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International Organizations as Law-makers



José E. Alvarez

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This book is dedicated to
the memory of my first mentor in all things,
Maria J. Alvarez

Acknowledgments

This book is the product of over a decade of teaching courses on international organizations at various law schools in the United States. For much of this period I used, as my basic classroom text, editions of Frederic L. Kirgis's *International Organizations in Their Legal Setting*, and the impact of that book, and Professor Kirgis's perceptive questions throughout his text, will be evident to readers of this book. Indeed, much here seeks to provide my answers (as well as those provided by my students over the years) to Professor Kirgis's inquiries, and I am grateful, as are all students of international organizations, for his efforts to treat this subject seriously and from a legal standpoint. I also owe debts to colleagues from Michigan and Columbia Law Schools who read and commented on portions of this book through various iterations over the years, especially Michael Doyle, Kal Raustiala, and Eric Stein. They are not, of course, responsible for remaining errors. For financial support I owe debts to the Cook research funds of Michigan Law School, which sustained me through several Ann Arbor summers, as well as the Bernard H. Kayden Faculty Research Fund at Columbia Law School. I also owe a debt of gratitude to many student research assistants over the years, all of whom presumably worked not for the ridiculously low wages offered but for the love of the subject, most recently Christos Ravanides, and finally to my administrative assistant at Columbia, Lenge Hong, who made the last-minute editing tasks almost pleasant.

Perceptive readers will see that I have reproduced substantial portions of an editorial comment published in the American Journal of International Law, "Hegemonic International Law Revisited," in Section 4.2,[1] as well as an essay, first published in 2001, on "constitutional interpretation in international organizations," as Chapter 2.[2] Some of the themes in this book were also considered in prior articles.[3]

No book—like no man—is an island and I am grateful to my spouse, Susan M. Damplo, and son, Gabriel, for tolerating many lost weekends and summers along the way.

[1] Reproduced with permission from 97 *AJIL* 873 (2003), copyright with the American Society of International Law.

[2] *See* José E. Alvarez, "Constitutional interpretation in international organizations," in Jean-Marc Coicaud and Veijo Heiskanen, eds., *The Legitimacy of International Organizations* (Tokyo, Japan: United Nations Press, 2001).

[3] *See, in particular*, José E. Alvarez, "The New Treaty Makers," XXV *Boston College Int'l & Comp. L. Rev*. 213 (2002) and "The WTO as Linkage Machine," 96 *AJIL* 146 (2002).

Preface

Seeking Organizational Insights

A UN report on climate change documents a growing consensus among atmospheric scientists that human activity both is responsible for and can help reduce climate change, helping to buttress multilateral treaty negotiations to achieve this end.

The Security Council gives Iraq one final opportunity to comply with that body's own disarmament obligations, suggesting that Iraq has materially breached those obligations and leading to subsequent U.S. claims that it has unilateral authority to use military action to topple the Hussein regime.

The International Narcotics Control Board, a UN agency, releases a report canvassing such diverse issues as the dramatic increase in the use of Ritalin to temper the behavior of children in the U.S.; documenting how illegal LSD laboratories in the U.S. are becoming major suppliers to that drug in Europe; praising tighter drug laws in India, Sri Lanka, Nepal, and Bangladesh; and suggesting weaknesses in other national laws directed at money laundering related to the drug trade.

The World Bank extends a number of loans to developing countries intended to promote an end to sex bias in education, nutrition, health, and agricultural policies but refuses to attach such gender-sensitive conditions to all its loans.

The World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO) announce a new joint initiative to help least-developed countries maximize the "benefits" of intellectual property protection.

The International Court of Justice (ICJ) issues an Advisory Opinion calling nuclear weapons the "ultimate evil" but stopping short, in its majority opinion, of finding a threat to use such weapons in self-defense to be illegal.

Restrictions in trade in alcohol, brooms, buses, cars, cement, coconut, coffee, computers, footwear, gasoline, leather, macaroni, rice, scallops, steel, tomatoes, and underwear are among the targets of some 200 challenges filed by states against each other in the WTO's dispute settlement system from 1995 through 2000.

Taiwan places an advertisement in the *New York Times* calling for parallel representation in the UN, noting that its 21 million people are "not represented" even though they are part of a vibrant multiparty democracy with a vigorous free press.

The UN Secretary-General orders an internal investigation to determine how many UN peacekeepers may have hired child prostitutes during their assignments.

The World Health Organization (WHO) convenes an international conference to hammer out an international treaty that would, among other things, impose restrictions on how cigarettes are marketed around the world.

As is suggested by these press reports, international organizations (IOs) have a pervasive impact on the promulgation and implementation of law across all the various sub-specialities of international (and some national) law, and even across

the divides that supposedly separate the worlds of "public" and "private" regulation. As the first example on climate change suggests, IOs may both identify a problem and help guide the world to a multilateral solution, such as the conclusion of a treaty. But as the second example on Iraq suggests, inter-governmental processes may also help legitimize unilateral assertions of power. While IOs are often seen as beneficent servants of the "international community," they have often responded to the realities of power, including (or especially) the demands of great powers.

Networks of treaties, rules, guidelines, and other legally significant standard-setting techniques exist among IOs and states or among these organizations, including important regimes concerning technical and financial assistance, UN peacekeeping, nuclear power safeguards, international aviation law, international trade law, international labor law, and counter-terrorism. A large portion of the rules that we have to govern nations, both those that are formally legally binding and those that are not, are now initiated, formulated, negotiated, interpreted, and often implemented through the efforts of IOs. As of 1995, of some 1,500 multilateral treaties in existence, nearly half were attributable to UN system organization, and the rate of production of new treaties undertaken within the auspices of IOs appears to be steadily increasing.[1] Many other sources of international obligation involve IOs as parties or beneficiaries, including rules relating to the interpretation of their charter instruments, their legal personality, or to the privileges and immunities enjoyed by them or persons associated with them. And an even larger body of international rules, most of it generated by these organizations, is now subject to various forms of institutionalized dispute settlement, formal and informal, creating an ever increasing body of judicial and quasi-judicial opinions in discrete areas of the law.

Although we have turned to such institutions for the making of much of today's international law, the lawyers most familiar with such rules remain in the grip of a positivistic preoccupation with an ostensibly sacrosanct doctrine of sources, now codified in article 38 of the Statute of the International Court of Justice, which originated before most modern IOs were established and which, not surprisingly, does not mention them. International lawyers wrangle endlessly over the scope and interpretation of treaties, custom, or general principles and address only secondarily the impact of global institutions created since World War II on the formation and interpretation of international obligations, including these classic sources. To the extent international lawyers or others acknowledge that IOs have an impact on what is regarded as "real" international law—usually defined narrowly to embrace only norms governing states in their relations inter se—we continue to pour an increasingly rich normative output into old bottles labeled "treaty," "custom," or (much more rarely) "general principles." Few bother

[1] Paul Szasz, "General Law-Making Processes," in Oscar Schachter and Christopher Joyner, eds., *United Nations Legal Order*, 35, at 59 (Washington DC: American Society of International Law, 1995). *See also* Charlotte Ku, "Global Governance and the Changing Face of International Law: The 2001 John W. Holmes Memorial Lecture," *ACUNS Rep. & Papers 2001*, no. 2.

to ask whether these state-centric sources of international law, designed for the use of judges engaged in a particular task, remain viable or exhaustive descriptions of the types of international obligations that matter to a variety of actors in the age of modern IOs.[2]

Even when organizational processes are addressed, it is usually in the context of a specific regime, such as the role of the Security Council on the rules governing use of force, the impact of the International Criminal Tribunal for the Former Yugoslavia on the definition of international crimes, or the impact of the WTO's Appellate Body on the interpretation of the GATT-covered agreements. Organizational insights, to the extent they exist, remain largely regime-specific—at least within the legal literature. Perhaps, due to the ever increasing depth of particular regimes and the resulting degree of specialization among public international lawyers, few of us look across institutionalized regimes. We can count on trade lawyers knowing something about the WTO and its forms of dispute settlement and that those interested in national security will look at the Security Council, but few are apt to look at both—or at how other regimes affect the making of treaties or the settling of disputes. Cross-cutting questions—as with respect to the relative impact of institutionalized dispute settlement—are less frequently asked.[3] Except for a narrow breed of practitioners who work for IOs, few people pay much attention either to common institutional dilemmas faced by these inter-governmental organizations or to the broader implications of the rise, over the past half century, of a new sub-field of international law, namely "international institutional law."[4] Principles of treaty interpretation as they relate to the charters of these organizations, the rules regarding their legal personality or their financing, are generally regarded as derivative of comparable principles used by and for nation states and not really anything special. The notion that these doctrines as applied to IOs are mere parasitical variations on familiar rules applied to states reflects a prevailing assumption that such organizations are merely the agents of states and not in any real sense autonomous entities. International lawyers' perspective on how their law gets made and enforced remains, more than a half century after establishment of the UN system, remarkably uncurious about the impact of institutionalization.

This book responds to the resulting gaps in our descriptions, in our theoretical frameworks, and in our prescriptions for improving the law. Its central theme is that traditional inter-governmental organizations, especially those of the UN system created after World War II, remain today an essential part of how nations govern themselves and help to explain when they fail to do so. The study of IOs rewards

[2] *But see* Onuma Yasuaki, "The ICJ: An Emperor Without Clothes? International Conflict Resolution, Article 38 of the ICJ Statute and the Sources of International Law," in Nisuke Ando et al., eds., *Liber Amicorum Judge Shigeru Oda* at 191 (New York: Kluwer Law International, 2002) (casting doubt on the traditional reliance on article 38 sources).

[3] Political scientists, and lawyers who work with them, pay more attention to such matters. *See, e.g.*, "Legalization and World Politics: A Special Issue of *International Organization*," 54 *Int'l. Org.* 385 (2000).

[4] *See generally* Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (Boston: Martinus Nijhoff, 2003).

us with better descriptions of how international rules are now made, transformed, and applied; firmer theoretical groundings of how international law works or fails to work; and more accurate prescriptions for improvements in implementation, compliance, and effectiveness.

Better Description

IOs have helped spur the expansion of subjects deemed suitable for international regulation as well as inspire new methods for international standard-setting. It is not an exaggeration to say that "[m]ost changes in international law since 1945 have occurred within the framework of international organizations."[5] Perceptive scholars have noted that contemporary international relations is marked by "the move to institutions,"[6] and this book examines more closely some of the consequences.

The focus here is on those inter-governmental organizations that aspire to universal participation and therefore to global reach. It does not purport to be a complete picture of modern international law-making processes. There are other significant actors now involved in aspects of global governance, including IOs that are not this book's primary focus, including powerful regional bodies like those of the European Community, and non-state actors such as non-governmental organizations, NGOs, multinational corporations, other transnational networks (such as associations of sub-units of governments like central bankers, other government regulators, or private enterprises such as those which set product standards), as well as gatherings of governments that can only with some difficulty be encompassed within traditional definitions of IOs. Each of these actors has generated a rich literature, particularly within political science and by lawyers who work in tandem with them.[7] Much of the speculation concerning the ostensible decline in the power of the nation state or the erosion of sovereignty reflects the growing normative impact of all of them, including international organizations.[8] There is

[5] *Id.*, at 6.

[6] David Kennedy, "The Move to Institutions," 8 *Cardozo L. Rev.* 841 (1987).

[7] For an introduction to the huge literature on NGOs, see Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca and London: Cornell University Press, 1998). On government networks, see, e.g., Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004); *id.* "Government Networks: Governing the Global Economy through Government Networks," in Michael Byers, ed., *The Role of Law in International Politics* at 177 (Oxford, U.K. and New York: Oxford University Press, 2000). For a discussion of the impact of global economic actors, see, e.g., Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996). On the EU, see generally Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford, U.K. and New York: Oxford University Press, 1999). For an interesting case study of the establishment of international soft law through the joint efforts of NGOs, IOs, and TNCs, see Kathryn Sikkink, "Codes of Conduct for Transnational Corporations: The Case of the WHO/UNICEF Code," 40 *Int'l Org.* 815 (1986)(describing the agreement between WHO and Nestlé on the marketing of breast milk substitutes).

[8] *See, e.g.*, Kenichi Ohmae, *The End of the Nation State: The Rise of Regional Economies* (New York: Free Press Paperbacks, 1995); Sassen, *supra* note 7; Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge, U.K. and New York: Cambridge University Press, 1996).

in particular a vast and growing literature on the rising import of members of "international civil society" (variously defined to include one of more of these non-state actors) on "global governance."[9] This book does not assume that the particular IOs that are its focus are necessarily the most important innovation in international law-making techniques over the past 50 years.

Nor does this book provide a comprehensive look at its own subject matter: the diverse world of inter-governmental organizations. It is neither an encyclopedic description of these organizations nor a comprehensive look at all their law-making activities, from forms of regulation to attempts at enforcement.[10] Instead it re-examines select examples of IO activity whose normative impact is often ignored or under-estimated within three broad categories: (1) international institutional law (Part I); (2) treaty-making conducted under IO auspices (Part II); and (3) institutionalized dispute settlement (Part III). The premise—that these three categories are especially relevant to how the world governs itself—may appear dubious to many readers (and not only because if the world is governing itself, it is manifestly not doing a very good job). The legal literature does not, after all, generally characterize these phenomena as "law-making," whether global or otherwise. International institutional law tends to be dismissed as merely dealing with routine household matters, of little external normative relevance, or at best with "technocratic" problems of small political import. Global modes of treaty-making, although widely acknowledged to be a principal activity for many IOs and the reason many were established, are rarely seen as having any distinctive normative impact: a treaty, whether negotiated under the auspices of an IO or not, remains merely a consensual contract to which states may choose to agree (or not). And international modes for dispute settlement are not usually regarded as part of "law-making" at all and are only indirectly connected to the study of IOs. Much of the motivation for this book is precisely to dispel such views.

As do many works examining the impact of NGOs, this book contends that we need to reconsider the state-centric ways in which public international law-making processes are described. This conclusion may appear odd for a book that focuses on entities that are composed largely if not entirely of states. Inter-governmental organizations lend themselves to state-centric description. We continue to

[9] For a bibliography, see Ann M. Florini, ed., *The Third Force: The Rise of Transnational Civil Society* at 241–76 (Nihon Kokusai Koryu Senta: Carnegie Endowment for International Peace, 2000). For more critical views, see Kenneth Anderson, "The Ottawa Convention Banning Landmines, The Role of International Non-Governmental Organizations and the Idea of International Civil Society," 11 *EJIL* 91 (2000); Peter J. Spiro, "New Global Potentates: Nongovernmental Organizations and the 'Unregulated' Marketplace," 18 *Cardozo L. Rev.* 957 (1996).

[10] For more comprehensive treatments, see, e.g., Schermers and Blokker, *supra* note 4; Jan Klabbers, *An Introduction to International Institutional Law* at 202 (Cambridge, U.K. and New York: Cambridge University Press, 2002); Schachter and Joyner, *supra* note 1; Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (London: Sweet & Maxwell, 5th edn., 2001); C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge, U.K. and New York: Cambridge University Press, 1996); Frederic C. Kirgis, Jr., *International Organizations in Their Legal Setting* (St. Paul, MN: West Publications, 2nd edn., 1993).

assume, to a surprising extent given the decades-long experience we have now had with these organizations, that these organizations are merely "new settings for old techniques of diplomacy."[11] To the extent we examine the origins of particular treaty regimes—from trade to international civil aviation—we tend to focus on the policy evolutions within member governments, paying less attention to the possibility that organizational processes structure and transform the responses of international actors, including states.[12]

A descriptive gap exists even for those, perhaps the majority of international lawyers, for whom the categorization of sources of international law in article 38 is and should remain unaffected by the post-World War II move to institutions. This book addresses how IOs have had and are having an impact on the making and interpretation of treaties. It also contends that the new forms of treaty-making, involving the rise of IOs themselves as "actors" or "subjects of international law," the institutionalization of dispute settlement, and the evolution of international institutional law have all had an impact on the ways in which customary international law is formed or proven. It also addresses how the proliferation of institutional dispute settlers (in fora as diverse as WTO panels and human rights tribunals) have affected other sources of law, including general principles of law, while transforming the nature (and not just the number) of judicial opinions that positivists see as a subsidiary or evidentiary source of law.

Organizational law-making has also affected the other types of evidence relevant to proving the existence of or interpreting article 38 sources of law. IOs have inspired or organized the "teachings of publicists" and the practices of merchants ("*lex mercatoria*") through the activity of expert groups such as the UN's Legal Subcommittee of the Outer Space Committee, the International Law Commission (ILC), and the UN Commission for International Trade Law (UNCITRAL). Even those who are persuaded that article 38 sources of law exhaust the methods of international law-making are likely to find the processes of normative change within IOs, occurring at the periphery of those sources, of interest. The contemporary conception and use of treaties, custom, and general principles cannot be understood without some idea of the constitutional evolution of organizational charters—of how or why the GATT turned into the WTO, why the UN Security Council has come to have an impact on the development of human rights law, or more generally why it might credibly be said that the UN Charter has undergone more changes in fifty years than the U.S. Constitution has seen in over 200.[13]

But, more fundamentally, IOs should be of interest to anyone willing to re-evaluate the monopoly long exercised by our article 38 totem. Anyone trying to

[11] Lawrence T. Farley, *Change Processes in International Organizations* at 2 (Cambridge, MA: Schenkman Publishing Company, 1982) (quoting Hans J. Morgenthau).

[12] Political scientists, especially those identifying themselves as "constructivists," have been far more attentive to this possibility. *See, e.g.*, Robert O. Keohane, "International Institutions: Two Approaches," 32 *Int'l Studies Q.* 379, at 382 (1988) and *infra*, Chapter 1.

[13] Louis Sohn, "Interpreting the Law" in Schachter and Joyner, *supra* note 1, 169, at 227. *See also* Chapter 2, *infra*.

understand national law-making needs to go beyond a static list of hierarchically arranged sources of law consisting of a national constitution, statutes, and judicial decisions. Anyone seriously interested in learning how national legal systems work needs to take a serious look at the institutions that give rise to them. The same applies at the global level. We should not expect that the static list of types of international obligations in article 38 remains an adequate description for an age that relies so heavily on international institutions.

Organizations have changed both the process by which international law is made as well as its content. A static list of sources tells us nothing about distinctions within each type of source resulting from organizational processes of law creation. In the real world, all treaty-making processes are not equal (or alike). An international charter like the UN Charter or a series of interwoven obligations subject to binding institutionalized dispute settlement like the WTO covered agreements, or a modern environmental framework convention continuously revised through periodic meetings of the parties, is each subject to a significantly different interpretative process than is the bilateral treaty-contract between two states. Treaties produced under such institutionalized mechanisms can not be equated with treaties of old. A multilateral treaty convention negotiated under UN auspices is the product of a significantly different process from an agreement reached after an ad hoc conference in the 19th century or a contract premised on tit-for-tat reciprocity resulting from bilateral negotiations. A treaty produced through modern collective processes is likely to be different not merely in its origins, but also in its final text and in its subsequent evolution. Process affects substance.

And it is not only new law produced in the age of IOs that is affected. Old rules of international law may be transformed utterly when applied to collective bodies of states deemed representative of (an ambiguously defined) "international community." Familiar rules initially designed to be applied as between sovereign state actors, including rules for the interpretation of treaties or concepts like "legal personality," take on new dimensions and pose new challenges when applied by or for the benefit of IOs. Vague principles such as "sovereign equality" and "self determination," frequently included in the instruments that establish IOs, take on more concrete form thanks to iterative attention by repeat players who are forced by circumstances—as by the Trusteeship Council during the course of decolonization or by the Secretary-General reacting to requests for election assistance or supervision. Inchoate goals evolve into more cognizable "rights" (whether for the benefit of states or individuals) thanks to the group dynamics within IOs, as well as their associations with other actors.[14]

[14] *See, e.g.*, James C.N. Paul, "The United Nations and the Creation of an International Law of Development," 36 *Harv. Int'l L. J.* 307 (1995); Karl Doehring, "Self-Determination," in Bruno Simma, ed., 1 *The Charter of the United Nations: A Commentary* 47 (Oxford, U.K. and New York: Oxford University Press, 2002); Hurst Hannum, "Human Rights," in Christopher Joyner, ed., *The United Nations and International Law* 131 (Cambridge, U.K.: Cambridge University Press, 1997).

Permanent bodies associated with the collective also inspire new types of rules that presuppose the values of (and the reaction by) an "international community"—such as duties to negotiate multilaterally or to consult prior to taking unilateral action,[15] duties to report subject to collective scrutiny,[16] and obligations *erga omnes* as well as principles of *jus cogens.*[17] Such rules would probably not have emerged but for the 20th century's move to institutions.

Better Theory

This book also raises broader questions that tend to be overlooked in the absence of an institutional perspective. The student of international organization, whether or not she ultimately accepts the continuing utility of the traditional article 38 sources of law, is more likely to raise questions about the fundamental premises underlying these sources, such as the assumption that international obligations are the exclusive province of nation states or that all international obligations are the product of the consent of states. IOs challenge the primacy of the nation state as sole actor and consent as legitimating rationale. The student of international organization is also more likely to question whether customary international law remains today the primarily unwritten, incidental accumulation of bilateral actions/reactions of states over an extended period of time suggested by traditional doctrine, raising new questions about that source's legitimacy and function, especially within national legal systems. She is also likely to question whether the third source of law in article 38, general principles of law, are still that rarely encountered, perhaps mythical, source of international obligation found only in learned treatises. Awareness of organizational forms of law-making are also likely to provoke debate about whether, or to what extent, international obligations now reflect "community" interests, whether of the global, regional, or more specialized kind, and whether those that create the new kinds of international law are accountable to a distinct "demos" separate from that addressed by national constitutions.

Organizational insights also provide grist for the perennial jurisprudential inquiry which still needs to be posed for public international law, namely, "Is it law?" The world of IOs provide abundant examples of how the international

[15] *See, e.g.*, *US—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R, para. 166 (October 12, 1998) (reprinted in 38 *ILM* 118 (1999)) (finding such a duty in the WTO covered agreements); Frederic L. Kirgis, Jr., "NATO Consultations as a Component of National Decisionmaking," 73 *AJIL* 372 (1979)(finding such an obligatory norm in certain instances within NATO).

[16] *See, e.g.*, Abram and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* at 154–96 (Cambridge, MA: Harvard University Press, 1995)(describing a variety of institutionalized reporting, verification, and monitoring obligations and their impact).

[17] *See, e.g.*, *Barcelona Traction case (Second Phase)*, 1970 ICJ Rep. 3, at 32; Ian Brownlie, *Principles of Public International Law* at 512–15 (Oxford, U.K. and New York: Oxford University Press, 4th edn., 1990).

legal system generates norms and attempts to secure compliance without either legislature or sovereign enforcer. IOs provide new ways to answer a question that has interested international lawyers for centuries: namely, "Why do states obey?" Whether the answer given is process-based legitimacy (Franck), more amorphous forms of collective legitimization (Claude), or because the norms they produce reflect the will of the international community (Jenks, Lauterpacht), the common purposes of participants (De Vissher, Hoffman), shared expectations as to authority (MacDougal), or systemic goals (Kaplan and Katzenbach), IOs provide richer explanations for the sense of obligation than is given by positivists' parsimonious reliance on consent.[18] At the same time, the pathologies of IOs may help to explain when or why states fail to comply with or to implement those international rules to which they have subscribed or the many gaps in the law.

The study of organizational "soft" and "hard" law raises concerns about the firmness of the line between black letter law that is (*lex lata*) and progressive law that might be (*lex ferenda*), as well as questions about the legitimacy of legal rules whose binding authority appears to lie along a spectrum. A focus on institutions raises anew familiar questions about the relative autonomy of law as distinct from politics.[19] It also directs attention to issues that preoccupied earlier generations of international lawyers but which now merit renewed scrutiny, such as whether the piecemeal creation of organizational regimes, including the proliferation of international tribunals, is conducive to "world federalism by installments," or, on the contrary, undermines the prospects both for global governance and harmonious or uniform law.[20]

Organizational inquiries encourage cross-disciplinary analysis. Theoretical frameworks now deployed in many other areas of (national) law, such as law and economics and public choice theory, are grounded in the study of institutions or other forms of collective action. Such theoretical insights are more readily adaptable to international law once we direct our attention to international forms of collective action. We can see more clearly the values of independence and centralization, for example, when we examine permanent structures, like the WTO, that permit iterative action and reaction, promote path dependencies, or permit the pooling of resources or information.[21]

[18] *See, e.g.*, Thomas Franck, *The Power of Legitimacy Among Nations* (Oxford, U.K. and New York: Oxford University Press, 1990); Inis L. Claude, Jr., "Collective Legitimization as a Political Function of the United Nations," 20 *Int'l Org.* 367 (1966). For a summary of the other views identified in the text, see Oscar Schachter, "Towards a Theory of International Obligation," 8 *Va. J. Int'l L.* 300, at 301 (1968).

[19] It is no accident that the second chapter of Georg Schwarzenberger's classic text on *International Constitutional Law*—Vol. III of *International Law as Applied by International Courts and Tribunals* (Boulder, CO: Westview Press, 1976)—for example, is devoted to examining the "political element in international institutions."

[20] *Compare* David Mitrany, *A Working Peace System* (Chicago: Quadrangle Books, 1966), *with* Benedict Kingsbury, "Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?," 31 *NYU J. Int'l L. & Pol.* 679 (1999). *See also* Chapter 1, *infra*.

[21] *See, e.g.*, Kenneth W. Abbott and Duncan Snidal, "Why States Act Through Formal International Organizations," 42 *J. Conflict Res.* 3 (1998); José E. Alvarez, "Symposium, The Boundaries of the WTO," 96 *AJIL* 1 (2002).

The study of organizations permits us to see as well their many failings and especially their shortcomings from the perspective of democratic theory. Examining their impact on law forces us to consider their democratic deficits: the alleged absence of accountability of their political bodies, experts, and even their international judges.[22] The disjunctures or parallels between the emerging systems of global governance based in IOs and the national rule of law become more apparent. While some have justifiably questioned the relevance of analogues to national law and institutions to the study of international organization, it is hard to escape such comparisons as the subject matter of international law expands. As the missions of these organizations intrude more deeply into the fabric of domestic law, as more national judges, parliamentarians, and executive agencies are required to deal with rules produced at the international level, and as more individuals are affected by them, it makes sense to many to ask whether domestic legal doctrines—such as principles relating to "separation of powers" or "improper delegation"—should pose limits on the incorporation or enforcement of international law within national law.[23]

As the chasm between the subject matter of national and international law shrinks, the gaps between the frameworks that we use for discussing each decreases as well. The resulting benefits of cross-fertilization are not all in one direction. A more organizationally grounded discipline of public international law may pose challenges to national law. As more courts, international and domestic, are required to deal with the interpretation of treaties, national legal doctrines such as federalism, the separation of powers, or improper delegation, may require reconsideration, along with interpretative principles national courts have long used to mediate between national and international rules.[24] For these reasons, both national and international lawyers may benefit from closer scrutiny of IOs' impact on law-making.

Better Prescriptions

While this book does not attempt to present grand blueprints for organizational reform along the lines of those advocated by those "present at the creation" of the UN,[25] it does have some modest prescriptive aspirations. The study of international law's organizations may suggest directions for more effective international

[22] *See, e.g.*, Eric Stein, "International Integration and Democracy: No Love at First Sight," 95 *AJIL* 489 (2001).

[23] *See, e.g.*, Curtis A. Bradley, "International Delegations, The Structural Constitution, and Non-Self-Execution," 55 *Stan. L. Rev.* 1557 (2003).

[24] *See, e.g.*, Jonathan Turley, "Dualistic Values in the Age of International Legisprudence," 44 *Hastings L. J.* 185 (1993)(applying a public choice critique to the *Charming Betsy* canon of construction and the presumption against extraterritoriality).

[25] *See, e.g.*, Grenville Clark and Louis B. Sohn, *Peace Through Disarmament and Charter Revision: Detailed Proposals for Revision of the UN Charter* (Dublin, NH: Privately Published, 1953).

regulation.[26] Even the compilation of comparative organizational experiences with respect to select problems in international institutional law is likely to generate useful guidance for institutional reformers. As Louis Sohn noted long ago, even those working within IOs stand to benefit from attempts to compile experiences from other organizations, as "even the best of them have only limited knowledge of the practice of other international organizations."[27]

This book devotes some attention to distinct approaches now being undertaken, as with respect to treaty-making in Chapters 5 and 6 and various forms of dispute settlement in Chapters 7 to 9, to secure compliance with international norms and considers whether some forms of international cooperation work better than others or at least how such inquiries might proceed. It appears that in some cases IOs learn from each other's mistakes. We may, in turn, learn to devise better law if we learn about how organizations learn.

Organizational insights are also helpful in suggesting possible reasons for the lack of cooperation or failures in national implementation or compliance. As is discussed in Chapter 6, some have argued that current procedures for multilateral treaty-making within organizational venues make concluding treaties all too easy and that the results are agreements that exist only on paper but that fail to reflect what states are actually willing to consent to or to actually implement.[28] Others have suggested that IOs, like all bureaucracies, reflect certain pathologies that may contribute to the unmaking of international law.[29]

As Robert Keohane has warned, the study of the forms of international cooperation should not be confused with their celebration.[30] Learning about IOs may help us to understand how they hinder, as well as facilitate, inter-state cooperation. Careful attention to IOs may prove a useful corrective to the common bias shared by many international lawyers: few of us have ever encountered an IO or an international court that we did not like. Examining IOs does not imply a commitment to them or even to multilateral as opposed to national (or "unilateral") solutions. Looking to IOs' legal effects does not mean endorsing their normative reach. It does not signal a commitment to expanding the power of the UN Secretary-General or other IOs. The study of institutional forms of global governance should not be restricted to card-carrying members of the World Federalist Society. It may well be that the more we learn about these organizations, including their capacity to serve as

[26] *See, e.g.*, Geoffrey Palmer, "New Ways to Make International Environmental Law," 86 *AJIL* 259 (1992) (drawing upon a number of institutional insights, including the usefulness of "soft law").

[27] Louis B. Sohn, "The Growth of the Science of International Organizations," in Karl W. Deutsch and Stanley Hoffmann, eds., *The Relevance of International Law* 251, at 269 (Cambridge, MA: Schenkman Publishing Company, 1968).

[28] Bruno Simma, "Consent: Strains in the Treaty System," in R.St.J. Macdonald and D.M. Johnston, eds., *The Structure and Process of International Law* at 487, 494 (Boston: Martinus Nijhoff, 1983).

[29] *See, e.g.*, Michael N. Barnett and Martha Finnemore, "The Politics, Power and Pathologies of International Organizations," 53 *Int'l Org.* 699 (1999).

[30] Keohane, *supra* note 12, at 380.

agents of ideology and power, the more reason we will have to question their efficacy, legitimacy, or competence.

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Chapter 1 begins to fill the descriptive, theoretical and prescriptive gaps by defining international inter-governmental organizations. It identifies the common legal attributes that tie these disparate entities together, suggesting why it makes sense to collectively examine the legal impact of organizations with such disparate purposes as the UN and the WTO. That chapter also establishes some parameters for addressing how organizations that aspire to global membership make law and surveys some of the theoretical frameworks scholars have used to assess the impact of these organizations.

Part I on international institutional law addresses select aspects of the so-called "internal" law of these organizations, such as the rules governing their financing, as well the modes for setting standards or rendering decisions that appear to have more "external" effects on general international law. The three chapters in this section demonstrate through concrete example some of the challenges these organizations pose to fundamental tenets that originally applied only to nation states, such as rules governing the interpretation of treaties and legal personality, or rules that served to protect "sovereignty," such as "sovereign equality" and non-intervention in states' "domestic" affairs. Chapter 2 looks at the interpretation of organizational charters and how forms of "constitutional interpretation" affect the lawyers' standard tools of treaty interpretation reflected in the Vienna Convention on the Law of Treaties. That chapter suggests how the interpretation of organizational charters has generally served to expand organizational powers and the scope of operations for many of these organizations. Chapter 3 canvasses IO charter provisions that purport to delegate authority to IOs to make law and thereafter revisits questions initially canvassed by Rosalyn Higgins, namely how the UN's political organs have used their delegated authority. Chapter 4 takes another look at the UN Security Council's law-making powers, using it as a case-study to delineate the distinct law-making functions of that body as well as the line between political power and law. It thereafter describes standard-setting techniques in other IOs that are not obvious from a reading of their respective charters.

These chapters begin to identify how IOs have emerged as relevant law-making actors and subjects. They suggest how IOs, or more specially bodies within them, transform themselves into something more than the mere agents of nation states, namely international legal persons with their own special attributes or powers. At the same time, these chapters introduce the blurred outlines of our artificial divisions between "internal" and "external" forms of organizational law-making and the difficulties of describing their output in terms of the traditional sources of international obligation.

Chapters 5 to 9 consider the role of IO-generated law in two other areas: the making of treaties and international dispute settlement. Chapter 5 canvasses the

role of IOs as venues for the negotiation and conclusion of what many consider to be the principal source of expanding international regulation: multilateral treaties. This chapter explains why the rise of these organizations has generally coincided with and encouraged the rise of multilateral treaty negotiations on a multitude of topics. It also enumerates the ways these organizations have changed the nature of those negotiations. Chapter 6 addresses whether organizational involvement has improved the quality of the resulting agreements or the prospects for subsequent ratification by nation states.

Chapter 7 considers the surprising diversity of venues for dispute settlement not involving judges that now exist, including organs to which states report and Secretariat officials, as well as the normative impact of such activity. Chapter 8 examines institutionalized forms of more judicialized dispute settlement, including the proliferation of formal tribunals in fields as diverse as trade and international criminal law. That chapter enumerates the varieties of adjudicative law-creation that occurs with respect to (1) the specific legal regime in which the adjudicator is embedded; (2) "general" public international law; (3) other sources of potential international obligation, including varieties of "soft law;" and (4) national law. Chapter 9 explores the underlying nature of institutionalized dispute settlement as well as the factors that help explain the degree of law-making that occurs in its wake.

A final chapter considers the larger implications of the move to institutions.

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List of Abbreviations

AEC	African Economic Community
AJIL	*American Journal of International Law*
ANZUS	Tripartite Pact between Australia, New Zealand and the United States
APEC	Asia-Pacific Economic Co-operation
ASEAN	Association of Southeast Asian Nations
ASIL	American Society of International Law
ATCA	Alien Tort Claims Act (U.S.)
AU	African Union
BCLR	British & Commonwealth Law Review
BISD	GATT Basic Instruments and Selected Documents Series
BIT	Bilateral investment treaty
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CENTO	Central Treaty Organization
CFC	Common Fund for Commodities
CFCs	Chlorofluorocarbons
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CMLR	Common Market Law Report
CML Rev.	Common Market Law Review
Codex	Codex Alimentarius
COMECON	Council for Mutual Economic Assistance
COMESA	Common Market for Eastern and Southern Africa
COP	Conference of Parties
CRC	Convention on the Rights of the Child
CSCE	Conference on Security and Cooperation in Europe
CTC	Counter-Terrorism Committee
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO)
EAC	Commission for East African Cooperation
EC or EEC	European Economic Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECOSOC	Economic & Social Council of the United Nations
ECOWAS	Economic Community of West African States

EEZ	European Economic Zone
EFTA	European Free Trade Association
EHR Convention	See ECHR
EJIL	*European Journal of International Law*
EU	European Union
EURATOM	European Atomic Energy Community
FAO	Food and Agriculture Organization
FCN	Treaty of Friendship, Commerce, and Navigation
FCTC	Framework Convention on Tobacco Control
FDA	Food & Drug Administration (U.S.)
FFCC	Fact-Finding and Conciliation Commission (ILO)
FRY	Federal Republic of Yugoslavia
GA	General Assembly
GATS	General Agreement on Trade in Services (WTO)
GATT	General Agreement on Tariffs and Trade
GBFA	Governing Body Committee on Freedom of Association (ILO)
GEF	Global Environment Facility
GYIL	*German Yearbook of International Law*
HIL	Hegemonic international law
IACHR	Inter-American Court of Human Rights
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social & Cultural Rights
ICFTU	International Confederation of Trade Unions
ICIFI	International Council of Infant Food Industries
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Rev. For. Inv. L. J.	*ICSID Review of Foreign Investment Law Journal*
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDA	International Development Association
IFC	International Finance Corporation
IGO	International Governmental Organization
ILC	International Law Commission
ILO	International Labour Organization
IMCO	Intergovernmental Maritime Consultative Organization
IMF	International Monetary Fund

INBC	International Nestlé Boycott Committee
INFACT	Infant Formula Action Coalition
INMARSAT	International Maritime Satellite Organization
INTELSAT	International Telecommunications Satellite Organization
IO	International organization
ISO	International Organization for Standardization
ITLOS	International Tribunal for the Law of the Sea
ITO	International Trade Organization
ITU	International Telecommunication Union
LDC	Least Developed Countries
MAI	Multilateral Agreement on Investment
MEA	Multinational environmental agreement
MERCOSUR	Southern Cone Common Market
MIGA	Multilateral Investment Guarantee Agency
MIT	Massachusetts Institute of Technology
MNC	Multinational corporation
MOP	Meeting of Parties
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
NIEO	New International Economic Order
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organization for Economic Co-operation & Development
OFAC	U.S. Office of Foreign Assets Control
OHADA	Organization for the Harmonisation of Corporate Law in Africa
OLA	Office of Legal Affairs (UN)
ONUC	United Nations Operation in the Congo
ONUVEN	United Nations Observer Mission for the Verification of the Elections in Nicaragua
OPCW	Organization for the Prohibition of Chemical Weapons
OPEC	Organization of the Petroleum Exporting Countries
OSCE	Organization on Security and Cooperation in Europe
PCIJ	Permanent Court of International Justice
PIC	Prior informed consent
PICT	Project on International Courts and Tribunals
PLO	Palestinian Liberation Organization
Res.	Resolution
SARPs	Standards and Recommended Practices (ICAO)
SARS	Severe acute respiratory syndrome

SC	Security Council
SCM	Agreement on Subsidies and Countervailing Measures (WTO)
SEATO	South-East Asian Treaty Organization
SFRY	Socialist Federal Republic of Yugoslavia
SOLAS	International Convention for the Safety of Life at Sea
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures (WTO)
SWAPO	South West African People's Organization
TBT	Agreement on Technical Barriers to Trade (WTO)
TJAC	Court of Justice for the Andean Community
TNC	Transnational corporation
TRIMs	Trade-Related Aspects of Investment Measures (WTO)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCC	United Nations Compensation Commission
UNCED	United Nations Conference on Environment and Development
UNCIO	United Nations Conference on International Organization
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEF	United Nations Emergency Force
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNICEF	United Nations Children's Fund
UNIDO	United Nations Industrial Development Organization
UNIDROIT	International Institute for the Unification of Private Law
UNITAR	United Nations Institute for Training and Research
UNMIK	United Nations Interim Administration in Kosovo
UNOSOM	United Nations Operation in Somalia
UPU	Universal Postal Union
USSR	Union of Soviet Socialist Republics
USTR	U.S. Trade Representative's Office
WHO	World Health Organization
WMD	Weapons of mass destruction
WMO	World Meteorological Organization
WTO	World Trade Organization
ZaörV	*Zeitschrift für auslandisches öffentliches Recht und Volkerrecht*

1
Introduction

1.1 Why Focus on "International Organizations"?

Many entities, such as the Exxon Corporation or Amnesty International, clearly qualify as both "organizations" and "international" but are not the primary subjects of this book. Unlike a transnational or multinational corporation (TNC or MNC) or a non-governmental organization (NGO), inter-governmental organizations (IGOs) or IOs are typically collections of sovereign states that have banded together as states to create, under a constitutive international agreement governed by international law usually known as a "charter" or a "constitution," an apparatus, more or less permanent, charged with the pursuit of certain defined common ends.[1] While many of these inter-governmental organizations are part of the "UN system,"[2] others, even some that aspire to comparably universal membership, are not.

This book is an introduction to how inter-governmental or inter-state organizations, typically called "public international organizations," have affected international law and the ways it is made.

Why focus on this subset of international entities?

The premise is not that organizations like the UN are more important, or more likely to be active in more than one state, or are more powerful or even legally relevant than are TNCs or NGOs. A variety of non-state actors, from IOs to TNCs and NGOs, and even individuals, are helping to make and enforce modern international law, even if they are not formally recognized as "international legal persons" alongside of states.[3] NGOs like Amnesty International may be the single greatest promulgators and de facto enforcers of international human rights,

[1] This simple, albeit vague, definition is the most commonly accepted in the field, see, e.g., Clive Archer, *International Organizations* (London and New York: Routledge, 3rd edn., 2001); Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity Within Diversity* at 26 (The Hague and Boston: M. Nijhoff, 4th edn., 2003). For further discussion, see *infra* Section 1.2.

[2] The "UN system" includes the United Nations itself—including its primary organs, the General Assembly, the Security Council, Economic and Social Council, Trusteeship Council, the International Court of Justice, and the UN staff or secretariat—and the UN specialized agencies, each of which has entered into a "relationship agreement" with the UN itself as anticipated by Article 63 of the UN Charter.

[3] For a teaching casebook that is particularly sensitive to the role of non-state actors, see, e.g., Jeffrey L. Dunoff et al., *International Law: Norms, Actors, Process* (New York: Aspen, 2002).

for example.[4] TNCs like Exxon, many of which have a presence in more countries than most IOs, have exerted considerable power, particularly over the domestic law of small states whose gross national products they dwarf, and they have also influenced international law—as with respect to standards of compensation upon expropriation.[5] Both IOs and TNCs have at times been seen as competitors to sovereign states.[6] TNCs have also been the subject of considerable efforts at international regulation, no less than IOs.[7] The potential clout and legal impact of other non-state entities such as the Roman Catholic Church is also not in doubt. With the collapse of the Roman Empire, the Church willingly took upon itself some of the legal, social, economic, and even military and diplomatic tasks of Roman administration and for centuries since has exercised power and dominion to rival that of some of the most powerful nation states.[8] The Church, the oldest international entity in existence, has spawned its own network of organizations and has undertaken many of the tasks associated with the United Nations, including mediation and peacekeeping.[9] Its role and impact on prominent treaty efforts, including the Rome Statute for the International Criminal Court, is well known.[10]

Nor is the premise that IOs have unique characteristics that make the study of all international entities, whether or not composed of states, inconceivable or impractical. On the contrary, IOs, NGOs, and TNCs share many characteristics

[4] *See, e.g.*, Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* at 250–70 (Cambridge, MA: Harvard University Press, 1995); Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca and London: Cornell University Press, 1998). Indeed, some suggest that we are now in a new "post-institutionalist" period dominated by "international civil society." *See, e.g.*, Charlotte Ku, "Global Governance and the Changing Face of International Law," *ACUNS Rep. & Papers* at 26–34 (2001)(noting large rise in the numbers of NGOs relative to the more modest increase in the numbers of traditional inter-governmental organizations).

[5] For an introduction to the vast literature on the law affecting the treatment of aliens, of which standards for expropriation is a part, and attempts by those affected by that law to influence it, see, e.g., Richard Lillich, ed., *International Law of State Responsibility for Injuries to Aliens* (Charlottesville: University Press of Virginia, 1983). *See also* Paul Kuruk, "Renegotiating Transnational Investment Agreements: Lessons for Developing Countries from the Ghana-Valco Experience," 13 *Mich. J. Int'l L.* 43 (1991) (examining the negotiating power of TNCs over a particular contract and its consequences).

[6] *See, e.g.*, Raymond Vernon, *Sovereignty at Bay: The Multinational Spread of U.S. Enterprises* (London, U.K.: Longman, 1971).

[7] The UN Code of Conduct for Transnational Corporations is only one example. For one survey of attempts in the field of foreign investment, see World Bank, *Multilateral Approaches to the Treatment of Foreign Investment* (Washington DC: The World Bank, December 1991).

[8] *See, e.g.*, Lawrence T. Farley, *Change Processes in International Organizations*, at 20 (Cambridge, MA: Schenkman Publishing Co., 1982).

[9] *See, e.g.*, *id.*, at 20–7. *See also*, Hans Küng, *Structures of the Church* (Salvator Attanasio, trans.)(Notre Dame, IN: University of Notre Dame Press, 1968); Charles Poulet, *A History of the Catholic Church* (translated from the French 4th edn. by Rev. Sidney A. Raemers) (St. Louis: Herder, 1934). The Holy See, the principal organ of the Catholic Church, although not formally considered a "state," has participation rights in a member of numerous international organizations and diplomatic relations with over 100 states. Its claim to international personality is presumably based on its religious and spiritual authority rather than on its territorial holdings. *See, e.g.*, Barry E. Carter and Phillip R. Trimble, *International Law* at 463–5 (Boston: Little, Brown, 2nd edn., 1995).

[10] Carter and Trimble, *supra* note 9, at 4.

that facilitate distinctions between them as a group as compared to nation states. IOs, NGOs, and TNCs, after all, (usually) lack legitimated authority to legislate over a territory and a population. Membership within all of them is voluntary. All have limited scope and purposes, particularly as compared to nation states, and their goals are usually not to promote the interests of any one nation state. Indeed, the goals of Exxon or the Roman Catholic Church—to make a profit, or converts respectively—have more claim to universality than the goals of some IOs, such as the Organization of Petroleum Exporting Countries (OPEC) whose *raison d'etre* appears to be to protect the profitability of certain economic activities. None of them are "owed" allegiance sanctioned by national or international law. These similarities have encouraged some political scientists to examine "international regimes," a concept with uncertain legal contours but which, by most definitions, would include NGOs as well as IOs.[11]

The reason for focusing on this narrower range of non-state actors here is more pedestrian and practical: IOs tend to share characteristics that make *legal* generalizations possible. IOs form a cognizable subject because they more readily fit the categories that lawyers are comfortable using.[12] Because of their quasi-governmental status, IOs are usually accorded "international legal personality" that approximates that of the prime actors of state-centric international law.[13]

[11] *See, e.g.*, Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton, NJ: Princeton University Press, 1984)(defining regimes 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"). Even those political scientists intent on examining real "brick and mortar" organizations usually do not limit themselves to IOs. Bennett, for example, defines "international organizations" as permanent bodies with voluntary membership, having a basic instrument establishing goals, structure, and methods of operation, a broadly representative consultative organ, and a permanent secretariat. A. Leroy Bennett, *International Organizations*, at 2–3 (Englewood Cliffs, NJ: Prentice Hall, 6th edn., 1995). This definition appears broad enough to cover both Exxon and the Roman Catholic Church. *See also* Richard W. Mansbach et al., *The Web of World Politics: Nonstate Actors in the Global System* (Englewood Cliffs, NJ: Prentice Hall Publishing, 1976).

[12] Thus, the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (UN Doc. A/CONF.129/15, 25 *ILM* 543 (concluded March 21, 1986)) (hereinafter "IO Convention") adapts the rules that govern how states enter agreements between each other to the newer category of international legal person, namely IOs. A number of other multilateral and bilateral agreements, such as the General Convention on the Privileges and Immunities of the UN (21 UST 1418, 1 UNTS 16 (entered into force September 17, 1946)) and the United Nations Headquarters Agreement (12 *Bevans* 956, 11 UNTS 11 (entered into force November 21, 1947)) accord IOs, their officials, and representatives to them privileges and immunities that are to a considerable extent comparable to those that states grant to one other and their diplomats. In addition, states have recognized IO rights and benefits under their own national laws. *See, e.g.*, International Organizations Immunities Act of the United States, 22 USCA § 288, *et seq.* (1945). This law has also inspired international lawyers to construct a distinct sub-speciality devoted to "international constitutional law" or "international institutional law." *See generally* David Kennedy, "The Move to Institutions," 8 *Cardozo L. Rev.* 841 (1987). This constructed speciality reflects familiar, if increasingly contested, distinctions between the capabilities of "public" (governmental) and "private" actors, with IOs being accorded rights on the public international law plane largely on the basis that they are the duly designated agents of states.

[13] *See infra* Chapter 3. This does not mean that NGOs or TNCs are neutral bodies, free of governmental influence. Governments sometimes dominate NGOs and some governments have been heavily influenced (not to say dominated) by certain prominent TNCs. It is also true that all three types of entities—IOs, NGOs, and TNCs—sometimes undertake overlapping action and pursue common

To the extent that entities other than states are studied in international law courses around the world, the emphasis is on IOs. They, but not TNCs or NGOs, are constituted by one of the recognized sources of international law, an international agreement, and such agreements are subject to special rules.[14] IOs are a distinguishable sub-specialty within international law, with a discrete and identifiable literature.[15] While each IO has its own legal order and faces distinct problems, IOs share a certain "unity in diversity,"[16] including common principles (and unresolved difficulties) within a speciality of public international law, namely, "international institutional law," as well as common law-making techniques.

1.2 Defining IOs

Elaborate definitions of IOs raise more problems than they are worth. Consider the many criteria some have suggested. An IO must have genuinely international aims intended to cover at least three states; its membership must include full voting rights and be open to states appropriately qualified in the organization's area of operations; voting must be such that no one national group exerts control; its constitution must provide for a formal structure giving members the right periodically to elect governing bodies and officers; there should be the possibility of the continuous operation of a permanent headquarters; IO officers should not all be of the same nationality for more than a given period; the IOs should not engage in profit-making activities and there should be a substantial contribution to the budget from at least three states; each IO must show that it can exist independently and elect its own officials; evidence of current activities must be available; size, politics, ideology, fields of activity, geographical location of headquarters, nomenclature are, however, irrelevant.[17]

ends and that these often overlap with the goals of prominent states. *See, e.g.*, Farley, *supra* note 8, at 1–4. For those interested in or who presume the prevalence of the pursuit of power, it makes a great deal of sense to consider all of these actors, whether or not constituting real "bricks and mortar" organizations, as parts of a relevant "international regime."

[14] On the interpretation of organizational charters, see *infra* Chapter 2. Under article 38 of the Statute of the International Court of Justice, the sources of law that the Court is permitted to examine are international agreements, custom among nations, and general principles of law. As is discussed later in this chapter, these three sources have become, for most positivist international lawyers, the exclusive sources of international law. For the singular importance international lawyers have conferred on the question of the treaty status of the constitutive instrument of an IO, see David Kennedy, *supra* note 12, especially at 903–7.

[15] For a summary of this literature through 1968, see Louis B. Sohn, "The Growth of the Science of International Organizations," in Karl Deutsch and Stanley Hoffman, eds., *The Relevance of International Law: Essays in Honor of Leo Gross* (Cambridge, MA: Schenkman Publishing Co., 1968).

[16] Indeed, this is the sub-title of the major treatise in the field, namely, Schermers and Blokker's *International Institutional Law*, *supra* note 1.

[17] Werner J. Feld, Robert S. Jordan, and Leon Hurwitz, *International Organizations: A Comparative Approach* at 21–2 (Westport, CT: Praeger, 3rd edn., 1994) (citing criteria proposed by the Union of International Associations).

Although most of the IOs discussed in this book comply with these criteria, such (arbitrary) precision comes at a price. Insistence on a minimum of three states as members appears dubious given the occasional acceptance by legal bodies of bilateral commissions or tribunals as IOs.[18] In addition, some IOs, such as the Universal Postal Union (UPU) and the Telecommunications Union, accept as members not only states but also postal or telecommunications administrations, respectively, even when these administrative units are not within fully constituted states. Other IOs have at times accepted other IOs, such as the European Union (EU), as members. The second criteria above imposes artificial limits on organizations' membership decisions, suggesting that there is a kind of right to membership within particular organizations irrespective of what each organization's charter provides or how its institutional practice on such matters has developed. It would mean, for example, that the Organization of American States (OAS) could not legitimately decide, for example, to oust Cuba from its membership (as it has) and define itself in both political and geographic terms. Although the intent of this criteria, as well as a number of the others, is clearly to make sure that a purported IO is not merely the alter ego of a nation state, it is not clear why, in the absence of a specific requirement in a particular organization's charter, the test for independence or control should be the nationality of its officers, especially since such officers, as well as the staffs of IOs generally, are usually required to be "independent" of their states of origin.[19] Nor is it clear why particular budgetary arrangements standing alone should determine whether an IO ought to be considered autonomous from its members. The initial financial arrangements for the UN, based on a complex formula to determine ability to pay, would have had the U.S. paying almost fifty percent of its regular expenses.[20] While a cap was put on assessed contributions to prevent this outcome, few believed then that this was the only way to ensure that the UN would be considered a fully fledged international organization.

Similarly, the degree of formal structure and permanent bureaucracy suggested by these criteria would disqualify a number of inter-state entities from consideration, regardless of whether the states that established them intended to create what they considered to be an organization, including the pre-1994 General Agreement on Tariffs and Trade (GATT), the Conference on Security and Cooperation (CSCE) (the predecessor to today's Organization on Security and Cooperation (OSCE)), and Meetings of the Parties (MOPs) under various environmental framework agreements.[21] While, as we will see, the more limited criteria used by lawyers to define IOs with "international legal personality" may also pose doubts

[18] *See, e.g.*, *AS* v. *Iran-US Claims Tribunal*, Local Court of The Hague, June 8, 1983; District Court of The Hague, July 9, 1984, Supreme Court, December 20, 1985 (treating the Iran-U.S. Claims Tribunal as an IO for purposes of immunity).

[19] *See, e.g.*, Article 100, UN Charter.

[20] John George Stoessinger, *Financing the United Nations System* at 82–3 (Washington, DC: Brookings Institution, 1964).

[21] For a description of MOPs, see Robin R. Churchill and Geir Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law," 94 *AJIL* 623 (2000).

with respect to some of these entities, are to a certain extent also arbitrary, and are not free from doubt in terms of application, they do not rely on the accident of whether, for example, those who establish such organizations decide to establish a permanent base of operations in a particular locale. It is also not clear why legitimate IOs cannot engage at least partly in profitable activities, especially since states themselves now routinely engage in a considerable range of commercial activity, and this is certainly the *raison d'etre* of at least some IOs (e.g., the now defunct International Tin Council or OPEC). Indeed, few organizational charters contain any of the criteria mentioned as explicit conditions; indeed, of those mentioned, only the innocuous last appears unproblematic.

But if not these specific characteristics, what are IOs' distinguishing legal characteristics?

There is wide agreement among lawyers that three elements are important, namely, establishment (1) by international agreement between states; (2) of at least one organ distinct from member states and capable of so acting; and (3) under international law.[22] Schermers and Blokker have addressed the importance of each. The first, which generally requires a written,[23] usually multilateral, treaty, helps demonstrate publicly an entity's existence, distinguishes that entity from other international actors (such as organs of states, NGOs, TNCs, or the subsidiary organs of other IOs), extracts a mutual commitment by participating states of cooperation, and helps to secure legitimation at the national level.[24] The second, requiring a legally autonomous entity consisting of delegates from at least two states, ensures that treaty parties have entrusted some body other than themselves with developing and maintaining their common will.[25] The third facilitates the use of common rules for dealing with constitutive instruments. These rules are usually distinguishable from those governing the making and interpretation of arrangements subject to national law (such as those that typically establish NGOs and TNCs).[26]

These elements, while useful for purpose of characterization, are not always easy to apply. If the point of such a definition is to generalize from what states have done and not primarily to set limits on their discretion, it would appear that a number of exceptions have to be made. The first element has not been adhered to by some IOs that have, for example, been initially established by "informal" agreements whose legally binding nature was less than clear, by "parallel decisions"

[22] Schermers and Blokker, *supra* note 1, at 26–39.

[23] The assumption is that organizational charters need only fulfill the traditional requisites of a treaty under international law, either under the Vienna Convention of the Law of Treaties, 1155 UNTS 331 (concluded May 23, 1969), or under customary international law. Accordingly, an oral agreement between states would presumably be sufficient.

[24] Schermers and Blokker, *supra* note 1, at 27–36. The last occurs because democratic polities are accustomed to dealing with treaties; typically, these require approval by parliaments. *Id.*, at 29.

[25] *Id.*, at 32–3.

[26] It is assumed that IO charter instruments are governed by international law and more specifically the rules contained in the Vienna Convention on the Law of Treaties. *But see infra* Chapter 2.

between the parliaments of governments, or by other IOs.[27] The second element was probably not met in the initial years of the GATT, when that agreement consisted solely of an agreement between states. Did an IO dealing with trade only emerge in 1960 when its Council of Representatives was created?[28] In other cases, disputes may arise as to whether an entity is merely the subsidiary organ of another IO or is autonomous, as with respect to the Global Environmental Facility, initially created by the World Bank.[29] This element is also not clearly satisfied by an increasingly large number of international agreements that merely call for periodic conferences, including MOPs, and charge these meetings with particular tasks but fail to clearly accord to such gatherings a permanent secretariat (that may serve as some evidence of the intent to accord the degree of autonomy envisioned).[30] Some have questioned the application of the third element where the claim to organizational privileges and immunities, for example, appears to be based on national, and not international law.[31] The failure to comply with these essential elements, while not necessarily fatal to the successful accomplishment of treaty purposes, prompts legal uncertainties concerning entitlement to "legal personality" (and therefore MOPs' entitlement to some rights and possibly responsibilities under international law) as well as with respect to the applicability of other principles of international institutional law.[32] For these reasons, there is some controversy about whether what such entities produce ought to be regarded as a species of treaty law or as a part of international institutional law.

IOs do not aspire to achieve the same things. As examination of the charters of IOs reveals, while their preambular purposes are often cast in terms of achieving comparably lofty (and sometimes strikingly similar) goals, such as the promotion of peace and inter-state cooperation, their more specific operational goals differ and are as diverse as the range of issues now embraced by international law, including matters within virtually every field of human endeavor. Some IOs encourage the free trade in goods, others promote safety in international aviation, others seek fair labor standards or the reduction in military force as between nations. While they are not, generally speaking, intended to generate a profit, some IOs have operated, at least for certain purposes, like commercial entities, and even the UN undertakes some modest activities, such as operating

[27] For examples, see Paul Szasz, "The Complexification of the United Nations System," *Max Planck UNYB* 3 (1999)(discussing IOs created by other IOs).

[28] *Id.*, at 30. Indeed, some would say a fully fledged organization did not emerge until much later, when the WTO was established in the course of the Uruguay Round.

[29] *See, e.g.*, Schermers and Blokker, *supra* note 1, at 27–32; Szasz, *supra* note 27.

[30] *See, e.g.*, Szasz, *supra* note 27 (discussing entities created under arms control agreements); Churchill and Ulfstein, *supra* note 21(discussing entities created under environmental framework conventions).

[31] *See, e.g.*, August Reinisch, *International Organizations Before National Courts* at 52–70 (Cambridge, U.K. and New York: Cambridge University Press, 2000).

[32] *See, e.g.*, Churchill and Ulfstein, *supra* note 21(discussing doubts about the applicability of doctrines such as "implied powers" and the "principle of effectiveness" in connection with periodic meetings or conferences established under environmental framework agreements).

bookshops, that resemble those undertaken by private corporations.[33] But IO charters do share common structural elements. They typically indicate organizational goals or purposes, establish internal structure and sub-organs, explicitly provide for or assume a personality juridically separate from the members that constitute it, spell out the requisites of membership and other rights to participate, and identify the organization's and particular organ's powers.

As we will examine in Chapter 3, IO charters may authorize the IO (or organs within it) to conclude certain types of treaties, take legally binding or, more commonly, hortatory action directed at their members within the field of interest for the organization, and establish subsidiary organs. As we will see, under principles of so-called "internal" international institutional law, IOs enjoy certain rights and duties that are said to arise generally as a result of their legal personality, including, some would argue, the implied power to take other action reasonably necessary to fulfill the purposes for which such organizations were established. IO charters also sometimes specifically authorize or establish some methods to settle disputes between members, between members and the organization, or between employees of the organization and the organization.[34] And in some cases IOs have used other powers conferred on them, including the residual power to establish subsidiary organs, to create forms for institutionalized adjudication of some disputes.[35] And,

[33] Some entities created by OPEC, based on treaties, seem to qualify as IOs; while some of the activities of the International Telecommunications Satellite Organization (INTELSAT), the International Maritime Satellite Organization (INMARSAT), and the international financial institutions (World Bank, IMF, regional banks) are no different from commercial activities engaged in by private companies. *See, e.g.*, Schermers and Blokker, *supra* note 1, at 37–8. While INTELSAT and INMARSAT were privatized in 2001, the others mentioned remain inter-governmental organizations.

[34] *See, e.g.*, UN Charter, Articles 92–6 and the Statute of the ICJ (providing that contentious disputes between states that agree to the Court's jurisdiction may be brought before the International Court of Justice (ICJ) for binding decision and permitting UN organs and other IOs authorized by the Assembly to ask for advisory opinions from the ICJ).

[35] *See, e.g.*, UN Charter, Articles 22 and 29 (permitting the General Assembly and the Security Council respectively to create subsidiary bodies). The UN today has dozens of committees or other bodies charged with human rights matters, for example, most of which report directly to Assembly or indirectly to the Assembly via ECOSOC. The Assembly also established a tribunal to handle complaints from UN staff. *See* "Effect of Awards of Compensation Made by the United Nations Administrative Tribunal," Advisory Opinion, 1954 ICJ Rep. 47. The UN Security Council has created, under its general powers to maintain and restore international peace, two ad hoc tribunals to try persons accused of war crimes (*see* SC Res. 808 (1993) (establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY)) and SC Res. 955 (1994) (establishing the International Criminal Tribunal for Rwanda (ICTR)). The Council has also established more than a dozen sanctions committees to assist it in the implementation of its diverse sanctions regimes (see, for instance, SC Res. 1267 (1999), concerning al-Qaeda and the Taliban and associated individuals and entities). For a chart identifying Council-mandated sanctions regimes from 1966 (the first case of such sanctions, directed at Southern Rhodesia) through the end of 2000, see David M. Malone, ed., *The UN Security Council*, at Appendix 3 (Boulder, CO: Lynn Rienner, 2004); for current activities of these sanctions committees, see the Council's website at http://www.un.org/Docs/sc/committees. The Council has also established a UN Compensation Commission to evaluate claims against Iraq emerging from the Gulf War (see SC Res. 687 (1991)), and a Counter-Terrorism Committee (CTC) to consider states' implementation of Council anti-terrorism actions (see SC Res. 1373 (2001)).

as we will address in this book, to the extent such institutionalized dispute settlers make law in the course of settling such disputes, IOs are responsible for that law as well.

As is suggested by their charters, a tripartite structure is common to many IOs. Many have a plenary body consisting of the full membership, charged with broad powers to discuss policy, and meeting relatively infrequently;[36] an organ of more reduced membership capable of exercising some select powers, particularly of implementation, and capable of meeting on a more regular basis;[37] and a staff or secretariat of ostensibly "independent" international civil servants drawn from, and broadly representative of, member states and headed by a "Secretary" or "Director" general.[38] In addition, IOs tend to produce other IOs, whether in terms of subsidiary bodies, expert groups, or more autonomous organizations. The establishment of IOs has been accompanied by the growth of a vast bureaucracy of institutional organs both within particular IOs and between them and arising out of a number of multilateral treaties dealing with a specific subject, which some have described as "regime complexes" (defined "as an array of partially overlapping and non-hierarchical institutions governing a particular issue-area").[39] IOs increasingly interact as well with a tremendous range of non-state actors, particularly NGOs, that are increasingly active transnationally, as well as with a substantial number of transnational regulatory organizations, most of which have not been established by formal treaty but which nonetheless consist of government regulators expert on particular subjects, including those dealing with regulating banking, international securities, or transnational crime.[40]

While voting procedures and requirements differ widely as between IOs or as between organs within a single organization—from requirements for unanimity in some cases to majoritarian procedures based on differing schemes for weighted

[36] Such as the UN's General Assembly (GA), which usually meets once a year from September through December. Its powers are detailed in Articles 10–22 of the Charter.

[37] For example, the UN's Security Council, given sweeping powers to authorize a variety of sanctions (Article 41) and even the use of force (Article 42) in cases of a "threat to the peace, breach of the peace or aggression" (Article 39), has been meeting on a virtually continuous basis since the end of the Cold War. The Council has fifteen members, five of which—the U.S., Russia, China, France, and the United Kingdom—have the power to veto any action. *See* UN Charter, Articles 23–32, 33–8, and 39–51.

[38] *See, e.g.*, Articles 97–101, UN Charter. The UN's "secretariat" is headed by the Secretary-General, as "chief administrative officer." Article 97, UN Charter. As of 1992, the UN employed 51,724 persons, including 13,988 in the secretariat, 15,874 in the specialized agencies, and 21,331 in subsidiary bodies. The number employed by the Secretariat was reported to have increased to 14,309 by the end of 1995. Mark W. Janis, *An Introduction to International Law*, at 207 (Gaithersberg, NY: Aspen Law & Business, 34th edn., 2003).

[39] Kal Raustiala and David G. Victor, "The Regime Complex for Plant Genetic Resources," 58 *Int'l Org.* 277 (2004)(describing the interlocking actions of both formal IOs, including the Food and Agriculture Organization (FAO) and the WTO, as well as actions taken under various multilateral environmental agreements).

[40] *See, e.g.*, Kal Raustiala, "The Architecture of International Cooperation: Transgovernmental Networks and The Future of International Law," 43 *Va. J. Int'l L.* 1 (2002); David Zaring, "International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations," 33 *Tex. Int'l L. J.* 281 (1998).

voting—there have been two tendencies, not totally consistent with one another, with respect to IO voting: a marked trend to depart from the rule of unanimity on the one hand when formally casting votes and a no less potent trend to operate on the basis of "consensus" (and thereby avoid a formal vote) on the other.[41] IOs or organs within them operating on the basis of majority voting have sometimes been seen as a threat to sovereignty, particularly when these are authorized to take legally binding action over the objection of a dissenting state. Those operating on the basis of weighted voting, such as the Security Council—which privileges five permanent members with a permanent seat and a veto and permits legally binding action to be taken on the vote of only nine states in an organization of over 190—are also seen as a threat to the principle of sovereign equality. Consensus-based decision-making, especially when it operates in the relatively informal fashion evident within some IOs—amidst heavy political pressure not to "disturb" consensus—is also seen as less protective of sovereign consent than the more traditional procedures providing for "one state, one vote" common to 19th-century treaty-making conferences.

The financial arrangements that underlie IOs also implicate sovereignty concerns. For the most part, states have kept their IOs on a financial tether, requiring IOs to rely on state sources of financial support. While some IOs have generated a modest amount of income to support their operations, most still rely on the financial support of members, either through voluntary or assessed contributions or both, with rather ineffective penalties sometimes prescribed for the failure to pay required assessments.[42] Yet, to the extent members have a legal obligation to pay their dues and are formally barred from preventing particular expenditures to which they object, this, too, has been the source of some tension. Thus, the U.S. Congress, starting particularly in the 1980s, has attempted to exercise a financial veto over the UN.[43]

The bureaucratic structure of IOs, particularly when viewed as part of the broader UN system of organizations with plenary, executive, judicial, and organs for specialized activities laid out in concentric circles, as well as the growing mandates of IOs, sometimes prompt comparisons with systems for national governance. The comparison as well as the reality of IO forms of law-making has generated concerns that IOs should be as accountable to affected constituencies as are national law-makers within democratic states. Although as is discussed in Chapter 3, few IOs are accorded explicit law-making powers, except in narrowly defined areas of the law, and relatively few IO organs combine explicit delegated

[41] Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions*, at 263–75 (London: Sweet & Maxwell, 5th edn., 2001). For further discussion of the impact and justifications offered for different approaches to voting, see Kennedy, *supra* note 12, at 956–79.

[42] *See, e.g.*, José E. Alvarez, "Financial Responsibility of Members," in Christopher Joyner, ed., *The United Nations and International Law* (Washington DC: ASIL, 1997).

[43] *See, e.g.*, *id.*; José E. Alvarez, "Legal Remedies and the UN à la Carte Problem," 12 *Mich. J. Int'l L.* 229 (1991); José E. Alvarez, "The United States' Financial Veto," *ASIL Proceedings of the 90th Annual Meeting* 319 (1997).

law-making power with the power to take such action without the specific concurrence of all members, there are increasingly vocal complaints that some of these organizations, such as the WTO, suffer from a "democratic deficit." This has led to a search for other forms of accountability for many of these institutions, at both the national and international levels, including by legal limitations under general international law or otherwise; internal or external political checks and balances; or various possible forms of judicial review by international, administrative, or national courts.[44]

There have been many attempts to classify types of IOs. Some have preferred to distinguish those that aspire to universal state membership from those with more regional aspirations. Some have made distinctions based on policy agenda, attempting to distinguish administrative or technical organizations from political or judicial organizations.[45] It is common in the literature to find characterizations of the United Nations, for instance, as the quintessential "universal/political" organization; the International Monetary Fund (IMF) or the International Bank for Reconstruction and Development (IBRD) as "technical/financial" bodies; the International Civil Aviation Organization (ICAO), International Telecommunications Union (ITU), Universal Postal Union (UPU), and International Maritime Organization (IMO) as "regulatory" entities; the European Community/European Union (EC/EU), North American Free Trade Agreement (NAFTA), and the Andean Pact as "regional/economic"; and the Organization of American States (OAS), the Organization of African Unity/African Union (OAU), and North Atlantic Treaty Organization (NATO) as "regional/political."

These classifications are sometimes useful. Knowing that a particular IO has universalist aspirations implies certain outcomes with respect to the admission, suspension, or expulsion of members. The technical nature of the subject matter dealt with by some organizations (such as civil aviation) may suggest fewer political controversies or what game theorists might describe as a "coordination game," leading to speedier and more effective forms of inter-state cooperation, including possibly law-making.[46] Knowing an IO's purpose is crucial to understanding the nature of its activities and may therefore be useful, as the International Court of Justice has reminded us, to determine the proper limits on the scope of its

[44] *See, e.g.*, Ian Brownlie, *Principles of Public International Law* (Oxford, U.K. and New York: Oxford University Press, 6th edn., 2003), at 664–70 (enumerating the possible ways to control IO acts as including finding responsibility under general international law, internal political or judicial control (such as divisions of competence between political organs or resorting to ICJ advisory opinions), external political control (such as the requirement that regional arrangements seek authorization from the Security Council prior to taking enforcement action), direct judicial control (permitting, for example, national courts to pierce the immunity of some organizational privileges and immunities in certain cases), external rights of appeal (noting that the FAO's right to decide disputes is conditioned on a right of appeal to an appropriate international court or arbitral body), and administrative tribunals (noting the administrative tribunals frequently available to adjudicate staff complaints).

