will to actually effect a redistribution of the resulting economic gains. In their absence, significant numbers of people may either fail to participate in the benefits of growth or even fare significantly worse. Yet, where all but minimal redistribution is actually discouraged or precluded and the ideology of reward through individual effort prevails, as is the case with the neoliberal economic model, the possibility of substantial redistribution recedes. To the extent that welfare and social status or power encompass more than simply access to income, there may be non-pecuniary losses that arise as a consequence of the adoption of such policies that simply cannot be compensated for, even if redistribution actually takes place.

As the routine appearance of winners and losers suggests, what makes the question of distribution so important is that increased inequality is not merely a contingent or coincidental event, but is often a product of the reform process itself. Reforms that reach deep into the institutions of states are intended to and do change the structure of the economy and the role of the state in ways that may produce profound shifts in the fortunes of different groups. Distributional shifts should thus be understood as one of the defining characteristics of market-centred reforms. Far from being marginal or peripheral events, they may be among the most important consequences.<sup>40</sup>

Despite the intense interest that the Bank has shown in regulatory and policy issues, distributional considerations have historically been eclipsed by efficiency concerns in the design of market reforms. Until recently, the Bank has paid relatively little attention to the way that different rules and policies might affect the distribution of gains from economic activity and the resulting welfare of different groups. The preferred, and still important, strategy has been to emphasize the benefits of economic growth for all and de-emphasize the conflicts of interest among different groups with respect to reform policies and the trade-offs that they often entail.<sup>41</sup> Because the question of winners and losers in neoliberal market reform has been treated as a secondary concern, something to be addressed after the project of generating aggregate economic growth is in place, responses too have been confined to remedial measures such as safety nets.

The Bank has now committed itself to the concept of “growth with equity.” Numerous policy documents and public speeches reflect the Bank’s position that equity is good for growth<sup>42</sup> and demonstrate a move toward greater focus on equity and social issues.<sup>43</sup> In the wake of the Asian economic crisis and the stalled development in many transitional



states in Central and Eastern Europe and the CIS in particular, there has been a searching critique of the failures resulting from the neglect of the maintenance of demand and output.<sup>44</sup> Yet this is not the first time the Bank has claimed to be truly interested in the social dimension of economic reform. The debate on the relationship between growth and equity has been going on, within the Bank at least, since 1974.<sup>45</sup> As the Bank appears to be of the view that its basic development architecture remains serviceable with a few adjustments,<sup>46</sup> the new focus on the social dimension of reform only heightens the necessity to examine the tensions between the pursuit of equality and a market-centred framework for economic development.

Its commitment to poverty alleviation notwithstanding, the Bank's general position on equality as a development objective remains ambiguous. While nods in the direction of equity frequently surface in the literature of the Bank, it remains unclear whether increased income inequality, as distinct from poverty, is thought to be a problem. In the countries in transition, for example, the Bank has maintained that greater wage inequality is necessary to spur development. It now routinely advocates that states focus on targeted poverty alleviation efforts, often at the expense of universal programmes that ensure basic levels of welfare and services to all and generally reduce economic inequality. This is not a trivial issue, as income inequality has been rising in recent years in many countries, whether developed, developing, or transitional.<sup>47</sup> Furthermore, it remains unclear whether poverty can realistically be combated while inequality is on the increase.<sup>48</sup> Although the two concerns are clearly connected and often conflated, in many instances it may be important to distinguish between them. As a positive matter, although there is evidence that greater equity may enhance growth, there appears to be no necessary relationship between economic growth and the relative position of particular groups within society.<sup>49</sup>

As is evident in the states in transition, the most significant source of redistribution may be structural reform to the economy. For this reason, and because the neoliberal model envisions quite limited redistribution on the part of the state, ultimately, any analysis of equality has to return to the distributive properties of the neoliberal market itself.

### Market regulation as a source of (re)distribution

Neoliberal market reforms rest upon the premise that there is a "natural" or optimal market whose properties and institutional foundations are both well established and largely uncontested.<sup>50</sup> It is this premise that reinforces consensus within the Bank around a canonical set of legal rules,

regulations, and economic policies thought to best further economic development. However, there are in fact myriad institutional forms that market economies can and do take. The prevalence of one form over another cannot be explained simply by functional superiority, nor can the institutional choices made between alternatives be considered neutral. Markets have histories, and their institutional forms embody social and political struggles; the resulting rules and policies frequently reflect victories, losses, and trade-offs that dispose significant stakes for different groups.<sup>51</sup> They also typically reflect different value preferences, as well as shifting political and ideological influences over time. Ideology and interests, rather than simply efficiency, shape the rules and institutions that govern markets; neoliberal markets are no exception.

The model neoliberal market rests on the protection of “core” legal entitlements such as property and contract rights. It is marked by the presence of additional rules, regulations, and institutions thought to facilitate commercial transactions and aid efficiency, as well as the absence or elimination of rules that are thought to interfere with these goals.<sup>52</sup> While this market is sometimes referred to as the “unregulated” or free market, as the efforts of the Bank indicate, it is necessarily constructed by myriad rules and regulations that are backed by the state.

It is against this structure that deviations, typically characterized as state “interventions,” are measured. Additional regulations that secure investments and increase efficiency may be incorporated into the definition of the normal market.<sup>53</sup> However, rules or policies that are expressly adopted to further equity, distributional, or other objectives remain exceptions to the normal market. Moreover, apart from basic non-discrimination rights, these exceptions are largely undesirable, in part because investors crave a stable, predictable, and low-cost economic environment.<sup>54</sup>

Under neoliberal theory, objectives such as the facilitation of market transactions and the removal of impediments to growth and efficiency provide the justification for a wide range of regulatory reforms. The resulting markets are assumed to be neutral institutions. However, they have not only efficiency effects but also distributional effects, for at least three reasons. Firstly, the rules and norms that govern market activity have a deep impact on the welfare and relative economic opportunities of different groups, variably empowering and disempowering such groups as investors and consumers, landlords and tenants, employers and employees, or men and women. This is an inherent and unavoidable consequence, as this regulatory and institutional infrastructure performs such crucial functions as structuring the incentives for participation in different types of economic activity, determining access to productive resources, and allocating wealth, income, risk, and power to different parties.<sup>55</sup>

Secondly, market reforms inevitably have an impact on non-market

spheres such as the household and the community. Although reform policies focus almost exclusively on the effects of regulation within the market, markets are not discrete entities, nor is productive activity restricted to the market. Instead, market and non-market institutions are integrated and deeply interconnected in ways that mean that economic restructuring and reform will engender a range of effects and responses outside the market as well.<sup>56</sup> As the following discussion on gender will outline, groups are positioned differently both inside and outside the market. Thus, enhancing the primacy of market activity and changing the regulatory context in which it occurs is highly likely to benefit some more than others.

Thirdly, the effects of market reforms will vary depending on the presence or absence of numerous other state policies and institutions. Where, for example, market reforms accompany the dismantling of social programmes, the elimination of subsidies, and the privatization of state enterprises and services, the effects of the enforcement of new rights and entitlements by property owners may be increased. Renters may be disadvantaged relative to property owners, just as workers may be disadvantaged relative to managers, and women relative to men.

Finally, neoliberal policies with respect to the market and the state tend to increase the costs and responsibilities that are borne by individuals and households. At the same time, they diminish the collective assumption of risk and decrease the degree of economic redistribution. This heightens the risks that distributional disparities will increase from economic restructuring; these disparities will become evident on analysing the gender effects of neoliberal reforms.

### Gender disadvantage in economic restructuring

In recent years, a host of critiques has been levelled at the Bank around gender issues, largely by non-governmental organizations advocating for women. One of the main issues around which criticism crystallized was that of the structural adjustment programmes implemented by the Bank in response to the debt crises in sub-Saharan Africa and Latin America in the 1980s. These programmes have been roundly criticized on numerous occasions because of the routinely damaging effects they appear to have generated for women in developing countries.<sup>57</sup>

Even prior to the advent of structural adjustment programmes, however, the Bank had been taken to task for the gender effects of its development programmes. As scholars and activists had long pointed out, the design of development projects rested on unexamined and often mistaken assumptions about the respective roles of men and women in economic production and household decision-making.<sup>58</sup> Projects often channelled

the bulk of development resources towards men, despite the profoundly important role that women play in local economies, and frequently aggravated the relative disadvantage of women. For example, the reallocation of land and resources from subsistence activities to cash and export crops – standard practice in development efforts to generate increased foreign currency reserves – often functioned to intensify the levels of work required of women. This made it more difficult for women to discharge their continuing obligations to provide for the basic needs of their families. The upshot of these critiques and analyses was that the benefits of development aid proved to be uneven at best; what is “good” for women may turn out to be vastly different from what is “good” for men.

A number of gender effects have been linked to both economic crises and recessions and neoliberal economic reform, restructuring, and development policies. While the effects are neither uniform nor wholly negative, there are recurring patterns of disadvantage for women. They include a marked deterioration in women’s position in the labour market and an intensification of unpaid labour at home. For example, the elimination of subsidies on basic goods and services, or the introduction of user fees for services, often places pressure on women to enter the market to meet the increased need for income. The same policies, along with general cutbacks to social services, may intensify women’s unpaid work as well, as women step in to provide services previously purchased or provided elsewhere.<sup>59</sup>

Women tend to experience both the “added worker” and “discouraged worker” effects in the course of structural adjustment and economic recessions.<sup>60</sup> The “discouraged worker” effect manifests itself in disproportionate levels of redundancy, more lengthy unemployment, and difficulties in re-employment for women as compared to men. It may be aggravated by the exclusion of women from employment-related safety nets, such as job creation and job training programmes.<sup>61</sup> The “added worker” effect is the push to enter the labour market that women experience as real wages and incomes fall, a common effect of adjustment and macro-economic stabilization programmes. The terms of employment under such circumstances are often highly disadvantageous, and frequently result in employment in low-productivity sectors or the informal sector.<sup>62</sup>

In the course of transition from plan to market economies in Central and Eastern Europe and the CIS, for example, women have experienced higher levels of unemployment than men in nearly every country.<sup>63</sup> The labour force participation rates of men and women in the region have also decreased dramatically, with women in general experiencing greater drops in participation.<sup>64</sup> Equally significantly, there are indications that the women who remain in the labour market are positioned less favourably than are men in the emerging private sector, having been unable to take advantage of the entrepreneurial opportunities in the new market

economies.<sup>65</sup> Although the transition in these countries does not appear to be producing the massive levels of female unemployment that were originally feared, women appear to have been channelled into low-wage employment that makes inadequate use of their relatively higher levels of education and skills. In Russia, for example, despite the fact that women have higher levels of education than men, they have been the first to be let go in retrenchment and are now concentrated in low-level occupations.<sup>66</sup> Overt employment discrimination against women has become common, and the transition to a market economy has been accompanied by a general decline in the conditions of employment, including benefits and wages.

Among the most obvious causes of this displacement from the labour force are the ongoing gender disparities in household and family responsibilities, accompanied by the elimination of policies and programmes to mitigate their effects. In the privatization and restructuring of enterprises – a cornerstone of and key to the transition process – services such as full or subsidized child care, which enabled women to participate in wage labour, have been among the first to disappear.<sup>67</sup>

Public sector reforms that result in a decline in real wages, job losses, or both, also almost invariably hit women harder than men because of the gendered nature of public-sector employment. For women, the state has often been a better employer than the private sector, as it tends to be ahead of the private sector in terms of anti-discrimination efforts and the provision of benefits and services. Thus, the loss or deterioration of state-sector jobs frequently means the loss or degradation of one of the most important forms of employment for women. At the same time, the elimination of public-sector jobs may increase the gender wage gap, due to the increased degree of informal work and the channelling and high concentration of women in particular sectors that tends to occur as a result.

Export promotion, an integral part of the growth strategy for developing countries under the neoliberal model, appears to provide mixed benefits for women. It is frequently associated with increased labour market participation for women,<sup>68</sup> since a significant part of the comparative advantage of many developing states is the availability of a pool of low-wage labour which is largely, if not overwhelmingly, comprised of women. While this provides employment options to women, the forms of labour that result from integration into global production and service work tend to be structured around low-skill, low-pay work with few prospects for training or advancement and little job security. Labour and employment standards and regulations tend to be minimal, if not absent, and opportunities for union membership and collective bargaining, the standard vehicles for enhancing employee representation and power in the workplace, are typically highly restricted, if not precluded altogether. As a consequence, many women find themselves employed in precarious and relatively unattractive forms of work.

To summarize, in aggregate, and unless compensated for in some way, reforms tend to increase and intensify the degree of unpaid labour that must be performed, worsen the conditions under which women participate in labour markets, and adversely affect the price and availability of goods and services, such as social and health services, which are disproportionately used by women.

### Analysing gender disadvantage in market reform

Economic reform and the restructuring of state institutions, policies, and regulations tend to produce a wide-ranging set of effects across different sectors of society, as different groups and institutions adapt and respond in different ways to a new set of expectations and incentives. Understanding gender disadvantage and its relation to particular trajectories for economic reform and development requires an analysis of the particular location of women in the economy and the ways in which this position might be altered, either for better or for worse, through such reform. Tracing how flows of labour and resources might be generated by or connected to reforms thus requires an evaluation of the effects of institutional and policy reforms on the existing background structure of resources and entitlements.

The pursuit of gender equity, or other political projects or distributive goals, within a framework that is already presumptively legitimate and desirable means that the enterprise is subject to a number of constraints and limitations from the outset. To the extent that the policies and institutions that constitute good governance in market societies are regarded as established and universally applicable, exploring their relationship, if any, to the disadvantaging of women becomes more difficult. Tracking changes in the flow of resources or the intensification of particular labour and attempting to establish their relationship to economic development policy, for example, might seem either a pointless or a subsidiary exercise. Even if undertaken, any perceived gender disadvantage might be regarded as unavoidable, a necessary cost of economic development. Once the burden is placed on those arguing for changes, remedial efforts may be undertaken, but the institutions and structures that either produce disadvantage or facilitate its perpetuation are likely to remain legitimate, integral parts of the reform platform, with predictable results. Not only is the disadvantage of women intensified, but neoliberal conceptions about the elements of good governance in a market society appear to provide a justification for the naturalization, normalization, and persistence of such inequality.

The significance of this scenario lies in the fact that much of the risk of increased disadvantage to women can be traced to policies promoted

by the Bank on the grounds of efficiency and aggregate economic benefit. Hence, gender disadvantage in the context of the pursuit of neoliberal policies cannot be addressed as a question of either deliberate attempts to impoverish women or good intentions to improve the status of women. Both of these interpretations, on some level, miss the point. Gender disadvantage can and does result simply from basic institutional decisions about the legitimate and proper functions of the state and the optimal or efficient structure of markets. Many of these decisions and institutional preferences appear to be ostensibly neutral with respect to gender. However, they rest on a set of assumptions about the normal structure and operation of a market society that are distinctly gendered and, moreover, unequally gendered. Conceptions of the proper role of the state, the boundary between public and private concerns, the nature and concerns of the normal or average worker, and the proper functions and obligations of enterprises are all central to the current ideology of market reform. They are also all infused with submerged assumptions about the gendered division of labour, and play out in very different ways for men and women. Consequently, the manner in which these norms find expression in the institutional underpinnings of market economies is of direct relevance to questions of gender equity.

For women, one of the threats of the neoliberal economic framework is that it discourages the use of many of the classic remedies for social and economic disadvantage, such as labour market regulation and various forms of income transfers and support for care-giving labour on the part of the state. A central part of the market-centred growth strategy includes the displacement of the state as the guarantor of social welfare. Instead, individuals are encouraged, if not compelled, to seek their fortunes in the market through greater personal efforts and responsibility. The broad effect of this strategy is to place greater risks on individuals and households and heighten the importance of participation in markets. For many, it also causes one or more of the following responses: a reduction in the standard of living; more intensive labour market participation; or more unpaid labour and self-provision of goods and services.

However, because of the gendered nature of household and care-giving obligations and labour, it is women in particular, rather than households and individuals in general, to whom the increased responsibility and labour devolve. It is also women rather than men who are more likely to alter or increase their activities in response to changes in the market and the state.

As the experience with neoliberal reforms to date suggests, projects to downsize the state sector, “deregulate” markets (labour markets in particular), and eliminate or sharply restrict redistribution through subsidies and income transfers all directly increase the pressure to engage in paid

labour, and are likely to draw more women into the labour force. The net result is that the conditions of labour market participation for women, both those which enable it and those which constrain it, have become crucial to women's survival and well-being and ever more salient to the pursuit of gender equity. Indeed, the Bank itself has drawn heightened attention to the constraints on women's labour market participation by endorsing the turn towards the market.

However, at the best of times, women are likely to face systematic constraints in exploiting the opportunities in the market to the same degree as men. These are structural issues that far exceed, although they are not unrelated to, the problem of intentional discrimination by employers against women. One of the main reasons for these constraints is the manner in which non-market and family obligations intersect with paid work. The gendered division of labour in the household and the way that family obligations are structured, although varying enormously in their form, mean that women often have less labour mobility and opportunity to seek out and accept more remunerative work. Alternatively, such obligations may simply exclude women from job opportunities that require flexibility and long hours, as women rather than men are likely to cut back work to accommodate family crises and demands such as care of the young, sick, elderly, or disabled.

For the woman with care-giving obligations of some form or another, the ability to reconcile the demands of the labour market and external, non-market obligations is a pre-condition to participation in the market. However, it is the ability to do so without incurring economic and other forms of disadvantage in the process that is crucial to gender equity. This is true *a fortiori* in a neoliberal society, in which the key to both welfare and self-actualization lies in the market. While the first proposition now has increasing acceptance, the second remains largely unexamined.

## Gender and labour market deregulation

One of the linchpins of neoliberal economic reforms has been the weakening, if not abandonment, of the commitment to various forms of worker security. Market reformers stress the need for flexible labour markets under the new economic paradigm, and challenge the benefits of many labour market protections even for workers. This scepticism runs particularly deep concerning regulations, such as collective bargaining laws, that have redistributive effects among workers.<sup>69</sup>

The result is a model market based on "deregulated" labour markets;<sup>70</sup> the effect is to leave workers increasingly subject to the rules and considerations which govern other commercial transactions. Whatever room



there may be for core labour rights, the claim is that workers' fates are, like those of everyone else, linked to growth, and thus inextricably to the fortunes of the enterprises in which they work. Since workers and employers share a common interest in growth and productivity, the appropriate policy response on the part of the state is to avoid excessive intervention in the market and to craft labour regulation in ways that facilitate growth. Protective regulations and standards such as minimum wages are increasingly perceived to constitute rigidities that impair labour mobility and employment growth. Collective bargaining not only introduces inefficiencies, but may even be undesirable if not illegitimate as unions tend to raise wages for their members at the expense of the unorganized and the unemployed.<sup>71</sup>

The model worker in the neoliberal vision is one who embraces these new developments and adopts an entrepreneurial attitude toward work, preferring risk and the promise of reward based on individual merit and effort in the market over protection and security. Yet, the shifting ideology on the legitimacy of labour market regulation notwithstanding, the concerns which have always motivated the reconstruction of labour markets and the introduction of employment standards are increasing rather than decreasing. Many workers have little hope of influencing the terms of their employment contracts. Emerging forms of work in the global economy are increasingly characterized by decreased job and income security and a decline in the collective sharing of risks.<sup>72</sup> In total, the result is lower wages and increased vulnerability for individual workers. In the industrialized world, declining wages have contributed powerfully to the decline of the family wage and the rise of the two-income household. For many workers, contract work, piece work, industrial home work, and other forms of non-standard employment have displaced the full-time, long-term employment that has long been the norm in industrialized economies. The contractual or organizational form of such work frequently places it outside the reach of existing labour market standards and regulations. Indeed, work is frequently transformed and reorganized precisely for the purpose of permitting employers to reduce costs by avoiding the financial and legal obligations that they would otherwise incur under labour and employment laws. In both developing and industrialized countries, job opportunities may be available only where labour standards are scarce, absent, or unenforced, and where unions operate with difficulty, if at all.

While decollectivization of risk and increased vulnerability in the market have affected all workers, they have a particular impact on women. This is true not least because women everywhere are over-represented among those engaged in low-wage, non-standard work and are consequently those who stand to benefit most from labour market standards and regulations. However, for women, the transformation in the structure of labour mar-

kets and the role of the state have meant a decline in support at both the normative and economic levels for non-market and care-giving obligations. Redistribution has been delegitimated and dependence pathologized;<sup>73</sup> everywhere, the model citizen has become the worker. The deregulation of labour markets thus tends to affect women disproportionately in at least two ways. Firstly, because of their relatively weak position in the labour force, women can be expected to experience a disproportionate degree of the disadvantage from policies designed to empower capital-holders, managers, and entrepreneurs relative to employees and workers. Secondly, the arguments against labour market regulations and social programmes that are perceived to be efficiency-detracting or burdensome to capital operate against the implementation or extension of regulations, programmes, and policies such as maternity, parental, and family programmes, and subsidized child care, that tend to be important to women. All of these policies and regulations redistribute resources towards those whose household or family obligations otherwise limit their ability to engage in paid work. They do so by compelling other workers, employers, consumers and the public at large to cross-subsidize labour that would otherwise remain uncompensated. As this unpaid work turns out to be a major structural source of women's labour market inequality, as long as the antipathy to labour market regulation persists, an important instrument for the pursuit of gender equity is effectively blunted.

### Recharacterizing efficiency

To review, the Bank has committed itself to the market provision of goods and services wherever possible, accompanied by a reduced and subsidiary role for the state so that economic growth and the efficient operation of markets remain unimpeded. A hallmark of neoliberalism is the relentless search for ever-greater efficiency and productivity in both the state and market sectors. States are exhorted to facilitate the continual efforts of enterprises to contain and reduce costs in order to improve bottom-line results by providing a relatively "deregulated" market environment. Enterprises receive support for their desire for a regulatory structure favourable to their interests on the grounds that, in a globally integrated economy, they operate under continuous pressure and threat of elimination from competitors. States themselves are in competition for foreign capital and investment, which compels them to give priority to the elimination of deficits and the maintenance of a stable and "market-friendly" investment climate. Although the state has a role to play in providing basic social services, this can only occur to the extent permitted by these larger fiscal and (de)regulatory imperatives.

The devolution or privatization of state services, the contraction of the state sector, and the elimination of subsidies to goods and services all shift costs, responsibilities, and activities away from the state. In the process, such projects and policies also eliminate important means of redistributing resources throughout society and impose heavier burdens on individuals, households, and communities. The deregulation of labour markets weakens the relative position of labour by eliminating the rules and institutions which are intended to and do redistribute income to workers.<sup>74</sup> The absence or weakness of labour market regulations also precludes potential redistribution among employers, consumers, and other employees.

In light of these effects, apparent efficiency gains on the part of the state and enterprises are often better characterized as transfers of costs and responsibilities and a reallocation of risk and income. For this reason, what constitutes an efficiency-enhancing policy or action on the part of the state or a particular enterprise is not necessarily efficient in aggregate, nor does it necessarily result in a net gain in human welfare. To briefly illustrate, initiatives by enterprises to save on labour costs may improve the productivity of firms; however, by redistributing earnings from workers to capital-holders, they lower the remuneration received by the average employee. This may produce negative effects for local economies as a whole, and may also increase pressure on the state to supplement declining wages with income transfers. However, simultaneous pressure is operating on states to decrease expenditures, especially those connected to “social” costs, to which states typically respond by devolving responsibility to individuals or households. If the resources are unavailable at this level, the greater fiscal austerity of the state may simply result in declines in welfare and human capital. This, in turn, may generate spillover effects, such as lower productivity on the part of workers.

These examples merely illustrate two basic propositions. Firstly, the calculus of benefit and loss from efficiency-enhancing efforts can be quite complex; moreover, the conclusions inevitably vary depending on the activities and parties that are included or excluded. Secondly, the costs of many activities, particularly those associated with the maintenance and support of human welfare such as the care of children or elderly, ill, or disabled people, although they can be externalized or shifted, cannot truly be eliminated or can only be eliminated at a price.

The significance of the neoliberal paradigm is that it provides an economic framework in which the externalization of costs and responsibilities by both states and enterprises to the non-market or reproductive sphere is both legitimated and encouraged. Because only market activity is considered productive, the increased risk, burden, and cost to the individual, household, or community as a whole remains either invisible or irrelevant

to the determination of economic growth. Indeed, the deregulatory and devolutionary imperatives of neoliberalism provide an institutional environment in which enterprises enjoy hard economic incentives to exploit opportunities to externalize as much of the cost of production as possible, so as to register improvements in efficiency and productivity.<sup>75</sup> The exclusion of these shifts in risk and economic burdens makes the exercise appear to be a true savings and efficiency gain. Where those externalized costs end up is of no interest within the neoliberal paradigm.

An important key to the disadvantage of women lies here, in the way in which various activities, both market and non-market, are restructured, costs are shifted, and risks are transformed in the drive to deregulate or re-regulate markets and refashion the role of the state. To repeat, while such market reforms may be gender neutral in their design, it is women in particular, rather than individuals or households in general, on whom the intensified risks and burdens fall. These policies affect the incentives and opportunities of women in the market, yet ignore the effects of non-market obligations, norms, and constraints on women's actual ability to perform in the market.

Whatever their other merits, markets constituted in the neoliberal image cannot provide a solution to these forms of structural disadvantage; indeed, they are likely to increase such disadvantage. The issue that neoliberal reform and development strategies bring to the surface is one of how and where such costs should be borne, and how various political and institutional options might both promote human well-being and advance or undermine the position of particular groups. Exploring the range of solutions that do not systematically disadvantage women requires, among other things, an articulation of the ways in which the paid economy relies on the unpaid economy. This in turn requires the shifting and expanding of both the conception and the locus of economic activity upon which the Bank's policies have rested, at least until the present.

## Rethinking production

Economic growth and successful reform are determined by measuring the increases and decreases in economic activity according to macroeconomic indicators such as gross domestic product.<sup>76</sup> Yet it is now uncontroversial that such indicators seriously understate the degree of economic activity and are, partly for this reason, unreliable indices of improvements in human welfare. In themselves, they say nothing about the distribution of wealth and income; economic growth can be completely commensurate with widening inequality and declines in the status and fortunes of particular groups.

The inadequacy of such indicators lies partly in the fact that the productive activity measured by these indicators is, with some exceptions, only that which circulates in the monetized economy. However, enormous amounts of economically indispensable labour occur outside the domain of the market, particularly in households. Contemporary estimates are that the valuation of this unpaid labour would increase the size of most national economies by at least one third.<sup>77</sup>

This domain of unpaid work, often referred to as the reproductive sphere, constitutes a valuable sphere of economic activity. In addition, all other production is dependent on myriad inputs, resources, and activities, only some of which are located within and compensated directly in the market. The labour force itself is, to a large extent, a “product” of unpaid labour in the reproductive or non-market sphere. And although they are often imagined as discrete, the two economies function in a dynamic and interconstitutive manner. The boundaries between them are unstable. Certain activities, such as child care, may be either compensated or not; whether and how much they are compensated varies with the policy and regulatory environment. Production should thus be understood as an integrated activity involving both the public and private spheres, including labour and inputs from the market, the state, communities, and households. Changes to one often effect changes to another.

From this vantage point, it becomes much easier to understand how it is that economic restructuring might affect not simply the market but other social institutions, such as households and communities, as well. Economies function as a whole; moreover, it is precisely *because* the different spheres are already functionally integrated and because the boundaries between them are unstable that the household is the place to which responsibilities and activities devolve when states or enterprises attempt to increase efficiency and cut costs. At the same time, it is the singular focus on improving the efficiency of market-based production in the calculation of economic growth that creates the incentive for the displacement and externalization of costs, rendering such effects largely invisible.

It is characteristic of all known societies that women rather than men perform the bulk of this uncompensated labour,<sup>78</sup> much of which involves care-giving and subsistence labour. Although such work is typically regarded as distinct from other productive labour, care-giving and other forms of domestic labour are major contributors to the creation and maintenance of a functioning labour force. Because it contributes to economic activity “for free,” as it were, unpaid labour can be regarded as a subsidy to economic activity in the market.

This gendered division of labour with respect to unpaid work, care work in particular, constitutes a huge source of disadvantage to many women, as it is an ongoing and significant constraint on women’s labour market participation. The source of this disadvantage lies partly in the design of

the market: in a competitive labour market structured to reward individual efforts, assuming responsibility for others on an unpaid basis is systematically penalized, while freedom from such obligations constitutes a market advantage.

These relative advantages and disadvantages of different parties can be intensified by the absence or elimination of subsidies and support from the state, or cross-subsidies from other workers. The paradoxical effect is that those who either must or choose to engage in unpaid work pick up the slack that is inevitably produced by the withdrawal of the state and the deregulation of labour markets, yet simultaneously worsen their own prospects for successfully engaging in paid work.

As the aggravation of pre-existing gender disadvantage in the course of reform strongly suggests, this state of affairs is neither natural nor inevitable. It is, at least in part, a function of the institutional and regulatory structure of the economy. Yet those interested in gender and distributional questions will look largely in vain for a close analysis by market reformers of the connection between efficiency-enhancing, market-friendly reforms and the increased workloads and altered market prospects that these policies might portend for women. Indeed, there are a number of features of the neoliberal plan that work to either naturalize such effects or displace them from discussions about market design.

Firstly, the ideology of the normal or natural market and the view that there are proper and improper functions for different institutions in a market economy tends to naturalize the separation of the state, the family, and the market.<sup>79</sup> This, in turn, enables the extrusion of “reproductive” issues from production, at the same time perpetuating the view that economic concerns are separate from social concerns. Secondly, the attempt to protect the market from the incursion of social and political concerns plays a role in delegitimizing market-based responses to distributive issues. To the extent that efficiency is promoted as the organizing ideal of markets, alternative structures, rules, and policies, some of which might be capable of responding to the forms of disadvantage that neoliberal policies tend to produce, are removed from contention.

The location of particular risks and the performance of productive activities, whether they are compensated or not and whoever pays for them, are, in part, products of the way that economic activity is organized and regulated. For example, subsidized day care not only increases the likelihood that more child care will occur out of the home and in the market, it also decreases the amount of unpaid child care that is performed, placing part of the cost of this care on taxpayers. Labour standards mandating maternity (and paternity) leave compel the employer to compensate workers for the otherwise unpaid time they take in connection with childbirth, and, depending on how it is structured and whether the employer absorbs or passes on any increased costs, may redistribute part

of the cost among employees who do not require maternity or paternity leave.

What is masked by the idea of a normal market is the fact that such structures are malleable, contestable, and historically varied, rather than simply natural, optimal, or given.<sup>80</sup> Consequently, particular forms of disadvantage, however common, are not inevitable but result in part from decisions about market design. There is no demonstrated reason that women should perform the bulk of unpaid labour. But neither is it inevitable that particular forms of labour remain uncompensated, their contribution to economic activity unrecognized in any way.

While it is tempting to locate these issues in the domain of culture rather than the domain of economics and governance, it is misleading to imagine cultural practices and social norms themselves as either static or entirely separate from legal rules and institutions. Instead, there is a continuous process of feedback that ensures that legal norms operate on cultural and social practices, while cultural and social norms exercise an effect on the legal norms that are instituted and the degree to which they are respected or enforced. Institutional decisions themselves can both entrench and transform gendered practices.

Much of the characteristic disadvantage of women is subject to both amelioration and aggravation through policies and regulations. However, it is hard to imagine solutions that do not involve some form of cross-subsidization or compensation for the reproductive labour of women. And the failure to acknowledge the economic contribution of unpaid work and its connection to productive activity is likely to ensure the continued externalization of costs from the productive to the reproductive or non-market sphere. Simply drawing, even compelling, women into the neo-liberal labour market armed with guarantees against formal discrimination virtually guarantees the perpetuation of disadvantage.

Given the gendered division of labour in both the productive and reproductive economies, addressing gender equity requires the Bank to take into account the extensive non-market activity and obligations characteristically borne by women, and their effects on labour force participation. This, in turn, would require that the Bank explicitly take into consideration the extensive economic activity that occurs outside the market and its connection to apparent efficiency gains within the market.

### The World Bank: The turn to gender equity

The Bank has historically approached the question of gender as a matter ancillary to, and in many ways independent of, its mainstream development efforts. Originally, its interest took the form of particular projects directed at women, such as initiatives to improve maternal health and,

later, to improve access to education and training for girls and women, modelled on the "women in development" framework.<sup>81</sup> The interests in health, reproductive issues, and education still form central parts of the Bank's gender initiatives. However, sustained critiques of this framework and the emergence of an alternative "gender in development" approach placed pressure on the Bank to recognize such previously neglected issues as the allocation of resources within the household and the power relations between men and women.<sup>82</sup>

Now, gender equity has been added to the list of official development objectives<sup>83</sup> and the Bank has acknowledged the need to "mainstream" or integrate gender concerns in development policies in general.<sup>84</sup> It has also endorsed the idea of participatory project development rather than "development from above," a trend that is likely to be enhanced by the new reliance on public-private partnerships.<sup>85</sup> Indeed, gender analysis is now sufficiently entrenched that there are calls to end the era of rhetoric by replacing "empty words" with action.<sup>86</sup> The clearest indication of this shift is the increasing public acknowledgement by the Bank of the value of gender equity to economic development.<sup>87</sup> Since the United Nations Fourth World Conference on Women, in Beijing in 1995, the Bank has embarked on a number of ventures to enhance the focus on gender and increase assistance to women. These include participation in the Consultative Group to Assist the Poorest (CGAP), a microcredit lending project directed at women, and the creation of the External Gender Consultative Group to advise the Bank on gender issues. The latest initiative is the Policy Research Report on Gender and Development, entitled "Engendering Development."<sup>88</sup> In the light of its recent commitments to gender equity, there is growing interest in the initiatives which the Bank has announced to advance the position of women.<sup>89</sup>

Despite these initiatives and attempts to raise the profile of gender issues, the embracing of gender equity within the Bank has been equivocal at best. The case for gender equity is still largely made in instrumental terms, with an emphasis on the importance of attention to women in advancing general development goals, rather than as an independently valuable objective.<sup>90</sup> Moreover, there appears to be no unanimity or agreement about the role and importance of gender equity within the Bank, and there still appears to be considerable resistance and scepticism toward the positive links between gender and development that are claimed by the proponents of gender equity within the Bank.<sup>91</sup> And despite the extensive body of literature, both empirical and theoretical, investigating systemic gender bias in economic development and restructuring efforts, the results of this research have yet to be seriously incorporated into neoliberal development theory, nor have they significantly altered the reigning development paradigm within the Bank.<sup>92</sup>

Yet the increasing involvement of the Bank in policy and adjustment



lending and broad structural reforms, rather than simply discrete development projects, has arguably expanded the Bank's involvement in and impact upon gender issues and heightened the need for a comprehensive gender analysis. Thus, the way that gender is imagined, the issues that are identified as "gender issues," and the particular aspects of reform and restructuring that undergo gender analysis all require renewed attention. Rethinking such concepts is crucial to both recognizing and ameliorating emerging and shifting forms of gender inequity that are likely to result from the pursuit of reforms designed to enhance growth and efficiency in the market.

There are a number of conceptual limitations that have historically marked the Bank's approach to gender and that still persist in its analysis. Despite the rhetorical shift from women to gender, gender still tends to function as a code word for initiatives directed towards women, whether in the form of attempts to "include women" in development projects or efforts to ameliorate the adverse effects of economic development and restructuring programmes on women. Gender is not imagined as a relational construct; consequently, the connection between disadvantage for women and advantage for men is often unrecognized. Nor are gender relations regarded as central to economic organization and the operation of markets, despite the fact that productive activity remains deeply segregated, if in varied ways, along gender lines in all known societies.

To the extent that gender is still thought to be primarily about special issues and projects for women, rather than central to the organization and operation of economic life, a number of risks can be identified. Firstly, gender analysis is likely to be viewed as marginal or irrelevant to many policy and regulatory issues. Secondly, the gendered results of transformation in these "non-gender" areas may be ignored if not legitimated, even though they may be a major cause of shifting gender roles. Thirdly, it follows that it becomes more difficult to assess how particular groups of men and women might be advantaged or disadvantaged in the course of development. Finally, the strategies proposed or adopted to remedy gender disadvantage are likely to be confined to a small and inadequate subset of the possible solutions. This last obstacle arises from the view that gender equity, like other distributive projects, must be pursued within the established neoliberal parameters for economic development.

What this suggests is that any ambivalence or equivocation over the commitment to gender equity reflects not simply disagreement over its importance to development, but rather disagreement about its content and what that might imply in the way of social and economic reforms. There is a persistent tension in the simultaneous commitment to gender equity and market-centred reforms. This is reflected in the distance between the strategies that have been consistently identified to advance gender equity,

sometimes within the Bank itself, and the official Bank view on the optimal forms of regulation and the role of the state in market societies.

For these reasons, the Bank's operational idea of gender equity, as well as the gendered effects of its development policies as a whole, are best gleaned not through its gender policies but rather in light of the model institutional environment which the Bank has constructed and seeks to use to promote market societies. As outlined above, gender norms structure both market and non-market activity, in varied, shifting, and contingent forms. Consequently, disadvantage may be produced in spite of, and in tandem with, special efforts on the part of the Bank to improve the status of women. The only way to realistically assess the effects of the Bank's position on women, then, is to read its gender initiatives in conjunction with a range of market policies with respect to issues such as taxation and pensions, welfare and social services, and labour market regulation. Indeed, whatever the significance and value of these gender initiatives and special projects for women, they may actually divert attention from the core structure and commitments of neoliberalism which, although they may not appear to have anything to do with women, are often associated with disadvantage for women.

Given the limits of focusing on gender without examining the market, what is required is an analysis of the Bank's simultaneous pursuit of gender equity and economic development in the neoliberal style. The Bank claims that a number of synergies exist between its path for economic development and the pursuit of gender equity. Yet despite the possibility of mutual gains, the two projects – increasing gender equity and development based on relatively “deregulated” markets and a minimal state – appear to be radically discontinuous if not in outright conflict at crucial points. This conflict or discontinuity begins to emerge if we compare the analyses and policy recommendations that the Bank has generated to improve the status of women with the general scheme for development; it becomes still more evident when we look at the policies that are now actively promoted in the context of development.

A comprehensive summary of the Bank's position on gender equality, *Toward Gender Equality*,<sup>93</sup> was produced in anticipation of the 1995 United Nations Fourth World Conference on Women, in Beijing. Among its conclusions are recommendations about three issues central to the achievement of gender equity: the performance of unpaid work and the allocation of resources within the household; women's labour market participation; and the role of investment in social services.

*Toward Gender Equality* stakes out a clear position linking gender equality with improved economic growth,<sup>94</sup> and suggests a number of ways in which states might intervene to improve the prospects of women. Given that there is no necessary trade-off between equality and growth, it is

essential that public policies compensate for market failures in the area of gender equality.<sup>95</sup> It holds that “safety nets” are not a substitute for a more integrated approach to economic and social policy that includes appropriate levels of investment in social services and infrastructure.<sup>96</sup>

Development economists and feminists have long identified the structure of the household and the division of labour within it as central to the issue of gender equality.<sup>97</sup> Yet in neoclassical economic analysis, upon which neoliberal policies are partly founded, the household is typically taken as the relevant unit for the measurement of welfare; policies are accordingly targeted at families or households rather than the individuals within them.

This focus on the household as a whole is likely to obscure an analysis of issues which are crucial to the disadvantaged position of women. As *Toward Gender Equality* notes, it now seems clear that household resources are not necessarily pooled, nor is the welfare of the household synonymous with the welfare of individuals within it.<sup>98</sup> Moreover, the exercise of power and decision-making within the household tends to mirror the relative bargaining power of household members. Bargaining power in turn is a function of social and cultural norms; however, it also seems to be significantly affected by external factors such as the opportunity for paid work and the degree of legal control over assets.<sup>99</sup> There may be gender differences in the preferences for income versus the direct provision of goods and services; men disclose a strong preference for cash wages, while women are attracted to benefits and wages in kind.<sup>100</sup> Increases in household income may benefit some household members but leave others unaffected or worse off.<sup>101</sup> There is even an economic cost exacted by violence against women.<sup>102</sup>

*Toward Gender Equality* identifies the existence and enforcement of fair and equal employment as a key public policy issue.<sup>103</sup> Necessary labour market safeguards are of two types: the first ensure pay equity and outlaw occupational segregation by gender; the second “protect women in their roles as mothers” by requiring employers to pay the full cost of maternity leave and provide child care services, among other things.<sup>104</sup> Measures that are proposed to increase women’s chances of entering the labour force include the creation of an appropriate regulatory framework that encourages the establishment of child care, private nursery schools, and kindergartens in both the formal and informal sectors.<sup>105</sup> However, a prime consideration in labour market standards is crafting the provision of benefits in a way that does not restrict women’s participation by making women relatively more expensive than men to employ. This is the risk of “generous” maternity and child care benefits.<sup>106</sup> For this reason, “[e]mployment legislation should avoid having employers pay benefits directly. Maternity benefits should be funded through general revenue taxes or social security systems.”<sup>107</sup>

One of the dangers of market-centred, supply-and-demand approaches to income security and welfare for women is a blindness to the different constraints that women and men face in labour market participation. This encompasses, of course, overt gender discrimination and gender segregation of the labour market. The more intractable problem, however, may not be what goes on strictly within the market, but the external factors that cause men and women to respond to price signals in different ways and to be over-represented in certain sectors. As the report notes:

Social norms affecting decisions within the family about occupational choices or migration can also lead to differential patterns of male and female earnings in informal markets. Family responsibilities hinder women's geographic mobility, constraining their ability to command high wages and limiting them to certain areas or industries. The concentration of women in certain sectors ... intensifies competition between women entrepreneurs and wage workers and lowers the returns to female labour. These effects are compounded by women's lack of access to credit, training, and technology.<sup>108</sup>

These constraints on female employment arising from social norms can be compounded by institutional norms in the market. For this reason, there is a place for public policy initiatives that address inequalities in the household division of labour by supporting initiatives that reduce the amount of time women spend doing unpaid work.<sup>109</sup>

The report fails to engage directly the question of how it is that women come to do so much unpaid work and what, if anything, this might have to do with economic organization and institutions. For example, there is little examination of the way in which market reforms may powerfully affect the operation of other social institutions, such as the family, and the activities of those within them. While the report notes the value of women's unpaid work, it does not probe the relationship of unpaid work to the support of human capital and economic growth; this is an issue which, if explored, might place the virtues of efficiency-enhancing reform strategies, especially those designed to cut social costs and expenditures, in doubt. In addition to the strategies to ameliorate gender disadvantage identified in the report, there are others that might be pursued within the context of a market economy.

Even so, what is striking about these observations and recommendations is the distance between the remedies for gender disadvantage and the standard set of governance and policy recommendations for market societies generated by the Bank. In particular, the promotion of greater gender equity is difficult to square with heavy reliance on relatively unfettered markets to deliver goods and services on the one hand, and the attempts to curtail or minimize social welfare efforts, labour market regulation, subsidies, and market "interventions" on the other.

The path which the Bank advocates to enhance gender equity so far tends to supplement rather than challenge the central neoliberal tenets about the policy and regulatory structure that should govern enterprises and the market. For example, classic gender equity policies include improved access to basic health and education provided by the state, especially where there is an existing differential between men and women, as such investments are thought to generate significant externalities that result in productivity gains.<sup>110</sup> Also favoured are labour market non-discrimination policies such as legislation prohibiting hiring and redundancies on the basis of gender. Discrimination on gender, racial, or other bases is not only normatively undesirable but inefficient, and regulation to eliminate it is consistent with economic development objectives. Women may also be the beneficiaries of the safety nets or social funds instituted to assist the very worst off in the course of structural adjustment.

The Bank has always emphasized the importance of investing in women's reproductive and maternal functions;<sup>111</sup> this is a function of the long-standing concern over population growth. However, beyond promoting education, it has endorsed only a limited number of proposals to further women's labour market participation,<sup>112</sup> in spite of the fact that participation in the market is becoming more and more central to the Bank's economic development project and wage labour is now crucial to individual and household welfare, if not survival. Moreover, there has been surprisingly little attention on the part of the Bank to the impact of market reforms and macroeconomic restructuring on patterns of women's labour market participation. Particularly striking, as some researchers have noted, is the lack of attention to the shifts in economic participation that occur in the course of restructuring.<sup>113</sup>

The labour market programmes that have attracted the most attention and support at the Bank are the microcredit lending programmes for women modelled on the Grameen Bank in Bangladesh.<sup>114</sup> Such programmes are designed to make small amounts of credit available to women who would otherwise be ineligible for loans or unattractive to lenders, for example because they lack collateral or because of the high relative cost of administering small loans; repayment of debts is then guaranteed by the debtors as a group. They are completely consistent with the transformed vision of the employee under neoliberalism – the worker as entrepreneur – and the Bank now routinely promotes them as the solution to the economic disadvantage of women.<sup>115</sup>

Microcredit programmes to support self-employment appear to form a part of the solution to women's labour market disadvantage, at least in some contexts.<sup>116</sup> However, while they typically permit women to accommodate their reproductive responsibilities while generating income, they fail to touch the disadvantage that is generated by the disparity in such

responsibilities between men and women. Nor are they a solution to the continuing constraints on women's broader employment prospects.

Whatever their merits, the constant promotion of what is in effect a self-help strategy for women merely underscores the absence of myriad other policy and regulatory responses that might improve women's access to employment and income-generating activities. In general, market-based strategies either permit or compel women to enter the labour market, performing and managing an escalating number of tasks while often continuing to absorb the existing costs of household and family obligations. The only source of relief is the hope that through their efforts they will then be in a position to purchase goods and services on the market. From the point of view of gender equity, the shortcomings are clear. Such strategies encourage women to be more economically active and productive workers in an institutional environment and organizational structure that is replete with unacknowledged subsidies by women and sources of disadvantage for women; this environment relies upon women's unpaid work. The paradox of the turn to the market for women is this: neoliberal policies that mandate the devolution of "family" or social concerns from the public to the private sphere and the creation of a regulatory environment permitting employers and capital-holders to reduce "unproductive" expenditures intensify the burdens on many women in terms of paid and unpaid work, thus increasing the constraints on women's labour market participation at the very moment that it becomes most important.<sup>117</sup>

The Bank is not unaware of the significance of labour market constraints. For example, *Advancing Gender Equality* has this to say about the plight of poor women in the urban sector in Bolivia:

While most women are required to work to help support their families, they still remain the main caregivers for their children. This dual role is made all the more difficult in urban areas, where the extended family arrangements common in rural areas cannot usually be reproduced. In some households, a vicious circle operates: low-paying jobs prevent mothers from having access to adequate child care [that is, child care purchased on the market], and the absence of adequate child care prevents mothers from seeking more stable, higher-paying employment. Providing low-cost, easily accessible day care that meets women's needs could break this circle, raising earnings and productivity and benefiting both women and children ...<sup>118</sup>

As this excerpt suggests, responding to women's labour market disadvantage might require, among other things, social policies and employment regulations that subsidize child care and maternity leave. Since the Bank is cognisant of women's dual roles, and the wrench that the conflict between them often throws into their market prospects, the extent to which the issue is avoided and solutions are resisted raises questions about both the vision of gender equity the Bank holds and the nature of its interest in gender

issues.<sup>119</sup> It also suggests that where the promotion of gender equity conflicts or is perceived to conflict with development ideology or practices that are considered otherwise desirable, it is likely to be seriously limited.

Although there is increasing attention in the Bank to the deleterious effects of gender inequality on productivity and to the claimed links between equality and growth in general, it is important to consider how the operation might work in reverse and how market reforms might adversely affect equality. There are hard economic reasons to take such questions seriously and to move beyond questionable assertions that equity automatically improves with growth. If there is no routine or systematic analysis of the ways in which economic development or market policies might have disparate effects on men and women, while the gender equity of women is key to development, the Bank itself risks undermining or subverting the project of development by adopting policies that aggravate the reduced position of women.

There is emerging recognition that the structure of household responsibilities affects access to resources and is a significant source of gender disadvantage. Yet the Bank has yet to incorporate such considerations into the design of the economic policies it promotes and has adopted only a limited number of policies to respond to them. This is the case even though its own research has concluded that “[h]ouseholds do not make decisions in isolation ... their decisions are linked to market prices and incentives and are influenced by cultural, legal and state institutions.”<sup>120</sup> What is required is a detailed examination of the effects of market-centred policies on the structure and activities of households and an exploration of the way in which market reforms and incentives intersect with and reconstitute other social norms and institutions.

Often such issues are treated as social phenomena or cultural practices that persist outside the realm and influence of economic reforms, institutional choice, and social policy. However, such beliefs tend to rest on a number of problematic assumptions. One is the view that it is simply natural that women’s economic prospects be constrained by family obligations and that, furthermore, women are the sex or social group to whom care-giving labour and unpaid family work properly or inevitably fall. The danger of such assumptions lies in the conclusions that easily follow. The first is that it is neither possible nor desirable to substantially redress any disadvantage that results for women. The second is that it is unnecessary to pay attention to how such phenomena might be related to strategies of adjustment and economic reform.

One question is the degree to which the Bank participates in a norm of female economic dependence. This issue, and the risks it poses for women, is particularly pertinent in the approach to labour market transformation in Central and Eastern Europe. In that context, the Bank has taken the

view that what is crucial for gender equity is not the extent of participation in the labour force but whether women have the choice to engage in paid labour.<sup>121</sup> Consequently, despite the importance of increased labour productivity to market-driven reforms, there is little concern about the high number of women relative to men who have dropped out of the formal labour market since market reforms began.<sup>122</sup> Indeed, the Bank even appears to regard this as a normal or inevitable consequence of the shift to the market.<sup>123</sup> Curiously, “choice” as to labour market participation is an issue for women, but not for men.

Yet, other than dependence on a male provider, the options available to women in the new market economies are largely labour market participation under worsened conditions. Many of the supports, such as highly subsidized child care and extensive access to leave, that have been identified as key to securing women’s labour market participation have been eroded, and meaningful economic support from the state has now also been foreclosed. What “choice” might mean in a market in which many of the conditions that previously enabled high levels of labour market participation by women have been deliberately dismantled remains unexplained. Dependence on male providers is not actually an available option for the vast majority of women in these states at the moment, in any event. Even if it were, however, any assumption that such a state is easily reconciled with the pursuit of gender equity is a conclusion that seems completely unsound. Assumptions of altruistic sharing of labour, resources, power, and leisure among household members are unsafe. In common with women elsewhere, many women in these economies are single parents or caregivers for ageing or otherwise dependent relatives with no prospect of support from male providers. As the Bank has noted, women have clearly indicated that they have no desire to be economically dependent and confined to the household, and would not abandon paid employment even if it were economically possible.<sup>124</sup>

Given that the emerging forms of labour market disadvantage for women are not simply transitional but structural and institutional, the question is why the move to neoliberal markets represents not the enhancement of choice for women but instead its retrenchment. Can increased productivity be purchased only at the unacknowledged price of women’s labour market disadvantage? What image of gender equity is at work here?

### Gender equity and market reform: Reconciliation or avoidance

It is difficult, if not impossible, to make sense of the concept of gender equity that the Bank promotes without returning to consider the funda-



mental structure and ideology of neoliberal markets. Both what the Bank does and what it fails to do, what it notices and what it ignores, can often be better perceived from the vantage point of this larger schema of development than from the standpoint of gender equity.

The first relevant aspect is the Bank's position on the proper relationship between states and markets. The belief that markets should be structured to maximize growth and productivity alone<sup>125</sup> mandates a posture of restraint on the part of the state that curtails many possible responses to equity issues such as gender. This posture of restraint is expressed in the move towards minimal income transfers and targeted and confined poverty reduction efforts, rather than broadly based social programmes. It also supports the minimalist approach to "intervention" in the market and the concern to remove regulatory impediments to efficiency. In addition, part of the lack of response to the labour market constraints of women might be explained by the Bank's view that, even though state investments to enhance efficiency are sometimes warranted, many social or human capital expenditures, unlike productive investments in the area of infrastructure, are just dead-weight losses, and simply do not generate sufficient economic returns to justify themselves.<sup>126</sup>

However, the Bank also appears to subscribe to the view that some expenditures simply "are" private and should not be subsidized by the state;<sup>127</sup> nor should enterprises be burdened with them. This commitment to the existence of a natural or proper division between public and private costs, however fluid and contestable,<sup>128</sup> provides a mechanism for limiting the response to gender inequality. It is especially effective with respect to expenditures that can be characterized as "family" or household issues, rather than market or workplace issues.

The Bank's current remedies for gender disadvantage, particularly in the labour market, also remain affected by and housed within the Bank's general approach to equity and distributional issues. To reiterate, this approach has been to categorize such questions as social or political matters that are distinct from, and to be dealt with apart from, basic decisions about market design and regulation. Yet because of the fact that market regulations and institutions allocate power and resources, distributional considerations are inherent in decisions about how to structure markets. The attempt to separate these questions from the pursuit of efficiency merely blocks this aspect of the reforms from view; it does not eliminate it. However, this separation is not without effect. The result tends to be the creation of significant distributional effects through market reform and restructuring, accompanied by a constant demotion of distributive concerns and deferral of their open consideration.

When distributive concerns do surface, whether because of gender inequality or persistent or rising poverty, the solutions offered are neces-

sarily remedial in nature and limited by the capacity of the state to engage in redistribution in a market economy, particularly in a globally integrated economy. They are applied after the fact, to ameliorate the worst effects of a market and production structure that is regarded as otherwise optimal, inevitable, determinate, or simply essentially "correct." Solutions to distributional problems, including systemic gender disadvantage, are thereby separated from what helps produce the disadvantage in question, and redress of the inequality is limited to a subset of the potentially relevant tactics or policies. It should not be surprising that such an approach might routinely fail to significantly redress gender disadvantage or other distributional concerns.

The possibility of pursuing gender equity, and other equity-based concerns as well, thus seems ineluctably tied into the tractability of core neoliberal commitments regarding the relationship between the state and the market, the division of "public" and "private" responsibilities, and the primacy of efficiency over distributive concerns. Certainly, the shape and fate of the Bank's gender equity project turns in large measure on the degree to which it persists in adhering to its current stance on these key issues.

However efficient markets may be at allocating resources, the role of particular institutions in promoting growth remains uncertain and contingent in important ways. There remain large, unsettled debates around the role and functions of the state in a market economy; these are increasingly evident both within the Bank as well as in civil society. These debates arise in disputes over the place of industrial policy in market economies, the future of the welfare state and its associated programmes and policies, the actual extent and effects of regulatory constraint and convergence as a consequence of global economic integration,<sup>129</sup> and the ability of relatively unregulated markets and unfettered trade and investment to actually deliver improved standards of living to the populations of developing states. The general relationship between the pursuit of equity and efficiency in particular is hotly contested, as is the contribution of specific forms of equity-based regulations, such as labour market regulation, to economic growth.<sup>130</sup> Nor does the mere fact of increasing global economic integration itself lead to the worldwide adoption of a single market structure or adherence to the neoliberal regulatory ideal of complete openness to trade.<sup>131</sup> In short, there remain serious and pressing questions about the kind of market economies that are available and the ways in which they serve or undercut the goals that various societies wish to pursue. These debates all hold the promise of a reconsideration of the policies most central to distributional issues.

Given the current struggles within the Bank over the direction of development policy and the fact that the Bank itself has in previous moments

taken other, quite divergent views on the best route to economic development, it seems likely that at a minimum, new positions will emerge in the future. In embracing the “effective” rather than the “minimal” state,<sup>132</sup> the Bank has signalled a new recognition of the importance to the economy of the various forms of infrastructure provided by the state. This includes not only investments in roads and telecommunications and institutions, but also institutional support for the rule of law and, at least at the primary level, expenditures on health and education. There is also increasing recognition that at least some forms of regulation are crucial to the operation of markets. There is no reason that the logic that legitimates these “interventions” and expenditures might not also legitimate a host of others that are now excluded. At the very least, they present new opportunities to revisit the regulatory and policy exclusions that often operate to disadvantage certain groups.

Through its preoccupation with designing the optimal institutional environment for economic development, the Bank is participating in a powerful transformation in the expectations of the state as a political institution. Through policy stances and regulatory proposals advanced in the name of efficiency, the Bank has weighed heavily on a range of fundamental social and political decisions as to how and where the costs and risks of productive activity are to be borne. In the eyes of the Bank, risks that might be shared or collectively assumed, either through the state or via employment contributions by employers and employees, must now fall on individuals or households. At the same time, capital-holders, entrepreneurs, and enterprises enjoy a policy climate in which their ability to remain unfettered and maximally flexible approaches the status of entitlement. The result is the externalization of significant social and productive costs that might otherwise be internalized through the regulatory environments in which enterprises function, all in the name of maintaining or increasing productivity and competitiveness.