[45] *See e.g.*, Sands and Klein, *supra* note 41, at 18–19.

[46] *See, e.g.*, Kenneth W. Abbott, "Modern International Relations Theory: A Prospectus for International Lawyers," 14 *Yale J. Int'l L.* 335 (1989).

activities.[47] But while these typologies are a handy shorthand, they may also mislead. Such characterizations are static, simplistic, or both.

The UN, universal as it may be, is composed of various regional or other blocs, which often function in ways that are hard to distinguish from regional bodies such as the OAS. Further, that political body's actions can sometimes be explained in economic terms and may entail economic consequences. On the other hand, "financial" organizations like the IMF take or threaten measures whose political significance, and possibly even motivation, are not remarkably different from actions taken by the UN's Security Council. And "regional" groupings such as the OAS have sometimes acted, whether or not in tandem with the UN, in furtherance of ostensibly universal, political goals, as with respect to the promulgation of human rights standards.[48] Erstwhile "economic" entities like the former European Coal and Steel Community and the World Bank have transformed themselves into entities with far more diverse reach and motivations, as have IOs charged with mere "regulation," which have sometimes emerged as instruments for political condemnation usually associated with political bodies such as the UN's Security Council.[49] Seemingly technocratic organizations, such as ICAO, have become active on issues concerning the use of force (as directed against civilian airliners) and national security (such as the negotiation of counter-terrorist conventions). Both attempts at inter-state regulation are at a far remove from mere coordination games.[50] Meanwhile, even the most highly politicized entities, such as the Security Council, have sometimes been used to encourage relatively non-contentious inter-state coordination.

IOs are too complex to be reduced to typologies, their normative impact too broad to be limited to specialized branches of domestic or international law, their evolving nature too difficult to pin down to one character type. One of the themes of this book is that it is shortsighted to view the GATT/WTO as contributing

[47] *See Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request for an Advisory Opinion by the World Health Organization)*, 1996 ICJ Rep. 66 (rejecting the attempt by WHO to secure an advisory opinion from the Court with respect to the legality of nuclear weapons on the basis that such a request was outside the scope of that specialized organization's mandate).

[48] *See, e.g.* Douglas Cassel, "Inter-American Human Rights Law, Soft and Hard," in Dinah Shelton, ed., at 393 *Commitment and Compliance* (Oxford, U.K.: Oxford University Press, 2000). Further, the OAS, as when it ousted Cuba from membership, has adopted a political as well as geographic definition of "regional." *See* Sands and Klein, *supra* note 41, at 18.

[49] On the transformations of the European Communities, see, e.g., Joseph Weiler, "The Transformation of Europe," 100 *Yale L. J.* 2403 (1991). For a critique of the World Bank's expanding mandate, see, e.g., Jessica Einhorn, "The World Bank's Mission Creep," *Foreign Affairs*, (at 22 September/October 2001). *But see* Robert Picciotto, "Letter to the Editor," 81 *Foreign Affairs* 231–2 (January–February 2002) (defending the Bank's expanded mandate). For an example of a "technical" organization acting in a "political mode" and condemning the use of force deployed by a member, see Frederic L. Kirgis, Jr., *International Organizations in Their Legal Setting* at 469–71 (St. Paul, MN: West Publishing Co., 2nd edn., 1993) (discussing the ICAO's Council's condemnation of the Soviet downing of an aircraft).

[50] Kirgis, *supra* note 49, at 469–78 (discussing the ICAO Council's involvement in shoot-down incidents); 303 (enumerating the various counter-terrorism conventions negotiated under ICAO auspices).

only to international trade law; the ILO as effecting only the regulation of labor; the UN as solely affecting peace and security.

Another definitional distinction or typology, common to the political science literature, should be discussed at the outset: the difference between international organizations and international organization. As noted by Inis Claude, the former refers to the particular organizations that are the subject of this book, entities that, in his view, "may be nothing more than playthings of power politics and handmaidens of national ambitions."[51] The latter is not an identifiable institution but a process, less reality than an abstract vision, and, particularly for some international lawyers, nearly a religion—as in Claude's description of international organization as "an historical process . . . a secular trend toward the systematic development of an enterprising quest for political means of making the world safe for human habitation."[52] While the emphasis here is on organizations in the plural (and the particular), more general conclusions about the prospects for international organization (the integrative process) are sometimes suggested.

Another terminological question also needs to be addressed at the outset. Given the variety of techniques that IOs deploy that have at least the potential to have legal consequences, it is not surprising that there is some dispute about how to categorize what IOs do. Commentators have described IO law-making phenomena, including forms for promulgating rules as well as enforcing them, as involving rule-making, standard-setting, or the fostering of norms.[53] They have categorized IO-generated law under all three of the standard sources of international obligation (treaty, custom, general principles); as new sources of obligation (for example, "world law," "universal international law," "declaratory law," or a new species of "internal" institutional law), or as not belonging to international law at all.[54] Others have suggested that IOs undertake "legislative acts" when they take action that is unilateral in form, capable of creating or modifying some element of

[51] Inis L. Claude, Jr., *Swords into Plowshares: The Problem and Progress of International Organization* at 405 (New York: Random House, 4th edn., 1971). [52] *Id.*

[53] *Cf.* Jack Donnelly, "International Human Rights: A Regime Analysis," 40 *Int'l Org.* 3 (1986)(describing the following methods by which a regime promotes and enforces international norms: authoritative international decision-making, monitoring, policy coordination, information exchange, promotion, or assistance, and reliance on national decision-making). For his part, Paul Szasz delineated IO-mediated "international legal processes" as extending to (1) multilateral treaty-making; (2) the taking of binding decisions and hortatory resolutions; and (3) operational activities (from engaging in peacekeeping to giving succor to refugees) with normative effects. He described the last as having legal effect through the creation of customary international law, international administrative law, and internal administrative law. Paul Szasz, "General Law-Making Processes," in Joyner, *supra* note 42, at 27.

[54] *See, e.g.*, Louis B. Sohn, "Ways to World Law," *The Federalist*, at 13 (March 1952); Jonathan Charney, "Universal International Law," 87 *AJIL* 529 (1993); Hiram E. Chodesh, "Neither Treaty nor Custom: The Emergence of Declarative International Law," 26 *Tex. Int'l L. J.* 87 (1991); Szasz, *supra* note 53 (discussing "internal administrative law"). *See also* Rudolf Bernhardt, "International Organizations, Internal Law and Rules," in Rudolf Bernhardt, ed., 2 *Encyclopedia of Public International Law* at 1314–18 (Amsterdam and New York: North-Holland, 1992–2003) (discussing views of those who regarded internal institutional law as not properly part of public international law at all).

a legal norm, directed at indeterminate addresses, and capable of repeated application over time.[55] While in this book what IOs produce will be called different things—"rules," "norms," "standards," or simply "laws"—the difference in terminology is not necessarily intended to suggest precise differences in meaning, as with respect to degree of intended binding effect. Because IOs have not been consistent in using such terminology, it would be misleading and artificial to impose one on them here. More important that the terms used is a recognition of the techniques by which IO law-making takes place. In this book we will focus on just four: (1) by serving as the venue for the conclusion of or amendments to treaties among members (as opposed to by entering treaties between IOs themselves as parties or between IOs and states),[56] (2) through the enactment of "internal" rules dealing with intra-organizational issues (such as the rules governing the financing of the organization), (3) through political organs' taking of any other action, hortatory or legally binding (or as we will see somewhere in between), authorized by its institutional charter, and (4) through the actions of institutionalized dispute settlers.[57] Other books could be written on how other things that IOs do also shape the law. Thus, Chayes and Chayes' *The New Sovereignty* is at least partly an examination of how what IOs do by way of attempting to implement international law, that is, in seeking compliance, helps to shape modern international law.[58]

Because there is a superficial comparison that can be made between these powers and legislative, executive, and judicial powers conferred within national orders,[59] some commentators, such as Evan Luard, have suggested that the UN system contains "at least a skeleton of government," with the main difference being not the "degree of compliance" or the "sense of community" but merely the "scale

[55] *See, e.g.*, Frederic L. Kirgis, Jr., "The Security Council's First Fifty Years," 89 *AJIL* 506, 520 (1995), quoting Edward Yemin, *Legislative Powers in the United Nations and Specialized Agencies* 6 (Leyden: A.W. Sijthoff, 1969).

[56] *See* IO Convention, *supra* note 12.

[57] Sands and Klein, *supra* note 41, at 275–92.

[58] Thus Chayes and Chayes address, among other things, the following compliance tools: institutionalized methods for reporting and date collection, verification and monitoring, instruments of active management (including capacity building, dispute settlement, and the adaptation and modification of treaties), policy review and assessment, and interaction with NGOs. Chayes and Chayes, *supra* note 4. All of these have implications not only for whether and when states comply but on how we see the international legal process. These tools of enforcement, usually if not invariably in institutional settings, impact or reflect who the law-making agents actually are, the process by which the law evolves, and the content of the emerging rules. In this book the only compliance tool that we examine in this connection is institutionalized dispute settlement.

[59] Thus, for example, Sands and Klein address the "executive" function of IOs, defined as the implementation of the standards that the organization assists in promoting, see Sands and Klein, *supra* note 41, at 315 and 297–335, and their "judicial and quasi-judicial functions," in a separate chapter. The latter identifies "diplomatic" as well as "legal" means to address disputes within IOs, enumerating the ways IOs have encouraged the emergence of arbitration and other means of judicial dispute settlement and describing the increasingly large number of judicial institutions of global competence, regional courts, administrative tribunals, inspection panels, and more specialized adjudicative bodies (such as the Iran-U.S. Claims Tribunal and the UN Compensation Commission). *Id.*, at 337–438.

of activity" undertaken by this incipient system for international governance.[60] While such comparisons are sometimes tempting, particularly for international lawyers who sometimes confuse their aspirations for reality, one has to be cautious when comparing IOs' bureaucratic structures or their activities to those of nation states.[61] An IO's plenary organ is not equivalent to a legislative branch, its more limited organ is not an executive, and its adjudicative fora are not the equivalent of a judiciary. With the possible exception of the new European Constitution (which is outside the scope of this book), no IO charter purports to establish a "union" (perfect or otherwise). And not even the EU, the one IO with the clearest legislative and judicial capacity, has so far supplanted the nation states that formed it. Not even that body has managed to settle jurisprudential debates about whether, even today, there can be said to be a European "demos" subject to a "constitution."[62]

IOs are not intended to be proto-states or governments in the making. They were and are established for limited purposes—primarily, to facilitate the making of some treaties, to focus debate and make recommendations to governments, and to serve as venues for settling disputes on closely circumscribed topics. They are institutions of limited and delegated powers, lacking the plenary rights of sovereigns under international law (most prominently exclusive rights and duties over a people or a territory).[63] Despite their general entitlement to international legal personality, IOs are denied the power all nation states inherently have as international legal persons, such as the plenary power to conclude treaties on whatever topic.[64]

[60] Even Luard, *International Agencies: The Emerging Framework of Interdependence*, at 2 (Dobbs Ferry, NY: Oceana, 1977). "As communications develop, government moves, willy-nilly, more and more upwards from the national level to the international." *Id.* at 3. Indeed, Luard titles one chapter, "The Techniques of International Government." *Id.* Chapter 17. Not everyone has found such analogies comforting.

[61] *See, e.g.*, Sands and Klein, *supra* note 41, at 261 (noting that only a small number of IOs are endowed with the power to take binding decisions and that strict parallels between the production of norms by IOs and the legislative process within states are misleading). For further discussion of the relevance of such "domestic analogies," see Chapter 2.

[62] *See, e.g.*, J. H. H. Weiler and Joel P. Trachtman, "European Constitutionalism and Its Discontents," 17 *Nw. J. Int'l L. & Bus*. 354 (1996/97).

[63] The international law definition for a "state" presupposes a territory with established borders, a people, effective internal governance, and the ability to conduct foreign relations with other states. *See, e.g.*, *Restatement of the Foreign Relations Law of the United States, Third*, Sec. 201 (1986). Once these criteria are met, states are accorded a number of rights automatically under customary international law. *See, e.g.*, *Restatement*, *supra*, Sections 206–7. Unlike states, IOs do not have "jurisdiction to prescribe or enforce law" over territory, not even their headquarters (except insofar as this is granted pursuant to treaty). If the UN does have limited jurisdictional powers over the UN Headquarters in New York City, this is so pursuant to the 1947 Headquarters Agreement between the United States and the UN, 12 *Bevans* 956, 11 *UNTS* 11 (see article III, sections 8 and 9). On the legal personhood of IOs, see Chapter 3. That chapter will also briefly address one exception to the proposition posed in the text: where IOs have been charged, on a temporary basis, with the administration of territory.

[64] Thus, while the Vienna Convention on the Law of Treaties, *supra* note 23, recognizes, as does customary international law, that every state possesses the capacity to conclude treaties (Article 6), the comparable provision in the IO Convention, *supra* note 12, is considerably more hedged. Article 6 of that treaty provides that the "capacity of an international organization to conclude treaties is governed by the rules of that organization." Those rules include the IO's charter, as well as any

Nor are any existing IOs fully "supranational" if this means (1) the power to take binding decisions upon states, (2) the ability to take particular action without the express state consent, (3) the capacity to make rules directly binding on the inhabitants of states without the need for an intervening act by national authorities, (4) the capability to enforce decisions without the cooperation of the governments of participating states, (5) financial autonomy from member states, *and* (6) the prohibition of a unilateral right by states to withdraw.[65] While some IOs are loosely described as having "supranational" powers, the term is best used in the relative sense that some aspects of some organizations (or organs within them) share more of these six characteristics than do others.[66]

And to the extent some IOs have the power to take action that is explicitly binding on member states—such as the UN Security Council pursuant to its power to take binding decisions under Article 25 of the UN Charter—such powers are not plenary but are conferred only with respect to particular issue(s) and with respect to particular organs within an IO.[67] In addition, with rare exception mostly confined to European institutions,[68] even those "binding" norms issued by IOs typically require some intervening action by a domestic actor, such as a parliament, before they acquire the status of national law such that they can be invoked in local courts.[69] IO actions therefore share the detriments (or the benefits) of international legal norms generally: they include built-in political checks since states remain free to disregard, usually with impunity, even those rules by which they are formally bound.

This book does not purport to exhaustively examine all the "legislative," "executive," and "judicial" organs and law-making techniques described in standard treatises on IOs. But its select examples—in chapters on international institutional law, on treaty-making and dispute settlement—are intended to provoke thought about the standard ways international sources of law are often described. IO law-making is not in fact limited to the few instances in which these institutions are given express authority to take normative action directed at indeterminate addressees. And the cumulative normative impact of what IOs do is not

decisions and resolutions adopted in accordance with the charter, as well as the "established practice" of the organization. Article 2 (j), IO Convention, *supra* note 12. *See also* discussion of international legal personality in Chapter 3.

[65] Schermers and Blokker, *supra* note 1, at 46. As Schermers notes, not even the European Union, the most "supranational" of existing IOs, fully satisfies all of these criteria.

[66] *Id.*, at 42.

[67] *See, e.g.*, Chapter VII of the UN Charter (granting the Security Council powers over international peace and security) or articles 12, 37–8, 54, and 90 of the Convention on International Civil Aviation, 15 UNTS 295 (entered into force April 4, 1947) (granting the ICAO Council certain standard-setting powers).

[68] This includes EU directives with direct effect and treaty obligations on member states of the Council of Europe to change domestic law in conformity with rulings issued by the Strasbourg Court.

[69] This appears to be the case for Security Council decisions under the law of many UN member states and is certainly true of WTO rules in most WTO member states (which have not made WTO law "self-executing"). John H. Jackson and Alan O. Sykes, eds., *Implementing the Uruguay Round* (Oxford, U.K.: Oxford University Press, 1997).

limited to the particular regimes—security, trade, international air law, and so on—in which they find themselves embedded. The thesis here is that the IOs that are the primary focus of this book—namely those that aspire to universal participation—have transformed the processes by which international norms are produced, the nature of the actors that produce these rules, as well as the content of much of general public international law itself.

1.3 An Intellectual History

There is no single over-arching scholarly framework that comprehensively explains IO law-making or indeed suggests uniform agreement about what IOs are for. As we shall examine below, for some, IOs have been and remain primarily beholden to those with power, mere vassals for the hegemon. Others agree that IOs are the agents of states but argue that states have diverse tradable interests and that IOs serve the needs of states to cooperate on the international level, with consequent beneficial effects, notably in law. Some contend that IOs are not merely vessels for the individual and collective interests of states, but vehicles by which national and transnational groups take action at the international level. And some would even turn the causal arrows the other way, to suggest that IOs shape what states (and possibly others) want. As with respect to accounts of national law-making, what we have within the academy are competing or overlapping approaches or frameworks whose respective appeal ebbs and flows with events in the "real world," far from academe.

1.3.1 Functionalist Theories

The most common perspective on IOs remains functionalism, a school with many rooms but which, at its core, credits changing state needs for both the rise in, and the subsequent development of, IOs. Functionalist perspectives are probably most clearly manifest in historical accounts of the rise of IOs.[70]

The traditional functionalist explanation for the emergence of IOs can be briefly summarized.[71] Traces of the modern IO appear in the ancient Greek

[70] For a wide-ranging perspective on modes of "functionalism" prevalent in law and the social sciences and its impact, see Douglas M. Johnston, "Functionalism in the Theory of International Law," 26 *Canadian Yrbk. Int'l L.* 3 (1988). For a typical political scientist text evincing the "functionalist" perspective, see Feld, Jordan, and Hurwitz, *supra* note 17 (including a theoretical model to indicate the "propensity for international organization").

[71] For one of the best of these, see Gerard J. Mangone, *A Short History of International Organization* (New York: McGraw-Hill, 1954). For shorter accounts, typical of course books in this field, see, e.g., Sands and Klein, *supra* note 41, at 1–13; Harold K. Jacobson, *Networks of Interdependence* at 7–10 (New York: Knopf, 2nd edn., 1984); Robert F. Riggs and Jack C. Plano, *The United Nations: International Organization and World Politics* 1–15 (Belmont, CA: Wadsworth Publishing, 2nd edn., 1994); Kirgis, *supra* note 49, at 1–6; Feld, Jordan, and Hurwitz, *supra* note 17, at 1–8; 16–35.

Achaean League through which city-states sought to discourage conflict and generate cooperation[72] and later, in the innovation of the Roman or Greek consul of the 15th century, a permanent diplomatic ambassador.[73] Modern IOs were made possible by the creation of the territorial European state as a consequence of the 1648 Treaty of Westphalia, since the (primarily economic) forces that led to the creation of states were, in embryonic form, the same forces that would eventually lead to more inter-state forums for inter-state cooperation.[74]

In the 19th century, states' needs to resolve problems on more than a bilateral basis—their increasing "interdependence"—are credited with leading to the rise of multilateral international conferences, initially on an ad hoc, and later, on a periodic, basis (as the Congress of Vienna in 1815).[75] The early 19th-century river commissions of Europe, such as the Central Rhine Commission of 1804 and the European Danube Commission of 1856, which responded to commercial needs to regulate river traffic, constituted the next incremental step towards more permanent modes of international cooperation. Later still, international public administrative unions, such as the Universal Telegraphic Union (1865), the General Postal Union (1874), the International Bureau of Industrial Property (1883), and the International Union of Railway Freight Transportation (1890)—driven by the need for common approaches to problems of commerce, communication, and transportation—make their appearance, contributing in their wake the idea that these needs can be better filled through the creation of permanent secretariats but still involving only periodic, not permanent, meetings of representatives of member states and usually, but not always, requiring unanimous agreement for taking action.[76] Not much later, the Versailles Treaty at the end of World War I, from which sprang the League of Nations—the forerunner of today's United Nations—becomes the "progenitor of the modern 'universal' international organization."[77]

Under the traditional, functional account of the rise of the League of Nations, that entity arose as a reaction to World War I. States, particularly major military powers, realized that there was a need and an opportunity at the war's end to institutionalize the "conciliatory, judicial, prelegislative, administrative and co-ordinative

[72] *See, e.g.*, Riggs and Plano, *supra* note 71, at 1; Jacobson, *supra* note 71, at 8.

[73] Sands and Klein, *supra* note 41, at 1.

[74] *See, e.g.*, Riggs and Plano, *supra* note 71, at 1–2; Mangone, *supra* note 71, at 98–123.

[75] *See, e.g.*, Mangone, *supra* note 71, at 98–123. The Congress of Vienna and the later two Hague Conferences of 1899 and 1907 are also credited with other innovations vital to the development of IOs, including the techniques of the multilateral treaty and law-making (or codification) treaties, the expansion of topics suitable for international regulation (such as the regulation of the slave trade), the creation of international arbitration as a form for dispute settlement, and an orientation towards universality (as opposed to inviting only some states at the discretion of the state hosting the conference). *See, e.g.*, Kirgis, *supra* note 49, at 3–4.

[76] *See, e.g.*, Kirgis, *supra* note 49, at 5–6.

[77] *See, e.g.*, *id*., *supra* note 49, at 6; Mangone, *supra* note 71, at 128–56. Kennedy contends that international lawyers viewed 1918 as the decisive "break between a preinstitutional and an institutionalized moment." Kennedy, *supra* note 12, at 844.

tasks" that had been undertaken in a variety of forums prior to the War.[78] The idea was to force the coalescence of pre-1914 international relations into a "system;" the League was a "conscious" attempt to create an organized international society through a multi-purpose and comprehensive international institution.[79] Thus, the Covenant of the League of Nations, which entered into force on January 10, 1920, indicated that the organization's purposes were not merely to accept obligations "not to resort to war," but also to "promote international co-operation," "achieve international peace and security," prescribe "open, just, and honourable relations between nations," establish "international law as the actual rule of conduct among Governments," and maintain "scrupulous respect for all treaty obligations."[80] All these issues were to be dealt with by an Assembly to meet at stated intervals and consisting of all (originally 42) League Members;[81] a Council, an organ of limited membership consisting of "representatives of the Principal Allied and Associated Powers together with representatives of four other Members . . . selected by the Assembly from time to time . . ." to meet at least once a year;[82] a Secretariat comprised of a Secretary-General and "such secretaries and staffs as may be required;"[83] and subordinate bodies such as committees created by either the Assembly or the Council.[84] Under article 14 of the Covenant, the Council was to submit to

[78] Georg Schwarzenberger, *International Constitutional Law*, Vol. 3 of *International Law as Applied by International Courts and Tribunals* at 178 (Boulder, CO: Westview Press, 1976). *See also* Kennedy, *supra* note 12, *passim*.

[79] *See, e.g.*, Schwarzenberger, *supra* note 78, at 178.

[80] Preamble, Covenant of the League of Nations (1920) (hereinafter "Covenant").

[81] Although the Assembly could discuss "any matter within the sphere of action of the League or affecting the peace of the world," article 3, Covenant, it only had the power to make "resolutions" or "recommendations" and could bind no member. *See*, *e.g.*, Sands and Klein, *supra* note 41, at 9–13. Each state had one vote on the Assembly and its decisions, like those of the Council, required unanimity. *See* articles 3 and 5, Covenant. In both the Assembly and the Council, matters of "procedure," however, could be decided by a majority. Article 5(2), Covenant. The Assembly met every September from 1920 to 1940.

[82] Article 4, Covenant. The four original permanent members were Britain, France, Italy, and Japan. Over time, the Council was enlarged, as when Germany became a permanent member and non-permanent membership was enlarged to six in 1922, nine in 1926, and eleven in 1936. Due especially to the United States' failure to join the League, at no time did the Council consist of a majority of the then major powers. *See* Sands and Klein, *supra* note 41. In practice the Council met four times a year.

[83] Article 6, Covenant. This was the most ambitious international civil service yet established. *See* Sands and Klein, *supra* note 41, at 11–12. The League drafters envisioned that "all international bureaus and all commissions for the regulation of matters of international interest" would be placed under the "direction of the League." Article 24(1), Covenant. Further, even with respect to matters not placed under the control of such bureaus and commissions, the Secretariat was, subject to the consent of the Council and treaty parties, to "collect and distribute all relevant information" and "render any assistance" deemed "necessary or desirable" with respect to "all matters of international interest which are regulated by general conventions." Article 24(2), Covenant. The resulting efforts by the League Secretariat to collect and disseminate information, call conferences, and put "persistent pressure upon governments to take steps either by international convention or by national statutes to improve the world's welfare," have been seen, at least by some, as impressive "strides toward a world community." Mangone, *supra* note 71, at 134.

[84] *See* article 5(2) of the Covenant (permitting the appointment of such Committees by majority vote of members represented at the meetings of either the Assembly or the Council). The League also was instrumental in creating other organizations, all of which operated in close association with League organs. Among the most significant were the Economic and Financial Organization,

members a plan to establish a Permanent Court of International Justice competent to hear any dispute of an "international character" which the parties thereto submit to it as well as to render "advisory opinions" referred to it by the Council or by the Assembly. Pursuant to this, a Statute for the Permanent Court of International Justice (PCIJ), the forerunner to today's ICJ (or World Court), was drawn up by an Advisory Committee of Jurists and approved by the Assembly on December 13, 1920.[85] As many have noted, the League was clearly inspired by 19th-century developments; its organs reflected earlier experiences with a "concert of major powers," plenary assembles reminiscent of the Hague conferences, and "dispassionate" international secretariats or "bureaus."[86]

The drafters of the League Covenant subordinated other League goals to the all-important purpose of maintaining international peace.[87] The primary objective, to prevent recourse to war, was to be furthered by a three-pronged approach: peaceful settlement of disputes, collective security, and disarmament. League members pledged to turn to arbitration, judicial settlement, or to inquiry by the Council prior to resort to the use of force;[88] not to resort to force for three months after an arbitral or judicial decision or a report by the Council;[89] that they

composed of two committees of experts charged with investigating, among other things, tariffs, clearing agreements, and taxation, and the Communications and Transit Organization, which was established by separate constitution but whose expenses were paid by the League and which acted as a spur to the making of international conventions, including agreements on maritime ports, international railways, regulations for international touring, and water-power projects affecting more than one state. Also within the "League" system were organizations relating to health, intellectual property, traffic in women and children, and drug trafficking. *See, e.g.*, Mangone, *supra* note 71, at 134–5.

[85] *See* Resolution Concerning the Establishment of a Permanent Court of International Justice, passed by the Assembly of the League of Nations on December 13, 1920, in International Intermediary Institute, ed., *The Permanent Court of International Justice—Statutes and Rules* at 36 (Leyden, Netherlands: A.W. Sijthoff's Vitgereesmaatschappij, 1922).

[86] *See* Mangone, *supra* note 71, at 132.

[87] Thus, article 23 of the Covenant, the main provision on point, imposed only vague duties. It stated:

Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:
(a) will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organizations; (b) undertake to secure just treatment of the native inhabitants of territories under their control; (c) will entrust the League with the general supervision of the trade in arms and ammunition with the countries in which the control of this traffic in opium and other dangerous drugs; (d) will entrust the League with the general supervision of the trade in arms and ammunition with the countries in which the control of this traffic is necessary and in the common interest; (e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. In this connection, the special necessities of the regions devastated during the war of 1914–1918 shall be borne in mind; (f) will endeavour to take steps in matters of international concern for the prevention and control of disease.

For a case emphasizing the minimal character of legal commitments thereby assumed, see, e.g., *Railway Traffic between Lithuania and Poland*, 1931 PCIJ (Advisory Opinion).

[88] Article 12(1), Covenant. *See also* article 13, Covenant. The report of the Council was to be issued within six months after submission of the dispute. Article 12(2), Covenant.

[89] Article 12(1), Covenant (as amended).

would carry out any award or decision so rendered;[90] and that they would not resort to war against a League member in such compliance.[91] League members were further obligated to submit to the Council any dispute "likely to lead to a rupture" not submitted to arbitration or judicial settlement.[92] The Secretary-General and Council, in turn, were thereby obliged to attempt a settlement and, if this proved impossible, to issue a report containing a statement of the facts and recommendations for settlement.[93] Further, "[i]f a report by the Council is unanimously agreed to by the Members thereof other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report."[94] What was envisioned was to compel a "cooling-off" period prior to the resort to force. To this end, two new institutional forums, apart from traditional ad hoc arbitration, were created: a political one (the Council) and a judicial one (the PCIJ).

The League Covenant also sought to deter the resort to war by creating a collective security system. Although the League Covenant did not directly ban the resort to war, under its terms League members mutually pledged to "respect and preserve as against external aggression the territorial integrity and existing political independence" of each other.[95] To this end, League members that resorted to force in violation of the Covenant were deemed to have "committed an act of war against all other Members of the League;" as a consequence, the Council was entitled to immediately subject such treaty violators 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."[96] In such cases, the Council was also empowered to "recommend" the use of force by member states[97] and it could, by unanimous vote of other Council members, expel such treaty violators from the organization.[98]

Finally, the League envisioned an active role for the Council on the reduction of armaments. The Council was empowered to formulate disarmanent plans "for the consideration and action of several Governments."[99] Once adopted by governments, the limits in such plans were not to be exceeded without Council

[90] Article 13(4), Covenant. [91] Article 13(4), Covenant.

[92] Article 15, Covenant (as amended).

[93] Article 15, Covenant. Such a report could be issued by a majority of the Council. Article 15(4), Covenant. [94] Article 15(5), Covenant.

[95] Article 10, Covenant. [96] Article 16(1), Covenant.

[97] Article 16(2), Covenant. Members were further obligated to cooperate with one another in the taking of financial and economic measures and were to "afford passage" through their territories to any forces of any League members "co-operating to protect the covenants of the League." Article 16(3), Covenant. League members could individually resort to force when the Council failed to unanimously adopt a report as to a dispute since members "reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice." Article 15(7), Covenant.

[98] Article 16(4), Covenant. [99] Article 8(2), Covenant.

concurrence.[100] In addition, the Council was empowered to advise governments on the prevention of manufacture of munitions and implements of war by private enterprise[101] and League members pledged to exchange "full and frank information" as to "the scale of their armaments, their military, naval and air programmes and the condition of such of their industries as are adaptable to warlike purposes."[102]

The League's three-pronged system to prevent war failed to do so, and the organization itself collapsed with the onset of World War II. Its failures, the subject of a vast literature, have been attributed to many factors: (1) constitutional weaknesses such as the requirement of unanimity or the failure to accord a central organ the power to impose legally binding economic sanctions; (2) non-universality, especially the non-participation of the U.S.; and/or (3) failure of political will such that those who were members failed to implement the Covenant as intended since only "half-hearted" sanctions were ever imposed (against Italy in 1935).[103] Whatever the cause, despite some arguable early successes (as in dealing with the Graeco-Bulgarian crisis of 1925 and the Chaco dispute of 1928),[104] the League stood helplessly by, doing little to prevent the Japanese invasion of Manchuria in 1931; the German march into the Rhineland in 1936, into Austria in 1938, and into Poland in 1939; or the Soviet Union's invasion of Finland in 1939.[105] As an organization, it was effectively dead some twenty years after its establishment.

Despite its failure with respect to its primary task, the League of Nations has exerted a pervasive influence over all subsequent international organizations, along with the field itself. Correcting the League's perceived weaknesses provided much of the inspiration for later institution-builders, as within the context of drafting of the UN Charter. But the League's influence has not only been through negative example or lessons. The League's substantive achievements, particularly in the development of cooperative techniques by its Secretariat in other fields apart from peace and security, continue to be cited as essential tools for securing compliance with treaty obligations,[106] and the precedents established by its PCIJ continue to influence subsequent judicial and arbitral bodies and continue to be cited by practicing lawyers and scholars.[107] Further, many League innovations continue to

[100] Article 8(4), Covenant. [101] Article 8(5), Covenant. [102] Article 8(6), Covenant.

[103] *See, e.g.*, Sands and Klein, *supra* note 41, at 13; D. W. Bowett, *The Law of International Institutions* at 17–18 (London: Stevens & Sons, 4th edn., 1981).

[104] For a brief but favorable account of the League's handling of these early disputes, see Mangone, *supra* note 71, at 144–6.

[105] Bowett, *supra* note 103, at 18; Mangone, *supra* note 71, at 147–53. Mangone argues that the League's attempt to impose economic sanctions against Italy, between October 1935 and July 1936, even though not applied by all states and only partial in nature, had a "telling effect," were "utterly unprecedented," and "came within inches of astonishing success." Mangone, *supra* note 71, at 151–2.

[106] *Compare* Mangone, *supra* note 71, at 153 (identifying the League's contributions to international cooperation) *with* Chayes and Chayes, *supra* note 4, at 154–249 (describing compliance techniques apart from coercive sanctions).

[107] Between 1922 and 1940 the PCIJ heard 65 cases, delivering 32 judgments and 27 advisory opinions. Although this record is modest by the standards of domestic courts, as Mangone notes, this first international court helped to settle significant sources of tension among states and within the League. *Id.*, at 138.

be adapted to subsequent attempts at institution-building. Although a "failed experiment" in collective security, the League nonetheless anchored important precedents in international institutional law, including the proposition that the starting point of any IO (as well as any subsequent discussion of its functions) needs to be a legally binding instrument, namely a charter;[108] that other institutional frameworks need to replicate the League's structure (including membership provisions, decision-making procedures, and respective competences of organs);[109] and that states' "domestic jurisdiction" can be limited by an international instrument and the evolving practice of organs.[110] Further, the League's ability to evolve over time, despite its failures, has given hope to subsequent institution-builders that they need not anticipate all future needs since charter provisions can be altered over time through institutional innovations short of charter amendment.[111] Finally, as David Kennedy has suggested, the League as ideal gave concrete form to the transformative power of institutionalization, at least when allied with the rule of law.[112]

The League's failures did not undermine those who put their faith in such institutionalization. To many functionalists, the League's failures suggested only that the machinery for peace and cooperation needed to be improved for smoother operation. Particularly after World War II, IOs proliferated at a phenomenal level, and not merely due to the rise of the UN and its specialized agencies and "regional" organizations such as the European Community (EC) and its Cold War counterpart, the Council for Mutual Economic Assistance (COMECON) (dissolved in 1991). While in 1909, there were 37 IOs in the world, by 1956 there were 132. (That number would grow steadily to reach a high of 378 in 1985 but decline, to some 250 by the close of the century.[113]) As with the League of Nations, these

[108] For further elaboration of the significance of this reliance on the "written word," see Kennedy, *supra* note 12, at 903–7.

[109] *See, e.g.*, *id.*, at 952–79. Kennedy also identifies how early League debates concerning the merits and demerits of a unanimity voting requirement, along with a tendency towards "consensus" decisions without formal vote, have dominated much of the thinking on the subject. *Id.*, at 962–79.

[110] *See, e.g.*, Schwarzenberger, *supra* note 78, at 180–1.

[111] Thus, commentators have noted how the League, for example, shifted its emphasis to the regulatory functions identified in its Article 23, as its failures to protect the peace became clearer over time (see, e.g., *id.*, at 183); or how the relative power of its organs shifted over time (see, e.g., Mangone, *supra* note 71, at 141–2); and how its organs learned to minimize the difficulties of securing complete unanimity (see, e.g., John Fischer Williams, "The League of Nations and Unanimity," 19 *AJIL* 475 (1925)).

[112] Thus, Kennedy writes about the

> relationship between law and politics which animates the recapitulation of the relations among Conference, Covenant, and plenary . . . The Covenant, closing the Peace Conference with a legal document, promises to close political debate, to freeze it, to permit the politicians to return to their capitals without fear that their work will be undone. In the Covenant, law closes the social rupture worked by politics. In the plenary, law reverses direction, inaugurating a new politics, promising to channel politics and enable debate without rupture. Law becomes facilitator, background procedure, mechanism, forum.

Kennedy, *supra* note 12, at 985.

[113] *See* Ku, *supra* note 4.

organizations are also said to respond to increasing needs for inter-state cooperation in the wake of increasing interdependence.[114]

The decline in the absolute number of IOs since 1985 can also be explained on functionalist terms: some IOs dissolved when they ceased to meet the needs of their creators (as happened with the East African Community (EAC), the Central American Common Market (CACM), and the Warsaw Pact). Functionalist explanations for the proliferation of IOs that do not aspire to universal membership are also not hard to find. European regional bodies like the European Community or COMECON emerged at least partly in response to the need for greater economic cooperation to overcome the ravages of recent war. Other regional bodies emerged elsewhere—principally to promote economic development in the wake of decolonization, but also as a forum for those perceiving other common economic and political interests. Finally, other bodies, such as NATO, the Warsaw Pact, SEATO, and CENTO, emerged to respond to security needs prompted by the Cold War.[115]

As IOs have, with time, gained institutional experience, functionalist explanations have also emerged to explain the processes of change within them. The Cold War security interests of the United States, for instance, are seen as a prime contributing cause to evolutionary changes within the Organization of American States (OAS).[116] Within political science, functionalist accounts ground a rich lore of competing or complementary explanations for institutional effectiveness and change over time, including explanations based on game theory,[117] "market" theories (involving collective goods, externalities, or primary market failures),[118] and theories of hegemonic cooperation.[119]

Functionalist accounts of international organizations assume that states are the dominant actors in international relations; that states, in the absence of institutions, engage in the anarchic pursuit of power but do have some common interests; that, over time, they respond rationally to (primarily technologically driven) developments; and that, given time, they "learn" from prior experience.[120] As adherents to institutionalism (a version of functionalism that emerged in the

[114] According to Luard, institutionalization is prompted by the "simple fact that the problems of government are today increasingly international rather than national," and the "international community is obliged to try to devise the institutions to tackle them most effectively." Luard, *supra* note 60, at 2–3.

[115] *See* Feld, Jordan, and Hurwitz, *supra* note 17, at 20–1.

[116] *See, e.g.*, Mangone, *supra* note 71, at 258–61.

[117] *See, e.g.*, Kenneth W. Abbott, "International Relations Theory: A Prospectus for International Lawyers", 14 *Yale J. Int'l L.* 335, 354–75 (1989).

[118] *See, e.g.*, *id.*, at 375–404.

[119] *See, e.g.*, Keohane, *supra* note 11. For an overview of differing approaches to hegemonic stability, see Stephan Haggard and Beth A. Simmons, "Theories of International Regimes," 41 *Int'l Org.* 491, at 500–4 (Summer 1987) (distinguishing "malign" and "benign" views). For a survey of many of these explanations for IO development, see Oran B. Young, "Regime Dynamics: The Rise and Fall of International Regimes," in Stephen D. Krasner, ed., *International Regimes* at 93 (Ithaca, NY: Cornell University Press, 1983).

[120] *See, e.g.* Anne-Marie Slaughter, "International Law and International Relations," 285 *Recueil des Cours* 12, at 37 (2000). *But see* Luard, *supra* note 60, at 324–9 (identifying a somewhat different set of basic premises for functionalist theory).

1980s within political science) argued, IOs create the "conditions for orderly multilateral relations" by, for example, reducing the costs of making transactions, legitimating different forms of (inter-)state action, facilitating linkages among issues and between regimes, and increasing the symmetry and the quality of information states receive.[121] On this view, IOs are not only capable of modifying the conditions of anarchy in which states find themselves by permitting cooperation: they are as fundamental to the determination of international outcomes as the distribution of capabilities among states.[122]

To a functionalist, IOs are simply agencies called into being by states, sustained by states, and actually or potentially directed by states on the supposition that the organization's existence and operation are useful to themselves.[123] States, not utopian dreamers intent on creating a "world government," are credited with the rise of modern IOs, which, after all, are as much the product of state needs as are the laws of sovereign immunity or of war. They are seen as natural a product of international society as states, and as inevitable. They are no more and no less the subject of praise or of criticism than the state-centric international system of which they are a product.

That the UN Charter seeks, in Article 2(4), to "outlaw" the aggressive use of force is, from this perspective, neither an objectionable diminution of sovereign rights nor a praiseworthy step towards "international governance" but the manifestation of states' enlightened self-interest: after two disastrous world wars and an ineffective prior attempt to discourage inter-state warfare (through the League of Nations), those states left standing after World War II sought a more effective collective security system to better fulfill their need for greater stability. States, still the primary actors in international relations, have chosen to act through agents called IOs but this agency relationship remains terminable at will, whenever the underlying needs that drive states to create the relationship cease to apply or are overtaken by greater competing needs.

Changes in technology and its impact on the structural constraints on states, not ideology or politics as such, loom large in this account of IOs.[124] After all, functionalist historians note, IOs did not emerge immediately after the rise of states, but centuries later, in the wake of 19th-century technical developments that made more essential (and facilitated) transnational communication and travel. It is no coincidence that the first IOs were technical organizations. Industrial development instigated the needs and brought the tools that facilitated the rise of IOs. Developments thereafter proved symbiotic. Building a submerged telegraph cable to join England and France in 1850 inspired the need to create a body

[121] Robert O. Keohane, *supra* note 11, at 244. *See also* Kenneth W. Abbott and Duncan Snidal, "Why States Act Through Formal International Organizations," 42 *J. Conflict Res.* 3 (1998).

[122] *See, e.g.*, Slaughter, *supra* note 120, at 37 (quoting Keohane).

[123] *See, e.g.*, Sands and Klein, *supra* note 41, at 1; Mangone, *supra* note 71, at 1.

[124] *See generally* John G. Ruggie, "International Responses to Technology: Concepts and Trends," 29 *Int'l Org.* 557 (1975).

to regulate these communications but faster international communications in turn meant that government delegations to the International Telegraphic Bureau could more rapidly receive government instructions, thereby facilitating the work of that organization and making possible the creation of permanent unions at the international level.[125]

"Learning" plays an important role in this version of history. To the functionalist, international entities are created because states rationally respond to the challenges they face (as from emerging technology) and are consistently innovative, building upon prior experience, step by step, to design a better multilateral response.[126] There are many historical examples of "learning." States learned from the defects of ad hoc conferences, which had proven unsatisfactory for the resolution of many issues because: they were dependent on the initiative of a state willing to convene the event, limited to the specific agenda the organizer had in mind and could not serve as a forum for more general debate, restricted to those states invited by the host, and rigorously adhered to a rule of unanimity on the basis of one state/one vote. Such conferences gave way to the periodic conference system whose regularized meetings and other attributes would eventually culminate in a permanent body: the League of Nations.[127] International law-making was also expedited (if not transformed) by the creation of multilateral treaties (as opposed to a series of bilateral arrangements). "Codification" conventions, intended to have at least some impact on non-signatories, in turn further improved the prospects for the promulgation of truly international rules and facilitated the expansion of the subject matter of international law. International unions gave states the further insight that institutional permanence was a virtue, and that votes (and budgetary contributions) could be weighed on the basis of differing criteria, as appropriate to the object of the organization or the organ within an organization. States also learned that while the effectiveness of international regulation was often enhanced by expanding the number of participants—thereby encouraging a trend towards universality—not all state participants needed to be treated for purposes of voting or participation rights as equal within institutional organs.

[125] On the relationship between technology and functionalism, see generally Jacobson, *supra* note 71, at 62–7.

[126] Indeed, the role of rationality plays such an important role in this perspective that some have characterized the approach as "rationalist" rather than "functionalist." *See, e.g.*, Malcolm N. Shaw, *International Law* at 590 (Cambridge, U.K.: Grotius Publications, 2nd edn., 1986). The classic text on whether and how different IOs learn or adapt, depending on a number of institutional factors (such as their ideology, nature of member representation, degree of secretariat autonomy, status given to experts, and revenue base), is Ernst B. Haas, *When Knowledge is Power: Three Models of Change in International Organizations* (Berkeley: University of California Press, 1990).

[127] The machinery of the Great Power Conference was executive, legislative, and mediatory. It took executive action in the sense of sometimes ordering armed forces to produce certain results. It was legislative by reason of its pronouncements on general questions of international law, and it was sometimes a judge between the conflicting interests of its own members or of other Powers. In all these functions it anticipated part of the machinery of the League of Nations. Kennedy, *supra* note 12, at 858, n. 37, quoting C. K. Webster and S. Herbert, *The League of Nations in Theory and Practice* at 20 (London: George Allen/Unwin Ltd., 1933).

In the 20th century, learning from the prior flaws in institutional design has continued, as states corrected the "birth defects" of entities as different as the League of Nations and the GATT.[128] As David Kennedy has noted, the rhetoric of the IO literature is one of "forward movement, of institutional maturation through reform."[129] But, as will be discussed below, some of those who have stressed the role and impact of learning have questioned the instrumentalist logic of functionalist accounts—which tend to presume that IOs operate in a world of competing or complementary state interests where both the identity and the interests of the principal actors (states) are predetermined. For some, the learning process promoted by, among other things, IOs, itself helps shape both the identity and interests of the relevant actors (which now include much more than states).[130]

Some functionalists have built onto this historical account an ambitious programmatic thesis. Taking an explicitly evaluative stance that some would associate with idealism, they have postulated that IOs, which have proven to be demonstrably useful for "technical, non-political" cooperation, may also, over time, erode other sources of conflict among nations. Functionalists such as David Mitrany have seen IOs as a kind of rear guard action against state sovereignty, as an interim step towards political integration at the international level.[131] Mitrany and others have argued that by learning to cooperate in technical areas through supranational institution-building, states eventually learn to cooperate with respect to more political issues, including the prevention of war. They theorize that states will gradually learn a larger lesson: that international cooperation through institutions does not involve the surrendering of sovereignty but merely "pooling as much of it as may be needed for the joint performance of a particular task."[132] They hope that world order, if not necessarily "world government" involving a politically difficult decision to renounce sovereignty in favor of centralized political authority, will gradually evolve as governments learn that functions can be integrated

[128] *See, e.g.*, Kennedy, *supra* note 12, at 984 and n. 330, 986–7.

[129] *Id.*, at 853–63, 972. As Kennedy notes, some of the literature also stresses cross-institutional learning. The League might be seen as building upon the immature 19th-century conference system by developing a "standing parliament." The UN thereafter transformed this parliamentary system into an "administrative apparatus." The Law of the Sea conference has since contributed a complex mechanism for dispute resolution and adjudication. Between the three, there appears the beginnings of a "tripartite structure familiar from domestic civics." *Id.*, at 986.

Not surprisingly, Mangone's history of IOs is organized into chapters that stress the "maturation" of international society through institutionalization, from the "age of consultation," to the 19th-century period of "administration," to the age of "collaboration" with the League and the United Nations. Mangone, *supra* note 71.

[130] *See* discussion of constructivists, *infra* at text accompanying notes 205–13.

[131] *See, e.g.*, Richard A. Falk et al., *The United Nations and a Just World Order* at 138 (Boulder, CO: Westview Press, 1991); David Mitrany, "The Functional Approach to World Organization", in *id.*, at 153 (reproduced from 24 *Int'l Affairs* (1948)). Mitrany first developed his approach preliminarily in 1933 (David Mitrany, *The Progress of International Government* (London: G. Allen & Unwin, Ltd., 1933)) and later in 1943 (David Mitrany, *A Working Peace System* (London: Royal Institute of International Affairs, 1943)). Supplementary essays were added to the latter for a later edition in 1966.

[132] Mitrany, in Falk, *supra* note 131, at 160.

internationally as much as they are internally.[133] For such functionalists, IOs hold out the prospect of "federalism by installments" or "peace by pieces."[134]

Mitrany and many others since have seen the international community as moving towards some kind of federalist system of world governance.[135] Indeed, for some this eventuality is the inevitable product of forces that states cannot control. But whether seen as inevitable or merely likely, world federalism on the installment plan is welcomed by these scholars for whom this is likely to be an evolution and not a revolution. Unlike Marxists who see world socialism emerging only after fundamental clashes between violent social forces, such functionalists argue that world federalism is most likely to emerge not as a result of a climatic confrontation between conflicting paradigms, but through incremental steps taken in a range of institutional settings. Thus, while they accept that IOs sometimes extend their power over governments as a result of a specific, deliberate act by states, such as the signing of the UN Charter or the Treaty of Rome, they suggest that a more common phenomenon is "the slow and steady accretion of responsibilities that arises through a series of decisions over a period, leading eventually to wider or stronger powers for the organization concerned."[136] They contend that IOs gradually extend their powers through new interpretations of their charters, an expansion of the role of organs or secretariat, the growth of their bureaucracy (committees, staff), or an expansion of their budgets.[137] They explain that while states often resist such changes and the consequential interference with their sovereignty, the pressure to accede arises from the substantive advantages provided by institutional integration itself, with often startling results.[138] Thus Luard, although critical of much of Mitrany's views, concludes his 1977 book as follows:

> Only thirty years ago the right to impose exchange restrictions and quotas, or to raise tariffs, the right to determine what human rights were to be accorded minority populations, the right to determine exchange rate policies, all these were almost universally regarded as matters solely within domestic jurisdiction, for each government to decide for itself; today it is equally taken for granted that they are all subject to international influence, to the norms established by the international community. It is above all through this gradual erosion of

[133] *Id.*, at 160–1. *See also* N.D. White, *The Law of International Organisations*, at 5–6 (Manchester, U.K. and New York: Manchester University Press, 1996).

[134] Mitrany, *A Working Peace System, supra* note 131, at 28 and 83; Frederick L. Schuman, *The Commonwealth of Man: An Inquiry Into Power Politics and World Government* at 314 (New York: Knopf, 1952). The premise is that IOs can lead to "ordered liberty." Kennedy, *supra* note 12, at 867. *See also* Robert N. Wells, Jr., ed., *Peace by Pieces—United Nations Agencies and Their Roles* (Metuchen, NJ: Scarecrow, 1991)(a reader and bibliography).

[135] *See, e.g.*, Geoffrey Goodwin, "World Institutions and World Order," in Carol Cosgrove and Kenneth J. Twitchett, eds., *The New International Actors: The United Nations and the European Economic Community* at 55 (New York: Macmillan, St. Martin's Press, 1970); Georges Abi-Saab, ed., *The Concept of International Organization* (Paris: UNESCO, 1981). To be sure, not all of these commentators would agree with all of Mitrany's views and there are significant nuances between these functionalists (as there are within the other schools of thought), which cannot be addressed here.

[136] Luard, *supra* note 60, at 304–5. [137] *Id.* [138] *Id.*

the barriers between subjects regarded as national and as international that international authority is slowly extended, and the power of the nation-state gradually challenged.[139]

As this suggests, functionalists of the Mitrany school see profound substantive as well as procedural changes being wrought as a result of international organization.[140] Mere mechanisms to facilitate greater efficiencies (as with respect to transportation and communication), become, through inevitable and sometimes unplanned learning processes, engines of political integration capable of generating world peace.

1.3.2 Realism

However, the historical facts that have so inspired functionalists and their more optimistic fellow travelers have prompted quite a different reaction among self-described "realists." While there are as many schools or varieties of realists as there are within functionalism, realists share certain assumptions with functionalists: namely, that the only important international actor is the state, that states rationally pursue power within a system that is largely anarchic, and that the clash of competing state interests defines the significant issues of foreign affairs.[141] Realists also agree that states respond rationally to stimuli and would even accept the possibility that states can learn. They would therefore not dispute much of the functionalist account of the rise and fall of IOs, subject to three significant caveats.

First, realists deny any suggestion that IOs (or their products such as international law or regimes) have fundamentally altered the conditions in which states find themselves. Where functionalists of various stripes look out into the world and see islands of cooperation, realists see a much larger ocean of continued disorder and anarchy.[142] To them, IOs' regulatory schemes are epiphenomenal and less significant than they appear to be since the law they propound is generally ineffective or merely constitutes "agreements to disagree."[143] Whether because they see human nature as impossible to control in the absence of a hierarchically superior, centralized, and powerful authority or because they believe that the anarchic structure of the international system of horizontal states makes this inevitable, realists disparage the power of IOs (or international law, for that matter) to change the fundamental behavior of states. Realists dispute the claim that IOs have helped

[139] *Id.*, at 306. [140] Shaw, *supra* note 126, at 590.

[141] Slaughter, *supra* note 120, at 31–3. But as Slaughter indicates, some realists stress human beings' ineradicable tendency to do evil, while others emphasize the structure of the international system, especially the lack of central authority to reduce the anarchic competition among states to act strategically in order to survive. *Id.*, at 32.

[142] See, for example, Susan Strange arguing against those who, by focusing on international regimes (including IOs), give the "false impression" of a slow advancing "against the forces of disorder and anarchy . . . The reality is that there are more areas and issues of disagreement and controversy than there are areas of agreement." Susan Strange, "*Cave! Hic dragones*: A Critique of Regime Analysis," in Krasner, *supra* note 119, at 349 (Ithaca, NY: Cornell University Press, 1983).

[143] *Id.*, at 350.

make the "world anew" or have fundamentally altered either the structural elements of sovereignty or changed the human nature of the individuals that compose states. To them, the world of 2005 is not structurally different from the pre-UN world of the early 20th century. While the names of some of the players have changed, then, as now, the "structures of global security, of a global credit system, of the global welfare system (i.e., aid and other resource transfers) and the global knowledge and communications system" remain under the control of a handful of countries, primarily the U.S. and its political allies.[144]

This leads to the second difference between most realists and functionalists: realists, particularly those who link an effective international regime or its decline to the power or decline of a hegemon, emphasize the role of militarily powerful states in the rise and fall of IOs. While they agree that the interests of states makes the world (and IOs) go around, for realists the interests of some states continue to matter most. They note, for example, that it was no accident that the great European powers of their day, such as France and Britain, were instrumental in establishing some of the earliest IOs, as were the Romans and the Greeks in theirs. Further, they point out that today's most potentially significant IOs, which they would take to mean those with a conceivable impact on "high politics" such as the UN Security Council and military alliances such as NATO, are the creatures of the most powerful states emerging from World War II, particularly the United States.[145] They also explain the greater activity of some IOs, and the lethargy of others, in terms of relative hegemonic power within those respective organizations.[146]

For realists, to the extent counterveiling power is wielded within the anarchic international system, powerful hegemons such as the U.S. still make the world go around and exert considerable control over what it means to be sovereign. The system of "hegemonic stability" has not been fundamentally altered by the work of IOs.[147] The realist explanation for one foremost example of the ostensible

[144] *See generally id.*, at 341. Strange also argues that changes in international monetary arrangements or in trade arrangements can only partly be attributed to the "Bretton Woods" system or to the GATT since these changes also reflect decisions taken by national governments unilaterally. *Id.*, at 347.

[145] Thus, a realist account of the UN system of organizations, for example, emphasizes the role of the United States as principal propagandist, drafter, and actor in the creation of the UN itself as well as of many of its specialized agencies.

[146] Thus, Susan Strange, writing in the early 1980s, explains the "inactive" status of the GATT, the FAO, and UNESCO compared to the vitality of some of the international financial institutions at least partly on the premise that the U.S. has relatively less power in the former group of organizations. *Id.*, at 341–2. *See also* Young, *supra* note 119, at 98–101 (noting how some regimes are "imposed" deliberately by dominant powers). Young contends that "other things being equal, the incidence of negotiated orders will vary with the degree of centralization of power and authority in society." Young, *supra* note 119, at 103.

[147] Realist perspectives are particularly evident in the work of diplomatic historians such as A.J.P. Taylor, *The Struggle for Mastery in Europe 1848–1918* (London: Oxford University Press, 1954); K.J. Holsti, *International Politics—A Framework for Analysis* (Englewood Cliffs, NJ: Prentice-Hall, 2nd edn., 1972); Bernardotte E. Schmitt and Harold C. Vedeler, *The World in the Crucible 1914–1919* (New York: Harper Collins, 1984); R. Albrecht-Carrie, *A Diplomatic History of Europe since the Congress of Vienna* (New York: Harper & Row Publishers, rev. edn., 1973). *See also* Hans Morgenthau, "Emergent Problems of United States Foreign Policy," in Deutsch and Hoffmann, *supra* note 15, at 47.

success of collective UN action, the intervention by the U.S. and its allies against Iraq for its 1991 invasion of Kuwait, for instance, is not that the international community of states finally learned the value of the legal principle against aggression. To realists, that the UN Security Council authorized the action against Iraq is merely a testament to the U.S.'s ability in the wake of the Cold War—and its emerging status as P-1 within the Council—to secure a legitimating fig leaf for its goals. Iraq was dislodged from Kuwait not by the UN or the "international community" represented by that organization in defense of the rule of law, but by the U.S., intent on protecting its sphere of influence in a region vital to U.S. economic and strategic interests.

As this implies, there is a third distinction between realists and functionalists: to realists, the only IOs that might conceivably matter are those concerned with "high" politics, which they define to be those involving national security issues. This provides yet another reason for disparaging the ultimate value of IOs; realists argue that none of the universal IOs in existence and only one with a unique regional mandate, the European Union, aspires to serious governance over states and even the European Union has wavered on intruding on matters of high politics.[148] To them the UN system is neither an incipient world government nor even an effective collective security system since its restrictive purposes and powers preclude the former and the veto (accorded to the five permanent members of the Security Council) makes its security capabilities derisible in the most significant cases: where a great power either becomes an aggressor or is allied with one. To realists the Charter contemplates a "balance of powers system," with the major powers left with essentially unfettered discretion on matters of high politics.[149] At best, the UN is an arguably effective collective security system only for cases of "relatively minor significance"[150] or where it reflects the counterveiling power of the most powerful states in the system.[151]

A fourth distinction is that realists reject the idea that there is any momentum or historically demonstrable tendency towards international governance or global federalism by installments. Because realists see the world as states in perpetual collision—as is suggested by Arnold Wolfers' well-known metaphor of opaque, hard, clearly defined billiard balls colliding with one another[152]—they particularly denigrate the comparisons between the international system and domestic schemes

[148] *See, e.g.*, Strange, *supra* note 142, at 346. [149] *Id.*

[150] Claude, *supra* note 51, at 152. Inis Claude, neither a clear realist nor a follower of Mitrany, is a cautionary example of the risks of pigeon-holing particular writers within the categories discussed here. *See* Inis L. Claude, Jr., "A Scholar's Beginnings: A Study of the San Francisco Charter," 40 *Va. J. Int'l L.* 311 (1999)(recording the author's thoughts on the UN both in 1945 and in 1999). Although the schools of thought identified here are useful to illustrate the range of perspectives in the literature, particular writers may have identified with more than one school or adopted insights from one or more of the approaches surveyed here in individual works.

[151] *See, e.g.*, Michael J. Smith, *Realist Thought from Weber to Kissinger* at 13 (Baton Rouge, LA: Louisiana State University Press, 1987); Slaughter, *supra* note 120, at 31.

[152] Arnold Wolfers, *Discord and Collaboration: Essays on International Politics* at 19 (Baltimore: Johns Hopkins Press, 1962).

for governance suggested in some of Mitrany's work. To the realist, the horizontal constellation of states zealously protective of their respective sovereign capacities has little in common with a vertical, hierarchical government ruling on the basis of a social contract between ruler and subject. Further, even assuming a transformation to world federalism were possible, such a radical change in inter-state relations would require, say the realists, a deliberate political act by states and, in this age of increasing democratic rule, probably by their voting publics as well.[153] In the absence of such an unlikely act, states will (as they often do) fail to abide by edicts issued by IOs, even when these are formally "binding"—whenever these clash with a member's perception of its own national interests.

Realists are profoundly skeptical of Mitrany's and others' contentions that cooperation on technical or economic matters necessarily leads to either political cooperation or world peace. They point out that post-UN developments hardly support their optimistic premises or conclusions: neither the UN (the institution) nor international organization (the process) has slowed the pace of wars, after all. Despite economic interdependence, and perhaps in some cases because of it, nations still go to war. If IOs constitute or are bringing into being a federalist scheme of governance by pieces, realists argue that they have utterly failed government's most essential role: to keep the peace.

To realists, Mitrany's "federalism by installments" is as inconceivable as statehood by spontaneous combustion. Both the achievement of statehood and its termination require conscious acts, say the realists, and, given the hold nationalism retains over the consciousness of most of the world's peoples, the demise of the concept of national sovereignty demands a singularly unrealistic transformation of attitudes—one that no IO is now capable of achieving.

1.3.3 Disaggregationists

Another group of scholars attack both the functionalists' and realists' state-centricity. They counter that the relevant actors in international relations are not "governments" in the abstract or "states" in the sense of opaque colliding balls. This group of theorists, as diverse as the other two, emphasize that states are not monolithic units but groups of persons with varying interests and that the actions of IOs reflect the interest groups that exist both within governments and outside of any one of them, including voting blocs within democratic states, NGOs, TNCs, industrial cartels, professional associations, and social and economic classes. These scholars, more inclined to disaggregate the actions of "states," are also more likely to question the other assumptions realists and functionalists share: namely, the anthropomorphic assumptions that states respond "rationally" and "learn."

Disaggregationists inclined to peek behind the veil of state sovereignty or to penetrate the dark center of the opaque billiard balls emerge with somewhat

[153] *See, e.g.*, Luard, *supra* note 60, at 327.

different accounts of the history of the IOs. Marxist or socialist commentators, for example, have seen broad social forces, led by distinct social classes, at work in the creation of first, the technical organizations for commercial cooperation, and later, the more politicized entities such as the ILO, the UN, or the IMF.[154] They certainly would not object to the proposition, advanced by some functionalists, that 18th-century concepts of laissez-faire capitalism and democratic nationalism were responsible, at least indirectly, for the rise in the process of international organization on the assumption that the first emphasized individual choice and initiative, thereby helping to instigate an Industrial Revolution that "spectacularly increased the interdependence of states," while the second presumed a commitment to a particular process for decision-making.[155] Certainly many of Marx's historical assumptions, including his reliance on the global accumulation of capital and transnational communications among members of monied classes of capitalist nations, are consistent with the functionalist account of the rise of public international unions and early IOs.[156] But from a Marxist perspective, many IOs are merely an amalgamation of prominent and powerful interest groups, essentially social/economic classes. From this perspective "technologically driven needs" are a euphemism for a drive by ruling, propertied classes to amass capital for their own gain. To this end, these classes, in control of their governments, successfully sought and achieved cooperation on, for example, international communications.

As Marxists achieved control of governments, their perspective had some real-world consequences, particularly during the Cold War. For some time, Marxist explanations for IOs helped to justify, among these governments, a posture of suspicion, if not downright hostility, towards at least some IOs, especially when significant organs seemed under the dominance of "capitalist" nations.[157] (For remnants of that posture today, see, for instance, the statements of the Cuban and Libyan representatives to the UN with respect to the post-Cold War Security Council, an organ that those governments see as increasingly dominated by the

[154] *See, e.g.*, William Elliott Butler, *Soviet Law* at 26–38 (London: Butterworths, 1983); V. Kartashkin, "The Marxist-Lenist Approach: The Theory of Class Struggle and Contemporary International Law," in R.St.J. Macdonald and Douglas M. Johnston, eds., *The Structure and Process of International Law* at 79 (Boston: M. Nijhoff, 1983).

[155] *See, e.g.*, Riggs and Plano, *supra* note 71, at 2. As they put it, "democratic nationalism supports a rational search for cooperative alternatives and agreed rule of state conduct. It has not been a historical accident that modern international law and institutions have been created largely at the initiative of nations enjoying the greatest measure of individual freedom." *Id.* And on consent: "Just as democracy in a national political setting implies a process of public decision making by consent of the governed, international organization implies a process of international action achieved through the consent of sovereign states." *Id.*

[156] To this extent, as has been noted, Marxist–Leninists have built, despite avowals to the contrary, an unintended bridge between their insights and "bourgeois or capitalist" realists—who also saw international law and institutions through the prism of politics. *See* Johnston, *supra* note 70, at 11.

[157] Thus, the then Soviet Union earlier in the century labeled the ILO a capitalist plot to oppress workers and did not participate in that organization until 1953. *See, e.g.*, Walter Galenson, *The International Labor Organization: An American View* at 35–7 (Madison, WI: University of Wisconsin Press, 1981).

United States and those sympathetic to its interests.[158]) At other times during the Cold War, Marxist-led regimes assumed a pro-active stance towards many IOs, including UN system organizations, as opportunities emerged to reorient those organizations' agendas. This posture was especially evident in organizations aspiring to universal membership since, after decolonization, an increase in the number of members greatly lessened at least the numerical dominance of the U.S. and its allies, particularly in the plenary bodies of those organizations. Eventually, most of these governments came to see IOs, especially UN system organizations, as important potential tools to advance the three international legal principles fundamental to Marxist–Leninist thought (at least as articulated by Soviet writers during the Cold War), namely (1) "socialist internationalism in relations between socialist states"; (2) "equality and self-determination of nations and peoples, whose spearhead is aimed against the system of colonialism, as well as against any national oppression and inequality"; and (3) "peaceful coexistence, aimed first and foremost at relations between states with different social system."[159]

Political scientists who focus on the study of "epistemic communities" defined not as Marxists would define them, in terms of economic class, but in terms of shared expertise (and perhaps social agenda), have provided yet a different view of the rise and progress of IOs.[160] These scholars have complemented, and sometimes challenged, functionalist explanations for the rise in IOs by stressing the role of these communities—whether free traders, telegraphic administrators, railway engineers, or international lawyers—as independent or quasi-independent actors whose interests cannot always be reduced to those of particular nation states or be equated with them. At various times, these scholars explain, governments have handed over responsibility over certain matters to experts, relying on their technocratic or other skills, and these persons have used their authority at least partly to pursue their own shared agendas—from an interest in regularized postal delivery to the more uniform regulation of telegraphic services. The cohesion and strength of such communities within the bureaucracies of IOs, and not realists' hegemons nor some functionalists' inevitable interdependence, are treated as important in analyzing and predicting the relative vitality of different IOs, including the growth of their bureaucracies.

This "epistemic community" perspective on IOs is not limited to technocratic organizations like the WHO or ICAO, where reliance on technical expertise is said to reduce the tendency to politicize disputes and to generate more efficient international standard-setting.[161] It has also been applied to more politicized

[158] *See, e.g.*, UN Doc. A/A/AC.182/1993/CRP. 1 and 2 (containing reform proposals from these two governments derived from perceived dissatisfaction with the Council).

[159] *See* Grigorii Ivanovich Tunkin, "Peaceful Coexistence and International Law," in G.I. Tunkin, ed., *Contemporary International Law* at 5–35 (Moscow: Progress Publishers, 1969).

[160] *See, e.g.*, Peter M. Haas, "Knowledge, Power and International Policy Coordination," 46 *Int'l Org.* 1 (Special Issue, 1992).

[161] *See, e.g.*, Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," 53 *Int'l Org.* 887 (1998) (discussing how "norm promoters" facilitate "norm cascades").

bodies like the GATT or human rights bodies where there is a perception that the "experts" have taken over, with either praiseworthy or unfortunate results.[162] Some might contend that international lawyers are themselves an "epistemic community" capable of exerting influence within legal bodies such as those charged with codification or courts, as well as political bodies such as the Security Council.[163]

A different kind of disaggregating perspective is provided by those who contend that understanding the impact of NGOs is vital to understanding the evolution of IOs. The growing literature on NGOs addresses their roles as "institutionalist enablers" assisting the state and their institutions (including IOs) or as "adversarial activists" opposing states (including through fora within IOs).[164] As institutionalist enablers, NGOs help to expand the capacity of IOs to fulfill tasks assigned to them for which IO organs or officials have not been given sufficient institutional capacity or resources. Thus, it is noted that NGOs in environmental regimes conduct independent research and development that influences state policies and perhaps even preferences, draft policy proposals, assist in various ways during treaty negotiations (as during negotiations for protocols under framework conventions), and help in monitoring states' compliance.[165] Anne-Marie Slaughter suggests that NGOs' enabling roles, which essentially complement or overlap with those performed by IO secretariats and officials and are often as important in promoting inter-state cooperation as the IOs themselves, are part of a growing privatization of formerly state-centric functions.[166]

Of course, NGOs do more than merely assist states in pursuing agendas that states have already chosen for themselves. As "independent" entities devoted to a more focused agenda than is often possible for governments (whose commitments to the regimes they are parties to may vary over time), NGOs often use the opportunities accorded to them within IOs to advocate, often aggressively and in ways quite antagonistic to perceived state interests, on behalf of particular causes. As part of "transnational advocacy networks" in human rights, the environment, or women's rights, for example, they use IO fora—such as opportunities to comment on state reports—to put internal and external pressure on states to conform to such regimes or to expand them. Similarly, NGOs have sometimes assumed the role of adversarial critics of IOs and procedures within them—often urging these organizations to become more transparent and to permit more NGO participation (as through amici participation in WTO dispute settlement). As Keck and

[162] *See e.g.*, Robert Howse, "From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime," 96 *AJIL* 94 (2002)(arguing that the impact of elite trade insiders on the WTO has varied over time).

[163] *See* Martti Koskenniemi, "The Place of Law in Collective Security," 17 *Mich. J. Int'l L.* 455 (1996)(discussing the role of lawyers within the Security Council) and, more generally, Oscar Schachter, "The Invisible College of International Lawyers," 72 *Nw. L. Rev.* 217 (1977). *Cf.* Slaughter, *supra* note 120, at 234–5 (contending that international lawyers themselves constitute global governance networks and shape the substantive content of relevant norms).

[164] *See* Slaughter, *supra* note 120, at 101–12. [165] *Id.*, at 102–4. [166] *Id.*, at 104.

Sikkink have noted, NGOs rely on various forms of "information politics" within IO fora or use IOs as tools.[167] They may use the communication of credible information to put pressure on the UN to designate a particular year or decade as devoted to a particular cause, thereby symbolically heightening its moral resonance or appeal; to leverage a particular cause onto the international agenda; or to hold target actors (such as multinational corporations) to standards of conduct adopted within IOs, even in the form of "soft law."

Thus, NGOs have been given a large portion of the credit for such events as the UN's designation of the Decade for Women's Rights (and numerous conferences that followed this designation); the negotiation and successful conclusion of UN treaty negotiations to eradicate landmines and to establish the ICC; and the WHO's adoption of a Code on the Marketing of Breast-Milk Substitutes or that organization's decision to request an advisory opinion from the ICJ concerning the legality of nuclear weapons, to cite but a few examples of the successes of "symbolic," "leverage," and "accountability" politics respectively.[168] The NGO literature also enumerates many instances in which these non-state actors have also used not merely IOs, but national governmental institutions—namely, courts, regulators, and legislators—to achieve their goals, and some scholars of NGOs contend these actors are becoming significant international actors on their own, capable of bypassing the state and state-centric institutions like IOs altogether, most notably through their own "market power" (as expressed through, for example, consumer boycotts).[169]

But the disaggregating account that is the most sophisticated yet mounted to the state-centric assumptions made by realists and others has been liberal theory, as propounded by Andrew Moravcsik and Anne-Marie Slaughter. Moravcsik/Slaughter challenge the assumption that IOs result from rational behavior by unitary states. They argue that it is misleading to attribute the rise and fall of IOs, or changes within them, to a means/end utility calculus by single-minded units (namely states). They contend instead that such developments are attributable to the interests and actions of individuals and interest groups within states. IOs or innovations within them, such as deepening cooperation evinced by the creation of binding forms of international dispute settlement, are, in the liberal account, explicable by factors other than those encompassed by functionalist models on the "propensity for international cooperation" or realists' hegemons.