Who pays these costs in particular contexts and who is advantaged are no longer questions that can automatically be separated from the desirability of the paths of market reform. This point has become unavoidable, in light of the degree to which neoliberal policies themselves undercut the very possibility of the redistribution that would lend legitimacy and normative support to the pursuit of efficiency. However, to broach this issue is also to question the legitimacy, if not to imply the hubris, of pursuing universal development paradigms that are hermetically sealed off from local or regional histories, norms, and priorities, governed simply by their own logic and justification. If it is recognized that questions of advantage and disadvantage lie unavoidably at the core of neoliberal reforms, then it also becomes apparent that economic reform is not a technical issue that can be consigned to experts. At this point, the door is open to retrieving

distributive and equity concerns from the periphery of the development debate, and to placing them at the centre of discussions around market design and possible policy responses in a globally integrated economy.

## Notes

1. Williamson, J., 1989. "What Washington Means by Policy Reform," in Williamson, J. (ed.), *Latin American Adjustment: How Much Has Happened?* Washington: Institute for International Economics.
2. The successes of the East Asian economies over the long term remain an anomaly that the Bank has attempted, arguably unsuccessfully, to assimilate to the neoliberal model. See World Bank, 1993. *East Asian Miracle: Economic Growth and Public Policy*. New York: Oxford; Wade, R., 1996. "Japan, the World Bank and the Art of Paradigm Maintenance: The East Asian Miracle in Political Perspective." *New Left Review* 217.
3. In this matter, the Bank's position reflects the influence of public choice theory.
4. These recommendations can be found throughout the World Bank's reports. The effects of specific reform packages such as the structural adjustment programmes implemented throughout Latin America and sub-Saharan Africa in response to the debt crises of the 1980s are discussed in United Nations, 1995. *World's Women 1995: Trends and Statistics*. New York: United Nations.
5. Pieper, U. and Taylor, L., 1998. "The Revival of the Liberal Creed: The IMF, the World Bank, and Inequality in a Globalised Economy," in Baker, D., Epstein, G. and Pollin, R. (eds), *Globalisation and Progressive Economic Policy*. Cambridge: Cambridge University Press.
6. A statement of the Bank's position on the role of the state in economic development is explicitly set out in World Bank, 1997. *World Development Report 1997: The State in a Changing World*. Washington: World Bank.
7. World Bank, 1993. *Poland: Income Support and the Social Safety Net during the Transition*. Washington: World Bank, xiii.
8. Williamson, J., "What Washington Means by Policy Reform" (see note 1, above).
9. Wolfensohn, J. D., 1999. "A Proposal for a Comprehensive Development Framework (A Discussion Draft)." See <<http://www.worldbank.org/cdf/cdf-text.htm>>.
10. World Bank, *World Development Report 1997* (see note 6, above).
11. Wolfensohn, J. D., "A Proposal for a Comprehensive Development Framework" (see note 9, above).
12. "Good governance" and securing the regulatory and institutional fundamentals of a market economy were again reinforced in the context of the Asian crisis. See Wolfensohn, J. D., 1999. "The Other Crisis." Address to the Board of Governors of the World Bank Group, Washington, 6 October 1998. See <<http://www.worldbank.org/html/extdr/am98/jdw-sp/am98-en.htm>>.
13. Project summaries can be found in the World Bank's annual reports; see, for example, World Bank, 1995. *World Bank Annual Report 1995*. Washington: World Bank.
14. World Bank, 1996. *World Development Report 1996: From Plan to Market*. New York: Oxford, 110.
15. Ibid.
16. See, for example, Stiglitz, J., 1998. "More Instruments and Broader Goals: Moving toward the Post-Washington Consensus." 1998 WIDER Annual Lecture at the House of Estates, Helsinki, 7 January 1998. See <<http://www.wider.uu.edu/stiglitz.htm>>. See also Wolfensohn, J. D., "The Other Crisis" (see note 12, above).

17. See, for example, World Bank, 1995. *World Development Report 1995: Workers in an Integrating World*. New York: Oxford, 44–46.
18. World Bank, 2000. *Advancing Gender Equality: World Bank Action Since Beijing*. Washington: World Bank.
19. Articles of Agreement of the International Bank for Reconstruction and Development, Article IV, Section 10: “The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.”
20. For a discussion of this issue, see Bradlow, D. D., 1996. “The World Bank, the IMF and Human Rights.” *Transnational Law and Contemporary Problems* 6(1): 47.
21. See, for example, World Bank, 1996. *Poverty Reduction and the World Bank*. New York: Oxford.
22. This is the major focus of the Bank’s 1996 and 1997 World Development Reports, *From Plan to Market* (see note 14, above) and *The State in a Changing World* (see note 6, above).
23. See, for example, the recent decision of the Bank and the IMF to link further lending in Indonesia to efforts to secure peace.
24. This effort remains at the core of the Bank’s activities. See, for example, Wolfensohn, J. D., “A Proposal for a Comprehensive Development Framework” (see note 9, above).
25. The *locus classicus* on this issue is Cornia, G., Jolly, R., and Stewart, F., 1987. *Adjustment with a Human Face*. New York: UNICEF/Clarendon.
26. The Gini coefficient, a measure of income inequality in which 0 equals absolute income equality and 1 represents complete inequality, rose from .25 to .30 in a mere five years. See United Nations Development Programme, 1996. *Human Development Report 1996*. New York: Oxford, 17.
27. United Nations Development Programme, 1996. *Human Development Report 1996*. New York: Oxford.
28. Baden, S., 1994. “The Impact of Recession and Structural Adjustment on Women’s Work in Developing and Developed Countries.” Working Paper. Geneva: ILO; United Nations, *World’s Women: Trends and Statistics* (see note 4, above).
29. Paukert, L., 1995. *Economic Transition and Women’s Employment in Four Central European Countries, 1989–1994*. Geneva: ILO. However, reforms do not manifest themselves in disadvantage to women in all cases: in some countries, notably Russia, the collapse of the plan system appears to have initiated a devastating drop in the life expectancy of men. See United Nations Development Programme, 1997. *Human Development Report, 1997*. New York: Oxford, 150.
30. Fong, M. S., 1996. “Gender Barriers in the Transition to a Market Economy,” PSP Discussion Paper Series. Washington: World Bank; Sipos, S., 1994. “Income Transfers: Family Support and Poverty Relief,” in Barr, N. (ed.), *Labor Markets and Social Policy in Central and Eastern Europe: The Transition and Beyond*. New York: Oxford.
31. World Bank, *World Development Report 1996* (see note 14, above).
32. International Monetary Fund, World Bank, Organization for Economic Cooperation and Development, and European Bank for Reconstruction and Development, 1995. *A Study of the Soviet Economy (II)*. Paris: IMF, World Bank, OECD, and EBRD. See also Standing, G. and Vaughan-Whitehead, D. (eds), 1995. *Minimum Wages in Central and Eastern Europe: From Protection to Destitution*. Geneva: ILO.
33. Amsden, A. et al., 1994. *The Market Meets Its Match: Restructuring the Economies of Eastern Europe*. Cambridge, Mass.: Harvard University Press.

34. Meller, P., 1991. "Adjustment and Social Costs in Chile during the 1980s." *World Development* 19; Pastor, M., 1987. "The Effects of IMF Programs in the Third World: Debate and Evidence from Latin America." *World Development* 15: 253. This issue is also discussed in Carrasco, E. R. and Kose, M. A., 1996. "Income Distribution and the Bretton Woods Institutions: Promoting an Enabling Environment for Social Development." *Transnational Law and Contemporary Problems* 6: 1.
35. World Bank, *Poverty Reduction and the World Bank* (see note 21, above), 32.
36. Vivian, J., 1995. *Adjustment and Social Sector Restructuring*. Geneva: UNRISD.
37. Ibid.
38. See, for example, World Bank, *The State in a Changing World* (see note 6, above), 4–5.
39. World Bank, *From Plan to Market* (see note 14, above), 110.
40. This is a major theme in literature on globalization and trade as well as development. See, for example, Rodrik, D., 1997. *Has Globalization Gone Too Far?* Washington: Institute for International Economics; Wood, A., 1994. *North-South Trade, Employment and Inequality*. New York: Oxford University Press.
41. See, for example, World Bank, *Workers in an Integrating World* (see note 18, above), in which the main message to workers is the need to increase labour market flexibility rather than protect and harmonize the interests of all in the pursuit of growth.
42. See, for example, World Bank, 1995. *Toward Gender Equality: The Role of Public Policy*. Washington: World Bank. See also World Bank, *East Asian Miracle* (see note 2, above).
43. Wolfensohn, J. D., "A Proposal for a Comprehensive Development Framework" (see note 9, above); Stiglitz, J. E., 1999. "Whither Reform? Ten Years of Transition?" Keynote address at the World Bank Annual Bank Conference on Development Economics, Washington, 28–30 April 1999. See <<http://www.worldbank.org>>.
44. Stiglitz, J. E., "Whither Reform?" (see note 43, above).
45. See Chenery, H. et al., 1974. *Redistribution with Growth: Policies to Improve Income Distribution in Developing Countries in the Context of Economic Growth: A Joint Study by the World Bank's Development Research Centre and the Institute of Development Research, University of Sussex*. London: Oxford University Press.
46. Wolfensohn, J. D., "A Proposal for a Comprehensive Development Framework" (see note 9, above).
47. UNDP, *Human Development Report 1997* (see note 29, above).
48. Sen, A., 1995. "The Political Economy of Targeting," in van de Walle, D. and Mead, K. (eds), *Public Spending and the Poor: Theory and Evidence*. Washington and London: Johns Hopkins.
49. For example, the East Asian economies, which have experienced the greatest rates of growth in recent years, are characterized both by quite equal income distribution as compared to other industrialized or industrializing countries, and also by dramatic disparities in the relative incomes of men and women.
50. This theme is explored in Berger, S. and Dore, R. (eds), 1996. *National Diversity and Global Capitalism*. Ithaca and London: Cornell.
51. This is recognized by the chief economist in a recent speech. See Stiglitz, J., "Moving Toward the Post-Washington Consensus" (see note 16, above).
52. Discussions of the model market can be found in World Bank, *From Plan to Market* (see note 14, above), and World Bank, *The State in a Changing World* (see note 6, above).
53. There are now frequent arguments in favour of the regulation of financial institutions; periodically, there is reference to the need for environmental controls as well. See World Bank, *The State in a Changing World* (see note 6, above).

54. Ibid., 34.
55. This insight on the relation of legal rules and markets dates from the legal analysis of the American realist school of the early twentieth century. For an overview of these arguments, see Horwitz, M. J. and Fisher, W. W., 1993. *American Legal Realism*. Cambridge, Mass.: Harvard University Press. These basic premises also form the foundations of the fields of law, economics, and critical legal studies. See, for example, Hale, R., 1923. "Coercion and Distribution in a Supposedly Non-Coercive State." *Political Science Quarterly* 38: 470; Hale, R., 1943. "Bargaining, Duress and Economic Liberty." *Columbia Law Review* 43: 605.
56. See, for example, MacDonald, M., 1995. "The Empirical Challenges of Feminist Economics: The Example of Economic Restructuring," in Kuiper, E. and Sap, J. (eds), *Out of the Margins: Feminist Perspectives on Economics*. London: Routledge.
57. Baden, S., "The Impact of Recession" (see note 28, above).
58. A classic early text is Boserup, E., 1970. *Woman's Role in Economic Development*. London: Allen and Unwin. See also Sen, G. and Grown, C., 1987. *Development, Crises, and Alternative Visions: Third World Women's Perspectives*. New York: Monthly Review Press.
59. Joekes, S., 1991. "Women and Structural Adjustment: Operational Implications for the JCGP Member Agencies," cited in Baden, S., "The Impact of Recession" (see note 28, above).
60. Baden, S., "The Impact of Recession" (see note 28, above).
61. Vivian, J., *Adjustment and Social Sector Restructuring* (see note 36, above).
62. Moser, C., 1992. "Adjustment from Below: Low-income Women, Time and the Triple Role in Guayaquil, Ecuador," in Afshar, H. and Dennis, C. (eds), *Women and Adjustment Policies in the Third World*. London: Macmillan.
63. Paukert, L., *Economic Transition* (see note 29, above).
64. International Labour Organization, various years. *Yearbook of Labour Statistics*. Geneva: ILO.
65. Paukert, L., *Economic Transition* (see note 29, above); Kostova, D., 1994. "Similar or Different? Women in Postcommunist Bulgaria," in Rueschemeyer, M. (ed.), *Women in the Politics of Postcommunist Eastern Europe*. Armonk: M. E. Sharpe, 117; Einhorn, B., 1995. "Ironies of History: Citizenship Issues in the New Market Economies of East Central Europe," in Einhorn, B. and Janes, E. (eds), *Women and Market Societies*. Aldershot and Brookfield: Edward Elgar.
66. Moghadam, V., 1996. *Patriarchy and Development*. Oxford: Clarendon.
67. UNICEF, International Child Development Centre, 1993. "Public Policy and Social Conditions." Regional Monitoring Report No. 1, Central and Eastern Europe in Transition; Fong, M., 1996. "Gender Barriers in the Transition to a Market Economy." PSP Discussion Paper Series. Geneva: World Bank.
68. Standing, G., 1989. "Global Feminisation Through Flexible Labour." *World Development* 17(1): 1077
69. The Bank's framework for worker protection in a global economy is described in World Bank, *Workers in an Integrating World* (see note 17, above).
70. An important exception is the continued regulation of the price of labour through repression of the minimum wage in the context of price liberalization. See Standing, G. and Vaughan-Whitehead, D. (eds), 1995. *Minimum Wages in Central and Eastern Europe: From Protection to Destitution*. Geneva: ILO.
71. World Bank, *Workers in An Integrating World* (see note 17, above), 81.
72. Standing, G., 1995. "Labor Insecurity through Market Regulation: Legacy of the 1980s, Challenge for the 1990s," in McFate, K., Lawson, R., and Wilson, W. J. (eds), *Poverty, Inequality and the Future of Social Policy: Western States in the New World Order*. New York: Russell Sage Foundation.

73. Fraser, N. and Gordon, L., 1997. "A Genealogy of 'Dependency': Tracing a Keyword of the U.S. Welfare State," in Fraser, N. (ed.), *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition*. New York and London: Routledge.
74. See Freeman, R. and Medoff, J., 1984. *What Do Unions Do?* New York: Basic Books. Freeman and Medoff estimated that the union wage effect, the premium that workers under a collective agreement can expect to receive, is in the range of 10–15 per cent in the United States.
75. Elson, D., 1987. "From Survival Strategies to Transformation Strategies: Women's Needs and Structural Adjustment," in Beneria, L. and Roldan, M. (eds), *Crossroads of Class and Gender: Industrial Homework, Subcontracting and Household Dynamics in Mexico City*. Chicago: University of Chicago Press, 26.
76. The basis is the UN System of National Accounts. For a discussion from a gender perspective, see Waring, M., 1988. *If Women Counted: A New Feminist Economics*. San Francisco: Harper and Row.
77. United Nations Development Programme, 1993. *Human Development Report 1993*. New York: Oxford.
78. United Nations Development Programme, 1995. *Human Development Report 1995*. New York: Oxford.
79. Olsen, F., 1983. "The Family and the Market: A Study of Ideology and Legal Reform." *Harvard Law Review* 96: 1497.
80. A sustained exploration of this issue is found in Rittich, K., 1998. "Recharacterising Restructuring: Gender and Distribution in the Legal Structure of Market Reform." SJD dissertation, Harvard Law School.
81. The most significant early text of this approach is Ester Boserup's *Women's Role in Economic Development* (see note 58, above).
82. See *Investing in Women* (Buvinic, M., 1996. *Investing in Women*. Washington: Overseas Development Council) for a history of the Bank's approach to the question of women.
83. World Bank, 1995. *Advancing Gender Equity: From Concept to Action*. Washington: World Bank.
84. World Bank, 1994. *Enhancing Women's Participation in Economic Development*. World Bank Policy Paper. Washington: World Bank.
85. Wolfsensohn, J. D., "A Proposal for a Comprehensive Development Framework" (see note 9, above).
86. See Buvinic, M., *Investing in Women* (see note 82, above), 1.
87. "Experience from around the world shows that supporting a stronger role for women enhances the quality of their own lives, and also contributes to economic growth, improves child survival and the health of all members of the family, and reduces fertility, helping slow population growth. But while investing in women is central to sustainable development (the returns can be enormous, generation after generation), women still face many barriers in benefiting from development – and in contributing fully to it ... The persistent inequalities between men and women lead to lower levels of productivity and growth" World Bank, *Advancing Gender Equality* (see note 83, above), 1.
88. See World Bank website: <<http://www.worldbank.org/gender/>>.
89. There is growing interest among non-governmental organizations and broader civil society in the policies of the Bank. One such group is "Women's Eyes on the World Bank."
90. World Bank, 1997. Report of the External Gender Consultative Group. See <<http://www.worldbank.org/gender/egcgii.htm>>.
91. Ibid.
92. This issue is canvassed in "Special Issue: Gender, Adjustment and Macroeconomics." *World Development* 23: 11.
93. World Bank, *Toward Gender Equality* (see note 42, above).
94. Ibid., 22.



95. Ibid., 1.
96. Ibid., 55.
97. Representative discussions can be found in Boserup, E., *Women's Role in Economic Development* (see note 58, above) and Beneria, L. and Roldan, M. (eds), *Crossroads of Class and Gender* (see note 75, above).
98. World Bank, *Toward Gender Equality* (see note 42, above), 22.
99. Ibid.
100. Ibid., 62.
101. Ibid.
102. Ibid., 26.
103. Ibid., 47.
104. Ibid., 47.
105. Ibid., 48.
106. Ibid., 46.
107. Ibid., 48–49.
108. Ibid., 34–35.
109. Ibid., 4.
110. World Bank, 1991. *World Development Report 1991: The Challenge of Development*. New York: Oxford.
111. Buvinic et al. report that the Bank has consistently supported women as mothers rather than as workers. See Buvinic, M., *Investing in Women* (see note 82, above).
112. See, however, Psacharopoulos, G. and Tzannatos, Z. (eds), 1992. *Case Studies on Women's Employment and Pay in Latin America*. Washington: World Bank.
113. Cloud, K. and Garrett, N., 1996. "A Modest Proposal for Inclusion of Women's Household Human Capital Production in Analysis of Structural Transformation." *Feminist Economics* 2(3): 94.
114. Khandker, S., Khalily, B., and Khan, A., 1995. *Grameen Bank: Performance and Sustainability*. Washington: World Bank.
115. A notable example is the Consultative Group to Assist the Poorest, announced at the Fourth World Conference on Women.
116. However, there is evidence that the benefits of such programmes may also be overstated. Although women may be responsible for repaying loans, for example, they may not always have control over the resources necessary to do so.
117. This is the "pincers" effect described in Joeke, S., "Women and Structural Adjustment" (see note 59, above).
118. World Bank, *Advancing Gender Equality* (see note 83, above), 29.
119. See also Jackson, C., 1996. "Rescuing Gender from the Poverty Trap." *World Development* 24(3): 489.
120. World Bank, *Toward Gender Equality* (see note 42, above), 21.
121. World Bank, *From Plan to Market* (see note 14, above), 72.
122. World Bank, *Workers in an Integrating World* (see note 17, above), 108.
123. Ibid.
124. World Bank, *From Plan to Market* (see note 14, above), 72.
125. World Bank, *Poland: Income Support and the Social Safety Net* (see note 7, above), xiii.
126. This is an unresolved debate, both within the Bank and outside it. See, for example, Stiglitz, J., "Whither Reform?" (see note 43, above).
127. See, for example, the discussion in World Bank, *From Plan to Market* (see note 14, above), chapter 7. In *The State in a Changing World* (see note 6, above), 59–60, the Bank describes higher education, "curative" as opposed to "preventive" health services and pensions, and other forms of insurance as essentially "private" goods and services that have "somehow wandered into the domain of public provision."

128. In its 1998 report, for example, the Bank said: "The knowledge perspective has reinforced some well-known lessons, such as the crucial importance of universal education, and focused fresh attention on other needs, such as tertiary education." See World Bank, 1998. *World Development Report 1998: Knowledge for Development*. New York: Oxford, 144.
129. Hirst, P. and Thompson, G., 1996. *Globalisation in Question: The International Economy and the Possibilities of Governance*. Cambridge: Polity Press; Boyer, R. and Drache, D., 1996. *States Against Markets: The Limits of Globalisation*. London and New York: Routledge.
130. Deakin, S. and Ewing, K. D., 1997. "Inflation, Economic Performance and Employment Rights," in Michie, J. and Grieve-Smith, J. (eds), *Managing Without Unemployment*. Oxford: Clarendon.
131. Kennedy, D., 1994. "Receiving the International." *Connecticut International Law Journal* 10: 1.
132. See World Bank, *The State in a Changing World* (see note 6, above).

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## Legitimacy in the real world: A case study of the developing countries, non-governmental organizations, and climate change

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### Introduction

It would appear to be incongruous to end a book on the legitimacy of international organizations by talking about the legitimacy of an institution and certain actors within that institution, rather than about an organization. And yet, that is precisely what this chapter does. The reason for doing so is simple. In the area of international and global environmental problems, there is no global organization<sup>1</sup> that is working on the issue. Although there have, since the 1960s, been occasional discussions on the need for a global environmental organization or a global environmental security organization,<sup>2</sup> these organizations have thus far not materialized. Instead, the international community has responded to the international and global environmental crises innovatively, by developing several programmes, negotiating laws, and establishing a code of conduct that, over time, has acquired a certain degree of legitimacy.<sup>3</sup> The international community has thus initiated the development of regimes<sup>4</sup> or institutions. Hence, this chapter examines the legitimacy of international environmental institutions.

In 1948, the International Union for the Protection of Nature, the predecessor of the current World Conservation Union, was established by the United Nations Educational, Scientific, and Cultural Organization (UNESCO), since there was no other organization at that time to deal with environmental issues. This body is a cooperative venture between the environmental NGOs and governments and has, over the years, pro-

vided the United Nations with a list of parks and reserves that needed to be protected and helped through the early meetings and negotiations of the UN Conference on the Human Environment, the Convention Concerning the Protection of the World Cultural and Natural Heritage, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).<sup>5</sup> The 1972 Conference on the Human Environment ended with a call for the establishment of a United Nations body on environmental issues, and this led to the establishment of the United Nations Environment Programme. Although UNEP has, over the years, initiated and coordinated global responses to several international environmental problems (the Regional Seas Programme, the transboundary movement of hazardous wastes, and the depletion of the ozone layer, for example), environmental issues are not exclusively concentrated within UNEP but are dealt with by several international bodies. As such, UNEP was not considered to have enough standing to deal with the complex problem of climate change. Instead, when the climate change problem reached the international political agenda in 1989, the United Nations General Assembly established the Intergovernmental Negotiating Committee to negotiate a framework treaty on climate change, in 1990.<sup>6</sup> Within two years a treaty was negotiated; in 1992, the United Nations Framework Convention on Climate Change (FCCC) was adopted.<sup>7</sup> Five years later, in December 1997, the Kyoto Protocol to the FCCC was adopted.<sup>8</sup>

This chapter focuses on the problem of climate change, since this issue represents a microcosm of environmental problems. It touches almost every facet of human activity. The climate change problem is believed to be caused, in large part, by the emissions of greenhouse gases.<sup>9</sup> These gases are released in the process of energy generation and use, transportation, and agriculture.<sup>10</sup> The emissions of these gases are closely linked to the gross national income of countries.<sup>11</sup> Although it is possible to some extent to sever the link between the growth of emissions and national income,<sup>12</sup> a permanent delinking may be difficult to achieve.<sup>13</sup> Furthermore, in addressing this problem, the international community has, in its wisdom, created a new (controversial) system of property entitlements to the atmosphere<sup>14</sup> and allows international trading in these entitlements through a variety of market-based instruments.<sup>15</sup> In doing so, the regime has the potential to affect international trade and may create a new type of legal tender. Hence, this would appear to be one of the most all-encompassing global environmental problems, and this is the reason for choosing to undertake a case study on the subject in this chapter.

At the same time, in the climate change policy process, the international legal and political system is developing by leaps and bounds, although perhaps not fast enough for the environmentalists. The international system is using precedents and past modes of cooperation as a basis for innovating and developing new institutions. Will these new institutions be highly legit-

imate and also be able to achieve a high degree of compliance? This chapter investigates this question using empirical data gathered in the course of several different research projects.

What will be clear is that this chapter has taken an ideal typical approach and focuses on the legitimacy issue from a North-South context. This does not imply that there are no North-North and South-South legitimacy issues; merely that this chapter does not focus on these areas. A reason for taking such an approach is that the key challenge in the development of global solutions to the environmental crises is its North-South character.

The UN has had particular difficulty in enunciating effective principles for tackling perhaps the most basic and fundamental division of international life – the division between the largely affluent societies of the North and the largely poor societies of the South. Conscious of a link between economic disruption and war, those who framed the UN Charter placed much emphasis on economic and social progress ... However, in this area more than in any other there has been a huge gulf between the UN rhetoric and the progress actually achieved in large parts of the South.<sup>16</sup>

The new discourse of “integration” suggests that there is no longer any conflict between environmental protection and economic development, and that the latter has become a necessary complement, condition even, of the former. This obfuscates the very real and increasing conflict between the dominant view of “development” and prevailing patterns of economic growth on the one hand, and the imperatives of environmental protection on the other. It ambiguously stands for the subordination of environmental policies to economic imperatives in the eyes of some, as for the converse for others.<sup>17</sup>

While negotiations take place primarily among governments, the non-governmental actors are playing an ever more important role in the process. In doing so, these NGOs are trying to promote a greater degree of transparency and legitimacy in the negotiations; hence, the role of non-governmental organizations will be highlighted throughout the chapter.

The chapter is structured as follows. It first argues in favour of developing a broader theory on legitimacy; it then provides some basic background information on the climate change regime. Finally, the chapter examines ten indicators of legitimacy in international law and relations, which are expressed as implicit and explicit assumptions of international law. Using empirical evidence, it examines the validity of these assumptions in the specific context of the climate change problem.

## Towards a broader theory on legitimacy

As mentioned before, the international treaties on climate change have been negotiated with considerable speed. Do these treaties have any effect?

Classical realists and structuralists argue that “[international rules, norms and law] are largely epiphenomenal. The rules may exist, but they do not exert an independent influence on State behaviour.”<sup>18</sup>

However, institutionalists would argue that legal rules are binding rules, and they become law through the consent of the states, even in the absence of sanctions, because through state consent they become legitimate. “If even a very small percentage of the population of the United States – two percent for example – believed that a particular law was illegitimate and refused to obey it, no amount of coercive power could enforce compliance. It is thus the perception that makes the rule law, not the guarantee of sanction. Similarly we assert that a sanction is not necessary to make *international* legal rules binding. It is enough that States regard the rules as binding and, accordingly, believe that a sanction would be appropriate for a violation of such rules.”<sup>19</sup>

At the same time, this chapter argues that underlying the global consensus in the treaties and the willingness of nations to be bound by these treaties through the ratification process, there are several conflicts and tensions, and that these tensions do not augur well for the legitimacy and compliance pull of the regime. These conflicts and tensions are not always apparent to lawyers and political scientists, since these individuals make certain assumptions about the negotiation process and about treaties that form a very important part of the regime. They expect that by the time a treaty has been negotiated, signed, and ratified, the major conflicts of interest have been resolved to the satisfaction of all parties, and that these parties are in a position to implement and comply with the obligations that flow from the membership of the regime in good faith. They expect that the binding rules generated by the negotiation process will be prescriptive and proscriptive in nature and will have a high compliance pull.<sup>20</sup>

This chapter argues that although most treaties embedded in regimes are highly successful, regimes in relation to environmental issues such as the climate change problem tend to be less successful. This does not imply that the treaty approach should be abandoned in relation to environmental problems; on the contrary, it implies that the expectations of treaties on environmental issues need to be modified, and that the role of law is to identify ways and means to ensure that the negotiation process on these treaties and regimes can lead to the development of regimes with a high compliance pull and with high environmental and legal effectiveness.

A treaty is defined in the 1969 Law of Treaties as follows: “An international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”<sup>21</sup> As Harris states, “The multilateral treaty remains the best medium available at the moment for imposing binding rules of precision and details in the new areas into which international law is expanding and for codifying,

clarifying and supplementing the customary law already in existence in more familiar settings.”<sup>22</sup> Treaties are an important element of international regimes.

In general, treaties are effective because “[a]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”<sup>23</sup> Rules on transport and communication generally tend to operate “without violation or much controversy.”<sup>24</sup> Such treaties have a high legitimacy and compliance pull. That international law in general is implemented in good faith has set a precedent; thus, environmental problems are also being addressed nowadays by international environmental treaties. There are more than 870 legal agreements pertaining directly or indirectly to environmental issues<sup>25</sup> and more than 152 environmental treaties.<sup>26</sup> The proliferation of environmental treaties and regimes begs the question: are these treaties and their regimes being implemented in such a way as to address the environmental problem in question?

At a workshop on the implementation of international treaties, it was concluded that: “Environmental treaties do make a difference. Countries increasingly tend to comply with environmental treaties. Processes of domestic implementation are set in motion, although this may take some time.” However, the effectiveness of the implementation may not necessarily imply that the environmental problem is being addressed adequately.<sup>27</sup> There are several international projects investigating the effectiveness of international treaties, and although they use vastly different definitions and methodologies for investigating the implementation of and compliance with treaties, they tend to indicate that there are some shortcomings in the implementation process.<sup>28</sup> It can be seen that some environmental treaties have practically “no effect” despite their entry into force and full participation of parties to the treaty.<sup>29</sup>

In the Present author’s book, *The Climate Change Convention and Developing Countries: From Conflict to Consensus?*,<sup>30</sup> the negotiations on the FCCC are examined through a series of about 150 interviews, conducted primarily in a few key developing countries. Since then, the author has conducted an additional 100 interviews, and the empirical evidence indicates that the general assumptions of international law are not equally appropriate or valid (not to be confused with legal validity) in relation to environmental problems. Further, it is because of the inappropriateness of these assumptions that the environmental treaties are not always effective in achieving their environmental objectives. Research into the effectiveness of treaties by other authors, cited in appropriate sections of this chapter, tends to support several of the author’s own findings.

Hence, it can be argued that although the international regime and treaty formation process has high legitimacy in a “formal” sense, it seems to lack

legitimacy in practice, in that many of the assumptions of the international legal process do not have a high degree of validity in relation to environmental issues. A study of these assumptions is especially warranted since international law is difficult to enforce, especially in problems of global commons and free-riding. The tragedy of the global commons is that each person or country feels that it can either use resources or emit pollutants into nature without care, since it is maximizing its own utility. However, if all people and countries undertake such activities, then at some point they will have exhausted the resources and polluted the globe. The tragedy lies in the fact that each country is locked into a system that encourages it to maximize its own utility without a care for others.<sup>31</sup> However, even once actors and countries realize the scope of the problem, they are still tempted to take a free ride. Free-riding implies that actors and countries wish to enjoy the benefits of action without paying for it.<sup>32</sup>

It is very difficult, especially in dealing with such global problems, to ensure that all concerned countries participate in the negotiations of such a treaty and subsequently sign and ratify it, that they follow any subsequent amendments and protocols, that they do not make reservations to the treaty, and that they do not withdraw from the treaty. Furthermore, if countries are in dispute regarding a specific issue, then they may approach the International Court of Justice or special tribunals or may go for arbitration. While options for dispute resolution exist, these may not always be used, especially in relation to environmental issues. This is because states may not have the right to demand the implementation of obligations unless they have suffered direct losses.<sup>33</sup> Besides, proving the relationship between cause and effect in environmental issues is not at all easy and may discourage states from pursuing expensive litigation, since the outcome is not predictable.<sup>34</sup> In some environmental issues, such as climate change, all states are polluters and it is likely that most will be victims. In such a situation, states may not feel that it is advisable to pursue such a course and thereby create a precedent that may very well backfire against them at a later stage. Birnie and Boyle point to Chernobyl and Amoco Cadiz to show that pollution disasters seldom lead to international claims.<sup>35</sup> This all tends to imply that the opportunities for applying the traditional principles of state liability will be limited.<sup>36</sup> Furthermore, it is not possible at present for non-state actors to bring a claim against states at the International Court of Justice (although they do have other options). Finally, even if a dispute is brought before the International Court of Justice, this Court does not exercise compulsory jurisdiction, nor does it have a mechanism to enforce compliance. However, Article 94 of the UN Charter clearly imposes an obligation on members to comply with the decisions of the International Court of Justice.<sup>37</sup>

Since there is an overwhelming likelihood that traditional adjudication



methods will not be used, there is a tendency to adopt non-compliance regimes that are simple and non-confrontational, and that aim to assist parties to the treaties in improving their compliance standards.<sup>38</sup> Such an approach is also seen as an efficient and equitable approach to using available resources.<sup>39</sup> Considerable research is being undertaken at present in relation to the review mechanisms, verification mechanisms, and non-compliance regimes.<sup>40</sup> While such non-confrontational mechanisms are vital for improving the effectiveness of international treaties, there also needs to be a focus on identifying ways of increasing the compliance pull of treaties by increasing the legitimacy of these regimes.

There are different theories of legitimacy and compliance pull.<sup>41</sup> Nollkaemper explains that there are three approaches to explaining the effectiveness of international rules: the structural approach, the institutional approach, and the internal legal approach. While proponents of the structural approach argue that rules are effective when they conform to the structure of power in the system to which they are applicable, those from the institutional school counter that rules may be effective even when they do not conform to power structures, since international institutions also have an important effect on the definition of national interests. According to the internal (legal) approach, the normative force and legitimacy of a set of rules determines its effectiveness.

The author's own conviction is that all these theories shed light on how the rules are implemented, and that there is a struggle between, on the one hand, powerful governments who want to arrange international policies to favour their own interests, and, on the other, the slow but inexorable development of common principles of international law that serve to balance the power of countries. Furthermore, the author believes that countries are not only motivated by their narrow national interests, but also by their role as members of the international community.

The compliance pull of treaties has been dealt with by different researchers in different ways. Institutionalists examine the entire process of treaty-making and implementation and look at the way the international processes influence domestic processes. They argue that institutions influence domestic policies by creating more appropriate agendas, developing international strategies, and formulating domestic policies.<sup>42</sup> On the basis of a workshop that examined the consequences of environmental regimes, Young and Moltke argued that researchers belonged either to the ecological school, which focused on the social learning that emerges from such negotiations; to the legal school, which focused on implementation and compliance; to the political school, which focused on outcomes rather than outputs; or to the policy school, which focused on the efficiency of policy mechanisms. These are all different approaches to studying the real follow-up to an international agreement.<sup>43</sup>

In this chapter, it is argued that the compliance pull and legitimacy of a treaty depends on the appropriateness of the implicit and explicit assumptions of international law in each specific treaty. Where these assumptions are less than appropriate, the compliance pull of the treaty will be less, unless the treaty is designed to address the relevant problems, and the expectations with regard to the compliance pull of the treaty are modified accordingly.

A key argument for developing such a theory is that the faith in international environmental institutions may be negatively affected if people perceive such institutions as being ineffective in achieving their environmental objectives. Such loss of faith is not warranted, since international institutions have a very important role to play in providing a forum for developing rules for the international community. Since very few international environmental treaties include measurable objectives, relying on normative persuasion rather than targets and timetables,<sup>44</sup> the “compliance pull” of a regime is not merely intended in this chapter to refer to the extent to which binding quantitative and measurable goals are implemented and complied with; this chapter also intends to examine the potential for countries to feel bound to address the environmental problem that is being dealt with by the institutions in question.

### A brief summary of the climate change issue and the treaties

The climate change problem refers to the problem of anthropogenic emissions of certain gases that have the potential of destabilizing the global climatic system, thereby leading to rising sea levels, changing regional climates, changes in rainfall patterns affecting the local availability of food and water, and extreme weather events.<sup>45</sup> In order to deal with this irreversible global problem, the FCCC aims “to achieve, in accordance with the relevant provisions of the Convention, the stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”<sup>46</sup> This objective is to be achieved by measures that take the common but differentiated responsibilities and respective capabilities of developed and developing countries into account, that are precautionary in nature, that promote sustainable development, and that are cost-effective.<sup>47</sup> As part of these common but differentiated responsibilities, the FCCC urged the developed countries in legally vague language to bring their emission levels

back to 1990 levels in the year 2000. The rich developed countries were also expected to help the developing countries financially and technologically so that they would be in a better position to deal with this problem.<sup>48</sup> The Convention also established five bodies to undertake various activities considered necessary for the further development of the regime.<sup>49</sup>

The Convention entered into effect in 1994. In 1995, the parties agreed that the target for the year 2000 was insufficient and that a process should be set in motion to develop tougher targets for the developed countries. The Kyoto Protocol of 1997 aimed to strengthen the regime by including legally binding targets for the developed countries.<sup>50</sup> This was laid out in the form of differentiated Quantified Emission Limitation and Reduction Commitments for all the developed countries. The Protocol allows parties to reduce their emission levels by also undertaking emission reduction activities in other countries via three different types of market mechanisms.<sup>51</sup> Both the Convention and the Protocol call on parties to prepare national communications reporting, *inter alia*, on their emission levels and measures taken to reduce their emissions.<sup>52</sup> The regime is thus being strengthened and the rules are becoming more determinate in relation to targets and timetables, and there is progress on the institution-building front.

The FCCC and its Kyoto Protocol are special legal instruments that have tried to deal with the free-rider problem. Since sovereign states are not obliged by any general rule of international law to participate in a treaty, the FCCC encourages participation through a flexible, framework approach with common but differentiated responsibilities for all countries.<sup>53</sup> The Kyoto Protocol also has a wide range of articles that provide flexibility to countries in the implementation of their obligations.<sup>54</sup> However, both the FCCC and its Kyoto Protocol forbid reservations.<sup>55</sup> This combination of flexibility and the lack of reservations has been successful to the extent that the FCCC has been ratified by more than 165 countries. But countries are permitted to withdraw and/or not follow amendments, protocols, or new annexes.<sup>56</sup> From the speed with which the Convention and its Protocol have been negotiated, it would appear that the problem is well on its way to being addressed. In fact, from an international law perspective, the treaty provisions are really quite progressive and far-reaching.<sup>57</sup> While deeply appreciative of the tremendous achievements of the regime, the author would like to point out that there are some serious problems.

### Legitimacy of the climate change regime

The climate change regime has been developed around two treaties. It thus has an essentially legal character. Hence, the legitimacy of the regime will

be examined here in the context, though not exclusively, of the Law of Treaties,<sup>58</sup> which regulates state cooperation in relation to treaties. The Law of Treaties is viewed as a primary source of international law and is referred to in disputes between countries by the International Court of Justice. The Law of Treaties and international law make some implicit and explicit assumptions about state behaviour. What is argued here is that some of these assumptions are not always valid in specific negotiations. This then affects the legitimacy of the regime and its compliance pull.<sup>59</sup>

The following section systematically explains these assumptions and discusses the climate change regime in relation to these assumptions. The validity of the assumptions of international law in specific circumstances, whether explicit or implicit, is crucial to understanding whether a specific regime will be developed further in the international context and implemented effectively in the domestic context.

### *The state as major actor*

In international law, the state is recognized as the major actor. Article 6 of the Law of Treaties states: "Every State possesses capacity to conclude treaties." This is because the structure of the global community has been defined in terms of states. "The States are the repositories of legitimated authority over peoples and territories. It is only in terms of State powers, prerogatives, jurisdictional limits and law-making capabilities that territorial limits and jurisdiction, responsibility for official actions, and a host of other questions of co-existence between nations can be determined . . . This basic primacy of the State as a subject of international relations and law would be substantially affected, and eventually superseded, only if national entities, as political and legal systems, were absorbed in a world State."<sup>60</sup> The 1969 Law of Treaties deals with treaties between states.<sup>61</sup> Hence, states, and sometimes integrated regional communities, are the only legally authorized bodies to negotiate bilateral or multilateral treaties.

The climate change regime is one in which the primary negotiating partners are state representatives. A special feature of the regime is that all states were invited to participate in the negotiating process (unlike other regimes, such as the early negotiations on the GATT or the recent negotiations on the Multilateral Agreement on Investment). This increases the legitimacy of the process, since all states are party to the process when it is setting its goals and rules.<sup>62</sup>

On issues that are highly centralized and relatively simple, where power tends to be vested in the government, states may be the appropriate bodies for conducting the negotiations and for implementing the outcome. However, in scientifically complex problems concerning a large number of social actors and vested interests, states may still be the relevant formal authority to negotiate the treaty but may not have access to adequate information

or the capability to negotiate competently. This is especially the case when the receding power of the state provides it limited jurisdiction and control over its own country and its own people, as well as over the large multinationals and the capital market, which is highly mobile and can move from one jurisdiction to another. Thus, while the state may be the most appropriate body for negotiating rules in relation to the power sector (even when parts of the sector have been privatized) or in relation to controlling the production of ozone-depleting substances,<sup>63</sup> mostly concentrated in a few national and international companies, it may be less able to deal with issues such as climate change that require the commitment of many domestic and international actors. States and their negotiators do not always have a thorough understanding of the scientific issues involved, nor of the complexity of domestic interests, and are sometimes simply unable to convince the domestic population and international business to take action. In complex issues like climate change, such global negotiations among states tend to be based on reductionist and aggregative science, which may lead to simplistic solutions that are not feasible in specific local contexts. Hence, it is important to stimulate and use the results of public and NGO participation in the process of treaty negotiation as a way to increase the legitimacy and the compliance pull of the treaties.<sup>64</sup> The participation of NGOs (environmental groups, industry, and the scientific/epistemic communities) can increase the legitimacy of the process by ensuring greater democracy and transparency, and by providing input into the process.

The climate change regime tends to acknowledge this. Firstly, like many other modern treaty negotiation processes, its rules allow observers to be present and make their points of view and knowledge available to the negotiators, although these observers are not allowed to actually negotiate the text. Secondly, the climate treaties allow for the systematic collection of scientific information from scientific communities through the Intergovernmental Panel on Climate Change and the Subsidiary Body for Scientific and Technological Advice, under Article 9 of the Convention and Article 15 of the Protocol. Thirdly, the FCCC calls for education, training, and public awareness.<sup>65</sup> Not much, however, has been undertaken in relation to this article. Finally, the Convention allows for the participation of the private sector by promoting market-based instruments.<sup>66</sup>

While there are several NGOs participating in the negotiations, the interests represented by these NGOs are not always regionally balanced, since financial and resource constraints make it difficult for many NGOs to participate in such a process. In the negotiations, there are several NGOs from the United States, significant numbers from Western Europe and relatively fewer NGOs from Eastern and Central Europe and the developing countries. The approximately 300 environmental NGOs tend to function under the global Climate Action Network. The Network develops a strategy and promotes the strategy through advocacy, lobbying, and informa-

tion dissemination. Collectively, it is highly effective in providing a daily factual record of events (see, for example, the *Earth Negotiations Bulletin* produced by the International Institute for Sustainable Development),<sup>67</sup> a commentary on the process (see the Climate Action Network newsletter), and specialized papers addressing individual issues. Environmental NGOs are frequently seen advising their national delegations and those from other countries. One study on the influence of NGOs on the process claims that there would have been no comparable climate change treaty if the NGOs had not been present.<sup>68</sup> They also provide a second opinion on how countries actually implement their commitments, and monitor the activities of different industries.<sup>69</sup> The author's own observations and interviews indicate that they contribute to the transparency of the process, that they provide huge amounts of information which are avidly read by negotiators from developed and developing countries, and that they very much influence the way negotiators think, even if their influence on the negotiation outcome is less traceable.

The influence of the scientific community through the reports of the Intergovernmental Panel on Climate Change is substantial.<sup>70</sup> This body consists of government representatives who assign the responsibility of reporting on the state of scientific, technical, and socio-economic knowledge to senior scientists in the field. These scientists assess the available knowledge and prepare a policy makers' summary, which may then be adopted by the policy makers on a line-by-line basis. These reports provide basic scientific information to negotiators. However, although the integrity of the scientists is not in question here, a literature review inevitably tends to have an Anglophone bias, because of the domination of these scientists in the process, constraints in relation to language, and the paucity of work undertaken in the developing countries in relation to the climate change issue.<sup>71</sup> Many scientists and researchers are also present at the negotiations, as are a large number of industry representatives, especially American ones. They are active in lobbying their national negotiators at the negotiations and their representatives within the domestic political arena. Hence, although only state representatives are formally allowed to negotiate, the legitimacy of the process has been enhanced by the participation of non-state actors as observers. While the international process tries to ensure legitimacy by funding the participation of developing country negotiators, developing country NGOs do not always have the resources to participate, leading to some degree of Northern bias in the process.

### *Sovereignty and equality of states*

International law assumes that all states have a uniform legal personality and that all states are sovereign and equal.<sup>72</sup> This implies that all states have exclusive jurisdiction over their territory and permanent population,

a duty not to interfere in the affairs of other states, and state obligations under international law only on the basis of their own consent. This implies that a state is not obliged to become a member of an international organization and that the jurisdiction of tribunals and courts depends on the consent of the state.<sup>73</sup>

Sovereign equality of countries may arguably imply fairness of treatment to all countries. In the UN system, this tends to imply “one country, one vote.”<sup>74</sup> However, countries are quite different in population. The sovereign equality concept also allows a country like Kiribati an equal vote to that of a country like China.<sup>75</sup> The fairness inherent in providing a tiny small island state the same number of votes as a giant like China is questionable. At the same time, although each country has one vote, the voice of the United States still counts for more than the voice of Zimbabwe or even that of China or India. Thus, on the one hand, the approximately 40 small island states do not have much power in negotiating an agreement that gives concrete attention to their special vulnerability to the problem of climate change. At the same time, although the bulk of the parties to the FCCC, both in terms of population (65–75 per cent) and in terms of number (approximately 134), are developing countries, they arguably have only a very limited role in shaping the regime (see below).

Secondly, sovereign equality means that countries may participate on a voluntary basis in treaty negotiation. This implies that if a sovereign state agrees to participate in the negotiations of a treaty, it will eventually be willing to ratify the agreement, if such is required, and subsequently to implement the agreement following its entry into force. However, research on the climate negotiations reveals that many developing countries have participated and ratified the FCCC less out of a deep-felt concern for the problem as a top priority of their countries than out of notions like solidarity and the desire to be “on the boat” (which could be referred to as the social function of the state); the desire to influence rules at the stages in which they are negotiated (which could be referred to as the precautionary approach in relation to international regimes; that is, state participation in negotiations when they are uncertain how international regimes may develop, but expect that the direction of development of the rules are likely to be irreversible); and the desire for financial and technological gain (the opportunistic function).<sup>76</sup> Thus, the premise that they will actually be able to implement their obligations voluntarily does not automatically hold.

To some extent, the presence of environmental NGOs does increase the “negotiating voice” of a state. Some members of the London-based Foundation for International Environmental Law and Development negotiate on behalf of some small island states, thereby effectively enhancing the presence of these states in the negotiations.

*Common problem definition*

An implicit assumption of international law and international relations is that when countries enter into negotiations on a problem, they have a clear and common definition and understanding of the problem. A common definition of a problem implies that the countries have mostly common interests in addressing the problem. They have some different interests, but these generally converge in the broader context. There are only limited conflicting and divergent interests. A common definition of a problem also implies that there is a clear understanding of the science underlying the problem and that the nations share common values, norms, and customs in relation to that problem.<sup>77</sup> When countries come together to negotiate international treaties to harmonize existing domestic laws, they tend to have shared interests in relation to a common problem.

Modern environmental problems, in contrast, are such that countries may not always define them in the same way. The science involved may be so complex and controversial that the uncertainties and risks entailed are viewed differently by different groups. The allocation of responsibilities for taking action may depend on values that are not globally shared. It has been argued that there is no global community in any “meaningful sense,” and that on any given issue, “[n]ormative communities must first be imagined and nurtured.”<sup>78</sup>

In relation to the complex problem of climate change, for example, it is quite clear that countries see the problem very differently. Thus, while for the industrialized countries, climate change is caused by emissions of greenhouse gases and these emissions therefore need to be reduced, for the developing countries, climate change is a problem caused by ideology and related lifestyles, and solving the problem calls for questioning and modifying that ideology and its related production and consumption patterns.<sup>79</sup> In this way, countries have predominantly divergent, different, or even conflicting interests in relation to an issue. Such types of interests would *per se* imply that the definition of the problem for both parties is quite different and that they are not, in effect, discussing the same problem. If the latter is the case, then an agreement would appear to be out of the question, unless some of the negotiators, however excellent their personal qualifications may be, are unable to articulate their views adequately and/or are susceptible to opposing negotiating techniques (see below). An analysis of the negotiation process indicates that frequently, the attempts of the developing countries to discuss the issues in terms of consumption and production patterns and development are marginalized via processes of exclusion, in which the developing countries’ perspective is characterized as irrelevant to the agenda being discussed.<sup>80</sup> Having said that, it must also be acknowledged that this is sometimes difficult to distinguish



from the issue-linkages made by the developing countries that are part of a negotiating strategy to gain concessions.

NGOs have a major role to play in the development of a common problem definition. However, the field is currently dominated by environmental NGOs, and developmental NGOs have yet to engage in a fruitful debate on the subject. The epistemic/scientific communities working on developmental issues are also largely not engaged in this debate. A few Southern NGOs and representatives bring these issues to the negotiating table, but are not effective enough to adequately influence the agenda.

### *Informed and effective negotiators*

An important implicit assumption of international law is that when countries send their negotiators to the negotiating table, these negotiators are informed, empowered, and effective; that their statements are statements supported by the domestic policy-making structure, and that their silence implies informed consent. This can be derived from the Law of Treaties. Article 46(1) states: "A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance." Furthermore, under the Vienna Convention, the effect of a treaty on a particular state cannot be considered invalid because of a lack of authority on the part of the representative.<sup>81</sup> Error by the representative can be accepted as a way to render a specific treaty invalid in relation to the specific state, but only if "the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty"<sup>82</sup> except when "the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error."<sup>83</sup> On the basis of these articles, it is not only possible to infer that the Law of Treaties assumes that state representatives at the negotiating table are authorized representatives if they fulfil the legal requirements in Articles 7 and 8, but also that they have a clear and detailed mandate on the basis of which they represent their nation's interests.

Although it is unimaginable for many international legal and international relations theorists that countries would send negotiators to the negotiating table without a proper and complete briefing and a thorough understanding of what is at stake both legally and economically, this is nonetheless sometimes the case. Modern environmental treaty negotiations often precede domestic public concern on the issue, and in such cases, although many of the negotiators are perhaps as well prepared as they can

be under the circumstances, they are not well-informed negotiators, and hence are not in a position to negotiate effectively. Interviews with more than 250 domestic actors and negotiators from developing countries reveal that many of the negotiators working on the climate treaties did not have much domestic input on the relevant science (the facts of the problem, for example regarding national emissions), economics (the costs of dealing with the problem), or democratic requirements (the values that needed to be defended and/or supported). For these reasons, the author argues<sup>84</sup> that the developing country negotiators had a "hollow mandate" that led to a handicapped negotiating position.<sup>85</sup> Such a handicapped negotiating position implied further that the developing countries were unable to cooperate and form detailed joint positions in between the international negotiating sessions. Although their positions were and are formally legal positions, their legitimacy can be questioned.

This is not an issue that is frequently investigated in scientific journals. Interviews conducted in 1994–1996 and again in 1998–1999 revealed that few negotiators from the developing countries had any specific ideas of how their national interests would be affected, and they were thus operating in the negotiations on the basis of their own common sense. In a research project on joint implementation in Africa conducted in 1994–1996, it became clear that despite the fact that negotiators from three of the six African countries studied had made national positions on joint implementation known during the international negotiations, researchers from these very countries were arguing on the basis of a stakeholder study that there had been no national position in existence at that time.<sup>86</sup> On the basis of interviews with the negotiators, it was argued that this implied that some negotiators were spontaneously producing country positions on various issues in order to have some say in the negotiating process.

Such positions do not have the domestic backing that they need. If the negotiators do not say anything, this leads to a situation in which the argument is lost by default. If they object to decisions being taken on the issue on the grounds that they do not have a formal mandate, they are seen as unnecessarily hampering the progress of the negotiating process.<sup>87</sup>

The author does not believe that this is merely incidental. It is arguable that two factors will contribute to many more such situations in the future: firstly, the increasing globalization of problems, and secondly, the growing disparities in political, economic, and social welfare among countries.<sup>88</sup> The "late comers" on each issue, whether from among the developing countries of the South or even some of the slow developers of the North, will be sending negotiators to the table ill-equipped to deal with the complexities of modern negotiations. This implies that the outcomes of the negotiations may be skewed and the compliance pull of the negotiation outcome weak, since these outcomes were not based on any legitimate

negotiating mandate. Although the Law of Treaties allows “errors” as a possible reason for invalidating consent under limited circumstances, Harris explains that such a reason has rarely been invoked in international law, quite unlike the situation in domestic law.<sup>89</sup> Besides, insufficient negotiating mandate hardly amounts to “error.” Indeed, the Law of Treaties has no ready-made rule to apply to insufficient mandates.

Another consequence of the “hollow mandate” is that negotiators use proxy indicators of legitimacy. This means that they rely on the position of their department in relation to other previous negotiations, that they link direct issues to other international issues on which they have more information, and that they fall back on posturing and rhetoric. The consequence of this is that they are unable to come up with constructive proposals representing their own interests, that they tend to be defensive and reactive in the negotiating process, and that they can easily be divided if there are some incentives provided in the international negotiations. This clearly influences the negotiation outcomes.

To the extent that the developing country negotiators are helped by NGOs during the negotiations, however, they may come up with constructive negotiating positions. The small island states have prepared a draft protocol<sup>90</sup> with the help of Western NGOs. At the Fourth Conference of the Parties to the FCCC, the Chinese negotiator spoke about “survival emissions,” an idea presented by Agrawal and Narain in their 1990 paper.<sup>91</sup> (The arguments presented above tend to imply that Western negotiators have very detailed and thorough mandates for the negotiations. This may not always be the case. The US negotiators appeared to have a dual mandate – a mandate to negotiate a protocol with binding targets for themselves, although their Senate had made clear that it was unlikely to ratify any agreement with legally binding emission reduction commitments.<sup>92</sup> Konrad von Moltke argues that this is possible because of the growing role of civil society in influencing the position of the government.<sup>93</sup>)

### *The rules of procedure*

International regimes develop their own rules of procedure to ensure that the process of decision-making is legitimate. Werksman explains that the adoption of formal rules of procedure would help to increase the legitimacy of the process. He explains that there are two types of procedural rules in the regime: those agreed to in the legal treaties and those that would govern the general functioning of the regime. The first set includes the requirement that amendments, protocols, and annexes should be adopted by consensus, or by a three-fourths supermajority vote if this is not possible. These are included in the texts of the treaty and its protocol. The second set of rules of procedure, regarding the adoption of substantive

decisions, has still not been adopted, although the presidents of the Conference of the Parties have striven to do so. There is particular disagreement about the voting rules. Some developing countries feel that all substantive decisions should be taken by consensus, while some developed countries feel that all decisions in relation to the financial mechanism should be taken by consensus. Some parties feel that the rules for adopting protocols should be stricter than those for substantive decisions. This implies that in the meantime, all decisions should be taken by consensus, which has slowed down the efficiency of the process but might eventually guarantee greater legitimacy. This has also meant that there is an effort to avoid voting procedures in the adoption of decisions. However, although formally the procedures are observed, the negotiations often last late into the night and the negotiators become exhausted. The quality of the translation also becomes poorer, and this too has an impact on the negotiations.<sup>94</sup>

Furthermore, there are examples of decisions being taken through procedures that are not always correct. The adoption of the Kyoto Protocol took place 12 hours after the session was supposed to conclude, and some of the participants were already on their non-exchangeable flights. Some African delegates later said that they did not know that the Protocol had been adopted until they returned home. Werksman argues that it is possible that fewer than two thirds of the parties took part in the actual adoption of the Protocol.<sup>95</sup>

### *Balanced negotiations*

There is also an implicit assumption that the negotiations allow a give-and-take process, that the negotiated outcome is a fair outcome of the negotiation process and will, moreover, be seen as fair by the parties concerned, and that the parties will thus be inclined to implement the agreement. The use of fraudulent conduct of another negotiating state,<sup>96</sup> corruption, or coercion by representatives of other states to induce a state to enter into an agreement may be invoked by the latter state as a reason for invalidating its consent to the agreement.<sup>97</sup> The use of coercion on states renders the treaty void.<sup>98</sup>

Where negotiators are well prepared for the negotiation process, the inherent power of some countries may nonetheless be strong enough to play a major role in shaping the final negotiation outcome. But when some of the negotiators have handicapped negotiating power, this is less likely to be the case. In relation to simple problems, the negotiation outcome may leave all parties convinced that they have gained something. In complex problems, the negotiation outcome may leave all parties feeling dissatisfied. The line between dissatisfaction at having to trade some gains for

others and dissatisfaction about the fairness of negotiations is sometimes very diffuse. It is not easy to determine when there has been a clear case of hegemonic power being used to shape the final outcome to the detriment of other countries.