For liberals, the proper starting point is neither realists' human nature nor the anarchic structure of the international system but social actors, namely individuals

[167] Keck and Sikkink, *supra* note 4, at 18–22.

[168] *See, e.g.*, Kenneth Anderson, "The Ottawa Convention Banning Landmines, The Role of International Non-governmental Organizations and the Idea of International Civil Society," 11 *EJIL* 91 (2000); Christine Chinkin, "Human Rights and the Politics of Representation: Is There a Role for International Law?," in Michael Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* at 131 (Oxford, U.K. and New York: Oxford University Press, 2000). *See generally* Slaughter, *supra* note 120, at 108–9.

[169] *See, e.g.*, Slaughter, *supra* note 120, at 110–13 and 117–21.

and private groups acting both within and outside of nation states acting rationally and in risk-averse fashion.[170] These societal actors, engaging in collective action to promote differentiated interests under constraints imposed by material security, conflicting values, and variations in societal influence, define state preferences. The resulting configuration of interdependent preferences determines state behavior, including whether and when IOs are established and with what powers.[171] Under this view, what states—and in turn what IOs—do reflect the preferences of societal actors who interact both with governments as well as, increasingly, directly with the IOs themselves. As Slaughter points out, while her approach preserves an important role for states, it deprives states of their "traditional opacity by rendering State-society relations transparent."[172]

Liberals transform states into governments.[173] Because they force an examination of the precise interactions between individuals and their governments—especially with respect to whether a particular government can be said to represent these individuals' interests—liberals identify different government institutions, as well as differentiate between different kinds of governments, and they contend that these differences matter with respect to the establishment, evolution, and presumably effectiveness, of IOs of which they are a part. Since the nature of domestic representation becomes the decisive link between societal demands and state policy,[174] liberals argue that liberal, democratic states tend to create different kinds of institutions from, for example, totalitarian states on the model of the former Soviet Union. Liberals would say that to the extent that there were clear differences in the ways the Warsaw Pact and NATO operated, as well as these organizations' respective goals, these correspond to the distinct types of societal interests that each of these institutions represented through the distinct type of governments that were members of each. They also postulate that liberal, representative governments may act differently, as a unit, within IOs with universal membership and may create strikingly different and perhaps more integrative institutions within organizations of fellow liberal nations, such as the European Court of Human Rights or the Court of Justice of the European Communities.[175]

Liberal scholars do not make absolutely clear how their approach relates to those who would contend that democracies do not make war on each other

[170] Slaughter, *supra* note 120, at 40. Liberal theory is often cast as a refutation of realist assumptions. *See* Andrew Moravcsik, "Liberal International Relations Theory: A Scientific Assessment," in Colin Elman and Miriam Fendius Elman, eds., *Progress in International Relations Theory: Appraising the Field* at 159 (Cambridge, MA: MIT Press, 2003). [171] Slaughter, *supra* note 120, at 40–1.
[172] *Id.*, at 41. [173] *Id.* [174] *Id.*, at 41.
[175] *See, e.g.*, Anne-Marie Slaughter, "International Law in a World of Liberal States," 6 *EJIL* 503 (1995); *id.*, "Government Networks: The Heart of the Liberal Democratic Order," in Gregory H. Fox and Brad R. Roth, eds., *Democratic Governance and International Law* 199 (Cambridge, U.K. and New York: Cambridge University Press, 2000); *id.*, "The Liberal Agenda for Peace: International Relations Theory and the Future of the UN," 4 *Transnat'l L. & Contemp. Probs.* 377 (1994); *id.* and Walter Mattli, "Europe Before the Court: A Political Theory of Legal Integration," 47 *Int'l Org.* 41 (1993). For a critique, see José E. Alvarez, "Do Liberal States Behave Better?," 12 *EJIL* 183 (2001).

or how liberal theory relates to compliance with international law. Some, like Friedrich Kratochowil, have suggested that there may be a "cultural" aspect to liberal theory, namely an assumption that respect for law internationally is a function of the domestic tendency (prevalent especially among liberal states) to do the same.[176] On this view, the robustness of international regimes such as IOs is best explained by a common commitment to certain values (such as tolerance reflected in certain rights such as freedom of speech) and certain procedures (such as independent courts), which liberal states share. Liberal states share a culture of "liberal values," a tolerant ability to "live and let live" that permits a "zone of overlapping consensus" to develop internationally as well as domestically.[177] Effective IOs that successfully uphold the rule of law among nations without the exercise of raw power by a hegemon manifest a spillover effect resulting from the success of liberal politics: people accustomed to autonomy and self rule, who are routinely urged to extend self-respect to others, are more likely to cooperate internationally and not to require punitive sanctions to do so.[178]

Whether this continues to reflect the views of liberal scholars like Slaughter or is an essential component of liberal theory is uncertain. While Slaughter has in earlier work suggested that liberal states on the model of the U.S. and Europe generally create more effective and intrusive global institutions for cooperation, both through formal IOs and through transnational networks of bureaucrats from fellow liberal nations, she has been more cautious about such blanket claims in later work, noting the "paradox" that "it is precisely those states with the strongest domestic legal systems and rights traditions that are likely most strongly to resist strong enforcement mechanisms."[179] In her later work, Slaughter has taken care not to associate liberal theory with Kant's view that an international rule of law can only emerge among "republican" (presumably truly democratic) states and has contended that the application of liberal theory remains open to multiple understandings of the public good.[180]

And the most sustained liberal analysis of an IO, Moravcsik's liberal explanation for the rise and deepening nature of the European human rights regime suggests that international structures for deep cooperation, including courts, need not be restricted to those states that are fully functioning, long-standing democracies. Moravcsik emphasizes how that European regime deepened in response to the interests of those societal actors within the more fragile democracies of post-World War II Europe.[181] His account attributes the turn to greater empowerment for that regime (through ever deeper commitment to independent judicial review

[176] Friedrich V. Kratochwil, "How Do Norms Matter?" in Byers, ed., *supra* note 168, 35 at 60.
[177] *Id.* [178] *Id.*
[179] Anne-Marie Slaughter, "A Liberal Theory of International Law," *ASIL Proceedings of the 94th Annual Meeting* 240, at 249 (2000). [180] *See, e.g.*, Slaughter, *supra* note 120.
[181] Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," 54 *Int'l Org.* 253 (2000).

at the international level) to the perceived needs of those who were anxious to stabilize their own hold on democratic rule.[182] This account suggests that the liberal disaggregating approach may be equally applicable to non-liberal states and is not intended to express a preference for liberal nations as the more compliant actor in international relations. This is also suggested by the description of liberal theory as a "positive" theory, that is, an objective, value-neutral attempt to describe empirical reality and not to impose an evaluative or normative framework.[183]

Like other kinds of disaggregationists, liberals do not spend much time on IOs. Liberals have, at times, suggested that traditional IOs are being displaced in relative importance, as well as perhaps in number, by transnational governance networks, such as government regulators of securities or banking. For liberals, transnational networks such as the Basel Committee on Banking Supervision, established by the governors of the central banks of the Group of Ten countries in 1974, constitute increasingly significant sites of power not found within a single state or IO, nor captured in the concept of an "epistemic community" (if only because of their access to government decision-makers).[184]

1.3.4 Critical Theory

Another group of IO scholars has taken issue precisely with IOs' as well as scholarly claims to neutrality. For these observers, often critical of IOs, the "facts" realists, functionalists, and liberals all have chosen to emphasize in their historical accounts of IOs are contestable. For those inclined to be sensitive to culture and ideology, especially including scholars from developing countries, there is a prevailing "euro-centric bias" within these competing schools of thought—all of which have not accidentally arisen within schools of political science in the West and usually in the U.S. or the U.K.

One competing account of the rise of IOs argues that the only relevant forebears of the modern IO are not only those entities familiar to students of Western culture, beginning in ancient Greece and Rome and extending exclusively to European public unions and organizations. These scholars attempt to reorient the history of IOs (and of international law) to recognize the contribution of ancient civilizations in China, India, Egypt and Assyria. Thus, Anand has argued that one finds in these civilizations, long before the Treaty of Westphalia, "just and humane

[182] *Id.*

[183] Anne-Marie Slaughter, *supra* note 120, at 26 and n. 17. Accordingly, particularly in recent work, Slaughter disputes some functionalists' assumptions concerning automatic progress towards or unidirectional change in the direction of "federalism by installments." *See generally* Slaughter, *supra* note 120. *See also* Kratochowil, *supra* note 176, at 61.

[184] *See, e.g.*, Anne-Marie Slaughter, "The Real New World Order," 76 *Foreign Affairs* 183 (September/October 1997); *id.*, "Government Networks," *supra* note 175. For a description of the regulatory impact of a number of these networks, see Zaring, *supra* note 40.

rules of war and peace" along with "the law of treaties, right of asylum, treatment of aliens and foreign nationals, the immunities and privileges of ambassadors, modes of acquiring territory, and even glimpses of the law of the sea and maritime belt."[185] He argues that "it is, therefore, not correct to assume that international law has developed only during the last four or five hundred years and only in Europe, or that Christian civilization has enjoyed a monopoly in regard to prescription of rules to govern inter-state conduct."[186] Third World scholars such as Anand deny there is a necessary connection between Western-style democracies (or capitalism) and the growth in IOs, contending that such views artificially limit the range of options that ought to be considered within IOs. Their prescriptions are often clear: IOs, such as the UN and the IMF, need to reorient their priorities and structures to address more forcefully economic issues of concern to the developing world.[187]

Other critical scholars do not deny that existing IOs and the laws they produce are Euro-centric. Indeed, they contend, that is precisely the problem. Their scholarship, which often takes the form of a historical account, argues that modern IOs and modern IO law-making reflect the complex legacies of colonialism.[188] These scholars seek to correct the selective historical record suggested by politically neutral functionalist accounts. They believe that history is told for a purpose and their point is prescriptive as well as analytical. By showing that international law and organizations are not purely value-neutral responses to "changes in technology," they seek greater respect for the views of non-European nations within today's IOs. At the same time, they are suggesting that the cultural and institutional context in which IOs emerge and operate structures their results, including their legal product.

Like cultural relativists, these critics challenge the purported universality of many of the rules IOs make, especially those which fail to take into account the perspectives of developing states (LDCs).[189] Many also argue that the "eurocentricity" that dominates the thinking and writing in the field also dominates the actions of many IOs, which remain tools of "imperialistic" exploitation and are powerless to make corrections. Borrowing a page from the Marxists as well as from realists, some of these critics contend that IOs are subject to hegemonic control, noting however that this may take the form of cultural and not merely economic

[185] R.P. Anand, "The Influence of History on the Literature of International Law," in Macdonald and Johnston (eds.), *supra* note 154, at 342. [186] *Id.*

[187] *See, e.g.*, *id.*, at 374 (arguing for a new international law not of "coexistence" but of "cooperation," including economic cooperation). *See also* Mohammed Bedjaoui, "No Development Without Peace, No Peace Without Development," in Falk et al., *supra* note 131, at 178.

[188] *See, e.g.*, Antony Anghie, "Time Present and Time Past: Globalization, International Financial Institutions, and the Third World," 32 *NYU J. Int'l L. & Pol.* 243 (2000); Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law," 40 *Harv. Int'l L. J.* 1 (1999).

[189] *See, e.g.*, Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights," 42 *Harv. Int'l L. J.* 201 (2001).

hegemony. At the same time, many critical scholars would deny realist claims that such control is either natural or inevitable given the horizontal nature of international relations.

These scholarly views resonate at the policy level within the governments of many developing states, many of which periodically attempt to secure, as a group, the reorientation of the priorities of IOs whose aspirations to universality invariably, in their view, fall short.[190] Such suspicions fuel the efforts of many of those states to transfer issues or authority from one IO or organ perceived to be controlled by "adverse" interests to another body seen as likely to be more sympathetic to LDC views. Critical perspectives, within the academy as well as governments, may also help to explain the growth of regional institutions and regional bloc voting within universal institutions.[191]

Other critical perspectives, grounded even more explicitly on race or ethnicity but still purporting to reflect the views of developing nations, have also emerged.[192] Examples of these include, for example, increasingly critical accounts of the Security Council's actions on a variety of issues, from the treatment of ostensibly "failed" states to its establishment of an ad hoc war crimes tribunal for Rwanda.[193] At least some of these critiques are premised on a deep suspicion that some IOs (or organs or officials within them) have been captured by special interests and can no longer been seen as credible agents acting on behalf of the entire international community. But other critiques are grounded on a different complaint: namely, that international processes (such as the War Crimes Tribunal for Rwanda) are overly representative of the interests of transnational bureaucratic elites and insufficiently responsive to the interests and needs of the local populations that they were ostensibly established to serve.[194]

Others critique the existing schools of thought—from realism to liberalism—more generally for their failure to acknowledge the continuing role of ideology. Susan Marks contends, for example, that Slaughter's liberal theory is not the value-neutral "positive" theory that it purports to be. She argues that by privileging the role of the individual, the market, and "democracy," liberal theory furthers

[190] *See, e.g.*, "The Jakarta Message: A Call for Collective Action and the Democratization of International Relations, September 1–6, 1992," Annex to Report of the Secretary-General on the Work of the Organization, A/47/675, S/24816 (November 18, 1992).

[191] Thus, there are efforts by LDCs, along with others, to transfer, for instance, greater authority on peace and security questions from the Security Council to the GA or issues involving the geostationary orbit from the International Telecommunications Union to the UN's Outer Space Committee. *See, e.g.*, Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, A/47/33, at 45–9; Report of the Committee on the Peaceful Uses of Outer Space, A/46/20, at 21–2.

[192] *See, e.g.*, Makau Mutua, "What is TWAIL?," *ASIL, Proceedings of the 94th Annual Meeting*, 31–9 (2000); Makau Mutua, "Critical Race Theory and International Law: The View of an Insider-Outsider," 45 *Vill. L. Rev.* 841 (2000).

[193] *See, e.g.*, Ruth Gordon, "Saving Failed States: Sometimes a Neocolonialist Notion," 12 *Am. U. J. Int'l L. & Pol'y* 903 (1997); Ruth Gordon, "Intervention by the United Nations: Iraq, Somalia, and Haiti," 31 *Tex. Int'l L. J.* 43 (1996); José E. Alvarez, "Crimes of States/Crimes of Hate: Lessons from Rwanda," 24 *Yale J. Int'l L.* 365 (1999).

[194] *See, e.g.*, Alvarez, *supra* note 193.

a particular ideological conception of the role, functions, and priorities of IOs—from the UN to the IMF.[195]

Another critique of IOs has emerged from those who contend that these entities, like all the sources and processes of international law, have been structured not only by states, epistemic groups, or interests within liberal states, but also by gender. Criticisms have emerged of the rise and continued operation of IOs for reflecting institutionally the "gender bias" endemic to a world of states largely ruled by men, with results that are said to be detrimental to achievement of genuinely universal organizational goals, as well as to the status of women. Chinkin and Charlesworth, for example, after documenting the absence of women at senior levels at the UN, contend that the invisibility of women at decision-making levels has affected the treatment not only of "women's issues" but also the way all international concerns are understood.[196] Although Chinkin and Charlesworth's approach is not avowedly liberal (in the Slaughter/Moravscik sense described above), their account of the relatively low levels of women's representation at the UN (including with respect to levels of representation within the highest levels of the secretariat, with respect to the appointment of experts, or even with elected members of the ICJ and the International Law Commission (ILC) is sensitive to the correspondingly low levels of women's participation within member governments and government bureaucracies as well.[197] Beyond documenting the impact on issues relating to women (such as levels of sexual harassment within the UN), Chinkin and Charlesworth speculate on the impact the absence of women might have with respect to political issues on which there is some evidence of a gender divide, such as support for peace initiatives, protection of the environment, and the attention paid to social and economic issues.[198] They also critique current approaches to "gender main-streaming" now being pursued within IOs.[199] Others have critiqued IOs, including the WTO, for their indifference (or worse) with respect to other issues of gender politics, including the rights of homosexuals.[200]

From a theoretical perspective, these critical perspectives on IOs might be regarded as forms of post-modernism now increasingly influential in many fields, including cultural anthropology, literary theory, and legal interpretation. There is, to be sure, some affinity between some of the critical scholars of IOs and moral skeptics or subjectivists like Alastair MacIntyre who argues that it is impossible to

[195] Susan Marks, "The End of History: Reflections on Some International Legal Theses," 3 *EJIL* 449, at 470–2 (1997). *See also* Martti Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations* at 17 (Oxford, U.K. and New York: Oxford University Press, 2000).

[196] Christine Chinkin and Hilary Charlesworth, *The Boundaries of International Law: A Feminist Analysis* at 171 (New York: Juris Publications, 2000).

[197] Chinkin and Charlesworth would presumably take issue with any claim that liberal or more democratic states necessarily do better in representing their female constituents. They point out that the "democratization" of Eastern European countries since 1989 has decreased the level of women's participation in national legislatures and speculate that democratization permits legislatures to reflect more accurately the existing (gendered) distribution of power and wealth within a community. *Id.* at 175.

[198] *Id.*, at 187–95. [199] *Id.*, at 195–6.

[200] *See, e.g.*, Joel Richard Paul, "Cultural Resistance to Global Governance", 22 *Mich. J. Int'l L.* 1 (2000).

demonstrate a fully rational intellectual position.[201] Like other post-modernists, these critical scholars tend to focus attention on distinct communities and their interests (whether defined in terms of geography, economic interests, gender, or race) and are skeptical of the various forms of hierarchies that typify IOs—such as the special voting privileges of the P-5 in the Security Council or predominantly male bastions such as the ILC. Critical scholars are also likely to "deconstruct" paradigmatic forms of thinking—such as realism, which privileges state power and rule by the powerful; functionalism, which stresses technological responsiveness; or liberalism, which tends to privilege Western conceptions of individualism. For these critical scholars, established scholarly discourses inevitably reflect the views of the powerful, victimize others (such as the poor within the North and South), and deny multiple forms of discourse or causality.

These critiques share at least one post-modernist trait: a worldview that perhaps the only truly bad moral belief is intolerant affirmation of one's own cultural superiority.[202] It would, however, be unfair to suggest that these various critiques of IOs retreat into moral relativism or nihilism. On the contrary, what is most apparent in these critiques is their studied avoidance of either value neutrality or moral relativism. Critical scholars like Martti Koskenniemi take an explicit normative stance in opposition to totalitarianism.[203] Critical race scholars presume to speak on behalf of oppressed or under-represented racial groups, both in the West and in developing states.[204] Critical international scholars often have an implicit or explicit reform agenda embracing greater inclusion, participation, and sensitivity to interests within developing countries and under-represented groups within those countries or the West itself (such as women or minorities).

1.3.5 Constructivism

The critique from culture, gender, ideology, and race/ethinicity is suggestive of another failing shared by realists, functionalists, and liberals: none of these concern themselves with how the primary actors of each of these approaches—states, hegemons, state-centric entities like IOs or individuals—form their own preferences. All of these frameworks for analysis presume instrumental calculation by different actors each seeking to advance predetermined sets of interests.[205] Constructivists are concerned precisely with those interests and whether these interests are in fact pre-formed. For constructivists, as with respect to some crits, ideology and gender matters, along with much else in the construction of what people, including states, want.

[201] *See* Alasdair MacIntyre, "Epistemological Crises, Dramatic Narrative, and the Philosophy of Science," 60 *The Monist* 453 (1977).

[202] *Cf.* Eduardo Moises Penalver, "The Persistent Problem of Obligation in International Law," 36 *Stan. J. Int'l L.* 271, 292 (2000).

[203] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Lakimiesliiton Kustannus, 1989) at 496–500.

[204] *See supra* note 192.

[205] *See* Slaughter, *supra* note 120, at 44.

Keohane suggests that these theories of regime formation share a "sociological approach to the study of institutions, which stresses the role of impersonal social forces as well as the impact of cultural practices, norms, and values that are not derived from calculations of interests."[206] As Keohane indicates, constructivists (whom he categorizes as reflectionists) argue that

> individuals, local organizations, and even states develop within the context of more encompassing institutions. Institutions do not merely reflect the preferences and power of the units constituting them; the institutions themselves shape those preferences and that power. Institutions are therefore constitutive of actors as well as vice versa. It is therefore not sufficient in this view to treat the preferences of individuals as given exogenously: they are affected by institutional arrangements, by prevailing norms, and by historically contingent discourse among people seeking to pursue their purposes and solve their self-defined problems.[207]

For this group of theorists, neither states' nor individuals' interests are fixed. On the contrary, interests flow from a constructed identity and the identities of all actors in international relations fluctuate either through different associations with others (as through participation in an IO) or through changing self-perceptions (which can also be influenced through the normative activity of IOs).[208] On this "normative" as opposed to "instrumentalist" optic,[209] states are socialized, including through their participation in IOs, to see themselves as, for example, defenders of trans-Atlantic political/economic values through their membership in NATO, the European Union, the Inter-American and European human rights regimes, or the Helsinki process. They come to believe that they have an interest in protecting the human rights of their own nationals (and understand what this means) at least in part because of the "norm cascades" produced by a gamut of IOs of which they are an active part. They come to see peacekeeping as a good or useful activity and to regard themselves as peacekeepers, for example, because they are conditioned (as by the Secretariat who created the concept and the ICJ, which gave it its blessing) to accept that task as part of being UN members (or members of an "international community").

As Slaughter has suggested, some constructivists see their approach as anti-materialist, since it gives primacy to ideas, norms, and ideals rather than material interests, as well as anti-rationalist, at least to the extent that it rejects the focus on instrumental calculation based on fixed preferences.[210] Other constructivists,

[206] Robert O. Keohane, "International Institutions: Two Approaches," 32 *Int'l Stud. Q.* 379, 381 (1988)(distinguishing "rationalist" from "reflectivist" approaches to regimes).

[207] *Id.*, at 382. But note that older theories of institutional "learning," such as the work of Ernst B. Haas, *When Knowledge is Power*, *supra* note 126, appear to have anticipated these insights as well.

[208] *See, e.g.*, Slaughter, *supra* note 120, at 44.

[209] Robert O. Keohane, "International Relations and International Law: Two Optics," 38 *Harv. Int'l L. J.* 487 (1997).

[210] Slaughter, *supra* note 120, at 46 (citing Wendt). The latter is suggested as well by Oran Young, who contends that some regimes emerge "spontaneously" without "conscious design" or "even explicit awareness." Young, *supra* note 119, at 98–101. War crimes tribunals, for instance, might be said to

while they accept the significance of ideas and normative commitments, are also willing to accommodate material interests as well as strategic or rational calculation in order to achieve them.[211] Constructivists also partially modify some of the other assumptions that realists and functionalists share. While the structure of the international system matters for constructivists, for them that structure includes social relationships, including those promoted within IOs. Like functionalists, constructivists stress the value of learning but add that learning is not simply the instrumental use of accumulated knowledge or the other tools of IOs to solve a problem but "transformative, in the sense of changing the definition of what the problem is and what it would mean to solve it."[212] Constructivists suggest that the "structures of anarchy" in which states find themselves are also constructed and not inevitable; they are more hopeful than realists are about the possibility of change. Indeed, for leading constructivists like Alexander Wendt, states have been taught to pursue power and have learned to fear its threat; states can learn not to pursue it and do not require central authority to be coerced into such a change.[213]

1.4 Lawyers and the Competing Schools of Thought

The preceding description of major schools of thought is misleading to the extent it suggests hermetically self-contained alternatives. The competing frameworks elaborated above are best regarded as ideal types in the Weberian sense: generalized rubrics that might be useful for didactic purposes but that do not necessarily represent the views of any single scholar.[214] In reality, scholars within these various schools have borrowed from each other, both with respect to methodology as well as substantive conclusions. Keck and Sikkink, for example, although perhaps best seen as representing the disaggregationalist approach, describe the contributions of NGOs in terms that functionalists and their realist and constructivist critics would all recognize. Their descriptions of, for example, how human rights advocates engage in "leverage politics" vis-à-vis powerful actors owes much to the

arise from revulsion at human rights abuses in part attributable to the presence of CNN cameras—and not because states necessarily see any benefit to themselves as a result of their operation.

[211] Slaughter, *supra* note 120, at 48 (discussing the work of Martha Finnemore and Kathryn Sikkink on "norm entrepreneurs"). Some critiques of particular functionalist models for regime formation do not challenge functionalist premises and amount to a claim that the functionalist model being critiqued, e.g., game theory, does not take into account sufficient variables that influence the behavior of the relevant actors or that the model does not correctly identify the regime-making (or regime-preventing) factors "really" at work. Young, *supra* note 119, at 98–101.

[212] Slaughter, *supra* note 120, at 47.

[213] Alexander Wendt, "Constructing International Politics," 19 *J. Int'l Sec.* 5 (1994–5); Alexander Wendt, "Anarchy is What States Make of It," 46 *Int'l Org.* 391 (1992). *See also* Slaughter, *supra* note 120, at 49.

[214] *See generally* Max Weber, *The Theory of Social and Economic Organizations* at 89 and n. 5 (A.M. Henderson and Talcott Parsons, trans. New York: Oxford University Press, 1947)(defining "pure"or "ideal" types as part of the methodological foundations of sociology).

realists.[215] On the other hand, their description of how NGOs use (and are used) by IOs borrows a page from functionalists, while their contention that NGOs' activities, including those within IOs, may help to change state interests through symbolic politics, norm generation, and consciousness-raising is avowedly constructivist.[216] Although modern international lawyers readily understand how these approaches have often blurred into one another since in recent years they have constantly engaged in similar pragmatic borrowing in their own work, this was not always the case.

Public international lawyers, through at least the greater part of the 20th century, have sought to define their field as relatively autonomous from either politics or morality. Their endeavor turned many, particularly in Europe and North America, towards legal positivism. While there are as many definitions of positivism as there are positivists, among the classic descriptions is H.L.A. Hart's. Hart identified five meanings of positivism:

(1) the contention that laws are commands of human beings.

(2) the contention that there is no necessary connection between law and morals, or law as it is and ought to be.

(3) the contention that the analysis (or study of the meaning) of legal concepts is (a) worth pursuing and (b) to be distinguished from historical inquiries into the causes or origins of laws, from sociological inquiries into the relation of law and other social phenomena, and from the criticism or appraisal of law whether in terms of morals, social aims, "function," or otherwise.

(4) the contention that a legal system is a "closed logical system" in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, moral standards, and

(5) the contention that moral judgments cannot be established or defended, as statements of facts can, by rational argument, evidence, or proof ("noncognitivism" in ethics).[217]

Not so subtly altered, such that "states" replace "human beings" in (1) above, these contentions have helped define the field of positivist international law for centuries.[218]

[215] *See* Keck and Sikkink, *supra* note 4, at 23–4. For an interpretation of Keck and Sikkink's work that heightens their "liberal" leanings, see Slaughter, *supra* note 120, at 110; Anne-Marie Slaughter and David Bosco, "Plaintiff's Diplomacy," 79 *Foreign Affairs* 102 (2000).

[216] *See, e.g.*, Slaughter, *supra* note 120, at 105.

[217] H.L.A. Hart, "Positivism and the Separation of Law and Morals," 71 *Harvard L. Rev.* 593, at 601–2, n. 25 (1958). *But see* Koskenniemi, *supra* note 203, at 106–30 (surveying other definitions of "positivism" and suggesting that its "deep structure" is not altogether different from what is sometimes assumed to be its polar opposite, natural law).

[218] *See, e.g.*, Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Dispute- and War-Law* at 12–13 (London: Stevens, 1954)(noting that the theories of international law now grouped as positivist, conventional, or consent-based pre-date Grotius). For a classic turn-of-the-century formulation of positivism, see Lassa Oppenheim, "The Science of International Law: Its Task and Method," 2 *AJIL* 313 (1908).

Nothing embodies these central positivist tenets in international law as much as the doctrine of sources. For most international lawyers trained in the West, article 38 of the Statute of the International Court of Justice remains the "constitution" of the international community.[219] Its enumerated sources of international law—treaties, custom, and general principles of law—remain, for most, the exclusive means for generating legal obligations on states.[220] Through the doctrine of sources, international lawyers define (and defend) their field as characteristically "legal." Thanks to sources doctrine, international lawyers argue that international law, like domestic law, also has a circumscribed set of sources and rules for interpreting them; thanks to article 38, international law is distinguished from morality or politics. Thanks to sources, international rules have a distinctive either/or quality, essential to distinguish mere wishful thinking (*lex ferenda*) from black letter obligation (*lex lata*): something either is or is not within one of the recognized sources of international law and someone with the requisite skill, like a judge, can do so. Thanks to its distinctive sources, international law, like all law, exists in a self-contained world, which excludes not only morality, but historical inquiry, sociology, and social aims. Legal inquiry, furnished with rules about the source rules—rules for interpretation of treaties for instance—fulfills Hart's "closed logical system" enabling legal interpreters to render "objective" legal judgments untainted by political or other aims. Further, legal judgments, deduced by logical means from predetermined legal rules, can be defended in terms that no argument grounded in morality or other non-legal methods can be.

Hart's first tenet—law as command—has given international lawyers some trouble, but they have met the challenge by asserting that just like domestic law, international law is also the product of sovereign will. International law rules are not Austinian hierarchal commands from ruler to governed, but rules established through express or tacit consent on the horizontal plane of sovereign states in order to cooperate on areas of mutual benefit. States have merely agreed that for the sake of their own long-term stability, they will accept that certain forms—pre-eminently a treaty—shall be reserved for especially solemn commitments. The doctrine of sources then, has a dual agenda: it tells the lawyer where to find the law in an objective fashion because it is ostensibly based in the concrete practice of states but it also seeks to provide a normatively constraining code for states. As a critical legal scholar would put it, the doctrine of sources both "apologizes" for state practice and imposes a "utopian" limit on what states do.[221] While states are free to back out of any treaty consistent with its terms, they are not free to proclaim that hereinafter they will not accept the category "treaty" as a form for binding commitment.

[219] *See, e.g.*, G.M. Danilenko, *Law-Making in the International Community*, at xv, 14–15 (Boston: M. Nijhoff, 1993).

[220] This is acknowledged even by critics of the field, as is apparent from the organizing structure of Martti Koskenniemi, *supra* note 203. *See also* David Kennedy, *International Legal Structures* (Baden-Baden, Germany: Nomos, 1987).

[221] *See generally* Koskenniemi, *supra* note 203.

Given the hold legal positivism asserts over international lawyers, many, perhaps most, continue to insist that the rise of IOs have not changed the fundamental bases of international obligation, either in terms of the process by which treaties, custom, or general principles are produced, or in terms of the content of the law. Many, perhaps most, are content to shoehorn the IO forms of standard-setting canvassed in this book into the molds set by the traditional doctrine of sources, as reflected in article 38 of the Statute of the ICJ. This is most evident with respect to the more rigid, traditional positivists who maintain that there is no such thing as "international" legislation ("quasi" or otherwise), since all international obligations remain firmly based on the "consent of sovereign states."[222] Since the legitimacy of international rules depends on the authoritativeness of the process by which they are created and states have not agreed on an alternative, stability and certainty demand that article 38 be presumed to contain the "complete list of sources" of international obligation.[223]

On this view, if what IOs do is produce "standards" or "norms," as in the form of political declarations or expert-generated guidelines that do not purport to be legally binding, this phenomenon ought not to be of concern to lawyers. Such forms of IO-generated "soft law" is an oxymoron that seeks "unprecedented expansion of the concept of law into areas of normative regulation which have never been considered as belonging to the law proper," risks "normative confusion and uncertainty," and "erodes the concept of legal obligation."[224] To the strict positivist, the possibility that law can exist along a spectrum of binding authority or may constitute "instant custom" is anathema. Accordingly, the strict positivist dismisses as insignificant such community-based methods of law-making as GA resolutions and is leery of other innovations that are clearly the product of the modern age of IOs, such as *jus cogens*, objective regimes, or law-making treaties that purport to rapidly codify rules binding on non-parties.[225] Since strict positivism was always a bit leery of the uncertain

[222] *See, e.g.*, Danilenko, *supra* note 219, at 7.

[223] *See, e.g.*, *id.*, at 29; also 40 and 202.

[224] *Id.*, at 20–2. Danilenko also denies the idea that "soft law" may harden through incorporation by reference in existing hard treaties. *Id.* at 69–74. *See also* Jan Klabbers, *An Introduction to International Institutional Law* at 202 (Cambridge, U.K. and New York: Cambridge University Press, 2002)(dismissing idea of "soft law").

[225] *See, e.g.*, Danilenko, *supra* note 219, at 60–8 (contesting the notions of objective regimes or global treaties binding on non-parties); 88–91 (contending that Assembly resolutions do not suffice in and of themselves to constitute state practice for purposes of finding custom); 121–2 (denying the Assembly resolutions can be said to constitute the second element of custom, namely *opinio juris*); 200 (concluding that there is no serious evidence that the community of states have abandoned the preordained doctrine of sources and accepted either consensus or GA resolutions based on them as an alternative basis of legal obligation) and 214–38 (highlighting the "tenuous" ground for *jus cogens* and suggesting that if it is valid, it is developing through the usual customary law process). A failure to recognize the legal significance of GA resolutions (including when they appear to be directed at internal administrative matters) is suggested by a recent listing of key Assembly resolutions that have developed or strengthened international law, which manages to list only the most obvious but omits, for example, Assembly requests for Advisory Opinions from the Court. *See Key Resolutions of the United Nations General Assembly, 1946–1996* (D. Raushnig et al., eds., Cambridge, U.K. and New York: Cambridge University Press, 1997).

contours of customary law, it usually prefers traditional treaty-making for the progressive development of law and certainly denies the possibility that any changes in how treaties are negotiated or interpreted, caused by the rise of IOs, may be changing the basic general rules by which treaties are governed, such as the lack of legal impact prior to ratification or with respect to non-parties.[226] As would be expected, the strict positivist also disparages general principles as a distinct category apart from customary international law and not merely a synonym for it, even though this third source is explicitly included in article 38. General principles are problematic from the standpoint of positivism to the extent that this source is understood as meaning that certain propositions found in national law may find their way to inter-state relations without a clear consensual basis. (After all, if such consent were to exist, such rules would presumably be binding on states as a matter of treaty or custom, and if states have not given their consent to applying such principles on the international plane, as between themselves, on what basis would it be legitimate to extract such rules from the national legal systems in which they originate?) What is worse is what such a category may license judges, national and international, to do in the guise of strict interpretation and gap-filling. Accordingly, the strict positivist either denies that general principles are a real independent source of international legal obligation or accepts only a limited role for such sources.[227] In legal positivism, if not in life, states and not IOs or other actors (such as international judges) remain the sole makers of international law. For the strict positivist, the sources of law in article 38 of the ICJ Statute suggest a hierarchy: treaties are far and away the most significant source with custom (and possibly general principles a distant third in the normative hierarchy) used for gap-filling when necessary but only when there is fairly clear evidence that states have in fact consented to these latter sources.[228]

Self-described "enlightened" positivists are more willing to concede that some things have changed in the modern world. They are willing, for example, to loosen the traditional requirements for state practice, *opinio juris*, and the passage of time for the establishment of custom and more willing to accept the impact of GA resolutions or modern treaty-making practices on the more rapid development of custom. Some positivists have begun to acknowledge that the modern needs of states (among other factors) have led to shortcuts for generating rules binding on all states and, on occasion, for new international actors (such as NGOs, TNCs, and even the occasional individual).[229]

[226] *See, e.g.*, Danilenko, *supra* note 219, at 156 (suggesting that the merging of conditions for the creation of treaties and custom would be destablizing).

[227] *See, e.g.*, *id.*, at 171–181 (suggesting that general principles may not be a source of law at all but merely a kind of *renvoi* to domestic law permitted ICJ judges); 180–1, 182, 184, 186 (suggesting that general principles are few in number with rare judicial invocations); and 186 (suggesting that general principles may retain only the status of a subsidiary source of law).

[228] *See, e.g.*, *id.*, at 253–60 (discussing the role of the ICJ as law application, not law creation).

[229] *See, e.g.*, Bruno Simma and Andreas Paulus, "The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View," 93 *AJIL* 302, at 306–7 (1999).

To the extent international lawyers engage in fields outside of law, they have traditionally been much more inclined towards functionalist or instrumentalist perspectives than towards realism.[230] Particularly in the early decades of the 20th century, those who worked at the intersection of foreign policy and law in the West gravitated towards approaches sympathetic to the possibility of real international cooperation. Undoubtedly because their work dealt with the products of those "islands of stability" that realists saw as epiphemonalist, international lawyers "present at the creation" of the UN and working with UN system organizations in their early years tended to see more of these islands than the realists' surrounding tumultuous seas of competing state interests or hegemons.[231] Since anarchy, by definition, connotes the absence of law, it (and its consequences) was generally not the focus of much lawyerly attention. By training and aspiration, the first generation of IO lawyers were more likely to believe in the future possibilities of an international "rule of law"—a view very much at odds with the beliefs of most realists and more likely to be sympathetic to the aspirations of Mitrany and others like him.[232] Like functionalists, these lawyers accepted the proposition that law is built on calculations of political interests, and they also tended to believe that rational states, presumed to share many common interests, could and would learn to cooperate through the rule of law and its institutions.[233] Accordingly, U.S. and European lawyers produced in the inter-war period and in the 1950s a substantial programmatic literature that was, in law, sympathetic to "federalism in installments" or "peace through pieces."[234] This was certainly the implied if not explicit motivation or assumption for leading blueprints for UN reforms in that

[230] *See, e.g.*, Johnston, *supra* note 70, at 4–5; Oppenheim, *supra* note 218; Hans Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, 1945 and 1961); José E. Alvarez, "Positivism Regained, Nihilism Postponed," 15 *Mich. J. Int'l L.* 747 (1994).

[231] Thus, the legal literature was characterized, particularly when the League of Nations and the United Nations were first constructed, as "necessary and desirable reactions to a disorganized world." Kennedy, *supra* note 12, at 845. Lawyers then, as now, were attempting to transcend what realists assumed was the unchangeable nature of the world: interstate chaos. *See* Kennedy, *supra* note 12, at 848.

[232] Thus, the leading IO treatise identifies the separate questions addressed by political science and "legal science," suggesting that the former are interested in whether IOs influence the exercise of state power whereas lawyers presume that IO rules are relevant. Schermers and Blokker, *supra* note 1, at 9–10. This treatise forthrightly states that IOs "have a role to play in reality" and that IOs emerge as "the result of the need felt by states to cooperate . . ." *Id.* at 9–10.

For examples of positivist lawyers' general attempts to demarcate law from politics, see Koskeniemmi, *supra* note 203, at 1–40; Kennedy, *supra* note 12, at 868, 871, 985–6, and 949.

[233] But while functionalists in the social sciences embrace a "dynamic model" of international rule-making and standard-setting, traditional international lawyers have been preoccupied with the positivist status of particular texts and the forms of particular action. *See, e.g.*, Johnston, *supra* note 70, at 30–1. This difference, along with others, has produced schisms between lawyers and social scientists despite shared premises and sporadic attempts to form inter-disciplinary bridges.

[234] *See* Louis B. Sohn, "The Growth of the Science of International Organizations," in Deutsh and Hoffman, eds., *supra* note 15; Kennedy, *supra* note 12.

period: the goal was to make that institution more capable of "legalizing" issues of war and peace.[235]

Both then and now, international lawyers have been and remain leading proponents for the "constitutionalization" of the UN and other IOs and leading advocates for resolving international disputes through formal institutionalized adjudication.[236] As David Kennedy has put it, the majority of international lawyers tend to see themselves engaged in a common "international project," in which all things international (including international organizations and their courts) are good and resorts to notions of "sovereignty" are seen as parochial or bad.[237] For these reasons, early on, realists branded international lawyers as "idealists" or "utopians" for their emphasis on legal texts; lawyers have been accused of relying too much on the written word over the actual practice of states.

The critique that international lawyers' belief in law was (and to some extent remains) built on self-justification and not an objective look at empirical reality was not unjustified. As the preceding discussion of legal positivism suggests, all too often it appeared that international lawyers were content to construct and parse an ever growing number of legal texts, as if the construction and interpretation of such texts were all that mattered. Positivism elevated to religion the belief, not unreasonable in itself, that the transformation of a policy preference into a legal rule—as by including it in a treaty or an act legalized or authorized by a treaty—has a constraining impact on the behavior of states, but lawyers largely failed to expose their beliefs to empirical testing.

The "policy science" school of McDougal and Lasswell—the so-called "Yale School" of international law—arose partly in response to the critique of traditional positivist conceptions of legitimate sources of law and its failure to acknowledge the complex reality of the many actors involved in the making of international law. The rise of the Yale School has been told elsewhere and requires but a brief mention here.[238] The Yale School directs international lawyers to a

[235] *See, e.g.*, Louis B. Sohn and Grenville Clark, *World Peace Through World Law* (Cambridge, MA: Harvard University Press, 1958). Lawyers had played a similar role with respect to the League of Nations (see, e.g., Kennedy, *supra* note 12), and some are still playing that role today (see, e.g., Saul H. Mendlovitz and Burns H. Weston, "From Geopolitics to Humane Governance: Transition Steps," 4 *Transnat'l L. & Contemp. Probs*. 671 (1994)).

[236] *See, e.g.*, Ernst-Ulrich Petersmann, "Constitutionalism and International Organizations," 17 *Nw. J. Int'l L. & Bus.* 398 (1996/97).

[237] David Kennedy, "Receiving the International," 10 *Conn. J. Int'l L.* 1 (1994)(suggesting that international law, including its institutions, has been seen as providing an attractive escape from politics). For these reasons, Louis Henkin struck a responsive chord in the invisible college when he condemned sovereignty as a bad word. Louis Henkin, "International Law: Politics, Values and Functions," 216 *Recueil des Cours* 9, at 24 (1989/IV).

[238] *See, e.g.*, Phillip Trimble, "International Law, World Order, and Critical Studies," 42 *Stan. L. Rev.* 811 (1990). For a description of the Yale School from one of its principal modern-day exponents, see, e.g., W. Michael Reisman, "The View from the New Haven School of International Law," 86 *ASIL, Proceedings of the 86th Annual Meeting* at 118 (1992). For one of many trenchant critiques, see, e.g., James C. Hathaway, "America, Defender of Democratic Legitimacy?," 11 *EJIL* at 127–31 (2000).

problem-oriented style of inquiry that sought to supplement the focus on legal texts with insights from sociology, political science, and law in furtherance of postulated "goals" and "base values."[239] This attempt to bridge law and the social sciences accepts the proposition that law is grounded in realpolitik and stresses, for example, that law emerges from a variety of sources not limited to those listed in article 38 of the Statute of the ICJ.

McDougal and Lasswell's description of "authoritative decision-making processes" included a role for IOs and was more receptive to accepting, as legally relevant, processes of interaction among the various actors in international society, especially when these were solidified in growing expectations of legitimate authority. The Yale School, which aspired to systematic, open-ended, and value-based inquiry, was open to the prospect of improved global processes for international cooperation, but unlike Mitrany and his followers, McDougal and Lasswell did not pin these hopes on a gradual evolution of global IOs or peace by multilateral pieces. Yale School adherents, especially in their policy prescriptions, have given considerable deference to what they perceive to be geopolitical realities but which others have seen as "raw instrumentalism," premised on the ultimate benevolence of U.S. hegemonic power and interests.[240] The Yale School's value orientation has been attacked, on the one hand, for being too supportive of Western liberalism and/or capitalism, and on the other, for failing to provide definitive guidance on whether action is "legal" or not.[241]

As is suggested by the realist/functionalist divide and the rise of the Yale School in response, rival approaches to IOs surveyed above have emerged within the international legal literature only in recent years. It is not hard to see why. As Slaughter has pointed out, much of the structure of international law is built on the foundations that both realists and functionalist have laid. Like realists, Western-trained international lawyers also tend to rely on the primacy of states as actors, instrumentalist calculation as principal motivator, and the horizontal nature of the international system.[242] Realists' opaque billiard balls are lawyers' nation states: defined by territory and protected in their "territorial integrity" and "political independence" by principles such as "sovereign equality," the prohibition on the use of force, and the prohibition on interference with

[239] For an early introduction to the large Yale School literature, see Myres S. McDougal, Harold D. Lasswell, and W. Michael Reisman, "Theories About International Law: Prologue to a Configurative Jurisprudence," 8 *Va. J. Int'l L.* 188 (1968). For a more recent "Yale School" legal casebook, see W. Michael Reisman et al., *International Law in Contemporary Perspective* (New York: Foundation Press, 2004).

[240] *See, e.g.*, Stephen J. Toope, "Emerging Patterns of Governance and International Law," in Byers, *supra* note 168, 91, at 100–1. *See also* White, *supra* note 133, at 14 (suggesting that the Yale School approach was motivated by antipathy to the Soviet Union and was firmly entrenched in the "bipolar world"). This critique is undoubtedly inspired by a number of works, undertaken by Yale School founders, which appeared to support U.S. government positions during the Cold War. *See, e.g.*, Myres S. MacDougal and Norbert A. Schlei, "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security," 64 *Yale L. J.* 648 (1955)(defending the legality of U.S. atmospheric tests).

[241] *See* Johnston, *supra* note 70, at 14, n. 37.

[242] Slaughter, *supra* note 120, at 33–4.

"domestic jurisdiction."[243] This has meant that international lawyers have come only belatedly to recognize the merits of what are described here as "disaggregating" perspectives that go beyond realists' and functionalists' state-centricity. At the same time, international lawyers' fight for relevance earlier in this century—as against the realists—tended to take the form of multiple arguments attempting to establish international law's relative autonomy from politics. For this reason, rival approaches to law more open to recognizing the role of politics in law (apart from the Yale School) have tended to arrive late within international law circles.

Starting in the 1990s, international lawyers in the West emerged who were more willing to cast a critical eye on the structures of international law. Scholars like David Kennedy and Martti Koskenniemi described international law argument as an oscillation between irreconcilable antimonies such as apology/utopia or normativity/order that, to a considerable extent, reflected idealist/realist divides.[244] These critiques have gone far to challenge the fundamental assumption that law is distinguishable from politics. By exposing the state-centricity of international law and its sources, self-identified "crits" within international law also encouraged the rise of other critical perspectives of IOs, including by race crits and feminists, as well as the distinct disaggregationist and constructivist critiques to state-centricity canvassed above.

Today, lawyers who study IOs are nearly as eclectic in their methodological approaches as are social scientists.[245] Many international lawyers remain comfortably ensconced in Keohane's "instrumentalist optic." Much of the analysis of IO's involvement in treaty-making regards this as the product of rational unitary actors (states) acting strategically in pursuit of predetermined goals. Instrumentalist explanations, sometimes taking the form of game theory, abound for other forms of IO law-making as well. And some international lawyers, such as Ernst Petersmann, have taken instrumentalism to an extreme that some would identify with utopianism: they argue for the "constitutionalization" of the international system through processes not unlike those described by Mitrany.[246]

On the other hand, some international lawyers are even more drawn to constructivism and its "normative optic" than are political scientists as a group. The accounts of treaty-making and dispute settlement now emerging written by and for international lawyers are increasingly likely to suggest that these phenomena do not merely give effect to states' predetermined goals but shape the identity and interests of all the various actors involved, from states to NGOs. Thus, international lawyers have noted how pressures from a variety of sources, including IOs

[243] *See, e.g.*, UN Charter, Article 2. *See also* Slaughter, *supra* note 120, at 34.

[244] Koskenniemi, *supra* note 203.

[245] For a survey of some of these methodological approaches, see "Symposium on Method in International Law," 93 *AJIL* 291 (1999).

[246] *See, e.g.*, Ernst-Ulrich Petersmann, "Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?," 31 *NYU J. Int'l L. & Pol.* 753 (1999).

and NGOs, have shaped states' views with respect to the importance of women's rights.[247] As Slaughter suggests, the appeal of constructivism for international lawyers is not hard to see:

> Many lawyers are norm entrepreneurs; virtually all lawyers engage daily in deliberation and persuasion—a world of discourse. Many lawyers are intuitively uncomfortable with purely Rationalist instrumental accounts, believing deeply and verifying empirically through their practice the ways in which the rules that they shape in turn shape the identity and interests of the actors who operate within those rules. For these lawyers, Constructivism provides a deeply satisfying account of how and why what they do matters.[248]

Today's legal literature concerning treaty-making and dispute settlement is also likely to reflect disaggregationist insights. Lawyers are increasingly recognizing that the actors they presume to be acting strategically, whether in negotiating the Rome Statute for the International Criminal Court (ICC) or in bringing international claims before international tribunals, now increasingly include non-state as well as state actors, including various kinds of epistemic communities with distinct professional expertise, NGOs, other IOs, and other transnational and national interest groups. Today's legal literature on the WTO, for example, is as likely to concern itself with the ostensible impact of an epistemic community of free traders, both within the executive branches of GATT parties as well as among transnational networks, as it is with the views of the leading hegemon, namely the United States.[249]

For all these reasons, the theoretical approaches canvassed here, though usually arising initially outside legal circles, need to be kept in mind as we consider law-making by and in IOs. It is also important to recognize that the various approaches to the study of IOs, although categorized differently by various authors,[250] constitute "different readings of history" as much as distinct methodological approaches

[247] *See, e.g.*, Christine Chinkin, "Human Rights and the Politics of Representation: Is There a Role for International Law?," in Byers, *supra* note 168, at 131.

[248] Slaughter, *supra* note 120, at 48.

[249] *See, e.g.*, Gregory C. Shaffer, "The World Trade Organization Under Challenge," 25 *Harv. Envt'l. L. Rev.* 1 (2001)(examining the role of NGOs from the North and South within the WTO).

[250] For a survey of perspectives similar to those adopted here, see Jacobson, *supra* note 71, at 59–73. *Compare* Julius Stone, "A Sociological Perspective on International Law," in Macdonald and Johnston, eds., *supra* note 154 (identifying frameworks premised on a "common law of mankind," on policy-oriented decision-making (Yale School), and on world order realizable by spreading planetary consciousness); Malcolm N. Shaw, *supra* note 126, at 590–1 (identifying "rationalist," "revolutionary," and "realist" approaches); Johnston, *supra* note 70 (identifying theories of international law, including scientific, moralist, doctrinal, historical, cooperative, and Yale School); Stephen Haggard and Beth A. Simmons, "Theories of International Regimes," 41 *Int'l Org.* 491 (1987)(identifying theories of international regimes within the social sciences, including theories premised on hegemonic stability, game theory, and cognitive approaches); J. Martin Rochester, "The Rise and Fall of International Organization as a Field of Study," 40 *Int'l Org.* 777 (1986) (identifying "federalists," "neorealists," "globalists," and "regime theorists" within a broader "idealist/realist" framework).

and assumptions.[251] As might be expected of different readings of history, contemporaneous developments exert a powerful impact on the relative popularity of these scholarly trends.[252]

It was no accident that functionalist theory was born with the establishment of the League of Nations and other early 20th-century IOs. The creation of the League of Nations prompted a sense of optimism among those who lavished attention on the new organization and its prospects. The demise of that organization prompted scholars to design anew, in reaction to the horrors of World War II and the hopes of a "new world order." Both the lawyers and social scientists "present at the creation" of the UN drew hope from the prospect that world peace could be achieved "by pieces," through technical and, gradually, political cooperation.[253] Years later, the Cold War and north/south disappointments in turn provoked skepticism with the views of Mitrany, especially in political science, which saw the rise and eventual dominance of realism. The rise of constructivism in political science coincides with the end of the Cold War and the rise in confidence in policy circles in the power of such ideas as the free market, democracy, and human rights.

These distinct schools have had changing fortunes within legal circles as well. For much of the 20th century the central battles fought by international lawyers were with those who argued international law did not really exist, namely realists. Later, the central battles waged were between particular trends in legal positivism and between these and the Yale School.[254] Lawyers are not immune from contemporary developments and faddish changes within the academy. By 1980, few U.S. law schools, for example, were offering courses on the UN or IOs as such, undoubtedly reflecting the wane of interest in these institutions within U.S. foreign policy circles as well as within political science. This began to change by the early 1990s, coinciding with the rise both in the functionalist regime literature in political science as well as the end of the Cold War.[255] In the immediate aftermath of the Cold War, legal idealism (or utopianism) re-emerged briefly, as some lawyers (and even some officials within the UN) voiced hopes that the UN

[251] Rochester, *supra* note 250, at 781. Indeed, Kennedy contends that the discipline of international institutions distinguishes itself from public international law "by locating its origins in a set of historical developments." Kennedy, *supra* note 12, at 842.

[252] For a survey of how current events have influenced those writing within the social sciences, see, e.g., Rochester, *supra* note 250.

[253] For accounts of the "overselling" of the UN at its creation within U.S. intellectual and policy circles, see Thomas M. Franck, "U.S. Foreign Policy and the U.N.," 14 *Denv. J. Int'l L.* 159, 160–2 (1986). Some have read the vacillating history of U.S./UN relations as a reaction to initially unrealistic, exaggerated expectations. *See, e.g.*, Robert W. Gregg, *About Face? The U.S. and the UN* (Boulder, CO: Lynne Rienner Publishers, 1993). For examples of similarly exaggerated hopes for the League of Nations, see Kennedy, *supra* note 12, at 845 n. 10.

[254] For an account of trends within the U.S. legal academy, see generally David Kennedy, "The Disciplines of International Law and Policy," 12 *Leiden J. Int'l L.* 9 (1999).

[255] Thus, in 1993 Fredrick Kirgis published a second edition of *International Organizations in Their Legal Setting*, at the time the only casebook purporting to cover IOs generally released by a U.S. publisher. The prior edition of that casebook had been published in 1977.

might finally "work as intended."[256] Institution-building seemed, at least briefly, to make a comeback from 1989 to 1992, with functionalist hopes of the most utopian cast reflected in prominent documents as the UN Secretary-General's ambitious goals for the UN, set out in his "Agenda for Peace."[257] At the same time, the rise of the perceived import of the WTO (especially after the conclusion of the 1994 Uruguay Round) led to an increase in the legal literature (and law courses) devoted to that institution, coinciding with an increase in attention among political scientists interested in that regime.[258] Not surprisingly, this was also the period in which leading liberal scholars argued that liberal states complied better with international law and would develop more integrative law-making processes.[259]

By the late 1990s, however, in the wake of what were perceived (accurately or not) as UN "failures" in Bosnia, Rwanda, Somali, and elsewhere, optimism in institutionalized collective security faded anew in both political science and even somewhat in law while interest in other IOs, particularly those engaged in economic matters remained high.[260] At the same time, the growth and apparent integrative successes of the EU over the period continued to inspire liberal theorists in both political science and law, including attempts to distill European lessons for successful integration at both the regional and universal level.[261]

At the century's end, interest in international institutions remained high: amidst continued institution-building at the universal level in diverse fields, from the environment to trade and investment; the proliferation of international tribunals on various subjects (especially international criminal law); and the rise of regional institutional mechanisms like the NAFTA. These developments inspired, especially within the U.S. legal academy, more conscious attempts to build

[256] *See, e.g.*, Thomas M. Franck and Faiza Patel, "UN Police Action in Lieu of War: 'The Old Order Changeth', " 85 *AJIL* 63 (1991). For some, this period suggested the heady possibility of eliminating the troublesome concept of sovereignty altogether, see, e.g., Ali Khan, "The Extinction of Nation-States," 7 *Am. U. J. Int'l L. & Pol'y* 197 (1992).

[257] "An Agenda for Peace," UN Doc. A/47/277, S/24111, June 17, 1992.

[258] *See, e.g.*, Raymond Vernon, "The World Trade Organization: A New Stage in International Trade and Development," 36 *Harv. Int'l L. J.* 329 (1995). Interest in the WTO has continued unabated since the successful conclusion of the Uruguay Round; see generally "Symposium: The Boundaries of the WTO," 96 *AJIL* 1 (2002).

[259] *See*, in particular, Anne-Marie Burley (Slaughter), "Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine," 92 *Colum. L. Rev.* 1907 (1992); Anne-Marie Slaughter, "International Law in a World of Liberal States," 6 *EJIL* 503 (1995).

[260] But some remained cautiously hopeful even with respect to the UN; see, e.g., Boutros Boutros-Ghali, "The Role of International Law in the 21st Century: A Grotian Moment," 18 *Fordham Int'l. L.J.* 1609 (1995).

[261] *See, e.g.*, Anne-Marie Slaughter and Bruno Mattli, "Europe Before the Court: A Political Theory of Legal Integration," 47 *Int'l Org.* 41 (1993); Joseph Weiler, "A Quiet Revolution: The European Court of Justice and Its Interlocutors," 26 *Comp. Pol. Studies* 510 (1994); Anne-Marie Slaughter and Lawrence Helfer, "Toward a Theory of Effective Supranational Adjudication," 107 *Yale L. J.* 273 (1997); Alec Stone Sweet, "Judicialization and the Construction of Governance," 32 *Comp. Pol. Studies* 147 (1999).

bridges between the disciplines of international relations and international law, including with respect to the study of IOs and their impact on compliance.[262] Today there are increasing signs that political scientists are rediscovering norms and even the significance of brick and mortar institutions, including international courts.[263] A new generation of institutionalists—now often involving interdisciplinary collaborations—appears to be emerging.[264]

[262] *See, e.g.*, Anne-Marie Slaughter, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship," 92 *AJIL* 367 (1998); Stephen Toope and Jutta Brunnée, "Freshwater Regimes: The Mandate of the International Joint Commission," 15 *Ariz. J. Int'l & Comp. L.* 273 (1998); Beth A. Simmons, "International Law and International Relations: Scholarship at the Intersection of Principles and Politics," *ASIL, Proceedings of the 95th Annual Meeting* at 209 (2001); Anne-Marie Slaughter and Kal Raustiala, "Compliance and International Law," in Walter Carlsnaes, Thomas Risse, and Beth Simmons, eds., *The Handbook of International Relations* (London: Sage Publications, 2002).

[263] *See, e.g.*, "Legalization and World Politics: A Special Issue of International Organization," 54 *Int'l Org.* (2000).

[264] *See, e.g.*, Simmons, *supra* note 262; José E. Alvarez, "Measuring Compliance," *ASIL Proceedings of the 95th Annual Meeting* at 209 (2002).

PART I

INTERNATIONAL INSTITUTIONAL LAW

International law as a system is commonly distinguished from the national rule of law because of the absence of a legislature or parliament with authority to make the law for all states, the lack of a police or executive power capable of enforcing it, and the want of a judiciary with the compulsory jurisdiction to interpret the law. When it comes to describing the norms (or "rules" or "standards") that emerge directly from the work of IOs—namely international institutional law—leading legal treatises take their cues from the positivist list of sources, as well as realists who have long disparaged the significance of international organizations as factors in how states behave. In the standard account, the power of IOs to make law is limited by how this comes about: IO law-making power is only as extensive as those who delegated their sovereign power want it to be. For this reason, among others, the constituent instruments of all international organizations—whatever their formal designation ("conventions," "charters," or even "constitutions")—are considered to be mere treaties, and not "constitutions" with all that term usually implies within national legal orders. From this perspective, there is no such thing as general "constitutional law" for international organizations or indeed even regime-specific "constitutional law" for the UN, the WTO, or any other organization with global aspirations, if by this is meant establishment of a distinct legal order with the sweeping delegation of legislative, executive, and judicial functions contained in, say, the U.S. Constitution. To the extent that institutional organs authorized to take binding decisions might be seen as making "law," this is, in accordance with the article 38 source of law that gave rise to it, by definition, regime-specific law, applicable only as between the states that contracted by treaty as between themselves to respect it.

In addition, in the standard account contained in legal treatises, much of what IOs do that is legally relevant is limited to "secondary legislation" dealing with the "internal sphere" of the organization; that is, intended to "ensure the functioning of the organisation itself, by providing for more detailed rules than those contained in the constitutent instrument or by implementing those rules."[1] On this view, *internal* international institutional law should only be of interest to a rather narrow range of people, namely those few international lawyers lucky (or unlucky) enough to work closely with these organizations and necessarily interested in the "secondary" legislation that makes it possible for IOs to run smoothly. Defined in such narrow terms, such internal law encompasses only the rules governing the international civil service (including the agenda-setting duties of the chief administrative officer, the rules governing the recruitment and retention of a geographically diverse staff, and the application of the Noblemaire Principle (establishing

[1] Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* at 279–80 (London: Sweet & Maxwell, 2001). For comparable descriptions of organizational law-making, see, e.g., Krzysztof Skubiszewski, "International Legislation," in Rudolf Bernhardt, ed., 2 *Encyclopedia of Public International Law*, at 1255 (Amsterdam and New York: North Holland, 1992–2003); Henry G. Schermers, "International Organizations, Resolutions," 3 *Encyclopedia of Public International Law, supra*, at 159; Robert E. Riggs, "The United Nations and the Development of International Law," *BYU L. Rev*. 411 (1985).

the level of compensation to be that of the highest paying national civil service)); the information-gathering and dissemination rules for preparation of studies and, in those instances where on-site inspections are authorized, the scope of such limited intrusions into state sovereignty; the rules governing the rights and duties of the organization that emerge from its entitlement to international legal personality (as with respect to engaging in the conclusion of treaties and contracts or presenting claims before international tribunals); the less pedestrian (but still relatively rarely exercised) rules governing the implementation of sanctions or other forms of enforcement action when these are explicitly authorized; and the privileges and immunities extending to the organization and its agents.[2]

When it comes to "producing effects outside" the organization's legal order, since most IOs have been given only recommendatory or consultative powers in this "external" sphere, the prototypical examples of legally binding external international institutional law cited are even more sparse.[3] Putting aside the rarely exercised powers of the Security Council to enforce the peace and the unique supranational authorities conferred on the European Community's Commission, real IO law-making, at least as is suggested in the standard account, is limited to the technocratic law of certain circumscribed UN specialized agencies, such as the WHO's ability to issue health regulations or the ICAO Council's ability to adopt binding aviation rules over the high seas.[4] All other forms of standard-setting occurring within IOs or through their actions can be comfortably explained as mere variations on traditional forms for the making of treaties or (perhaps) customary international law.[5]

Given such descriptions, it is hardly surprising if most students of international law emerge from their studies believing that the amount of delegated law-making authority in the international realm is largely limited to relatively narrow technocratic or non-political topics—precisely those that are readily dismissed by many economists and political scientists as mere coordination games having little impact on "high" politics or on how states generally behave except on matters where they already have pre-determined that it is in their interests to behave.

The following three chapters describe select examples of how IO organs contribute to international law, apart from serving as facilitators for treaty-making or venues for institutionalized dispute settlement. The larger premise is that old notions of "international institutional law" are ripe for reconsideration and that both

[2] *See* Sands and Klein, *supra* note 1, at 297–335 (detailing these "executive" and "administrative" functions).

[3] *Id.*, at 280.

[4] *Id.*, at 281–92.

[5] Thus, although Sands and Klein acknowledge that apart from the European Community, some regional organizations (such as the Arab League and the OECD) are authorized to take legally binding action, they also note that since in all these cases such action requires a unanimous decision, such examples are "not very different, from a theoretical point of view, from multilateral conventions adopted within an organization." *Id.*, at 283. Similarly, in canvassing instances where IOs' recommendations have resulted in legally binding acts, Sands and Klein contend that such effects result from the link to traditional sources of international law, such as unilateral undertakings or international customary law. *Id.*, at 285–91.

"internal" and "external" standard-setting within IOs is a great deal more complex and intrusive than the standard account suggests. The thesis is not merely that there is more IO law-making than is suggested by positivist (or realist) accounts; it is also that law-making by political organs of these organizations, including their Secretariats, cannot be cabined so neatly into "internal" versus "external" spheres, is considerably more dynamic than is implied by the attempt to describe it through a static doctrine of (dated) sources of international law, and is capable of having normative effects far beyond the specific treaty-regimes in which such standard-setting occurs. Chapter 2 sets the stage by considering how IO organs have interpreted their charters, indicating the malleability of both institutional charters and the underlying rules of treaty interpretation. Chapter 3 surveys briefly the charters or constitutions that aspire to global membership and draws certain general conclusions from this textual review. The work of the political organs of the UN is next examined to test these general conclusions and revise them in light of institutional realities. That chapter ends by re-examining, in a more contemporary light, the subject that Rosalyn Higgins considered in her classic, *The Development of International Law Through the Political Organs of the United Nations* (1963), to illustrate how UN organs have helped to redefine the concept of sovereignty and "domestic jurisdiction." Chapter 4 examines more closely the legal impact of the UN Security Council as well as the complex interplay between law and power that it embodies. That chapter also describes select examples of how other organizations with global aspirations engage in standard-setting and rule making, usually in ways not formally authorized in their charters. That chapter ends with interim conclusions that are at odds with the standard accounts of the limited role of IOs in law-making and that describe the emerging global administrative law that these organizations produce.

2

"Constitutional" Interpretation

2.1 Domestic Analogies

Like other international agreements, the constituent instruments of international organizations usually contain substantive obligations—such as mutual commitments to seek tariff reductions (as in the WTO), to settle disputes peacefully (as under the UN Charter), or to improve labor conditions (as under the ILO's Constitution). An IO's charter is distinguishable from most other treaties in that it constitutes a permanent and autonomous entity.[1] This chapter considers the distinctive elements of IO charters: who interprets them, how they do so, and why interpretation matters. While this chapter considers the UN in particular, the same questions, if not always the same answers, apply with respect to other IO constitutions.

There are ostensible similarities between the UN Charter and the U.S. Constitution. Both provide institutional mechanisms to accomplish goals identified only as "majestic generalities."[2] The purposes of the U.S. Constitution—a "more perfect union," "justice," "domestic tranquility," a "common defense," "welfare," and "liberty"—are no more transparent than the UN's Purposes and Principles as stated in UN Charter Articles 1 and 2. Both instruments attempt, in broad strokes, to set out the structure of an organization, its competence and functions, and to identify institutional organs and their respective powers. Articles I, II, and III of the U.S. Constitution, which identify the powers accorded the legislative, executive, and judicial branches respectively, can be compared to those sections of the UN Charter that spell out the duties and powers of the UN's General Assembly, Security Council, Economic and Social Council, Trusteeship Council, and the International Court of Justice. It is also tempting to see the principal UN organs, namely the General Assembly, the plenary body consisting of all members, the Security Council, a body of dramatically more limited membership capable of meeting on a continuing basis, and the World Court, as the international equivalent of legislative, executive and judicial branches. While neither instrument accords its respective "judiciary" an explicit power of judicial

[1] *See infra* Section 3.2 for further discussion of the legal personality of IOs.

[2] William Rehnquist, "The Notion of a Living Constitution," 54 *Tex. L. Rev.* 693, at 694 (1976)(discussing the U.S. Constitution).

review, both the World Court and the U.S. Supreme Court have interpreted the constitutions of which each is a part.[3]

Both texts also seem to be premised on democratic principles. "The peoples" of the world, through their "respective governments," "establish" the UN, and are represented in the Assembly, just as "the peoples" of the United States "establish" their constitution and are represented in Congress.[4] The UN's plenary body, because it represents all of member governments and is the most "democratic," is the only organ with plenary powers of discussion and recommendation, including "encouraging the progressive development of international law and its codification" (Article 13).[5] It is also the organ given, like the U.S. Congress, the power of the purse (Article 17).[6] As with the U.S. Constitution, which does not confer on the executive branch general law-making powers, such general powers are not given to the UN Security Council. That body is, however, charged with responsibility over the peace and security of the community of states and is enabled to take binding decisions to this end—just as the U.S. President is given the power to protect the security of the United States as commander in chief of U.S. armed forces.[7]

As with the U.S. Constitution, which provides for the method of electing a U.S. President (article II, sec. 1(2)–(4)), ensures that Congress meets once a year (article I, sec. 4(2)), and stipulates special procedures in the making of treaties (article II, sec. 2(2)) and for constitutional amendment (article V), the UN Charter details only some basic procedural rules, leaving much to the discretion of each organ. Thus, the Charter provides for Assembly and Council involvement in the admission, expulsion, and suspension of members (Articles 4–6), identifies issues requiring a two-thirds vote in the GA (Article 18), establishes voting procedures in the Council (Article 27), and ECOSOC (Article 67), guarantees some rights of access for states with respect to the Council (Articles 31 and 32), and provides a mechanism for amendment (Article 108).

As with the U.S. Constitution, there also appears to be a separation of powers notion at work within the UN Charter.[8] While both Assembly and Council action are required for some tasks, such as decisions to admit, suspend, or expel

[3] *See, e.g.*, Blaine Sloan, "The United Nations Charter as a Constitution", 1 *Pace Yrbk Int'l L.* 61, at 62–77 (comparing certain ICJ Advisory Opinions, in which that court has taken upon itself to interpret the Charter despite claims that such issues are "political questions" to cases such as *McCulloch* v. *Maryland* and *Marbury* v. *Madison*).

[4] *Compare* preamble, U.S. Constitution *with* preamble, UN Charter.

[5] For these reasons, some of the UN drafters saw the Assembly as the "creative" body entitled to "establish principles on which world peace," as compared to the "organ for action," of the Council. Report of Committee II/2, Doc. 1151, II/17, 8 U.N.I.C.O. Docs. 190, 196 (1945), quoted in Inis L. Claude, Jr., *Swords into Plowshares: The Problem and Progress of International Organization* at 176 (New York: Random House, 4th edn., 1971). For further discussion of the impact of Assembly resolutions on international law, see Chapter 3 *infra*.

[6] *See* Section 3.2, *infra*.

[7] *See* Chapter VII, UN Charter; article II, sec. 2(1), U.S. Constitution.