In some instances, however, the very difference in negotiating power between countries may be cause to question the appropriateness of the assumptions underlying the negotiation of treaties. More than 1,700 years ago, the Indian international relations expert Kautilya postulated a theory on unequal treaties developed between unequal negotiating powers and set forth the conditions under which weaker countries should accept such treaties.<sup>99</sup> In more recent years, the former communist countries have argued in favour of developing the doctrine of unequal treaties. They have argued that treaties negotiated between states not on any basis other than that of sovereign equality should be considered invalid. This might be the case between a powerful country and a dependent country, where the latter might concede extensive economic, political, and military privileges to the former.<sup>100</sup> This doctrine is not accepted by Western jurists, although many others from different parts of the world believe that it is valid.<sup>101</sup> Although the Law of Treaties does not recognize this doctrine, it does include articles on duress, fraud, and changed circumstances. While the doctrine refers to the political situation of a country, its economic and scientific situation may also be such that the countries are not equal negotiating partners in terms of the substance of the treaties. Given the degree of growing North-South conflict in relation to various international treaties, in which Southern countries feel that their interests have been inadequately represented, it is valid to ask if the negotiations are truly balanced. The question then becomes: how does one determine when a treaty is balanced?

Without being rash enough to attempt a theory that does so, this chapter will merely mention a few examples of the use of power in such negotiations. Firstly, in the run-up to the negotiations of the FCCC, the regime was developed along a leadership paradigm in which the North, in view of its greater responsibility for causing the problem and its greater capacity to take action, would reduce its own emissions first; it would also provide resources and assistance to the developing countries, and the developing countries would subsequently be invited to follow in the footsteps of the North. The Kyoto Protocol, too, embodies this concept.

Over the years, however, this has developed into a “conditional leadership” paradigm.<sup>102</sup> This is because the US senate will not ratify the Kyoto Protocol until key developing countries are willing to “participate meaningfully” in the process.<sup>103</sup> Pressure was thus put on the developing countries to discuss voluntary commitments at the third and fourth meeting of the parties, in Kyoto and Buenos Aires respectively. Meanwhile, the European Union countries and other developed countries are unlikely to

ratify the Protocol until the United States does so. Thus, a vicious cycle appears to be set in motion.

Another example relates to the negotiations on the metamorphosis of joint implementation into the Clean Development Mechanism. To explain, "joint implementation" refers to a relatively new mechanism which allows one country/investor to invest in another country. If the investment results in a reduction in (the growth of) greenhouse gas emissions, the investor can take the credit for the reduction. This mechanism allows countries to reduce emissions where it is cheapest for them to do so. It also ensures that "new and additional" resources (for official development assistance (ODA)) are generated. This issue came up for discussion in the period before 1992. The developing countries were unenthusiastic about this mechanism for several reasons. Hence, the negotiated FCCC only mentioned the term "joint implementation"; it did not define it.

Interpreting joint implementation in the context of the FCCC might take the reader in any number of directions. Those looking for secondary sources of information will turn first to preparatory documents. While some jurists conclude from an analysis of these documents that they reveal that joint implementation was intended to imply the implementation of emission reduction measures in other countries in return for emission credits,<sup>104</sup> that intention is not reflected in the text itself; this indicates that the controversy and the negotiations on this issue were so complicated that the issue could not, perhaps, be reflected in the text. A look at the documents of the NGOs shows controversy about the extent to which that interpretation was shared by the participants. Furthermore, interviews with negotiators in 1993 and later in relation to a project specifically on joint implementation indicated that many of them did not quite understand how the discussions had suddenly shifted to centre on a credit-sharing mechanism.<sup>105</sup> Although in subsequent negotiations the controversies continued, the developing countries finally accepted a decision on "activities implemented jointly" (note the change of name) in 1995, on the condition that no credits would be accredited during the pilot phase.<sup>106</sup>

In the run-up to the Kyoto Protocol, the developing countries proposed a Clean Development Fund, which would call on countries in non-compliance with their international obligations to pay a fine into the fund, which would then be used to assist developing countries. However, during the process of negotiations, the Clean Development Fund metamorphosed into the "Clean Development Mechanism," a new name for joint implementation, with crediting possible from the year 2000. The Clean Development Mechanism projects, however, were also required to be aimed at sustainable development, and were supposed to be more in line with the priorities of the developing countries. However, there is now a very real risk that the (declining) ODA funds will be earmarked for those sustainable develop-

ment projects with a climate change component. It is already possible to hear comments to the effect that climate change and sustainable development should not be dichotomized.<sup>107</sup>

A third example relates to the Global Environment Facility. Although the developing countries negotiated in favour of an independent financial mechanism, they were forced to accept the developed countries' ultimatum that such a mechanism would be located at the World Bank-based Global Environment Facility or would not be established at all.<sup>108</sup>

In the fourth example, the group of small island states negotiated in favour of provisions to assist them in adapting to the impact of climate change in the climate negotiations. Neither the FCCC nor the Global Environment Facility has made any clear-cut and concrete financial commitments on this issue. The Kyoto Protocol, however, does so. The article on the Clean Development Mechanism in developing countries calls for a small sum of the proceeds to be set aside to assist the most vulnerable countries.<sup>109</sup> Curiously, this element emerged not so much from North-South negotiations but from South-South negotiations on the issue, where support from the small island states for the Clean Development Mechanism was linked to the generation of resources to assist them with adaptation.

A fifth example can be seen in relation to the targets in the Kyoto Protocol. The targets call on the developed countries to scale back their emission levels by 5.2 per cent from 1990 levels (1995 levels in the case of three new gases, should the parties so wish) in the budget period 2008–2012. However, the target does not have to be achieved domestically. The emission reductions can be achieved through the Clean Development Mechanism in the developing countries, through joint implementation with Central and Eastern Europe, and through emissions trading with other countries that also have binding targets. The Clean Development Mechanism results in the inflation of the emission budget of the developed countries, especially since emission reductions from this instrument can be “banked” from the year 2000 onwards. Emissions trading *per se* would not necessarily cause a problem, except that many scientists argue that the emission budgets for Russia and Ukraine are far in excess of the emission levels that they are likely to reach in the year 2008–2012, leading to trading in hot air. All this could imply that the actual emission reductions in the developed countries may be far less than the 5 per cent figure would suggest.

Finally, there are many aspects of the negotiation process that the final versions of the FCCC<sup>110</sup> and the Kyoto Protocol leave out. The Law of Treaties does not provide much indication of how to deal with these issues. Clearly there is no consensus on these issues, and the parties have not given their consent to include these issues. But are the omitted issues relevant? Are they critical elements for determining the compliance pull of the treaty? Most lawyers would argue that such issues are irrelevant. However, policy

studies theory focuses precisely on what has been left out; that is, the non-decisions. Bachrach and Baratz argue that when decisions are being made, decision makers have a tendency to limit the discussions to relatively safe issues, so that some issues get organized out of the process. Thus, in the decision-making process, there are decisions (when a clear choice is made for an alternative), decisionless decisions (when, although a decision is not taken, steps are taken and these steps tend to acquire a life of their own), and non-decisions (when a decision is taken that results in the suppression of a latent challenge to the values of the powerful players).<sup>111</sup> Institutional processes tend to mobilize bias, and rules and norms may lead to the exclusion of certain perceptions. Hence, it is important to examine the non-decisions; this can be undertaken by examining the grievances of relevant actors.

A workshop on the issue held in the Netherlands also concluded that it was important to pay attention to the differences in position between developed and developing countries, since these might shed light on the compliance aspects of the problem.<sup>112</sup> Some of the evidence of the power imbalance in the negotiation process is addressed in the NGO reports and analyses of the negotiation process, which attempt to enhance the transparency of the process. While non-decisions are an important element of political analysis, legal analysis would generally show that such non-decisions are only relevant to the extent that they make clear that some issues have been deliberately left out and should not be included. While this is true, the argument presented in this chapter is that the existence of non-decisions may also reduce the compliance pull of a treaty by affecting the will of a party to abide by the decisions.

#### *Determinate (interpretable) text*

A further implicit assumption is that the negotiated text should have a minimal level of determinacy and its interpretation should not lead to intractable controversies. Franck argues that the higher the textual determinacy (that is, the clarity and transparency with which a rule defines what conduct is permitted and what is prohibited),<sup>113</sup> the greater the information about expected behaviour from other countries and the greater the incentive to comply.<sup>114</sup> Article 31(1) of the Law of Treaties states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 31(2) states that the context of a treaty includes, in addition to the text, preamble and annexes, instruments and agreements made by the parties in relation to the conclusion of the treaty, subsequent agreements and/or practice regarding the interpretation of the treaty, and relevant rules of law. According to Article 31(4): "A



special meaning shall be given to a term if it is established that the Parties so intended.” Article 32 allows recourse to the preparatory work of the treaty as a means to guide the interpretation of the treaty. The courts have been reluctant to use this principle, since the preparatory documents may often reflect diverse views and the negotiated text is the best authority of what has been agreed. In essence, Brownlie argues that the ordinary meaning of the words in the convention needs to be examined.<sup>115</sup>

When negotiators are in the same room, negotiating a treaty, but are dealing with a problem that they define very differently and for which they have conflicting and different interests, a situation may arise in which the text in the convention becomes so vague that treaty interpretation may not help to clarify what the parties have deliberately left unclear. As mentioned earlier, the articles on the “targets” of the developed countries in the FCCC, although purportedly requiring that the Annex I countries should scale back their greenhouse gas emissions to 1990 levels in the year 2000, are so ambiguous that it is completely unclear what the legally binding element in the target is.<sup>116</sup> The reference to “joint implementation” in the FCCC was also indeterminate, although, as mentioned above, it has since been renamed twice and now appears as the Clean Development Mechanism.<sup>117</sup> The large number of flexibility mechanisms in the Kyoto Protocol (trading, joint implementation, Clean Development Mechanism, and bubbling – the joint target of the European Union member countries) have not been clearly defined and there is considerable ambiguity about the relationship between these mechanisms and between the different emission reduction units each mechanism generates. Peter Sand cites the incertitude of treaty standards as a key reason for non-compliance in many international treaties. He argues that consensus in complex issues is often achieved at the cost of “constructive ambiguity.”<sup>118</sup>

In general, when there is controversy regarding the interpretation of a text, experts believe that three approaches to interpretation are possible: an approach that examines the ordinary meaning of the words, an approach that argues that the interpretation should help to make the convention effective, and finally an approach that seeks the original intent of the negotiators by looking at the preparatory documents. Fitzmaurice explains: “All three approaches are capable, in a given case, of producing the same result in practice; but equally (even though the differences may, on analysis, prove to be more of emphasis and methodology than principle) they are capable of leading to radically divergent results.”<sup>119</sup> Furthermore, when use is made of teleological approaches, it should be realized that in modern global issues, developing countries are less forthcoming with background documents, and reference to these documents may reflect only the views of the more advanced countries.

*Legitimacy of rules and the normative force of international law*

An implicit assumption of international law that can be derived from state practice is that even if the negotiated agreement is against the short-term interests of the country concerned, it may accept and implement its obligations, because of the country's long-term interest in maintaining the international system; this is, in particular, the case for those states whose interest or stake in the international system is especially strong. However, this is more likely to be the case when the rules are not only legal, but legitimate.<sup>120</sup> While positivists and proponents of the binary school argue that rules are either legally binding or not, Franck defines legitimacy as "a property of a rule or a rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule has come into being and operates in accordance with generally accepted principles of right process."<sup>121</sup> Legitimacy refers to the inherent capacity of a rule to encourage states to comply. According to Franck's theory, there are four indicators for determining when a rule has a strong compliance pull. The first is textual determinacy (discussed above). Symbolic validation and pedigree convey the authority of a rule; that is, the symbolic acceptance of the rule. Coherence refers to the connectedness between the rule and the different international rules, and their applicability and inherent justness. Adherence to a normative hierarchy refers to the way in which rules are to be made, applied, and interpreted. "The legitimacy of a rule is determined in part by the degree to which that rule is practised coherently; conversely the degree to which a rule is applied coherently in practice will depend in part on the degree to which it is perceived as legitimate by those applying it."<sup>122</sup>

Within the climate treaties there is inconsistency. For example, the Clean Development Mechanism is the only mechanism that calls for a portion of the proceeds to be set aside to fund adaptation measures, while the other flexibility mechanisms do not do so. This, in effect, is a tax on North-South cooperation. At the same time, there is a general lack of consistency and coherence in the way environmental principles in different treaties are being developed. While environmental principles are being generally recognized, not many of these principles are actually expressed in the different treaties. The United Nations Economic Commission for Europe (UNECE) Long Range Transboundary Air Pollution Treaty makes reference to four very general principles, but none of the subsequent protocols mention any principles as such. Although the responsibilities for taking action are shared in the regime, principles of burden-sharing have not been explicitly developed.<sup>123</sup> In the treaty and protocol of the ozone depletion regime there are several guidelines in

the text, but no explicit reference to principles. In the FCCC, although Article 3 mentions five sets of principles, there is controversy regarding their status and also regarding their relationship with each other. The Kyoto Protocol does not clarify this controversy either.

Furthermore, as mentioned above, it is also unclear what precisely is meant by “common but differentiated responsibilities.” There is a school of thought that argues that the implicit principles in these regimes are gradually being articulated and are taking shape through the manner in which they are interpreted.<sup>124</sup> Another school of thought argues that environmental lawyers are engaged in wishful thinking when they see the signs of an emerging general law of environmental protection.<sup>125</sup> But there is also a contrary school of thought that is trying to prevent the articulation of general principles of international environmental law, because of the general reluctance to create open-ended rules.

This struggle was evident in relation to the principles in the climate change treaty. Although the developing countries argued in favour of the inclusion of an article entitled “Principles” in the text of the FCCC, the text was ostensibly edited during the process of the negotiations to remove repetitive mention of the word “principles,” and the word was moved to the title of Article 3. Subsequently, the United States had a chapeau inserted in the text to the effect that “titles of articles are included solely to assist the reader.” By this insertion, the US delegation aimed to reduce the status of the principles to that of guidelines, since the explicit designation of “principle” might create a specific legal effect. However, Sands<sup>126</sup> argues that since the text of the chapeau does not specifically state that “the titles are not intended to have legal effect,” the titles are indeed relevant to the interpretation of the text. From the developing countries’ point of view, principles are important, since they are norms as to how the regime should develop, and these principles tend to balance the use of power by powerful countries. The Kyoto Protocol does not clarify the situation, since there is only a reference in the Preamble to the relevant article in the FCCC – “Being guided by Article 3 of the Convention” – thus avoiding the use of the word “principles.”

The lack of coherent and consistent practices may reduce the compliance pull of the regime. This absence is accentuated by the tendency of negotiators to divide environmental problems into many different sub-issues, to deal with each issue separately and according to different principles, and to resolve differences with side-payments that may lead to inconsistent behaviour. This leads not only to the fragmentation of the law, but also to a lack of coherence and consistency in the field; these factors are in fact the basis of the normative pull of rules. There is thus an emerging contradiction between the realist approaches to treaty-building, as embodied in the regime analysis school of thought, and the legal tra-

dition of trying to build on precedent and developing a coherent, consequent, consistent body of rules that apply on a non-discriminatory basis and are thereby inherently just and have a high compliance pull. At a more theoretical level, Franck argues that since the international system lacks secondary rules (rules regarding the enforcement of primary rules), all treaties tend solely to negotiate primary rules (rules regarding the conduct of parties on particular issues). He argues that “[p]rimary rules, if they lack adherence to a system of validating secondary rules, are mere *ad hoc* reciprocal arrangements. They may well exert a pull to compliance, but a weaker one than is evinced by primary rules of obligation that are reinforced by a hierarchy of secondary rules which defines the rule-system’s ‘right process’.”<sup>127</sup>

### *Pacta sunt servanda*

The rule of *pacta sunt servanda*, as embodied not just in the Preamble and Article 2 of the Charter of the United Nations<sup>128</sup> but also in Article 26 of the Law of Treaties,<sup>129</sup> signifies that once a convention enters into force, parties shall in good faith implement such a convention. Although the Law of Treaties codifies this principle, this is a fundamental principle of international law, for “[u]nless States have first accepted this principle, it would be impossible to regard any principle as binding.”<sup>130</sup> It is possible to go a step further and argue that *pacta sunt servanda* is a norm, without which the conclusion of treaties would be literally impossible. This suggests that its existence does not depend on acceptance.<sup>131</sup> This principle is not just prescriptive; it is a reflection of state practice.

While this principle is vital for the justification and survival of international law, and while the wide recognition and observance of this rule provides it legitimacy, the point raised in this paragraph is that environmental issues are intrinsically different from the bulk of international law issues. This is because in environmental issues, the international consensus is generally ahead of domestic consensus, at least for some countries; environmental law inevitably covers issues that are in the domestic jurisdiction; and environmental law covers issues that are not easily controllable by national governments. This implies that the issues being discussed internationally are often so new and so complex that, even if they are necessary for the global good, it may be very difficult for negotiators to promote them effectively within the domestic context, whether in a rich or poor country. It is probably for this very reason that the targets for industrialized countries have been ambiguously articulated in the FCCC; but arguably, a good-faith implementation would require countries at least to aspire to reduce their emissions to 1990 levels by the year 2000. But many of the developed countries may be unable to achieve that

goal. While the European Union is likely to achieve its target, there are doubts about the ability of the United States and Japan to do so. Furthermore, several articles in the Convention receive such marginal follow-up that the good will underlying their implementation is questionable. This is especially the case in relation to the provisions on technology transfer.<sup>132</sup>

### *Institutional capacity*

Finally, and most importantly, international law also tends to assume that states have the institutional capacity – including financial, technological, administrative, and legal capacities – to implement the obligations that they have taken upon themselves. This appears to be a corollary of the *pacta sunt servanda* principle and the sovereignty and equality of states.

However, the reason why many environmental laws have been found to be ineffective is the lack of institutional capacity in, for example, the developing countries. The work of Jacobson and Weiss indicates that there is empirical evidence to show that developing states tend to have a poor compliance record in relation to environmental treaties, partly because of their poor institutional structure.<sup>133</sup> Peter Sand's article on empirical research on the effectiveness of international treaties indicates that the incapacity of states is a critical reason for non-compliance.<sup>134</sup> Keohane concludes in his analysis that a key feature influencing the effectiveness of international institutions is sufficient administrative and political capacity.<sup>135</sup> Without a strong domestic enforcement mechanism, governments in the developing countries may have mere nominal power and no real effective power, especially in relation to environmental issues. So even if there is the desire to meet international obligations expressed by the government, the treaty will not be implemented if the institutional basis for executing that desire is inadequate.

This has been recognized by many governments, and several international documents, including Agenda 21,<sup>136</sup> recommend that assistance should be given to the developing countries and countries in transition to a market economy. The FCCC, too, includes several articles related to scientific cooperation, technological cooperation, and financial assistance. Large sums of money have been disbursed to assist developing countries in preparing national emission inventories.

While these attempts at assisting developing countries are crucial, they raise two critical issues. Will such efforts create dependency and enhance the repetition of Northern patterns of development by the South, or will such efforts help developing countries reach a critical point of independent decision-making? In the meantime, the institutional weaknesses remain a major bottleneck. However, while the industrialized countries

have realized the need to support the developing countries in developing implementation capacity, the issue remains that the lack of institutional capacity influences the negotiating power of the developing countries, and they may be unable to get a fair deal in the first place. Assisting them in implementing the negotiation outcomes may then serve only to alienate the developing countries further, since it may be seen as perverting national priorities.<sup>137</sup>

The lack of institutional capacity in developing countries is also used as a reason by aid agencies to bypass state authorities and directly fund the activities of NGOs. The GEF and the World Bank also have developed policies to involve NGOs in the process of project identification and implementation.

## Conclusion

This century has witnessed tremendous developments in international law in comparison to previous centuries. International law is now being used as a tool to address global environmental problems, among many others. The effectiveness of international law depends not only on the legality of the negotiated documents but also on their inherent legitimacy. This legitimacy depends to some extent on the appropriateness of the assumptions underlying international treaties in relation to the issues being addressed. However, since global environmental problems are complex and affect countries differently, it is very difficult for countries to commit to a process of identifying and accepting objective and fair principles, processes, and instruments for dealing with these issues.

In the meantime, political scientists advise that the negotiation process should try to develop incrementally, build on agreement, not polarize issues, and use side-payments to persuade other countries to take action. At the same time, the tendency to free-ride implies that countries will seek ways to minimize their obligations, contribute to indeterminate language in the text and inconsistency in the principles, demand exceptions or exemptions, avoid ratifying the conventions, and so on. The principles of reciprocity and good neighbourliness, while useful as guiding principles in international bilateral and multilateral diplomacy, have to be re-examined in global treaties where direct reciprocity is difficult to ascertain and good neighbourliness has its limits.

Thus, while the huge number of global treaties indicates that a legitimate process is being set in motion and that the rule of law is being promoted at a global level, this chapter has argued that the nature of environmental problems and the very large disparities among countries call into question the appropriateness of the assumptions that underlie the

international legal system, and that it may be necessary to make these assumptions explicit and review them in order to develop a more legitimate international system for the next century.

This is especially imperative because otherwise, the compliance pull of such treaties is likely to be low. This is cause for real concern, especially given that enforcement mechanisms are generally weak at the international level. This does not mean that the treaty approach should be abandoned as a method of problem-solving. Instead, it suggests that on the one hand, expectations of the treaty approach need to be modified, while on the other hand, ways and means must be sought to increase the legitimacy of international environmental regimes. One could argue that instead of expecting treaties to be tools for problem-solving in complex issues, we should see treaties as tools of institutional learning, and that we will learn over time how to use treaties to solve global environmental problems. At the same time, it is possible to argue that there is a need for a host of other strategies to increase the legitimacy of international negotiations. These include providing a *modus operandi* for the effective participation of non-governmental organizations in the process; providing weaker countries with some sort of “legal aid” to assist in the negotiations; providing countries with some sort of a “right to scientific rebuttal” so that if they are taken by surprise by new scientific information, they may ask for some additional time to investigate the facts; developing a set of generic rules of procedure for global environmental issues; developing rules to interpret “constructively ambiguous” text; and finally, developing a method to help poorer countries build the capacity to implement decisions.

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## Notes

1. This chapter uses the distinction made by Oran Young in relation to institutions and organizations. Institutions are seen as social practices and roles coupled with rules or conventions governing relations among the occupants of these roles, while organiza-

- tions are physical entities possessing offices, personnel, equipment, budgets, and so on. Young, O. R., 1994. *International Governance: Protecting the Environment in a Stateless Society*. Ithaca: Cornell University Press.
2. See, for example, Kennan, G., 1970. "To Prevent a World Wasteland." *Foreign Affairs* 48(3): 408. Kennan argues that there is a need for an organization "which has at heart the interests of no nation, no groups of nations, no armed force, no political movement and no commercial concern, but simply those of mankind generally, together – and this is important – with man's animal and vegetable companions who have no other advocate. If determinations are to be made of what is desirable from the standpoint of environmental conservation and protection, then they are going to have to proceed from a source which . . . sees things from a perspective which no national body – and no international one whose function is to reconcile conflicting national interests – can provide."
  3. These include the United Nations Environment Programme, the Commission for Sustainable Development, and the inclusion of various environmental aspects in different international treaties.
  4. Regimes are defined as "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors, expectations converge in a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behaviour defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice." Krasner, S. D., 1982. "Structural Causes and Regime Consequences: Regimes as Intervening Variables." *International Organization* 36(2): 186.
  5. Christoffersen, L. E., 1997. "IUCN: A Bridge Builder For Nature Conservation." *Green Globe Yearbook 1997*: 59–69.
  6. This was done by GA Res. 45/212 (1990).
  7. United Nations Framework Convention on Climate Change (New York), 9 May 1992, in force 24 March 1994, *International Legal Materials* 31: 822.
  8. The Kyoto Protocol to the United Nations Framework Convention on Climate Change, *International Legal Materials* 37: 22 (corrected text is available at the website of the climate secretariat; see <http://unfccc.de/FCCC/CP/1997/L.7/Add.1>).
  9. These include carbon dioxide, methane, NO<sub>x</sub>, chlorofluorocarbons, and so on.
  10. See, for details, the various reports of the Intergovernmental Panel on Climate Change: Houghton, J. T., Jenkins, G. J., and Ephraums, J. J. (eds), 1990. *Climate Change: The IPCC Scientific Assessment*. Cambridge: Cambridge University Press; Houghton, J. T. et al. (eds), 1995. *Climate Change 1994: Radiative Forcing of Climate Change and an Evaluation of the IPCC IS92 Emission Scenarios*. Cambridge: Cambridge University Press; Houghton, J. T. et al. (eds), 1995. *Climate Change 1995: The Science of Climate Change*. Cambridge: Cambridge University Press.
  11. Since the emission of these gases is closely related to the production and consumption of goods and services in an economy, reducing greenhouse gas emissions is likely to lead to a reduction in the rate of growth of the economy.
  12. However, the theory of the Environment Kuznets Curve shows that, while emissions increase with economic growth in the early phases of development, technological advances in a society over time may lead to a shift in the sectoral composition of that society and to the adoption of environmental policies; this could, in turn, lead to a de-linking between growth and pollution.
  13. This is because after a while, the volume of demand increases and these increases are greater than the decreases achieved through sectoral changes and technological advances. Compare de Bruin, S., 1998. "Dematerialisation and Rematerialisation," in



- Vellinga, P., Berkhout, F., and Gupta, J. (eds), *Managing a Material World: Perspectives in Industrial Ecology*. Dordrecht: Kluwer, 47–164.
14. Article 17 of the Kyoto Protocol (see note 8, above).
  15. Article 6 and 12 of the Kyoto Protocol (see note 8, above).
  16. Roberts, A. and Kingsbury, B., 1993. "Introduction: The UN's Roles in International Society since 1945," in Roberts, A. and Kingsbury, B. (eds), *United Nations, Divided World: The UN in International Relations*. Oxford: Clarendon Press, 55.
  17. Pallaemarts, M., 1993. "International Environmental Law from Stockholm to Rio: Back to the Future," in Sands, P. (ed.), *Greening International Law*. London: Earthscan, 17.
  18. Arend, A. C., 1996. "Towards an Understanding of International Legal Rules," in Beck, R. J., Arend, A. C., and Vander Lugt, R. D. (eds), *International Rules: Approaches from International Law and International Relations*. Oxford: Oxford University Press, 289.
  19. Arend, A. C., "Towards an Understanding" (see note 18, above), 290.
  20. Compare Birnie, P. W. and Boyle, A. E., 1992. *International Law and Environment*. Oxford: Clarendon Press, 546. In general, this is because: states may not be able to demand reparation unless they can demonstrate direct loss; the cause-effect relationships involved are difficult to prove; and countries are unlikely to litigate because they are all likely to be polluters in one or other case, and this can establish a precedent that can work against the interests of the plaintiffs at a later date. See also Sands, P., 1993. "Enforcing Environmental Security," in Sands, P. (ed.), *Greening International Law*. London: Earthscan, 50–64.
  21. See Article 2(1)a of the Convention on the Law of Treaties (Vienna), 23 May 1969, in force 27 January 1980, *International Legal Materials* 8: 679.
  22. Harris, D. J., 1991. *Cases and Materials on International Law* (4th ed.). London: Sweet and Maxwell, 729.
  23. Henkin, L., 1979. *How Nations Behave: Law and Foreign Policy* (2nd ed.). New York: Columbia University Press, 47.
  24. Arend, A. C., "Towards an Understanding" (see note 18, above), 306.
  25. Weiss, E. B., 1992. "The Introductory Framework," in Weiss, E. B. (ed.), *Environmental Change and International Law: New Challenges and Dimensions*. Tokyo: United Nations University Press, 9.
  26. UNEP Doc. GC 16/inf4, Nairobi 1991.
  27. Hisschemöller, M., Faure, M., Hordijk, L., and Burel, R., 1996. "Improving Knowledge on the Effectiveness of Environmental Treaties." Report to the International Human Dimensions Programme Commission, organized by the Netherlands Organization for Scientific Research, Ede, Netherlands, 16–17 February 1996. Unpublished, author's copy.
  28. See, for example, Young, O. R. and von Moltke, K., 1994. "The Consequences of International Environmental Regimes," report from the Barcelona Workshop. *International Environmental Affairs* 6: 348–370; Sand, P. H., 1992. "Summary Report on the Survey," in Sand, P. H. (ed.), *The Effectiveness of International Environmental Agreements: A Survey of Existing Legal Instruments*. Cambridge: Grotius, 8–18; Jacobson, H. K. and Weiss, E. B., 1995. "Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project." *Global Governance* 1(2): 119–148. See also the papers produced by the IIASA on the implementation and effectiveness of international environmental commitments. See also Keohane, R. O., 1993. "The Effectiveness of International Environmental Institutions," in Haas, P. M., Keohane, R. O., and Levy, M. A. (eds), *Institutions for the Earth*. Cambridge: MIT Press, 3–24.

29. Birnie, P. and Boyle, A. E., *International Law and Environment* (see note 20, above), 546.
30. Gupta, J., 1997. *The Climate Change Convention and Developing Countries: From Conflict to Consensus*. Dordrecht: Kluwer.
31. See Hardin, G., 1968. "The Tragedy of the Commons." *Science* 162: 1243–1248.
32. Olson, M., 1971. *The Logic of Collective Action, Public Goods and the Theory of Groups*. Cambridge, Mass.: Harvard University Press.
33. Sands, P., "Enforcing Environmental Security" (see note 20, above), 54.
34. Birnie, P. and Boyle, A. E., *International Law and Environment* (see note 20, above), 136.
35. *Ibid.*, 137.
36. Iwama, T., 1992. "Emerging Principles," in Weiss, E. B. (ed.), *Environmental Change and International Law: New Challenges and Dimensions*. Tokyo: United Nations University Press, 111.
37. Charter of the United Nations (San Francisco), 26 June 1945, and amended on 17 December 1963, 20 December 1965, and 20 December 1971, ICJ Acts and Documents No. 4.
38. Such an approach has been taken in many treaties such as the 1946 International Convention on Whaling (1946: International Convention for the Regulation of Whaling (Washington), 2 December 1946, in force 10 December 1948, 161 UNTS 72 (as amended, 19 November 1956, 338 UNTS 336)), the 1972 London Dumping Convention (1972: Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, Mexico City, Moscow, Washington), 29 December 1972, in force 30 August 1975, 1046 UNTS 120), the 1973 CITES Convention (1973: Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington), 3 March 1973, in force 1 July 1975, 993 UNTS 243), the 1985 Ozone Convention (1985: Convention for the Protection of the Ozone Layer (Vienna), 22 March 1985, in force 22 September 1988, *International Legal Materials* 26: 1529), and many regional agreements.
39. Birnie, P. and Boyle, A. E., *International Law and Environment* (see note 20, above), 138.
40. See, for example, the extensive work being undertaken by John Lanchbery on this subject. See Lanchbery, J., 1997. "Briefing Paper for the Eighth Session of the AGBM: Some Practical Considerations for a Protocol." London: Vertic, Implementation Matters No. 5. Unpublished, author's copy.
41. See Nollkaemper, A., 1992. "On the Effectiveness of International Rules." *Acta Politica* 27(1): 49–70.
42. Keohane, R. O., "The Effectiveness of International Environmental Institutions" (see note 28, above), 8.
43. Young, O. R. and von Moltke, K., "The Consequences of International Environmental Regimes" (see note 28, above).
44. Sand, P., "Summary Report" (see note 28, above), 8.
45. See, for instance, the reports of the Intergovernmental Panel on Climate Change (see note 10, above).
46. Article 2 of the FCCC (see note 7, above).
47. Article 3 of the FCCC (see note 7, above).
48. See Articles 3.2, 4.3, 4.4, 4.5, 11, and 21 of the FCCC (see note 7, above).
49. These include a secretariat, a Conference of the Parties, a financial mechanism, a Subsidiary Body for Scientific and Technological Advice, and a Subsidiary Body for Implementation.

50. See the Kyoto Protocol (see note 8, above).
51. These include joint implementation (Article 6), the Clean Development Mechanism (Article 12), and emissions trading (Article 17) (see note 8, above).
52. See, for example, Article 12 of the FCCC (see note 7, above).
53. See, for instance, the title of the treaty, and Articles 3.1 and 4 of the FCCC (see note 7, above).
54. See, for instance, Articles 2 and 3, especially 3.10, 3.11, and 3.12, and Articles 4, 6, 12, and 17 of the Kyoto Protocol (see note 8, above).
55. See Article 24 of the FCCC (see note 7, above).
56. See Articles 25, 15, 16, and 17 of the FCCC (see note 7, above).
57. Yamin, F., 1998. "The Kyoto Protocol: Origins, Assessment and Future Challenges." *Review of European Community and International Environmental Law* 7(2): 113–127.
58. See the customary Law of Treaties and the Convention on the Law of Treaties (see note 21, above).
59. This article does not examine the inherent weaknesses of the Law of Treaties.
60. Browlie, I., 1990. *Principles of Public International Law* (4th ed.). Oxford: Clarendon Press, citing Professor Friedmann, 59–60.
61. Treaties may also be made between international organizations and regional economic integration organizations, but these are not affected by the Law of Treaties. Harris (see Harris, D. J., *Cases and Materials* (see note 22, above)) argues that in international law, individuals have never been recognized as having the capacity to make treaties. He cites the Anglo-Iranian oil company case, where an agreement was made between Iran and an Anglo-Iranian oil company; the International Court of Justice held that the agreement was not a treaty but a concessionary contract.
62. It may reduce efficiency, but this can hardly be seen to be the case in the climate negotiations which produced a framework treaty in two years, despite having 165 negotiating partners.
63. Convention for the Protection of the Ozone Layer (see note 38, above) and the Protocol on Substances that Deplete the Ozone Layer (Montreal), 16 September 1987, in force 1 January 1989, *International Legal Materials* 26: 154.
64. Gupta, J., 1996. "The Precautionary Principle and Public Participation with Special Reference to the UN Framework Convention on Climate Change," in Freestone, D. and Hey, E. (eds), *Precautionary Principle: Book of Essays*. The Hague: Kluwer Law International, 231–247. See Hisschemöller et al. (eds), "Improving Knowledge" (see note 27, above), 4. See, for example, Carroll, J. E., 1992. "Introduction," in Carroll, J. E. (ed.), *International Environmental Diplomacy: The Management and Resolution of Trans-frontier Environmental Problems*. Cambridge: Cambridge University Press, 1–10.
65. See Article 6 of the FCCC (see note 7, above).
66. See Article 4(2)d of the FCCC (see note 7, above). See also Articles 6, 17, and 12 respectively of the Kyoto Protocol (see note 8, above).
67. The e-mail address of the bulletin is <enb@iisd.org>.
68. Arts, B., 1998. *The Political Influence of Global NGOs: Case Studies on the Climate and Biodiversity Conventions*. Utrecht: International Books, 111.
69. See, for example, Climate Network Europe with assistance from United States Climate Action Network, 1997. *Independent NGO Evaluations of National Plans for Climate Change Mitigation: OECD Countries – Fifth Review*. Brussels: Climate Network Europe.
70. See, for example, van der Sluijs, J. P., 1997. *Anchoring amid Uncertainty: On the Management of Uncertainties in Risk Assessment of Anthropogenic Climate Change*. Utrecht: University of Utrecht.
71. Gupta, J., *The Climate Change Convention* (see note 30, above).

72. Article 2 of The Charter of the United Nations (San Francisco), 26 June 1945, and amended on 17 December 1963, 20 December 1965, and 20 December 1971, ICJ Acts and Documents No. 4, states:

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

1. The Organization is based on the principle of the sovereign equality of all its Members ...

73. Brownlie, I., *Principles of Public International Law* (see note 60, above).
74. In some cases, weighted voting is allowed – as is the case with the Global Environment Facility – thereby providing the richer countries with a stronger voting power. Within the Bretton Woods system and the Security Council, the “one country, one vote” system is not applied. See also, for example, Article 27(3) of the Charter of the United Nations.
75. A similar argument is made by Franck, T. M., 1995. *Fairness in International Law and Institutions*. Oxford: Oxford University Press, 479–480.
76. See Gupta, J., *The Climate Change Convention* (see note 30, above).
77. A common definition of the problem is a prerequisite for addressing the problem, except in cases where, despite different definitions, countries have different reasons for dealing with the problem.
78. Brunnée, J. and Toopé, S. J., 1997. “Environmental Security and Freshwater Resources: Ecosystem Regime Building.” *American Journal of International Law* 91: 30–31.
79. See Gupta, J., *The Climate Change Convention* (see note 30, above), 184.
80. This has been argued in *ibid.*, chapter 9.
81. Article 47 of the Law of Treaties (see note 21, above). Harris (see Harris, D. J., *Cases and Materials* (see note 22, above)) explains in his notes to Article 47 that there are several cases in which the decision made indicates the acceptance of this principle. In the Eastern Greenland Case (1993 PCIJ Rep. Series A/B, No. 53), while the Norwegian government argues that its representative was not competent to bind Norway to the Ihlen Declaration, the Court held that this was irrelevant.
82. Article 48(1) of the Law of Treaties (see note 21, above).
83. Article 48(2) of the Law of Treaties (see note 21, above).
84. Gupta, J., *The Climate Change Convention* (see note 30, above), 132–133.
85. This does not mean that all developed country negotiators were well prepared. Some parallels can be drawn with the positions of some of the negotiators from the less developed European countries, though the author did not specifically make them the subject of her research.
86. Gupta, J., Maya, S., Kuik, O., and Churie, A., 1996. “A Digest of Regional II Issues: Overview of Results from National Consultations on Africa and II,” in Maya, S. and Gupta, J. (eds), *Joint Implementation: Carbon Colonies or Business Opportunities? Weighing the Odds in an Information Vacuum*. Zimbabwe: Southern Centre on Energy and Environment, 43–61.
87. Gupta, J., *The Climate Change Convention* (see note 30, above), 125.
88. For example, the debt of developing countries amounts to 40 per cent of their GNP in 1993, according to the UNDP. See United Nations Development Programme, 1996. *Human Development Report*. Oxford: Oxford University Press, 173.
89. Harris, D. J., *Cases and Materials* (see note 22, above), 785.
90. AOSIS Protocol, 1994. *Draft Protocol Text*. A/AC.237/L.23, 27 September 1994.
91. Agarwal, A. and Narain, S., 1991. *Global Warming in an Unequal World: A Case of Environmental Colonialism*. New Delhi: Centre for Science and Environment.

92. The US Senate had made clear in the latter half of 1997 that it would be unwilling to ratify any agreement with legally binding targets that did not call for the meaningful participation of developing countries. Nevertheless, the US negotiators went ahead and negotiated such an agreement.
93. Von Moltke, K., 1998. "International Civil Society: A World of Regimes and Governance," in Theys, J., *The Environment in the 21st Century*. Turriers: Germes, 379–390.
94. Werksman, J., 1999. "Procedural and Institutional Aspects of the Emerging Climate Change Regime: Do Impoverished Procedures lead to Impoverished Rules?" Paper presented at the Workshop to Enhance the Policy-Making Capacity under the Framework Convention on Climate Change, 17–18 March 1999. Unpublished, author's copy.
95. *Ibid.*, 13.
96. Article 49 of the Law of Treaties (see note 21, above).
97. Articles 50 and 51 of the Law of Treaties (see note 21, above). This, of course, only refers to military coercion and not to use of political power.
98. Article 52 of the Law of Treaties (see note 21, above).
99. Kautilya, 1987. *The Arthashastra* (ed. and trans. Rangararaj, L. N.). New Delhi: Penguin Books.
100. Harris (see Harris, D. J., *Cases and Materials* (see note 22, above), 789–790) explains that textbooks on international law in the former Soviet Union defined this doctrine. See also Dixon, M. and McCorquodale, R., 1991. *Cases and Materials on International Law* (2nd ed.). London: Blackstone Press Limited, 95. Dixon and McCorquodale cite P. Wesley-Smith's account of China's claim that the 1989 Convention of Peking on the new territories of Hong Kong was an unequal treaty because the countries involved were unequal in the circumstances in which it was negotiated.
101. See Brownlie, I., *Principles of Public International Law* (see note 60, above), 615–616.
102. Gupta, J. and van der Grijp, N., 1999. "Leadership in the Climate Change Regime: The European Union in the Looking Glass." *International Journal on Environment* 2(2): 303–322. Gupta, J., 1998. "Leadership in the Climate Regime: Inspiring the Commitment of Developing Countries in the Post-Kyoto Phase." *Review of European Community and International Environmental Law* 7(2): 178–188.
103. See Clinton, W. J., 1997. Remarks by the President on Global Climate Change at the National Geographic Society on 22 October 1997; see <http://www.whitehouse.gov/initiatives/climate/19971022-6127.html>.
104. Arts, K., Peters, P., Schrijver, N., and van Sluijs, P., 1994. "Joint Implementation from an International Law Perspective," in Kuik, O., Schrijver, N., and Peters, P. (eds), *Legal and Economic Aspects of Joint Implementation to Curb Climate Change*. Dordrecht: Kluwer, 4–5.
105. Gupta, J., *The Climate Change Convention* (see note 30, above), 116–131.
106. See for details *ibid.*, 116–131.
107. Slade, T. N., 1998. "National Perspectives – Ratification and Implementation Strategies: The View From the Small Island States," presentation at the conference "Climate after Kyoto – Implications for Energy," at the Royal Institute of International Affairs, Chatham House, London, UK, 5–6 February 1998. Unpublished, author's copy.
108. See Gupta, J., *The Climate Change Convention* (see note 30, above), 99–115.
109. Article 12. 8 of the Kyoto Protocol (see note 8, above).
110. Gupta, J., *The Climate Change Convention* (see note 30, above), 132–149.
111. Bachrach, P. and Baratz, M. S., 1970. *Power and Poverty: Theory and Practice*. London: Oxford University Press, 42.
112. Hisschemöller, M. et al., "Improving Knowledge" (see note 27, above), 3–5.
113. However, determinacy is achieved at the cost of flexibility and may not permit countries to respond creatively in line with their own potential.

114. If a rule's application in a particular situation leads to an absurd result, however, then the rule will not be taken seriously, no matter how clear it is. See Franck, T. M., 1990. *The Power of Legitimacy among Nations*. Oxford: Oxford University Press.
115. Brownlie, I., *Principles of Public International Law* (see note 60, above), 628–632.
116. Article 4.2a and b of the FCCC (see note 7, above). The language is referred to as “impenetrable treaty language” by Sands (see Sands, P., 1992. “The United Nations Framework Convention on Climate Change.” *Review of European Community and International Environmental Law* 1(3): 273) and as “two highly ambiguous subparagraphs” by Bodansky (see Bodansky, D., 1993. “The United Nations Framework Convention on Climate Change: A Commentary.” *Yale Journal of International Law* 17: 515).
117. See discussion on joint implementation.
118. Sand, P. H., 1996. “Institution Building to Assist Compliance with International Environmental Law: Perspectives.” *Heidelberg Journal of International Law* 56(3): 776.
119. *British Yearbook of International Law* 28: 1, cited in Dixon, M. and McCorquodale, R., *Cases and Materials* (see note 100, above), 767.
120. Franck explains that some researchers, like Weber, define legitimacy in terms of the fairness of the process in which the law is developed. Others, like Habermas, see legitimacy in terms of complex procedural and substantive terms, in that they also consider whether the rule/law developed has taken into account all objective and attitudinal data; they thus distinguish legitimacy from rules springing from forms of domination that are accepted without reason by the population. Such rules are unstable in themselves. Still other neo-Marxist researchers argue that for a system to be valid, it must be defensible in terms of equality, fairness, justice, and freedom. Franck, T. M., *The Power of Legitimacy* (see note 114, above), 17.
121. *Ibid.*, 24.
122. *Ibid.*, 142.
123. 1979 Convention on Long-Range Transboundary Air Pollution (Geneva), 13 November 1979, in force 16 March 1983, *International Legal Materials* 18: 1442.
124. Researchers from this school argue that state practice and interpretation of international agreements indicate that there is a gradually growing acceptance of the general principles of international environmental law. See the presentation by David Freestone at the session on the Challenges that the Law of Sustainable Development Presents to Fundamental Notions of International Law, in the Conference on Contemporary Issues in International Law: A Century after the First Hague Peace Conference, held in the Hague on 21 May 1999.
125. See the presentation by Jan Klabbers at the session on the Challenges that the Law of Sustainable Development Presents to Fundamental Notions of International Law, in the Conference on Contemporary Issues in International Law: A Century after the First Hague Peace Conference, held in the Hague on 21 May 1999.
126. Sands, P., “The United Nations Framework Convention on Climate Change” (see note 116, above), 272.
127. Franck, T. M., *The Power of Legitimacy* (see note 114, above), 184.
128. Article 2(2) of the Charter of the United Nations (see note 72, above) states: “All members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.”
129. Article 26 of the Law of Treaties (see note 21, above) states: “Every treaty in force is binding upon the Parties to it and must be performed by them in good faith.”
130. See Arend, A. C., “Towards an Understanding” (see note 18, above), 298.
131. The author is indebted to Jan Klabbers for pointing this out.

132. See Gupta, J., *The Climate Change Convention* (see note 30, above), 144–145.
133. Franck, T. M., *The Power of Legitimacy* (see note 114, above), 137.
134. Sand, P. H., “Institution Building” (see note 118, above).
135. Keohane, R. O., “The Effectiveness of International Environmental Institutions” (see note 28, above), 11.
136. Rio Declaration and Agenda 21. “Report on the UN Conference on Environment and Development,” Rio de Janeiro, 3–14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (Vols. I–III).
137. This argument has been made in relation to the Global Environment Facility and joint implementation/the Clean Development Mechanism. The developing countries have argued that assistance must be provided that is in line with national priorities; hence, both these mechanisms indicate that consistency with national priorities should be a criterion for determining eligibility of projects.

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## Conclusion

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### International organizations, the evolution of international politics, and legitimacy

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*Jean-Marc Coicaud*

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The establishment of international organizations after the Second World War called upon values to be projected and institutionalized at the international level. International organizations were created to enhance and regulate the public dimension of the international realm. To achieve this, they were assigned three institutional mandates. Firstly, international organizations were to be a forum for negotiations among countries on short-term, medium-term, and long-term problems. Secondly, they were to establish norms in the various areas of multilateralism and international law falling in their respective bailiwicks. Thirdly, they were to extend assistance, whenever possible and necessary, in security, development, and other domains. The legitimacy of international organizations was sought on the basis of externalized values, the goals and mandates these values justified, and the ability of the organizations to achieve them. In the process, not only was the legitimacy of the international organizations grounded, but also the overall legitimacy of the international system itself as envisioned by the major powers.

On that account, where do things stand now? To find out, it is necessary to focus on the analytical lessons drawn from this book on the current standing of international organizations and to put these lessons in context to see what they mean for the legitimacy of the international system of which these organizations are an integral part. Some light should also be shed on where international organizations and the international system are likely to lead in the coming years.



## Assessing the legitimacy of international organizations

Three major analytical lessons can be identified in the previous chapters. First is the relative heterogeneity of identity – that is, of membership, purpose, results, and values – in international organizations. Second is the problematic coherence among international organizations, as can be seen in their relationships of compatibility, competition, and hierarchy. Third is the weak legitimacy of international organizations.

### *The relative heterogeneity of the identity of international organizations*

International organizations are the product of a targeted and systematic effort to ensure synergies of cooperation at the international level. As such, they are certainly part of the same cultural and political world – a world that can be conceived of as the age of multilateralism. From this common birth there result a number of similarities, an *air de famille*, among them. All, for instance, claim to be dedicated in one way or another, directly or indirectly, to greater global economic prosperity and security. All also claim to be committed to arriving at decisions and implementing policies through international negotiation. This is why we tend to speak of them in generic terms, as if they were of one kind. However, international organizations are not all alike. They have different identities, and specifically, their membership, purpose, results, and values are rather heterogeneous.

To start with, the nature of international organizations varies with their type of membership. There is quite a difference, for example, between the United Nations, universal in its membership and offering equal voting power to every member, and the IMF and World Bank, also universal in their membership but basing the voting power of their members on national wealth. Although the United Nations itself is not immune to an unequal distribution of power,<sup>1</sup> any unevenness in access to representation is not institutionally entrenched and sanctified in principle, the way it is with the IMF and World Bank.

From disparities in the nature of membership may follow differences of purpose. The tasks and mandates assigned to international organizations reflect, in part, their constituency, their concerns, and their powers, and the ways they are expressed internally and projected externally. Nonetheless, the variety of purpose mainly amounts to the simple fact that international organizations have different areas of activity and that each performs its activities at its own level of expertise. As such, some international organizations may have more narrow operational purposes than others.

The purpose of an international organization does not fail to affect its results, the way these results are perceived, and thus, at times, its credi-

bility. It is, for example, rather easy to get results when the mandate is focused, technical, and quantifiable. As a consequence, it is feasible for an institution with such a mandate to win acclaim and support. On the other hand, when the purpose is global, unspecialized, and long-term, the task is more complex. Conveying a sense of tangible success and carving a positive image for the organization become real challenges.

The diversity of values among international organizations is another element to be accounted for. The democratic culture at the international level is not entirely homogeneous in the values it projects. Debates are always taking place on the best values to use as guidelines and ideals, and on the best policies to be implemented. It is difficult for international organizations, as an outgrowth of the democratic culture and the disagreements inhabiting it, not to echo and position themselves along the lines of these debates, at least in part. Hence, a certain amount of value plurality exists among international organizations, and even within them. For instance, it would be hard not to see the gap between the views of the IMF and those of the UNDP on economic growth and development. Similarly, beyond a consensus *de façade*, there is at the moment little agreement within the World Bank concerning the values and policies to be emphasized.

### *A problematic sense of coherence*

The problematic coherence that characterizes the relationships among international organizations is another analytical lesson. It boils down to the fact that international organizations relate to one another in terms of both compatibility and competition. From the juxtaposition of these two types of relations follows a third: hierarchy. The sense of hierarchy tends to generate winners and losers, although their rankings can be volatile.

The relations of compatibility among international organizations are designed to converge on the goal of enhancing international cooperation for the production of public goods. These relations may be found at three levels. Compatibility is, firstly, a product of the principles of multilateralism, and of the norms, standards, and rules derived from them. These general, fundamental principles and the norms, standards, and rules derived from them are meant to be consonant and mutually reinforcing. They delineate a framework of deliberations and actions which are recognized as valid. International organizations participate in this framework through their embedded enrolment in the multilateral network, as is manifest in the overlapping implementation of their specific mandates.

Secondly, compatibility is the expression of the necessary division of labour and distribution of work among international organizations. Since the tasks at hand cannot possibly be performed by one organization alone but require a collaborative effort, the input of organizations with

compartmentalized mandates in different areas – security, development, environment – is envisioned as complementing and leading in the same direction as international integration.

Compatibility, finally, is connected with the comparative advantage that each international organization brings to the multilateral enterprise. Calling upon the things that each organization does best and pooling the resources together is part of the picture of compatibility and synergy.

However, it would be foolish and naive to believe that compatibility is all there is to relationships among international organizations. Competition among international organizations is at least as important. To begin with, while multilateralism provides international organizations with a common normative framework, it also has to cope with the plurality of values and policy preferences that animate the democratic culture. The reverberation of this plurality of values and policy preferences accounts for the competitive character of the relationships between international organizations. The differences between the traditional views of the World Bank and those of the UNDP on economic issues can serve here as an illustration. The rift between the values and interests with which they respectively identify and that they are eager to promote helped set, at least in the past, these two institutions on the path of ideological and political competition. It is partly in this context that international organizations have to compete for funds, attention, support, and credibility. They have to try to demonstrate their worth. This is especially true in a time when public institutions – national and international – are under pressure to perform. Competition, or emulation, among organizations that claim to strive for excellence and relevance becomes a way to justify their existence.

From these relationships of compatibility and competition arise a tendency to establish a hierarchy among international organizations, which amounts to a ranking of winners and losers. However, this hierarchy is not permanently fixed. Rather, it is changeable and reversible. The likelihood of reversibility depends upon how organizations pursuing their mandate interact with the international milieu, and upon how this milieu itself evolves, sometimes partly as the result of the actions of international organizations. In this way, what was previously an asset for an organization may later become a liability.

This is well demonstrated by the recent evolution of the reputations of the IMF and World Bank. Not long ago, being politically and ideologically close to the United States and the private economic actors that constituted the driving forces of globalization augmented the positive image of these two organizations in the circles of power. But in the year 2001, the picture is different. The poor handling of the Asian financial crisis and the increasing recognition of the necessity to engineer globalization with a human face explain why the credibility of the IMF and the World Bank has been

affected and why there have been calls for adjustments of ideology and activity. The same applies to the World Trade Organization, yesterday at its peak but today under the damaging spell of the Seattle fiasco.

*The weak legitimacy of international organizations*

The relative heterogeneity and problematic coherence of international organizations illustrate their weak legitimacy. This sense of weakness arises from the criteria for the legitimacy of international organizations. It can be seen in the relative lack of convergence and consistency in values and policies, not only from one international organization to another, but also within a given international organization. This shortcoming appears to be most prevalent in international organizations dealing with global issues of peace and economic and social justice. The fact that these international organizations also tend to be characterized by a client-based culture further weakens their legitimacy, in that it takes place within the context of international organizations' derivative and secondary status *vis-à-vis* states. Finally, the rather low level of institutionalization of international organizations is the logical by-product of these factors, of their non-integrated and fragile legitimacy.

*International organizations and the criteria for legitimacy*

The legitimacy of international organizations derives originally from states. International organizations were created by states, and it was from some of the most powerful of them – the major democratic nations of the Western world, beginning with the United States – that international organizations received their mandate, the essential aspects of their normative and operational agenda. In addition, state recognition is crucial to the legitimacy of international organizations. An international organization that no state would want to join would be in no position to be legitimate or even to exist.

Nonetheless, in creating international organizations and serving as their source of legitimacy, states also established for them a second criterion of legitimacy: the obligation to go beyond the limitations of each member state. Far from envisioning their own demise, states saw in international organizations vital instruments to bring about a culture of mutually recognized values and rules, of common appeal and welfare, able to rise above states' narrow and self-interested outlook. The imperative of delivering public goods at the global level assigned by states to international organizations – each according to its mandate – emerged as the more important of the two criteria of their legitimacy. International organizations derived their social and political meaning and validity from this criterion, and it was according to their capability to fulfil it over time that their legitimacy would mainly be evaluated and judged.<sup>2</sup>

International organizations have worked hard to cope with and overcome the limitations of individual member states. From the beginning, they have attempted, through procedure and substance, to short-circuit the dividing and disrupting effects of bringing such diversity together. They have tried to sublimate them and transform them into assets, and to reach out for more international reciprocity, shared responsibility, and accountability. International organizations have not only undertaken to secure for themselves a type and level of legitimacy that can balance out the unhappy aspects of national legitimacy that arise from state shortcomings. They have also sought to complement and enhance national legitimacy by supplementing state actions whenever and wherever needed, and by contributing to the change of state identity and to its opening up to the world's new multilateral considerations.

So far, however, the end result is mixed. In spite of the accomplishments of the past 50 years,<sup>3</sup> particularly the progress realized since the early 1990s under dramatic circumstances, success has remained elusive. The inward-looking perspectives and gaps among states have not disappeared, and have never ceased to haunt international organizations and impair their legitimacy. This is shown first in the relative lack of convergence and consistency in values and policies among and within international organizations.

*Divergence and inconsistency in values and policies*

This issue is less of a concern for specialized international organizations that deal with highly technical matters.<sup>4</sup> But it is a real challenge when it comes to international organizations that have a symbolic, and thus strategic, status. Examples include the United Nations, the Bretton Woods institutions, and the United Nations Environment Programme. These organizations tackle issues such as economic growth, development, security, and the environment – issues where much is at stake, and over which there is often contention on how to address and solve them. These organizations are nonetheless expected to play a leading role in handling such problematic issues. The tendency of such organizations to lack convergence and consistency in their values and policies is, therefore, a problem.

The propensity towards a quasi-institutionally embedded, disorganized course of ideas and actions from one organization to another, or even from one policy to another within the same organization, due to disagreements over values and policies, sends the wrong message. The effects of divergence and inconsistency are not good for the credibility of international organizations. Firstly, they are unlikely to produce positive outcomes. The minimum positive results that must be rendered are coherence, congruence, and regularity. The reduction of policies to rhetoric and cosmetic actions from which no significant, concrete betterment can really be expected, and rampant policy sectionalism (including decisions and ac-

tions taken on the basis of the narrow and segmented support often generated by divergence and inconsistency<sup>5</sup>), are no substitute. In addition, divergence and inconsistency create an impression of confusion and inefficiency within and outside organizations. This undermines the worth of the organization, as perceived internally and externally, but more importantly, also diminishes the sense of overall meaning and validity of the mandate that the organization is supposed to implement.

Lamenting the lack of convergence and consistency that frequently characterizes the initiatives of international organizations does not mean ignoring or rejecting the positive character of disagreements as to what should be done to solve the issues at hand; within the limits of jurisdiction, disagreements on ideas, values, and policies are the oxygen of public institutions. Public institutions – national and international – cannot live and be legitimate without such debates. Nor does this lack of consistency mean that evolving contexts and problems cannot call for changes of value, policy, and strategy. Rather, the critique of the lack of convergence and consistency specifically points to the shortcomings of representation, participation, and decision-making procedures that give rise to such institutional pathologies in international organizations.