[8] *See, e.g.*, Sloan, *supra* note 3, at 78–85 (discussing the respective powers of "rival" UN organs and comparing state/federalism concerns within the U.S. to the UN Charter's evolving interpretations of "domestic jurisdiction" for purposes of its Article 2(7)).

members (Articles 4–6), only the Assembly is explicitly given some powers, as with respect to the budget (Article 17), suspension of a member's Assembly vote for failure to pay (Article 19), or the initiation of studies and recommendations (Article 13). While it is foreseen that both the Assembly and the Council may discuss questions relating to international peace and security (Article 11), it is the Security Council that is alone given "primary" responsibility over these issues (Article 24), while the Assembly is directed not to make any recommendation with regard to disputes or situations while the Council is acting (Article 12). The ICJ is also implicitly told to stay away from the political concerns of interest to other UN organs, as its advisory jurisdiction extends only to "legal questions" (Article 96, Charter; article 65, Statute of the Court) and its cases extend only to "legal disputes" decided under rules of law (article 36, Statute of the ICJ).[9]

That the U.S. Constitution and the UN Charter should appear to share similarities might be attributed to the pervasive U.S. influence in its drafting. The UN Charter, like the constituent instruments of many other UN system organizations such as the ILO, was, to a substantial extent, a "90 percent American creation."[10] Examination of the preparatory works for the Charter show that "the initiation, detailed elaboration, and formulation of the material lay primarily in American hands."[11] Of the Great Powers instrumental in its creation, the U.S. was "by far the most dominating and influential party," with U.S. nationals leading all drafting committees, except that dealing with credentials.[12]

Yet all of these domestic analogies, tempting as they are, given the history of the drafting of the Charter, mislead. Every one of the propositions above is either wrong or fundamentally misconstrues the purposes of the UN Charter.

One basic difference is suggested by the respective preambles. Unlike the U.S. Constitution, the UN Charter does not seek creation of a "more perfect Union," the first and most essential goal of the drafters of 1789. Those representatives of sovereign nations who convened in San Francisco and Dumbarton Oaks to draft the Charter were not creating a world government or, indeed, a "government" at all. Each government representative was not ceding its sovereignty but creating a mechanism that each hoped would help preserve it. To this end, the UN's Purposes and Principles, vague as they are, are much more specific than the aims indicated in the U.S. Constitution's opening lines. The UN Charter provides, for example, a relatively concrete list of tasks deemed essential to the effort to maintain international peace (see Article 1(1)). These tasks are all the more

[9] While the Court is also empowered to resolve disputes on the basis of equitable principles, this may only occur with the consent of the (state) parties involved. Article 38(2), Statute of the ICJ. With respect to advisory questions involving international organizations, the Court is given no such discretion.

[10] Paul Kennedy, "Remarks," *ASIL Proceedings of the 89th Annual Meeting* at 51 (1995).

[11] Wilhelm G. Grewe and Daniel Erasmus-Khan, "Drafting History", in Bruno Simma, ed., *The Charter of the United Nations: A Commentary* 1 (Oxford, U.K. and New York: Oxford University Press, 2002).

[12] *Id.*, at 11.

specific because of the explicit prohibition indicated at the outset: Article 2(4)'s ban on the use of force between states.

There is nothing in the Charter comparable to the U.S. Constitution's conferral of "legislative," "executive," or "judicial" authority under the Constitution's articles I, II, and III respectively. "All legislative powers" were not conferred on the General Assembly. Article 13 only indicates that this body may "discuss" and "recommend" and therefore "encourage" the development of international law. The Security Council is not given article II "executive power." Instead, members merely "agreed to accept and carry out the decisions" of the Council, and these, enumerated in Chapter VII of the Charter, relate to the enforcement of collective security. The Secretary-General, merely the "chief administrative officer" (Article 97) and not the titular head of a governmental body, is not given any plenary powers, "executive" or otherwise. The Secretary-General's duties are limited to carrying out functions assigned by other UN organs, to the making of an annual report, to bringing matters to the attention of the Council, and to the appointment of staff (Articles 98–101). Even the authority conferred on the ICJ is hedged since that body is not given "[t]he judicial power," as under article III of the U.S. Constitution. Further, the ICJ's statute precludes it from giving legally binding advice to UN organs since those can only request "advisory" opinions (articles 65–8, Statute of the Court). Only states are bound to comply with ICJ judgments to which they are parties, and even here, the independence of this ostensible global judiciary is compromised by the method for enforcement of its binding decisions: under Article 94, the Council, a pre-eminently political body, "may" (not "shall") and only "if it deems necessary," take action to give effect to the Court's judgments.

Although as will be discussed in later chapters, the UN, like many IOs, is in many ways a law-making institution, there is no global legislature, and the UN General Assembly is not "representative" of the peoples of the world in the same way that, for example, a U.S. member of the House of Representatives, elected from a district, represents the interests of a particular constitutency. While the normative status of some GA resolutions remains, as will be discussed, controversial, few maintain that the GA's work product generally has the full legally binding effects, either de facto or de jure, of bills passed by the U.S. Congress and signed into law by the President of the U.S. As discussed in Chapter 1, most international lawyers still adhere, at least as a starting point, to the list of sources provided in the World Court's statute, at article 38: custom, treaty, and general principles. To the extent texts emerging from international organizations are regarded as binding, most lawyers attempt to fit them into these traditional three sources. Later chapters will suggest the problems that emerge from this effort, but one impact of the doctrine of sources is to render domestic law-making analogies more difficult. Even if the work product of many global IOs actually produces legal effects, the limited conception of what constitutes international law tends to obscure them. Moreover, even if one were to suggest that some GA resolutions have a normative

effect comparable to the traditional sources of international law, the analogy with the U.S. constitutional scheme for law-making would quickly break down since the Security Council, the ostensibly "executive" power within the Charter, also produces comparable (if not greater) normative effects. As will be discussed in Chapters 3 and 4, the Council has engaged in quasi-legislative as well as quasi-judicial activity.

It also seems terribly misleading to read the Charter, a document premised on a realpolitik assessment of what sovereign states would tolerate in 1945, as a democratic document. As Oscar Schachter once suggested, 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 II, were "not comparable to the reflections of Madison or Hamilton."[13] Unlike the founders of the United States, the Charter drafters were not inspired by the notion of a social compact between individuals and a government, created to ensure and protect their 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 (as opposed to sovereigns) were given no content in the Charter. The peoples on whom ostensible self-determination rights were conferred were not specified. A bill of human rights was not attached. The peoples invoked in the Charter's opening phrase essentially disappear in its operative text—as the protection of states, not the human rights of individuals, is given pride of place in UN Purposes and Principles.[14] States were also given assurances against interference in matters "essentially" within their "domestic jurisdiction" (Article 2(7)), and the organ capable of puncturing that guarantee, the Security Council, was the only organ explicitly given binding authority—but only in connection with threats to or breaches of the peace and acts of aggression (Article 39).

The prime goal of those who drafted the Charter, and particularly of the U.S., was to create a mechanism to guarantee members' collective security that would be more effective than that under 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.[15]

The statist ideal of a collective security scheme, dating back to Italian city-states in the fifteenth century, to the Treaty of Münster in 1648, and of course, to the

[13] Oscar Schachter, "The Charter's Origins in Today's Perspective," *ASIL Proceedings of the 89th Annual Meeting* at 45 (1995).

[14] 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'." W. Michael Reisman, "Amending the UN Charter: The Art of the Feasible," *ASIL Proceedings of the 88th Annual Meeting* at 108–9 (1994).

[15] Schachter, *supra* note 13, at 47 (emphasis in original).

League of Nations—not democratic self-government—was the impetus for the Organization. The UN Charter is backwards-looking, crafted to deal with many of the flaws of the League as seen, in hindsight, from the perspective of World War II, including that Organization's failure to achieve universality and lack of real enforcement powers, reliance on unanimity for decision-making, and failure to allocate responsibility among organs for keeping the peace.[16]

To secure effective collective security, Charter drafters felt compelled to violate the equality between states mentioned in the Charter's Articles 1 and 2 by giving the world's five police powers decidedly unequal powers in the Security Council. 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 with the Council at its apex.[17] Indeed, for some, the UN more closely resembles a "police state" than a system based on the "rule of law" since the Council is entitled, indeed, is most successful and arguably operates "as intended," when it takes the "law unto itself" in a flexible and opportunistic manner.[18]

That this non-governmental apparatus should share with the U.S. government a similar conception of separation of powers or checks and balances seems naive. As has become clearer with the post-Cold War reactivation of the Security Council, there are no apparent checks on Council action explicitly anticipated within the Charter. While the GA has repeatedly refused to defer to the Council as is anticipated in Article 12 of the Charter, GA 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 are not binding, unlike Council decisions.[19] On the other hand, the Council has no apparent Charter authority to interfere in GA decisions, such as those regarding the budget for the organization, and the GA purse-strings power could, in theory, be used to deprive Council actions requiring expenditures from taking effect. To date, the GA has not made the attempt and the legality of such an effort has not been tested.

Similarly, the ICJ, which is not explicitly given the power of judicial review and is denied judicial power except where states have consented to its jurisdiction, has purported to reject the possibility of checking the Council whenever it has been raised.[20]

[16] *See, e.g.*, D.W. Bowett, *The Law of International Institutions* at 17–22 (London: Stevens & Sons, 4th edn., 1981).

[17] Grewe and Khan, *supra* note 11, at 8.

[18] *See, e.g.*, Serge Sur, "Security Council Resolution 687 of 3 April 1991 in the Gulf Affair: Problems of Restoring and Safeguarding Peace" (research paper No. 12), UN Doc. UNIDIR/92/53, at 8, 61.

[19] For a review of the GA flexible interpretations of Article 12, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ Rep. 136, at paras. 24–8 (noting the "evolution" of Article 12 and the "increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security")(para. 27).

[20] *See, e.g.*, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (*Libya* v. *UK*; *Libya* v. *U.S.*), Provisional Measures, 1992 ICJ Rep. 3, 114 (Orders of April 14)(hereinafter "*Lockerbie case*").

While the Court has interpreted the Charter in the course of affirming the legality of action by UN organs, it has usually done so in the course of advisory, non-binding opinions.[21] The possibility of *Marbury* v. *Madison*-style review by the ICJ, culminating in a determination that action by another UN organ is illegal and has no effect, would provoke a political crisis and appears unlikely given the limits on the ICJ's jurisdiction, as well as gaps in international law.[22] The World Court has never found any action taken by any UN organ to be illegal in a binding context. Nor is it clear what the consequence of such a finding by the Court would be. And even if that Court would dare make such a finding, it could not count on the Council taking action to enforce such a judgment, as anticipated under the Charter's Article 94.

Yet the World Court has also rejected the applicability of one consequence of U.S.-styled separation of powers: the political question doctrine. When both Iran and the United States in different cases raised arguments on inadmissibility suggestive of the political question doctrine, the Court was quick to dismiss them, finding that it had power to consider from a legal standout even political issues raised in other fora, including the Security Council.[23] The appellate body of the War Crimes Tribunal for the Former Yugoslavia also rejected the applicability of the "political question" doctrine in considering claims that the Security Council acted illegally in establishing it.[24]

The inappropriateness of domestic governmental 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, the only instrument plausibly regarded as a "constitution for the world community,"[25] can not

[21] *See, e.g.*, *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 (hereinafter "*Namibia case*"); *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, 1954 ICJ Rep. 47 (hereinafter "*Effect of Awards case*"); *Certain Expenses of the United Nations*, 1962 ICJ Rep. 149 (hereinafter "*Certain Expenses case*"). *See, eg.*, W. Michael Reisman, "The Constitutional Crisis in the United Nations," 87 *AJIL* 83 (1993). *But see* José E. Alvarez, "Judging the Security Council," 90 *AJIL* 1 (1996) and Section 8.3, *infra*.

[22] *See* further discussion in Chapter 9 *infra*.

[23] Thus, the Court found Iran's seizure of U.S. diplomatic hostages illegal, notwithstanding Iran's claims that the dispute involved broader political issues between the two governments. *Order indicating Provisional Measures*, 1979 ICJ Rep. 7. In response to charges by Nicaragua in another case the court found that it had jurisdiction to consider Nicaragua's claims that the U.S. used impermissible force despite U.S. claims that the dispute was inadmissible since it involved an on-going conflict being considered by the Security Council. *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (*Nicaragua* v. *U.S.*), 1984 ICJ Rep. 392, at paras. 84–108 (Jurisdiction) (hereinafter "*Nicaragua Jurisdictional Phase*").

[24] *Dusko Tadic*, Case No. IT-94-1-AR72, Oct. 2, 1995 (hereinafter *Dusko Tadic case*, at paras. 23–5) (rejecting the trial chamber's reliance on the political question doctrine). For further discussion of this case, see Section 8.3, *infra*.

[25] Georg Ress, "Interpretation of the Charter," in Simma, *supra* note 11, 13, at 16; Ignaz Seidl-Hohenveldern and Karin Rudolf, "Article 104," in *id.*, Vol. 2, at 1302. 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, e.g.*, SC Res. 748 (1992)(imposing sanctions on Libya in connection with Lockerbie bombing); *Lockerbie case*, *supra* note 20, para. 42 (indicating that the Council resolutions imposing sanctions on Libya prevail over other treaties and citing UN Charter Article 103). The

credibly be compared to a national constitution, this is all the more true of other organizations with more modest agendas and powers. Analogies between the texts of domestic constitutions and constituent instruments such as the original GATT, for example, seem inappropriate. The original GATT was an institutional orphan whose text contains practically no reference to organs or their respective powers. Its voting rules were succinctly indicated and the Contracting Parties were simply authorized to "establish such institutional arrangements as may be necessary" to further the GATT's enumerated objectives (GATT, articles XXV; article XXXVIII(2)(f)). The one international entity whose structure and purposes might more plausibly be compared to those of governments, the EU, is, by some measures, more a proto-European state in the making than an international organization.[26] Subject to that possible exception, not the subject of this book, all global international organizations constitute mere mechanisms to achieve limited goals.

Yet international lawyers, judicial interpreters, and, more importantly, those engaged in the day to day practice of these organizations, have examined the constituent instruments of international organizations with much of the rhetoric and many of the tools ordinarily reserved for national constitutions. For many, the temptation to use special "constitutional" methods of interpretation has proven irresistible, especially with respect to the UN Charter. Thus, Dr. George Ress, as part of an exhaustive commentary on the UN Charter, writes 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 organizational 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

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 May 23, 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 e.g.*, Richard H. Lauwaars, "The Interrelationship Between United Nations Law and the Law of Other International Organizations", 82 *Mich. L. Rev.* 1604 (1984).

The argument that the UN Charter is entitled to superior status under U.S. domestic law, such that, for example, it must be given effect even over later in time federal law, has been rejected by at least one U.S. court. *See, e.g.*, *Diggs* v. *Schultz*, 470 F.2d 461, at 465 n. 4 (D.C. Cir. 1972).

[26] There appear to be, at the extremes, 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.

Trevor C. Hartley, "The European Court, Judicial Objectivity and the Constitution of the European Union", 112 *L. Q. Rev.* 95, at 109 (1996).

law in a narrow sense, such as the secondary organizational 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.[27]

Just as national judges and commentators have argued for textual, originalist, or teleological (or "dynamic") interpretations of national constitutions, interpreters have favored one or more of these for purposes of the UN Charter, and, at times, other IO charters. Dr. Ress, for example, insists that what he calls the "dynamic-evolutionary" method for interpretation of the UN Charter now prevails, at least with respect to ICJ judges. He claims that the World Court no longer interprets the charters of international organizations restrictively for fear of limiting "sovereignty."[28] He argues that "static interpretation, based on the original meaning of a term at the time of conclusion," has given way to a tendency to interpret different treaties differently, depending on their type.[29] Dr. Ress contends that, at least for purposes of interpreting the UN Charter, a purpose-driven inquiry, intended to effectuate broad Charter purposes in light of existing community needs, "free from historical perceptions," is necessary.[30]

As students of national constitutions might suspect, not everyone agrees with this view, but even those who do not, persist in making domestic analogies. The opposing side favors narrower approaches to UN Charter interpretation, including resort to textual "plain meaning" and "original intent."[31] Charter interpreters and reformers have also turned to arguments from "democracy"—including proposals to enhance the Council's "democratic deficit" through consultations with the GA, greater transparency in Council activities, or more diverse Council membership.[32] Even members of the U.S. Congress talk of the need for financial constraints on the UN in order to keep that body "accountable" to its membership. Others debate the possibility of "judicial review" over the Council, discussing

[27] Ress, *supra* note 25, at 15–16; *but see* Sloan, *supra* note 3, at 114–26 (arguing that the terms of the Charter and the open-ended intent of those who drafted it permits flexible interpretation without need to adopt explicitly "non-interpretive" approaches); Ervin Hexner, "Teleological Interpretations of Basic Instruments of Public International Organizations," in Salo Engel, ed., *Law, State, and International Legal Order: Essays in Honor of Hans Kelsen* 119 (Knoxville: University of Tennessee Press, 1964)(surveying "teleological interpretations" within various IOs).

[28] Ress, *supra* note 25, at 15–16.

[29] *Id.*, at 23–4.

[30] *Id.*, at 23–7.

[31] *See, e.g.*, Grigory I. Tunkin, "The Legal Bases of International Organization Action," in René-Jean Dupuy, *A Handbook on International Organization* at 265–9 (Dordrecht, Boston: M. Nijhoff 1998) (favoring a narrow interpretation); Malvina Halberstam, "The Right to Self-Defense Once the Security Council Takes Action," 17 *Mich. J. Int'l L.* 229 (1966)(arguing for an originalist interpretation of Article 51 of the Charter). For a survey of different views, see, e.g., G. G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points," 28 *Brit. Yrbk Int'l L.* 1 (1957).

[32] *See, e.g., Dusko Tadic case, supra* note 24, Separate Opinion of Judge Sidhwa, paras. 67–9 (arguing that the ICTY was established by "popular will"); GA Res. 47/62 (February 10, 1993)(recognizing need for "equitable representation" and an increase in the membership of the Security Council). For further discussion of the "democratic deficits" of IOs, see Section 10.5, *infra*.

the question in terms that suggest the need for "checks and balances" in accord with "separation of powers," or invoking doctrines scarcely distinguishable from "political questions."[33]

Why is there recourse to domestic interpretative analogies? It is not merely because lawyers and others revert to the familiar. As discussed in Chapter 1, the contemporary international system no longer consists of completely autonomous nations free to act independently in pursuit of their self-interest. While it remains true that IOs are not, individually, the equivalent of states in terms of capacity to generate binding rules for the community of states or for individuals within them, it is less clear what they, collectively, constitute or what contemporary states would be without them. International organizations and non-institutionalized "regimes" do not, as an ensemble, constitute "supragovernmental" authority or a "world government." Yet, while in no case have nations ceded all "sovereign" powers to one organization and while they are not united to "form a more perfect Union," IOs collectively have helped to redefine "sovereignty."[34] In doing so, they have made analogies to domestic governance inescapable.[35]

2.2 Who Interprets a Charter?

The UN Charter does not identify a method for an authoritative interpretation of its terms. Resort to the UN's principal judicial forum, the ICJ, for this purpose is hampered by that body's limited jurisdiction.

Disputes between UN members may be heard in the ICJ under articles 36(1) or 36(2) of the Court's Statute. Under article 36(1) the Court has jurisdiction to hear disputes arising under any agreement which provides for ICJ jurisdiction, whether a standing treaty or ad hoc arrangement, as between states once a dispute has arisen. Under article 36(2) the Court can also hear any dispute arising between those states that have, by separate agreement, accepted the Court's "compulsory" jurisdiction. As in *Nicaragua* v. *United States*,[36] a dispute within the Court's article 36 jurisdiction might incidentally present interpretative questions under the UN Charter but, notwithstanding the language in article 36(1) of the Court's Statute,

[33] *See* Alvarez, *supra* note 21, at 2–4 (surveying the diverse scholarly views). For specific attempts to find limiting principles either based on black letter rules of international law or analogies from the practices of constitutional courts, see, e.g., Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford, U.K.: Hart Publishing, 2004); Antonio Perez, "On the Way to the Forum: The Reconstruction of Article 2(7) and the Rise of Federalism Under the United Nations Charter," 31 *Tex. Int'l L. J.* 353 (1996). *See also* Sections 4.1 and 4.2, *infra*.

[34] *See, e.g.*, Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* (Cambridge, MA: Harvard University Press, 1995).

[35] Thus, even Grigory I. Tunkin who affirms that to "equate the constituent instruments of international organizations to the State constitutions has no justification whatsoever," concedes that some theories of charter interpretation have been "born under the very strong influence" of national constitutional practices, however confusing or regrettable such analogies may be. Tunkin, *supra* note 31, at 264.

[36] *See supra* note 23.

no UN member is obliged, merely by being a party to the UN Charter, to submit to the Court's jurisdiction.[37] The UN Charter only urges, and does not require, parties to submit their disputes to the Court (see Article 33 of the Charter). Moreover, even in those cases in which the Court has jurisdiction to consider the meaning of the UN Charter, there is no mechanism to ensure that whatever the Court says, as a legal matter, binds the organization. In cases brought under the Court's article 36 jurisdiction, limited to states as parties, UN organs may be heard only if these see fit to file the equivalent of an amicus brief, as where the interpretation of the Charter is at issue and the Court requests the views of the Organization (see article 34 of the Court's Statute). Disputes between UN members and the Organization or between UN organs may only arise in the ICJ as requests for non-binding advisory opinions under article 65 of the Court's Statute. These can only occur at the request of one of the UN organs authorized to make such requests, namely the GA, the Security Council, ECOSOC, and the Trusteeship Council, and not at the request of an individual UN member or individuals. The Secretary-General is not, at present, authorized to ask the Court for an advisory opinion.

In principle, the ICJ is available to hear disputes concerning other IO charters under the same terms, that is, it may interpret any charter instrument directly relevant to any dispute properly before the Court under article 36 of the Court's statute and it can answer any advisory opinion request presented to the Court by an institution authorized to do so. At present all UN system organizations, with the exception of the UPU, may ask for advisory opinions and several of these have used this power.[38]

Some charters formally entrust authoritative interpretations to their own organs, such as plenary bodies in the FAO and the IMO or bodies with more limited membership, such as the twenty-seven member ICAO Council.[39] In the

[37] Nothing "specially provided for in the Charter" requires UN members to go the Court. *Cf.* article 36(1), Statute of the Court. Article 93 of the Charter merely enables UN members to enter into agreements accepting one or both portions of the article 36 jurisdiction of the Court. Even in cases such as *Nicaragua* v. *United States*, in which Nicaragua charged the United States with violating portions of the UN Charter, as well as customary international law, the jurisdictional question before the Court was whether both Nicaragua and the United States had submitted to article 36(1) or (2) of the Court's statute. Only after the Court found that it had *prima facie* jurisdiction (see *Nicaragua, Jurisdictional Phase, supra* note 23) did it proceed to consider Nicaragua's claims. Ultimately, it dismissed all claims arising under the UN Charter and affirmed, on the merits, only those claims arising under customary international law. *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (*Nicaragua* v. *U.S.*), 1986 ICJ Rep. 14 (Judgment)(hereinafter "*Nicaragua, Merits*").

[38] *See, e.g.*, Henry Schermers and Niels Blokker, *International Institutional Law: Unity Within Diversity* at 865–6 (Boston and Leiden: M. Nijhoff, 4th edn., 2003). These include the ILO, IMO, and the WHO.

[39] Constitution of the Food and Agriculture Organization of the United Nations, 12 UNTS 1980 (entered into force, October 16, 1945)(for a current version, see www.fao.org), article XVII; Convention on the International Maritime Organization, 289 UNTS 48 (entered into force March 17, 1958), article 69; The Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15 (entered into force May 26, 2001), article 27; Convention on International Civil Aviation, 15 UNTS 295 (entered into force April 4, 1947)(as amended) (current version can be found at www.icao.int/icaonet/dcs/7300_8ed.pdf),

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.[40] In some of these cases, as with respect to ICAO, the charter may provide for appeal to the ICJ, an arbitral body, or to either.[41] Some of the charters of UN system organizations, such as the ILO's, establish, in addition, elaborate alternative dispute settlement mechanisms which may in the course of settling disputes between members, interpret the IO's charter.[42] Other organizations, such as the GATT/WTO, the European Union, and regional human rights systems, have their own adjudicative fora which have in fact served as an alternative to the ICJ or other modes of dispute settlement.[43]

Many IO charters, however, including the UN Charter, do not assign the power of authoritative interpretation to any entity, whether a policy-making body or a judicial one.[44] In the absence of an express clause in an IO, who is so authorized? This issue has been most directly addressed in the context of the UN and its resolution has had implications for all IOs.

One response might be that in the absence of express charter authority conferring the power to interpret, no organ is so entitled and each member can interpret for itself what the charter means. Support for this self-judging method of interpretation might be suggested by the first and most important rule of treaty interpretation in article 31 of the Vienna Convention on the Law of Treaties: the "ordinary meaning" of the text. That the UN Charter omits a clause long familiar in treaty practice providing for an explicit method for authoritative interpretation by an identified organ suggests that it is meant to be self-judging. One might also reach

article 84. The WHO Constitution, 14 UNTS 185 (entered into force April 7, 1948) (article 75) states that questions of interpretation shall be submitted to its plenary organ but does not indicate that any interpretation given shall be authoritative.

[40] *See, e.g.*, article XVIII of the Articles of Agreement of the IMF, 2 UNTS 39 (entered into force December 27, 1945)(as amended); *see also* F. A. Mann, "The 'Interpretation' of the Constitutions of International Financial Organizations", 43 *Brit. Yrbk Int'l L.* 1 (1968–9).

[41] *See, e.g.*, Schermers and Blokker, *supra* note 38, at 854. On ICAO, see article 84. For a case finding that appeal can only be sought from a final and not an interim decision by the ICAO Council, see *India* v. *Pakistan*, 1972 ICJ Rep. 56.

[42] Constitution of the International Labour Organization, 15 UNTS 35 (entered into force January 10, 1920), article 26 (for a current revision, see www.ilo.org/public/english/about/iloconst.htm). *See also* Chapters 7 and 8, *infra*.

[43] For a review of early discussions within the context of the planned charter for an International Trade Organization (ITO) to submit trade disputes to the ICJ, see Seymour J. Rubin, "The Judicial Review Problem in the International Trade Organization," 63 *Harv. L. Rev.* 78 (1949). The ITO never emerged and the formal institutionalization of the GATT did not occur until the creation of a WTO in the Uruguay Round. GATT disputes have been submitted to internal GATT dispute settlement processes. *See* Chapter 8. Under the GATT/ WTO's new Understanding on Rules and Procedures Governing the Settlement of Disputes (also a product of the Uruguay Round), Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization (see www.wto.org/english/docs_e/legal_e/28-dsu.pdf), GATT/ WTO parties have formally agreed to submit interpretative disputes to GATT dispute settlement processes. Annex 2, (especially article 23). For further discussions of adjudicative fora within IOs, see Chapters 7 and 8, *infra*.

[44] In addition to the UN, this is true of the ILO, UNESCO, IMO, IMF, World Bank, WHO, WMO, and the UPU.

this conclusion through general principles of international law as enunciated in cases like the *S.S. Lotus*. In that case, the PCIJ, the predecessor to today's ICJ, favored Turkey's acquisition of jurisdiction over an accident on the high seas on the grounds that "[r]estrictions upon the independence of States cannot . . . be presumed."[45] That case seems to suggest that a state is free to do what is not expressly prohibited by a rule of international law. Accordingly, a UN member should be free to interpret the Charter in good faith, according to customary rules on treaty interpretation. While another state is free to dispute that interpretation, as being not in good faith or otherwise groundless, the interpretative dispute between them cannot be resolved unless both states consent to some means to resolve the issue, such as the methods for peaceful dispute settlement enumerated (but not required of states) in the Charter's Article 33.

If one believes that the Charter's silence on the issue makes its meaning "ambiguous or obscure" or, in order to "confirm" the meaning of silence, one might, consistent with article 32 of the Vienna Convention rules on treaty interpretation, seek comfort in the Charter's negotiating history. There were considerable differences at San Francisco within the Committee on Legal Problems (Committee IV/2) as to who might be charged with authoritative interpretation, with some recommending the GA as the competent organ, some the ICJ, and others proposing other possibilities depending on the seriousness of the interpretative issue. Those who favored the GA argued that "the power to interpret was tantamount to the power to legislate, and this was the function of the General Assembly, as the democratic body of the new organization."[46] This "democratic" argument was met with the realpolitik response that given the need for sovereign states to consent to new restrictions on their rights, granting any institutional organ the right to provide "an authentic and constitutional interpretation" would require express Charter amendment.

Belgium sought to resolve the differences through a formal provision in the UN Charter which would have indicated that

> [a]ny State, party to a dispute brought before the Security Council, shall have the right to ask the Permanent Court of International Justice whether a recommendation or a decision made by the Council or proposed in it infringes on its essential rights. If the Court considers that such rights have been disregarded or are threatened, it is for the Council either to reconsider the question or to refer the dispute to the Assembly for decision.[47]

This proposal was rejected, as was Belgium's second proposal providing that the Committee on Legal Problems "should determine the proper interpretative organ for the several parts of the Charter."[48] Some have argued that this negotiating history

[45] *The S.S. "Lotus"* (*France* v. *Turkey*), PCIJ, 1927 Series A., No. 10.

[46] Quoted in Louis B. Sohn, "Interpreting the Law," in Oscar Schachter and Christopher C. Joyner, eds., *United Nations Legal Order* 169, 172 (Cambridge, MA: Harvard University Press, 1995).

[47] Doc. 2, G/7(k)(1), 3 U.N.C.I.O. 335, 336.

[48] Doc. 664, IV/2/33, 13, *id.* at 633, 633.

shows that there can be no "established procedure" for authoritative interpretation[49] or that, at any rate, judicial review over the Council is a political non-starter.[50]

The conclusion that each UN member is ultimately free to interpret, for itself, the meaning of the Charter is also consistent with scholarly views of the "residual" powers of states. Thus, some scholars have argued that, faced with a clearly erroneous decision by a UN body, including the ICJ, any state is legally entitled, as a "right of last resort," to ignore any such decision.[51] The view that nullity is the ultimate sanction in international law, to be determined by each state's individual decision, might therefore support the conclusion that ultimately only members can "authoritatively" interpret their UN Charter commitments.

A second possible answer is that an authoritative interpretation of the UN Charter can or should be issued by the ICJ. This interpretation, at odds with the rejection of Belgium's original proposals at San Francisco, might emerge from a "dynamic" re-interpretation of the Charter's Article 92, which recognizes that the Court is the UN's "principal judicial organ." The "principle of effectiveness," employed by the Court in various advisory opinions,[52] might be relied upon as well to reach the same result. The argument would essentially be that an authoritative interpretation of the Charter is necessary to permit the UN 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. Although this argument might be met with the response that the Court's answer would, under article 59 of its Statute, only bind those states parties to its judgment, this would be met with two counter-arguments: (1) article 59 addresses the possibility of *res judicata* and does not address the precedential value of the Court's decisions; and (2) in such cases, the general international law obligation to comply with a treaty in good faith obliges the Security Council to abide by the Court's ruling and enforce its judgment in this and similar cases under Article 94.[53] It might also be said that this is also what the Charter intends to accomplish when it makes ICJ decisions final and binding (see UN Charter, Article 94 (1); Statute of the Court, article 60).

Neither of these two extreme answers to the "who interprets" question has won many adherents. The first is regarded as a recipe for nullification of the UN

[49] *See, e.g.*, Geoffrey R. Watson, "Constitutionalism, Judicial Review, and the World Court," 34 *Harv. Int'l L. J.* 1, 12 (1993).

[50] *See, e.g.*, Reisman, *supra* note 14, at 110–12.

[51] *See, e.g.*, Dan Ciobanu, *Preliminary Objections Related to the Jurisdiction of the United Nations Political Organs* 173–9 (The Hague: M. Nijhoff, 1975).

[52] For discussion of these, see Sloan, *supra* note 3, at 113–14 and G.G. Fitzmaurice, *supra* note 31, at 18–20.

[53] *See, e.g.*, Craig Scott et al., "A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina," 16 *Mich. J. Int'l L.* 1, 95 (1994).

Charter and its purposes. 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). The most accepted view today is a third, the outcome of a decision taken at the Charter's negotiation sessions in San Francisco.

As one of those "present at the creation," Louis Sohn, has shown, the San Francisco drafters did not end their discussions with their rejection of Belgium's proposals. They 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 supranational authority. As the subcommittee put it:

> In the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions . . . . Difficulties may conceivably arise in the event that there should be a difference of opinion among the organs of the Organization concerning the correct interpretation of a provision of the Charter . . . 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 Organization and of its operation would not seem to be such as to invite the inclusion in the Charter of any provision of this nature. If two member states are at variance concerning the correct interpretation of the Charter, they are of course free to submit the dispute to the International Court of Justice as in the case of any other treaty. Similarly, it would always be open to the General Assembly or to the Security Council, in appropriate circumstances, to ask the International Court of Justice for an advisory opinion concerning the meaning of a provision of the Charter. Should the General Assembly or the Security Council prefer another course, an *ad hoc* committee of jurists might be set up to examine the question and report its views, or recourse might be had to a joint conference . . . It would appear neither necessary nor desirable to list or to describe in the Charter the various possible expedients.
>
> It is to be understood, of course, that if an interpretation made by any organ of the Organization or by a committee of jurists is not generally acceptable it will be without binding force. In such circumstances, or in cases where it is desired to establish an authoritative interpretation as a precedent for the future, it may be necessary to embody the interpretation in an amendment to the Charter . . . [54]

For Sohn, the most important aspect of this approach is its implicit support for the proposition that "an interpretation made by an organ of the Organization which is generally acceptable is binding" (or "authoritative").[55] Such an interpretation is entitled to a presumption that it is a legitimate interpretation of the Charter. Under this statement issued at San Francisco, it seems that the ICJ, like any other organ of the UN, is permitted to consider the meaning and interpretation of the Charter; indeed, that Court from its earliest days has deemed such issues to pose

[54] Quoted in Sohn, *supra* note 46, at 172–3. [55] *Id.*, at 174.

"legal" questions with which it could deal.[56] It is also clear that even an advisory opinion of the Court as to the interpretation of the Charter, even though not binding by definition, may ultimately carry the day if it proves "generally acceptable."[57] The same is true for action not reviewed by the Court but undertaken by an organ and accepted by members. Indeed, the practice of any organ which meets with such approval can later be cited as precedent if the legality of similar action is contested.

As the San Francisco interpretation statement has been interpreted, the "presumption of legality" that attaches to approved institutional practice only exists for action taken in conformity with the Charter and in fulfillment of its purposes.[58] In theory, it also applies only to action "adopted by unanimity, or by consensus without any objection."[59] These limits avoid the implication that the practice of organizations is the sole determinant of legality and are intended to protect the rights of states. After all, "states are sovereign in the sense that their powers are not dependent on other authority" but "the powers of international organizations are limited to whatever is necessary to perform their functions which their constitutions have defined."[60]

Under the San Francisco statement, authoritative interpretation does not require a particular procedure and all elements of an organization—members, organs, and adjudicative bodies—potentially participate. Despite the uncertainties that result from this approach,[61] this has become, de facto, the operating mode of behavior for most IOs. Even when an IO charter is silent with respect to authoritative interpretation, in practice members and organs routinely interpret that charter, usually establishing institutional precedents that are conclusive over the long term. Action taken by a member with respect to an organization, if unchallenged by the organization or other members, may also constitute, de facto, an interpretation with such effects. The same is true of action taken for the first time by an institutional organ, if unchallenged by the membership. Even an interpretation by the legal department of the secretariat, if accepted by the membership,[62] is presumed to be *intra vires* and may be cited as authoritative the next time a similar issue arises. Given the reluctance of members and organs to submit

[56] *See, e.g.*, Sloan, *supra* note 3, at 74–7 (indicating that the GA has sanctioned resort to the Court for purposes of Charter interpretation and that ICJ advisory opinions have involved interpretations of the Charter).

[57] *See, e.g.*, Sohn, *supra* note 46.

[58] As the ICJ later affirmed in an advisory opinion that queried the legality of action by the General Assembly, the presumption of legality only applies "when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations . . ." *Certain Expenses case, supra* note 21, at 168.

[59] Sohn, *supra* note 46, at 204.

[60] Schermers and Blokker, *supra* note 38, at 155–6.

[61] Some have even suggested that such an approach is inconsistent with the premise of an "authoritative" interpretation. *See, e.g.*, Leland Goodrich et al., *The Charter of the UN: Commentary and Documents* 15–16 (New York: Columbia University Press, 3rd rev. edn., 1969).

[62] But the degree of deference members accord to interpretations issued or requested of the legal department of IO secretariats varies. In the IMF, interpretations issued in his personal capacity by Sir Joseph Gold, longtime legal adviser to that organization, have been extremely influential. *See, e.g.*, Schermers and Blokker, *supra* note 38, at 855–6. 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

to even those relatively few adjudicative fora available with jurisdiction, institutional action is rarely the subject of a formal judicial interpretation. But to the extent adjudicators, such as ICJ judges and arbitrators, are seized of such disputes, whether in cases culminating in a formally binding judgment or not, they often cite the "uniformly accepted practice" of an organization to justify an interpretation of a charter. Such "judicial" interpretations, even if not legally binding, may become so in practice again if the membership accepts them.

The Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations seems to attempt to codify this approach. That convention includes, in its definitional section, the "established practice of the organization" as part of the "rules of the organization."[63] This is significant insofar as basic rules within that Convention, such as the organization's capacity to enter into treaties, are determined by the "rules of the organization."[64]

In the course of attempting to fulfill the functions with which they are charged, all IOs have generated foundational or constitutional interpretations of their constituent instruments which have found "general acceptance." As will be clear from subsequent chapters, the San Francisco statement on authoritative interpretation has therefore facilitated the continuous development of international institutional law. Growth through subsequent practice has turned these international agreements into "living constitutions" rather than static contracts.[65] This has also meant that the often unamended texts of institutional charters make for deceptive reading. As is discussed further in Chapter 3, anyone who expects to get an accurate view of what an IO does and how it does it from a glance at its charter is bound to be as disappointed as someone who relies only on the text of the U.S. Constitution for a sense of how the U.S. government operates.

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 *id.* at 844–5. Respect for the opinions issued by the UN's Office of Legal Affairs has been more equivocal. *See, e.g.*, Frederic L. Kirgis, Jr., *International Organizations in Their Legal Setting* at 32–3 (St. Paul: West Publishing, 2nd edn., 1993).

[63] Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, (concluded March 21, 1986) UN Doc. A/CONF.129/15, 25 ILM 543 (1986), at article 2(1)(j) (hereinafter "IO Convention") (but note that, as of July 2004, only 37 states are parties to this treaty). As indicated in the ILC's commentary to this Convention, "established practice" was intended to encompass only institutional practice that was not "uncertain or disputed" (see A/CONF.129/4, May 1, 1985, at 21), i.e., that is "generally acceptable." Of course, as the Convention indicates (at article 2(2)), its definitions are intended to apply as default norms—in the absence of a particular organization's own internal law indicating to the contrary. Many would contend that the rules in this Convention, essentially duplicative of those in the Vienna Convention on the Law of Treaties governing states (concluded May 23, 1969), 1155 UNTS 331, codify international rules of custom.

[64] *See, e.g.*, IO Convention, *supra* note 63, at article 6.

[65] *See, e.g.*, Jiménez de Aréchaga, *Derecho constitucional de las Naciones Unidas: comentario teórico-práctico de la Carta* at 204 (Madrid: Escuala de Funcionarios Internacionales, 1958)("few national constitutions have undergone in the process of their application such important and rapid changes as the UN Charter").

2.3 How to Interpret a Charter?

Questions of interpretation of an IO charter regularly arise as a result of disputes between institutional organs or between members. Such disputes might be resolved by "power-oriented diplomacy" as opposed to a lawyerly resort to rules. Faced with, for example, a dispute about whether a clause in the original GATT ought to be read to forbid a particular trade practice between parties A and B, GATT contracting parties have sometimes decided to simply let the parties fight it out in negotiations between them, with the result to emerge as a consequence of which of the two can exert the greater leverage on the other through, for example, threats of denial of foreign aid, of military action, or of import restrictions. As John Jackson has suggested, this approach left the interpretative issue to be decided on the basis of the relative power status of the parties. Such a result, which might also emerge from parties' decisions to submit to mediation, does not tend to lead to stable, predictable modes of interpreting the underlying treaty in ways that would be of use to other parties.[66] For these and other reasons, neither the GATT nor other IOs have relied on this as the only method to interpret their charters and resolve interpretative disputes. Although the power of the disputants continues to matter even within forums such as the new WTO,[67] these and other interpreters increasingly favor what Jackson calls "rule-oriented diplomacy" by which disputes are not simply resolved based on power differentials, but are *adjudicated*, based on rules of law. The results are interpretations more likely to be premised on generalizable principles of interpretation, consistently applied.

Such rule-based interpretation, though familiar to lawyers, should not be equated with judgments issued by a "judicial" forum or through processes dominated by lawyers. As discussed, charter interpretation is rarely conducted in recognizably "judicial" fora, such as the ICJ. This does not mean that constitutional interpretation is invariably conducted on the basis of "power-oriented diplomacy." While rule-based approaches are of course prominently addressed 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—and 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 GA or the

[66] *See, e.g.*, John H. Jackson, William J. Davey, and Alan O. Sykes, Jr., *Legal Problems of International Economic Relations: Cases, Materials and Text* at 333–5 (St. Paul: West Publishing, 3rd edn., 1995).

[67] For an example under the pre-WTO system, see *id.* at 347 (describing the problems with compliance with a GATT panel report in a case between Nicaragua and the United States). For further discussion of the interplay between power and IO modes of standard-setting, see Sections 4.2 and 10.5, *infra*.

Security Council—even the latter "political" institutions are often characterized by arguments couched in recognizably "legal" terms.[68]

2.3.1 The Vienna Rules of Treaty Interpretation

The starting point for rule-based charter interpretation, initially set out by judges of the World Court, has been the traditional customary international rules for treaty interpretation.[69] These rules are now widely considered to be codified at articles 31–2 of the Vienna Convention on the Law of Treaties and are expressly applicable to the constituent instruments of IOs under article 5 of that Convention.[70]

Under article 31 of the Vienna rules, the primary rule is interpretation "in good faith in accordance with the ordinary meaning" of a treaty text, in "context," and in light of its "object and purpose." "Context" is defined to include, in addition to operative text, any preamble and annexes, and other contemporaneous and related agreements and instruments. It is also permissible to 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.

Under article 32 of the Vienna Convention, "supplementary means of interpretation," including reference to preparatory work and the circumstances of a treaty's conclusion, may only be used to "confirm" the meaning derived from application of article 31 or to determine the meaning where application of article 31 leaves the meaning "ambiguous" or "obscure," or leads to a result which is "manifestly absurd" or "unreasonable." Article 31 is commonly interpreted as preferring text over negotiating history, a result achieved in article 32's seeming direction to resort to originalism only when text and context fail.[71] This approach would appear to justify judicial opinions that omit any reference to relevant negotiating history, such as the ICJ's majority opinion in the *Reparation for Injuries case*. In that case, the

[68] *See, e.g.*, Kirgis, *supra* note 62, at 137–76 (discussing legalistic arguments raised in connection with membership and participation issues in variety of IOs). For differing views of the prevalence of "lawyerly" approaches to charter interpretation in financial organizations such as the IMF, see, e.g., J.E.S. Fawcett, "The Place of Law in an International Organization," 26 *Brit. Yrbk Int'l L.* 321 (1960); Ervin P. Hexner, "Interpretation By Public International Organizations of Their Basic Instruments," 53 *AJIL* 341 (1959); F.A. Mann, "The 'Interpretation' of the Constitutions of International Financial Organizations," 43 *Brit. Yrbk Int'l L.* 1 (1968–9). For perceptive elaboration of the reasons for the prevalence and power of legal analysis even in "politicized" fora, see, e.g., Oscar Schachter, "The Quasi-Judicial Role of the Security Council and the General Assembly," 58 *AJIL* 960 (1964); Ian Johnstone, "Treaty Interpretation: The Authority of Interpretive Communities," 12 *Mich. J. Int'l L.* 371 (1991); Martti Koskenniemi, "The Place of Law in Collective Security," 17 *Mich. J. Int'l L.* 455 (1996).

[69] *See, e.g.*, Tunkin, *supra* note 31, at 265–9.

[70] Vienna Convention on the Law of Treaties governing states, *supra* note 63.

[71] *See, e.g., Restatement of the Law, Third, Foreign Relations Law of the United States*, sec. 335 (1987).

court majority interpreted the UN Charter simply on the basis of its text and context, especially subsequent institutional practice and customary international rules relating to capacities of "international persons," ignoring express statements on the question in the course of the Charter's negotiation.[72]

The text of article 32 does not, however, require this result. Under article 32, an interpreter is licensed to consider the *travaux* of a treaty in order to "confirm" its meaning.[73] Negotiating history is, therefore, not necessarily to be ignored if the text and context resolve a question; original intent can also be used to complement an interpretation reached by the methods described in article 31. Moreover, article 32 licenses the use of "supplementary means" of interpretation if the textual or contextual meaning is "ambiguous." Yet, as modern scholars have amply demonstrated, language is rarely precise enough to be unambiguous, especially in a constitution.[74] Provisions are often left consciously vague to permit initial agreement or to permit change as conditions warrant.[75] Treaty clauses likely to give rise to a serious dispute are also likely to be "ambiguous," especially in the hands of skilled advocates on either side. As a result, charter interpreters have considerable discretion to resort to "supplementary means" of interpretation.

Further, as those familiar with domestic constitutional interpretation would confirm, assessing the "ordinary meaning" of constitutional text is rarely simple.[76]

[72] *See, e.g., Reparation for Injuries Suffered in the Service of the United Nations*, 1949 ICJ Rep. 178 (hereinafter *Reparation case*) (ignoring arguably relevant negotiating history described in Louis Sohn, *Cases on United Nations Law* 32–3 (Brooklyn: Foundation Press, 2nd edn., 1967)). This case is discussed in detail in Section 3.2 *infra*.

[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, January 3–28, 1966, UN Doc. A/6309/Rev.1, 2 *Yearbook of the ILC* 169, at 354, reprinted in 61 *AJIL* 248, at 349 (1967). *See also* Maria Frankowska, "The Vienna Convention on the Law of Treaties Before United States Courts," 28 *Va. J. Int'l L.* 281, 335 (1988). As Professor Frankowska suggests and the U.S. Restatement on Foreign Relations confirms, U.S. 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*, section 325, comment g at 198 and reporters' notes at 198–9 (1987).

[74] On the more general issue of ambiguity of legal language even within national laws, see, e.g., Duncan Kennedy, "Form and Substance in Private Law Adjudication," 89 *Harv. L. Rev.* 1685 (1976). 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. Sloan, *supra* note 3, at 104. For a view that the treaty interpretation questions faced by the U.S. Supreme Court in *United States* v. *Alvarez-Machain*, 112 S.Ct. 2188 (1992), were incapable of resolution on the basis of traditional arguments grounded in text, intent or purpose, see Derek C. Smith, "Beyond Indeterminacy and Self-Contradiction in Law: Transnational Abductions and Treaty Interpretation," 6 *EJIL* 1 (1995)(arguing that treaty interpreters must be "social, moral and political" actors).

[75] *See, e.g.*, Chayes and Chayes, *supra* note 34, at 10–11.

[76] This is especially the case given the text of article 31, which licenses such interpretation "in light of its object and purpose." As Sloan and others have noted, this potentially opens the door to a teleological approach. Similarly, article 31's permission to consider the "general rules of international law," and not those rules "in force at the time of a [treaty's] conclusion" as was originally proposed, is a further refutation of "static interpretation." Sloan, *supra* note 3, at 106.

As Oscar Schachter has noted, a treaty such as the UN Charter is characterized by its "open texture."[77] 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).[78] Opinions differ not only as to the scope of even the more precise rules, but especially as to the specific content and application general principles and standards.

Determining "ordinary meaning" is often a matter of applying "canons" of interpretation subject to considerable discretion as applied.[79] Consider, for example, the canon of interpretation *expressio unius est esclusio 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 assessments for two years, the organization is thereby disempowered from undertaking other actions to supplement what has clearly become an ineffective remedy?[80] Is Article 19 a kind of *lex specialis* or a "self-contained" regime such that the UN 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? If so, notwithstanding Article 19, the Organization, and arguably members individually, are nonetheless permitted to take other measures to force deadbeats to pay.[81] As the debate on this issue suggests, competing interpretations may rely on competing canons of interpretation. Those who would favor Article 19 as exclusive remedy might in addition invoke the principle of restrictive interpretation in favor of state sovereignty; their opponents might also cite to the principle of (institutional) effectiveness.[82]

Consider as well the perennial question of gap-filling. Why is the word "only" traditionally read into some UN Charter provisions but not others? Thus, it is usually assumed that Article 42 permits only the Security Council to authorize the

[77] Oscar Schachter, "Interpretation of the Charter in the Political Organs of the United Nations," in Engel, *supra* note 27, 270, at 274. [78] *Id.*, at 274–7.

[79] For one survey of these, see Chester James Antieau, *Constitutional Construction* (London and New York: Oceana Publications, 1982) (surveying fifty guides or canons of construction in common practice among 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, *supra* note 3, at 92.

[80] For further discussion of the duty to pay UN dues and its broader implications, see Section 3.2, *infra*.

[81] *See, e.g.*, Elizabeth Zoller, "The Corporate Will of the United Nations," 81 *AJIL* 610, at 621 (1987).

[82] Thus, Edward Gordon, for example, notes the possible inconsistencies of the Court's oft-cited "twin-forked rule of interpretation" whereby (a) "a treaty must be read as a whole to give effect to all of its terms and avoid inconsistency" or (b) "no word or provision may be treated as or rendered superfluous." 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 apparently conflicting words or clauses." Edward Gordon, "The World Court and the Interpretation of Constitutive Treaties," 59 *AJIL* 794 (1965), at 814.

use of force, even though that provision on its face only addresses the powers of the Council and not the residual or implied powers of any other UN organ. Yet, the next article in the UN Charter, which addresses the provision of armed forces to the Organization, and does not indicate that this is the "only" way such forces may be made available, is not considered a prohibition on alternative methods, not involving standing Article 43 agreements, to provide ad hoc forces to the Organization.[83] Neither it, nor any other provision of the Charter, has been read to preclude "contracting out" UN force to participating states.[84] As Laurence Tribe has argued in the context of the U.S. Constitution, canons of interpretation, such as *expressio unius est esclusio alterius*, must be employed with care and must take into account what he calls the "architecture" of the institutions defined by the text.[85] UN Charter silences—such as the omission of the word "only" in certain provisions—can only be filled with an awareness of how they relate to the whole of the Charter. The traditional interpretation of UN Charter Article 42, for example, is grounded not only in the interpreter's view of the role envisioned for the Security Council but also in the considered rejection of certain implied powers for the GA. The traditional interpretation of Article 43, on the other hand, is based on the application of a "principle of effectiveness" and on an expansive notion of the implied powers of both the Council and the GA to accept forces volunteered for UN peacekeeping operations. Both of these interpretations illustrate that the "good faith" interpretation of "text" may require giving some provisions an "extraordinary" meaning, in order to give the UN Charter as a whole "ordinary meaning."[86] But the need to read one provision in light of the "whole" permits charter interpreters, even when restricted to "plain meaning," to exercise considerable discretion. Further, within the context of IO charters, often authenticated in several official languages, the discretion accorded interpreters is potentially greater than with respect to national constitutions. Despite the traditional rule that, unless the parties indicate otherwise, all texts of a treaty in whatever language are "equally authoritative,"[87] distinct word choices in different language versions of treaties have sometimes become determinative.[88]

Given all the ambiguities with the license accorded treaty interpreters by the Vienna rules, as well as the ambiguities with the application of those rules, it seems clear that these black letter rules are merely the start of the inquiry. In fact

[83] *See, e.g., Certain Expenses case, supra* note 21.

[84] For a survey of the PCIJ's and the ICJ's varying practices with respect to interpreting charters' "deliberate silences" or "negative pregnants," see Gordon, *supra* note 82, at 804–6. For the related issue of using shifting burdens of proof, see *id.*, at 806–10. For further discussion of the powers of the Security Council, see Chapters 3 and 4, *infra*.

[85] Laurence Tribe, "Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation," 108 *Harv. L. Rev.* 1221, 1235–48 (1995).

[86] *See, e.g.*, Ress, *supra* note 25, at 31–2; *Certain Expenses case, supra* note 21, at 162 (discussing the need for putting text within the "general structure and scheme of the Charter").

[87] Vienna Convention on the Law of Treaties governing states, *supra* note 63, article 33(1).

[88] *See, e.g., Nicaragua (Jurisdictional Phase), supra* note 23, at para. 30 (addressing the French and English language versions of article 36(5) of the Statute of the Court).

the Vienna rules, open to differing interpretation and outright manipulation, are often cited by those on both sides of an interpretative dispute.[89]

2.3.2 Institutional Practice

The discretion accorded under the Vienna rules is all the greater given article 31's license to consider "subsequent practice." The use of institutional practice to help interpret the UN Charter where that practice is not uniformly and undisputably accepted by all the members has not gone unchallenged. In his separate opinion in *Certain Expenses*, Judge Spender questions the value of such practice to a judicial interpreter.[90] For him, the subsequent practice of organs is not the equivalent of the subsequent practice of parties to a multilateral treaty. As Judge Spender notes, the practice of a UN organ does not necessarily reflect the wishes of all the parties to a multilateral treaty or even of some of them. To Judge Spender, the subsequent practice of parties to a multilateral treaty can be used to interpret that treaty because a multilateral treaty is like a contract; the practice of *all* those who engage in the making of the treaty-contract reflects their common understanding and is appropriate to consider. But, argues Judge Spender, just as the subsequent conduct of one or even a majority of parties to a multi-party treaty should not be so used, the practice of an institutional organ should not be used to bind the totality of the membership. For these reasons, Judge Spender expresses doubts about

> whether the practice of an organ of the United Nations has any probative value either as providing evidence of the intentions of the original Member States or otherwise as a criterion of interpretation. As presently advised I think it has none.[91]

Resistance to institutional practice as a tool of charter interpretation is understandable if that practice constitutes, as Judge Spender and others[92] have suggested, merely shorthand for the common and more contemporaneous intent of members. If so, the customary practice of an organ has no greater significance than the negotiating history of its charter and those who read article 32 of the Vienna Convention treaty interpretation rules to suggest that intent-based arguments are not to be preferred have a ready license to do the same with respect to institutional practice.[93] Those who see IO powers as solely the result of the express consent of

[89] *See, e.g., Sale* v. *Haitian Centers Council, Inc.*, 113 S.Ct. 2549 (1993) (where U.S. Supreme Court judges, whether in the majority or in dissent, cited the Vienna rules of treaty interpretation). Indeed, some consider the attempt in the Vienna Convention to codify "rules" as to treaty interpretation an exercise in futility. Consider Professor Schwarzenberger's view that there is only one such "rule": namely that treaties should be interpreted in a spirit of equity (*jus aequum*), that is in accordance with good faith, common sense, and reasonableness. Quoted in Sloan, *supra* note 3, at 97.

[90] *Certain Expenses case, supra* note 21, Separate Opinion of Judge Percy Spender 1962 ICJ Rep. 182.

[91] *Id.,* at 195.

[92] *See, e.g.*, Interpretation of article 3, para. 2, of the Treaty of Lausanne, 1925 PCIJ, Series B, No. 12, 24 (Advisory Opinion); *Anglo-Iranian Oil Co.*, 1952 ICJ Rep. 93, 107 (Judgment); Sloan, *supra* note 3, at 108.

[93] *See supra* at text and note 73.

states also disparage the resort to institutional practice.[94] Such practice would have dramatically less relevance if undertaken at a time when the organization had a significantly different membership or if there is other evidence to suggest that the practice does not, at the time an interpretative dispute emerges, reflect the intent of some portion of the membership.

Yet Judge Spender did not convince his colleagues in *Certain Expenses*. And despite Judge Spender's views, it has become common for charter interpreters to rely on institutional (or "customary") practice as evidence of the meaning of a constitutional provision, at least so long as that practice is within the purposes of the organization.[95] Thus, more recently, judges on the ICTY turned, in part, to other Council actions, "precedents" that are themselves controversial, in order to justify the Council's establishment of that Tribunal. That Tribunal cited, as justifications for the Council's determination that the situation in the Former Yugoslavia constituted a "threat to the peace," prior Council resolutions which found such a "threat" in similar contexts.[96] It also relied in part on prior Council practice to justify an expansive interpretation of the scope of humanitarian law.[97] Dispute settlers in other institutional contexts, such as the GATT and human rights bodies, have also relied on institutional practice, routinely considered as legal "precedents."[98]

Just why charter interpreters have routinely resorted to institutional practice in diverse institutional settings, from the Security Council to trade disputes, is a complex issue. Some have suggested that such reliance is inherent in the "working legal culture" that operates within politicized fora such as the Security Council. Under this view, 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 as itself desirable.[99]

Others have suggested that the practice of institutional organs is better evidence of the collective "contemporary expectations" of members than the statements or actions of individual members.[100] From this perspective, the creation of these organizations constitutes a delegation of institutional authority to them: members are regarded as having specifically charged institutional organs, and not members individually, with the discharge of certain commitments. Although members are

[94] *See, e.g.*, Tunkin, *supra* note 31, at 274.

[95] For a survey of the many instances in which the PCIJ and the ICJ have relied on such practice through 1967, see Salo Engel, " 'Living' International Constitutions and the World Court (The Subsequent Practice of International Organs Under Their Constituent Instruments)," 16 *Int'l & Comp. L. Q.* 865 (1967). 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." *Id.* at 908–9.

[96] That is, citations to other Council actions where such "threats" were found in situations involving the use of force within and not between states. *Dusko Tadic case, supra* note 24, at paras. 28–30.

[97] *Id.*, at paras. 65–142, especially paras. 114 and 133.

[98] GATT panels have often given greater weight to prior GATT panel determinations over national court interpretations of GATT obligations.

[99] Koskenniemi, *supra* note 68.

[100] *See e.g.*, Gordon, *supra* note 82, at 827–8.

also obligated to fulfill their legal responsibilities, they are interested parties whose own national interests sometimes preclude an objective determination of their international obligations under these respective agreements. Thus, no GATT/WTO or UN member is delegated the responsibilities of implementing the GATT/WTO or the UN Charter; organs under those charters are the only entities so charged and giving weight to what these organs do accords respect to members' original delegation.[101] On this view, members' support for particular organizational practices need not be unanimous for those practices to have persuasive effect.[102] 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. At a minimum, it only suggests that institutional practice should be regarded with the same caution as self-interested interpretations by members. Viewed in this light, Justice Spender was wrong: institutional practice, even when controverted by some members, has an inherent value and is not simply a sometimes misleading alternative to "original intent."[103]

Despite the widespread reliance on customary practice, questions about the respective weights to be accorded practice versus text, negotiating history, teleological purposes, or other factors remain unresolved. There is considerable variation among different organizations and even within organizations over time on such issues. Some ICJ judges have argued, for instance, that institutional practice, however uniform or of long duration, can never suffice to alter the meaning of what is unambiguous in the text of the UN Charter.[104] But other ICJ judges have, in other cases, suggested that they would elevate "pressing teleological requirements" above both text or practice.[105] As with domestic constitutions,

[101] 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 S.J. Rubin, "The Judicial Review Problem in the International Trade Organization," 63 *Harv. L. Rev.* 78 (1949).

[102] 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, *supra* note 3, at 110. Compare the need, at least in theory, for uniformity when such practice is used by itself to determine an authoritative interpretation, see Sohn, *supra* note 46.

[103] Of course, 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, e.g.*, Ress, *supra* note 25, at 28–9. Even those positivists who have resisted the use of institutional practice in constitutional interpretation concede that some practice should be given weight. *See, e.g.*, Tunkin, *supra* note 31, at 275 (accepting the relevance of Security Council practice on "abstentions" for purposes of the interpretation of "concurring" votes in article 27 of the Charter).

[104] *See, e.g.,* Judge Spender, Separate Opinion, *Certain Expenses case, supra* note 21, at 189 (subsequent conduct "can hardly control the language or provide a criterion of interpretation of a text which is not obscure").

[105] *Competence of the General Assembly for the Admission of a State to the UN*, 1950 ICJ Rep. 4 (hereinafter "*Competence case*"), Judge M. Azevedo, Dissenting Opinion, at 23 ("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"); *id.* at 24 ("Even long practice, usually a good guide to interpretation, cannot frustrate a pressing teleological requirement").

the relative importance given to institutional practice relates to interpreters' views on the propriety of "dynamic" interpretations. The Vienna Convention rules on treaty interpretation, for what they are worth, appear to elevate text above all but, as discussed, these rules give interpreters considerable discretion as applied.

The possible limits on the use of subsequent or "customary" institutional practice has also given rise to controversy. It is uniformly accepted that institutional practice must conform to charter purposes. But the broad or vague purposes usually indicated in IOs' constituent instruments suggest that this requirement is not likely to be much of a limit in practice.[106] It has also been said that the use of subsequent practice should be limited to constitutional "gap-filling." Under this view, 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.[107] But ambiguities in the application of such limiting principles, as in determining what or when constitutional "gaps" exist, have led to sharp differences among charter interpreters.[108] Further, it is not clear whether organizations have adhered to such limits in practice.[109]

The use of institutional practice to determine legality has at times displeased those at either end of the realist/idealist divide. Idealists worry that reliance on such practice subjects the "rule of law" to political expediency and devalues it. Realists remain skeptical that practice opposed by a minority will bind all members for very long. Many on either side of the realist/idealist spectrum also worry about the short-term consequences. A member immediately injured by the action of an IO organ may not find a way to bring a contentious dispute raising the question before the ICJ or other adjudicative body with jurisdiction, may fail to secure sufficient support to seek an ICJ advisory opinion, and may not secure an

[106] Under the traditional view, a *détournement de pouvoir* may occur if the 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 organization." J. E. S. Fawcett, "Détournement de Pouvoir by International Organizations," 33 *Brit. Yrbk Int'l L.* 311, at 316 (1957).

[107] *See, e.g.*, Tunkin, *supra* note 31, at 274–5 (suggesting that the GA "Uniting for Peace" resolution is illegitimate on these grounds). In his separate opinion in the *Namibia case*, Judge Dillard found institutional practice interpreting Article 27(3) to permit the Council to take action notwithstanding permanent members' abstentions became the text of Article 27(3) was not sufficiently precise to make abstentions impermissible. *Namibia case, supra* note 21, at 153–4.

[108] *See*, *e.g.*, the dissenting opinions by Judges Hackworth and Krylov in *Reparation, supra* note 72 (accusing the majority of improperly legislating from the bench).

[109] Thus, a former General Counsel of the World Bank, Aron Broches, for example, 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. Aron Broches, "International Legal Aspects of the Operations of the World Bank," 98 *Recueil des Cours* 297 at 304 (1959). As Hexner notes, this conception seems based on "an extreme teleological approach." Hexner, *supra* note 68, at 128.

alternative means for an "objective" evaluation of the issue. It may find that it effectively has no legal remedy and may therefore be tempted to ignore its obligations to the organization lest it subject itself to the "tyranny by majority" through institutional practice.[110]

There are also problems of application. As within domestic systems, institutional practices may not be contested for a variety of reasons, including the absence of transparency, lack of financial or other resources to mount a challenge, or simply the fear of giving offense to the powerful. Day-to-day institutional practices therefore may be accepted by inaction or default. By the time that the cumulative effect of these practices becomes clear or certain members are emboldened to mount a challenge, others might contest their right to do so, especially if prior silence is regarded as acquiescence. Further, it is not altogether clear what counts as opposition. When certain members object to institutional action that is nonetheless adopted by majority vote, does it matter for the subsequent weight to be given the institutional precedent if the opposition comes from members that would be "specially affected" by the action, as it seems to be for the creation of customary international law?[111]

There are especially serious implications in those cases when the organ that is generating the institutional precedent 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 binding decisions by, for example, the Security Council (see Article 25 of the Charter) is troubling to some members. If a UN member wishes to protest the Council's expansive interpretation of "threat to the international peace"—as where the Council used such a finding to impose sanctions on Libya for its failure to extradite alleged terrorists 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.[112] Is such protest sufficient to cast doubt on the scope of the institutional precedents established by the Council? It seems that the answer thus far is "no." As the GA's ineffectual opposition to the continuation of the Council's arms embargo in Bosnia-Herzegovina suggests, the "general unacceptability" of Council action does not necessarily prevent the Council from continuing it or undertaking similar action in the future. In fact, despite doubts in some quarters, Council authorizations of force with respect to Haiti, the Kurds in Iraq, Somalia, and in Bosnia-Herzegovina, and even Council actions in response to actions taken by others, as in Kosovo, have all been read as important legal precedents on the expanding scope of permissible "humanitarian intervention" under both the

[110] *See, e.g.*, Hexner in Engel, *supra* note 27, at 910; Gordon, *supra* note 82, at 830–3. *See also* Zoller, *supra* note 81.

[111] For further discussion of the interplay between customary rules and institutional practice, see Sections 3.2 and 3.3, *infra*.

[112] *But see* Zoller, *supra* note 81 (arguing for the right of last resort by members in response to illegal actions by the organization).

Charter and general international law.[113] As this suggests, in the case of organs like the UN Security Council, the principle which accords weight to institutional practice is a powerful tool for the expansion of power at the expense of the wishes of even a majority of the membership.

2.3.3 Implied Powers

The doctrine of "implied powers," the step-child of "customary powers," is also widely accepted.[114] In theory, implied powers are based not on the subsequent practice of an organization, but on inherent authority contained in a charter.[115] While some IO charters expressly authorize organs to assume implied powers,[116] the doctrine has been applied even with respect to organizations whose charters contain no such reference. As applied by the European Court of Justice (ECJ) and the ICJ, the doctrine is the result of the "principle of effectiveness." As the ECJ indicated in one case, implied 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."[117] Institutional organs have similarly justified such powers as ancillary to powers explicitly authorized or needed to assure the "effectiveness" of authorized action.[118] Thus, the Security Council has justified its decisions authorizing members to use force to implement economic sanctions on

[113] *See, e.g.*, Fernando Teson, "Collective Humanitarian Intervention," 17 *Mich. J. Int'l L.* 323 (1996); Bruno Simma, "NATO, the UN, and the Use of Force: Legal Aspects," 10 *EJIL* 1 (1999). *But see* Antonio Cassesse, "*Ex injuria ius oritur*: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?," 10 *EJIL* 23 (1999). For more on the tangled web between the Charter and emerging rules of custom, see Chapter 3.

[114] *See, e.g.*, Schermers and Blokker, *supra* note 38, at 175–83. Even a strict constructionalist like Tunkin stated that implied powers "really exist." Tunkin, *supra* note 31, at 268.

[115] Of course, in practice, a constitutional interpreter may turn to subsequent practice as evidence that an implied power was intended to be conferred by those who drafted an IO's charter.

[116] *See, e.g.*, article 308 (formerly article 235) of the Treaty Establishing the European Community, 7 February 1992 (entered into force November 1, 1993) 37 *ILM* 56, which provides:

> 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.

[117] Case 8/55, *Fedechar*, ECR 1954–6, at 299, quoted in Schermers and Blokker, *supra* note 38, at 179. Similar principles have been applied within the U.S. Supreme Court. *See, e.g., United States* v. *Classic*, 313 U.S. 299, at 316 (1941)("we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose").

[118] This interpretation might be justified by the terms of article 31 of the Vienna Convention. As the ILC put it: "[w]hen 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, *supra* note 73, at 351. For ICJ cases expressly citing to the principle of effectiveness, see Sloan, *supra* note 3, at 113–14; Fitzmaurice, *supra* note 31, at 18–20.

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 effective.[119]

As with customary practice, controversy persists on the scope of implied powers. Though usually premised on "functional necessity," implied powers are sometimes applied to justify powers deemed "essential" for carrying out not merely explicitly conferred powers but also to permit achievement of expansive charter "purposes."[120] The doctrine has been cited to permit an organization to undertake action that is not, strictly speaking, "essential" or "necessary," but is merely desirable or consistent with charter powers or aims.[121] In its most direct statement on point, the ICJ indicated, in the *Reparation for Injuries case*, that "[u]nder international law, the Organization 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."[122] But even in that case, a majority of the Court applied the doctrine expansively—to justify the UN's 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 as against non-members, including for injury suffered by individuals and not just the Organization itself. As at least one dissenting judge argued that 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 fulfill UN purposes.[123]

As the *Reparation for Injuries case* also suggests, a finding of "implied powers" has ripple effects on the balance of powers between organs. Indeed, as a result of that case, the Secretary-General seized the power to pursue, present and settle part or all

[119] *See, e.g.*, SC Res. 221 (1966), empowering the U.K. 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, e.g.*, Kirgis, *supra* note 62, at 630. The Secretary-General, in turn, has regularly justified certain decisions as "necessary" to carry out directives of other UN organs, such as the Council. *Id.*, at 764–85 (discussing, among other things, the latitude of the Secretary-General in interpreting the mandates of UN peacekeeping operations).

[120] *Compare* the majority opinion in the *Certain Expenses case, supra* note 21, to Judge Hackworth, dissenting, at 198 (implied powers are 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, Series B., No. 3 (hereinafter "*ILO Competence case*") (denying the ILO's request to permit it to examine proposals for the organization and development of methods of agricultural production).

[121] *See, e.g., Competence case, supra* note 105, Dissenting Opinion by Judge Krylov.

[122] *Reparation case, supra* note 72, at 182.

[123] Judge Hackworth, dissenting, *Reparation case, supra* note 72, at 198. *See also supra* note 120. For a survey of other cases relating to implied powers, see Schermers and Blokker, *supra* note 38, at 175–83; Sloan, *supra* note 3, at 70; Gordon, *supra* note 82, at 816–21. Similar tensions have appeared in the context of the U.S. 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* Gerald Gunther, *John Marshall's Defense of McCulloch* v. *Maryland* 64 (Stanford, CA: Stanford University Press, 1969), quoted in Sloan, *supra*, at 71.

of such claims, thereby incidentally expanding the UN Secretariat's powers and discretionary authority.[124] In 1995, some judges on the ICTY took an expansive view of the implied powers of the Security Council, affirming the Council's powers to impose criminal liability through establishment of a war crimes tribunal.[125] In the course of doing so, those judges also applied, expansively, the Tribunal's own powers to determine its "*compétence de la compétence*," thereby seizing an implied power to review, de facto, actions by the Security Council.[126] In the course of affirming the Council's powers, those judges also attempted to enhance the independence and authority of their own Tribunal, an organ created by the Council.