In international organizations that address issues of global peace and justice, the deficiencies of decision-making outputs and their disappointing effects are mostly connected with problems of representation, participation, and decision-making. This comes as no surprise, considering the strong links between the mechanisms for representation, participation, deliberation, and decision, between the substance that is debated and decided, and the implementation of the decisions. Likewise, it is no surprise when one considers the complexity of international organizations' task in coming to terms with the diversity they encompass. In this context, questionable procedures of representation and participation end up accounting for what seem to be two recurring trends: oscillation between endless deliberations and ad-hoc decisions behind closed doors by small committees and policies, possibly inhabited by ulterior motives,<sup>6</sup> and erratic realization of decisions. In other words, the weakening of legitimacy arising from the negative consequences of the lack of convergence and consistency is, itself, largely the product of the legitimacy flaw contained in debatable representation, participation, and decision-making mechanisms.

#### *International organizations and clientelism*

The client-based culture that contributes to giving international organizations their generalist mandates echoes and dramatically illustrates this point. To be sure, international organizations receive critical support and cooperation from member states in line with their multilateral mission. There are, for instance, countries committed to multilateralism on a struc-

tural basis, as shown by the cases of the Nordic countries and Canada. Major democratic powers are also endorsing multilateral imperatives to a certain extent; otherwise, no progress would have been made in multilateral matters in the past decades. But by and large, in one way or another, international organizations with generalist mandates have not been able to establish a strong constituency, a widely and deeply institutionally embedded base of constituents and partners dedicated, first and foremost, to the unique dimensions of their task. Rather, they have mainly found clients for themselves. The bickering apt to be engendered by the allocation of high- or even medium-ranking positions is one among many of the mundane examples of clientelism in these institutions. Another, probably more crucial, example is the impact of the various modalities of organizational membership. The selective veto powers have made of the IMF, the World Bank, and the UN Security Council a *chasse gardée*, a nearly proprietary territory of the most developed and powerful nations, one that all too often caters primarily to their needs. On the other hand, the one-seat-one-voice policy has allowed the General Assembly to become one of the favoured playgrounds and instruments of the developing countries.

In the process, which is all the more damaging considering the centrality and visibility of these institutions in the UN system, it is the inclusive and universal qualities of their message that tend to be lost. Instead of ensuring the universalization and conjunction of particular interests, the clientelist inclination contributes to the particularization of universal interests. In undermining the claim to universalism of generalist international organizations, this inclination undermines a crucial piece of their legitimacy. To concede to this logic represents defeat.

Furthermore, this is a failure that is likely to generate further normative, political, and institutional disenchantment and unravelling. It is difficult to reverse, since it has a penchant for feeding on itself. A clientele, by definition, is not really concerned with integration and inclusiveness, with possible benefits attached to long-term investments involving the commitment to the public good. Rather, its prime objective tends to be the fulfilment of its exclusive and immediate interests. As such, clientelism springs partly from the incapability of international organizations to convey and secure trust in their power to deliver the goods that they are mandated to deliver, to give enough assurance to buy patience and borrow time. Confronted with the uncertainty of the future, opting for a client status and focusing on the pursuit of short-run gains appears to be the safest bet. To invert this downfall logic, international organizations may sometimes seek additional support, which can ideally be used as leverage in pursuing the mandate. This, however, frequently triggers mounting clientelist demands. New supporters exact their price while old clients raise the stakes. As a result, most of the time, the salvation attempt entrenches more than ever

the particularization and segmentation of interests, and increases the difficulty of breaking this vicious cycle.<sup>7</sup>

The inability to project decisively and convincingly a sense of the universalization and transcendence of particular interests accounts for the fragmented reputation of generalist international organizations. Except in radical circles with various political affiliations, very few critics are so harsh as to advocate the dissolution of such international organizations. Most people recognize the need for them to exist. Nonetheless, the endorsement often does not go much beyond that, and the disjointed perception of such organizations, varying with the satisfaction and dissatisfaction they bring to their clients, is rather unsettling. An organization that fits the views and interests of developed countries is likely to be seen positively by them, and runs the risk of being badly rated and perceived as a foe by developing countries, and *vice versa*.

Such adversarial images based on segmented vested interests are hardly a vote of confidence. How could they be, considering that the more an organization is associated with initiatives perceived as favouring one clientele over another, the more the legitimacy of its policies is under stress, and the more its legitimacy as an institution is questioned and weakened? The worst happens when, in spite of and because of the clientelist culture, no member state really recognizes itself in and identifies with the organization and its overall multilateral mission.

#### *Low level of institutionalization*

The custom-tailored aspects of international organizations are not peculiar to them. States and national governments themselves face the challenge of having to universalize particular interests. Even when functioning properly – that is, when integrated and producing public goods reasonably well – they never succeed completely in this enterprise. Their decisions and actions are seldom able to generate full qualitative consent. They, too, have clients and detractors in their national realm. However, due to the derivative status of international organizations *vis-à-vis* states, the tendency to custom-make policies to client interests becomes a central impediment to their legitimacy. Instead of placing multilateral qualities, on which their legitimacy primarily depends, at their core, this tendency leaves such qualities at their periphery. Hence the low level of multilateral institutionalization of international organizations.

The lack of proportionality between international organizations' charters and the means at their disposal to accomplish the mandates and goals specified in these charters provides a good illustration of the low level of institutionalization. Of course, charters and the mandates and objectives they dictate have rhetorical, inspirational, and mission-establishing functions that exceed any plans that they should ever be entirely realized. This



is especially true for the wide mandate of international organizations such as the United Nations (global security and prosperity) and the World Bank (eradication of poverty), much as it is for those delineated by the constitutions, declarations of rights, and principles on which most modern nations are based. Moreover, the mandate of an international organization does not necessarily imply that it falls exclusively to that organization to achieve the designated goals. Their implementation is part of a systematic effort in which states, developed and developing countries, corporations, and individuals have a role to play. Considering this role, some argue that the responsibility of international organizations is mainly to occupy the interstices between the contributions of these other actors. Others hold that the disparity between the budgets allocated to international organizations<sup>8</sup> and the need to rationalize costs speaks in favour of a more balanced view on the institutionalization of international organizations.

No matter how sensible these arguments are, it remains the case that if the charters, mandates, and goals of international institutions are really going to be taken seriously, the means provided to fulfil them need to be adequate, even if in a minimally reasonable way. There is a threshold under which the lack of resources prevents any effort from being successful, as demonstrated by the case of peacekeeping operations in the first half of the 1990s. Permanent Members of the Security Council – under the on-and-off pressure of France, the United Kingdom, and the United States – asked the UN Secretariat to launch, in a very short period of time, more peacekeeping operations than ever before. They also requested the establishment of operations of a complexity previously unheard of. This necessitated massive financial, logistical, and military assistance. Yet these members fell short of offering or generating the requisite level of planned support. Troops arrived late and in smaller numbers than envisioned. The same applied to logistical support. As for financial assistance, the United Nations had to borrow from its regular budget to ensure the tentative implementation of peacekeeping operations. The combination of mixed results and dramatic failures of the peacekeeping operations of the period were the logical outcomes of limited backing by member states. Although this restricted support took place in the midst of exceptional circumstances, it was certainly not unusual in itself, for it largely echoed the almost institutionalized hand-to-mouth policies and practices to which the United Nations has had to resort for quite some time.

In the end, the low level of institutionalization that characterizes international organizations is reflected in the fact that, rather than being global institutions with both worldwide integration of the institution proper and effective operational reach, they tend to be headquarters organizations. In this context, the head is likely to be remote from the rest of the organization and its activities on the ground. At times, the two hardly recognize

each other as parts of the same entity. As internal deficiencies usually result in poor power projection, this situation largely accounts for the inadequate cohesion of decision-making processes and the erratic implementation of operations in the field.<sup>9</sup> As a consequence, what international institutions have built so far is less a thick multi-directional web or matrix than a thin network with a relatively meagre normative, operational, and political grip on, or “pull power”<sup>10</sup> over, developed and developing countries.<sup>11</sup>

Do member states, particularly the most powerful ones, feel compelled to engage internationally to satisfy a sense of solidarity and responsibility beyond their borders, while never really expecting or seeking significant, actual results or improvements? The answer is uncertain, especially since the shortage of resources from which some international organizations suffer appears mainly to be rooted in the conditional character of states’ political commitment to multilateral initiatives. If this is so, the relatively low level of institutionalization of international organizations, and of the international integration and socialization<sup>12</sup> that go with institutionalization, must be explained in connection with the various sources and modalities of legitimacy that inhabit the international system and the dilemmas of action they create. Touching upon this point will help to put in perspective the weakness of the legitimacy of international organizations.

### The international system and international organizations in search of legitimacy

The legitimacy of international organizations – the substance and procedures of which legitimacy is comprised, and the evolution of its successes and shortcomings – has to be understood in the context of the international system. This implies, firstly, the need to examine how the components and factors at work at the international level help to define and structure the international system in the midst of three major characteristics of international life: plurality, historicity, and an unequal distribution of power. In addition, this idea makes it necessary to analyse the way in which international organizations, in helping to generate a sense of international integration, are meant to take into account the components, factors, and major characteristics of the international system, and the way in which, in the process, their efforts at socialization incorporate, project, and contribute to the transformation of the diverse orders and disorders that are part of the international system. The extent to which and the limits within which international organizations achieve their socializing goal serve, finally, as an indicator not only of their level of legitimacy, but also of the state of legitimacy of the international system as a whole.

*Plurality, historicity, and the unequal distribution of power in international politics*

Plurality, historicity, and the unequal distribution of international power are three key factors with which international life must cope. The dimension of plurality can be seen in the various forces active on the international plane. The sense of historicity is the key to evolution of international plurality. The unequal distribution of international power is largely the product of international plurality historically unfolding and eventually creating hierarchies. A grasp of the interplay among these three characteristics and the other components and factors of international life certainly puts us on the path of elucidating the extent and limits of the contribution of international organizations to the socialization of the international system.

*The many faces of international plurality*

The plurality that is part of international life can be arranged in four main types or categories. (Although these categories obscure the incongruities of the real situations grouped under them, they are helpful in achieving understanding of international plurality.) In one way or another, these categories and the reality they envelop are connected.

First is the plurality of types of actors involved at the international level. These types of actors include states, international organizations, regional organizations, non-governmental organizations, corporations, individuals – increasingly important on the international stage – media, and others.<sup>13</sup>

Second is the plurality of types of activities of such actors. Each type of actor having a relatively unique perspective on the world, the goals, modalities, and results of its actions differ from those of other categories of actors. The state's involvement in international affairs – the purposes, levels, domains, and outcomes of its intervention – tends, for instance, to be quite different from that of corporations. Similarly, the engagement of individuals on the international plane is generally, in its diverse aspects, unlike that of institutional collective actors.

The pluralities of types of actors and activities point to a third plurality: the plurality of types of identities. Any type of actor or activity is the product of and a contributor to the moulding of a particular identity, with its own history, values, culture, narrative, interests, motivations, and aims. From one category of actor to another, from one category of activity to another, the properties of identity vary. For example, the identity of the state differs substantially from that of a non-governmental organization. The property of identity also changes within each type of actor and its activities. Take, for instance, the category of state actors. There are demo-

cratic and non-democratic states, Western and non-Western states, states governing developed countries and those governing developing countries. Each of these versions of the state has a relatively unique identity. The repertoire of activities that it generates is also relatively singular. Moreover, the plurality of types of identities that inhabit international life does not only exist among the categories of actors, activities, and identities.<sup>14</sup> It is no longer enough to describe international relations as comprised of an ensemble of self-contained, unitary, homogeneous, and unidirectional entities. A plurality of types of identities also exists inside the elements at work at the international level.<sup>15</sup> A state is composed of several identities, as an individual is made of various selves. Two historical and systemic trends largely account for this plurality of internal identities: social interdependence and fluidity.<sup>16</sup> While influential on the international plane, these two trends are not limited to it. They would not be a force in international life if they were not present in the many strategic aspects of the various levels – national, international, and other – of social reality.

There is, firstly, the growing social interdependence<sup>17</sup> and interconnectedness among actors, activities, and identities.<sup>18</sup> Now more than ever, no one can exist and nothing can be done in a vacuum, without being affected by and affecting its environment. In the context of international interdependence, embedded actors and activities in a network of several layers are meant to have or embody more than one identity, to follow more than one course of action conjointly or successively.<sup>19</sup> The number, content, and modalities of incarnations and courses of action, and their more or less strategic importance in establishing an overall identity, depend on the depth of their involvement in interdependence.

Social fluidity is another factor enhancing the plurality of identities within types of actors, activities, and identities. Once the belief that social reality is the way it has always been and should be has been uprooted, once the spell of necessity has been removed, the concept that social reality is unitary, permanent, and impermeable to human intervention is also dislodged. The awareness of the largely constructed qualities of the various dimensions of international, national, and individual social life – “constructed” because they are deliberated and decided upon – creates an openness to the prospect of imagining and manufacturing change, alternatives, and plurality. It invites the exploration of new possibilities and new life-paths, the experience of which enhances, among other things, a plurality of internal identities – for instance, a plurality of selves within one self. The recent development of multicultural and multiple citizenship – both a national and an international affair – is an illustration of this phenomenon.<sup>20</sup> In this case, multicultural and multiple citizens consist of several affiliations and loyalties, of the various identity elements they carry.

Behind social fluidity and the flourishing of a plurality of internal identities that it makes possible is the recognition of their valid right to exist. From this proceeds the possibility for them to develop through the positive role of democratic norms of social regulation of change and the associated philosophy of rights.<sup>21</sup> In this context, norms fulfil two functions. They permit and protect freedom of choice, as well as the individual and social flexibility and plasticity that go with it. Yet they also ensure that this freedom, flexibility, and plasticity evolve in an inclusive manner, through a dynamic of rights and duties, a sense of tolerance and respect – self-respect and respect toward others – so that the predictability they organize is geared towards reciprocity and socialization. Incidentally, the dimension of reciprocity related to social fluidity echoes the mutual accommodation of rights and duties and the drive to cooperation associated with the principle of interdependence. Thus, the web of ethical concerns that social interdependence and fluidity represents and helps to create shows how the two trends are complementary and mutually reinforcing.

To be sure, these trends generate serious challenges. How far can a plurality of internal identities go? Where must it stop so that it can still form a recognizable, centred identity? How does a plurality of internal identities – in an actor, for example – affect decision-making and implementation processes? Does the openness that it allows compensate adequately for the correlative dangers of lack of coherence, follow-through, and commitment? How can the convergence and reconciliation of the plurality of identities be ensured? These challenges, which lie at the core of contemporary culture in general, are also those that the mandates of international organizations make it imperative for them to confront.

Finally, on top of the plurality of types of actors, activities, and identities, there is a fourth type of plurality that participates in the shaping of international life. It is the plurality of categories of relations among and within actors, activities, and identities. Three major types of relations encountered earlier in this book come to mind: compatibility, competition, and hierarchy. These types of relations can take place separately – for instance, relations of compatibility or relations of competition among actors. They can also coexist, as long as they are not in a strategically mutually exclusive situation: two actors can have activities that are both in competition and compatible, as shown by the nascent relations among state actors within the European Community. Compatibility has the tendency to occupy centre stage when there is a common interest at stake or added value to be achieved through complementary efforts and division of labour. The intensity of competition varies with the eagerness to attain goals that cannot be shared. A sense of affinity that brings rivals closer is less likely to diminish competition than it is, ultimately, to modulate the modalities and

outcomes of competition, permitting the actors to avoid deadly, brutal confrontation in favour of some sort of accommodation. Hierarchy tends to result from the way in which competition and compatibility are handled and sustained over time.

*International plurality in its historicity*

The plurality of types of actors, activities, identities, and relations, and the specific reality they envelop, unfolds in the historical dimension. As such, this plurality changes over time. The actors, activities, identities, and relations currently at work in the international system are rather different from those that inhabited international relations three hundred years ago. While they differ from the past, they are likewise destined to be different from those present on the international stage a century from now. Nor are the changes that actors, activities, identities, and relations undergo the only measure of their embedded historicity. In addition, there is the fact that they have both a passive and an active status *vis-à-vis* the process of transformation.

As products of history, actors, activities, identities, and relations are passive. While at the receiving end of historical evolution, they try to cope with it and adapt to it. Nevertheless, actors, activities, identities, and relations are also the engines of this very same change. Through their contribution to the production of history, they are active. This shows that the active and passive qualities of actors, activities, identities, and relations are not necessarily part of an “either/or” logic. An entity is not inevitably passive or active. The two qualities can very well coexist in the same entity. Their coexistence is rather common, if not the norm, and indeed is partly due to the plurality of identities of the forces of international life. This plurality is likely to put them in a passive position in certain situations, and an active position in others.

Besides, the duality of being, the combination of active and passive qualities, is associated with cause-and-effect mechanisms. For instance, a state can be an instigator of international events and, at the same time, among those most affected by the events that it sets in motion. The unintended consequences of the First World War for the great European powers, which took the decision to unleash war and ended up being diminished by it, are one good example. The gradual marginalization of the United States in the General Assembly of the United Nations triggered by the initial American support for decolonization is another.

Finally, the extent to which actors, activities, identities and relations are passive or active, the extent to which one quality takes precedence over the other, depends on how close they are to or how much they interact with the powers that are the engines of strategic transformation. The capacity

to ensure that their activity is predominant over their passivity is, to such powers, of decisive importance for their relevance and their future. Their capacity to maintain an edge is one of the best guarantees that they have of being the beneficiaries and not the casualties of change.

*The unequal distribution of international power*

The categories of actors, activities, identities, and relations, and the specific realities they enfold, form an ensemble in which inequality is a significant feature. Among types of actors, activities, identities, and relations, there are disparities of power. Within each category, there are inequalities. There are actors more powerful than others, activities with a greater impact than others, identities more influential than others, and relations more prominent than others. These asymmetries reflect the respective impacts of the various elements at work in international politics.

The hierarchies that these asymmetries represent indicate the loci through which the international system receives a large part of the arrangement of its overall structure. They point to the existence of centres of power that are strong enough to play the role of magnets and structuring factors. It is in connection with such centres of power that the agenda and dynamics of the international system are defined and established. It is around these centres of power that the international system revolves. These centres of power can contribute to organizing international social reality in positive or negative terms, and in inclusive or exclusive and polarized terms,<sup>22</sup> as the current power of attraction and rejection of the United States shows. The overwhelming power of American international influence<sup>23</sup> means that every other actor must grapple with it.<sup>24</sup> In the process, however, it generates as much resentment and even opposition as it does support or envy. The same could be said of the Western modern identity in general and the power of diffusion that it has demonstrated and continues to demonstrate.

Because it is part of history, the configuration of the unequal distribution of power cannot be taken for granted. There is no assurance that it will stay still and continue to benefit the same forces of international life. Actors, activities, identities, relations, and the categories they belong to are, in their aspect at any given point in time, only the provisional last words of historicity. Beyond this point, they continue to evolve. In the process, they go through all kinds of transformations, likely to include alterations in positions of predominance. How actors, activities, identities, and relations handle change and evolution affects their life conditions and duration, position of influence, and eventually, the distribution of power of international politics in general.

For example, the strength and resilience acquired by an international actor, possibly because it took much consistent, creative, and sustained

effort over time to emerge and reach its mature existence, usually equates to a good chance to rank high in power. This is what is demonstrated by the history of the development of the Western nation-states, with their penchant for robustness and the internal and international authority they have achieved.<sup>25</sup> However, while the *longue durée* and stamina of die-hard actors, activities, identities, and relations may be positive factors, as elements of stability for instance, they can also be a source of pathology, an obstacle to the redistribution of power sometimes required for international dynamism or justice. This is especially the case when entities become a permanent part of the landscape despite having been in some way emptied of their envisioned function and sidelined. They can become an obstacle to a needed evolution. Their endurance can lead energies to focus mainly on ways to reform them, obscuring as such the search for alternative and imaginative solutions, or can make them a natural venue to host forces reluctant to change. This may end up wasting precious time and opportunities.

This pattern typically characterizes what happens with public institutions. Tremendous investment is necessary to bring them to life. Vested interests make them their home. Because of their central social and symbolic role, they have a convocation and rallying power that has a tendency to persist in spite of their shortcomings, and to outlive their most successful periods. These factors make it difficult to dislodge their more negative aspects or to eliminate them altogether.<sup>26</sup> This is all the more striking when comparing public institutions with corporations. For companies, where profits on the balance sheet are the bottom line and are the explicit rationale of their existence, a much higher rate of turnover is not unusual.

### *International organizations and international socialization*

International organizations are part of the plurality, historicity, and unequal distribution of power that is always at work in international life. But they are also the instruments designed to socialize these factors. Although they are not exclusively responsible for this endeavour, they occupy, through their close association with multilateralism, a key position in the enterprise of international socialization, the project of constituting an international legitimacy. Nonetheless, they can only go as far as is permitted by the different and more or less attuned legitimacies that are part of international politics. The relations of international organizations with the main principles that govern international relations, the establishment of such organizations, the orders to which they belong, and their interpretation and application, provide an excellent illustration of this state of affairs.



*Non-monopoly of international organizations vis-à-vis international socialization*

International organizations are not the exclusive vector of international socialization; that is, of a search for international order animated by a sense of justice. To argue that they would be ludicrous, and a sign of lack of intellectual and political lucidity.<sup>27</sup> It is, for example, on the basis of local commitments and investments, with the eventual support of transnational input, that modern nations grow and achieve economic, political, and social integration, allowing socialization at the national level to resonate with and benefit the international plan. In addition, whenever and wherever international organizations make a difference, they do so with the help of other actors, beginning with the state. As a creation of states, borrowing largely from the political and legal culture of the major democratic powers and unable to perform its functions without their support, the international organization shares with states the credit for participating in socialization. Moreover, the natural connection between international organizations and international regimes, and the favourable effect that this connection has on international socialization, cannot be sustained and enhanced without the lifeline of cooperation from states and even corporations. The increasing efforts to raise the awareness of the international business community concerning its responsibilities *vis-à-vis* issues of social and economic justice, and the calls for an improvement in the business community's attitude, are also an acknowledgement of its importance in this area.

All of this is an invitation to remain level-headed as to the influence of international organizations on international socialization. Nonetheless, although fairly modest and in constant need of external assistance, the contribution of international organizations to international socialization is highly significant and irreplaceable – especially since there are domains in which international organizations play a unique and critical role. This is the case when it comes to the development of international law through practice. Here, the Security Council of the United Nations has, via its debates and resolutions, an essential function. To understand the extent to which this role aids the establishment of international legitimacy, it is necessary to comprehend the way in which the role is affected by the various normative canons which structure international relations. To understand this, it is first necessary to reflect on the major principles that govern international politics, attempting to secure an international order that is as just as possible, and to consider the way in which international organizations, particularly the United Nations, relate to these principles.<sup>28</sup>

*International principles, normative determinacy, and indeterminacy*

Sovereign equality of states; self-determination of peoples; prohibition of the threat or use of force; peaceful settlement of disputes; non-intervention

in the internal or external affairs of other states; respect for human rights; international cooperation; and good faith. These are some of the major principles that serve as the fundamental and structural standards of international law and the international system. They spell out for state actors the main rules of the game of international life and, as such, describe certain ethics of international affairs. They are the minimal overall conditions for the legitimacy of the international system, both in terms of values and modalities of action. In supporting the progress of a sense of rule of law at the international level, they combine four main qualities.

Firstly, international principles are a product of history. Their recognition and establishment as principles are the result of an historical evolution that has led to a perception of these principles as key to the enterprise of socializing international relations. As part of a process of searching for criteria to monitor unfolding events and ensure international socialization, these principles have not always been present, and it is possible that they and the normative order they embody will change as time passes.

Secondly, international principles are an interpretation of international reality that combines descriptive and prescriptive dimensions. The descriptive dimension accounts for the reality of the international landscape at the time that the principles are established, including the ideals and values of this reality. For if the inspirational qualities of principles were entirely detached from reality, how could they have any significance for actors? How would actors – states, people, and others – connect with them? The prescriptive dimension participates in the ethical mapping of the international world. It draws distinctions between courses of action to abide by and courses of action to avoid, between what is commendable and what is condemnable. In doing so, it points towards what international actors should be striving for, what they should be and should do.

Thirdly, international principles, by providing axiological foundations, aid in setting the framework and the horizon of social validity and the meaning of the international system. It is largely on their basis that the normative and legal architecture of the international order is envisioned and constructed, from its most general to its most particular characteristics. Norms, standards, rules, and regulations of the various aspects of socialized international relations are associated with these principles, directly or indirectly.

Fourthly, they serve as guidelines for the deliberations, decisions, and actions of the actors involved in international politics. They show directions to be followed in order to bring about a more just international system – for example, an international system that attempts to tame the inequalities in the international distribution of power and to enhance behaviours of reciprocity.

Through these qualities, the international principles that govern international relations give a strong sense of normative determinacy to the

international system. Normative determinacy is illustrated and engineered by the paths that principles recommend and those that they reject; by the norms, standards, rules, and regulations of the international system; and by the deliberations, decisions, and actions that are triggered by those principles. This is so because normative determinacy is at work in the compatibility of content and practical prescriptions among international principles.

Although the ensemble of these principles is designed to produce a coherent international system, some principles are more compatible and convergent than others – for instance, the prohibition of the threat or use of force, the peaceful settlement of disputes, and international cooperation. These principles are clearly mutually reinforcing. The normative determinacy of the international system engendered by the international principles and their compatibility, predictability, reciprocity, and consistency outlines the legitimate conduct and responsibilities of actors at the international level. In indicating what is signified by international justice, the minimum requisite substance of a just international order, this normative determinacy provides evidence of the requirements of international legitimacy.

In addition to creating normative determinacy, international principles leave room for normative indeterminacy. This normative indeterminacy is necessary for the application of principles. The application of international principles is not a mechanical procedure, nor should it be. Principles cannot foresee the details of each situation. This is all the more true considering that social reality is relatively open and indeterminate, contingency constantly entering into its formation and development. Applying international principles therefore presupposes a process of interpretation to assess whether or not actual events correspond to the vision and arrangement of principles of international relations, and whether or not something should be done about these events to ensure socialization. The fact that international principles, along with introducing normative determinacy, have a level of indeterminacy asks for and allows interpretation, the embracing and evaluation of international reality.

*Normative indeterminacy, legitimacies, and international legitimacy*

The normative indeterminacy contained in the international principles is also a sign of uncertainty as to how the international system should prioritize among the ingredients of international justice as delineated by international principles. This kind of normative indeterminacy results when international principles constitute a normative order that, while designed and destined to be coherent, hosts and represents a relative plurality of values that is not entirely convergent. This is a manifestation of the different legitimacies inhabiting international legitimacy, as embodied and sought through international principles. What, more concretely, does this mean?

It means, to begin with, that in their search for international justice, international principles are a recognition of and an accommodation to a variety of ideal-values. This recognition and accommodation are made mandatory by the fact that these ideal-values are viewed as valid by a significant and strategic number of actors. These actors identify with the ideal-values and consider their endorsement as principles to be an indispensable element of the quest for and establishment of a workable and just international system, as well as a condition of their own integration and participation in the international system. In this context, the recognized and accommodated principles appear to be components of the systems and paradigms of legitimacy, without which the international order could not exist, nor hope to fulfil its claims to legitimacy. For example, the legitimacy of the current international system could not do without the sovereignty of states and the national legitimacy of which state sovereignty is an eminent part.<sup>29</sup> The idea that respect for human rights is essential to the democratic legitimacy dimension of the legitimacy of the international system is another illustration of this phenomenon.

The recognition and accommodation of these principles is of crucial importance for the inclusiveness of the international system, and for the inter-subjective dialogue among its actors and the interactive relations with history that its socializing qualities aim to express, defend, and promote. The problem is that the normative indeterminacy they introduce is not necessarily coherent. The necessary recognition of one principle, the value-substance it carries, its interpretation, and the application to which it opens a path, may clash with the substance, interpretation, and application of another or several other principles whose recognition is equally decisive. Consequently, while the legitimacy of the international system makes it a requirement and an asset for the different principles to be included, doing so also introduces possible discrepancies. Take, for instance, the issue of non-intervention in the internal affairs of other states and that of respect for human rights. These are both values about which actors feel strongly. Yet they are apt to be at odds with one another, and thus in competition. Their application may entail the choice of one over the other, which is prone to generate difficulties and dilemmas, if not deadlocks.