That powers might be implied, or that subsequent practice might be cited as authoritative precedents, elevates the potential significance of any charter provisions which purport to limit the authority of an organization or of its organs. If an organization potentially has the authority to undertake 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 are provisions prohibiting organizational action that "interferes" with members' "domestic jurisdiction" (or their "*domaine réservé*").[127] In international economic organizations, it is usual to have "safeguard clauses" permitting members to escape from substantive obligations, such as the GATT's article XII (balance of payments restrictions) and article XIX (emergency action to protect domestic producers against competitive imports) or the Chicago Convention's (ICAO) 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 objection to members' or organs' actions, lest these become "accepted" practice or suggest existence of implied powers heretofore unsuspected.[128] It also helps to explain occasional attempts to limit the precedential effect of certain action by an organization itself, as where the Security Council insisted that its actions with respect to Haiti and Somalia responded to "unique" situations requiring exceptional responses.[129]

[124] *See* Section 3.2, *infra*. [125] *See* Section 8.3, *infra*.

[126] *Dusko Tadic case, supra* note 24 at para. 19. The Appellate Body of the ICTY found in that case that the Security Council's powers were not unlimited but that, on the contrary, the Council is subject to "constitutional limitations, however broad its powers may be." *Id.,* at para. 28. The ICTY noted that the Charter "speaks the language of specific powers, not of absolute fiat." *Id.*

[127] *See, e.g.*, article 2(7), UN Charter; OAS Charter, article 1, second para.; League of Nations Covenant, article 15.8; UNESCO Constitution, article I.3.

[128] Thus, the UN Secretariat, as well as other UN members, faced with United States' attempts to challenge budgetary assessments for particular UN expenses, has protested these and affirmed the illegality of selective or contingent payments of assessed contributions. *See, e.g.*, José E. Alvarez, "Legal Remedies and the United Nations' à la Carte Problem," 12 *Mich. J. Int'l L.* 229 (1991). *See also* Section 3.2.

[129] SC Res. 940, (August 1, 1994), para. 2 (Haiti); SC Res. 794 (December 3, 1992), 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, UN members attempted, unsuccessfully, to

Through such assurances, an organ might seek to reassure members as to the institutional impact of particular action. To date such assurances have had a dubious effect, at least for the Council, since many lawyers and others have continued to cite to even those "unique" measures as legal precedents and have not distinguished such actions from others undertaken by the Council.[130]

2.3.4 Intent

As scholars of domestic constitutional law would predict, "intent"-based arguments have also been controversial with respect to the interpretation of IO charters.[131] The argument begins, as noted above, with a dispute as to the weight to be accorded intent-based arguments under article 32 of the Vienna rules,[132] 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 "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.

As with respect to institutional practice, Judge Spender was equally disparaging of arguments in the *Certain Expenses case* premised on the "intention of the framers of the Charter." For Spender, such intentions were "less important than intention in many other treaties where the parties are fixed and constant and where the nature and subject matter of the treaty is different."[133] An even more extreme rejection of "original intent" had appeared earlier, in Judge Alvarez's teleological interpretations, premised on a non-positivist stance with respect to the role of judges. As early as 1950, Judge Alvarez proclaimed that ICJ judges "create precedents" and bring about dynamic changes through caselaw, no less so than national courts.[134] For him, the "progressive tendencies of international law,"

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, *supra* note 62, at 676.

[130] See, for example, Teson who relies on the Haiti and Somalia Council resolutions despite their ostensible uniqueness for an expansive view of "humanitarian intervention," *supra* note 113, at 354.

[131] 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 what the legislature meant. Except for the rare case 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 not themselves usually in court maintaining that they had particular intentions. Yet international judges are usually in exactly such a position—as the parties to disputes to it may themselves be those who expressed views during the negotiations. Fitzmaurice, *supra* note 31, at 17, n. 4.

[132] *See supra* at text and notes 73–5.

[133] *Certain Expenses case, supra* note 21, at 185.

[134] *Competence case, supra* note 105, Dissenting Opinion of Judge Alvarez, at 15.

constituted a new license to "interpret treaties, as well as laws, in a different manner than was customary when international life showed few changes."[135]

To Judge Alvarez, only the presumed intent of the international community of states, given its existing needs, was worth considering.[136] For him, the old rules of treaty interpretation, premised on identical treatment of all treaties, rigid adherence to text, resort to negotiating history if the text was not clear, and immutable interpretation, had been changed. Under the new system, interpreters ought to distinguish between "bilateral" and "political" treaties such as treaties creating international organizations. IO constitutive instruments were

> [n]ot to be interpreted literally, but primarily with regard to their purposes . . . . The text must not be slavishly followed. If necessary, it must be vivified so as to harmonize it with the new conditions of international life.
>
> When the wording of a text seems clear, that is not sufficient reason for following it literally, without taking into account the consequences of its application . . . . It will be necessary in future—unless in exceptional cases—when interpreting treaties, even those which are obscure, and especially those relating to international organizations, to exclude the consideration of the *travaux préparatoires*, which was formerly usual. The value of these documents has indeed progressively diminished, for different reasons: (a) they contain opinions of all kinds; moreover, States, and even committees, have at times put forward some idea and have later abandoned it in favor of another; (b) when States decide to sign a treaty, their decision is not influenced by the *travaux préparatoires*, with which, in many cases, they are unacquainted; (c) the increasing dynamism of international life makes it essential that the texts should continue to be in harmony with the new conditions of social life . . . . A treaty or a text that has once been established acquires a life of its own. Consequently, in interpreting it we must have regard to the exigencies of contemporary life, rather than to the intentions of those who framed it.[137]

For U.S. lawyers, Judge Alvarez' words are reminiscent of oft-repeated reminders by U.S. Supreme Court justices of the singular significance of the U.S. Constitution.[138] They call to mind, for example, Justice Holmes in *Missouri* v. *Holland*

> [I]t is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found . . . . [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely be the most gifted of its

[135] *Competence case, supra* note 105 at 16.

[136] Sir Gerald Fitzmaurice has called this view the theory of "emergent purpose." Fitzmaurice, *supra* note 31, at 8, n. 2.

[137] *Competence case, supra* note 105, at 17–18.

[138] As by Chief Justice Marshall in *McCulloch* v. *Maryland* 17 U.S. (4 Wheat.) 316, at 407 (1819)("we must never forget, that is *a constitution* we are expounding")(emphasis in original). *Cf.* Judge Charles de Visscher, *International Status of South West Africa*, 1950 ICJ Rep. 128, at 189 ("one must bear in mind that in the interpretation of a great international constitutional instrument, like the United Nations Charter, the individualistic concepts which are generally adequate in the interpretation of ordinary treaties, do not suffice"). *See also* Sloan, *supra* note 3, at 62–4.

begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation . . . . We must consider what this country has become in deciding what [the Tenth] Amendment has reserved.[139]

Differences among ICJ judges about "original intent" partly reflect deep philosophical differences. Some judges, like Judge Alvarez or Judge Azevedo who, in the same case, expressed compatible views, dismiss criticism that they are "legislating from the bench." Others, of a more positivist persuasion, resist the idea that judges, national or international, make law. Yet others, even if willing to consider the possibility of national judges as more than mere interpreters, resist a Holmesian view of the UN Charter because they do not see that Organization as in any sense a "nation" with the inherent powers of "civilized governments." For them, the UN (and other international organizations) remain very much "organisms" of limited purposes constrained by the limited intent of their drafters; to go beyond these is to embark on a risky course, however noble.[140] Finally, others would come to the same conclusion by distinguishing the role of ICJ judges from the position of national judges on the grounds that the consensual (and therefore tenuous) basis for the World Court's jurisdiction necessitates greater caution on the part of its judges.

Judges like Alvarez and Azevedo, who resort to the "natural consequence of the dynamism of international life"[141] or "the natural evolution of the needs of mankind,"[142] seem to share a common faith in internationalism that approaches that held by early advocates of "natural law." As David Kennedy might describe them, they share an "internationalist sensibility" that elevates international institutions, most particularly the UN, very nearly to the place some natural lawyers once reserved for divine truth.[143] This is antithetical to the views of others, like Judge Spender, who insists on the primacy of text and asserts that "when . . . the Court is called upon to pronounce upon a question whether certain authority exercised by an organ of the Organization is within the power of that organ, only legal considerations may be invoked and de facto extension of the Charter must be disregarded."[144]

Judge Alvarez's views on the alleged differences between types of international agreements have not been, on the whole, accepted. For some, IO charters remain

[139] 252 U.S. 416 (1920), at 433–4.

[140] *See, e.g.*, Tunkin, *supra* note 31, at 262–4.

[141] Judge Alvarez, *Competence case, supra* note 105, at 18–19. For a broader perspective on Judge Alvarez's judicial philosophy, see William Samore, "The New International Law of Alejandro Alvarez," 52 *AJIL* 41 (1958).

[142] Opinion of Judge Azevedo, *Competence case, supra* note 105, at 23.

[143] *See, e.g.*, David Kennedy, "A New World Order: Yesterday, Today, and Tomorrow," 4 *Transn'l L. & Contemp. Probs.* 329, 332–6 (1994).

[144] Opinion of Judge Spender, *Certain Expenses case, supra* note 21, at 197. But note that even Judge Spender accepts the proposition that interpretation of the Charter should "be directed to giving effect to that purpose, not to frustrate it," and "whilst in no way deforming or dislocating its language, so that the authority conferred upon the Organization and its various organs may attach itself to new and unanticipated situations and events." *Id. See also* Tunkin, *supra* note 31, at 265–9.

fundamentally contractual documents, and therefore, domestic contractual analogies—such as the role of parole evidence—seem applicable. Others are more ready to distinguish IO charters from domestic contracts and to apply canons of construction sometimes analogized to those applied in national courts for "constitutional" or "statutory" interpretation.[145] Yet not even the latter interpreters have embraced Judge Alvarez's proposal of wholly different interpretation rules for treaties that create international organizations.[146] There has been no wholesale rejection of the "old" rules of treaty interpretation in favor of "dynamic," evolutionary interpretation totally dismissive of "original intent."[147] Nor has there been any attempt by the International Law Commission or others to craft distinct interpretative rules either for "political" treaties generally or for IO charters. When the international community had such an opportunity last, in the course of drafting the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, it opted to replicate the treaty interpretation rules contained in the original Vienna Convention on the Law of Treaties.[148]

Varying trends have appeared from time to time with respect to the use of "original intent," and not even the judges on the PCIJ and ICJ have managed to adopt wholly consistent rules with respect to the use of a charter's *travaux*.[149] Although in the ICJ, there has been a tendency to give "original intent" arguments premised on statements in the *travaux* lesser importance, Judge Alvarez's views remain at the extreme. Whereas, in 1966, a majority of the ICJ judges gave significant weight to original intent in the *South West Africa case*,[150] by 1971 a narrow majority decided to the contrary in the course of an advisory opinion on Namibia.[151] Similarly, the trial chamber in the ICTY dismissed, as "nothing to the

[145] For a summary of views by ICJ judges and others, see Sloan, *supra* note 3, at 114–26. During the Cold War, scholars from socialist states and judges from that region favored contractual analogies for the UN Charter while many in the West favored a more avowedly "constitutional" perspective. R.St.J. Macdonald, "The United Nations Charter: Constitution or Contract?," in R.St.J. Macdonald and Douglas M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* 889 (Boston: M. Nijhoff, 1983). Early on, the U.S. Supreme Court rejected contractual analogies for purposes of interpreting the U.S. Constitution. *See, e.g., Juilliard* v. *Greenman*, 110 U.S. 421, 438 (1884)("A Constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty . . . is not to be interpreted with the strictness of a private contract"). *But see* Justice Frankfurter, dissenting, *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, at 647 (1949)("Precisely because 'it is a *constitution* we are expounding'. . ., we ought not to take liberties with it")(emphasis in original).

[146] Although many have been sympathetic to drawing distinctions among types of treaties. *See, e.g.*, Sloan, *supra* note 3.

[147] *See, e.g.*, Tunkin, *supra* note 31, at 264.

[148] *See* articles 31–2 of both Conventions.

[149] *See, e.g.*, Gordon, *supra* note 82, at 823–6; Fitzmaurice, *supra* note 31, at 6–7, 15–17.

[150] "[T]he Court must have regard to the situation as it was at that time, which was the critical one, and to the intentions of those concerned as they appear to have existed, or are reasonably to be inferred, in the light of that situation." *South West Africa, Second Phase*, 1966 ICJ Rep. 6, at 23. *See also* Dissenting Opinion of Judge G. Fitzmaurice, *Namibia case, supra* note 21, 1971 ICJ Rep. 220, at 223; Interpretation of article 3, para. 2, of the Treaty of Lausanne, 1925, PCIJ, Series B, No. 12, at 24.

[151] "That the concepts embodied in Article 22 of the covenant . . . were not static, but were by definition evolutionary . . . [the court's] interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary

point," arguments that the framers of the Charter did not intend to accord the Council the right to establish ad hoc war crimes tribunals.[152] Nonetheless, preparatory works, particularly the widely accessible documents relating to the San Francisco conference, continue to be analyzed by judges, advocates, and scholars and, as discussed, the Vienna Convention rules on treaty interpretation continue to permit such recourse.[153]

There is, in addition, within universal IOs, something of a north/south division of views on "original intent." Resort to negotiating history often advantages 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. 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 (U.S.S.R., U.S., U.K., and China) with respect to the meaning of "procedural questions" in Article 27(3).[154] The same seems to be true of other IOs, such as the Bretton Woods organizations. 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 could hardly be expected to do otherwise. Governments who later accede to IO membership cry foul when obscure parts of negotiating history, in which they did not participate, are cited to support a current interpretation adverse to their interests.

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 as to certain points. There are no uniformly accepted rules about the relative weight

law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." *Namibia case*, *supra* note 21, at 31.

[152] *Dusko Tadic*, Case No. IT-94-I-T, August 10, 1995 (hereinafter "*Dusko Tadic, Trial Chamber*"), at para. 27.

[153] *See, e.g.*, Grewe and Khan, *supra* note 11, *passim*; Watson, *supra* note 49.

[154] UNCIO XI, at 711. As one commentator suggests, because this agreement can be traced back to the Yalta Conference, its use suggests that even preparatory work prior to San Francisco remains relevant. *See* Ress, *supra* note 25, at 27, n. 116. But recourse to such "agreed statements" produced in the course of a negotiation might not be functionally the equivalent to resort to more ordinary forms of negotiating history.

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.[155]

Further, there is the sheer volume of a multi-party negotiating record, which may span years, as did the latest GATT Uruguay Round or negotiations for the Law of the Sea Convention, and arguably includes statements made by national bodies in dozens of states made in the course of the ratification and negotiation process. Those involved in such a process come and go; by the end, even those states most closely involved in the negotiations retain few if any government officials or experts with a personal knowledge of the details of the entirety of the negotiations. In an ideal world, adherents to a treaty resulting from such a process would, at the time of accession, closely scrutinize all of the *travaux* and related documents, including at least the formal interpretative statements made by other parties. No one lives in such a world. For many it seems unfair and unrealistic to expect those who did not assume a major role in the negotiations or did not participate at all, least of all developing states with meagre resources, to devote resources to such an effort. Even if there were uniform agreement on what constitutes the *travaux*, few have the ability to read it in full. Yet if no one has truly read, much less "consented," to all of the *travaux*, the rationale for its importance becomes obscure.

For these reasons, the caution with which some IO interpreters view "original intent" arguments is not just a function of judicial philosophy. The difficulties of determining what is legitimately contained in the *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 were only minimally involved in the original negotiations, all help to dampen resort to *travaux*.[156]

2.4 Why Interpret a Charter?

The interpretation of IO charters is more than the sum of the application of rules—whether contained in the Vienna Convention on the Law of Treaties or reserved for "constitutional" treaties. As with domestic constitutional

[155] For a summary of the problems with intent, see Fitzmaurice, *supra* note 31, at 3–4. Given the uncertainties with determining original intent, resort to it does not always lead to certain results in the interpretation of a treaty. *Cf. Chris Sale* v. *Haitian Centers*, 61 WL 4685 (1993).

[156] *Cf.* Ress, *supra* note 25, at 26–27 (advocating resort only to "accessible" preparatory works).

interpretation, interpretative conclusions are based on factors other than proclivities with respect to the text, context, practice, or *travaux*.[157]

As Joseph Weiler has suggested with respect to constitutional interpretation within the European Union, judges and other interpreters are motivated by identifiable, sometimes competing, but often overlapping, visions of legitimacy. Among these visions are "democratic legitimacy," generated by perceptions of real participation in governance; "formal legitimacy," generated by results produced from institutions or systems created through democratic processes; or "social legitimacy," connoting empirically determined social acceptance occurring when relevant actors display a commitment to and actively guarantee values that are part of the general political culture (such as justice, freedom, and general welfare).[158]

Adaptation of these various legitimating visions to IOs is difficult. The first two are troublesome for the UN since, for example, the Security Council and, arguably, the Organization generally, is not designed to be "democratic" in the sense of equal participation by all members. Moreover, even if the UN Charter's principle of "sovereign equality" (see Article 2) was taken as a central normative goal of the Charter, to be given effect despite the Council's exclusive membership and voting structure, it is not clear why the equal participation of executive branch officials of states should be assumed to be the exclusive or best touchstone for democratic legitimacy. In an age of human rights and relativistic conceptions of "sovereignty,"[159] why should state-centric notions of "democratic" governance be central? If the Council, even with the full consent of the more "democratic" GA, were to consent to genocide, should the Court or anyone affirm the legality of that act? Similar problems arise in connection with many organizations, such as the World Bank or ICAO, whose governance elevates the participation of certain members over others through weighted voting schemes or other mechanisms deferential to realpolitik.[160] With the possible exception of the EU whose new

[157] As Sir Hersch Lauterpacht has put it, rules are

not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means . . . [T]he very choice of any single rule or of a combination . . . of them is the result of a judgment arrived at independently of any rules of construction, by reference to considerations of good faith, of justice, and of public policy.

Quoted in Gordon, *supra* note 82, at 796.

[158] J.H.H. Weiler, "The Transformation of Europe," 100 *Yale L. J.* 2403 at 2468–9 (1991). This is also suggested by scholars such as Oscar Schachter who assert that interpretations of the UN Charter's vague or conflicting rules, general principles, and standards, require validation of choices in terms of the "shared values" expressed in the Charter or through other consensual procedures. Schachter, *supra* note 77, at 280–2.

[159] *Cf.* Louis Henkin, "An Agenda for the Next Century: The Myth and Mantra of State Sovereignty," 35 *Va. J. Int'l L.* 115 (1994).

[160] For arguments against the applicability of arguments from "democracy" in the context of GATT panels' review of the determinations of national bodies, see Steven P. Croley and John H. Jackson, "WTO Dispute Settlement Procedures, Standard of Review, and Deference to National Governments," 90 *AJIL* 193, at 209–10 (1996).

parliament may someday come to be a "representative" body, IOs are not "democratic" institutions in any traditional sense.

The third legitimating vision, grounded in defensible "social" values, invoked in the purpose-driven inquiries of Judges Alvarez and Azevedo, for example, is also troublesome. It is often said that the UN's foremost goal is the maintenance of international peace and security.[161] This is defensible given the primacy of that goal in the Charter's text and in the powers accorded to the Security Council. Nonetheless, the UN Charter indicates other, sometimes conflicting, goals. Most recently, international judges have been confronted with some of these: as when Libya and Bosnia-Herzegovina claimed, in separate cases before the ICJ, that Council actions undermined their "sovereign rights" in the name of international peace, or when the first defendant before the ICTY claimed that the establishment of that body, in the name of international peace, breached the rights of states and human beings.[162] Elevation of peace and security, if tantamount to saying that the Security Council can do no wrong in its name, is disturbing to many; it poses too stark a challenge to the claim that the Organization is based on the "rule of law."[163] The same might be said of any attempt to single out other goals among the many articulated in other IO charters. The interpreter who invariably elevates, for example, the safety of international aviation in ICAO or the lowering of trade barriers in the GATT/WTO above the rights of "sovereigns" when these goals appear to conflict in either of these organizations, risks losing both legitimacy and effectiveness.[164]

Judges also differ on how best to further the "purpose of the Organization" even when they agree on what that purpose is. As demonstrated in the concurring and dissenting opinions rendered in the ICJ's *Lockerbie case*, judges who agreed on the centrality of the UN's goal of maintaining peace and security differed on whether that meant that the Court should "review" Council decisions or that the Council had acted lawfully in imposing sanctions on Libya.[165] Nor is it clear that

[161] *See, e.g.*, Opinion of Judge Spender, *Certain Expenses case, supra* note 21, at 186 ("The purpose pervading the whole of the Charter and dominating it is that of maintaining international peace and security and to that end the taking of effective collective measures for the prevention and removal of threats to the peace").

[162] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia-Herzegovina* v. *Yugoslavia (Serbia and Montenegro)*), Provisional Measures, 1993 ICJ Rep. 3 (Order of April 8); *Lockerbie case, supra* note 20; *Dusko Tadic case, supra* note 24; *Dusko Tadic, Trial Chamber*, *supra* note 152.

[163] *See, e.g.*, Martti Koskenniemi, "The Police and the Temple: Order, Justice and the UN: A Dialectical View," 6 *EJIL* 325 (1995); Koskenniemi, *supra* note 68.

[164] Some have argued that similar risks arise for judges on the European Court of Justice should they elevate "federalism" goals too far above the residual rights of state parties to the European Union. *See, e.g.*, Hartley, *supra* note 26, at 107–9.

[165] *See supra* note 20; *see also Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, (*Libya* v. *United States, Libya* v. *United Kingdom*), Preliminary Objections, 1998 ICJ Rep. 9 and 115.

purpose-driven interpretation ought to be limited to express charter purposes. The decision by the appellate body in the ICTY that it had jurisdiction to decide the legality of its establishment by the Council was based on the general international law principle that all judicial bodies decide the scope of their own jurisdiction.[166] This general principle, not expressly stated in the UN Charter except with respect to the ICJ, was interpreted expansively, based on "general international legal principles" deemed applicable to all "judicial" bodies.[167] The Tribunal opted to give effect to these principles, grounded not in the Charter as such but in general international law, even if at the expense of a much more explicit Charter goal, namely, the finality of Council decisions.[168]

Despite the difficulties of applying these legitimating visions to IOs, traces of them appear in ICJ opinions. Judge Alvarez's views, as expressed in the *Certain Expenses case*, are sympathetic to "social legitimacy," whereas those portions of Judge Spender's opinion in the same case stressing the need for faithful compliance with the "agreed" text suggest an "equal participation" model of legitimacy. Both judges, as well as the majority of those deciding the *Certain Expenses case*, are, in addition, inclined to presume the legality of acts by UN organs, thereby suggesting their shared respect for the "formal legitimacy" achieved by organizational processes.[169]

The interpretation of IO charters also contains hints of models of judicial review long familiar to scholars of domestic constitutional law.[170] These include: (1) a consent-based model;[171] (2) a minority protection model intended to shelter particular state(s) from majoritarian or hegemonic processes within the organization;[172] (3) a participation-based model premised, more narrowly, on equality

[166] *Dusko Tadic case, supra* note 24, at para. 19. As that case indicates, questions relating to the legality of IO action can arise in various forums and are not restricted to the ICJ. Indeed, even national courts have been faced with such questions. *See, e.g., The Hague District Court, Slobodan Milosevic* v. *The State of the Netherlands*, August 31, 2001, 41 *ILM* 86 (2002)(briefly discussing and affirming the legality of the Council's establishment of the ICTY).

[167] *Id.*, paras. 18–19.

[168] But note that the Appellate Chamber of the ICTY in the *Dusko Tadic case* did not purport to engage in judicial review over the Security Council but only reviewed the legality of the Council's actions as part of its "incidental" jurisdiction to determine whether it had jurisdiction. *Id.*, at para. 21. *Compare* Separate Opinion of Judge Li, *id.*, para. 2 (contending that the majority's review of the legality of the Security Council's resolution is *ultra vires* and unlawful).

[169] The deference accorded institutional practice generally suggests the same respect.

[170] For a summary of these within the context of U.S. constitutional review, see Steven P. Croley, "The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law," 62 *U. Chi. L. Rev.* 689, at 750 (1995). For a summary of arguments for and against judicial interpretation grounded in treaty text in the context of the European Union, see Hartley, *supra* note 26.

[171] *See, e.g.*, Ress, *supra* note 25, at 24–5 and 28 (arguing that evolutionary interpretation for the UN Charter was foreseen by the drafters and that judicial competence is based on "the contractual obligation to submit to the decision"); Croley and Jackson, *supra* note 160, at 198–201 (arguing that GATT members delegated to GATT institutions the power to interpret the scope of GATT obligations).

[172] *See, e.g.*, Paul J.I.M. de Waart, "The U.N. System at a Crossroads: Peoples' Centre or Big Brother's Small Club?," in Nils Blokker and Sam Mueller, eds., *Towards More Effective Supervision by International Organizations* at 49 (Dordrecht and Boston: M. Nijhoff, 1994) (proposing a similar democratic governance model for the UN).

of participation in governance but not assuring substantive outcomes produced by those processes;[173] (4) a teleological model, grounded in achieving organizational goals at all costs;[174] or, potentially the most broad of all, (5) a rights-based model permitting interpretation to protect human, and not merely states', rights.[175] Each of these presents a very different conception of the role of interpreter, and it is sometimes difficult to understand particular decisions except in light of such (often unacknowledged) models.[176] All of these models might be justified on the grounds of the traditional tools of treaty interpretation—text, context, practice, or intent—but may become themselves analytical constructs with independent significance.

The legitimating visions and models of interpretation to which IO charters are subject are, of course, not contained in Vienna's rules for treaty interpretation. Those rules also contain no hint of the evolutionary dynamic often apparent in charter interpretation. As Eric Stein has noted, IOs, even in their relatively brief history, have tended to seek (often successfully) more power.[177] Each IO's potential for dynamic re-interpretation of its charter in the service of its growing power varies. It is affected, among other things, by the type of forum in which constitutional interpretation occurs (e.g., judicial/non-judicial); the tools available to the constitutional interpreter (e.g., the existence or not of the *travaux* of the charter); the purpose of the organization (e.g., "technical" regulation/plenary jurisdiction over international peace and security); the types of disputes which prompt constitutional interpretation; and the historical milieu in which interpretation takes place.

The constituent instruments of IOs vary in purpose, from the narrow to the sweeping, and the organizations they establish differ widely in institutional depth—from the mere establishment of a handful of ad hoc commissions for fact-gathering to organs charged with elements of "supranational" authority. Given

[173] One prominent example might be South Africa's pleas to the ICJ in the *Namibia Advisory Opinion* concerning the alleged denial of its participation rights in the Security Council. *Namibia case*, *supra* note 21, at paras. 23–5.

[174] *See, e.g.*, discussion of views of Judge Alvarez, *supra* at text and notes 134–7; Sohn, *supra* note 46 at 186–7.

[175] *See, e.g.*, dismissal of defense arguments in *Dusko Tadic case, supra* note 24. *See also* Mohammed Bedjaoui, "On the Efficacy of International Organizations: Some Variations on an Inexhaustible Theme . . .," in Blokker and Mueller, eds., *supra* note 172, at 26 (suggesting a need to verify the legality of the Council's acts not only to reassure members but also "to assure 'the peoples,' when it is sought to mobilize them through world opinion, that there is nothing pernicious about the action contemplated by the Security Council . . .").

[176] *See, e.g.*, Gordon, *supra* note 82, at 833.

[177] Eric Stein, "External Relations of the European Community: Structure and Process," in 1 *Collected Courses of the Academy of European Law 1990: Community Law* at 129–30 (Dordrecht, Boston and London: Martinus Nijhoff, 1991). In some cases, as with respect to the European Community and its deadlines for termination of negotiations leading to more expansive Community powers, the "evolution of power" is "mandated as a fundamental postulate in the constituent treaty itself." *Id.* In other organizations, such as the UN, the "evolution of powers" is not expressly mandated as a charter principle but may nonetheless be inherent—as a necessary by-product of the Security Council's powers to render legally binding decisions under Chapter VII, for example.

the variety of players engaged in charter interpretation, it is misleading to take a common law perspective attuned only to "caselaw" developments. Consensus-based decision-making processes, as within ICAO, suited to the "coordination" games of achieving mutually agreeable aviation standards, are not ideal for the generation of transparent rules of charter interpretation—such as those produced in the course of contentious adjudicative proceedings.[178] Constitutional interpretation that occurs so haphazardly and unconsciously evinces a different dynamic from that which emerges from adjudication by a court engaged in "judicial review." UN system organizations, although authorized to ask the ICJ for advisory opinions, only rarely resort to the ICJ or other formal adjudicative processes.

Moreover, different organizations have made conscious choices that affect interpretative possibilities even when judicialized fora are available. Some have made resort to originalism untenable by making original negotiating records unavailable.[179] Others have made arguments premised on prior institutional practice more difficult by rendering that practice, as for particular organs, less transparent.[180]

What is striking, however, is that amidst all this diversity of actors there is such a degree of relative conformity. Even organizations like the IMF that leave authoritative interpretation in the hands of ostensibly political bodies resort to many of the same constitutional tools and arguments that are canvassed here and are used by judges on the ICJ or the ECJ.[181]

Of course, even when IOs resort to similar tools for constitutional interpretation, they do not necessarily use these the same way. Even when available, charter *travaux* may not be given the same relative weight; textual arguments may be subject to differing models of interpretation.

[178] Although formal arbitral interpretative decisions, and often references to the ICJ, are possible under the Chicago Convention's article 84, which anticipates consideration by the ICAO Council and even arbitration to settle disputes.

This does not mean that constitutional interpretative issues addressed here are not relevant within organizations like ICAO. *See generally* Thomas Buergenthal, *Law-Making in the International Civil Aviation Organization* (Syracuse, NY: Syracuse University Press, 1969). Nor does it mean that the constitutionality of actions by members or the organization is not addressed by non-adjudicative bodies like the ICAO Council. When, for example, the then U.S.S.R. was accused of violating the Chicago Convention when it shot down a Korean airliner that had strayed over its territory, the Soviets responded with legal arguments premised on the text and underlying policies of the Chicago Convention. These arguments were canvassed and ultimately rejected by the ICAO Council, which condemned the Soviet action in a quasi-judicial resolution similar to one that might have been issued by the Security Council. It also led to a formal amendment to the Chicago Convention, article 3 *bis*, which prohibits the use of force directed at civil aircraft.

[179] As with respect to the IMF.

[180] The closed meetings of the Security Council, for example, make it difficult to divine the Council's intent. *See, e.g.*, Anthony Aust, "The Procedure and Practice of the Security Council Today," in René-Jean Dupuy, ed., *Development of the Role of the Security Council, La Haye Colloque, July 21–23, 1992* 365, at 370–1 (Dordrecht, Boston: M. Nijhoff, 1993)(hereinafter *Colloque*).

[181] *See, e.g.*, Hexner, *supra* note 68; C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* at 23–65 (Cambridge: Cambridge University Press, 1996); Fawcett, *supra* note 106; Mann, *supra* note 68.

Even relatively judicialized bodies differ with respect to these issues within distinct institutional settings. An international adjudicative body that is reasonably assured of compliance and operates within an established "community" might be emboldened to make more daring or expansive interpretations. Explicitly teleological or purpose-driven interpretations may be facilitated, for example, in the context of a proto-state like the EU and its Court of Justice where the parties and the Court have long been committed to safeguarding the Community's ability to function.[182] Indeed, the uniqueness of the European Court's setting limits the extent to which one might try to generalize from its precedents to other institutions.[183] An ICJ judge asked to give non-binding advice in response to a question posed by a coordinate organ, as in the *Certain Expenses case*, is faced with a different set of constraints and concerns than is a judge on the European Court; an arbitrator, tasked with rendering an enforceable decision in the course of a commercial dispute involving norms promulgated by an international organization, faces yet other constraints (but also has open other possibilities).

The setting in which adjudication of constitutional disputes occurs matters a great deal. The ICJ judge, giving an advisory opinion, may be freer in theory than is the arbitrator or even the European Court judge to adopt a daring teleological interpretation since his/her subsequent opinion is, after all, only advisory. On the other hand, since any advice rendered by the ICJ is likely to be effective only if magisterial and persuasive, there may be all the more reason for the ICJ judge to be more cautious in practice than a judge on the European Court might be.[184] An arbitrator with no UN affiliation who, in the course of a commercial dispute, is asked to determine, for example, the legally binding nature of particular GA resolutions, may be less cautious about the institutional implications of his/her decision or about how that decision comports with general institutional law than either the European Court judge or the ICJ judge in comparable circumstances.[185] At the same time, the absence of an institutional connection combined with the relative ease of enforcement may give more credence to the arbitrator's determination. And none of these international interpreters are faced with the constraints (or the corresponding

[182] *See generally* Weiler, *supra* note 158. *But see* Hartley, *supra* note 26, at 109 (noting that there are two incompatible models for the European Union: embryonic federation or treaty-created entity made by sovereign states).

[183] As Eric Stein has argued in the context of legal issues relating to the Community's "external" (or foreign) relations, the role played by the Court of Justice is a "distinct characteristic, perhaps unique in the history of national and international legal orders." Stein, *supra* note 177, at 128.

[184] Thus, Edward Gordon, writing at a time when the ICJ, had, in his view, exhibited caution in assuming jurisdiction, argued in favor of the "passive virtue of confining itself to those conflicts which it can resolve with some degree of finality." In his view, the Court thereby achieves "through durability and public acceptance a level of effectiveness commensurate with its responsibilities." Gordon, *supra* note 82, at 802.

[185] *Cf. Texaco Overseas Petroleum* v. *Libya* (Award of January 19, 1977), reprinted in 17 *ILM* 1 (1978)(decision by sole arbitrator René-Jean Dupuy upholding Western state's views of international law standards regarding compensation upon expropriation).

possibilities) of national judges who, when dealing with such interpretative issues, consider them through the prism of domestic law.[186]

The subject matter of the dispute within particularized institutional settings matters as well. The precise or technical nature of many GATT panel inquiries, along with the expertise of those participating in them, may be less likely to lead to expansive inquiries relating to the powers of GATT/WTO organs or to wide-ranging discussions of international legal principles as compared to, for example, interpretative disputes relating to the "external" powers of the European Community.[187] On the other hand, the lack of textually determinate legal standards in the UN Charter, among other things, may prevent ICJ judges from giving expansive answers even with respect to expansive inquiries.[188] And the availability of legal standards is not the only relevant factor. The arguably greater need to legitimate the imposition of criminal enforcement, given the consequences on the defendant and the existence of well-developed human rights norms intended to protect the defendant, has, for example, led some judges of the ICTY to suggest that it is all the more necessary for that body to seize jurisdiction to closely examine the legality of those proceedings, thereby suggesting that that Tribunal might have more license than even the ICJ to examine fundamental constitutional issues raised in the course of criminal prosecutions.[189]

Constitutional interpretation also occurs within a historical context. Interpretation of the UN Charter, circa 1947, prior to the development of human rights norms, could not, for obvious reasons, have used a rights-based model. Such a model is, however, more likely in the 21st century for any international tribunal, including the ICJ or war crimes tribunals. Nor is it as likely, when an international organization is in its infancy, that charter interpreters will consciously undermine their own legitimacy and threaten effective compliance with their edicts by adopting teleological or "dynamic" interpretations at odds with the views of founders still around to refute them.[190] On the other hand, political

[186] *See, e.g., People of Saipan* v. *United States Department of Interior*, 502 F.2d 90 (9th Cir. 1974)(deciding impact of UN Trusteeship Agreement through the prism of the U.S. doctrine of "self-executing" treaties); *Diggs* v. *Schultz*, 470 F.2d 461 (D.C. Cir. 1972)(deciding upon the enforcement of Security Council sanctions through the prism of the U.S. Supremacy Clause and the doctrine that a later in time Congressional statute can be enforced over a pre-existing treaty commitment); *United States* v. *Palestine Liberation Organization*, 695 F. Supp. 1456 (N.Y. 1988)(deciding the scope of the PLO's rights as a UN invitee given Congressional intent when passing anti-terrorism legislation) and see generally Benedetto Conforti, *International Law and the Role of Domestic Legal Systems* (Dordrecht and Boston: M. Nijhoff, 1993).

[187] *See generally* Stein, *supra* note 177.

[188] Thus, some scholars have suggested that Article 2(7) of the UN Charter is indeterminate and incapable of judicial interpretation. *See, e.g.*, Watson, *supra* note 49, at 35. Similar contentions have arisen on the propriety of "judicial review" by the ICJ over Security Council decisions, see Alvarez, *supra* note 21, at 14–20.

[189] The judgments issued by the ICTY's Appellate Body in *Tadic* speculate more widely about the powers of the Security Council (and potential limits thereon) than any judgments issued to date by the ICJ. *See Dusko Tadic case, supra* note 24, at paras. 28–47.

[190] This might be suggested, for example, in the respective attitudes of the ICJ judges who decided the first contentious case before that Court, the *Corfu Channel case* in 1947, with those who presided over Nicaragua's claims against the U.S. in 1986. As Louis Sohn has noted, the *Corfu Channel* judges

events at any time in the development of an organization may force constitutional issues—as when Cold War paralysis on the Council drove the U.S. to a de facto realignment of the balance of powers within the UN through passage of the Uniting for Peace resolution or when the rise of decolonized states gave rise to attempts by those states to reform international economic principles through efforts in the GA.[191] Nor is the press of contemporary events limited to high-profile actions by prominent political actors; interpreters may be influenced by contemporary ideas, including "feminist" or "deconstructionist" possibilities inconceivable in earlier periods. The impact of contemporary events is likely to be felt even within judicial bodies or technocratic policy-making organs that are supposedly removed from such influences. Constitutional interpreters, in whatever setting, may come to share views held within the relevant "epistemic community" of which they are a part.[192]

refrained from citing the relevant provisions of the UN Charter while the *Nicaragua case* judges aggressively seized jurisdiction over foundational "constitutional" questions, discussing the link between the law of the Charter and customary law. Sohn, *supra* note 46, at 175–81. One scholar has a similar explanation for the PCIJ's advisory opinion in the *ILO Competence case, supra* note 120. Edward Gordon argues that the result in that case can be explained on the basis of that Court's tentative hold over advisory jurisdiction—this was only the third such opinion with which it was presented. Gordon also sees it as part of the balance struck by a cautious Court that had just "courageously" affirmed the ILO's competence in another field not specifically mentioned in its constitutive treaty. Gordon, *supra* note 82, at 820. Some have seen a similar progression, towards more dynamic or expansive judicial interpretations over time, within the European Court of Justice. *See, e.g.*, Weiler, *supra* note 158; Joseph Weiler, "Eurocracy and Distrust," 61 *Wash. L. Rev.* 1103 (1986); Koen Lenaerts, "Constitutionalism and the Many Faces of Federalism," 38 *Am. J. Comp. L.* 205 (1990).

[191] For a review of the "transformative" phrases of the UN as corresponding to the rise and fall of different organs in tune with political events, see, e.g., Grewe and Khan, *supra* note 11, at 12–23.

[192] *See generally* Anne-Marie Slaughter, "A Typology of Transnational Communication," 29 *U. Rich. L. Rev.* 99 (1994)(discussing the prevalence of such communications among international and national judges).

3

(Re) Introducing International Institutional Law

This chapter begins by surveying the provisions in constitutions or charters of IOs with a global reach that permit them to make law. It draws some general conclusions about IO law-making from this survey and thereafter examines the dimensions of "international institutional law" through the practice of the UN's political organs.

3.1 IO Law-making: A Survey of Charter Provisions

While there is an extensive literature describing the powers of the three principal UN organs—the UN General Assembly, the Security Council, and the UN Secretariat—the starting point for all such descriptions is the enumerated powers conferred on each under a multilateral treaty, namely, the UN Charter.

The UN General Assembly's hortatory powers in the "external" realm derive from enumerated powers conferred on it by the parties to the UN Charter. It is authorized to discuss any topic within the scope of the UN Charter or relating to the powers of any of its organs and to make recommendations on such topics (Article 10), including those directed at encouraging the progressive development or codification of international law (Article 13(1)(a)) and for the "peaceful adjustment" of situations likely to impair the general welfare or friendly relations or resulting from violations of the Charter (Article 14). Similarly, that body's powers to take legally binding actions within the "internal" sphere derive from its power, shared with the Council, to admit, suspend or expel members (Articles 4–6); to determine the expenses of the organization (Article 17) and deny a vote in the GA to those who fail to pay their dues (Article 19). The GA's "decisions" on "important questions" must be taken by a two-thirds vote (as with respect to matters specifically enumerated in Article 18).[1] Like the Security Council, the GA can also establish subsidiary organs as it deems necessary (Articles 22 and 29).

[1] There is some debate as to whether the categories of important questions identified in Article 18 are exhaustive (as is suggested by the French text) or merely illustrative (as is suggested by the English version). It is also unclear whether this furnishes the GA with a power to take legally binding actions, at least in the internal sphere or merely take another form of recommendatory action. *See, e.g.*, Rüdiger Wolfrum, "Article 18," in Bruno Simma, ed., *The Charter of the United Nations: A Commentary* at 355–7 (Oxford, U.K. and New York: Oxford University Press, 2002).

The Security Council is accorded "primary responsibility for the maintenance of international peace and security," and to that end is permitted to take both procedural and substantive decisions (Articles 25–8 and 48), so long as these satisfy certain voting requirements (namely, an affirmative vote of nine members for procedural decisions and an affirmative vote of nine but including the concurring votes of the five permanent members for other decisions)(Article 27). Decisions of the Council are binding on members (Articles 25 and 48). Under Chapter VI of the Charter, the Council may take non-binding actions in situations that are "likely to endanger the maintenance of international peace and security," including calling on the parties to such disputes to settle them by peaceful means (Article 33), investigate disputes or situations (Article 34), recommend appropriate procedures, methods, or terms of settlement (Articles 36–8). Once it crosses the threshold of Chapter VII, however, by determining the existence of a "threat to the peace, breach of the peace, or act of aggression" (Article 39), the Council may call on the parties to comply with "provisional measures as it deems necessary or desirable" (Article 40), recommend or decide on "measures not involving the use of armed force" (Article 41), and, when non-forceful measures are inadequate or proven to be futile, "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security" (Article 42).

Although the Charter does not clearly say so, the Council's actions under Chapter VII (at least when exercising its powers under Articles 41 or 42), appear to be the "enforcement action" that is the only exception provided in the Charter to the normal rule barring intervention in the "domestic jurisdiction" of states or any requirement that members submit such matters to settlement (Article 2(7)). The Council is also authorized to utilize regional arrangements or agencies for enforcement action under its authority (Article 53).

By comparison, the UN Secretary-General's enumerated powers scarcely exist. Although this individual is described as the "chief administrative officer" (Article 97), authorized to do whatever other UN organs entrust him to do (Article 98), the only specific power accorded to this officer is the power to bring matters that may threaten the peace to the attention of the Security Council (Article 99). The Charter-based grants of authority for the other UN organ, the Economic and Social Council (ECOSOC), while more extensive than for the Secretary-General, suggest that this is a body with very "wide terms of reference but of limited powers."[2] The Charter enables that organ to make or initiate studies dealing with international economic, social, cultural, educational, health, and related matters, as well as make recommendations relating to such subjects to the GA, UN members, or UN specialized agencies.[3] Apart from specially conferred powers to enter into agreements with UN specialized agencies (Article 63) and to prepare draft conventions to submit for consideration by the GA (Article 62(3)), ECOSOC is

[2] *See* Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* at 58 (London: Sweet & Maxwell, 5th edn., 2001).

[3] Article 62(1), UN Charter. *See* Sands and Klein, *supra* note 2, at 58–63.

specially authorized to make recommendations for the purpose of promoting human rights (Article 62(2)). ECOSOC is also charged with making "suitable arrangements" with NGOs to enable them to consult on the wide variety of matters within ECOSOC's competence.[4]

Other UN system organizations also generally have powers to adopt binding decisions or, more commonly, hortatory recommendations within their respective, usually technical, domains. ICAO, as is typical of a "technocratic" body that is responsive to particular agencies within governments, is dominated by a specific expertise. Apart from the usual conferred powers with respect to internal law (relating to such matters as membership, procedures, voting, and financing)[5] its capacity to serve as a venue for multilateral treaty-making and to settle aviation disputes between members (both discussed in later chapters), the law-making aspects of ICAO that have drawn the most attention stem from the ICAO Council's ability to promulgate standards and recommended practices (SARPs) without going through a formal treaty process or amending the constituent instrument of the organization. Under authority expressly conferred in ICAO's constitution, the Council is authorized to adopt annexes to the Chicago Convention by a two-thirds vote of that body (unless within three months or any longer period as determined by the Council a majority of the members of ICAO register their disapproval)(Chicago Convention, articles 12, 28, 37–8, 54(1), and 90). Each ICAO member "undertakes to collaborate in securing the highest practicable degree of uniformity" with respect to the aviation matters that are now the subject of eighteen annexes, and to give immediate notification to the organization should it find it "impracticable to comply in all respects" with promulgated SARPs (articles 37–8). ICAO members are obligated to comply with rules over the high seas (article 12).[6]

Other seemingly technocratic specialized agencies include the International Atomic Energy Agency (IAEA) (permitted to establish and administer safeguards to ensure the peaceful uses of atomic energy with respect to services made available by the Agency or at the request of any state with respect to that state's relevant activities in the field),[7] the WHO (empowered to adopt recommendations and

[4] Sands and Klein, *supra* note 2, at 61.

[5] *See*, *e.g.*, Articles 48–54 (indicating respective powers of the GA and the Council), 55 (indicating permissive functions of the Council), 61–3 (authority with respect to financing), Convention on International Civil Aviation, 15 UNTS 295 (entered into force April 4, 1947)(as amended)(current version can be found at www.icao.int/icaonet/dcs/7300_8ed.pdf)(hereinafter "Chicago Convention").

[6] These "rules of the air" are now contained in Annex 2, as periodically updated, to the Chicago Convention. The Air Navigation Commission, composed of fifteen members appointed by the Council, is authorized to recommend to the Council modifications to the Annexes to the Convention. *See* Chicago Convention, articles 56–7. For background on the preparation of SARPs, see generally Frederic L. Kirgis, Jr., *International Organizations in Their Legal Setting* at 302–9 (St. Paul, MN: West Publishing Co., 2nd edn., 1993); Thomas Buergenthal, *Law-Making in the International Civil Aviation Organization* (Syracuse, NY: Syracuse University Press, 1969); R.I.R. Abeyratne, *Legal and Regulatory Issues in International Aviation* (New York: Transnational, 1996).

[7] Statute of the IAEA, 276 UNTS 3, (entered into force July 29, 1957)(for a current version, see www.iaea.org/About/statute_text.html), articles 3(a)(5), 9, and 12.

conventions, as well as regulations on such matters as sanitary and quarantine procedures and pharmaceutical standards),[8] the World Meteorological Organization (WMO) (empowered to adopt both "general" and "technical" resolutions within its domain),[9] the ILO's General Conference (authorized to adopt labor conventions and recommendations by two-thirds vote),[10] WIPO (empowered with recommendatory powers),[11] the UPU (with powers to promulgate General Regulations that implement its Constitution, and Detailed Regulations that implement the Universal Postal Convention),[12] the ITU (authorized to revise its Radio Regulations, International Telecommunication Regulations, and Administrative Regulations and capable of issuing recommendations on certain

[8] *See* WHO Constitution, 14 UNTS 185 (entered into force April 7, 1948)(a current version can be found at http://whqlibdoc.who.int/hist/official_records/constitution.pdf), articles 18, 19, 21, and 23. Notably, the Health Assembly is empowered to "consider" recommendations bearing on health made by the UN General Assembly, ECOSOC, the Security Council, or the Trusteeship Council and report to these bodies the steps taken by WHO to "give effect to such recommendations." WHO Constitution, article 18(i). The Health Assembly also has the power to "take any other appropriate action to further the objective of the organization." WHO Constitution, article 18 (m). WHO regulations bind WHO members unless they "opt out" by communicating their rejection or reservations. Article 22, WHO Constitution. For descriptions of WHO standard-setting, see Sands and Klein, *supra* note 2, at 282; Yves Beigbeder, *The World Health Organization* at 71–85 (The Hague: M. Nijhoff, 1998).

[9] WMO Convention, 77 UNTS 143 (entered into force March 23, 1950), articles 7(a) (power of Congress to determine general regulations "prescribing the constitutions and the functions of the various bodies of the Organization"), 7(d) (power of Congress to adopt "technical regulations covering meteorological practices and procedures"), 7(f) (power of Congress to make "recommendations" on matters "within the purposes of the organization"), 14(b) (power of executive committee of the Congress to adopt resolutions on "matters of urgency affecting the technical regulations"), 14(d) (power of executive committee of Congress to make recommendations "on any matter affecting international meteorology and the operation of meteorological services"). Members who find it "impracticable" to give effect to technical resolutions adopted by the WMO Congress need only inform the WMO Secretary-General of this, indicating whether this inability is provisional or final and indicating the reasons. WMO Convention, article 8(b). The WMO's Congress is also authorized to "take any other appropriate action to further the purposes of the Organization." WMO Convention, article 7(l). For a general description of the WMO, see Sands and Klein, *supra* note 2, at 282–3.

[10] Article 19, ILO Constitution, 15 UNTS 35 (adopted October 9, 1946)(as amended)(for a current version, see www.ilo.org/public/english/about/iloconst.htm). Under this provision, ILO members undertake, within a set period, to bring such conventions and recommendations to the attention of relevant national authorities "for the enactment of legislation or other action," to inform the ILO's Director-General of any measures taken, and to report at appropriate intervals as requested by the ILO's Governing Body as to their continuing action or inaction. Article 19(5) and (6), ILO Constitution. *See* Kirgis, *supra* note 6, at 276–95.

[11] Article 7(2)(i), WIPO Convention, 828 UNTS 3 (entered into force April 26, 1970)(for a current version, see www.wipo.int/clea/docs/en/wo/wo029en.htm). Sands and Klein, *supra* note 2, at 109.

[12] Article 22, UPU Constitution, 611 UNTS 7 (entered into force January 1, 1966)(as amended)(for a current version, see www.upu.int/acts/en/1_constitution_en.pdf). Sands and Klein, *supra* note 2, at 105–6. The General Regulations applying the UPU's Constitution, along with Universal Postal Convention, require the ratification of states to come into effect. The detailed regulations, drawn up by the Postal Operations Council, which apply the postal conventions, do not require states to ratify. *See* Commentary, article 22, UPU Constitution.

matters),[13] the UN Industrial Development Organization (UNIDO) (whose Conference is vested with the power to conclude agreements and issue recommendations),[14] the IMO (whose Assembly and Council are authorized to make recommendations to members, including with respect to adopting regulations, guidelines, and relevant treaties),[15] the FAO (whose Conference can make recommendations by two-thirds vote and whose Council is authorized to take

[13] Constitution of the International Telecommunications Union, 104 UNTS 19 (entered into force July 1, 1994)(for a current version see http//:www.itu.int/aboutitu/basic-texts/constitution.html) (hereinafter "ITU Constitution") articles 13 (power of world radiocommunication conferences, convened every two years, to revise in whole or in part the Radio Regulations), 14 (power of radio Regulations Board to issue rules of procedure to register frequency assignments made by members), 18 and 25 (power of world telecommunications conferences, convened every four years, to revise in whole or in part the International Telecommunication Regulations), 54 (power of competent world conferences to revise in whole or in part the Administrative Regulations included as part of the ITU Constitution). ITU members have thirty-six months from the date of provisional application of any revised administra-tive regulations to notify the organization should they not wish to be bound; if no notification is received within that time period, members are deemed bound. ITU Constitution, article 54(5) and (6). *See also* Convention of the International Telecommunications Union, 104 UNTS 89 (entered into force July 1, 1994)(text available at www.itu.int/aboutitu/basic-texts/index.html), article 7 (authorizing revision of Radio Regulations), 10 (authorizing Radio Regulations Board to issue recommendations in response to investigations of harmful interference); Sands and Klein, *supra* note 2, at 108–10.

[14] Constitution of the United Nations Industrial Development Organization, 1401 UNTS 3 (entered into force June 21, 1985)(for a current version, see http://www.unido.org/userfiles/KayalarJ/Constitution.pdf), article 8(d),(e), and (f)(authorizing the General Conference to adopt, by two-thirds vote, conventions and make recommendations to members concerning such conventions; permitting that body to make recommendations to members and international organizations with respect to "matters within the competence of the organization;" and enabling that body to "take any other appropriate action to enable the Organization to further its objectives and carry out its functions"), 9(b), (d), and (h) (authorizing the Industrial Development Board, consisting of fifty-three members elected by the Conference, to recommend scale of assessments for regular budget expenditures, to request information from members, and to "undertake such other functions as may be required to further the objectives of the Organization subject to the limitations stipulated in this Constitution"). *See also* Sands and Klein, *supra* note 2, at 111.

[15] Convention on the International Maritime Organization (formerly IMCO), 289 UNTS 48 (entered into force March 17, 1958)(for a current version, see Convention on the IMO, available through subscription or purchase at http://www.imo.org/home.html), article 2 (providing that the functions of the organization are "consultative and advisory"), 3 (general authority for making recommendations and for the drafting of conventions), 4 (general authority for making recommendations for settling disputes capable of being settled through the "normal processes of international shipping business" and enabling the organization to "consider" matters involving unfair restrictive practices by shipping concerns not capable of being settled through such normal processes), 16 (authorizing the Assembly and the Council to deal with recommendations made by members and recommendations for the drafting of treaties; authorizing the Assembly to recommend to members for adoption regulations and guidelines concerning maritime safety and prevention and control of marine pollution from ships; authorizing the Assembly to take decisions as to the convening of treaty-making conferences), 22 (authorizing the Council, composed of twenty-four members elected by the Assembly, to transmit reports and recommendations made by the IMO's Maritime Safety, Legal, and Marine Environment Protection committees); see also articles 30, 35, and 39–40 (concerning the powers of these respective committees to propose recommendations, guidelines, or conventions within their mandates), 16(l) (barring the GA from delegating its authority to recommend the adoption of regulations and guidelines). *See* Sands and Klein, *supra* note 2, at 102–5.

"decisions" by majority vote),[16] and the United Nations Educational, Scientific, and Cultural Organization (UNESCO) (whose General Conference is authorized to take certain decisions and adopt conventions and recommendations to be submitted to members).[17]

By contrast, the institutions comprising the World Bank group—the International Bank for Reconstruction and Development (IBRD), the International Finance Corporation (IFC), the International Development Association (IDA), and the Multilateral Investment Guarantee Agency (MIGA)—are at least on the face of their charters, operational agencies concerned with accomplishing set tasks, such as facilitating loans to governments and foreign investments by private industry or, in the case of the World Bank's International Center for the Settlement of Investment Disputes (ICSID), facilitating investor-state dispute settlement. These organizations are not authorized to be, even within the area of international economic law, normative standard-setters as such and are expressly barred from interfering in the "political affairs" of member states.[18] While the Board of Governors of the World Bank is empowered to "adopt such rules and

[16] Constitution of the Food and Agriculture Organization of the United Nations, TIAS 1554 (entered into force October 16, 1945)(text available at http://www.fao.org/DOCREP/003/x8700E/x8700e01.htm) Article IV(3) (authorizing Conference by two-thirds vote majority of the votes cast, to make recommendations "concerning questions relating to food and agriculture" to be considered by members "with a view to implementation by national action"), IV(4) (authorizing the Conference to make recommendations to any international organization regarding matters "pertaining to the purpose of the Organization"), V(3) (permitting the Council to have such powers as the Conference may delegate to it (but indicating certain limits on these)) V(5) (authorizing decisions of the Council taken by majority of votes cast). *See also* Sands and Klein, *supra* note 2, at 84–5.

[17] Constitution of the United Nations Educational, Scientific, and Cultural Organization, 4 UNTS 275 (entered into force November 4, 1946)(for a current version, see http://unescdoc.unesco.org/images/0013/001337/133729e.pdf)(hereinafter"UNESCO Constitution") articles IV B.(2) (permitting the General Conference to take decisions on programmes submitted to it by the Executive Board), IV B.(4) (permitting the General Conference to adopt, by majority vote, recommendations, and by two-thirds vote, international conventions), V B. (B) (authorizing the Executive Board, consisting of fifty-eight members elected by the General Conference, to execute the program adopted by the Conference in accordance with its decisions, and permitting that Board to "take all necessary measures to ensure the effective and rational execution of the programme"). UNESCO members are obligated to submit recommendations and conventions to their respective competent authorities within one year from the close of the session in which these are adopted. In addition, the General Conference is authorized to receive and consider reports by members "on the action taken upon the recommendations and conventions and if it so decides," can prepare "analytical summaries of these reports." UNESCO Constitution, article IV B. (4) and (6). *See* Sands and Klein, *supra* note 2, at 95–6.

[18] *See*, *e.g.*, article IV, section 10 of the Articles of Agreement of the International Bank for Reconstruction and Development, 2 UNTS 134 (entered into force December 27, 1945)(as amended) (for a current version, see http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20049557~menuPK:63000601~pagePK:34542~piPK:36600~theSitePK:29708,00.html (hereinafter "IBRD Articles of Agreement")) ("The Bank and its officers shall not interfere in the political affairs of any member . . . Only economic considerations shall be relevant to their decisions . . ."). To this extent, the charters for the international financial organizations contrast sharply with the mandate specifically accorded to the European Bank for Reconstruction and Development (established in 1990). *See* John W. Head, "Supranational Law: How the Move Toward

regulations as may be necessary or appropriate to conduct the business of the Bank," such standard-setting authority is primarily if not exclusively directed at governing the activities of those who work for the bank and need to follow particular loan policies.[19] For its part, the International Monetary Fund (IMF) was mandated to help states maintain a fixed but adjustable "par value" system of exchange rates; with the collapse of that system (essentially a variation of the "gold standard") in 1971, the IMF has focused on its second purpose, to lend money to members to help them deal with temporary balance of payments deficits in a manner that would not be "destructive of national and international prosperity."[20]

Some autonomous IOs, outside the UN, that aspire to universal participation and that have achieved considerable participation from all regions of the world also have, under their respective charters, powers to adopt some binding decisions (particularly dealing with "internal" matters such as the creation of subsidiary organs, rules of procedure, and budgeting), binding interpretations of their charters or other treaty instruments adopted under their auspices, and non-binding recommendations. The WTO's Ministerial Conference, which meets at least every two years and consists of every member of the organization is authorized under the Marrakesh Agreement Establishing the WTO to take "decisions" (article III:2, article IV:1), adopt "amendments" to the GATT covered agreement (article X), or issue "interpretations" (article IX:2) of the various multilateral trade agreements under its domain.[21] WTO interpretations are based on recommendations made by each of the three Councils responsible for Annex I agreements (namely, the Council for Trade in Goods, Trade in Services, or for Trade-Related Aspects of Intellectual Property Rights) and require an affirmative vote from three-quarters of the overall WTO membership, although they are commonly based on consensus.[22] In addition, the Ministerial Conference is authorized to waive obligations normally required of WTO members following a comparable procedure.[23]

Multilateral Solutions is Changing the Character of 'International' Law," 42 *U. Kan. L. Rev.* 605 (1994). The preamble to the European Bank's charter announces the parties' commitments to the "fundamental principles of multiparty democracy, the rule of law, respect for human rights and market economics." Quoted in *id.*, at 637. Head contends that the Bank is unique as an IO "established to promote a particular form of government and a particular economic system, and to undertake economic development in an environmental prudent way." *Id.,* at 641.

[19] Article V, section 2, IBRD Articles of Agreement, *supra* note 18. Sands and Klein, *supra* note 2, at 88.

[20] Article I(v), IMF Articles of Agreement, 2 UNTS 39 (entered into force December 27, 1945). *See generally* Daniel Kalderimis, "IMF Conditionality as Investment Regulation: A Theoretical Analysis," 13 *Social & Leg. Stud.* 103 (2004).

[21] *See* Steve Charnovitz, "The Legal Status of the Doha Declarations," 5 *J. Int'l Econ. L.* 207 (2002).

[22] Article IX(1) and (2), Uruguay Round Marrakesh Agreement Establishing the WTO (text available at http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm), April 15, 1994. *See* John H. Jackson et al., *Legal Problems of International Economic Relations* at 223–5 (St. Paul, MN: West, 2002).

[23] Article IX(3), Uruguay Round Agreement Establishing the WTO, *supra* note 22.

Apart from the formidable powers conferred on European Community institutions, which will not be addressed here, some regional organizations have, at least on the face of their charters, a greater degree of standard-setting powers than those universalistic IOs that are the focus of this book. Indeed, the institutions established for the African Union (AU), the African Economic Community (AEC), and the Economic Community of West African States (ECOWAS) resemble, structurally, the internal organs of European Community institutions, share the range of objectives associated with European Community institutions, and, on paper at least, are given considerable legal authority vis-à-vis their members.[24] Thus, the Treaty establishing the AEC envisions not only the traditional tripartite division among IO bodies (Assembly-Council-Secretariat) but also a Pan-African Parliament, an Economic and Social Commission, a Court of Justice, and a set of specialized technical committees that resemble the executive departments of national governments.[25] That treaty gives its Assembly the power to take, by consensus or two-thirds majority vote, "decisions" that are to be "automatically enforceable" thirty days after promulgation, as well as issue "directives;" authorizes its Council to act by binding regulations (subject to the same voting requirements and enforcement provisions as the Assembly's decisions), to make recommendations, and to request advisory opinions; and empowers its Secretary-General to, among other things, "ensure the implementation of the decisions of the Assembly."[26] The treaty provisions establishing these African institutions anticipate international organizations charged with discharging the kinds of plenary executive, legislative, and even judicial powers once associated exclusively with national governments.[27]

[24] *See*, *e.g.*, the Constitutive Act of African Union (entered into force May 26, 2001)(see also www.africa-union.org/About_AU/AbConstitutive_Act.htm), article 4 (establishing the formidable economic, social, and cultural objectives of the organization, including the intention to create a "common market").

[25] Treaty Establishing the African Economic Community, 30 *ILM* 1245 (1991) (entered into force May 12, 1994) (hereinafter "AEC Treaty") article 7 (delineating the organs of the community) and 25 (delineating the "specialized technical committees"). *See also* The Constitutive Act of the African Union, *supra* note 24, article 5 (delineating its organs to be an Assembly, an Executive Council, a Pan-African Parliament, a Court of Justice, the Commission, the Permanent Representatives Committee, Specialized Technical Committees, the Economic, Social and Cultural Council, and the financial institutions); Treaty of the Economic Community of West African States (ECOWAS), 535 UNTS 287 (entered into force June 20, 1975)(see www.sec.ecowas.int/sitecedeao/english/stat-1.htm), article 6 (delineating its institutions to be the Authority of Heads of State and Government, the Council of Ministers, the Community Parliament, the Economic and Social Council, the Community Court of Justice, the Executive Secretariat, the Fund for Co-operation, Compensation and Development, Specialized Technical Commissions, and "any other institutions that may be established by the Authority").

[26] AEC Treaty, *supra* note 25, articles 8(h), 10, 11, 13, 16, and 22.

[27] The AEC's Court of Justice is accorded the kind of compulsory jurisdiction over Community acts accorded to the European Court of Justice but denied to the ICJ. Under article 18 of the AEC Treaty, that Court "shall ensure the adherence to law in the interpretation and application of this treaty" and can "decide on actions brought by a Member State or the Assembly on grounds of the violation of the provisions of this Treaty, or of a decision or a regulation or on grounds of lack of competence or abuse of powers by an organ, an authority or a Member State." In addition, the Assembly is authorized to "confer on the Court of Justice the power to assume jurisdiction by virtue of this Treaty" over other disputes. AEC Treaty, article 18(2), (3)(a), and (4). *See also* Sands and Klein, *supra* note 2, at 243–50.

Older regional organizations, such as the Organization of American States (OAS) and the Organization for Economic Cooperation and Development (OECD), do not evince, on the face of their respective charters, the same grand ambitions as these African institutions, designed to create a "common market" among their members. Nonetheless, the OAS Charter permits its institutional organs to make recommendations, present drafts of international instruments, and engage in various forms of dispute settlement comparable to what is authorized under Chapter VI of the UN Charter.[28] The Council of the OECD, which comprises all of its 29 members, has the power to take both binding decisions and hortatory recommendations, but decisions must be based on a unanimous vote (although members are permitted to abstain, without precluding decisions from being adopted and becoming binding on other members).[29] And even the North American Free Trade Agreement (NAFTA), an arrangement that generally avoids establishing the permanent institutions and secretariats characteristic of formal international organizations, permits the three NAFTA parties, when acting together, to issue authoritative interpretations of their treaty that will be binding on certain NAFTA dispute settlers.[30]

It is notable what this survey of charter provisions (and welter of acronyms) leaves out: some regions of the world, notably parts of Africa and much of Asia, and certain pockets of international regulation, such as international environmental law, lack their fair share of institutional acronyms. Indeed, Sands and Klein's description of IOs in Asia, depicting the limited normative roles of the Association of South East Asian Nations (ASEAN), the South Asian Association for Regional Cooperation, Asia-Economic Cooperation (APEC), the South Pacific Forum, and the Anzus Council, covers a scant nine pages, hardly surprising since these IOs' normative outputs has been relatively low.[31] And, despite oft-repeated calls for a global environmental organization and a rising number of

[28] Charter of the Organization of American States, 119 UNTS 3 (signed April 30, 1948)(as amended)(for a current version, see www.oas.org/juridico/english/charter.html), articles 54, 70–7, 85–91, and 95. *See* Sands and Klein, *supra* note 2, at 205–14.

[29] Convention on the Organisation for Economic Co-operation and Development, 888 UNTS 179 (entered into force September 30, 1961)(see also www.oecd.org) articles 5–6 (permitting the Council, on which all members sit, to take binding decisions or make recommendations). Article 6(1) provides that "unless the organisation otherwise agrees unanimously for special cases, decisions shall be taken and recommendations shall be made by mutual agreement of all the Members." It also provides, however, that no decision shall be binding on any member "until it has complied with the requirements of its own constitutional procedures." OECD Convention, article 6(3). *See also* Sands and Klein, *supra* note 2, at 168.

[30] North American Free Trade Agreement, 32 *ILM* 605 (1993)(entered into force January 1, 1994)(text available online at http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx? DetailID=78), articles 1131–2, and 2001.

[31] Sands and Klein, *supra* note 2, at 227–36. *See also* Anne-Marie Slaughter, *A New World Order*, at 141 (Princeton, NJ: Princeton University Press, 2004) (describing APEC as an institutionalized transgovernmental bureaucracy characterized by informality). For a description of APEC's attempts to engage with environmental standards, see Lyuba Zarsky, "Environmental Norms in the Asia-Pacific Economic Cooperation Forum," in Dinah Shelton, ed., *Commitment and Compliance* 303 (Oxford, U.K.: Oxford University Press, 2000).

multinational environmental agreements (MEAs) dealing with the global commons, most of these MEAs resist formal institutionalization, at least if the term implies establishing international organizations as lawyers usually understand them, namely, permanent bodies with (a usually tripartite) division among a plenary representative assembly, a council of more limited membership, and a permanent secretariat of independent civil servants devoted exclusively to the particular organization.[32]

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This brief survey of charter provisions suggests some generalizations about IOs that aspire to global participation. If one defines real legislation or law-making as requiring the power (1) to take binding action backed by at least the possibility of real coercive enforcement; (2) affecting all relevant actors (including all states as well as any non-state actors that need to be reached for purposes of effective enforcement); and (3) capable of repeated application across time in comparable instances, it would seem that IO legislation does not exist.[33] This has certainly been the view of many who have imported this Austinian view of law to the international realm and emerged empty-handed.[34] Since IOs are never given explicit power to adopt resolutions and decisions regarding the behavior of *all* states (and not just members) and since they are rarely accorded options to coercively enforce any of the rules that they adopt, it follows that international institutional law, and naturally global governance, does not exist.

[32] *See generally* Robin R. Churchill and Geir Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law," 94 *AJIL* 623 (2000); Sands and Klein, *supra* note 2, at 121–8. Academics have sought to explain the absence of an "organizational frenzy" in some geographical regions and legal specialities. *See*, *e.g.,* Sands and Klein, *supra* note 2, at 251–4 (discussing North Africa); Miles Kahler, "Legalization as Strategy: The Asia-Pacific Case," 54 *IO* 549 (2000)(describing the "ASEAN way" as institutionalization without legalization).

[33] *Compare* Kirgis, *supra* note 6, at 275 (quoting E. Yemin's definition of "legislative acts" as embracing three essential characteristics: they are unilateral in form, create or modify some element of a legal norm, and the legal norm is directed to "indeterminate addressees and capable of repeated application in time"). Kirgis notes that if this is intended to limit the term to rules designed to govern conduct "through mandatory language, with express, meaningful sanctions enforceable by a duly constituted enforcement agency," it is a "rare phenomenon in international organizations, and in international law generally." *Id.*

[34] *See, e.g.*, Lori Fisler Damrosch et al., *International Law* at 16–19 (St. Paul, MN: West, 2001) (summarizing familiar debates between John Austin and H.L. Hart over the legal status of international law). For similar reasons, Bernhardt concludes that international legislation does not exist. Rudolf Bernhardt, "International Organizations, Internal Law and Rules," in 2 *Encyclopedia of Public International Law* at 1314 (Amsterdam and New York: North-Holland, 1992–2003). *See also* G.M. Danilenko, *Law-Making in the International Community* at 7 (Dordrecht: Martinus Nijhoff Publishers, 1993)("the term 'legislation' is much more appropriate in relation to some exceptional situations in which international organizations have been given powers to enact certain rules, in particular technical regulations, by less than unanimous consent with an immediate binding effect upon all their members. However, even in these cases 'legislation' remains only a fanciful description of rule-creating processes which ultimately are still based on the consent of sovereign states") (footnotes omitted).