The contentious interpretations of a principle by actors are another example. Conflicting interpretations affect some of the most critical international principles, such as sovereignty. In the debates of the 1990s concerning humanitarian interventions, two conceptual interpretations of the principle of sovereignty found themselves in opposition. On the one hand, some advocated a territorial understanding of sovereignty, basically associated with the view that nations are independent realms within which national political institutions are entitled to exercise almost unlimited and unchallenged power. Here, the autonomy of the state *vis-à-vis* the inter-

national plan is conceived of as largely non-negotiable. On the other hand, others put forward an interpretation of sovereignty that emphasized its democratic dimension, insisting on the significance of the autonomy of the individual and their human rights as a starting point.<sup>30</sup> The former tends to be favoured by the non-Western world, and in particular by developing countries already deeply penetrated by dominant powers or fearing such penetration. The latter is the preference of the Western democratic nations. However, these nations, especially the most powerful among them, tend to rein in their support for democratic sovereignty whenever its effects infringe upon their own autonomy of decision-making, as is specifically shown by the reservations of the United States regarding an international criminal court. This does not make things any easier.

The relations among the international principles and their possible, competing interpretations vary with circumstances, relations of force and, from a general point of view, the evolution of the international political culture. These relations can be calm and uneventful – this happens when international reality is mostly stable (when, for example, international society has settled for one principle or one interpretation over others, either because it is imposed by the equilibrium of power relations at the international level, as happened to a certain extent during the Cold War, or because a normative consensus emerges). But at other times, these relations can be tense, as when international relations are in a state of flux and go through the normative uncertainty that accompanies such transitions. In the end, the odd relations that characterize international principles and some of their interpretations are fluid. This fluidity displays how ambivalent and oscillating the understanding of the substance of international justice is, and is an indication of the mixed identity of the contemporary international system and its influence on decision makers.

*International organizations and international justice – the quandary of interpretation and application*

This is what international organizations are faced with. Their quest for legitimacy – that is, their contribution to the establishment of a sense of international legitimacy – is caught in the difficulties of interpreting and applying international principles. This situation is not unique. As a matter of fact, it is one illustration among many of the modalities of the search for justice in contemporary democratic culture. The more historicity and plurality are recognized as part of the human condition, the more they are viewed as positive values at the source of rights, and the more the study and realization of justice moves away from the idea that practical truth, the good, is singular and eternal. Evaluating what is right, what is good in the midst of change and plurality, can only complicate the inquiry into and implementation of justice. This renders the process more difficult at

the individual level, particularly since the power and responsibility to distinguish right from wrong increasingly falls to each individual, in that individual's life as well as in their social interactions.<sup>31</sup> This makes the process harder at the national level as well, for political institutions are less and less in a position to endorse and enforce one conception of the good, and are more and more led to acknowledge and organize pluralism in a dynamic manner.

This problem is even greater at the international level. Firstly, the scope of diversity to be coped with and reconciled is larger than it is at the individual and national levels. The cultural, economic, and social plurality involved tends to be wider and deeper. To address these issues is therefore no easy task, as shown by the dilemmas attached to assessing the right balance between universality and international diversity, and as attested to further by the complexity of arriving at a "consensus on the difference."

In addition, identification and the extension of responsibility and solidarity at the international level are problematic. Identification, extension of responsibility, and solidarity work in a concentric fashion. The further away from the centre they try to reach out, the more dilute they become. Humanity beyond borders is the broadest of these circles, but it does not generate the kind of commitment that the national realm can, for instance, produce in developed countries that are economically, socially, and politically integrated. As humanity beyond borders is the bailiwick of international organizations, this complicates their pledge to international justice. They are forced to deal with the quandaries raised by the democratic ideals and their diffusion – bridging the individual, national, and international dimensions, and probably destined to ultimately benefit the individual – and with their taming by the persistence of the "we" versus "them" divide.<sup>32</sup>

If the choices and preferences of international organizations, expressed through international principles and their interpretations and implementation, are to be fair and legitimate, they have to be as inclusive as possible. They share this imperative with the establishment and evolution of the international principles and the normative order that they engender. This is a condition that they must fulfil to avoid being labelled instruments of Western ideology.

Inclusiveness does not, however, imply bringing in and underwriting every claim. Inclusiveness presupposes a selection. This entails taking up three challenges in particular. To begin with, it posits a capacity to prioritize among potential choices and preferences. This prioritization does not have to be absolute, to the degree that one choice would devoid its alternatives of all validity forever. The choice can be temporary, leaving open the option of exploring other venues in the future. Nevertheless, the

need for coherence calls for choices that are relatively consistent over time. As a result, steadiness of direction is critical.

Secondly, expediency should enter only minimally into the prioritization and choices encompassed by selective inclusiveness. Prioritization and choice have to be earnest. They require an ability to discern and address the strategic questions of the time. This implies a willingness on the part of international organizations to tackle issues that may be remote from or opposed to the views and interests of major powers. This demands that problems be taken up, continuous ignorance and irresolution of which would appear to be a structural fault of international organizations, undermining the normative justification for their existence. The heart, the moral and political strength, that is essential to follow this route, already quite rare in the national context, is even scarcer at the international level. From words to actions, there is a gap that all too often remains unfilled in international organizations.

Thirdly, the hard choices attached to the problematic cohesion of international principles and the multi-layered reality to be addressed are complicated by the fact that the deliberation and decision-making bodies of international organizations are dealing with a moving target, so to speak. The idea of what is right tends to shift with the development of international politics. Consequently, international organizations, in the “arc of interpretation” that they lean on to deliberate, decide, and act – connecting principles, unfolding events, and the various parameters of the situations in which they are implicated<sup>33</sup> – have to consider the historical plasticity of the environment. Today’s context could be different from tomorrow’s, perhaps even because of the deliberations, decisions, and actions of international organizations, and this must be taken into account. At stake is not solely the attempt to solve the crises on the ground. Also at stake is the impact that these deliberations, decisions, and actions could have on the future of international organizations and their legitimacy, and on the evolution of the values and practices that shape the international system and its legitimacy.

*International organizations, international legitimacy, and transition:  
Old orders, disorders, new orders*

The roller-coaster of the past ten years for international organizations is an illustration of how difficult it is to compute and successfully manage the elements of their task. To be sure, this period has been a special one; in time, it may seem that it was the first step of an incremental but significant transition in the overall equilibrium of international relations. For this reason it does not represent *per se* a mainstream sample. However, beyond its specific characteristics, the period provides some sense of the type of circumstances that international organizations, the United Nations

in particular, tend to face, even in calmer times, and how they react to such conditions. It is also a foretaste of the kind of predicaments that they will presumably continue to struggle with in the coming years and of how they are likely to handle them.

*In the eye of the storm*

The end of the Cold War did not bring about the end of history, nor could it have done so.<sup>34</sup> Rather, the reverse happened: an acceleration of history. The previous points and areas of contention and confrontation have been replaced by others that were once present but kept submerged on both sides of the East-West divide, and by new ones fuelled by the redistribution of power. International organizations have had to work in this exacerbated international environment of transition.

For them it has meant a succession of changes of fortune. In the immediate aftermath of the Cold War, international organizations, and especially the United Nations, finally seemed capable of redeeming the promise invested in them forty-five years earlier. In the late 1990s, though, the picture was quite different. A number of international organizations had been able to retain or reinforce their roles, and new organizations had been created. On the other hand, the United Nations and other organizations with a “progressive” rather than market-oriented or technical agenda looked out of vogue. Now, in the early 2000s, the situation has changed again. While the United Nations appears to be less under attack than a few years ago,<sup>35</sup> the international organizations that were the stars of the second half of the 1990s – the IMF, the World Bank, the WTO – are being contested, asked to adopt a reflective mood and to evolve.

This roller-coaster ride has to be seen in connection with the fact that international organizations have been, in the past ten years, both trend-setters – leading the pack – and trend-followers – running after events. Sometimes they successfully assume these functions, sometimes not. The high fluidity and volatility of the period, the possibilities and dangers, and the exploration of the unknown, have made it difficult for international organizations to shy away from unfolding events and developments. Nonetheless, deciphering firmly what course to follow proved to be an overwhelming exercise. Hence their tendency to oscillate between “wait and see” and activist attitudes, between conservative and progressive management of crises, at the same time abiding by the old normative order and encouraging a new one to arise. This wavering only added to the period’s impression of transition, disorder, and messiness.

*The socialization of international reality and the transformation of international legitimacy*

In the current period, the problematic coherence of the normative framework of the international system is a factor. The international system con-



tinues to operate as a mixture. It is likely to stay that way. International politics will probably never be “pure,” made up of a single identity, no matter how progressive this identity could be. While advancing towards socialization, international reality will continue to be inhabited by tensions. Nowhere better than in the approach displayed by international organizations in the past decade can the combination of the normative identity of international politics and its tentative steps in favour of greater socialization be observed. International organizations have conducted several policies at the same time – policies corresponding to the various identities and legitimacies at work in the international system. Of course, depending on circumstances, emphasis has been put on some principles and not others. But, by and large, a balance has been sustained. The simultaneous pursuit of different policies – for instance, defending human rights while upholding national sovereignty – showed that although there was a commitment to international socialization, it was not going to be fulfilled at the total expense of the national realm. As such, international organizations have echoed resistance and demands for change. Their participation in what can be interpreted as a gradual improvement in the socialization of international life has therefore taken place hesitantly and half-willingly.

The concurrent use of the principles internalized by the international system as its axiological foundation and horizon introduced a normative and political diversity of conservative and progressive elements. Some of the most important resolutions adopted by the UN Security Council in the 1990s – especially between 1992 and 1995 – and the way they were implemented provide a good example of this situation. The imprecision that recurrently characterized them was not an accident. It was a manifestation of the plurality of identities and motivations present in international reality, of the dilemmas they cause for international organizations, and the way in which the betterment of socialization is achieved in the midst of indecision and reluctance. The vagueness of these resolutions was one of the modalities used to address the divergent positions among the Permanent Members of the Security Council. It permitted the Security Council to circumvent disagreements.<sup>36</sup> In addition, it allowed the Security Council to recognize the need to act while keeping its options open. It was boldness in disguise, as the Security Council was able to tackle issues and recommend initiatives that had never been suggested before, to the point that some argued that the Council was exceeding its legitimate constitutional powers.

It is at the projection level, in the actions conducted in areas of conflict, that the ambiguities in the resolutions of the Security Council appeared in full light, often unveiling the half-hearted engagement of the powers that were voting for them. The mixed results were not, however, without positive effects, even when the outcomes on the ground were clearly con-

demnable in their failures. Take, for instance, the case of human rights violations in the Balkans and Rwanda. The ambiguities of the international community, due to the various legitimacies it serves, did not stop the human rights violations from happening. Nevertheless, partly out of a sense of guilt, partly out of the desire to prosecute the authors of crimes, ad-hoc international criminal tribunals were set up. This helped speed the expansion of international criminal law, as indicated by the subsequent endorsement of the permanent international criminal court and the launch of a series of international indictments against individuals responsible for human rights violations in other countries and contexts. It is obviously tragic that crimes had to be committed for these new developments to occur, yet some progress was made. In the process, international legitimacy itself underwent a positive change.

### Towards international constitutionalism

International organizations are not going to disappear. Although constantly criticized from almost every corner, they are much too needed to vanish from the scene of international politics. The generic criticisms of them are an illustration of this need. If they were of no importance, international organizations would be synonymous with apathy rather than with criticism and heated debates. Nonetheless, though there are reasons that international organizations will conceivably remain significant players in the future, this should not be an invitation to complacency. For to secure and enhance their relevance, international organizations will have to take a number of challenges seriously.

#### *The need for international organizations in the future*

There are five main elements that speak in favour of the importance of international organizations for the future of international politics. Increased interdependence, calling for greater coordination, is the first reason. International organizations are natural candidates to satisfy this need for coordination, negotiation, and institutionalization of international interdependence. A second reason is that far from diminishing, inequalities at the international level are likely to increase if current international economic trends are left to themselves. It is more than doubtful that international organizations alone can reverse the trend, especially if one considers that the “Washington consensus” and the international organizations associated with it – the IMF, the World Bank, and the WTO – have tended to go along with international economic inequalities rather than fight them. However, provided that corrections are implemented,

international organizations could help to alter the inequality trend; for example, by ensuring that social concerns stay on the international agenda and by exercising pressure to have them really addressed. This would help to avoid further international polarization. Thirdly, the growing role and power of private actors, of forces of globalization in international economics and politics, as illustrated by the calls for liberalization and privatization, does not eliminate the requirement for political accountability. It only makes it more necessary. The imperative of political accountability presupposes the ability to identify the sources of power and their modalities and effects in terms of socialization. How else would it be possible to assess, control, and challenge power; how else would it be possible to evaluate its legitimacy? It is difficult for private actors to fulfil this need, namely because they are not mandated to do so. On the other hand, it suits the outlook and responsibilities of public institutions, both international and national. From this point of view, political accountability renders international organizations quite irreplaceable. Fourthly, without international organizations, the evolving formulation of principles and norms of international integration, of an international rule of law geared towards better socialization, could become stalled. Even in their shortcomings, international organizations host, make sense of, and intensify norms of public discourse on international legitimacy. They are a “work in progress” that is essential for debating and negotiating improvements of identification, participation, representation, projection of solidarity, and responsibility at the international level. Fifthly, due to the increasingly multilateral character of international politics, there is an exigency for non-national approaches to international and global issues. International organizations, directly and indirectly, are critical for the development of such non-national approaches, intellectually, normatively, and politically.

### *The challenge of international constitutionalism*

For all these reasons, international organizations are key to the gradual establishment of international constitutionalism. Constitutionalism is a theory whose central focus at the international and national level is the relationship between the source of authority of political power and the practical control of its exercise (which is, incidentally, one possible definition of the social-philosophical problem of legitimacy).<sup>37</sup> Nevertheless, the need for international organizations is not a guarantee that their existence and legitimacy will automatically be secure. For them to be actors of strategic importance to international constitutionalism in the making – including the limitation of unequal distribution of power (economic, political, and cultural), as well as the defence of individual rights – they must successfully take up four major challenges.

Adjusting diversity without annihilating it is the first of these challenges. This entails tackling the fact that at the international level, plurality is much deeper – in terms of cultural differences, levels of development, and aspirations – than it is at the national level. Here, the question is one of how to implement a multilateral culture without having it become a tool of Western extension and colonization. The problem also encompasses how to bring about an international order that is not, in its regulation of openness, a veiled monopolization of power. Solving this problem particularly involves looking for ways to further democratize the cultural, political, and economic hegemony of which the multilateral project is a part.<sup>38</sup> It is according to this condition that access to and circulation of power will not be opposed by multilateral arrangements themselves.

Secondly, it will be necessary for international organizations to address the weak sense of international community that exists. In order to overcome this weakness, stronger mechanisms of global identification, participation, representation, responsibility, and solidarity than those that exist at present will have to be imagined and implemented. However, strengthening the sense of global community must not be envisioned as the construction of a war machine against the national or even regional realms. For if the development of a legitimate international community cannot be reduced to the imposition of one cultural model, neither can it be based on the unilateral exclusion or elimination of existing forms of political association. Forms of synergy and complementarity among the various layers of contemporary politics are advisable. In this context, the democratic qualities of national, regional, and international political arrangements constitute an asset, one that can be capitalized upon in negotiating and facilitating the establishment of an international common sense.

This presupposes that international organizations will revisit their relations of cooperation with the actors that are both their partners and competitors, especially states, regional arrangements, private actors, non-governmental organizations, and individuals. This is the third challenge that must be confronted. Improving the relations of collaboration with these actors is destined to be a complex task, particularly because each tends to have an agenda that does not necessarily coincide entirely with those of the others. Fine-tuning the cooperation of international organizations with these actors will therefore mean not only the adaptation of international organizations, but also an adjustment of the way in which these actors see themselves and function.

States will have to become less protective of their sovereign powers: more willing, for instance, to share power with international organizations and non-governmental organizations, and more open to claims from individuals. In addition, demonstrating institutional flexibility without adopting an attitude of emulating the economic ideology of corporations

will help. Regional arrangements, beginning with the European Community, will have to clarify the aims and modes of the operation of their multilateral strategies and relations. For example, the European Community will probably have to find a workable balance between using the European project as a tool of international competition and making it an integral part of the multilateral network. Non-governmental organizations will be required to become more aware of the imperatives of representation and delegation attached to the exercise of public responsibilities. Self-appointment does not serve as a substitute here. Corporations will have to be more oriented to public goods. As for individuals, it may be necessary to come to terms with the fact that the defence of individual rights cannot equate strictly to a culture of entitlement and, as a result, should not be accomplished at the expense of a sense of responsibility.

The fourth challenge for international organizations is handling the effects of the paradox of contemporary democratic culture. The increased sense of responsibility at the international level and the simultaneous proliferation of a culture of individual entitlement at the national level (in particular through the diffusion of the American version of democracy) that is apt to be incompatible with solidarity is, indeed, a riddle for institutions committed to international socialization. What is to be made of these two trends, and can they continue to develop in parallel? Will the evolution of contemporary international democratic culture pursue the liberal quest of entitlement, or will it follow a more republican path – in which modern democratic culture as a whole is historically and ideologically rooted – with greater sensibility to the global social and citizenship concerns that it could bring about? The future legitimacy of international organizations and international politics depends largely on the answers to these questions.

## Notes

1. See the debates on the need to reform the Security Council.
2. See de Senarclens, P., 1998. *Mondialisation, souveraineté et théories des relations internationales*. Paris: Armand Colin, 41–42.
3. These accomplishments should never be taken for granted or overlooked.
4. Highly specialized or technical international organizations – for example, the International Civil Aviation Organization – although less visible and glamorous than organizations with a wider mandate, are, in their own way, of strategic importance. International cooperation and regulation could not accomplish what they do without these organizations' contribution. They can also deal with controversial issues in a controversial manner, as the work of the International Atomic Energy Agency and the World Intellectual Property Organization shows.
5. This may happen conjointly or consecutively.

6. Incidentally, endless deliberations only encourage the development of ad-hoc decisions and policies with ulterior motives.
7. The proliferation of international institutions can partly be seen in this light. While new organs, agencies, and such can be created to address emerging issues, they are also sometimes established to service a clientele that may previously have felt frustrated by its lack of recognition in extant institutions.
8. While there are organizations in need of funds for their day-to-day activities, others have an embarrassment of riches. This disparity is an interesting indication of how the most powerful member states envision the role of international organizations and of their priorities.
9. A deficit of cohesion can also influence career paths in international organizations. In the United Nations Secretariat, for example, there is little connection or resemblance between headquarters careers and field careers. The difficulty for field employees in obtaining positions in United Nations headquarters and the quasi-instinctive reluctance of those working in headquarters to spend too much time in the field – fearing that it could mean a permanent exile from the centre – serve here as a telling illustration. In the process, the sharing of knowledge that would be permitted by systematic institutional bridges between the two professional tracks is not taking place, regardless of how badly needed it is.
10. On pull power, see Franck, T. M., 1990. *The Power of Legitimacy among Nations*. Oxford: Oxford University Press, for instance p. 204.
11. The impact of international organizations on developed countries has typically meant that the national legal framework has made room for and incorporated international norms, from which policy implementation follows in the national and international areas. This echoes the fact that a high level of economic, social, and political integration goes with compliance with the law. In developing countries, on the other hand, the concrete intervention of international organizations tends to precede normative influence. The lack of social, economic, and political integration renders legal compliance very low. It is therefore a priority to try to improve the situation by providing technical assistance, rather than by expecting great and quick positive change based on the implementation of transferred norms.
12. The term “socialization” is used to qualify the process of social integration, taking into account the imperatives of justice; that is, the importance of reciprocity and the dynamics of rights and duties among actors.
13. The set of assumptions put forward by Emmerich de Vattel – namely, that international relations simply comprise a world of states – is untenable today. See Poirier, L., 1994. *La crise des fondements*. Paris: Economica, 170–172.
14. The 1990s have shown that identity is one of the core issues of contemporary international and national politics. Compare Franck, T. M., 1999. *The Empowered Self: Law and Society in the Age of Individualism*. Oxford: Oxford University Press, 38–60.
15. See Wendt, A., 1999. *Social Theory of International Politics*. Cambridge: Cambridge University Press, 224–230. As such, the understanding of international relations is only just catching up to what has already been recognized for some time; this has happened, to a large extent, under the pressure of the changes brought about by modernity in sociology, philosophy, and psychology. See, for example, in sociology, Giddens, A., 1991. *Modernity and Self-Identity: Self and Society in the Late Modern Age*. Stanford: Stanford University Press, chapter 6. In philosophy, see Flanagan, O., 1996. *Self Expressions: Mind, Morals, and the Meaning of Life*. Oxford: Oxford University Press, 70–72.
16. The adjective “social” is understood here in a wide sense, which includes economic, political, and other processes.

17. Interdependence, in contradistinction to one-way dependence, has to be seen as part of the socialization dynamic.
18. Identity is less and less self-defined, if it has ever been. The fact that identity is established in relation to its environment contributes to the incorporation of this environment in various ways. The included externality becomes an element of the internal plurality of the identity.
19. For an illustration of the way in which an actor can play on several boards at the same time, see Evans, P. B., Jacobson, H. K., and Putnam, R. D. (eds), *Double-Edged Diplomacy: International Bargaining and Domestic Politics*. Berkeley: University of California Press. Compare, in particular, Evans, P. B., "Building an Integrative Approach to International and Domestic Politics: Reflections and Projections," and Putnam, R. D., "Diplomacy and Domestic Politics: The Logic of Two-level Games."
20. On multicultural citizenship, see Kymlicka, W., 1995. *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford: Oxford University Press, for example pp. 1–9. On multiple citizenship, see Franck, T. M., *The Empowered Self* (see note 14, above), 61–75.
21. Liberal rights and norms of social regulation can also have a negative role when, as instruments of liberalism functioning as an ideology, they are portrayed in a semblance of naturalness and as being unquestionably without better alternatives. See Unger, R. M., 1998. *Democracy Realised: The Progressive Alternative*. London: Verso, 17–18.
22. It is crucial not to perceive as exclusively positive the structuring power that such factors may have, or their results. Structuring of a situation, a personality, or a system can take place through negative factors (through traumas and stigmas, for example) and engender a pathological configuration. In this case, the modalities for the structuring process and the characteristics of the resulting structure differ from those based on positive elements. For instance, instead of being inclusive – open, welcoming, and evolving – a structuring process and its result will be exclusive – closed and compulsively repetitive.
23. The United States' foreign policy is not the only tool of American influence abroad. Very often, due to the United States' dominant global position, American domestic debates acquire international significance. For instance, debates on democracy in the United States now tend to be part of the discussions in other countries on what democracy should be locally.
24. It is one of the privileges of power to set the tone. Even if the direction is wrong, it becomes a point of reference in relation to which others have to position themselves.
25. The counter-example is provided by the imported, rapidly assembled, and badly adapted political institutions of most developing countries. The result tends to be an extremely low capacity for national socialization and an even lower power of projection at the international level; hence the fragility and high rate of more or less failed states in the developing world.
26. The endless debates on the reform of the United Nations – all the more endless in that they go nowhere – have to do with the fact that there is little agreement on what should be done. In addition, they have to be understood in the context of an organization that is not strategic enough to have its reform taken truly seriously, but still strategic enough not to be eliminated. Its evolution, when it happens, is therefore left to a *coup par coup* adjustment.
27. From a general point of view, the forces at work at the international level contribute to overall socialization as long as the difficulties and dilemmas created by the different visions of socialization they may carry are addressed and become the focus of a reconciliation enterprise.
28. The type of analysis that follows is generic. It therefore applies to other areas of international relations, provided that the characteristics specific to each area are taken into

account. Reflecting on international economic relations and on the international principles and organizations responsible for their regulation, for instance, would require two factors to be kept in mind. Firstly, the principles meant to coordinate international economic relations are themselves sources of serious contention, certainly more than in the field of international order and security. Secondly, the involvement of public actors in this domain is more contested than it is in international security. In this context, furthering the quest for a comprehensive explication of global regulation would lead to an examination of the interactions between global security or political regulation on the one hand, and global economic regulations and the changes they are undergoing on the other.

29. Sovereignty is one way to minimize the effects of the unequal distribution of international power. This is one element of the conception of law, including international law, as the art of attempting to make unequal powers equal.
30. See Allott, P., 1990. *Eunomia: New Order for a New World*. Oxford: Oxford University Press, 246–249.
31. Ethical behaviour is less and less socially engraved, and more and more a question of personal choice. It is up to individuals whether to act ethically, now more than ever. Assuming that ethics is about individual autonomy and responsibility, contemporary culture can be described as the period of ethics *par excellence*. This phenomenon has to be understood in the context of the individual empowerment process, which tends to be the trademark of the whole social arrangement and development of industrially advanced societies. It also concerns, for example, religious belief; while in traditional societies, being religious is part of the socially defined identity of each individual, religious belief is likely to be a matter of personal faith in modern societies. Nonetheless, it should be kept in mind that the extent of the individual's power and responsibility regarding ethical issues in modern societies does not negate the fact that it is still exercised within social limits, in connection with the identity of society and its conception of justice.
32. The involvement of international organizations in the quest for justice has to be analysed in relation to the growing need for reformulation of classical issues of political philosophy. While the tradition has largely been to examine questions of justice, authority, and rights in a national setting, the internationalization of societies and the socialization of the international dimension that are under way require that this thinking be adapted to the emerging political landscape. Here, much remains to be done.
33. One of these parameters can be public opinion within major democratic powers. The political and normative importance of the public opinion of Western democratic powers is enhanced by the involvement of these powers in international affairs and the influence that public opinion has on the conduct of politics in these countries. In this context, public opinion and its commitment to international solidarity is probably firmer in continental Western Europe than it is in the United States.
34. The goal of international order is not to achieve stability first and foremost, nor stability at any cost, as is frequently assumed. It is to accompany and amplify the socialization of change. Aiming for absolute stability is an illusion, and a dangerous one. It is an illusion because the nature of international relations is to be in a more or less constant state of flux, as a part and a tool of history. This state of flux may be more or less settled, but it always has change at its core. Furthermore, stability as the ultimate goal is a dangerous illusion in that it has the tendency to artificially freeze forces of change, and to impose upon them a status quo that can become, over time, less and less desirable as it is challenged more and more. Imposed stability is likely to generate uncontrolled forms of change. By contrast, the socialization of change permits change to be controlled, by leaving room for it. Moreover, the welcoming of change is part of the process of entering



upon a learning path. As such, it is one of the ways that actors have to reach and remain at the top of the distribution of power.

35. This, however, could be more a sign of indifference than of a favourable rating.
36. Nebulous wording is, for the Security Council, a classic way to arrive at a common position in spite of dissension.
37. See chapter 2 of this book.
38. Following this route does not put the burden exclusively on developed countries. It encompasses the expectation that developing countries will take on responsibilities themselves. The privileged few in the developing countries would, for instance, have to move away from the victim/dependent mentalities *vis-à-vis* the West that are frequently combined with being the co-responsible and prime local beneficiaries of the unequal development of their own countries.

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# Acronyms

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AB	Appellate Body (of the WTO)
APEC	Asia-Pacific Economic Cooperation (forum)
BCBS	Basle Committee on Banking Supervision
BIS	Bank of International Settlements
CAD	computer-aided design
CAM	computer-aided manufacturing
CGAP	Consultative Group to Assist the Poorest
CIS	Commonwealth of Independent States
CITE	Convention on International Trade in Endangered Species of Wild Flora and Fauna
CPSS	Committee on Payment and Settlement Systems
CVI	Children's Vaccine Initiative
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
FAO	Food and Agriculture Organization
FCCC	Framework Convention on Climate Change
FDI	foreign direct investment
GATT	General Agreement on Tariffs and Trade
GBF	Global Biodiversity Forum
GKO	Russian Treasury Bonds
GWP	Global Water Partnership
IAEA	International Atomic Energy Agency
IAIS	International Association of Insurance Supervisors
IASC	International Accounting Standards Committee
ICANN	Internet Corporation for Assigned Names and Numbers

ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
IFAC	International Federation of Accountants
IFIs	international financial institutions
IGO	intergovernmental organization
ILO	International Labour Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
IO	international organization
IOSCO	International Organization of Securities Commissions
IUCN	International Union for Conservation of Nature and Natural Resources
MAI	Multilateral Agreement on Investment
NIEO	new international economic order
OAU	Organization for African Unity
ODA	official development assistance
OECD	Organization for Economic Cooperation and Development
OSCE	Organization for Security and Cooperation in Europe
PCIJ	Permanent Court of International Justice
PTA	preferential trading arrangements
RBWC	Reinventing Bretton Woods Committee
SDDS	Special Data Dissemination Standard
SPS	Sanitary and Phytosanitary
TRIMs	trade-related investment measures
TRIPs	trade-related intellectual property rights
UNCHE	United Nations Conference on the Human Environment
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre on Transnational Corporations
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNICTRAL	United Nations Commission on International Trade Law
UNIKOM	United Nations Iraq-Kuwait Observer Mission
UNSCOM	United Nations Special Commission
VERs	voluntary export restraints
WEU	Western European Union
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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