For reasons of self-interest, if nothing else, most public international lawyers have resisted this conclusion since, under such a standard, public international law itself would not exist. In accordance with widely shared views of public international law, lawyers have relaxed the pre-conditions for treating the product of what IOs produce as some species of "law." International institutional law is more commonly seen as a legitimate sub-species within international law consisting of the rules produced by IO organs pursuant to authority specifically granted in their respective institutional charters. It also includes other forms of "secondary" legislation not based on specific treaty powers conferred but that are "reasonably necessary" to permit the organization and its officials to act efficiently.[35]

Yet, as noted in Chapter 1, lawyers' accounts of IO law-making tend to remain firmly entrenched in the positivistic doctrine of sources, which, for most, continue to define the field of public international law.[36] This is so, even though article 38 of the Statute of the ICJ, in which these sources are enshrined and defined, was, by its own terms, intended only to instruct international judges as to what sources to consult for purposes of settling disputes before them and not as defining for all time the entire scope of legitimate sources of international legal obligation.[37] Worship of the article 38 totem explains the debates, common among scholars writing in the immediate wake of the establishment of IOs in the mid-20th century, about whether the "internal" law promulgated by IOs was public international law at all. Some of those willing to concede that the growing number of such internal rules, which no one denied governed the actions of states *inter se* as well as the behavior of their institutionalized agents, were some species of public law, did so only on the condition that these rules of procedure and process were categorized as belonging to a legal order *sui generis* and not part of public international law properly understood.[38] After all, they reasoned, such institutional rules were not mentioned in article 38 sources. But if such debates now appear quaint or irrelevant, are contemporary descriptions of how IOs engage in law-making better in accurately describing their normative impact on states and other actors?

[35] Bernhardt, *supra* note 34, at 143.

[36] Indeed, at the end of a book devoted to the diverse characteristics of international soft law, its editor stated that these norms "become international law only when they emerge in customary international law or are incorporated into a treaty." Dinah Shelton, "Editor's Concluding Note," in Shelton, *supra* note 31, at 554.

[37] *See*, *e.g.,* Onuma Yasuaki, "The ICJ: An Emperor Without Clothes? International Conflict Resolution, Article 38 of the ICJ Statute and the Sources of International Law," in Nisuke Ando et al., eds., Vol. 1 *Liber Amicorum Judge Shigeru Oda*, 191, at 195–203 (The Hague: Kluwer, 2002)(arguing that the "norms of adjudication" contained in article 38 should not be regarded as definitive norms of conduct for an international society that lacks a court with compulsory jurisdiction). He is correct that article 38 of the Statute of the Court, by its terms, states merely: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . .," thereby enumerating its familiar list of sources. There is no small irony that strict positivists, usually among those most wedded to reading treaty texts strictly under the plain meaning rule, should have given such an expansive, teleological meaning to article 38's instruction to the judges of the ICJ.

[38] *See, e.g.*, Bernhardt, *supra* note 34, at 144 (describing the views of Balladore Pallieri and Herbert Miehsler).

One might draw from the above survey of charter provisions three admittedly stylized, general propositions.

• First, that all law-making powers of IOs, and of organs within them, are derived from treaty and that, therefore, any effects felt by states result from a species of treaty obligation. This means that IO charters, as well as any law that IOs produce, remain subject to the ordinary rules applicable to all treaties and are based on states' consent. IO-generated law is subject to the customary rules of interpretation now codified in the Vienna Convention on the Law of Treaties as well as the other established rules for formulating reservations or amendment. It means that IO law remains subject to the familiar treaty rules governing invalidity, termination, and suspension of treaty obligations. This assumes as well that, since IO law-making is derived from the same consensual basis as are all treaties, standard canons of interpretation remain applicable, such as the *in dubio mitius* principle (that is, one should not assume that states have ceded sovereign powers unless this fact is evident from the text of the treaties that purport to cede such powers).

The treaty basis for organizational powers also suggests other inherent limitations on their legal impact. Since treaties, including organizational charters, cannot bind non-parties, IO law-making, binding or not, can only have normative effects with respect to members of the particular organizations in question.[39] Given the limitations of the positivist sources of international law, there is no such thing as "general" international law promulgated by IOs as such. All that IOs can produce are regime-specific rules or standards limited in terms of subject matter and effect. Since IO law-making essentially derives from the law-making powers of the only entities with plenary powers to make international law, namely states, IOs can only legally affect those states that delegated powers to them. IOs are only the agents of the states that establish them or that later choose to become members. It follows that those states or regions and those areas of the law that have not been the subject of such delegations—such as parts of Africa and international environmental law—also lack international institutional law.

• Secondly, that the differentiated powers of IOs is based on the enumerated powers explicitly given to each of these bodies under the respective IO charters. This also means that joint efforts by two or more institutional organs or by more than one IO to engage in law-making should also have a basis in treaty, as through explicit charter provisions authorizing collaboration (as the UN Charter does when it authorizes, indeed requires, both the GA and the Security Council to act on issues of membership, suspension, and expulsion, and through its provisions permitting relationship agreements with UN specialized agencies).[40] The requirement that IO

[39] *See, e.g.*, article 34, Vienna Convention on the Law of Treaties ("A treaty does not create either obligations or rights for a third State without its consent").

[40] *See* Articles 4–6, 63 UN Charter. *See also Competence of the General Assembly for the Admission of a State to the United Nations*, 1950 ICJ Rep. 4.

powers be enumerated means also that the legal effects of authorized IO action needs to be specified as well, such that it is clear whether organs are authorized to promulgate merely hortatory recommendations as opposed to legally binding decisions (as the UN Charter does between its Chapters VI and VII and in delineating the GA's and Council's respective powers).

This essential distinction respects the limits of state delegation contained in IO charters and is implied by the positivist list of sources, which does not recognize a category of "obligation" other than those which are legally binding. Since "soft law"—of the institutional or non-institutional kind—is not listed in article 38 sources, non-binding actions taken by IOs, even when permitted by their charters, should be of little or no concern to lawyers. A principal example of the distinction between hard and soft is suggested by the UN Charter's own recognition, in Article 13, of a difference between the progressive development of the law and its codification, or, in the Latin terms international lawyers love, between *lex ferenda* and *lex lata*.

• Thirdly, that the "external" rule-making capacities of these organizations, that is, powers to take substantive and binding actions on states, can be distinguished, in a practical way, from their powers to take actions within the "internal" sphere, and that this too is evident from institutional charters' delineations of the scope of relevant powers. The internal/external distinction is not merely useful descriptively but has an underlying substantive basis: namely, that while it can be assumed that the states that created such institutions intended to confer on their institutionalized agents a narrow range of internal rule-making powers reasonably necessary to the proper functioning of any organization, they cannot be presumed to have conferred "external" law-making powers. Such external law-making powers must be granted in an IO's constitutive instrument or must have some other explicit treaty basis since it cannot be assumed that states have ceded sovereign prerogatives to make law. The internal rules intended to ensure the smooth functioning of the organization itself include rules governing the international personality of the organization, the conditions of tenure of the secretariat, and the privileges and immunities of the organization, its agents, and representatives to it, as well as those procedural rules that the organization needs to fulfill its assigned functions.

A reading of the charters of IOs aspiring to universal membership, viewed in light of these three propositions, reveals that states have not, at least on the global level, ceded much of their external and general law-making powers. No global organization, not even the UN, has the capacity to engage in the plenary international law-making that the smallest or least powerful state on the planet has. No IO can make global law. Global governance, at least through IOs, appears to be a fiction.[41]

[41] As Paul Szasz indicates: "It is generally accepted that IGOs [intergovernmental organizations] in general, and those of the UN system in particular, do not have any inherent legislative authority; that is, they cannot create international norms that are directly binding on states generally or even just on their members—though they can take certain decisions binding on their members vis-à-vis the

As we shall see in the rest of this chapter, however, the three general propositions about international institutional law above, and the overall conclusion drawn from their application, are at best half-truths. In tackling these half-truths head-on, this chapter attempts to do more than demolish easy strawmen. The goal is to provide a less static description of IO law-making than is suggested by a comparative survey of IO charter provisions.

3.2 The "External" Ripples of "Internal" Law

The two most frequently cited examples of classic internal IO powers are the budgetary powers ceded to such organizations and the legal personality they enjoy. It is hard to find rules more intrinsic to the internal operation of IOs. The legal mind, as is suggested by the *Reparation for Injuries case* discussed below, has had considerable difficulty imagining an entity that operates legally on the world stage, as by making treaties or settling claims, that is not, to some extent, a legal person. Similarly, the rules that IOs have devised with respect to their financing have long been seen as essential to their smooth operation since an organization that needs to rely on voluntary handouts from its members and cannot determine its own budget is handicapped from the start.[42] In this section we re-examine the nature and operation of such rules in the context where they have been most developed, the UN, to see how well these examples of internal institutional law comport with the three general propositions at the end of Section 3.1.

3.2.1 The Assembly's Purse-strings Power

The development of the GA's power over the financing of the Organization shows why it would be wrong to relegate this power, one of the few specific powers accorded to the Assembly, to the purely internal sphere. Article 17(1) and (2) of the UN Charter, which simply instructs the GA to "consider and approve the budget" and indicates that the "expenses of the Organization shall be borne by the Members as apportioned by the General Assembly," are not models of clarity. While the Charter drafters intended to correct the budgetary dilemmas of the League of Nations by clearly allocating to the UN's plenary body the power over the budget, they left much for later resolution. Nothing in Article 17 or elsewhere in the Charter indicates what the scope of this grant of authority is or whether the GA needs to consult with other organs, such as the Security Council,

organization (e.g., the assessment of contributions)." Paul Szasz, "General Law-Making Processes," in Christopher C. Joyner, ed., *The United Nations and International Law* 27, at 58 (Washington DC: ASIL, and Cambridge, U.K.: Cambridge University Press, 1997).

[42] *See, e.g.*, Bernhardt, *supra* note 34. Indeed, Sands and Klein cite, as the principal example of authority to generate internal "secondary legislation," Article 17 of the UN Charter authorizing the General Assembly to approve the budget of the organization. Sands and Klein, *supra* note 2, at 280.

when it seeks to include expenses from that organ's operations in the regular budget. Article 17 does not indicate how the expenses of the UN should be apportioned or whether the GA enjoys total discretion to determine a formula. It does not state whether the GA can bind members to pay or whether members retain any discretion to refuse to pay if they deem an expense either unwise or illegal. Article 17 does not really tell us who ultimately holds the purse-strings for the Organization.

A full account of how these issues have been resolved, told elsewhere, is not required here, but a few highlights from that history illuminate the concerns of this chapter.[43] Since nothing in the Charter determined the scale of assessments, one of the first decisions for the GA was to determine a viable formula. It opted for a complex "capacity to pay" formula, along with minimum and maximum assessment levels that put a substantial burden on states with high gross domestic product, in particular the U.S. Members eventually acquiesced in this approach. Despite the occasional controversies emerging from the GA's determinations, its scale for assessments have been adopted by many other UN system organizations, providing a small example of the "extra-territorial" effect of the GA's budgetary decisions. But while the formula has remained relatively intact over the years, its application, and its upper and lower ranges, have periodically led to highly visible disputes. These have sometimes set the GA, and its Committee on Contributions, against prominent state actors, including the U.S. Congress.[44]

Questions regarding the scope of the GA's discretion to include certain expenses and the legal import of its decisions have proven harder to resolve and have only emerged in the wake of budgetary crises. Such a crisis emerged in 1962, when a number of members, including France and the Soviet Union, challenged the GA's power to include as part of the UN's regular budget certain expenses incurred for peacekeeping missions. Unable to resolve the dispute itself, the GA opted to request the ICJ for an Advisory Opinion. The ICJ majority opinion in the *Certain Expenses case* essentially affirmed the legally binding nature of GA budgetary resolutions. The Court affirmed both the GA's power to determine what expenses to include and its power to require payment, at least through the application of Article 19 permitting the GA to deny a vote to those who have failed to pay their contributions "for the preceding two full years."

Deploying techniques of Charter interpretation described in Chapter 2, the majority of the Court's judges rejected the French and Soviet objections to peacekeeping expenses, as well as their more general arguments with respect to the meaning of Article 17. While the Court refused to define "expenses of the organization," the Court rejected the proposition, advanced by France, that the only

[43] For a detailed account of these struggles in the early days of the UN, see J. Stroessinger, *Financing the United Nations System* (Washington DC: Brookings, 1967). For more contemporary accounts, including a survey of U.S. withholdings of its UN dues beginning in the mid-1980s, see *supra* note 43, José E. Alvarez, "Legal Remedies and the United Nations á la Carte Problem," 12 *Mich. J. Int'l L.* 229 (1991).

[44] *See generally* Stroessinger, and Alvarez, *supra* note 43.

expenses that the GA could include in its assessments were internal, that is, "administrative" expenses. It also rejected Soviet arguments that since peacekeeping was premised on special agreements concluded between the Security Council and particular members and that since GA resolutions were generally only hortatory, the GA was precluded from taking legally binding actions with respect to "external" expenses. The Court did not find the GA's discretion to be unlimited. Instead, it based its conclusion on a presumption of validity for the GA's actions while (softly) endorsing the possibility that some organizational acts might indeed constitute *ultra vires* action, without indicating what the consequences of *ultra vires* budgetary decisions by the GA might be.[45]

The Court's Advisory Opinion did not immediately resolve the specific debates over the contentious peacekeeping expenses at issue. Indeed, the subsequent GA session operated without taking a vote, given the controversy over applying the Article 19 loss of vote sanction immediately to those who continued to refuse to pay despite the Court's views. Yet over time, the combination of GA determination/ICJ opinion/eventual member acquiescence/subsequent institutional practice led to a now fairly settled interpretation of the Charter to the effect that the GA did indeed have final authority to assess members for expenses incurred and that such expenses could include non-administrative costs, including for operational activities such as peacekeeping.[46] But the 1962 controversy over peacekeeping expenses left open the possibility that the GA might take budgetary action that was unlawful, even though no one knew what legal remedies, if any, were available to states in such cases.

These latter issues emerged in the wake of subsequent financing disputes, most prominently those triggered by U.S. withholdings of its dues beginning in the mid-1980s that purported to target UN activities that the United States argued were *ultra vires*. The expenses in question included UN programs that benefited the Palestine Liberation Organization (PLO), the South West African Peoples' Organization (SWAPO), the Decade to Combat Racism and Racial Discrimination, and the Law of the Sea Preparatory Commission.[47] Attempts to justify the U.S. or others' attempts to withhold these or other UN assessments raised significant questions as to the relevant basis for members' duty to pay under Article 17, and indirectly the basis for much of international institutional law.

In the course of these disputes and academic commentary in their wake, it emerged that members' duty to pay (or right to withhold) might be seen from at

[45] Thus the Court noted that:

> [the Charter] purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action. But when the Organization takes action which warrants the assertain that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization.

Certain Expenses of the United Nations, Advisory Opinion, 1962 ICJ Rep. 149, at 168 (hereinafter "*Certain Expenses case*").

[46] Indeed, assessments for such expenses are now subject to a special formula. *See* José E. Alvarez, "Financial Responsibility of Members," in Joyner, ed., *supra* note 41, 409, at 417 and n. 52.

[47] *See* Alvarez, *supra* note 43.

least three distinct perspectives. First, the questions might be answered by turning to the law of treaties such that an *ultra vires* act by the Organization could be regarded as analogous to some of the preconditions that trigger the suspension or termination of treaty obligations under the Vienna Convention on the Law of Treaties, such as an unforeseen and fundamental change of circumstances or a material breach, either of which would permit at least those specially affected to suspend their corresponding treaty duties. Alternatively, answers might be sought by applying the doctrine of state responsibility. In that case, withholding payment for *ultra vires* actions might be regarded as a form of non-forcible countermeasure as against an illegal action by an international legal person. A third possibility would be to acknowledge that these are novel questions that can only be dealt with under new principles of international institutional law as a *sui generis* species of public international law. On this view, both the duty to pay and the possible right to withhold are dependent on the practice of the Organization, including any tolerance developed over time by its organs or by the membership demonstrating acquiescence in (principled?) failures to pay.[48]

At the same time, the withholdings of regular expenses by the U.S. and by others, which led to periodic budgetary crises for the UN, prompted reconsideration of the scope of the UN's remedies vis-à-vis defaulting members. Those who believed that the only remedy anticipated in the Charter—a loss of voting privileges in the GA once a member was in arrears for two years—was ineffectual, argued that the Article 19 sanction did not constitute a "self-contained" regime. They contended that the Organization had other legal remedies at its disposal, comparable to those that other international legal persons enjoy when they have been the victim of a treaty breach. Proposals emerged to permit the GA to charge interest on arrears, assess user fees or suspend organizational services to defaulting states, set off sums that the Organization would otherwise owe to defaulting members, or even bring enforcement actions for payment in local courts.[49] While the Organization did not resort to any of these measures, it took more modest steps to protect its financial base and to supplement the Article 19 remedy for failure to pay.

The UN's financial regulations, which permit the Organization to undertake revenue-producing activities, undertake internal audits, and stipulate a date certain for payment of assessed contributions, already constituted modest precedents for implied revenue-enhancing (or revenue-protecting) powers in addition to the Article 19 loss of vote sanction. In the late 1980s, in the midst of periodic budgetary crises caused in large part by members' failures to pay, the GA adopted a regulation, pursuant to its power to adopt resolutions governing the Headquarters District of the UN in New York under the U.S.–UN Headquarters Agreement, to limit the Organization's tortious liability (and therefore its insurance premiums). This bit of "territorial legislation"[50] implied that the Organization did indeed

[48] *See* Alvarez, *supra* note 46, at 420–3. [49] *Id.*, at 427.
[50] *See* Paul Szasz, "The United Nations Legislates to Limit Its Liability," 81 *AJIL* 739 (1987).

have some residual authority to protect its financial interests, even in ways not identified in the Charter. (The risk of perennial UN budget crises has been since reduced by the United States' payment of much of its accumulated UN arrears in the wake of 9/11.)

This abbreviated account of the UN's members' (still developing) duty to pay begins to suggest its wider normative ripples. The GA's fateful decision to include certain peacekeeping expenses affected internal institutional rules at some remove from narrow issues of financing. The ICJ's opinion in the *Certain Expenses case* and its subsequent acceptance by the Secretary-General and the membership confirmed what Article 17 had failed to state clearly: that payment of regular expenses of the Organization as determined by the GA was a legally binding treaty obligation.[51] But in coming to the aid of the GA, the ICJ did much more. Since one of the controverted peacekeeping missions had originally been authorized by the GA's novel Uniting for Peace Resolution, which purported to give the GA the power to recommend such peacekeeping missions when the Security Council proved unable to do so, and since the other peacekeeping mission under challenge had been continued as a result of the GA's action, the Court's conclusions affirmed the legality of these missions, and indirectly, of the underlying Uniting for Peace Resolution. The Court's finding that the GA did indeed hold the purse-strings incidentally provided a judicial imprimatur to considerable unenumerated powers for the GA.[52] That affirmation enlarged the GA's authority, vis-à-vis the Security Council, even with respect to matters of peace and security central to the Council's enumerated powers.[53]

In addition, in deciding that the GA could obligate UN members to pay for peacekeeping operations nowhere explicitly mentioned or authorized to any organ in the Charter, the ICJ also legitimated peacekeeping as consistent with the Charter, and did so in a way that helped to solidify the legal preconditions for these operations. In the *Certain Expenses case* the Court distinguished "peacekeeping," which it found could be authorized by the GA, from "enforcement action," which, under the Charter, appeared to be a power exclusively conferred on the Council. The Court found that peacekeeping missions required the consent of the territorial sovereign and could only use force in self-defense. The Court's opinion also affirmed the principle, first applied by the Court in the *Reparation for Injuries case* (to be discussed below), that the UN, and perhaps other IOs, have implied

[51] *Certain Expenses case*, *supra* note 45, at 162–7, 170–2, 175–7.

[52] *See* Sands and Klein, *supra* note 2, at 34–6 (discussing the GA's deployment of the Uniting for Peace Resolution to convene special sessions and attempt to put pressure on the Council to act). On occasion, the threat that the GA might recommend a peacekeeping mission appears to have deterred permanent members from exercising their veto to disapprove such missions. Paul Lewis, "China Lifts U.N. Veto on Guatemala Monitors," *New York Times*, January 21, 1997, p. A-8 (reporting China's reluctant approval of a mission to Guatemala purportedly because of such fears).

[53] *Cf.* Article 24(1), UN Charter (according "primary" responsibility over such matters to the Security Council).

powers to fulfill the purposes for which they were established and that organs for the collective, including the GA and the Court, have the power to decide the scope of these powers over the objection of dissenting members. In so doing the ICJ's decision on the scope of Article 17 further legitimated the teleological method of Charter interpretation described in Chapter 2, including a reluctance to resort to the *travaux* of the Charter to establish limits on Charter authority. The actions that followed the GA's resort to the Court, including the eventual (if slow) acceptance of the Court's opinion even by those who had most strongly resisted paying for peacekeeping, suggests broad acceptance by the membership of this teleological approach to the Charter.[54]

Far from being merely a clarification of members' internal housekeeping duties, the Court's Advisory Opinion in *Certain Expenses* and its aftermath was an incremental, but firm, step towards establishing the autonomous powers of the Assembly vis-à-vis the Council and the autonomy of the Organization vis-à-vis its members. For these reasons, this sequence of events is properly regarded as a fundamental building block in UN international institutional law, including the traditional law of peacekeeping.[55]

As this example suggests, under color of canons of interpretation such as the "principle of effectiveness" and the "presumption of legality," institutional acts dealing with "internal" matters may become vehicles for innovative law creation of much greater import. An implied power to charge members for one kind of "external" expense may subsequently be applied to other matters. International institutional law—including the day-to-day interpretation of a constitutive instrument with respect to procedural matters, determinations of legal personality and its consequences, and even assertions of privileges and immunities on behalf of the Organization or persons associated with it—can be a vehicle for external law-making.[56] From a common sense perspective, it is not difficult to see how the GA's de facto power to tax can produce external consequences. An organization's ability to decide what it charges to its members necessarily includes some ability to define the scope of the organization's operations. As the U.S. discovered when it tried to object, in 1978, against the practice of including forms of technical assistance within UN regular budgets, once the membership had acquiesced in

[54] As is further discussed in Chapter 2, *supra*.

[55] *See, e.g.,* Oscar Schachter, "The Relation of Law, Politics and Action in the United Nations," 1 *Recueil des Cours* 169, at 219–28 (1963). *See also The Blue Helmets: A Review of United Nations Peacekeeping*, UN Pub. No. E.90.I.18 (New York: United Nations, 3rd edn., 1996); Kirgis, *supra* note 6, at 716–830.

[56] *See, e.g.,* Ian Brownlie, *Principles of Public International Law* at 665 (New York and Oxford, U.K.: Oxford University Press, 6th edn., 2003):

> Organizations have considerable autonomy in making rules on internal matters such as procedure and the relations of the organization and its staff. Resolutions of organs of the United Nations on questions of procedure create internal law for members. However, questions of internal powers, for example concerning budgetary control, have a delicate relation to issues as to external ultra vires, if budgetary approval were given to sums allocated for operations under resolutions alleged to be ultra vires the Charter as a whole (citing the *Certain Expenses case*).

this practice of including external expenses as part of the "regular expenses of the organization," the precedent was hard to dislodge.[57]

The GA's efforts to exercise its power to tax, and some members' attempts to resist, demonstrate the dynamic between ostensibly internal legal matters and general principles of international law. As the financing debates illustrate, the establishment of IOs prompts new questions within general public international law and new ways to resolve them. As those who sought to justify the withholding of certain UN dues, or the Organization's efforts to respond, discovered, analogies to settled doctrines within the law of treaties go only so far when the treaty in question involves an IO. Established treaty doctrines, such as remedies upon material breach or change of circumstances, prove difficult to adapt to situations where one of the parties to the dispute (namely the Organization) is not a state or is not a party to the Vienna Convention on the Law of Treaties or even to the UN Charter itself. From the standpoint of the UN, it is not entirely clear whether a state that engages in a material breach (by failing to pay its dues unjustifiably) entitles the UN, as perhaps an interested third party, to any treaty remedy, or whether the defaulting states' failure to pay "injures" the other members of the Organization such that they are individually entitled to such a remedy.[58] And, even if this were the case, the presumptive remedy for material breach, namely suspension or termination, appears inappropriate in the context of the *erga omnes* obligations contained in the UN Charter.[59]

Nor is it clear how the traditional doctrine of state responsibility, if it is relevant at all, ought to apply to IOs, which are creators of states but not themselves states, even if they are a species of international legal person. (The ILC is only now beginning to consider the responsibilities of international organization in the wake of its completion of its work on state responsibility.)[60] The proposition that resolution of such questions relies on a new sub-genre of international institutional law, namely, the practice of IO organs and the subsequent rejection or acquiescence in such practices by members, departs from the confines of the positivist sources of international law without providing clear answers. Even assuming such a sub-genre of (customary?) law exists, what part of

[57] At that time, approximately 19 percent of UN technical assistance was funded from assessed contributions. *See* Alvarez, *supra* note 46, at 428.

[58] *Cf.* article 60, Vienna Convention on the Law of Treaties.

[59] For a discussion of the applicability of the Vienna Convention rules concerning treaty breach and the rules of state responsibility to treaties that impose collective obligations, including *erga omnes* and *erga omnes partes* obligations, see Joost Pauwelyn, "A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?," 14 *EJIL* 907 (2003).

[60] The discussions in the Sixth Committee relating to the ILC's consideration of this topic revealed considerable differences among states with respect to the responsibilities of IOs relative to states, and some delegates suggested that given the infinite variety of IOs, the ILC needed to take stock before launching into the drafting of possible articles. *See* Report of the ILC, 55th Session, General Assembly Official Records, 58th Session, Supplement No. 10, UN Doc. A/58/10, Chapter 4. *See also* discussions on October 28, 2003, 6th Committee (UN Doc. A/58/100), and Report of the Sixth Committee (UN Doc. A/58/514) of November 7, 2003, Part 3, §5; Summary of the Work of the Sixth Committee, Agenda Item 152 ("Report of the ILC"), at http://www.un.org/law/cod/sixth/ 58/sixth58.htm.

the old rules apply to it? Consider a contention that because the GA has not invariably or consistently applied the loss of vote sanction in Article 19, that provision in the Charter ought to be regarded as a dead letter because of desuetude.[61] Where is it ordained that even if states are obligated to respect a general principle of estoppel or acquiescence, IO organs are subject to comparable rules, especially in the face of explicit Charter language affirming the duty to pay? Can there be provisions in a treaty that are rendered ineffective not because of the actions of the parties but because of the (in)actions of some of the organs created by the treaty?

Some of the questions posed in the wake of UN financing disputes raise unresolved questions concerning the meaning and scope of the legal personality of the UN. Even if the UN (and other IOs) are not the functional equivalent of states, are they sufficiently like states that they retain residual rights to remedies not spelled out in the Charter that states otherwise would enjoy? If the UN is entitled to residual remedies not identified in its Charter as against its members, is this because it enjoys inherent legal personality, because it has implied powers to promote its effectiveness (see Chapter 2), or because such organizational rights derive from the rights of its principals, namely states?[62]

3.2.2 Legal Personality and its Consequences

International law presupposes, as do national laws generally, that "legal personality" is a prerequisite for the capacity to bear rights and obligations. An entity that is not a "subject of international law" or an "international legal person," is not able to be a party to treaties, present claims against other international persons, possess other international rights and duties, or otherwise exist with relative autonomy in the legal sphere.[63] Doctrinal debates, once common, about whether inter-governmental

[61] *See generally* Thomas M. Franck, *Nation Against Nation: What Happened to the U.N. Dream and What the U.S. Can Do About It* at 259 (New York: Oxford University Press, 1985). Alternatively, it might be argued that the UN has tolerated over time certain types of withholdings of dues by members (or the concept of withholding generally) and that this provides defaulting states with an equitable justification for continued withholding. *See* Elizabeth Zoller, "The 'Corporate Will' of the United Nations and the Rights of the Minority," 81 *AJIL* 610, at 615 (1987).

[62] For an argument that unilateral withholdings of UN payments are illegal because such breaches violate the rights of third party creditors to the Organization (including other states), see, e.g., Alvarez, *supra* note 43, at 272–4. It might also be argued that the UN enjoys certain additional remedies to assure payment against defaulters to the extent defaulting members impose additional costs on the Organization that have to be passed on to the membership as a whole. On this view, attempts by the Organization to charge interest on arrears, for example, might be justified as the exercise of members' collective rights vis-à-vis defaulters.

[63] *See* Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity Within Diversity* at 985 (The Hague, Boston: M. Nijhoff, 4th edn., 2003); Brownlie, *supra* note 56, at 57. As was stated by one member of the International Law Commission, "without legal personality and capacity, an organization would be unable to carry out the activities for which it had been set up. If it was denied legal personality, it would be stillborn." Quoted in Peter H.F. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* at 54 (Dordrecht, Boston: M. Nijhoff, 1994).

organizations are international legal persons have today given way to other disputes, such as the rights and duties resulting from such status for IOs and whether other non-state actors, apart from traditional IOs, might also have some degree of international legal personality.[64] It is increasingly recognized that while the indicia for the legal personality of IOs has been drawn from the incidents of statehood, IOs are not merely states writ large and that the rights and duties resulting from their personhood is not identical to that enjoyed by states.[65]

As with respect to financing issues, the question of the UN's legal status came to be resolved largely as a result of another crisis, namely, the killing of a UN mediator in the course of his UN duties in Israel in the 1940s that led to a dispute over whether the UN or only the mediator's nation state could pursue a claim against a state (Israel) that at the time of the incident was not a member of the UN.[66] As during the 1962 financial crisis, these debates led the GA to ask the ICJ for an advisory opinion as to whether the Organization had the capacity to bring an international claim against a state directed at seeking compensation for damages suffered by the UN *and* by the UN's agent (as for damages to his family), as well as whether either of such claims could be brought against any state or only against a UN member.

While the GA did not ask the Court to determine whether the UN had "legal personality," the Court determined that it needed to answer this initial question. From the Court's perspective, it had to determine whether the UN had the same ability as a state to resort to customary methods to present and settle claims, including negotiation and arbitration and, that in order to do so, it needed to determine whether the UN was a "legal person" under international law. It gave an affirmative response to all the questions posed. The Court determined that

> the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession a large measure of international personality and the capacity to operate upon an international plane . . . the Organization is an international person. This is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is a "super-State," whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international

[64] For an account of the debates concerning IOs as well as an introduction to some of the remaining unresolved issues, see Finn Seyersted, "International Personality of Intergovernmental Organizations—Do Their Capacities Really Depend upon Their Constitutions?," 4 *Indian J. Int'l L.* 1 (1964); Finn Seyersted, "Is the International Personality of Intergovernmental Organizations Valid Vis-à-Vis Non-Members?," 4 *Indian J. Int'l L.* 233 (1964); Schermers and Blokker, *supra* note 63, at 988–90; Bekker, *supra* note 63, at 55–7. In the 1960s, both within the ILC and in the Sixth Committee of the GA, some maintained that there were no rules of general international law on the international personality of IOs; whether IOs had such status was said to be a matter solely determined by their constitutions. *Yearbook of the ILC*, Vol. II (1967), at 137–8. For an overview of other controversial "subjects" of international law, whether or not formally characterized as international legal "persons," see, e.g., Brownlie, *supra* note 56, at 61–6.

[65] *See, e.g.*, Brownlie, *supra* note 56, at 57–8.

[66] Israel became a UN member on May 11, 1949.

law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.[67]

It also found that the Organization has "objective international personality, and not merely personality recognized by [UN members] alone" such that it could present a claim against either a member or non-member state and for damages incurred by the agent (or persons claiming through the agent) as well as to the Organization.

For the ICJ it was not determinative that the UN Charter—like many IO charters[68]—contains no explicit provision on personhood for purposes of international law.[69] The Court said that the Organization had legal personality because this had been implicitly "intended." The Court argued that such personality could be inferred from (1) necessity (since it was necessary to permit the organization to achieve the express goals indicated in the Charter); (2) members' intent (since they had decided to create an independent entity and not merely a means to harmonize the actions of separate states); and (3) the practice of the Organization (since it had concluded treaties with states).[70] As the wording of the Court's crucial finding as to the nature of the Organization's personality indicates, it adopted a relative, flexible view of legal personality. It suggested that unlike states, IOs have only that *degree of personality* that is functionally necessary to enable them to fulfill the tasks accorded to them.

In answering the specific questions relating to capacity to bring claims, the ICJ opined that the power to recover for harm to the Organization itself, including its property and assets, was functionally necessary because the UN could not effectively discharge its functions if recovery for damage turned on the concurrent action of all of its members.[71] But the issue of capacity to bring a claim to recover for harms done to one of its agents turned out to be more problematic. By a vote

[67] *Reparation for Injuries Suffered in the Service of the United Nations*, International Court of Justice, Advisory Opinion (hereinafter *Reparation case*), 1949 ICJ Rep. 174, at 179.

[68] Schermers and Blokker report that it has now become more common for IO constitutions to provide for international legal personality; see Schermers and Blokker, *supra* note 63, at 988, n. 9. The Court in *Reparation for Injuries* justified this finding on the basis that "fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality . . . ." *Reparation case*, *supra* note 67, at 185.

[69] Article 104 of the UN Charter is restricted to legal capacity "in the territory" of UN members and does not address such status or capacity on the international plane.

[70] *Reparation case*, *supra* note 67, at 178–9. *See also* Schermers and Blokker, *supra* note 63, at 989–90. But the Court turned to the text of the Charter and not to its *travaux* for this conclusion. Arguably, the records of the San Francisco conference, not discussed by the Court, would have supported its conclusion. A Belgian proposal that would have recognized the Organization's "international status, together with the rights this involves,"was rejected on the grounds that a provision regarding the "question of international juridical personality," would be "superfluous" since it "will be determined implicitly from the provisions of the Charter taken as a whole." Quoted in Louis B. Sohn, *Cases on United Nations Law* at 32–3 (Brooklyn: Foundation Press, 2nd edn., 1967).

[71] *Reparation case*, *supra* note 67, at 180–1 (unanimously). As the Court interpreted the question presented, "competence to bring an international claim" meant "capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims," including enquiry, negotiation, and request for arbitration. *Id.,* at 177. Of course, neither states nor international organizations are assured a particular forum to resolve such claims.

of eleven to four, the ICJ judges determined that the functions of the UN also imply the power to accord UN agents, broadly defined, limited protection. The ICJ judges found that the Organization can bring a claim on behalf of the agent or the agent's family and can pursue such a claim against members and even non-member states because the UN Charter anticipates that the Organization would be sending agents on dangerous missions (presumably even to states that were not UN members) and those agents should be able to rely on the Organization, and not merely the state(s) of which they are nationals, to look after their interests. The Court suggested that the functions of the Organization would be impaired if UN agents were given no such confidence and, further, that the "efficient and independent" performance of the Organization's agents, anticipated in Article 100 of the UN Charter (recognizing the independence of the UN's secretariat), further necessitates such a finding.[72]

The dissenting judges argued that while enabling the Organization to bring a claim for its own damages was a "necessary" implied power, essential to the Organization's "inherent right of self-preservation,"[73] the capacity to bring a claim for harms done to individual agents of the Organization was not. The dissenters argued, on the contrary, that the right to espouse claims of injured nationals was a right reserved to nation states under customary law and that the majority's approach put a "rather low estimate upon the employee's sense of fidelity."[74] They attacked the majority for engaging in judicial legislation that would have been better left to development through Charter amendment or separate treaty arrangement.[75]

[72] According to the Court, it was possible that the nation state of which the agent was a national might not be entitled to bring a claim on behalf of the agent or not feel disposed to do so and yet, in order that the agent "may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it." *Reparation case*, *supra* note 67, at 183. The Court argued that if the agent had to rely on his nation state, "his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter." *Id.* In addition, the Court buttressed its finding by noting that this was all the more necessary since agents' protection should not turn on the relative strength of their nation state(s) or the degree of a particular state's support for a UN mission. *Id.,* at 183–4. Finally, the Court argued that UN agents should be entitled to the organization's protection even if stateless. *Id.,* at 184.

[73] *See, e.g., Reparation case*, *supra* note 67, Dissenting Opinion, Judge Hackworth, at 196–7.

[74] *See, e.g., Reparation case*, *supra* note 67, Dissenting Opinion, Judge Hackworth, at 199. Judge Hackworth argued that "[n]o necessity for the exercise of the power here in question has been shown to exist." *Id.*, at 198. Judge Krylov implied, in his dissent, that the Court majority was in this instance violating Charter Article 2(7) since "the relations between a State and its national are matters which belong essentially to the national competence of the State." Dissenting Opinion, Judge Krylov, at 218. He argued that the Court's finding on this issue would only lead to collisions with the diplomatic protection principles in force and he was particularly disturbed by the majority's suggestion that the UN was capable of pursuing such claims even against the state of which the agent is a national. *Id.,* at 218–19.

[75] *See, e.g.*, *Reparation case*, Dissenting Opinion, Judge Hackworth, *supra* note 67, at 204; Krylov, *supra* note 67, at 219. Judge Krylov argued that the Court is not authorized to reason *de lege ferenda*, outside the limits of existing international law. *Id.,* at 218. Judge Krylov also objected to the Court's expansive view of the type of "agent" to which its opinion was applicable. The majority of the Court understood "agent in the most liberal sense . . . any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with

The Court majority dismissed these qualms, candidly admitting that they were confronting and resolving a "new situation."[76] While the majority acknowledged that in some instances some states might be confronted by competing claims, brought by the Organization and by the agent's nation state, and that international law did not assign priority to either type of claim, they were content to leave resolution of such issues to "goodwill and common sense," noting members' duty to render the organization "every assistance" under Article 2(5) of the Charter.[77]

Despite the divisions within the Court, the majority's decision was readily accepted by the GA. On the basis of the Court's opinion, the Secretary-General presented a detailed proposal that was subsequently accepted by GA resolution. Thereafter, the Secretary-General proceeded with settling the particular outstanding claims against Israel and, in later years, exercised the UN's newly acquired powers to espouse claims against other states whose actions had injured the Organization or its agents.[78]

Although the *Reparation for Injuries* Court dealt with the legal personality of the UN, its judgment otherwise adhered closely to providing the advice that the GA sought. The Court did not clarify the extent to which international law accorded legal personhood to other inter-governmental organizations, apart from the UN. It did not clarify which of the many attributes of the UN as an organization was crucial to its finding of personality or whether it was the unique combination of all of these which was determinative. The way it reached its conclusions—a mix of "intent"-based arguments, citations to the Charter, and reliance on institutional practice—made it difficult to draw firm conclusions as to what were the generalizable indicia for inferring the existence of organizational personhood. Moreover, because of this mix of arguments, the Court did not clarify whether the legal status of the UN arose because its members really intended this result, because such intent could be implied, or because of the automatic operation of general principles of international law whenever such institutions are created. While the Court's reliance on "intendment" suggests the first rationale, its conclusion with respect to non-members' need to recognize the "objective" personality of the Organization suggested the second or the third.

The *Reparation for Injuries* opinion also limited itself to finding that the UN had the requisite power to bring the types of claims at issue. The Court did not speculate as to what other implied rights and privileges necessarily flow from a

carrying out, or helping to carry out, one of its functions—in short, any person through whom it acts." *Reparation case*, *supra* note 67, at 177. Judge Krylov argued, on the contrary, for a restrictive interpretation that would exclude representatives of governments, members of national delegations, and representatives of governments in the different UN commissions. Dissenting Opinion, Judge Krylov, *supra* note 67, at 218.

[76] *Reparation case, supra* note 67, at 182. [77] *Reparation case, supra* note 67, at 186.

[78] *See* GAOR, IV, Resolutions A/1251, p. 64; A/1347; GAOR, V, Annexes, Agenda Item 50, pp. 2–3.

finding of international personality, even with respect to the UN itself.[79] Nor did the Court explain how such judgments should be made. While the Court's majority opinion suggests "implied" powers arise only when these are "necessary" to effectuate the presumed intent of Charter drafters to grant a non-state entity distinct legal status, the dissenters cast doubt on whether the majority really applied this test or merely presumed that the capacity to bring claims on behalf of its agents was "inherent" in a finding of objective personhood. As Schermers and Blokker suggest, the Court's timidity (or intentional ambiguity) is easy to explain: the Court sought to make its breakthrough decision, along with its finding that states now had a rival as a cognizable subject of international law, palatable to states by suggesting that this new legal person was not their equal and had only those rights and duties that states had necessarily accorded to it.[80]

Despite the Court's caution (or perhaps because of it), the *Reparation for Injuries case* has had a significant impact on other IOs. Today that case is routinely cited for two propositions that, strictly speaking, do not appear in the judicial opinions rendered but that now are assumed to be fundamental principles of international institutional law. First, the Court's finding of legal personality has overtaken, at least to some extent, the judges' own cautious rationales. Despite references in the *Reparation for Injuries* opinions to the (implied) "intent" of UN Charter drafters, today many conclude that legal personality emerges not from the explicit or implicit "intent" of IO creators but from the operation of general customary international law; that is, the personhood of IOs results from their existence as an "objective fact."[81] As one commentator has put it, the crucial fact seems to be not how or why IOs were established or what they are charged with doing, but "that they exist."[82] All IOs have benefited at least this much from the *Reparation* opinion, regardless of the intent of their creators, although as addressed below, the specific rights and duties that can be inferred from legal personality remain under dispute.

Secondly, the Court's implied functional necessity test for the rights and duties accompanying legal personality is regarded as generally applicable to all IOs, even those with far different purposes and structures than the United Nations. The *Reparation for Injuries case* is seen as establishing that IOs, by virtue of their independent existence and the goals they are meant to achieve, are afforded, under international law, the *degree* of personhood that they need to accomplish their

[79] Nor did the Court resolve what still remains a contentious issue in international institutional law: the (in)divisibility of international legal personality. In some instances, sub-bodies within IOs, such as UNICEF, have entered into agreements as if they were separate legal persons. While the ILC has opined that in principle, an agreement concluded by a sub-organ should bind the entire organization, neither institutional practice nor doctrine has led to clear general rules on these issues. Schermers and Blokker, *supra* note 63, at 993–4.

[80] Schermers and Blokker, *supra* note 63, at 1068.

[81] *See, e.g.*, Marjorie M. Whiteman, 13 *Digest of International Law* (Washington DC: U.S. Dept. of State, 1963–73) 13–14; Judge Krylov, dissenting, in *Reparation case*, *supra* note 67, at 218; Seyersted, ". . . Constitutions?," *supra* note 64, at 19.

[82] Bekker, *supra* note 63, at 56; *see also id.*, at 69.

assigned charter purposes, no more and no less.[83] These two provisions remain important despite specific treaties, such as the General Convention on Privileges and Immunities of the United Nations and a comparable treaty for UN Specialized Agencies, that impose on treaty parties specific duties to recognize these organizations' "juridical personality."[84] Although most members of the UN and the specialized agencies are parties to these conventions, some are not and these organizations' residual (customary?) rights remain important in such cases. In any case, the treaty instruments that affirm the existence of organizations' "juridical personality" typically do so without elaboration, except to say that the IOs subject to such treaties thereby have the capacity to contract, acquire and dispose of property, and institute legal proceedings.[85] The ICJ's affirmation that such personality relies on "functional necessity" for its scope at the international level would appear to confer on those organizations an entitlement to these rights on the international plane; this is an important general principle with both expansive and limiting potential.[86]

These two propositions are subject to differing interpretations, and many of the uncertainties left unresolved by *Reparation for Injuries* continue to bedevil the legal status of IOs. Despite that case and its aftermath, public international lawyers still dispute what the exact criteria for international legal personality are

[83] *See, e.g.*, Seyersted, ". . . Constitutions?," *supra* note 64 (international personality arises when an IO emerges with organs established by two or more states or other organized community and that is not authorized to assume obligations merely on behalf of several participating states). Although at times the opinion in the *Reparation for Injuries case* suggests that legal personality is a characteristic that the parties to the charter "intended" to give to the organization, *Reparation case*, *supra* note 67, at 178, as noted, the Court's majority did not consider the actual "intent" of the contracting parties to the Charter, whether expressed in the *travaux* or otherwise. *See supra* at note 67. Moreover, the "intent" of the parties to the Charter hardly seems relevant if personality is good as against non-UN members. For these reasons, scholars have not taken the Court's loose invocation of "intent" seriously. Thus, Bekker argues that reference to "intentment" in the *Reparation case* "should not be associated too strictly with the intention of the drafters or even with the terms of the constituent instrument itself" but instead as a "functional institutional intendment." Bekker, *supra* note 63, at 67–8.

[84] General Convention on Privileges and Immunities of the United Nations, 1 UNTS 15 (and 90 UNTS 327, corrigendum to Vol. 1) (entered into force September 17, 1946), article I, sec. 1; Convention on the Privileges and Immunities of the Specialized Agencies, 33 UNTS 261 (entered into force December 3, 1948), article II, sec. 3.

[85] *See e.g.*, General Convention, article I, sec. 1; Convention on Specialized Agencies, article II, sec. 3.

[86] Note that, at least with respect to the UN, Articles 104 and 105 of the UN Charter, while affirming the functional necessity framework for issues relating to the treatment of the Organization within the territories of members and for purposes of the treatment of representatives of members and UN officials, do not, as such, affirm the applicability of this test for purposes of the Organization's legal status under international law. Indeed, as discussed, *supra* note 70, the UN Charter avoided affirmation of the Organization's legal personality under international law. At least arguably, the General Convention on Privileges and Immunities of the UN, as well as the comparable treaty for UN specialized agencies, follows the UN Charter's lead and affirms the "juridical personality" of these entities only for purposes of national law. In both of these privileges and immunities treaties, the affirmation of such personality seems to focus on the kinds of rights these organizations need to have within the territories of member states and not on the international plane.

and which entities fulfill them.[87] Some have suggested that at least some of the benefits that accrue to IOs as a direct result of international legal personality, such as the capacity to conclude treaties, as well as some of the indirect benefits, such as implied powers, ought to extend to autonomous institutional arrangements established under a number of multilateral environmental agreements (or MEAs), such as the Meeting of the Parties (MOP) established under the Kyoto Protocol to the Climate Change Convention.[88] The argument is that such entities should not be seen merely as treaty bodies but as "international organizations with a distinct legal personality."[89] A MOP, also called a Conference of the Parties or COP in some treaties, is typically an organ on which all state parties to a treaty are represented; while MOPs lack a permanent seat, frequently do not have their own secretariats, and meet at different venues around the world, they nonetheless operate in many ways as would IOs. MOPs establish subsidiary bodies, arrange meetings, adopt rules of procedure, and interact with either their own secretariats or a borrowed one (such as one already existing under a separate treaty arrangement).[90] Some COPs or MOPs are authorized to amend the treaties that establish them or to adopt protocols, and since most are empowered to take any additional action that may be required to achieve the purpose of the underlying MEA, some have purported to take legally binding actions as a species of regulation.[91]

Nor are MOPs the only challenging kind of international entity. Some have asked whether aspects of international legal personality ought to apply to intergovernmental corporations of private law and *établisements publics internationaux*, essentially entities between governments but governed by the national law of one or more of the parties and not established by treaty governed by international law.[92] There are also a bewildering number of simple and complex subsidiary and quasi-autonomous bodies established by existing IOs, including the UN, in such fields as human rights, arms control, and international crime control, whose legal

[87] Thus, Brownlie's classic treatise purports to spell out what the *Reparation* court did not, namely, the general criteria for personality:

1. a permanent association of states, with lawful objects, equipped with organs;
2. a distinction, in terms of legal powers and purposes, between the organization and its member states;
3. the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states.

Brownlie, *supra* note 56, at 649. As Brownlie indicates, the fuzzy lines around some of these criteria sometimes present "delicate issues of law and fact," which may lead to disagreements. *Id.,* at 649–50.

[88] *See* Churchill and Ulfstein, *supra* note 32, at 632 (citing opinions issued by the UN Office of Legal Affairs which stated that the Climate Change Convention established an "entity/organization" with international legal personality that "have certain distinctive elements attributable to international organizations").

[89] *Id.,* at 625.

[90] *Id.*, at 626–35.

[91] *Id.,* at 639 (discussing the action of the Basel Convention's COP, which adopted Decision II/12 prohibiting the transboundary movement of hazardous waste from OECD to non-OECD member states).

[92] Brownlie, *supra* note 56, at 65–6.

status or institutional autonomy is not always clear.[93] In all of these cases, being accepted as an international legal person is an important battle to win since such recognition retains considerable significance in determining which international actors are permitted to engage with international law, including as treaty-makers.

And even with respect to established IOs, it still remains unclear whether legal personality is an objective fact that needs to be recognized and respected even by non-member states or whether the benefits of such objective personhood only applies to those that aspire to (and have achieved?) universal membership, such as the UN and its specialized agencies.[94] Seyersted, for example, argues that all IOs, by virtue of customary law and not because of specific authority granted in their respective charters, have powers analogous to those enjoyed by states, including exclusive jurisdiction over organs, the capacity to conclude treaties, active and passive personality, and the ability to settle disputes.[95] Others would argue, in accordance with the *in dubio mitus* canon of interpretation, that IOs' inherent powers must be premised on specific powers affirmatively granted in their charters and that the functional necessity principle must be delimited to what is strictly necessary for each organization to fulfill its functions.

Despite the *Reparation for Injuries case* or because of the ambiguities of that decision, specific attributes of international personality—whether, for example, all IOs enjoy the UN's capacity to espouse claims or to conclude all types of treaties—remain in dispute.[96] There is also considerable uncertainty, among commentators and the few national courts that have had to address such questions,

[93] *See* Paul C. Szasz, "The Complexification of the United Nations System," *Max Planck UNYB* 3 (1999). Note that while some of these entities, such as those established to monitor states under human rights treaties, are clearly treaty bodies, others, such as those that are joint organs of two or more IOs, may share the attributes of at least one (or all) of their founders, while yet others appear to be inter-organizational international organizations—Szasz calls them IOIOs—presumably with their own legal personality and attributes and not merely those ascribed to one of their founders. There is, in addition, the proliferation of transgovernmental networks, such as the Basle Committee on Banking Supervision (consisting of representatives of the world's twelve most important central banks), the International Association of Insurance Supervisors (comprising nearly 100 insurance regulatory agencies) or the International Organization of Securities Commissioners (with over 100 securities commissions). *See* Kal Raustiala, "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law," 43 *Va. J. Int'l L.* 1 (2002).

[94] The *Reparation case* finding on this point (see *supra* at text to note 68) stressed the fact that nearly all states were parties to the UN. Based on this, Schermers and Blokker argue that, while universal international organizations can claim such objective personality, "closed" non-universal IOs, on the other hand, "will have international personality only with regard to those states which have recognized them expressly, or implicitly" but that this has no effect on their competence "to enter into relations with all states wishing to do so." Schermers and Blokker, *supra* note 63, at 990–1. While others disagree, this shows that there is even some hesitation with respect to the proposition that the legal personality of all IOs exists as an objective fact.

[95] Seyersted, "International Personality of Intergovernmental Organizations—Do Their Capacities Really Depend upon Their Constitutions?," *supra* note 64, at 1–22.

[96] *See, e.g.*, Bekker, *supra* note 63, at 5, 64 and n. 285 (noting varying views on the extent to which other IOs have the capacity to bring international claims). *But see Yearbook of the ILC*, Vol. II (1967), at 302 (expressing views that all UN specialized agencies have the capacity to bring claims in respect of breach of international law against other subjects of international law).

concerning the other side of the coin: the international liability of IOs. Views remain divided about whether IOs, or their members derivatively, are liable for violations of human rights committed by such organizations, for example, even though IOs cannot participate as parties to most such treaties.[97] It also remains uncertain whether organizations (or their members derivatively or directly) are liable for violations of customary law, especially since it is not clear whether the rules of custom, such as the rules arising under international humanitarian law, apply in exactly the same way to IOs.[98] Questions have also arisen with respect to whether international organizations can succeed one another, as do states.[99]

These issues remain unresolved at least in part because there is considerable ambiguity about why IOs enjoy legal personality. While there is support for the proposition that personhood emerges as a result of treaty, others affirm that the rights and presumably duties resulting from legal personality emerge, for IOs, in the same way as they do for states, namely, through the operation of customary international law. Some national courts in non-member states have recognized an IO's ability to act like a legal person (and therefore, for example, be permitted to contract), in the absence of a treaty basis, either on the view that this is compelled as a matter of comity or due to the operation of customary international law (because of objective legal personality).[100] The recourse to general customary law arises because, as noted, IO charters do not always address international legal personality or fail to clarify its scope when they do. For those seeking to limit the powers of such organizations or to affirm their responsibilities, it is normatively desirable that IOs should be found subject to some or all of the same rules as states. Arguments over legal personality are also part of larger debates about the legal constraints, if any, that exist or ought to exist on IOs' external law-making prowess. There is a growing reluctance to say that any limitations on what an IO can do only arise if these limits are explicitly stated in its charter or in the treaties to which the organization is expressly bound as an organization. The resolution

[97] The topic of "Responsibility of International Organizations" has been on the agenda of the International Law Commission only since 2002, although debates about such questions as the applicability of international humanitarian law or principles of state responsibility to UN peacekeeping forces has long been of interest to the Organization and to scholars. *See, e.g.*, D.W. Bowett, *United Nations Forces* (New York: Praeger, 1964); Vera Gowland-Debbas, "Security Council Enforcement Action and Issues of State Responsibility," 43 *Int'l & Comp. L.Q.* 55 (1994); Judith G. Gardam, "Legal Restraints on Security Council Military Enforcement Action," 17 *Mich. J. Int'l L.* 285 (1996); Luigi Condorelli et al., eds., *The United Nations and International Humanitarian Law* (Paris: Editions Pedone, 1996). There have even been concerns expressed about the compatibility of human rights norms with the privileges and immunities usually accorded international civil servants, such as UN officials. *See, e.g.*, Michael Singer, "Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns," 36 *Va. J. Int'l L.* 53 (1995). *Cf. Mendaro* v. *World Bank*, 717 F.2d 610 (D.C. Cir. 1983)(finding the Bank immune from suit in U.S. court in case involving alleged sex discrimination against Bank employees). Only some of these issues have been resolved via bilateral or multilateral treaty.

[98] *See* Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford U.K.: Hart, 2004).

[99] *See, e.g.*, Sands and Klein, *supra* note 2, at 526–31.

[100] *See, e.g.*, Schermers and Blokker, *supra* note 63, at 1014–15; Bekker, *supra* note 63, at 62–3.

of such questions is not merely of interest to specialists in international administrative law.

Nonetheless, largely as a result of *Reparation for Injuries* and its acceptance within the international community, as well as subsequent actions that rely on its premises relating to international legal personality, such as the conclusion of the Vienna Convention on the Law of Treaties Between States and International Organizations and Between International Organizations,[101] all or most IOs have acquired the ability to perform acts on both the international and national plane: they conclude treaties, trade in goods, contract for services, register patents, arbitrate or litigate their disputes with private parties and even states, buy and sell real estate, or lease premises.[102] In addition, as is suggested by the discussion of MEAs above, the normative ripples of the *Reparation for Injuries case* appear to be spreading elsewhere, even in connection with entities that do not fulfill the traditional criteria associated with international organizations. Despite the many uncertainties as to its meaning and origins, legal personality, has proven to be essential to these actors' ability to act "externally" on the international plane vis-à-vis other international persons—as is clear from the dispute that gave rise to the *Reparation* opinion itself.[103] If states can no longer be regarded as the only international actors engaged in the making of law, the development of the UN's right to international legal personality is at least part of the explanation.

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These accounts of the developing budgetary powers of the GA and the rise of the principle of international legal personality for IOs cast some doubt on the three general propositions for IO law-making stated at the end of Section 3.1.

3.2.3 The Alleged Treaty Basis for Charter Powers

Those trying to solve the financing problems of the UN and the question of whether the UN can bring an international claim began by looking to the Charter. They assumed that answers could be found by looking at what the parties that

[101] IO Convention, adopted Mar. 21, 1986, 25 *ILM* 543 (1986). *See generally* Giorgio Gaja, "A 'New' Vienna Convention on Treaties Between States and International Organizations or Between International Organizations: A Critical Commentary," 58 *Br. Yrbk Int'l L.* 253 (1987).

[102] For surveys of practice, see, e.g., *Yearbook of the ILC*, Vol. II (1967), at 207–20, 299–302; also UN Doc. A/CN.4/L.383/Add.1, at 1–4; A/CN.4/L.383/Add. 2, at, 1–6; A/CN.4/L.383/Add.1, at 26 and A/CN.4/L.383/Add.2, at 4–6.

[103] *Cf.* Eric Stein, "External Relations of the European Community: Structure and Process," in 1 *Collected Courses of the Academy of European Law 1990: Community Law* at 131–2 (Dordrecht, Boston and London: Martinus Nijhoff, 1991). Stein identifies four components of "external powers" enjoyed by states: (1) the power to communicate with governments formally or informally ("diplomacy," active or passive rights of legation); (2) the power to take measures within national territory that have internal effects within the territories of other states or on their nationals; (3) the power to participate in the formation of the sources of international law and to take part in international organizations; and (4) the power to carry out international obligations, including the power to advance or respond to international claims and accept responsibility for violations of international law.

established the Organization intended to convey by way of delegated power. In both cases all appeared to assume that only an international legal person, established by treaty, could make states liable under international law for the payment of UN dues or be able itself to bring international claims. The ICJ insisted that capacity to bring international claims required attribution of international legal personality in *Reparation for Injuries*, raised the question on its own accord, and answered it. The same premise provided a subtle basis for that Court's resolution of the financing powers of the GA. In the *Certain Expenses case* the Court ultimately agreed, after all, with the proposition, advocated by the U.S., among others, that what an international legal person such as the UN can do, it ought to be able to pay for.[104] It was in part the UN's autonomous existence as a legal person that helped the Court to conclude that its members had a duty to pay their dues to it.

But if the Court in these cases began by turning to the UN Charter to settle these questions, it is not clear either from what the ICJ did in these cases or from subsequent developments that the GA's powers over the budget or the UN's capacity to bring international claims can be seen as being derived from treaty or what this would mean if they were. The GA's power to include such expenses as peacekeeping and other categories of expenses, within the legitimate, and legally binding, expenses of the Organization appears to derive less from the terms of any treaty than from the institutional practice of the Organization itself, even though, as was suggested by Justice Spender in Chapter 2, the practices of institutional organs, which are not parties to the UN Charter, are not identical to the subsequent practices of parties to a treaty.[105] Nor is it apparent, as is discussed above, whether a member's remedy as against illegal organizational expenditures or the Organization's remedies against a defaulting member ought to be seen as matters exclusively governed by the law of treaties or what it would mean for the Organization to insist on its "treaty" rights in the enforcement of the duty to pay. Similarly, it might surprise those familiar with the text of the UN Charter that the Organization somehow found within that text a general principle not only that it enjoys legal personality but that the UN can conclude treaties apart from those identified in the Charter and that it can even bring an international claim on behalf of itself and its agents, even as against states that are not UN members.

Those familiar with the number of IO charters, which, like the UN's, do not expressly grant international legal personhood, would also be surprised to see how far other IOs have taken the Court's Advisory Opinion as a license for themselves. There is accordingly much to be said for the proposition that if IOs generally enjoy certain rights emerging from legal personhood, these arise from some new kind of customary law, arising out of the practice of the organizations

[104] This is a paraphrase of what the United States argued in its pleadings in the *Certain Expenses case*. *Certain Expenses case* Pleadings, 1962 ICJ Pleadings 424 (arguing that "the United Nations can pay for what it is empowered to do" and "what the United Nations can do, it can pay for").

[105] *See supra* Section 2.3.2.

themselves. If this is true, it might be possible for other entities that have no formal charter at all, such as MOPs/COPs, to develop their own rights to legal personality arising from the same dynamic between practices by the collective and states' individual acquiescence. Moreover, it would seem to be misleading to suggest, at least with respect to international legal personality, that IOs can only generate regime-specific rules for themselves and their members. Today, few would deny that at least certain principles concerning the international legal personality of IOs exist as principles of general public international law and that if they do, they exist primarily because one IO, the UN, "legislated" it into existence through the combination of organizational practice/judicial opinion/ members' acquiescence, long before most of today's states were even members of that Organization.

3.2.4 The Limits of Enumerated Powers

The disputes underlying the *Certain Expenses* and *Reparation for Injuries cases* support the proposition that IOs and their members make distinctions between hortatory and binding IO action. Both the *Expenses* and the *Reparation cases* were searches for legal certainty. Members rejected the prospect that the UN could exist with ambiguity as to whether members had a duty to pay their dues or whether the GA could determine the budget for the Organization (or needed to secure agreement from the Security Council for this purpose). There was also little room for "soft law" when it came to the question of whether the UN did or did not have a right to espouse its rights or those of its agents on the international plane. In both cases the resort to the ICJ was based on a hope that definitive answers could be found in existing law and that impartial judges were the best hope of finding them.

But the general proposition that IO powers need to be expressly granted specific powers to act is belied by both the UN duty to pay and IOs' entitlement to international legal personality. The GA was not clearly delegated the power to tax or to include external expenses within that power, but it secured both, along with the power to recommend peacekeeping missions. The UN was not given international legal personality, the power to conclude treaties beyond those few enumerated in the Charter, or the power to espouse international claims, but it secured all of these (and more). Both sets of powers arose from (at best) the interstices of the Charter and the necessary "intendment" of its parties. Both owe a debt to expansive notions of constitutional interpretation such as application of the teleological principle of effectiveness and its close kin, the doctrine of implied powers.

The development of both of these rules of "internal" institutional law suggests how these develop: from the interaction of a number of institutional organs (GA/ICJ/Secretariat), states' reactions to these, and, as in the case of the development of international legal personality, the action of other IOs who piggy-back on

UN precedents to establish precedents applicable to them generally and appear not to wait for treaties to permit them to do so. While the power to tax and to sanction for failure to pay was given only to the GA in the Charter, whether those powers really existed and significant issues as to their scope were ultimately determined (and continue to be determined) by the collective action of several parts of the Organization. As we will see throughout this chapter, IO law-making is frequently "collective" in at least that sense, even when only one organ is accorded a specific grant of power.

Notably, in both cases, the development of the law strengthened the hand of an otherwise weak institutional player, the Secretary-General, who is otherwise given little by way of express powers. In the aftermath of *Reparation for Injuries*, the Secretary-General gained a useful new power—not spelled out in the sparse Charter provisions delineating his powers—the power to espouse claims, including in contexts where he might face a competing state claimant and with respect to states that are not even UN members. In the aftermath of the *Certain Expenses case*, the Secretary-General, the person who concludes treaties and engages the UN's legal personality in a range of ways, secured the assurance of a significant judicial body and eventually of the membership, that he indeed presides over an entity that is capable of acting in many respects like a state.

These developments only begin to suggest the power of the office of the UN Secretary-General. Although the normative impact of that office has varied with its occupant over the years, the laconic enumerated powers given to the UN Secretariat in the Charter do not do justice to its impact on the full range of legal issues before that Organization. As will be briefly addressed in Chapter 7, the Secretary-General is known best as a "soft" dispute settler but that office is fully engaged in the full range of standard-setting techniques used by the other UN political organs, except that these efforts usually take place behind the scenes, as through the Secretary-General's attempts to exhort and persuade states to abide by the law.[106] In some cases, the Secretary-General has not hesitated to make public

[106] For an overview of the development of that office, the use of "implied powers" by the Secretary-General, and the roles of the lawyers in the UN Secretariat, see Edward McWhinney, *United Nations Law-Making* at 145–53 (New York: Holmes & Meier Publishers, 1985). There are numerous examples of initiatives by the Secretary-General Kofi Annan that have had an impact on both "soft" and "hard" law, quite apart from his "good offices" role in the mediation of disputes. *See*, *e.g.*, John Gerald Ruggie, "global_governance.net: The Global Compact as Learning Network," 7 *Global Governance* (October/December 2001)(describing the Global Compact, a secretariat initiative to entice participating multinational enterprises to accept among other things, international human rights responsibilities); Michael Doyle and Nicholas Sambanis, *Making War and Building Peace*, Chapter 8 (forthcoming Princeton: Princeton University Press 2005)(discussing the "Friends of the Secretary-General," an ad hoc subject to changing membership created to exert multilateral leverage on behalf of UN diplomacy and used, for example, to promote the conclusion of a particular treaty like the peace agreements that permit the establishment of UN administrations of territory); Kirgis, *supra* note 6, at 803–51 (discussing the extensive interpretative and promotional roles of the Secretary-General under delegations of power to engage in election assistance, supervision, and peacekeeping). The Global Compact has, in turn, spawned various regional, national, and sectoral public–private partnerships around the world. Ruggie, *supra*, at 375.

statements that urge changes in existing law or that permit UN organs to undertake legally significant action.[107]

The concept of enumerated powers does not explain the evolution of institutional powers, or how the development of capacity for one organ (the GA), may have an effect on another (the Secretary-General or the Council). But perhaps these developments are satisfactorily explained by the proposition, considered below, that charter interpreters are entitled to presume implied powers not enumerated if all that is at stake are the internal rules for the smooth functioning of the organization.

3.2.5 The Distinction Between External and Internal Rule-making

This is the proposition most clearly challenged by the development of the duty to pay and the law governing the international legal personality of the UN. The application of the budgetary powers of the GA and the Organization's legal personality presented from the outset, and continue to pose, numerous normative spill-over effects, reaching far beyond the "internal" sphere. Apart from the impact, still emerging, on such questions as applicable treaty remedies, state (and organizational) responsibility, the significance of institutional practice (either as a new species of custom or a new kind of institutional law), and other rights attendant to legal personality, the exercise of the GA's powers of financial assessment has also had an impact on other legal issues, such as whether a member is entitled to withdraw from an organization that makes no provision for withdrawal.[108] In other organizations, decisions to levy assessments on certain members but not others have helped to determine questions as to representation or succession.[109]

As for legal personality, it is difficult to find a way to confine either that principle or particular applications of it—such as the ability to bring international claims—to the purely "internal" level. In an age still dominated by legal positivism, the

[107] *See, e.g.*, Kofi Annan, "Two Concepts of Sovereignty," *The Economist*, September 18, 1999, at 49 (urging humanitarian intervention); Warren Hoge, "U.S. Drops Plan to Exempt G.I.'s from UN Court," *New York Times*, at section A-1, June 23, 2004 (quoting Kofi Annan who called the United States' plan to seek renewal of the exemption of its peacekeepers from the ICC a proposal of "dubious judicial value" that would discredit the Council, the UN, and the "primacy of the rule of law"); Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704 (1993) at paras. 34–7 (affirming that certain crimes are "beyond doubt" part of customary international law).

[108] Thus, commentators who debate the legality of withdrawal in such cases invariably have to deal with the precedent established when the UN opted to assess certain contributions during the period of Indonesia's attempted withdrawal from the Organization (which was deemed by the Secretary-General to be merely a temporary cessation of cooperation). *See, e.g.*, E. Schwelb, "Withdrawal from the United Nations: The Indonesian Intermezzo," 61 *AJIL* 661 (1967); M. Akehurst, "Withdrawal from International Organisations," in *Curr. Leg. Prob.* 143 (1979); Sands and Klein, *supra* note 2, at 548.

[109] *See* Alvarez, *supra* note 46 at 429, n. 123 (citing the examples of the IAEA's recession of Chinese assessed contributions for the period before and immediately after the Board expelled the representatives of Taiwan and its division of assessments for Bangladesh and Pakistan).

right to be a legal person appears to open the door to external law-making, and it is hard to distinguish developments relating to the scope of that right from external law-making itself. It is also difficult to explain, if *general* law-making powers in IOs do not exist, why the UN, and perhaps other IOs, enjoy objective legal personality that even non-members need respect.

The most defensible use for the internal/external distinction is perhaps its usefulness as a tool of facile distinction. But note that if we define the differences between internal and external organizational law-making acts not by their addressees (members/non-members) but by their content, it is not clear what we gain. The internal/external distinction addresses a purported distinction between actions dealing with certain subjects (including matters of procedure, membership and participation, as well as other legal responsibilities imposed on IO members as a result of their membership, such as the duty to pay dues or to respect the organization's legal personality or to respect the Organization's privileges and immunities) and matters that do not deal with the rights and duties of members qua membership. If we apply this distinction, a decision by the GA to apply the Article 19 loss of vote sanction on a defaulting member or a decision by the UN Secretary-General to extend privileges and immunities to a person designated to be a human rights expert[110] are decisions with *internal* binding effect, but a decision by the Security Council to impose sanctions on Libya for threatening the international peace would be, at least as defined by subject matter, external. But of course the purported distinction is circular. We appear to be defining as "internal" those IO actions that deal with subjects which we have previously defined to be "internal." We apparently know what an internal IO decision is when we see it: when it deals with a topic that some international lawyers have classified as belonging to those rules of law that govern IOs' "legal status, structure and functioning."[111]

If we are asked to produce an independent, non-circular distinction between internal and external acts, this turns out to be more difficult. It is not true, after all, that only internal acts arise from states' responsibilities as members of the Organization. In the example above, UN members are equally obligated under the UN Charter to respect the privileges and immunities of UN experts or to pay their dues as they are to abide by Council sanctions.[112] Under the positivist view, it is because they are UN members that they must respect *all* of these obligations.

Perhaps the goal of accurate description can only be advanced if we de-emphasize the importance of the internal/external distinction and recognize that many if not most decisions made by IOs have *both* internal and external normative impacts in the sense of affecting both matters once deemed to be within internal administrative

[110] *See, e.g., Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (*The Mazilu Case*), International Court of Justice, Advisory Opinion, 1989 ICJ Rep. 177.

[111] Schermers and Blokker, *supra* note 63, at 4.

[112] *See* UN Charter, Articles 105(2) and 25.

law as well as other, ostensibly more "substantive," rules of international law, such as the general public international law rules governing the use of force or the interpretation of treaties. In life, if not in treaties, the line between internal and external law-making blurs.

As the examples of *Certain Expenses* and *Reparation for Injuries* and their respective aftermaths also suggest, the lines between "legislative," "executive," and "dispute settlement" actions also tend to dissipate in practice. The premise that law-making only occurs when an organization undertakes charter-authorized legislative action, at either the internal or external level, and that this does not occur when its executive officers or dispute settlers act, is at best misleading. In neither of the cases discussed here, dealing with financing and the right to espouse claims, can it be clearly stated with precision exactly when "legislative" authority was exercised or by whom, GA, Secretariat, or Court. What can be said with more certainty is that "executive" and "judicial" actions cumulatively had (and are continuing to have) significant normative effects on both the "internal" law of the Charter and "external" international law.

The process by which the respective powers of the GA, the Council, and the Secretary-General came to be determined, whether with respect to the power to tax, the ability to pursue international claims, the scope and definition of "enforcement action," or the ability to engage in peacekeeping, do not fit the mold of classic legislation. This is not standard-setting that is unilateral in form, directed at indeterminate addressees, and purporting to establish parameters for the future actions of all international legal persons. If this is "legislative" action, it is legislation by subterfuge. As these examples begin to suggest, IO organs "legislate" on behalf of the collective outside the positivist box. Neither the process by which IO norms emerge nor the norms ultimately produced fit very well within the predominant positivist framework under which most international lawyers work.

The financing and legal personality accounts offered in this section also begin to suggest what will become clearer in subsequent examples of IO law-making in this chapter and the next: it is often difficult to contain the impact of organizational normative developments to the organizations that give rise to them. For a variety of reasons that political scientists can better explain, such as path dependencies, the tendencies of international bureaucrats to behave in similar fashion, or learning effects among overlapping and interacting epistemic communities (such as international civil servants, diplomats in the service of their governments, or members of NGOs), what each IO does in its own legal sphere affects other comparable institutions, even in the absence of formal treaty or other arrangements for co-operation and obviously much more so when such arrangements exist. This is not only the case where it might be expected—with respect to common principles of so-called internal institutional law. There are many plausible examples of "general," and not regime-specific, international institutional law. These are the subject of the next section.

3.3 Revisiting the Development of International Law Through the Political Organs of the UN

Three decades ago, Rosalyn Higgins' examination of the practices of the UN's political organs led her to conclude that these bodies are "vitally concerned with the development of customary international law" both because they are themselves bound by them (along with the frequently overlapping rules of the Charter) and because the precise application of these rules will lead to "new practices" and "developments in the customary rules."[113] Her classic examination, *The Development of International Law Through the Political Organs of the United Nations*, did not waste time worrying about the supposed distinction between internal and external forms of UN law-making.[114] For Higgins it was obvious that the practice of states, which after all is the basis for customary law, is manifested not merely in the sum total of their individual actions and reactions but in their collective actions. She accepted that opportunities for developing customary law had expanded greatly with the establishment of the UN simply because that body increased the number of occasions on which states could act collectively and on the basis of law.[115] She argued that the votes and views of states articulated in IO settings "have legal significance as evidence of customary international law" and that "the collective acts by states, repeated by and acquiesced in by sufficient numbers with sufficient frequency, eventually attain the status of law."[116] (As she made clear years later, in this passage Higgins was not addressing the oft-debated issue of the status of GA resolutions as such but the collective practices of UN members in all their institutional manifestations, including the interplay between GA resolutions and other acts by states and other IO organs; indeed, she argued against an obsessive interest in GA resolutions as an isolated phenomenon or as substitute for ascertaining custom through all the manifestations of state practice now made possible by institutional fora and actors.[117])

In Higgins' book, the UN's political organs, especially the GA, Security Council, and Secretariat, took center stage to supply a clear, concentrated "focal point for state practice."[118] In doing so, Higgins was following in the footsteps of her mentor, Oscar Schachter, whose contemporaneous Hague Lectures also examined the normative import of the UN's political organs.[119] Higgins argued

[113] Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* at 2 (Oxford, U.K.: Oxford University Press, 1963). [114] *Id.*

[115] *Id.* [116] *Id.*

[117] *See* Rosalyn Higgins, "The Role of Resolutions of International Organizations in the Process of Creating Norms in the International System," in W. Butler, ed., *International Law and the International System*, at 21–3, 25–30 (Dordrecht, Boston: M. Nijhoff, 1987).

[118] Higgins, *supra* note 113, at 2.

[119] Schachter noted that the UN political organs operate within a fairly well-defined framework employing a "common vocabulary of the Charter principles and purposes to justify their positions and conduct." Schachter, *supra* note 55, at 173. He contended that the "outcomes sought are those

that due to the obvious impediments to action by the UN's legal bodies—as exemplified by the ILC's and Sixth Committee's uphill battles to make law through time-consuming treaty negotiations or the ICJ's lack of an *a priori* system of compulsory jurisdiction—the work of the UN's political bodies, whether or not they purport to act on the internal plane *qua* membership or with respect to external rules of general public international law, provided the most dynamic law-developing activities of the Organization.[120] She examined how the UN's political bodies applied and affected (1) the law governing the rights and duties of states, (2) the shrinking *domaine réservé* of Article 2(7), (3) the rules governing representation and credentials of representatives, (4) limits of states' and the UN's resort to force, and (5) the law of treaties.

Higgins showed, in case after case, how UN organs' resort to the theories of constitutional interpretation (surveyed in Chapter 2 of this book) have become a general engine for law-making. Her work documented how even those issues most closely associated with "internal" institutional law, such as the rights and privileges of UN membership, reflect and in turn affect general principles of customary international law. While Higgins conceded that it was impossible to state with precision exactly when a repeated institutional practice or pronouncement had hardened into a rule of law, she did not hesitate to suggest that even with respect to those organs charged only with prescribing law, such as the Security Council in situations requiring urgent action, or with respect to those charged only with impartially applying pre-established rules to decide a controversy, such as international judges, the line between applying law internally and legislating for the international community evaporates and that a "question of developing law becomes involved."[121] Higgins' pioneering work recognized the real world normative effects of what institutional organs accomplish because she went beyond the categories of law-making recognized under strict positivism.

This section uses Higgins' work as the framework for looking at more contemporary examples of UN law-making. The select examples here, relating to statehood and participation and human rights and the concept of domestic

which are believed to fall within the patterns of decision laid down by the Charter and related constitutional practice" and that "the pursuit of their particular interests by Governments is inevitably influenced by the norms of that system and the attitudes as to legitimacy and propriety that arise from it." *Id.*

[120] Higgins, *supra* note 113, at 3.

[121] *Id.,* at 5–8. Higgins' views were undoubtedly based in part, as she acknowledged, on a Yale School definition of law as the product of the interplay of law and politics, that is, as "the authoritative expression of principles that determine the goals and direction of collective action." *Id.,* at 9. Interestingly, although Higgins' work is grounded in the interpretation of the Charter by the UN's political organs, she stressed both at the beginning and the end of her opening chapter to her magisterial work the significance of the development of customary international law by these organs. She argued that this source was the "most flexible, the most fluid, and as such, is exceedingly responsive to the changing needs of the international community." *Id.,* at 1. And she concluded her introductory chapter with the following sentence: "Seventeen years' work by the United Nations has provided us with an important new source of customary international law." *Id.,* at 10.

jurisdiction, illustrate the extent to which the UN's political organs continue to be law-makers in the sense that Higgins described so well, even if the resulting law has moved in ways that she did not always anticipate.

3.3.1 Statehood and Participation

Higgins' survey of how the UN's political organs have interpreted and in turn affected the concept of statehood in UN practice reflected the concerns of someone writing at a time when the confluence of decolonization and the Cold War led to perennial conflicts with respect to membership within the UN and specialized agencies. Higgins' thesis was that, despite the prevalence of Cold War "package deals" with respect to membership, UN decisions showed a surprising close adherence to the traditional legal criteria for statehood (namely, membership only for those entities with a permanent population, a defined territory, a government, and the capacity to enter into relations with other states) but that the practice of the UN with respect to membership had in turn developed the law in terms of understanding the standard criteria.[122] She concluded her survey of Cold War membership debates by noting that while Article 4 of the Charter had by its terms rejected the idea of "automatic universality," this was in fact where the application of that Article was heading, largely out of concern that the organizational goals for which the UN was established would best be fulfilled if all states in the world were members.[123]

In the years since publication of Higgins' book through the end of the Cold War, the decreasing numbers of UN membership disputes showed an ever increasing reliance on the traditional legal requisites for "statehood" as the predominant requisite for membership. These requisites increasingly structured membership debates, even though they did not fully resolve questions as to their proper application.[124] Today, there is little doubt that Higgins was correct. Even before the Cold War ended, the principle of universality was firmly established at least within UN system organizations. And the principal reason was also one that she articulated: the collective desired comprehensive participation more than they needed to exclude pariah states. Whether or not international lawyers would read Charter Article 4 (as well as comparable provisions for the UN specialized agencies) as creating a "right" to membership, it is now assumed that any entity that fulfills the

[122] *Id.*, at 12–14. For an updated consideration of the same theme, see Frederick Tse-shyang Chen, "The Meaning of 'States' in the Membership Provisions of the United Nations Charter," 12 *Ind. Int'l & Comp. L. Rev.* 25 (2001).

[123] Higgins, *supra* note 113, at 54–7.

[124] *See, e.g.*, Kirgis, *supra* note 6, at 144–8 (discussing the debates over the admission of Bangladesh in 1972, Angola in 1976, and the reunified Viet-Nam in 1976). In each case, those opposed to admission originally based their opposition on either the inability of the entity to fulfill the obligations of the Charter as required by Article 4 or the absence of one or more of the traditional requisites for statehood but in all three cases membership was ultimately offered). *See also* Chen, *supra* note 122.

traditional legal criteria of the 1932 Montevideo Convention on the Rights and Duties of States should be admitted, even if this means ignoring troublesome questions about whether, in the terms of Article 4, the particular entity is "peace-loving" or is truly "able and willing to carry out" all of its Charter responsibilities (including increasingly onerous expectations in the peacekeeping realm).[125]

In recent times, the principle of universality has been affirmed by the ever-growing list of UN member states, now including laggards such as Switzerland. The *sub silentio* acceptance of the need to promote the effectiveness of the Organization through universal participation also explains the UN's reluctance to expel from membership, and therefore lose all leverage over, states such as Iraq or Libya, even though both were, at various times, subject to sanction by the Security Council and were therefore subject to at least the risk of suspension under Article 5 if not expulsion under Article 6.[126] It helps to explain as well the ease with which Russia was able to take over the Soviet Union's membership (and the attendant right of the veto on the Security Council) without being formally readmitted as a member or amendment of the Charter, despite the Charter's express mention of the "Union of Soviet Socialist Republics" in Article 23.[127] But it may also explain the undue haste with which the UN admitted Slovenia, Croatia, and Bosnia-Herzegovina, the component parts of the Former Yugoslavia, in 1992, despite still-lingering questions at the time about their economic and political viability and stability.[128] Admission of these three states in 1992 was less easy to explain in terms of fulfillment of all the traditional requisites of statehood, but these cases

[125] The practice of admitting any and all applicants to membership that meet the formal "statehood" requirement also suggests de facto acceptance of the much maligned majority *Advisory Opinion by the ICJ in the Conditions of Admission of a State to Membership in the United Nations*, 1948 ICJ Rep. 57 (finding, on a vote of nine votes to six, that UN members were not entitled to impose additional conditions on membership other than those identified in Article 4). Of course, troublesome membership issues, such as the questions of Taiwan and the Palestine Liberation Organization, remain. The reluctance to admit either of these entities is, of course, usually explained in terms of the failure to meet some of the traditional requisites of statehood, even if at the expense of having the organization "represent" the populations of those living in Taiwan and Palestine. Far from undermining Higgins' arguments, the failure to accept these two entities to membership show the way the traditional statehood criteria continue to mold membership decisions, including those made by advocates for admission. *See generally* Kirgis, *supra* note 6, at 137–64.

[126] *See infra* at Sections 4.1 and 4.2 (discussing SC Res. 678, 687, 731, and 748). Commentators have long argued that extreme measures, such as expulsion, are self-defeating. *See, e.g.*, Louis B. Sohn, "Expulsion or Forced Withdrawal from an International Organization," 77 *Harv. L. Rev*. 1381 (1964).

[127] But note that at least some commentators argued that the automatic secession of Russia to the former Soviet Union's seat was arguably inconsistent with prior institutional precedents concerning the recognition of successor states. As Yehuda Blum pointed out, the Sixth Committee had ruled in 1947 that the rights and obligations of UN members "ceas[e] to exist . . . with its extinction as a legal person internationally recognized as such," and the Soviet Union had ceased to exist in 1991. Yehuda Z. Blum, "UN Membership of the 'New' Yugoslavia: Continuity or Break?," 86 *AJIL* 830, at 833 (1992).

[128] *But see* Vladislav Jovanovic, "The Status of the Federal Republic of Yugoslavia in the United Nations," 21 *Fordham Int'l L. J*. 1719, at 1724 (1998)(arguing that the actions of the UN in admitting these states was intended to encourage and reward secession and punish the Federal Republic of Yugoslavia (Serbia and Montenegro), which was resisting such secession claims). The UN admitted Macedonia, under the official designation "Former Yugoslav Republic of Macedonia," whose entry had been blocked by a dispute with Greece in 1993.

demonstrate another one of Higgins' conclusions: the Organization's tendency at times to use the (sometimes premature) recognition granted by powerful states as a stand-in for satisfying the traditional requisites of the Montevideo Convention.[129]

As Higgins would have reminded us, at least some of these membership and participation decisions also implicate and affect in turn general principles of international law. The break-up situations presented at the end of the Cold War involving both the former Soviet Union and the former Yugoslavia presented the UN's political organs charged with membership decisions, the GA and the Security Council, and less directly the Secretary-General, with significant questions of state succession. When parts of a state separate to form one or more states, what happens to the treaty obligations of such states? This was not a new question for UN organs, which had helped define the parameters of the general rules arising from state secession through institutional precedents established in the cases of India-Pakistan and Pakistan-Bangladesh years before.[130] But at the time the UN political bodies again faced these issues, in the early 1990s, public international lawyers were divided among at least three possible responses as a matter of customary law: (1) the continuity principle (under which it was presumed that new states assume all the rights and obligations of the predecessor state of which they were formerly a part); (2) the clean state doctrine (under which it was up to the new state to decide which, if any, of these treaty obligations it wanted to assume); and (3) denial of any generally applicable rule in deference to a case-by-case approach.[131] (The lack of agreement as to the relevant customary rules is suggested by the fate of the Vienna Convention on Succession of States in Respect of Treaties, which had been adopted in 1978 but had only acquired eighteen adherents (not including the United States) as of mid-2004 and did not enter into force until 1996.[132] That treaty tended to side with adherents of the continuity principle but permitted certain exceptions, including with respect to membership in international organizations, which was left to the rules governing acquisition of membership.)

Scholars remain divided about the effects on the rules governing state succession resulting from the UN political bodies' response to the post-Cold War break-ups of states, but no one denies that the institutional precedents established will be relevant to how comparable issues are likely to be dealt in the future, within the UN, by other IOs, and in all likelihood by states generally.[133] With respect to

[129] *See, e.g.*, Higgins, *supra* note 113, at 42 (discussing the U.S. recognition of Israel and its use as relevant evidence of the international status of the applicant for UN admission). The EU and the U.S. recognized Slovenia, Croatia, and Bosnia-Herzegovina even while fighting continued in the latter two between Serbs and other groups.

[130] *See, e.g.*, Blum, *supra* note 127.

[131] *See generally* Jeffrey L. Dunoff et al., *International Law: Norms, Actors, Process* at 105–50 (New York: Aspen, 2002).

[132] *See* Chart 5–1 (at p. 305), *infra*.

[133] Thus, it seems apparent that the IMF and the World Bank, faced with the same issues of succession, were influenced (for good and bad), by, among other things, the UN's treatment of these questions. *See, e.g.*, Paul R. Williams, "State Succession and the International Financial Institutions: Political Criteria v. Protection of Outstanding Financial Obligations," 43 *Int'l & Comp. L. Q.* 776 (1994)(criticizing these institutions' treatment of these issues).

those states emerging from the Soviet Union and the new states emerging from the Former Yugoslavia that were not already UN members, the Organization applied a clean slate approach, forcing each to re-apply for membership. With respect to Russia, the UN organs regarded it as merely the continuation of the Soviet Union and did not require readmission. With respect to Federal Republic of Yugoslavia (FRY)(Serbia and Montenegro), which had formally declared itself the successor to the Socialist Federal Republic of Yugoslavia, the General Assembly and Security Council applied yet a third, much more controversial approach that critics suggested violated not only the rules governing state succession but the UN Charter itself.

In the case of Serbia and Montenegro, the UN's political bodies faced a two-fold problem: a matter of state secession and a question of human rights. Although under UN institutional precedents Serbia and Montenegro had at least as plausible a case for succeeding to the statehood status of Socialist Federal Republic of Yugoslavia (SFRY), as Russia did with respect to succeeding to the rights of the defunct Soviet Union,[134] this was not the view of certain powerful states. In April 1992, when the FRY first made its succession claim, both the United States and the European Union indicated that recognition of the FRY's new status (whether as a new state or as a successor to Socialist Federal Republic of Yugoslavia) was contingent on its withdrawal of federal military forces from Bosnia-Herzegovina, the facilitation of humanitarian relief, and demonstrated respect for human rights and the rights of minorities.[135] In addition, an arbitration commission established by the European Union to consider issues of recognition had found, on July 4, 1992, that the FRY was a new state and not a successor to the SFRY.[136]

These developments presented the UN bodies charged with membership issues with a significant question in the age of human rights: should a state alleged to be engaged in forms of ethnic cleansing (through its support of Bosnian Serbs in Bosnia-Herzegovina) be permitted to automatically assume continued rights of UN membership? While human rights questions had occasionally surfaced with respect to membership issues, as with admission of Franco's Spain in the early days of the UN, in the case of Serbia and Montenegro it was less plausible to argue that the questions posed of an initial candidate for membership under Article 4, including whether it was willing and able to take on the rights of membership, was a relevant question to ask of a state that was a plausible successor to an existing member. (After all, no one asks existing UN members whether they continue to meet these Article 4 criteria as a precondition for continued membership.)

Although at the time that the FRY was claiming to succeed the SFRY, no one had yet attempted to suspend or expel either the FRY or its alleged successor

[134] *See, e.g.*, Blum, *supra* note 127, at 833; Jovanovic, *supra* note 128.

[135] *See* Sean D. Murphy, "State Succession, Contemporary Practice of the United States Relating to International Law," 94 *AJIL* 677 (2000).

[136] *Id.*, at 677.

from the UN, in the fall of 1992 the Organization faced considerable pressures to punish Serbia and Montenegro for its conduct, even if this meant imposing new conditions on the FRY's attempt to continue its UN membership. In September 1992 the Security Council and the GA passed separate but nearly identically worded resolutions that purported to determine that "the claim of the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted."[137] This was an ambiguous and legally dubious determination, as was clear from the inconsistent interpretations given to it by the U.S. and France (both of which suggested that this meant that the FRY was no longer a UN member), Russia and China (both of which suggested that the FRY was merely prevented from participating in the work of the Assembly but remained a member), and the Secretariat, whose Legal Counsel appeared to side generally with Russia and China.[138]

In the wake of the resolutions by the Council and the GA, the UN's Legal Counsel issued a clarifying statement indicating that the FRY's UN membership had not been terminated, that its nameplate would continue to be present in the GA, and its flag would continue to be flown at UN headquarters.[139] In accordance with this opinion, the UN Secretariat permitted the FRY's permanent mission to the UN to continue to operate more or less as normal. Although the FRY was not allowed to participate in GA sessions, its representatives continued to circulate documents, to participate in various UN committees, and even to attend Security Council meetings as observers.[140]

This state of affairs pleased no one, least of all lawyers who pointed out that nothing in the Charter authorized this half-way measure between suspension and expulsion (both of which anticipate ceasing participation in the Organization as a whole). This was a denial of voting privileges within the Assembly, but not of other participation, not authorized by the application of Article 19 or any other provision in the Charter.[141] Although the FRY continued to act as if it were a UN member, including by paying membership dues apportioned as late as September 1998, the

[137] SC Res. 757 (May 30, 1992); GA Res. 47/1 (1992).

[138] *See* UN Doc. A/PV/3116 at 12 (1992); *see also* the relevant discussion in the *Case Concerning Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment of February 3, 2003, Dissenting Opinion of Judge ad hoc Dimitrijevic, at 30–1 (text available at http://www.icj-cij.org/icjwww/idocket/iybh/iybhframe.htm); *Consequences for Purposes of Membership in the United Nations of the Disintegration of a Member-State—General Assembly Resolution 47/1 and Practical Consequences of its Adoption*, Legal Opinion of 29 September 1992, in *U.N. Jurid. Yrbk* 1992, at 428 (hereinafter "*Legal Opinion of 29 September 1992*").

[139] *Legal Opinion of 29 September 1992*, *supra* note 138.

[140] Murphy, *supra* note 135, at 677–8.

[141] *See* Letter from Carl-August Fleischauer, UN Under Secretary-General for Legal Affairs, and General Counsel, to Mario Nobilo, Permanent Representative of the Republic of Croatia to the United Nations, UN Doc. A/47/485 (1992) (explaining the consequences on the FRY). For criticisms, see Blum, *supra* note 127; Jovanovic, *supra* note 128.

Security Council eventually barred its representatives from attending its meetings on June 23, 2000.[142] After the fall of the Milosevic regime, the FRY reconsidered its position and formally reapplied to the UN as a "new" member and it was so admitted on November 1, 2000.

The legal confusion resulting from these series of events is suggested by the varying positions of the two international courts that needed to resolve, for their own distinct reasons, the FRY's UN membership status. While the ICJ, along with some legal commentators, appeared to suggest that the eventual actions of the FRY itself indicated its own acquiescence in the U.S.'s original position, namely, that it ceased to be a member in September 1992 and did not resume such status until November 2000, a trial chamber of the ICTY found that the FRY retained sufficient indicia of UN membership after September 1992 to remain subject to the Council's Chapter VII sanctions imposed on the territory of the Former Yugoslavia.[143]

While the FRY episode appears at first glance at odds with Higgins' proposition that UN political organs generally adhere to existing law on statehood with respect to membership questions,[144] the incident illustrates the difficulty UN organs sometimes have in navigating among the conflicting provisions of the Charter, an instrument that generally calls for fidelity to international law (including presumably the rules of state secession) in the same Article that requires the Organization to promote and encourage respect for human rights (Article 1(1) and (3)). As Oscar Schachter, among others, has pointed out, such vague and often conflicting injunctions are to be expected in a multilateral instrument that is the product of political compromise, and UN organs' attempts to apply such provisions, even when undertaken in good faith, invariably prompt accusations that they are acting on "the basis of political interests and preferences rather than legal criteria."[145] As the FRY episode shows, they also prompt episodes of institutional innovation at odds with the anticipated remedies provided in the Charter. Whether or not the case of the FRY has altered the membership criteria in Article 4, it established an institutional precedent for a novel membership sanction nowhere contained in the UN Charter.

Neither Higgins nor Schachter would be surprised by the complex interplay between law and politics reflected in such contemporary participation decisions, nor by how hard fought these battles are. In the era of decolonization, UN membership decisions gave shape to (as well as delimited) the Charter's vague principle of "self-determination." But even in our day, when such battles are largely over, UN participation decisions continue to have normative bite and real world significance, especially since UN membership is often a prerequisite to participation in other

[142] *See* de Wet, *supra* note 98, at 239 and nn. 112 and 115; Murphy, *supra* note 135, at 678.

[143] *See* de Wet, *supra* note 98, at 239.

[144] But note that Higgins' own examples suggested that the UN's membership determinations were strongly influenced by the practices of states in according recognition. She merely suggested that such practices were also strongly influenced by the traditional legal requisites for statehood. Higgins, *supra* note 113, at 39–41.

[145] Schachter, *supra* note 55, at 172.

organizations that are vital to full engagement in the world economy as well as in its communication and technological networks. States continue to believe that it is vital for them to participate in IOs such as the UN. The vociferous debates over the FRY's UN participation, over the continued non-participation of Taiwan, and over attempts to challenge the credentials at various times of Israel's and South Africa's representatives to the UN, to cite only some recent examples, dramatically illustrate that today, perhaps more than ever, sovereignty is status and status requires being a fully participating member of the club.[146] UN membership and continued UN participation provide tangible as well as symbolic benefits. If international legal personality provides, as is suggested in the prior section, an entrée for IOs to make international law, participation in IOs such as the UN enables modern states to be more fully sovereign. IOs empower states as well as vice versa, since it is through IOs that so much of international law now gets made.

3.3.2 Participation by Non-state Actors

It is also clearer today than it was in 1963, when Higgins was writing, that the UN has provided a similar entrée to non-state entities, albeit not on an equal basis with states, and has thereby empowered them by providing access to international law-making. While a comprehensive account of such efforts has been undertaken by others and requires no repetition here, the UN's general practice of extending various forms of participation rights, including the right to access virtually all of its political bodies and UN conferences, distinct forms of participation rights (to make statements, distribute documents, sometimes even the right of reply and to make proposals), and privileges and immunities while engaged in UN business, has been extended to states prior to becoming members, other IOs (including to some regional organizations outside the UN system), private (or non-governmental) international organizations (primarily through ECOSOC), liberation movements, international caretakers (most famously the UN Council for Namibia), and NGOs (through consultative status under Article 71).[147] While the rights

[146] As the Chayes write:

In today's setting, the only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system. Isolation from the pervasive and rich international context means that the state's potential for economic growth and political influence will not be realized.

Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* at 250–70 (Cambridge, MA: Harvard University Press, 1995), at 27. For a description of the "club model of multilateral cooperation," see, e.g., Robert O. Keohane and Joseph S. Nye, Jr., "Introduction," in Joseph S. Nye Jr. and John D. Donahue, eds., *Governance in a Globalizing World* 1, at 26 (Washington, DC: Brookings, 2000). Concerning the status of Taiwan, see, e.g., "Symposium, The Legal Status of Taiwan," 1 *UCLA J. Int'l L. & For. Affairs* 321 (1996–7). For an account of some credential challenges, see, e.g., Kirgis, *supra* note 6, at 585–600.

[147] For a comprehensive (if dated) survey, see Erik Suy, "The Status of Observers in International Organizations," 160 *Recueil Des Cours* 74 (1978). For a more recent account, see Schermers and Blokker, *supra* note 63, at 130–46.

accorded to observers (a term that does not appear in the Charter) and to those granted consultative status (which does) have at times reflected considerable creativity; vary with time, the authorizing organ and type of non-state actor seeking access; and have not always been consistently granted, the overall trend has been, despite setbacks, towards providing ever more access and participation rights to "international civil society" in its various forms.[148] Similar trends appear with respect to other IOs, many of which have adopted comparable rules permitting access to groups purporting to represent international civil society, and there are increasing signs that even those IOs that have been reluctant, such as the WTO, are becoming more amenable to NGO access.[149] UN specialized agencies, in addition, as addressed in Chapter 4, have also provided access to private industry in some cases.

By opening the door to non-state participation, IOs have also generated new questions about the new participants' international rights and privileges. It is now an established principle of law that those invited to the UN GA, including liberation movements such as the PLO, are entitled to privileges and immunities within the host state even though these rights are not specifically conferred under any treaty. This principle appears to be based on a new species of institutional customary law, growing out of the practice of the Organization.[150] Inevitably, some of the organizational innovations with respect to access for non-state actors, such as observer status, or the specific rights accorded to some non-state participants (for example, certain rights to participate given the PLO), have raised objections as

[148] *See, e.g.*, Suy, *supra* note 147 (surveying changes from the origins of the UN through 1978). *But see* Jurij Daniel Aston, "The United Nations Committee on Non-governmental Organizations: Guarding the Entrance to a Politically Divided House," 12 *EJIL* 943 (2001)(discussing the limitations on NGO participation imposed by the UN Committee on NGOs).

[149] *Compare* Guidelines for Arrangements on Relations with Non-Governmental Organizations, WTO Dec. No. WT/L/162 (July 18, 1996)(available at website www.wto.org/ngo/guide.htm) (reporting "broadly held view" that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings) *with United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R, para. 110 (October 12, 1998)(reprinted in 38 *ILM* 118 (1999)(concluding that WTO dispute settlement panels have authority to accept unsolicited submissions from non-governmental actors). *See also* Steve Charnovitz, "Economic and Social Actors in the World Trade Organization," 7 *ILSA J. Int'l & Comp. L.* 259 (2001).

[150] *See United States* v. *Palestine Liberation Organization*, 695 F.Supp 1456 (S.D. N.Y. 1988)(suggesting that the PLO's rights to privileges and immunities arise out of the practice of the U.S. under the Headquarters Agreement between the U.S. and the UN; that Agreement anticipates the host state will permit GA invitees to have access to the GA but says nothing about their other privileges or immunities). Note that much the same can be said of other aspects of the growing law relating to the privileges and immunities of IOs. Notwithstanding the substantial number of multilateral and bilateral treaties extending privileges and immunities to the UN, its employees, or representatives to the organization, such privileges and immunities appear to be respected even in cases where no relevant treaty obligation applies, as, for example, with respect to the privileges and immunities routinely extended to member states' missions to the UN, located in New York. For a suggestion that such missions are entitled to privileges and immunities under customary international law, see Kirgis, *supra* note 6, at 58. *See also* August Reinisch, *International Organizations Before National Courts* at 52–70 (Cambridge, U.K. and New York: Cambridge University Press, 2000), at 145–57 (discussing the use of customary law as one of the "avoidance" techniques national courts use to dismiss suits under IOs).

being inconsistent with the Charter.[151] Procedural innovations such as granting liberation movements the right to reply in the GA or to be invited to the Council (a rare privilege since Articles 31 and 32 of the Council appear to anticipate that such invitations only be given to UN members who are otherwise not a member of the Council) have either been condemned as lawless departures from the Charter, or as creative ways to provide the Organization with the views of those that can help it achieve the Charter's purposes.[152] Whether condemned or praised, however, it is apparent that the series of UN precedents established over time concerning the rights of observers and those entitled to consultative status have influenced other IOs and contributed to an on-going "participant revolution" in the making of international law.[153]

3.3.3 Human Rights and the Shrinking Concept of Domestic Jurisdiction

The UN Charter was regarded, at least in 1945, as a tool to protect states from one another. Its principal goal was to prevent what had just taken place, the subjugation of countries by an aggressor and the consequential trampling of sovereign rights. The UN was established to protect states from the violation of their territorial integrity and political independence. The Charter proclaimed "the right of states to exercise exclusive and total jurisdiction within its territorial borders" and the corresponding duty on others, including the UN, "not to intervene in its internal affairs."[154] While Article 2(4) of the Charter proclaims the duty of states not to violate the sovereign rights of others through the use of force, it is Article 2(7) that proclaims the residual norm of non-intervention: the right of states to be left alone.

In her 1963 book, Higgins contended that the lack of clarity of UN Charter Article 2(7)—the undefined concepts of "intervention," "domestic jurisdiction," and the undefined exception accorded "enforcement action"—made this provision "singularly susceptible to development by the process of interpretation by political bodies."[155] Like many commentators, she noted that the mutable and developing nature under international law of the concept of "domestic jurisdiction" permitted the Organization to take a flexible approach "based on the principle that states

[151] *See, e.g.*, Kirgis, *supra* note 6, at 166–75 (canvassing debates concerning the granting of observer status to the PLO, including its right to reply in the GA and its right to participate in the Council); Suy, *supra* note 147, at 140–5 (discussing instances involving the right to reply and the right to make proposals).

[152] *See* Suy, *supra* note 147, at 140–1. Notably, the extra-constitutional innovation of permitting observers appears to have arisen as a result of the Cold War stalemate, which prevented many states from being accepted as full scale members. *Id.*, at 88.

[153] *See, e.g.*, Kal Raustiala, "The Participant Revolution: in Environmental Law," 21 *Harv. Envt'l L. Rev.* 537 (1997).

[154] *See* Gareth Evans and Mohamed Sahnoun, "The Responsibility to Protect," 81 *Foreign Affairs* 99, at 102 (November/December 2002).

[155] Higgins, *supra* note 113, at 61.

must be made responsible to the international community when their actions cause substantial international effects."[156] She also posited, perhaps more controversially, that the absence of a reference to "international law" in Article 2(7) suggested the drafters' greater willingness to accept a flexible interpretation of residual sovereign rights, as compared to what states had been willing to agree to with respect to the preceding League of Nations.[157]

But while Higgins stressed the inherent elasticity of Article 2(7), and the wide discretion of UN political organs as a result, she did not believe that this provision and its interpretation was wholly a political matter. She argued that evolving determinations of domestic jurisdiction and permissible forms of UN intervention reflected the changing concepts of international law over time, "in accordance with interpretations made in good faith and in the hope of making the Charter effective."[158] Her survey of relevant UN practice concluded that the practice of UN organs with respect to applying Article 2(7) adhered to certain legal parameters.[159] She also found at least three limits on UN action derived from Article 2(7):

- that whether a matter is essentially within a state's domestic jurisdiction is not a purely political matter but is subject to legal considerations;
- that the rights of states to non-interference with their domestic jurisdiction do not cease to apply once a state agrees to a UN presence, such as in connection with peacekeeping, since these rights continue to apply except to the extent the state has ceded them; and
- that while the GA has jurisdiction over human rights violations of the Charter, neither it nor the Council is authorized to recommend military measures unless the situation in addition poses the threat of international frictions understood to be encompassed by a "threat to the international peace."[160]

[156] *Id.*, at 62.

[157] *Id.*, at 66 (noting that deviation from the comparable provision in the League of Nations Covenant reflected the anti-legalistic (if mistaken) views of the UN's drafters who believed that a reference to international law in Article 2(7) would have frozen the development of the Organization and prevent its organs from dealing with the full range of issues embraced by its expansive Principles and Purposes). *See* article 15(8), League Covenant (barring the Council of the League from reporting on or making recommendations with respect to the settlement of, disputes that "arise out of a matter *which by international law* is solely within the domestic jurisdiction" of one of the parties) (emphasis added).

[158] Higgins, *supra* note 113, at 130.

[159] Among other things, Higgins contended that the practice of the UN suggested that the interpretation of Article 2(7) was for each UN organ to decide; that certain matters, such as placing an issue on the agenda, were not impermissible "interventions" and that such decisions were to be determined by the practice of organs and the general acquiescence of members; that not all questions about whether a matter is or is not a matter of domestic jurisdiction are "important" questions requiring a two-thirds vote in the GA; that topics not subject to formal international legal obligations may still be of international concern; that UN organs are not barred from adopting resolutions directed at particular states; that UN organs may always act where treaty rights and duties are involved; and that the exception for "enforcement actions" in Article 2(7) applies to any Chapter VII measure, taken by the Security Council, even if only recommendatory, even without a finding under Article 39, and that the exception also applies in certain cases of demonstrable international concern when the Council acts under Chapter VI. *Id.*, at 58–130.

[160] *Id.*, at 58–130.

The range of procedural and other matters that Higgins found to be resolved through institutional practice reveals much about the general gap-filling capabilities of IO political organs. It shows that a great deal of law gets made through the day-to-day operations of institutional organs given the degree of deference (or perhaps simply inattention) usually accorded such decisions by states. Most of Higgins' conclusions about the shrinking *domaine réservé* hold up fairly well under contemporary scrutiny, perhaps because she found relatively few hard constraints on UN action imposed by Article 2(7), except perhaps limits concerning the proper scope of the Assembly vis-á-vis the Council in connection with enforcement action.

Today, given the dimensions of human rights concerns that have been found to be of international concern, many of which have been solemnified via treaties subject to widespread ratifications, there is hardly a question that, in principle, is barred from UN consideration. The combination of the elastic terms contained in the UN's ostensible non-interference rule, the de facto agreement within the Organization that its scope is to be in the ordinary course determined by the practice of UN organs, and the accepted carve-out for Council enforcement actions in any case, means that there is precious little left of a state's residual right to be left entirely alone—at least from the UN's political bodies. Thanks to the practice of UN (and other IO) organs and the ever expanding reach of international legal concerns, even those matters that Higgins implied were sacrosanct, such as a state's right to determine for itself its form of government or its economic system, are no longer so clearly out of bounds.

No single development has done more to transform the meaning and scope of Article 2(7) than the rise of human rights, a subject only briefly addressed by Higgins. Today, largely as a result of the UN's own actions, it is assumed that "no state holds unlimited power to do what it wants to its own people" and that "sovereignty implies a dual responsibility: externally, to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people with the state."[161] Human rights has served as the linch-pin for the UN's contemporary encroachments on the ever-shrinking *domaine réservé*.

Since the publication of Higgins' book, human rights-related activity by the UN political organs has mushroomed into a cottage industry. The UN's undoubted impact on international human rights law is the subject of a voluminous literature that identifies a "norm cascade" emerging from the UN's work, along with the efforts of other IOs and non-state actors such as human rights NGOs.[162] This development is all the more striking because the Charter is actually quite cagey on the subject and accords UN political organs no explicit authority to engage in human rights law-making, apart from a vague pledge to

[161] Evans and Sahnoun, *supra* note 154, at 102.

[162] *See* Martha Finnemore and Kathryn Sikkink, "Norms and International Relations Theory," 52 *Int'l Org* 887 (Fall 1998); Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca and London: Cornell University Press, 1998).

take "joint and separate action" and "promote" undefined human rights.[163] While the work of the Assembly in promoting treaty-making, including human rights conventions, is addressed in Chapter 5, its efforts to otherwise promote, interpret, and attempt to enforce the growing body of international human rights law require brief summary here.

The innumerable Assembly resolutions produced on a yearly basis that purport to declare existing human rights norms feature prominently in hoary debates about the status of GA resolutions.[164] Lawyers who have attempted to ascribe legally binding status to certain of these resolutions, notwithstanding their hortatory status under Articles 10–13 of the Charter, have usually done so by attempting to shoehorn them into the traditional positivist sources of international law. Some have attempted to explain the normative significance of prominent GA products, such as the Universal Declaration of Human Rights, on the basis of treaty. For those for whom the practice of organs is indistinguishable from the practice of treaty parties, the premise is the familiar one that GA resolutions, at least if adopted by consensus or on the basis of a unanimous vote, may constitute an authoritative interpretation of their treaty by those best in a position to indicate what their agreement is.[165] On this view, the Universal Declaration of Human Rights and comparable GA resolutions, acquire their legal status because they purport to delineate in greater detail the "human rights" mentioned in the Charter. Such resolutions also incidentally interpret, presumably with authoritative effect on this view, the scope of Article 2(7).

[163] Articles 55 and 56, UN Charter. *See also* Articles 1, 62, 68, 73, and 76, UN Charter. While these references to human rights represent a considerable advance relative to the League of Nations Covenant, they do not constitute a mandate to engage in human rights promotion and standard-setting. Such reticence is not hard to understand since those primarily responsible for the text of the Charter had their own reasons not to authorize international scrutiny to this end. The U.S. was worried about international scrutiny of its de facto apartheid regime; Britain and France were presumably concerned about the rights of those under their colonial rule and the Soviet Union had, of course, its own reasons to be worried about external scrutiny of the rights that it accorded to its own nationals. *See* Thomas Buergenthal, *International Human Rights* at 22 (St. Paul, MN: West, 2nd edn., 1995).

[164] As Christopher Joyner has noted, the GA has emphasized three broad areas in its normative activity: human rights, inter-state dealings and the rules restraining force, and outer space. *See generally* Christopher C. Joyner, "U.N. General Assembly Resolution and International Law: Rethinking the Contemporary Dynamics of Norm-Creation," 11 *Cal. Western Int'l L. J.* 445 (1981).

[165] *Cf.* Vienna Convention on the Law of Treaties, article 31(3)(a) (including as part of the context that treaty interpreters may consider subsequent agreements between the parties regarding the interpretation of their treaty) or (b) (permitting consideration of the subsequent practice in the application of the treaty that establishes the agreement of the parties regarding its interpretation). *Compare* U.S. Restatement on Foreign Relations, §103, Reporters' Note 2, at 38 ("resolutions by a principal organ of an organization interpreting the charter of the organization may be entitled to greater weight"). Most who make this argument acknowledge that it is doubtful that the Charter drafters, in 1945, intended to include the many specific rights now specified in innumerable resolutions, but that certain GA resolutions reflect an evolving but nonetheless binding interpretation of the Charter consistent with the teleological approach to Charter interpretation discussed in Chapter 2. *See generally* Christoph Schreuer, "Recommendations and the Traditional Sources of International Law," 1977 *German Yrbk. Int'l L.* 103, at 106–7. Schreuer also notes the argument that GA resolutions adopted by consensus might be seen as a new species of inter-state agreement and therefore binding as treaty, independent of the role of the GA in interpreting provisions in the Charter. *Id.*

For others for whom the practice of organs is not tantamount to the practice of all members to a treaty for this purpose or who reject the possibility that the GA can engage in authoritative interpretation of the Charter (since it is not so authorized),[166] customary international law provides the vehicle for normative effect. Human rights resolutions that indicate that certain norms are rules of custom ought, on this view, to be taken at face value. If such resolutions reflect what those voting for them truly believe, they provide the *opinio juris* needed to form customary international law.

Others would contend that since the creation of customary international law does not demand that states manifest their practice in any particular fashion, certain GA resolutions may manifest as well (or instead) the relevant state practice needed to form customary international law.[167] A vote in the GA by a state's governmental representative indicating that torture violates customary law, on this view, is a relevant indication of state practice, no less than a state's national law to this effect. As this implies, there are even some who would base a finding of custom entirely on the existence of a GA resolution or a series of comparable resolutions over time.[168] Yet others have suggested that GA resolutions acquire their binding status to the extent they are incorporated in whole or in part into actual state practice, such as national laws, including state constitutions. To the extent this occurs among the diverse legal systems of the world, the argument goes, the GA's work product acquires the status of the third source of international legal obligation in article 38: general principles of law.

An acceptable compromise for many is the proposition that at least some GA resolutions that satisfy the requisite criteria (for example, those that draw the virtually universal support of members) constitute an additional source of *subsidiary*

[166] As Oscar Schachter reminds us, nothing in the Charter indicates that the GA is authorized to "declare" the law and yet, from its very first session, the GA purported to do just that. In 1946, it considered and "affirmed" the Nuremberg Principles and later, at the same session declared genocide to be a crime in international law. Oscar Schachter, "The Crisis of Legitimation in the United Nations," 50 *Nordisk Tidsskript for International Ret* 3, at 4 (1981). Schachter argues nonetheless that the GA's 1946 resolution on genocide was new law "created" by agreement of states "manifested in their approval of a law-declaring resolution." *Id.*, at 7. He contends that other GA products, such as its 1970 Declaration of Principles of International Law concerning Friendly Relations, were "law-declaring resolutions that construed and "concretized" the principles of the Charter and were "validated" as "authentic" interpretation by the parties of their existing treaty obligations. *Id.*, at 5.

[167] *See, e.g.*, Schreuer, *supra* note 165, at 107–9. This tends to be the position as well of those who are dubious about the need for a distinct demonstration that custom is supported by more than state practice or who believe that the requirement of *opinio juris* and state practice are often interwined. *See generally* Committee on Formation of Customary (General) International Law, International Law Association, London Conference, at 55–66 (2000).

[168] *See, e.g.*, Statement of E.A. Gross, Agent for the Governments of Ethiopia and Liberia, *South West Africa cases*, ICJ Pleadings 347 (Vol. IX) ("with the growth of an organized international community, with constituent organs, it is increasingly reasonable to regard the collective acts of the competent international organizations as evidence of general practice accepted as law"); Judge Tanaka, Dissenting Opinion, *South West Africa cases*, 1966 ICJ Rep. 292 (repeated resolutions and declarations "can be characterized as evidence of the international custom referred to in Article 38, paragraph 1 (b)"). *See also* Danilenko, *supra* note 34, at 88–9.

evidence of the existence of international obligations, albeit an evidentiary source not identified in article 38(d) of the Statute of the ICJ (which identifies judicial decisions and the teachings of the most highly qualified publicists as subsidiary means for the determination of rules of law). On this view, it would be improper to conclude that a rule of custom exists only on the basis that the GA says as much; what is always needed is additional support in the actual conduct of states.[169]

All of these routes to legal status presume an inquiry, sometimes exacting, into the text, negotiating history, vote, and other circumstances surrounding adoption.[170] GA resolutions that fail to draw support from a sufficient number of states, or even from a small number of specially affected states, have sometimes been found lacking in the requisite qualities to be considered legally significant.[171] Another contextual factor, cited by the UN Office of Legal Affairs, is the title of a resolution, since a resolution that is cast as a "declaration" suggests a "greater solemnity and significance" and "may be considered to import, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it."[172] Those who insist GA resolutions may constitute evidence of what needs to be proven through other evidence would require an inquiry into subsequent developments, such as how these resolutions are treated by states. Given underlying debates about whether resolutions are relevant to the interpretation of the Charter or to evolving rules of custom, just which contextual factors matter, as well as their relative weight, are highly contested matters as well.

Strict positivists have argued that no particular GA resolution, or series of them over time, can overcome the explicit terms of the Charter, under which all remain purely hortatory instruments. They have argued as well that the requisites of

[169] *See, e.g.*, Stephen Schwebel, "The Effect of Resolutions of the UN General Assembly on Customary International Law," 73 *Proceedings of the American Society of International Law*, 301–9 (1979).

[170] *See, e.g.*, Georges Abi-Saab, "Cours Général de Droit International Public," 207 *Recueil des Cours* 160–1 (1987) (identifying the significant criteria to be the circumstances of the adoption of the instrument (including voting patterns and expressed reservations), concreteness of the language, and existence of follow-up procedures).

[171] *See, e.g.*, *U.S. Restatement on Foreign Relations*, §103, Reporters' Notes 2, at 38 (indicating that the evidentiary values of IO resolutions is "high if it is adopted by consensus or by virtually unanimous vote of an organization of universal membership such as the United Nations or its Specialized Agencies" but less weight should be given when such resolution "declares law in the interest of the majority by and against the interest of a strongly dissenting minority"). *See also Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep. 254–5, paras. 70–1 (accepting that a series of GA resolutions "may show the gradual evolution of the *opinio juris* required for the establishment of a new rule" but not where these had been adopted "with substantial numbers of negative votes and abstentions"). In that instance the ICJ also found a general obligation on states to ensure that their activities respect the environmental concerns of other states in part from principles first proclaimed at UN conferences in Stockholm and Rio. *Id.*, 35 *ILM* 809, para. 27 (1996). Among the well-known examples of an arbitral ruling that supports such distinctions is *Topco/Calasiatic* v. *Libyan Arab Republic*, International Arbitral Tribunal, Merits, 1977, 17 *ILM* 1 (1978) (Sole Decision by René-Jean Dupuy) (drawing distinctions between the Declaration of Permanent Sovereignty over Natural Resources (GA Res. 1803 (XVII) of 1962) and the later, more controversial, Charter of Economic Rights and Duties of States (GA Res. 3281 of 1974)).

[172] Quoted in Schwebel, *supra* note 169, at 304.

custom, requiring the actual practice of states and not merely their verbal assent cannot be avoided through recourse to the GA.[173] They note that GA resolutions are not always solemn undertakings benefiting from the scrutiny of states' lawyers or the GA's Sixth (Legal) Committee but are the product of political calculations and "casual" voting.[174] They point to abundant examples of GA resolutions, ostensibly dealing with human rights, that appear to be less about setting standards than about long-standing diplomatic and political differences between various UN members. Resolutions proclaiming a right to engage in trade and prohibiting unilateral trade sanctions on this basis or on the right to development, or affirming, as an essential part of the right to universal freedom of travel and the vital importance of family reunification, an entitlement to a free flow of financial remittances from relatives living abroad, to cite two examples, are more likely meant to embarrass the U.S. for its embargo against Cuba than as serious good faith efforts to develop international human rights law.[175] And all observers, positivists or not, acknowledge that many GA resolutions, perhaps the vast majority and including many produced under the banner of human rights, have no legal impact and embody the GA's other functions, including to serve as a place for states to peacefully "vent" against one another.

All of these arguments have reverberated with respect to declaratory resolutions issued within the plenary bodies of UN specialized agencies. As has proven to be the case with respect to rules governing international legal personality and budgetary powers, contentions about the normative impact of UN General Assembly resolutions have established the parameters for comparable debates in other IOs.[176]

These debates appear sterile and are inconclusive because, as even a relatively strict positivist like Danilenko once recognized, it is difficult to apply the terms of familiar sources such as custom "to a procedure which is so different from the traditional practice-oriented source of law."[177] The attempt to pigeonhole GA resolutions to one or more of the paragraphs of article 38 fails to fully account, much less explain, the effects of GA human rights standard-setting and its

[173] *See, e.g.*, Danilenko, *supra* note 34, at 91–4. This was a common theme among U.S. commentators critical of the ICJ's reliance on certain Assembly resolutions in the *Nicaragua case*. *See, e.g.*, Anthony D'Amato, "Trashing Customary International Law," 81 *AJIL* 101 (1987). Although some commentators have been swayed by the GA's repeated attempts to declare the law, Professor D'Amato, and many others, have argued that simple repetition is insufficient. *See, e.g.*, Anthony D'Amato, *The Concept of Custom in International Law* (Ithaca, NY: Cornell University Press, 1971).

[174] *See, e.g.*, Schwebel, *supra* note 169, at 302.

[175] *See, e.g.*, GA Res. 52/120 (December 12, 1997); GA Res. 52/121 (December 12, 1997).

[176] Thus, even the generally cautious work of the American Law Institute, in its influential attempt to present a restatement of international law, did not distinguish between GA resolutions and those declaratory resolutions adopted in other organizations of universal membership such as UN specialized agencies. *See* Restatement on Foreign Relations, §103, Reporters' Note 2, at 38–9. *See also* Christine Chinkin, "Normative Development in the International Legal System," in Shelton, ed., *supra* note 31, 21 at 32 (using criteria developed for evaluating the legal impact of GA resolutions to evaluate the legal impact of "soft law" developed within other IOs).

[177] Danilenko, *supra* note 34, at 90.

incidental impact on the *domaine réservé* left to states. When the GA's efforts succeed, as they did with respect to the Universal Declaration of Human Rights, it can affect the content of international law as well as national law in ways that few treaties or rules of custom can.[178]

The GA purports to declare human rights norms in different ways: some declaratory resolutions are consciously adopted as an interim step towards the conclusion of a multilateral human rights treaty;[179] others intend to proclaim non-binding guidelines or principles on fairly specific subjects such as basic rules for the treatment of prisoners;[180] and in yet other cases GA majorities proclaim intentionally innovative new norms in open defiance of at least a minority of its members, with presumably little real hope of affecting the law.[181] Debates about

[178] *See, e.g.*, Hurst Hannum, "The Status of the UDHR in National and International Law," 25 *Ga. J. Int'l & Comp. L.* 287 (1995–6) (noting that virtually every human rights instrument, binding or not, refers to the Universal Declaration, that it has become the benchmark for all subsequent forms of standard-setting (as in UN conferences), that more than 90 national constitutions since 1948 contain statements of rights inspired by the Declaration and more than two dozen explicitly refer to it, and that it has been cited in more than 200 judicial opinions in national courts from 27 countries). The Declaration promoted the establishment of an immense UN bureaucracy devoted to its fulfillment, as well as inspired the creation of national posts for the same ends. *See generally* Shelton, "Commentary and Conclusions," in Shelton, *supra* note 31, at 455.

[179] As Hurst Hannum has noted, such resolutions are usually adopted by consensus. They include such prominent examples as the Declaration on the Rights of the Child, the Declaration on the Elimination of Discrimination against Women, the Declaration against Torture, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and the Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities. Hurst Hannum, "Human Rights," in Joyner, ed., *supra* note 41, 131 at 146. In some cases, most famously the case of the Universal Declaration of Human Rights, it took many decades for UN members to agree to adopt the GA's work into treaty form. As Higgins noted, the subsequent efforts to secure GA approval for either completed human rights treaties or to recommend an international negotiating conference to complete such efforts may also raise interpretative issues under Article 2(7). *See* Higgins, *supra* note 113, at 99–100 (discussing the controversies engendered within the GA over inclusion in the international covenants on human rights provisions respecting the right to self-determination). *See also* Shelton, *supra* note 178, at 453 (contending that the delay between Assembly declaration and the conclusion of a human rights treaty sometimes strengthens the underlying guarantees and that even when no treaty emerges, the Assembly's declaration (such as its 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief) "may become the de facto standard invoked to judge the behavior of states").

[180] As Hannum indicates, it is precisely the specificity of the GA's rules in the context of diverse practices by states that suggests the absence of any intention to make these rules immediately or universally binding or appropriate for development into conventions. Hannum's examples include the Standard Minimum Rules for the Treatment of Prisoners, the Code of Conduct for Law Enforcement Officials, the Principles of Medical Ethics Relevant to the Protection of the Rights of Those Facing the Death Penalty, Standard Minimum Rules for the Administration of Juvenile Justice, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Basic Principles on the Independence of the Judiciary, Standard Minimum Rules for Non-Custodial Measures, and the Guidelines for the Prevention of Juvenile Delinquency. Hannum, *supra* note 178, at 146–7. As this list indicates, the non-binding nature of the GA's efforts in these instances appears to have been used as a license for particularly intrusive international efforts on topics once regarded as firmly within states' domestic jurisdiction.

[181] As Hannum indicates, in recent years, these efforts have often concerned economic, social, and group rights supported by developing states over the opposition of some in the developed world, notably the U.S. Hannum identifies the following examples: the Declaration on Social Progress and

the status of GA resolutions in general or about particular ones fail to satisfy in part because of the conflicting intentions of members as well as the increasing complexity of the resolutions themselves. In some cases, UN organs indicate what they believe they are doing. In 1957, for example, when ECOSOC approved the UN Standard Minimum Rules for the Treatment of Prisoners, a product of the First UN Congress on the Prevention of Crime and the Treatment of Offenders, it was reasonably clear that these were intended to be newly minted hortatory guidelines. The text of ECOSOC Resolution 1984/50 on Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, by contrast, suggested that it was intended to reaffirm pre-existing rules.[182] But the texts of resolutions are not always so clear. A number of GA resolutions, adopted by consensus, simultaneously refer to soft standards or guidelines for action issued at UN Conferences, suggest that such standards reflect pre-existing legal obligations, and also try to affect the future interpretation and implementation of such treaties, without clarifying which provisions within the resolution are intended as proposed law and which constitute codifications.[183] These conflicting indications may be the product of political compromise or indecision, but they may also represent an intentional commingling of the GA's interpretative, promotional, treaty-facilitative, and more judgmental functions.

Consider, as an example, annual GA resolutions directed at sexual violence and sexual trafficking. In such resolutions, such as one adopted in 1997, the GA: affirms that "sexual violence and sexual trafficking are violations of the human rights of women and girl children and are incompatible with the dignity and worth of the human person;" welcomes national, regional, and international efforts to "implement the recommendations of the World Congress against Commercial Sexual Exploitation of Children;" calls upon governments to criminalize trafficking crimes, including with respect to intermediaries and whether or not such offences are committed in their own or in a foreign country, and to "penalize persons in authority found guilty of sexually assaulting victims of trafficking in their custody;" invites states that have ratified the Convention on the Elimination of

Development, the Declaration on the Right of Peoples to Peace, the Declaration on the Right to Development, the Declaration on Race and Racial Prejudice, the Declaration on Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid and Incitement to War. Hannum, *supra* note 178, at 147.

[182] *See* Shelton, *supra* note 178, 448, at 450 (distinguishing between these two resolutions on this basis). Note, however, that the UN Standard Minimum Rules for the Treatment of Prisoners have since been repeatedly cited, including by human rights treaty compliance bodies and NGOs, as if they were now binding human rights customary norms.

[183] Notably, the GA's efforts with respect to human rights treaties resemble to some extent the ILO's adoption of treaties "with strings attached" as well as attempts to supplement the reporting or other methods for enforcement contained in particular conventions. *See infra* Chapter 5. Of course, while the ILO's efforts are explicitly authorized by its Constitution, the Assembly's attempts to mobilize shame on behalf of the ratification and implementation of treaties are an institutional innovation based on its evolving interpretation of its recommendatory powers, as well as Article 2(7).

All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child to "include information and statistics on trafficking in women and girls as part of their national reports" to the respective treaty committees charged with examining state reports; invites relevant special rapporteurs and a number of other UN bodies to give priority to these issues and to make recommendations to combat the problem; and charges the Secretary-General to report to a future GA session measures that have been taken to implement the GA's recommendations as well as to implement relevant proposals in the Platform for Action of the Fourth World Conference on Women.[184]

Whether this particular GA effort has an impact on international law can only be judged over time, but any such assessment needs to consider the actions of the entities identified in the resolution itself. More interesting than any attempt to identify whether, when it was passed, this resolution constituted a definitive interpretation of treaty, custom, general principle, mere evidence of any of these, or none of the above, are a number of other characteristics of such GA efforts. Such resolutions provide striking evidence of the skillful way the GA appears to be relying on, as well as affecting, the efforts of other international actors. In this instance, the GA attempts to use established UN procedures, including reporting obligations that states have under existing UN mandates and other treaties to secure greater state acceptance for a problem that has only achieved worldwide attention in recent years. The GA is reacting to problems whose dimensions have been publicized and exacerbated by new information technologies and increased transboundary travel. As is the case with many human rights issues discussed by the GA, these are issues whose scope and ramifications were not necessarily evident when many human rights treaties were concluded. The GA appears to be trying to modernize existing treaties and their remedies by building creatively on the relatively sparse provisions in the relevant human rights treaties and by attempting to affect the discretion of the treaty bodies charged with implementation, even though the GA as such and at least some of its members are not parties to these treaties.[185]

The GA's reliance on reporting obligations in this resolution, such as those under the CEDAW and the Rights of the Child Convention, is only one instance of many in which an IO seeks to use, as well as further empower, NGOs.[186] This is a

[184] *See, e.g.*, GA Res. 52/98 (December 12, 1997).

[185] Christine Chinkin argues, to cite another example, that the efforts of a number of IO organs, such as the ICESCR's monitoring committee as well as the Assembly, have amplified as well as "hardened" the "minimalist" terms of the ICESCR such that some of the rights of that treaty are now treated seriously (such as the right to housing, which has been the basis of decisions within domestic courts). Chinkin, *supra* note 176, at 33. Note that the GA's efforts in this respect would hardly have surprised Higgins. Higgins devoted a part of her 1963 work to the effects on treaty law brought about through the efforts of the UN political bodies. Higgins, *supra* note 113, at 241–346.

[186] *See, e.g.*, Shelton, *supra* note 178, at 460. For a detailed account of how the human rights efforts of the Conference on Security and Cooperation in Europe (CSCE, now OSCE), growing out of the Helsinki process, empowered NGOs and promoted the establishment of human rights posts within national governments, see Erika B. Schlager, "A Hard Look at Compliance with 'Soft' Law: The Case of the OSCE," in Shelton, *supra* note 31, at 346.

resolution that responds to pressures of the many NGOs with access to the GA (and ECOSOC), while it seeks to continue to collaborate with them by signaling to them that more pressure is needed and by suggesting where to apply that pressure. But it is also a resolution that suggests new, undoubtedly contentious rules, either by re-interpreting existing treaties or by way of new proposed rules of custom, despite the consensus basis for the resolution. The GA's call for a new category of universal international crime of sex trafficking, which even goes so far as to include intermediaries and government officials, for example, is a controversial attempt to progressively develop the law, even though much else in this resolution is not controversial. Nor is this resolution particularly unusual; comparable Assembly efforts can be seen with respect to recently minted human rights-based prohibitions of female genital mutilation, female infanticide, prenatal sex selection, and dowry-related violence, as well as GA efforts to develop, at considerably more depth than is provided in existing treaties, children's rights.[187] Such Assembly efforts, which typically require the interaction of discrete UN and treaty bodies in order to solve a cross-cutting problem (from sex trafficking to child soldiers), are incipient endeavors to develop inter-organizational linkages.

The Assembly's operational activities also have normative ripples. Its decisions to establish numerous human rights bodies, including such early efforts as a Special Committee on Apartheid in 1962, has led to a substantial UN bureaucracy entirely devoted to the study, interpretation, and enforcement of human rights norms. Much of the GA's on-going efforts are directed at recommending or requiring particular actions by these numerous sub-bodies. These include authorization for numerous studies that identify gaps in either standards or implementation but do not explicitly purport to declare either the law of the Charter or the rules of custom.[188] While the Assembly does not usually approve or adopt such reports, they form the backbone of its later efforts to engage in norm-setting and are used by other actors, including human rights treaties bodies charged with

[187] *See, e.g.*, GA Res. 52/99 (December 12, 1997); GA Res. 52/107 (December 12, 1997). *See also* GA Res. 52/106, (February 11, 1998) (as well as GA Res. 58/156 (February 26, 2004); GA Res. 57/189 (December 18, 2002); GA Res. 56/139 (February 26, 2002); GA Res. 55/78 (February 16, 2001); GA Res. 54/148 (February 25, 2000); and GA Res. 53/127 (February 23, 1999), GA Res. 57/176 (January 30, 2003); GA Res. 57/179 (January 30, 2003); GA Res. 54/133 (February 7, 2000); GA Res. 57/181 (February 4, 2003); GA Res. 56/128 (January 30, 2002); GA Res. 53/117 (February 1, 1999); GA Res. 57/190 (December 18, 2002); GA Res. 58/157 (March 9, 2004); GA Res. 56/138 (February 15, 2002); GA Res. 55/79 (February 22, 2001); GA Res. 54/149 (February 25, 2000); GA Res. 53/128 (February 23, 1999); and Resolution S-27/2 (May 10, 2002) (final document of the special session of the General Assembly on children, entitled, "A World Fit for Children")). Contemporary Assembly efforts with respect to the rights of the child would appear to serve multiple goals: to enlarge or deepen rights already contained in the Rights of the Child Convention, suggest that such rights ought now to be regarded as customary and binding on non-signatories to relevant treaties, or to broaden rights in such general, but older, human rights instruments as the International Covenant on Civil and Political Rights (ICCPR) or the International Covenant on Economic, Social and Cultural Rights (ICESCR).

[188] Hannum cites the example of studies undertaken by the UN Subcommission on Prevention of Discrimination and Protection of Minorities, often based on information compiled by the Secretariat from governments. Hannum, *supra* note 178, at 147–8.

overseeing state reporting obligations under human rights treaties. In other instances the GA has inserted itself much more directly into a process that seems intended to proclaim and enforce, through reporting obligations imposed on the Secretary-General, new rules of general law in conjunction with other IOs and an interlocking web of treaty obligations. Its operational efforts extend, of course, far beyond human rights and into other areas that intrude on states' "domestic" domain. A series of GA resolutions beginning in the 1990s, for example, attempted to enforce a moratorium on large-scale driftnet fishing on the high seas due to environmental concerns that had been raised by the South Pacific Forum and the Organization of Eastern Caribbean States in the late 1980s.[189]

From its earliest days, the GA also has developed a regular practice of condemnatory resolutions directed at particular human rights practices. Although these efforts focused initially on apartheid in South Africa and Israeli practices in the occupied territories, today many states have been the subject of what some have described as the GA's more "adjudicatory" efforts.[190] These critical or condemnatory resolutions, while undoubtedly selective in terms of the states and practices chosen for opprobrium, are based on the work of numerous UN bodies that report to ECOSOC and in turn to the GA, including the development of well-known procedures developed by ECOSOC permitting the UN Human Rights Commission to accept certain types of complaints (such as those alleging gross patterns of human rights abuses).[191] Appointments of special rapporteurs with respect to specific human rights abuses or for particular countries have sometimes been the result of prior GA condemnatory resolutions and these in turn are typically followed by continuing GA efforts to put pressure on recalcitrant states to cooperate, for example, by permitting on-site inspections.[192] As Higgins recognized, such GA

[189] In more recent years, the GA's resolutions on this question have promoted states' ratification of and compliance with the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 10, 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and the 1995 FAO Code of Conduct for Responsible Fisheries. For a detailed description of these efforts, see Donald R. Rothwell, "The General Assembly Ban on Driftnet Fishing," in Shelton, *supra* note 31, at 121. Rothwell indicates the wide number of states, UN agencies, other IOs, and NGOs that have been involved in the reports required of the Secretary-General in an attempt to implement the GA's moratorium. *Id.*, at 132–3. He also reports on the number of national laws (including within the U.S.) and regional efforts (including EC regulations and memoranda of understanding between states) that sought to implement in whole or in part the GA's moratorium. *Id.*, at 138–44. He concludes that while verification of the effectiveness of the moratorium remained difficult, it appeared to be working without major violation through the end of the 1990s. *Id.*, at 144–6.

[190] Shelton, *supra* note 178, at 452.

[191] *See*, *e.g.*, Hannum, *supra* note 178, at 134.

[192] In addition, as was suggested in the prior section discussing the example of the FRY, other GA action, as with respect to membership or acceptance of delegates' credentials, might be seen as efforts to enforce, and perhaps develop, human rights standards. The GA's and Council's actions directed at the FRY were meant to send a message of the incompatibility of "ethnic cleansing" with modern notions of statehood or good faith compliance with Charter obligations. Similarly, the GA's termination of South Africa's mandate over Namibia, along with the Council's attempt to enforce the effects of that termination, can be described as both an attempt to provide an authoritative interpretation of

attempts to enforce human rights, the product of a collaborative effort among a number of UN organs, treaty bodies, and NGOs, and reports produced by all of these, add layers of interpretative detail to human rights standards that have inevitable consequences on the evolving interpretation of Article 2(7).

Quite apart from conferences authorized by the GA for purposes of concluding a treaty, addressed in this book's chapters on treaty-making, the GA or UN bodies that report to it have also organized significant global conferences, especially dealing with the environment, sustainable development, and human rights. Even when these conferences produce policy agendas and not normative instruments, they have sometimes served as catalysts for the formation of new general principles of soft law, such as the precautionary principle in environmental law that emerged from the 1992 UNCED Conference in Rio.[193] The product of some of these conferences, such as the Rio Declaration or its Agenda 21, or the Beijing Conference on Women's Platform for Action, have inspired other legal developments, including within the UN's numerous human rights bodies and in the GA itself. As Peter Haas has argued, when such global UN conferences are successful, they promote social learning, identify and construct new conceptual frameworks for law and policy, clarify issues and ripen them for legal development, crystalize consensus and raise consciousness among relevant epistemic communities, expand participation, assist in the diffusion of knowledge that permits better monitoring or the setting of targets, and promote national and international administrative reforms.[194] Such conferences are the product of the institutions that authorize and that organize them and require follow-up. Successful conferences require considerable institutional support, including repeated preparatory meetings that assist iteration among the participants, secretariat support, a porous

the Charter (at least for purposes of interpreting the powers of trusteeship) and to affirm the legal status of norms that the GA had a large role in establishing (principally identifying apartheid as a human rights violation, that was possibly barred by *jus cogens* as well as the Charter). *See, e.g.*, Louis Sohn, "The UN System as Authoritative Interpreter of Its Law," in Oscar Schachter and Christopher C. Joyner, eds., *United Nations Legal Order* at 191–8 (Washington DC: ASIL and Cambridge, U.K: Grotius, Cambridge University Press, 1995).

193 *See* Peter M. Haas, "UN Conferences and Constructivist Governance of the Environment," 8 *Global Governance* 73 (2002). *See also* Antonio Cassese, *International Law in a Divided World* at 183–5 (Oxford: Clarendon Press, 1986) (discussing how modern customary law develops "on the margin" of diplomatic codification conferences). The precautionary principle, along with such other soft products of the Rio Declaration on Environment and Development as the principle of "common but differentiated responsibilities," has in turn been incorporated (but not necessarily clarified) via treaty, as in article 3 of the Convention on Climate Change. *See* A.E. Boyle, "Some Reflections on the Relationship of Treaties and Soft Law," 48 *Int'l & Comp. L. Q.* 901, at 906–9 (1999)(suggesting that such general principles "are not necessarily binding rules which must be complied with or which entail responsibility for breach" but are nonetheless "relevant to interpretation and implementation of the Convention as well as creating expectations concerning matters which must be taken into account in good faith in the negotiation of further instruments").

194 Haas, *supra* note 193. *See also* Schachter, *supra* note 55, at 233–45 (discussing how the UN functions to "mobilize a community into action" by fulfilling the "intelligence" function, as through day-to-day administration through an independent staff, transferring knowledge and skills, and establishing subsidiary bodies for research, advisory services, and training).

flow of information assisted by independent experts and NGOs, and widespread participation, including among developing countries.[195] The prospects that future conferences will have direct or indirect impact on applicable law, and not merely the expenses incurred, help to explain resistance to them in recent years, including by the U.S. Congress.

On some occasions, the target of the GA's human rights enforcement efforts has been, at least in part, itself. For example, the Assembly has endorsed the need to "mainstream a gender perspective systematically into all areas of their work, in particular in such areas as macroeconomic questions, operational activities for development, poverty eradication, human rights, humanitarian assistance, budgeting, disarmament, peace and security and legal and political matters."[196] The GA has also attempted to influence human rights norms, along with their enforcement, through resolutions directed at the Security Council. These include resolutions either in support or criticizing the Council's sanctions programs on the basis of their impact on human rights in the target country, calling for modifications to other Council enforcement measures, or urging the Council to authorize the use of force at least in part because of human rights concerns.[197] In taking such action, the GA has had an impact on the implied separation of powers principle, contained in Article 12 of the Charter, that it should refrain from making any recommendations "in respect of any dispute or situation" while the Security Council is exercising its functions.[198] These GA efforts are built on a significant premise: that IO organs are themselves subject to international human rights law.

3.3.4 The Security Council and Article 2(7)

The UN General Assembly has not been alone in using human rights to expand the boundaries of permissible UN intervention despite Article 2(7). Particularly since the end of the Cold War, it has had a powerful, if not always consistent or reliable ally in the Security Council, and, on occasion, the ICJ (whose role we will address more specifically in a later chapter).[199] As a number of

[195] Haas, *supra* note 193, at 76–7.

[196] GA Res. 52/100 (December 12, 1997). Presumably this interprets and gives effect to Article 8 of the Charter (calling on the UN to place no restrictions on the eligibility of men and women to participate and under conditions of equality).

[197] *See generally* Hannum, *supra* note 178, at 134–5. As Higgins' work demonstrates, the GA had sought to connect breaches of human rights to potential threats to the peace almost from the very beginning of the organization, as in connection with the treatment of Franco's Spain, and at the time that she was writing was considerably active on this front with respect to South Africa. Higgins, *supra* note 113, at 118–28.

[198] *See, e.g.*, Eckart Klein and Kay Hailbrunner, "Article 12," in Simma, *supra* note 1. Klein and Hailbrunner conclude that while Article 12 "has not become a complete dead letter, its scope has been considerably reduced." *Id.*, at 295 (footnotes omitted).

[199] For a discussion of the interplay between the Security Council and decisions of the ICJ on Article 2(7), see Stephen M. Schwebel, "The Roles of the Security Council and the International Court of Justice in the Application of International Humanitarian Law," 27 *NYU J. Int'l L. & Pol.* 731 (1995–6).

scholars have demonstrated, despite the absence of clear Charter warrant, the Council has managed today to carve out for itself a considerable and diverse mandate with respect to human rights.[200] Although the Council has focused on maintaining the peace, even from its earliest days, when it condemned Franco's dictatorship as a potential danger to the international peace, the Council has raised the visibility of international human rights law and international humanitarian law by its own repeated (if selective) condemnation of states; by calling attention to the rights of specific vulnerable groups, thereby adding at least its rhetorical support to the treaty regimes that seek to protect them, such as the treaty regimes dealing with women, children, refugees, and civilians in armed conflict; and by encouraging the efforts of other UN human rights mechanisms such as the High Commissioner for Human Rights and the Commission on Human Rights.[201]

As this last example suggests, the Security Council, like the GA, has on occasion engaged in its own efforts at progressive development of human rights law, thereby affecting the *domaine réservé*. Thomas Franck's controversial suggestion that there is now an "emerging norm of democratic governance," owes much to the Council's actions, not only in authorizing the use of force to restore a democratically elected government in Haiti, but also in the Council's long-standing practice to authorize UN assistance for plebiscites (for those asserting rights to self-determination) and for election monitoring and verification.[202] And, like the GA with respect to gender mainstreaming, the Council has had an impact on international human rights law by setting an example for how states and others can integrate human rights into distinct policy instruments and by applying human rights and humanitarian norms to its own actions. The Council, acting

[200] *See, e.g.*, Oscar Schachter and Oliver Ulich, "The Security Council," in Philip Alston and Frederic Megret, eds., *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Oxford University Press, 2nd edn., forthcoming 2005); Bertrand G. Ramcharan, *The Security Council and the Protection of Human Rights* (The Hague: Martinus Nijhoff Publishers, 2002).

[201] *See generally* Schachter and Ulich, *supra* note 200, at nn. 2–6 (citing the S.C. Resolutions 1160, 1208, 1214, 1234, 1261, 1296, 1318, 1325, and 1370 as examples). On UN efforts relating to Franco's Spain, *see also* Hannum, *supra* note 178, at 134–5; Higgins, *supra* note 113, at 118–28. On the UN actions relating to international humanitarian law, *see also* Schwebel, *supra* note 199. Schachter and Ulich point out that in the decade after 1994, the Council explicitly mentioned "human rights" in 88 of its resolutions, 24 presidential statements, and 60 exchanges of letters. They also note that the term was mentioned in 118 reports from the Secretary-General to the Council. Schachter and Ulich, *supra* note 200, at nn. 1–6. If "human rights" has been mainstreamed within the UN system, as it has, the Council can surely take some of the credit. For discussion of the Council presidency, which rotates among Council members on a monthly basis and the uncertain legal status of presidential statements (since it is not always clear when Presidents purport to speak as the representatives of member states that they also are), see, e.g., Sydney D. Bailey and Sam Daws, at 398–400 *The Procedure of the UN Security Council* (Oxford, U.K.: Clarendon Press, 3rd edn., 1998).

[202] Schachter and Ulich, *supra* note 200. *See generally* Thomas Franck, "The Emerging Right to Democratic Governance," 86 *AJIL* 46 (1992). *See also* Kirgis, *supra* note 6, at 803–30 (discussing the respective roles of the Secretary-General, the Council and the GA in developing rules with respect to electoral assistance/supervision and its interplay with Article 2(7)).

together with the Secretary-General, has influenced the content and scope of international humanitarian law by indicating more clearly the responsibilities of UN peacekeepers and has altered our conception of how human rights can be interpreted and enforced by incorporating human rights standards into modern peace operations established to administer particular territories. Such matters, as noted, have not been clearly resolved either by the UN's entitlement to legal personality nor by existing treaties, particularly since the UN itself cannot become a party to most human rights treaties. By incorporating "humanitarian" exceptions into its many sanctions programs (as through its sanctions committees), the Council has implied that the UN itself, although not a party to human rights treaties, may be bound by at least some of their provisions.[203]

Even more significantly, the Council sometimes has backed its rhetoric with action through an apparent redefinition of the trigger under which it is authorized to take Chapter VII action. As is suggested by Resolution 940 (on Haiti), the Council has increasingly treated human rights as "an integral part of the very definition of international peace and security."[204] Although the extent to which the Council's practice now establishes the proposition that the violation of human rights in itself constitutes a threat to the international peace when it does not pose any risk of international friction among states remains controversial, mostly because virtually every instance of massive human rights violations poses some plausible threat to international security, everyone acknowledges that the Council has acted, sometimes forcefully, in cases where the principal motivation, if not the sole rationale, appears to have been to respond to a human rights crisis.[205] This was arguably true even back in 1966, when the Council explicitly crossed the Chapter VII threshold with respect to Southern Rhodesia to order sanctions against that country, even though the ostensible threat to the international peace in that case involved an apartheid government's proclamation of independence from a colonial power (Britain) that was itself not threatening to do anything about it. Those who argued that the Council's actions in that instance were a legal nullity charged, quite plausibly, that the purported threats to the peace in that case were ephemeral or posed by others, and that the target of the Council's sanctions was merely exercising its right to proclaim its independence. Dean Acheson, a former U.S. Secretary of State, among others, argued that the Council had no right to trample on Rhodesian sovereignty and had no warrant to intervene in its internal affairs as affirmed by Article 2(7).[206]

[203] Schachter and Ulich, *supra* note 200. *See generally* Erika de Wet, "Human Rights Limitations to Economic Enforcement Measures Under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime," 14 *Leiden J. Int'l L.* 277 (2001). Higgins, in 1963, assumed that the UN was subject to existing customary law, including presumably human rights law. *See* Higgins, *supra* note 113, at 2.

[204] Schachter and Ulich, *supra* note 200, at 2.

[205] *See generally* de Wet, *supra* note 98, at 138–72. Note that, as noted *supra* at text and notes 164–5, the Assembly had engaged in such efforts almost from the very beginnings of the Organization.

[206] *See* Kirgis, *supra* note 6, at 628 (citing Acheson's testimony in 1971 before the U.S. Congress). *But see* de Wet, *supra* note 98, at 150 (arguing that the Security Council adhered to a "double strategy"

Notwithstanding such complaints, the Council built on the Rhodesian precedent and found a threat to the peace posed by the apartheid regime in South Africa (presumably on the same basis as Rhodesia), and, after the Cold War, repeatedly used the same strategy of finding a risk of international conflict posed by internal human rights violations in a variety of cases: as with respect to Iraq in reaction to its oppression of the Kurdish and Shiite minorities (Resolution 688), Bosnia-Herzegovina and Croatia in the midst of "ethnic cleansing" (e.g., Resolution 824), and in the wake of genocide in Rwanda (Resolutions 981 and 929), as well as other cases of human rights crises in Liberia, the Democratic Republic of the Congo, the Central African Republic, and Sierra Leone.[207] In other cases, the Council took Chapter VII action in response to human rights or humanitarian crises without, at least on the face of its resolutions, drawing an express connection to possible risks of international armed conflict.[208]

The Council has also turned to instruments that are now seen as part of the human rights toolbox, namely, international criminal courts, to solve challenges to its continuing ability to maintain the peace and by doing so helped to revive international criminal law. The effort to criminalize certain massive human rights violations had been, except for the actions of some national courts, more or less moribund since Nuremberg. When the Council established ad hoc war crimes tribunals for the former Yugoslavia and Rwanda in 1993 and 1994, respectively, it single-handedly created mechanisms that would add depth and context to the definition of international crimes as well as to the nascent international procedures for handling them.[209] While it is now routine to credit the judgments of those ad hoc tribunals with numerous innovations in international criminal law, it was the Council, after all, that set the train in motion and even pushed it along, as by describing the events in Rwanda as "genocide."[210]

whereby it utilized the impact of an internal human rights crisis on international relations as the reason to address the internal situation but that there was in fact a danger of violent involvement between Rhodesia and its neighbors at the time). Notably, the original justifications offered by the United States in defense of the propriety of the Council's determination of a threat to the peace, in 1967, stressed that the apartheid regime's proclamation of independence "could lead to civil strife that might involve other parties on one or both sides of the conflict." *Id.*, at 626–7. At that time, the U.S. also argued that the terms of Article 2(7) did not prevent the Council's actions because Rhodesia was not a state, because the Council acted at the behest of the legitimate sovereign (Britain) and therefore the action could not be considered an impermissible intervention, because the case did not involve matters of domestic jurisdiction since Rhodesia owed international responsibilities under Article 73, and because, in any case, the Council had an express exception for enforcement action.

[207] *See* de Wet, *supra* note 98, at 150–5.

[208] *Id.*, at 155–7 (discussing Security Council action in Somalia in 1992, in reaction to the first coup against Aristide in 1993, with respect to Angola in 1993, and in East Timor in 1999).

[209] SC Res. 827 (May 25, 1993) (establishing the ICTY); SC Res. 955 (November 8, 1994) (establishing the ICTR).

[210] SC Res. 912 (1994); SC Res. 918 (1994); SC Res. 935 (1994). In addition, the Secretary-General and the UN Secretariat, on whom the Council relied with respect to the establishment of these tribunals, must also be given credit for these developments since the Secretary-General's reports to the Council, including reports that attached the proposed statute for the ICTY, were the linch-pin for all that followed. *See, e.g.*, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704 (1993).

The normative implications of these actions are considerable. Higgins assumed, as noted above, that the Charter did not authorize the Council to take Chapter VII actions unless there was a real threat of international friction since this limitation was inherent in the phrase "threat to the international peace." Yet the Council's readiness, especially since 1989, to act with respect to some human rights crises and to draw tenuous connections to the *possibility* of international friction, and the many instances in which it made no such express connections, poses real doubts about this ostensible legal limitation. But if the Council can decide that anything is a threat or breach of the peace permitting it to take legally binding action, is the world only nine Council votes away from governance by the Council?[211] The divisions on the Council, both among its permanent members, and sometimes between them and many of the non-elected members and the unlikely prospect that states would accede to such a state of affairs, makes this prospect unlikely. Nonetheless, the Council's post-Cold War actions pose continuing challenges to core concepts that have been long associated with "sovereignty."

In some cases, the Council has itself acted in a quasi-judicial capacity even though, as a political body whose members do not abstain on matters raised under Chapter VII,[212] it is not capable of granting states the independent, impartial, and even-handed judicial consideration that some would argue underpins Article 1(1) of the Charter.[213] Although we will address the Council's (and the UN Secretary-General's) roles as quasi-judicial adjudicators of disputes more specifically in Chapter 7, at this point we focus on the impact the Council has had on the evolving interpretation of sovereign prerogatives as a result of such actions.

The Council in effect imposed a settlement on Libya, which was forced to transfer its nationals for trial in the wake of terrorist bombings, and Iraq, whose borders and certain Gulf War debts were settled by Council fiat.[214] Though Libya and Iraq do not pose sympathetic cases in other respects, these Council's actions present serious questions about the extent of its powers and about traditional assumptions about the extent of the residual state powers notwithstanding UN membership. Prior to the Council's actions with respect to Libya, states assumed that extradition, particularly of their own nationals, was a discretionary act to be

[211] For an attempt to find legal limits on the Council's discretion under Article 39 precisely to avoid such an untenable result, *see generally* de Wet, *supra* note 98, at 133–77.

[212] *See* Article 27(3), UN Charter (requiring abstentions only with respect to "decisions" under Chapter VI and under Article 52(3)).

[213] Article 1(1) of the UN Charter states that one of the UN's Purposes is 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." As will be addressed further in Chapter 9, most presume that this means that UN organs engaged in dispute settlement ought to respect certain basic principles of procedural justice such as independence, impartiality, and even-handedness when it engages in the settlement of disputes, including compliance with such general principles as the "equality of arms" and the prohibition of methods that permit those sitting in judgment to become judges in their own cause. *See also* de Wet, *supra* note 98, at 339–40.

[214] *See* SC Res. 731 (January 22, 1992) and SC Res. 748 (March 31, 1992) (Libya sanctions); *See also* SC Res. 687 (April 3, 1991) (Iraq sanctions).

decided under existing agreements, including, as Libya argued to the ICJ, the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (which permitted Libya discretion whether to extradite or prosecute any requested persons).[215] In ignoring established extradition law as well as permitting prominent permanent members to act as judges in their own cause, some contend the Council overstepped its bounds and trampled upon the due process rights owed to states, if not to the individuals eventually transferred for a Scottish trial in The Hague.[216] (These issues were ultimately left unresolved by the ICJ after Libya's case, directed against the United States and the United Kingdom but which indirectly challenged the power of the Council, was withdrawn at the request of the parties.)[217]

Similarly, Iraq, although a sovereign state even in the wake of the Gulf War, had much of its sovereign rights in effect put into receivership as a result of the extensive measures imposed on it under Resolution 687. Its general license to maintain as well as restore the peace enabled the Council to impose a boundary, impose a method for settling its post-war debts and force payment of these debts, permit widespread intrusions into its territory (by arms inspectors), and deny access to weapons not otherwise illegal that Iraq, at least, argued it needed to defend itself. Resolution 687, whose full impact continued to be felt within Iraq until it was invaded in March 2003, appears to establish a precedent suggesting that those branded an aggressor by the Council enjoy few if any residual rights to nonintervention in their domestic affairs for as long as the Council determines. It stretches the scope as well as temporal dimensions of the "enforcement action" exception to Article 2(7) far beyond what was probably contemplated by its drafters.

Other examples of the Council acting as judge and jury implicate the due process rights of individuals more than they do the rights of states. Consider the sanctions regime established by Resolutions 1267 (1999), 1333 (2000), and 1455 (2002). The 1267 Committee, a subsidiary organ of the Security Council originally established in October 15, 1999 to monitor states' compliance with the Council's sanctions imposed on Taliban-controlled Afghanistan, under Resolution 1267, given that regime's support of Osama Bin Laden and Al Qaeda, has now a vastly expanded jurisdiction. While originally it was limited to examining the implementation of a flight ban and assets freeze, that Committee was charged with overseeing in addition an arms embargo and an expanded assets freeze

[215] *See Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (*Libya* v. *United States and United Kingdom*), Request for Indication of Provisional Measures, 1992 ICJ Rep. 114 (1992).

[216] *See* de Wet, *supra* note 98, at 348–51 (concluding that, as a result, the Council's Libyan embargo was "void of a legal basis").

[217] ICJ Press Release 2003/29, September 10, 2003. While the ICJ refused to grant Libya's request for provisional measures, it ultimately rejected the United States' and the United Kingdom's requests that the case be dismissed on jurisdictional grounds. *See Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (*Libya* v. *United States*, *Libya* v. *United Kingdom*), Preliminary Objections, 1998 ICJ Rep. at 115 (February 27) and 124 (June 2). For an examination of the case, see, e.g., de Wet, *supra* note 98, at 2–12.

(including the assets of any Al Qaeda supporter) through Resolution 1333. In January 2002 the Council expanded the Committee's domain further to permit it to examine states' compliance with measures targeting the Taliban, Al Qaeda, or their supporters anywhere in the world (Resolution 1455).

At this writing, that Committee presides over a periodically updated list of some hundreds of individuals and organizations, all of whom are identified to the world as associated with terrorism or their facilitators. Under binding Council order, all states must freeze the assets and resources and ban the travel of individuals and organizations on this list. Members of the Council, serving in their capacity on the 1267 Committee, identify the names to be put on the list, and other members have 48 hours to object or to place a hold on a submission. The Committee's membership replicates the current membership of the Council. If no member of the fifteen-member Committee objects, the name is added to the list. During the Committee's initial period of work, names were put on the list largely on the basis of political trust. According to a close observer to the process, submissions of names to the 1267 Committee often contained "minimal personal information and did not generally include explanations of the connection between the individual or entity" and members of Al Qaeda or the Taliban.[218] In the weeks immediately following 9/11, the Committee added more than 200 names to its list, most submitted by the United States.[219]

After considerable criticism, including by a UN monitoring body, that the Committee's procedures lacked transparency and failed to safeguard the listed individuals' due process rights, the Committee adopted, in November 2002, written guidelines on the submittal of names. The guidelines indicate that to the extent possible, members need to provide a "narrative description" that explains the basis for putting a name on the list; the guidelines also include procedures for removing names from the list.[220] But while it is now possible for individuals to be de-listed, provided the state that originally listed them agrees, individuals continue not to have an opportunity to challenge the Committee's designation and have to rely on their governments to complain to the Committee and to secure from the state that initially submitted their names an admission that a mistake was made before their names can be removed. In any case, since the Council does not provide a definition of the crimes to which its 1267 sanctions presumably apply (whether the crime of "terrorism" or the crime of "facilitating" it), the decisions reached by its 1267 sanctions committee will prove difficult for those targeted to challenge.[221] The Committee does not provide for a judicial finding of wrongdoing, and while

[218] Eric Rosand, "The Security Council's Efforts to Monitor and the Implementation of Al-Qaeda/Taliban Sanctions," 99 *AJIL* 745, at 748 (2004) (indicating that this approach was justified by the need to act quickly and to protect secret intelligence material and sources).

[219] *Id.*, at 749. [220] *Id.*, at 750–1.

[221] *See*, *e.g.*, *Aden* v. *Conseil de l'union Europeenne, Ordonnance du President du Tribunal*, May 7, 2002 (unsuccessful challenge to counter-terrorism financial sanctions imposed on individual); *Bosphorus Hava Yollari Turizm ve Ticaret AS* v. *Minister for Transport, Energy, and Communications*, 117 ECR I-3953 (July 30, 1996)(unsuccessful challenge to sanction imposed on corporation). A national

the Council sanctions anticipate that humanitarian exceptions can be made in order for designated individuals to secure funds to pay for their rent or food, for example, such exceptions are at the discretion of governments and may be waived if the Committee decides otherwise. Further, neither the Committee nor its guidelines take into account or make provision for the stigmatization and other effects on family members of those identified on its lists, including their employment prospects.

For critics of this new form of "smart sanction," the Council is imposing on individuals what is in effect a criminal sanction, both in terms of stigmatization and punitive financial deprivations of property, with which all states are, under Chapter VII order, bound to comply. Critics argue that this approximates a conviction for involvement with international terrorism that is not in compliance with established human rights law since it is imposed without the opportunity for trial, to confront one's accusers, or to enjoy the presumption of innocence.[222] Despite these criticisms, to date, the Council has rejected European proposals to permit listed persons to be heard before the 1267 Committee, have a right to appeal to an independent body (outside of the Committee), and obtain redress if they have been wrongly subjected to sanction. At this writing the Council continues to focus instead on strengthening states' compliance with its sanctions.[223]

While the Council's establishment of the ICTY and ICTR has won mostly praise from international lawyers, defendants before those tribunals have raised serious questions about whether the creation and continued operation of those bodies comports with international human rights law. Even if one ultimately concludes that such qualms are not merited, there is little question that by establishing these courts, the Council broke new ground in interpreting its powers as well as the *domaine réservé* of states.

While the trial and appellate chambers of these tribunals have to date rejected challenges to their jurisdiction that in effect challenge the Council's basis for

or international court asked to review the legality of a financial sanction imposed as a result of the Council's action would have little to review in any case since, as noted, the Council does not release a justification or documents associated with its targets and its targeted individuals have not been, in any case, formally charged with a crime.

[222] *See* de Wet, *supra* note 98, at 352–4. *But see* José E. Alvarez, "Hegemonic International Law Revisited," 97 *AJIL* 873, at 877 and n. 23 (2003)(noting that article 14 of the ICCPR is largely directed at criminal defendants and indicating that it is not clear whether under international law what the Council is authorizing would be regarded as merely a temporary deprivation of property). Some argue that states are inhibited from complying with the Council's edicts to identify such individuals located within their territories because this would constitute an acknowledgment that Al Qaeda or the Taliban operates within their jurisdiction while others are worried that some states may be adding organizations to the list (and therefore stigmatizing individuals associated with such organizations) for opportunistic, political purposes. Thus, some have criticized the Committee's decision to add the East Turkestan Islamic Movement, a Chinese separatist group whose alleged ties to Al Qaeda are less than clear. Rosand, *supra* note 218, at 752.

[223] SC Res. 1526 (January 30, 2004), for example, authorizes the 1267 Committee to prepare written, and not just oral, assessments of states' compliance efforts and establishes a new eight-member Analytical Support and Sanctions Monitoring Team to assist the Committee in improving compliance with the Council's counter-terrorism measures.

establishing them, the legality of these Council-generated bodies is not quite as simple a matter as these decisions, and many commentators, have assumed.[224] Article 14 of the International Covenant of Civil and Political Rights (ICCPR), which many assume codifies customary international law, accords criminal defendants the right to a fair and impartial hearing by a competent, independent, and impartial tribunal established by law; that provision also includes a number of specific rights for criminal defendants.[225] It is true that, unlike the Council's prior efforts on Iraqi boundaries, Gulf War liabilities, and alleged terrorists, the Council-generated Statutes for the ICTY and ICTR incorporate specific due process protections. The rights accorded criminal defendants in the ICTY and ICTR are comparable to those in article 14(3) of the ICCPR. But it is less clear whether the ICTY and ICTR constitute the "independent" tribunals "established by law" anticipated in the ICCPR. The independence of these tribunals appears to be a matter of degree. What would happen if the Council were to demand from one of these tribunals, which presumably were established pursuant to the Council's power to establish *subsidiary* bodies, that a defendant's trial be expedited or dealt with in a particular fashion? Are these courts independent of political control in the sense anticipated by the ICCPR if they cannot require the arrests of suspects or the securing of evidence without the effective cooperation of the Council? Nor is it clear just how these tribunals, established without any warrant in the Charter or the prior practice of the Council, came to be "established by law." That requirement, intended to prevent historic abuses of government power by which military or other courts have been established without pre-existing legal authority, is a distinct requirement of international human rights law and should not be regarded as redundant.[226]

Questions regarding the Council's relationship to human rights have been posed most directly in connection with resort to comprehensive economic sanctions. Despite the Council's incorporation of "humanitarian" exceptions into its sanctions programs, the scope and application of such exceptions have been questioned from time to time, leading to adjustments in how particular sanctions have been applied. More difficult are contentions that economic sanctions, at least of the comprehensive kind, are simply not compatible with the age of rights. Measures that are intended to inflict pain on populations in order to create

[224] *See, e.g.*, *The Prosecutor* v. *Tadic*, Decision on the Defense Motion for Interlocutory Appeal and Jurisdiction, Case No. IT-94-1-AR72, October 2, 1995, Appeals Chamber; *The Prosecutor* v. *Kanyabashi*, Decision on the Defense Motion on Jurisdiction, Case No. ICTR-96-15-T, June 18, 1997, Trial Chamber. For a defense of these decisions, see de Wet, *supra* note 98, at 341–8.

[225] Under article 14(3) of the ICCPR, 999 UNTS 171 (entered into force March 23, 1976) criminal defendants are entitled to prompt notification of pending charges, adequate time and facilities for the preparation of their defense, counsel of their own choosing, to be tried without undue delay, to be tried in their own presence, to examine or to have examined witnesses against them, to have the free assistance of an interpreter, and not to be compelled to testify against themselves.

[226] For a more detailed discussion of these critiques, see José E. Alvarez, "Nuremberg Revisited: The Tadic Case," 7 *EJIL* 245, at 253–60 (1996). *But see* de Wet, *supra* note 98, at 343 (arguing that "competent" and "established by law" are "effectively synonyms").

pressures on a recalcitrant government, it is argued, cannot be in compliance with basic principles of either international humanitarian law (which bars the targeting of civilians and imposes proportionality requirements) or a number of economic, social, and cultural rights, such as those contained in the Convention on the Rights of the Child, CEDAW, and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). And whether or not indiscriminate sanctions are now outlawed, the prospect that the Council's sanctions may be imposed without time limit or without thorough and on-going monitoring to determine whether they are having disproportionate impacts on vulnerable groups or on core rights like the right to health or life, greatly troubles human rights advocates. This explains the steady campaign by human rights NGOs directed against the legality of the lengthy comprehensive sanctions imposed on Iraq prior to hostilities commencing in March 2003.[227]

Human rights, as well as residual sovereignty concerns, have also arisen in connection with the many Council mandates leading to the UN administration of particular countries or territories. Although such mandates now typically arise in connection with the robust forms of peacekeeping that have emerged in the wake of the Cold War, they have a longer history. They have arisen as part of the final act of decolonization, in order to permit the peaceful transfer of control to an existing government, pending the holding of elections, as part of an on-going peace process, or merely in order to provide basic law and order in the wake of a governmental collapse.[228] Even in a post-colonialist age, the UN has been, at least some of the time, responsible for the administration of certain territories, including in some instances all manner of legislative, executive, and judicial functions and civil administration.[229] Such new forms of de facto trusteeships, not sanctioned by

[227] *See generally* de Wet, *supra* note 98, at 217–55 (arguing that the Iraqi sanctions regime, for example, ultimately became illegal and contending that under some circumstances, Council sanctions regimes can be deemed to have terminated, and need to include particular time limits, be carefully tailored, and provide for detailed and transparent monitoring).

[228] For a thorough description, see Simon Chesterman, *You, the People*, 48–98 (Oxford, U.K.: Oxford University Press, 2004).

[229] *See, e.g.*, SC Res. 1272 (October 25, 1999)(which explicitly endows the Transitional Administrator with the power to "enact new laws and regulations and to amend, suspend or repeal existing ones")(at para. 6). Pursuant to such authority, the Administrator in Kosovo and East Timor adopted Regulation No. 1, which in some respects is comparable to a constitution since it delineated the administrations' authority and powers, defined the applicable law, repealed other laws, while stipulating that in the exercise of their functions all public officials must observe internationally recognized human rights standards. UNMIK/REG/1/1999 of July 25, 1999 at sections 2 and 4 (available at www.un.org/peace/kosovo)(as amended by later regulations).

Michael Doyle has characterized the different aspects of UN transitional administration of territories into four categories according to the power exercised: supervisory authority (such as East Timor, Kosovo, and Brcko in Bosnia and Herzegovina), executive authority (as in Eastern Slavonia, Bosnia after 1997, Liberia); administrative authority (Mozambique, Cambodia, Bosnia from 1995–7, Western Sahara, and Somalia under UNOSOM II), and monitoring (UN in Afghanistan). Michael W. Doyle, "War-Making and Peace-Making: The United Nations' Post-Cold War Record," in Chester A. Crocker et al., eds., *Turbulent Peace: The Challenges of Managing International Conflict* at 529 (Washington DC: United States Institute of Peace Press, 2001).

(and expressly barred by) the Charter under its largely defunct Chapter XII,[230] have included Cambodia, Kosovo, East Timor, the Serb-controlled Republika Srpska Krajina, and to a lesser extent, Bosnia-Herzegovina under the Dayton Accords.[231] As would be expected, once the UN assumes the role of territorial sovereign, even for a limited purpose and a limited time, it faces all the predictable human rights issues (and duties) that states face and at least one more: how best to respect the underlying right of self-determination that is usually the UN's ostensible goal in undertaking these tasks.

The UN's administration of territories, occasions when the Council is in fact, and not just in a figurative sense, governing at least a part of the world, has generated an abundant literature and a rich set of inquiries that cannot be duplicated here. Some of the UN's practices in such cases, such as a regulation adopted for the operation of the UN's presence in Kosovo (UNMIK) requiring all persons undertaking public duties or holding public office to observe the standards of a substantial number of UN human rights treaties, appear to support the important principle, discussed above, that the UN itself is required to respect such treaties.[232] But these very cases suggest some of the troubling ambiguities about such efforts, however attractive they are in principle. Despite regulations like the one described, it is not entirely clear whether the Organization and its members uniformly believe that such human rights duties arise as a result of customary international law, because the Organization ought to be treated in some sense as a de facto party to (some or all) human rights treaties, because of the Charter's vague references to human rights, because institutional practice now requires it as a matter of institutional law, as a voluntary matter whenever the Organization decides that it is warranted by the circumstances, or for some other reason. The UN Charter answers none of these questions. No one knows for sure whether the matter is a question of legal duty or an *ex gratia* assumption of responsibility, whether it applies to all IOs and with respect to all its operations, or, even if all of international human rights law does apply to the UN, how it does so.

That the UN's Kosovo regulation mentioned above included references to the European Convention of Human Rights, among other human rights instruments,

[230] Chapter XII trusteeships are limited to League of Nations mandates, territories detached from enemy states in World War II, and territories voluntarily placed under the trusteeship system by the responsible states. Article 77, UN Charter. Article 78 of the Charter, drawing on the principle of sovereign equality, explicitly prohibits the Trusteeship System from applying in territories that have become UN members. But some have called for de facto or de jure amendment of the Trusteeship system precisely to permit it to operate within UN members. *See, e.g.*, International Commission on Intervention and State Sovereignty, *The Responsibility to Protect,* paras. 5.22–5.24 (Ottawa: International Development Research Center, December 2001)(available at www.dfait-maeci.gc.ca/iciss-ciise/report-en.asp).

[231] *See generally* de Wet, *supra* note 98, at 311–37; Chesterman, *supra* note 228.

[232] The instruments listed under UNMIK Regulation 1999/24 included the Universal Declaration of Human Rights, the ICCPR and its protocols, the ICESCR, the Convention on the Elimination of All Forms of Racial Discrimination, CEDAW, the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, The European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, and the International Convention on the Rights of the Child. Quoted in de Wet, *supra* note 98, at 320 and nn 55 and 59.

suggests the inconsistencies in the UN's practice. If that regulation is taken seriously, it also suggests the awkward fact that at least in this instance the Organization appears to be binding itself to instruments that a number of its own members have either failed to ratify or have done so only with considerable reservations.[233] There are also considerable doubts about how to apply such conventions, even assuming they invariably apply with respect to those who serve UN civil administrations, since such texts were not drafted with IO circumstances in mind.

Human rights treaties require some adaptation to suit Council-generated sanctions programs, Council-generated forms of adjudication, or the UN's administration of territory. For example, since UN responsibilities typically arise in countries still emerging from, if not still engaged in, severe conflict, the UN would typically require derogations from certain rights provisions but, while some of the relevant human rights instruments anticipate such derogations in cases of national emergency, the UN has no clear way to participate in the relevant treaty schemes.[234] And some rights, derogable or not, would appear difficult for UN administrators to comply with fully in the midst of territories still struggling with basic security concerns. These include the property rights provisions contained in several of the UN instruments[235] or provisions requiring access to court for certain infringements of rights (which may be difficult in any case given the immunity typically enjoyed by UN officials or the circumstances under which such administrations take place).[236] Perhaps as a result of these uncertainties as well as for other reasons, the UN has not always established procedures even for minimal independent monitoring to examine the level of its own human rights compliance.

No one is entirely certain whether, as with other Council-generated human rights activity, some of the UN practices on point (such as its regulation in Kosovo) are meant to be purely rhetorical but not to entail any concrete remedy for individuals. What is true is that, as is suggested by complaints filed against

[233] For this reason, as well as the fact that from a formal point of view the UN is a distinct legal person that cannot be regarded as the alter ego of its members and is not allowed to ratify such conventions (which are limited to states), it seems a bit of a stretch to contend that the UN is bound to the entire canon of UN human rights treaties merely because it was the venue for their negotiation or because the Charter refers to the concept of human rights. It is also notable that the Kosovo regulation includes the Universal Declaration of Human Rights, an instrument whose "soft law" status permitted the inclusion of certain vague rights whose content and binding force remain notoriously unclear. *See, e.g.*, article 28, Universal Declaration ("everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized"). Quite apart from such questions, it is not clear to what extent a regulation such as the one adopted for Kosovo implies that UN members, individually, are now derivatively or secondarily liable for acts committed by UN officials, even when the violations involve instruments that such members have not ratified.

[234] Such derogations clauses are intended to permit external scrutiny of the reasons given for derogating as well as the duration of ostensible emergencies. The UN's inability to participate in the anticipated reporting schemes for such treaties is accordingly, a very real and not merely a procedural handicap to its good faith compliance with such instruments.

[235] *See, e.g.*, article 17, Universal Declaration.

[236] *See, e.g.*, de Wet, *supra* note 98, at 324.

peacekeepers and others, the UN, like states, has not always respected fully the human rights of the individuals it has been charged with governing.[237]

Virtually all UN administrations of territory have also raised questions about the continuing meaning of the right of self-determination, contained in both the ICCPR and the ICESCR and, of course, in Article 1(2) of the Charter. As discussed, the concept of "self-determination" has had a checkered history in public international law and in the history of the UN.[238] Whether or not one agrees with the distinctions made between the right to "external" self-determination for succession (usually limited to those emerging from colonial rule or where minority rights have been totally denied otherwise) and the right to "internal" sovereignty (limited to the recognition of certain group rights within an existing state but not to succession), not all the beneficiaries of the UN's largesse have agreed with the way the Organization has interpreted or applied these rights in the course of its administrations of territory, as, for example, to permit in the end only some substantial autonomy for Kosovo Albanians within a greater FRY, while insisting on an independent East Timor.[239]

But such debates appear insignificant compared to the vociferous confrontations within the Council and outside of it with respect to the Council's handling of the occupation of Iraq in 2003. While the Council's decisions on the future of Iraq remain, at the time of writing, a work in progress, its resolutions on the matter, including Resolutions 1483 and 1511, appear to be yet another model for the handling of territories whose sovereign status is suspended at least for a time. In this instance, while the Council reserved the right of the Iraqi people to ultimately decide their own political future and type of government, it effectively recognized the rights of the United States and the United Kingdom as occupying powers ("the Authority") and acquiesced in those governments' civil and military control.[240] As it had numerous opportunities to do in connection with other occupations (e.g., Israel's over the occupied territories, Iraq's over Kuwait), the Council affirmed the applicability of established rights and duties of occupying powers under international humanitarian law.[241] At the same time, the Council appeared to acquiesce in the occupying powers' plans to remake Iraqi laws and transform its institutions as necessary in order to pave the way for a democratic state.[242] As at least one

[237] *See, e.g.*, *id.*, at 322–6.

[238] *See, e.g.*, Higgins, *supra* note 113, at 90–106. *See also* Section 3.3.1.

[239] For a defense of these efforts in terms of the meanings of self determination, see de Wet, *supra* note 98, at 326–35.

[240] SC Res. 1483 (May 22, 2003), para. 4; *see also* SC Res. 1511, (October 16, 2003).

[241] SC Res. 1483, *supra* note 240 at preamble and para. 4. For discussion of earlier Security Council resolutions on point, see, e.g., Schwebel, *supra* note 199.

[242] Thus, while SC Res. 1483 recognized "the specific authorities, responsibilities, and obligations under applicable international law" of the United States and the United Kingdom "as occupying powers under unified command ('the Authority')," para. 4, it also supported the formation of an "interim administration" as a transitional administration "until an international recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority," (SC Res. 1483, *supra* note 240, at para. 9).

commentator indicated, such bold and transformational control of Iraqi society and economy, permitting, for example, the Authority to disperse funds under a Development Fund for Iraq and to provide food assistance tied to the production of oil, is difficult to reconcile with existing humanitarian law rules.[243] Under the Council's supervision, the Authority appointed a "Governing Council" and subsequently an interim Iraqi government, all the while maintaining a substantial military presence in the country.

Unless Iraq emerges as a unique case, this new Council-sanctioned intrusion into "domestic jurisdiction" portends a new kind of occupation regime. The justification for this development would presumably be that an age that takes seriously the evolving right of "democratic governance," along with its connections to a state's ability to comply with other international human rights, can scarcely afford to do otherwise.[244] But if the Council, by delegating the task to occupiers as in Iraq or by itself attempting it as in Kosovo or East Timor, is now promoting a particular form of government within some of its members, this substantial re-interpretation of its role was not imaginable when Higgins was writing in 1963.

While Council Resolution 1483 deliberately avoids any suggestion of post-hoc Council approval of the United States' Operation Iraqi Freedom, it remains to be seen whether the Council's actions over time with respect to Iraq or otherwise will eventually legitimate, post hoc, what was formerly illegitimate.[245] If no weapons of mass destruction (WMD) are found in sufficient amounts to revive arguments

[243] *See* David J. Scheffer, "Beyond Occupation Law," 97 *AJIL* 842, at 847–8 (2003)(noting that occupation law does not anticipate wholesale change in the occupied state's laws and institutions and does not encourage or facilitate prolonged occupation but is intended to permit only those measures for public order and safety); Eyal Benvenisti, "Water Conflicts During the Occupation of Iraq," 97 *AJIL* 860, at 862 (2003)(same). *See also* Regulations Respecting the Laws and Customs of War on Land, annexed to Convention Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, 2 *AJIL Supp*. 90 (1908)(hereinafter "Hague Regulations"), article 43 (requiring occupying powers to "respect . . . , unless absolutely prevented, the laws in force in the country").

[244] For a survey of forms of UN civil administration attempting to secure a peaceful transition to democratic governance, see, e.g., Chesterman, *supra* note 228, at 126–53 (noting the dilemmas inherent in attempting to prepare peoples for democratic governance by imposing on them a "benevolent autocracy"). The UN's actions in the Iraqi case pose numerous other normative ripples beyond occupation law. *See, e.g.*, Benvenisti, *supra* note 243. Beyond the various freshwater rights that are the focus of Benvenisti's attention, he also notes that the Council's actions with respect to the occupation of Iraq refutes the claim that occupation as such is illegal, the demise of *debellatio* (a doctrine that passes sovereign title from those defeated in battle) as a legitimate principle of international law, and the continued application of human rights law within occupied territory. *Id.*, at 861–3 (noting that the last proposition has also been espoused by the GA, the UN Human Rights Committee, and the European Court of Human Rights).

[245] *Cf.* Anne-Marie Slaughter, "Good Reasons for Going Around the UN," *New York Times*, March 18, 2003, available at 2003 WL 17089910, (arguing that the Iraqi war might be illegal but could still be legitimate). Kirgis suggests that the relative absence of a substantial UN presence in Iraq pursuant to SC Res. 1483 serves to distinguish this case from Kosovo, where such involvement, welcomed by the Council in SC Res. 1244 (June 10, 1999) arguably served to legitimate the 1999 bombing campaign there. Frederic L. Kirgis, "Security Council Resolution 1483 on the Rebuilding of Iraq," *ASIL Insights*, May 2003, available at http:www.asil.org/insights/insigh107.htm. But the failure of SC Res. 1483 to authorize a comparable UN presence (or to put the UN's Special Representative clearly in charge of the administration of Iraq) cuts both ways. Some might contend

with respect to a continuing authority to invade under Resolution 678, would the case of Iraq come to be seen as a "humanitarian intervention" that ultimately received the Council's blessing (as some argued happened with respect to NATO's Kosovo intervention)? Could the March 2003 invasion of Iraq come to be regarded as a precedent for permissible humanitarian intervention without the backing of either an established regional organization or NATO in situations that do not involve on-going genocide (*pace* Kosovo) but a regime that was probably guilty of genocide in the past and was in any case an egregious violator of human rights? While this result appears unlikely given the Council's refusal to endorse the invasion in March 2003, much turns on the Council's future actions with respect to Iraq.[246] It is impossible to fully dismiss the possibility that the Council could, based on its praise for "representative" government in Resolution 1483 and its prior actions with respect to Haiti, eventually establish precedents consistent with neo-Kantian arguments in favor of military action to topple illiberal or undemocratic regimes.[247]

As will be examined in Chapter 4, the Council's contemporary practices are turning it into the ultimate tool to intervene in matters once regarded as of purely "domestic" concern. If it remains the case that, as Higgins wrote in 1963, Article 2(7) imposes legal (and not just politically prudent) limits on the UN's actions, few can now state with confidence just what those limits are. To the extent few obvious limits exist, at least with respect to the Security Council, the prospects for forms of global governance are not quite as fantastic as they once appeared to be.

that the Council's acquiescence in the Authority's sole responsibility for Iraq does not merely recognize the status quo but acknowledges the Authority's legitimate rights to rule the state that has been invaded. In Resolution 1483 the Council appears to be acquiescing in essentially a new form of trusteeship, complete with regular reporting responsibilities. Presumably one does not cede such authority to aggressors. By not imposing a UN presence, the Council seems to be trusting the Authority more than it did NATO in the case of Kosovo—a humanitarian intervention that, some have argued, ultimately received the Council's blessing.

[246] *See, e.g.*, Anne-Marie Slaughter, "A Chance to Reshape the UN," *Wash. Post*, April 13, 2003, available at 2003 WL 18817152 (proposing a Council determination of threat to the peace in cases combining possession of WMDs, grave and systematic human rights abuses, and evidence of aggressive intent).

[247] *See* SC Res. 940 (July 31, 1994). *See also* Fernando R. Tesón, *A Philosophy of International Law* at 62–3 (Boulder, CO: Westview Press, 1998).

4

The Varied Forms of International Institutional Law

This chapter examines the normative activity of the Security Council, introduced in Chapter 3. A second part addresses the broader implications of that activity: namely, the prospects for an "Imperial Council." A third section canvasses standard-setting in other IOs, and a final section presents interim conclusions on the nature and consequences of international institutional law.

4.1 The Security Council as Law-maker

During the Cold War, the entity most empowered to act internationally was usually precluded from exercising its considerable authority because of disagreement among its five Permanent Members. Through 1963 when Rosalyn Higgins wrote about the legal impact of the UN political organs,[1] the Security Council had not had many opportunities to clarify crucial ambiguous terms concerning the limits of states' deployment of force through its powers to recommend or to take decisions. The relatively few Council resolutions issued (less than ten per year through the Cold War) meant that it had not done all that much to interpret what was "use of force" against the "territorial integrity," or "political independence" of a state, or "in any other manner inconsistent with the Purposes of the United Nations" for purposes of Article 2(4), to explain what constituted an "armed attack" triggering a member's "individual" or "collective" "self-defense" for purposes of Article 51 or what those who suffered such attacks were expected to do under the "until" phrase of that provision.[2] Nor had the Council, which had through that year only authorized Chapter VII enforcement action once (with respect to Korea), done much to interpret the Charter's apparent triggers for such action (in Article 39), the preconditions for and scope of the Council's authorized

[1] Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford: Oxford University Press, 1963). *See also* Section 3.2.

[2] As compared to anywhere from 50 to 90 resolutions adopted by the Council every year since 1989. *See* Peter Wallensteen and Patrik Johansson, "Security Council Decisions in Perspective," in David M. Malone, ed., *The UN Security Council* 17, at 18, Figure 2-1 (Boulder, CO: Lynne Rienner Publishers, 2004).

responses (under Articles 40–42 and the rest of Chapter VII), or indeed even the meaning of "enforcement action" (for purposes of Article 2(7)). These provisions of the Charter were as much a *tabula rasa* as the budgetary authority of the Assembly had been when the UN was established.

By 1963, the Security Council, and to some extent the GA, had been the scene of numerous debates concerning the use of force, as with respect to claims by Israel, the United Kingdom, and France concerning actions in the Suez and in Egypt in 1956. Higgins argued that the study of the reactions of UN political organs to the legal arguments presented by states that had engaged in the use of force, even when these fell short of passage of a formal resolution, provided interpretative guidance on the legal limits on states' deployment of force, despite the highly political context in which such debates occurred.[3] For Higgins, Council debates had legal significance because the Council was under Charter injunction to act in accordance with the Principles and Purposes of the Charter and because the states that came before the Council usually invoked international law, including the law of the Charter. Higgins contended that the Council's reactions to these claims, when combined with other evidence, were relevant to determining the evolving contours of Articles 2(4) and 51, as well as the underlying customary international law rules governing use of force and self defense.[4] The Council's actions during the crucial period following North Korea's invasion of the South, branding those actions an "armed attack" as well as a "breach of the peace," provided Higgins with an additional opportunity to define some of the Council's powers to deploy force. Finally, the Council's and the GA's resort to "peacekeeping" in the Congo (ONUC) and in the Suez (UNEF) suggested to her other ways that the Charter could be interpreted to permit its organs to resort to distinct forms of force.

Despite the sketchy nature of the relevant UN practice on which she could rely, Higgins was remarkably prescient in recognizing that the UN's arm for enforcing the peace had enormous potential for amending, de facto, the Charter and even for more general forms of law-making. She recognized that the reactions of the UN political bodies, and especially the Council, to state claims with respect to the use of force could legitimate or undermine not only these claims but also the general rules on use of force and self defense. She correctly identified the potentially expansive nature of concepts like "threat" and "breaches" of the "international peace"—terms that had, before the Charter, no established meanings and were therefore essentially empty vessels that the Council could fill. She noted how institutional practice seemed to blur distinctions even between the Charter's enumerated powers and its demarcations between Assembly and Council

[3] Higgins, *supra* note 1, at 168.

[4] *See generally id.*, at 167–222 (systematically discussing UN debates and their relationship to the meaning of terms in Articles 2(4), 51, and 39). *See also* Steven R. Ratner, "The Security Council and International Law," in Malone, *supra* note 2, at 593.

prerogatives. She concluded from the Congo precedent, for example, that the UN could take preventive action under Article 40 as well as under Article 42.[5] Higgins highlighted the latent potential for the UN to authorize force despite the Organization's inability to rely on troops under established Article 43 agreements, through GA recommendation (pursuant to the Uniting for Peace resolution), or through the Council's resort to coalitions of the willing (as the Council did in the case of Korea). Higgins even foresaw a modest role for the Security Council in the enforcement of judicial settlements through its charge to enforce ICJ decisions in Article 94(2).[6]

In the wake of the Cold War and the subsequent decline in the use of the veto, the Council's law-making potential has emerged with considerable force.[7] As Higgins would have predicted, debates within the Council, its resolutions, statements by its President or by the Secretary-General in connection with Council activities, and even Council resolutions that are ultimately withdrawn or do not secure the requisite votes, have become significant elements in the interpretation of the law, even though nothing in the Charter authorizes the Council to make or interpret law. Contemporary treatises purporting to explain the parameters of the use of force are built around Council precedents such as its reaction to Iraq's invasion of Kuwait in 1990, or to Israel's bombing of a nuclear reactor in Iraq in 1981, or Council debates surrounding the Entebbe incident or NATO's humanitarian intervention in Kosovo, as well as references to certain actions in the GA (for example, its Resolution on the Definition of Aggression and its Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States),[8] by the UN Secretary-General, by other IOs (for example, NATO or regional organizations), along with more predictable references to the products of the UN's judicial arm, the ICJ, such as the Court's judgments at the jurisdictional and merits stages of the *Nicaragua case* and its Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons*.[9]

Recourse to the Security Council's practice for purposes of providing guidance on the law, especially with respect to the rules governing the use of force, is not

[5] Higgins, *supra* note 1, at 235–7. [6] *Id.*, at 237.

[7] Wallensteen and Johansson indicate that while permanent members have cast 294 vetoes in the period 1946–2002, only seven of these were cast in the decade 1991–2000, the lowest for any decade in UN history. Wallensteen and Johansson, *supra* note 2 at 20.

[8] Resolution on the Definition of Aggression, GA Res. 3314 (XXIX) (1974); Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States, GA Res. 2625 (XXV), (1970).

[9] *Military and Paramilitary Activities in and Against Nicaragua (Merits) (Nicaragua* v. *United States of America*), 1986 ICJ 14; *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ 226. Note that in the *Nicaragua case* the Court was compelled by the jurisdictional arguments presented in that case to consider the distinction between the Charter's rules governing the use of force and those that exist in customary law. Although the Court acknowledged the distinction, its treatment of the relevant rules of force under customary law drew substantially from those in the Charter. *Nicaragua* v. *United States*, Jurisdictional and Admissibility Judgment of November 26, 1984 ICJ Rep. 392, para. 73 (finding customary principles of use of force to be codified in the UN Charter). Indeed, Judge Schwebel in dissent, at the merits stage of the case, argued that the coincidence

limited to publicists of international law. The diplomatic discourse of states reflects the same tendency. Even the United States and the United Kingdom, in the midst of turning to a "coalition of the willing" to use force against Iraq in March 2003, with no small irony, legally justified their actions entirely around what the Council and its members had done (or had failed to do) since the end of the Gulf War.[10] The Council has also built upon the Charter innovations that Higgins noted with respect to its own ability to counter force with force and has far exceeded the limited quasi-judicial roles that Higgins anticipated. The Charter's drafters would scarcely recognize a Security Council that has embraced novel forms of adjudication and even legislation.

Few address why it is at all legally relevant what the Council, a blatantly political body, charged only with the enforcement of the peace and which no one would deny has been, even in the post-Cold War period, notoriously selective with respect to which uses of force it chooses to condemn, should be looked to for purposes of determining the rules on matters as significant as what rights states have to defend themselves.[11] Why have this recourse to the Security Council on subjects that no one doubts relates to a matter of "external" international law, and not internal or administrative institutional law?

Unlike actions taken by UN political bodies on the duty to pay, membership and participation, and even the bringing of international claims, where the normative impact follows from actions that are anticipated, perhaps even required, under the Charter, no one forces the Council to declare the law in the course of taking enforcement action. As Higgins originally noted, the category of acts that the Council usually reacts to—threats and breaches of the peace—do not require that the targeted state has violated either Article 2(4) or the customary rules regarding the use of force, or even international law at all.[12] The Charter leaves its enforcement arm with considerable discretion to act whenever the "international peace" is threatened, regardless of whether the threatening act violates international law or whether a victim state's self defense is triggered. Even

between the customary rules and the rules of the Charter were such that the United States' multilateral treaty reservation should have triggered dismissal of the case. *See* Dissenting Opinion, Judge Schwebel, paras. 92–6, *supra*.

[10] *See* William H. Taft and Todd F. Buchwald, "Preemption, Iraq, and International Law," 97 *AJIL* 557 (2003)(legal justification offered by the Legal Adviser of the U.S. Department of State and the Assistant Legal Adviser for Political-Military Affairs of the U.S. Department of State); Lord Goldsmith, Legal Basis for Use of Force Against Iraq (March 17, 2003)(Statement by U.K. attorney general in answer to a parliamentary question), available at http://www.labour.org.uk/legalbasis; Memorandum of Legal Advice on the Use of Force Against Iraq, Australian Attorney General's Department and the Department of Foreign Affairs & Trade, March 18, 2003, available at http://teaching.law.cornell.edu/faculty/drwcasebook/update_13IIF.htm.

[11] Thus, Wallensteen and Johansson point out that the Council failed to categorize (much less act upon) 26 of the 30 longest wars since 1946 as threats to or breaches of the peace (much less acts of aggression). Wallensteen and Johansson, *supra* note 2, at 23.

[12] Higgins, *supra* note 1, at 204 (noting that "there may be unfriendly acts which rise to a recourse to the Security Council, but not to a unilateral defense use of force).

when the Council is reacting to state actions that unmistakably violate Article 2(4) or customary law, nothing in the Charter requires that the Council say so. The Charter anticipates, on the contrary, that such legal questions, like other legal disputes, should be left to others with legal expertise, such as the ICJ, or even the GA (under its general grant of authority to promote the progressive development and codification of law). There is therefore considerable authority for the argument that the Council should stick to its job: to secure the peace.

If the Security Council disregards this injunction and expresses its view as to legalities in the course of making recommendations or taking decisions, by what warrant should such extraneous determinations in the course of enforcing the peace, usually in the context of a crisis prone to expeditious political compromise, be given any credence by those looking for reasonably dispassionate interpretations of the state of the law? We do not expect local police officers on the beat to make the law, although we expect them to enforce it. Worse still, in the case of the Council, unlike local police action in nations that respect the rule of law, those enforcing the law often include some with a keen self-interest in the matter at hand. When we turn to the Council for affirmations of the law, surely we know that these may not be wholly impartial.

No one has yet provided a better answer to these dilemmas than Higgins and one of her mentors, Oscar Schachter. States and their lawyers turn to the Council for guidance on these extraordinarily significant legal issues at the heart of state power apparently because they assume (or hope?) that the Council acts in accordance with international law; because Council decisions that incorporate declarations of legality are legally binding; and because they have so few alternative sources for collective legitimation.[13] The analogy with the local cop on the beat is flawed. At the global level we cannot rely on a court with compulsory jurisdiction to confirm that what the equivalent of the police officer did was legal. At the international level, the choices are starker, cruder: it is either the Security Council (or other flawed substitutes for collective multilateral legitimacy such as other UN organs or entities like NATO) or the self-interested judgments of states, including those engaged in the use of force. Except perhaps in the singular case when the question is raised before the ICJ by two states willing to submit their action to its scrutiny[14] (and even then, if we assume that the ICJ cannot render

[13] *Id.*, at 1–10; Oscar Schachter, "The Relation of Law, Politics and Action in the United Nations," 1 *Recueil des Cours* 1, at 173–6 (1963); Ratner, *supra* note 4, at 592–3. *See also* Ian Hurd, "Legitimacy, Power, and the Symbolic Life of the UN Security Council," 8 *Global Governance* 35 (2002)(discussing the "myth of collectivity" that has sustained the Council).

[14] While states are making more use of the Court to settle their disputes than ever before, including with respect to a surprising number of disputes involving the use of force (see Christine Gray, "The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force after Nicaragua," 14 *EJIL* 867 (2003)), no one imagines that there will come a day when the disputes involving *on-going force of a serious nature* will be immediately submitted to the Court for expeditious settlement. It remains doubtful in such cases whether the Court could handle, even through binding provisional orders, the on-going crises that are the Council's bread and butter.

a legally binding Council decision void because it is *ultra vires*), many lawyers continue to assume (or pretend) that what the Council does either reflects the existing rules of force or the international community's changing assessments of what those rules ought to be.

This raises troubling risks, addressed more specifically in the next section, about the relationship between law and power. But as a descriptive matter, the Council's normative authority is premised on both its coercive powers as well as on its legitimacy, at least relative to more self-interested actors (such as the states using force or reacting to it). It is based on the perception that the Council is licensed to confer the legitimacy of the international community. The Council is seen, at least by many international lawyers, as "the principal institution for building, consolidating, and using the authority of the international community . . . the linch-pin of order and stability, the framework within which members of the international system negotiate agreements on the rules of behavior and the legal norms of proper conduct to preserve the society of states."[15] Despite persistent complaints about the Council's unrepresentative nature, about the propriety and continued viability of the veto and the double standards it permits, about the Council's lack of transparency relative to other UN organs, and about its lack of effective consultation with other "more representative" organs like the GA, the Council continues to be seen as the principal, if not the only, legitimator of uses of force precisely because it is the only organ, other than self-judging states, specifically authorized to use force itself and to license others to do so.[16]

The Council has developed characteristic modes of deploying its legitimating authority. Steve Ratner, using terms made familiar by McDougal-Lasswell (of the Yale School of International Law discussed in Chapter 1), has categorized these as falling within its declarative, interpretative, promotion, and enforcement functions.[17] While these categories are as good as any, only the latter two can be clearly inferred from the Council's enumerated powers under the Charter and the normative ripples of all of them now exceed anything that the Charter drafters anticipated.

[15] Gareth Evans and Mohamed Sahnoun, "The Responsibility to Protect," 81 *Foreign Affairs* 99, at 106 (November/December 2002).

[16] *See* UN Charter, Articles 42 (permitting the Council to use force itself); Article 48 (permitting the Council to permit actions that it can take to be taken by members of the UN or "by some of them, as the Security Council may determine"); Article 51 (permitting the Council to respond to claims of self defense by others). For a close study of the working methods of the Council, see Sydney D. Bailey and Sam Daws, *The Procedure of the UN Security Council* (Oxford, U.K.: Clarendon Press, 3rd edn., 1998). As that study indicates, in recent years most of the substantive business of the Council occurs during informal consultations among all or some of its members and not at public meetings. Informal consultations are not mentioned in the Council's rules of procedure and non-members of the Council cannot attend such sessions. *Id.*, at 390–3. But the Council has met frequently if informally and on an ad hoc basis with NGO representatives and visiting dignitaries since the early 1990s under a plan devised by Ambassador Diego Arria (Venezuela). *See id.*, at 393; David M. Malone, "The Security Council in the Post-Cold War Era: A Study in the Creative Interpretation of the U.N. Charter," 35 *NYU J. Int'l L. & Pol.* 487, at 508–9 (2003).

[17] Ratner, *supra* note 4.

From a normative standpoint, the Council's deployment of what Ratner calls its "declarative" function, nowhere authorized in the Charter, has been creative. Deploying its declarative function, the Council, for example, labeled Southern Rhodesia an "illegal racist minority regime;" declared South Africa's occupation of Namibia "illegal" and its acts there "illegal and invalid;" branded actions, such as the use of chemical weapons, during the course of the Iran–Iraq war violations of "international humanitarian law and other laws of armed conflict;" warned those engaged in violations of international humanitarian law within Somalia they would be held "individually responsible;" and endorsed the representative of the Secretary-General's declaration that the Cambodian elections had been "free and fair."[18] Only some of these Council attempts to brand individuals or states as violators of the law, pronounce on the legality of conduct, characterize the legal consequences of future or past action, or endorse existing or novel legal rules can be said to be *required* by the Council's need to secure the peace and indeed, in only some of these instances, did the Council actually undertake enforcement action in the course of making these pronouncements. While the Council presumably needed to proclaim the "legitimacy" of the government of Kuwait, as it did en route to enforcement action against Iraq in 1990, since such a finding was reasonably incidental to finding Iraq's invasion of that sovereign country to be a threat to the peace, this is the rare case where a pronouncement on legalities is arguably required in order for the Council to do its job.[19] Yet even in this case, observers would have reasonably drawn such an inference irrespective of what the Council actually said, just as Higgins quite rightly assumed that the Council had effectively found North Korea guilty of aggression. By contrast, the Council's affirmation that Iraq would be financially liable for various categories of damage it inflicted on others as a result of the Gulf War in its Resolution 687, for example, is a declaration of a different kind. It suggests an officious interloping that is hardly required *of the Council* pursuant to its enforcement role and that the Charter anticipates will be undertaken by others such as the ICJ.

The Council's "interpretative" efforts to give "meaning to the Charter's open-textured provisions" by not succumbing to a "paralytic textualism," as Ratner puts it,[20] have extended far beyond matters already discussed, that is, its embrace of

[18] *Id.*, at 593–4.

[19] SC Res. 661, August 6, 1990.

[20] Ratner, *supra* note 4, at 596–7. The Council's interpretations of its expanding powers have thoroughly reconfigured the Charter with respect to how that body resorts to force. As Ratner indicated, the Council has refused to pin itself down in terms of acting pursuant to any one Charter provision, whether under Chapter VI or VII (especially since its peacekeeping and peace operations typically assumed more than the discrete functions authorized in, for example, Articles 34, 36, or 38). *Id.* And since the Council does not have to worry about fulfilling the preconditions identified in *Certain Expenses of the United Nations* (*Certain Expenses case*), 1962 ICJ Rep. 151, and needs at times to combine operations based on consent with more coercive mandates (e.g., disarm rebels, coerce a warlord), it has also broken down the ostensibly firm divisions between hortatory Chapter VI measures and binding Chapter VII enforcement, see Ratner, *supra* note 4, at 597—hence the term, "Chapter VI and a half" operations.

human rights as an apparent license to use force or its contribution to inventing the concept of traditional peacekeeping. As noted, peacekeeping came with another Charter innovation, the Uniting for Peace Resolution, and its shift in the enumerated prerogatives of GA and Council. The forms of peacekeeping discussed by the ICJ in the *Certain Expenses case* (see Chapter 3), premised on the consent of the territorial sovereign and the defensive use of force, eventually were joined by more robust "peace operations" with no such limitations. These peace operations respond to humanitarian crises that fall short of aggression but require more than patrolling a pre-existing armistice. These, too, were authorized by the Council but, as with traditional peacekeeping (which was justified under invisible emanations from various provisions Chapter VI or VII and possibly from an equally invisible "Chapter VI and one half"), again under no express Charter warrant. Today's peace operations are based on a loose interpretation of the "general powers" of the Security Council "under Chapter VII" or under its general grant of authority in Articles 24 and 25.

Complex peace operations may also assume another power not authorized by the Charter: the power to administer territory within UN member states. Such a power is not permitted under the Trusteeship System under Article 78 and is not mentioned anywhere in the Charter.[21] All of these operations, from traditional peacekeeping to full-scale authorizations to "use all necessary means" to restore and maintain international peace and security—as authorized against Iraq under Resolution 678 in 1990—are Council innovations that attempt to get around the problem that the Organization continues not to have troops of its own at its disposal. The results have been ever more creative forms of "contracting out" or delegations of the Council's enforcement functions—to use force, conduct on-site inspections, administer territory, and so on—to particular members, regional organizations or defense pacts like NATO, other IOs (such as the IAEA), or NGOs (such as the International Red Cross).[22]

In an age when most of the world's security threats do not fit the mold of interstate aggression that was foremost in the minds of those who drafted the Charter, the Council has adapted its role—and the Charter—to enable it to react to intrastate security threats, as well as to humanitarian concerns that some would see as

[21] For a thorough description of the evolution of the Council's powers in this respect, see generally Simon Chesterman, *You, The People*, at 48–98 (Oxford: Oxford University Press, 2004). Chesterman describes the Council's actions in the area of transitional administration as characterized by "reaction and improvisation." *Id.*, at 49, 54–6 (concluding that there is "little doubt" that the Council possesses power to administer territory on a temporary basis and may delegate that power to the Secretary-General and concluding that institutional reforms within the UN generally "will be incremental, driven by the exigences of the circumstances rather than institutional or doctrinal development"). Secretary-General Trygve Lie had argued for this power on the basis of the Council's general powers under Articles 24–5. *Id.*, at 54. *See generally Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution* 276 (1970), Advisory Opinion, 1971 ICJ Rep. 16.

[22] *See, e.g.*, Ratner, *supra* note 4, at 595–8; John Quigley, "The 'Privatization' of Security Council Enforcement Action: A Threat to Multilateralism," 17 *Mich. J. Int'l L.* 249 (1996).

part of a broader re-interpretation of the concept of "human security," such as the threats posed by the HIV/AIDs pandemic.[23] Its efforts, introduced in Chapter 3, to extend the definitions of threats or breaches of the peace to encompass, for example, civil wars, man-made famines, terrorist acts by non-state actors, or ethnic cleansing, have done more than open the door to the Council's own possibilities for action. By branding such actions as cognizable threats to world order, the Council has put them on the agenda in other organizations that address related issues; has channelled resources, NGO and media attention; and helped to alter the views and priorities of governments and legislators.[24] The normative ripples, within those with the capability themselves to affect national or international law, in other IOs, other transnational networks, and governments, are real but difficult to delineate with precision. In virtually all of these cases, the Council has managed to maintain a veneer of adherence to the original definitions of its purpose. The Council and textualist defenders of the Charter argue that all of these problems have posed the potential for international friction, because, for example, they prompt destabilizing streams of refugees.[25] As Higgins noted as well, it is not just what the Council has done that matters. Sometimes its failure to act or to pass a resolution is assumed to have normative consequences. For those who reject the proposition that the Council impliedly authorized Operation Iraqi Freedom in March 2003,[26] the Council's refusal to pass an authorizing resolution, after it adopted Resolution 1441, despite enormous pressure from two Permanent Members, is legally significant, for example.[27]

The Council's "promotion" functions are authorized by the Charter's Chapter VI, which anticipates that the Council will nudge states to settle their disputes peacefully and may make recommendations for settlement. In the exercise of this

[23] *See, e.g.*, Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* at 172–4 (Oxford, U.K.: Hart, 2004) (noting the Council's opening session on January 10, 2000 devoted to this topic, which some called a "security threat").

[24] As was clear to Higgins, even when the Council does not adopt a resolution identifying a threat or breach of the peace, merely debating an issue within the Council has potential normative effects. By putting the problem of HIV/AIDs on the Council's agenda, for example, the Council elevated the significance of, for example, the WHO's efforts on the subject and may have made it more difficult for those negotiating the WTO's DOHA Round to resist claims by developing countries that they had a right to distribute generic drugs despite the WTO's protections for intellectual property. *See generally* de Wet, *supra* note 23, at 172–4 (discussing the Council's session devoted to HIV/AIDs in January 2000).

[25] *See, e.g.*, Ratner, *supra* note 4, at 597–8 (speculating that through these actions the Council may be breaking down barriers between the functions of the UN and suggesting, for example, that maintaining the peace cannot be distinguished from respect for human rights). *But see* de Wet, *supra* note 23, at 133–77 (justifying such Council actions on the narrower basis that they constituted potential threats to the international peace).

[26] *Compare* Taft and Buchwald, *supra* note 10 (arguing that the Council authorized the 2003 invasion).

[27] Had the Council acquiesced, it is argued, the Council might have been seen as accepting as legal a newly minted doctrine permitting "preventive force" contained in the September 2002 National Security Strategy of the U.S. *See, e.g.*, Thomas M. Franck, "What Happens Now? The United Nations After Iraq," 97 *AJIL* 607, at 618–20 (2003). *But see infra* Section 4.2.

function, the Council may act in ways that are difficult to distinguish, in their normative effects, from some of the promotional activities of the GA. The Council's attempts to encourage states to settle their disputes pursuant to international law may lead it to propose specific legal remedies, for example, to establish a regional regime to register arms or to ratify an existing human rights convention.[28] Depending on the Council's legitimacy, its promotional efforts can affirm, strengthen, or undermine general rules of international law, and perhaps encourage the rise of new rules, even for those that are not parties to the disputes with which the Council is concerned. We have already examined the Council's considerable promotional prowess with respect to rules governing non-intervention in the domestic jurisdiction of states and the related subjects of human rights, international humanitarian law, and international criminal law. The Council's promotional function is also deeply implicated when it acts, under Chapter VII. As Adeno Addis has noted, the Council's enforcement actions not only attempt behavior modification in the target state; they constitute a process "through which the sanctioning community . . . defines its identity through the act of dissociating itself from the target regime, the 'troublesome or evil other.' "[29]

The Charter obviously anticipates as well the Council's enforcement function, although not the broader normative implications. The open contours of the Council's authority to "restore" or "maintain" the international peace, as noted, has been read to permit the Council to take actions not specifically mentioned in the Charter that are "reasonably necessary" to achieve such ends. The Council has stretched its general license to take measures to restore or maintain the peace, as we have seen in the discussion of Article 2(7), to matters that Charter anticipates will be handled through modes of dispute settlement of the parties' own choosing, including the ICJ. The Council has scarcely used one anticipated mode of Council-ICJ interaction apparent in the Charter—Article 94's provision for the Council to enforce ICJ decisions—but the Council has expanded its enforcement powers to embrace the power to settle, with finality, discrete legal disputes between states over extraditing suspects, boundary demarcations, and post-war liability.[30] And while the Charter does not specifically authorize, as part of those enforcement powers, measures that impact directly on individuals, the Council has now taken numerous decisions with clear impact on individuals, such as establishing courts for criminal liability and financial sanctions on alleged terrorists whom it identifies by name. All of these actions have the potential of developing the general law beyond the instances with which the Council is concerned.

[28] *See* Ratner, *supra* note 4, at 599–600.

[29] Adeno Addis, "Economic Sanctions and the Problem of Evil," 25 *Hum. Rts. Q.* 573, at 573 (2003).

[30] *See* prior discussion at *supra* Section 3.3.4. *But see* Article 36, UN Charter (permitting the Council to "recommend" appropriate procedures or methods of adjustment and noting that "legal disputes should as a general rule be referred by the parties to the International Court of Justice"). *Compare* Ratner, *supra* note 4, at 601–2 (describing many of these efforts as "using the law to enforce the law").

While some would contend that the Council's enforcement measures do not constitute "precedents" in the sense established by common law courts, those familiar with the path dependencies evident in most organizations know that prior practices are often a reliable guide to future actions. At a minimum they impose on those resisting such action the considerable burden of showing why something that was permissible previously is now either unwise or illegal. UN members, including members of the Council, appear to be cognizant of this. This is suggested by some members' insistence, in the course of considering the Council's reaction to the 1994 coup against Aristide, for example, that the Council insert what became the second paragraph of the final version of Resolution 940 (authorizing "all necessary means" to facilitate the departure of the coup leaders and restore the "legitimate" government). That second paragraph recognized the "unique" and "extraordinary nature" of the circumstances in that case, requiring an "exceptional response."[31] Whether that language had the intended effect of barring others from citing Resolution 940 as a precedent for similar Council action in the future remains to be seen, but in general, once the Council has crossed a line once, it appears that it is easier for it to cross it again. For this reason, states requesting UN election supervision are, as a result of Resolution 940, and irrespective of its alleged uniqueness, on notice that once the Organization certifies their election results, the Organization may be empowered to take action if its determination is not respected.

Although the Council's authority to take decisions binding on UN members does not constitute a general warrant to make law for the world, the broader normative ripples of the Council's enforcement actions are as difficult to contain as they are with respect to its declaratory, interpretative, and promotional activities. Legal legitimacy presupposes consistency of treatment (treating like cases alike), based on adhesion to coherent generalizable principles.[32] While these general characteristics of legitimate law are often presented as reasons why the Council's enforcement actions ought not be considered legal precedents, this assumes that the causal effects go only in one direction. Since, as Higgins postulated, the Council is presumed to act in accordance with the law and that what it does advances the law of the Charter, the presumptions of legality that attach to its actions invite states—and their lawyers—to interpret the Council's selective actions in the best light. Because international law resists the premise that any entity created by law can be a law unto itself, international lawyers project onto the Council the characteristics of law. At least until the Council's political

[31] SC Res. 940 (July 31, 1994) para. 2. Interestingly, a comparable effort to delimit the precedential impact of Council Resolution 687 was rejected. *See* Frederic L. Kirgis, Jr., *International Organizations in Their Legal Setting* at 676 (St. Paul, MN: West Publishing Co., 2nd edn., 1993) (noting failed attempt to indicate in text of Resolution 687 that it was not intended to set "undue precedents").

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

legitimacy is exhausted (a possibility considered in the next section), the Council's actions enjoy a presumption that they adhere to general principles of law, including respect for treating like cases alike. Rather than undermine the international rule of law by suggesting that the Council is a law on its own, international lawyers and states have an incentive to read Council enforcement actions as legal precedents. This also tempts those with power on the Council to use it to establish general law.

Whatever the underlying reasons, Council enforcement actions, or at least many of them, have normative effects. It is now plausible to contend, for example, on the basis of the Council's increasingly abundant enforcement measures to counter terrorism, that even states that have not entered into any specific treaty on the point may still owe a duty to cooperate with respect to investigating, prosecuting, and, even perhaps transferring upon request their own nationals abroad, in cases of alleged terrorism. It would not be surprising therefore if states, such as the United States, would make such demands even without a Council resolution directed at the specific situation. And the law's abhorrence of selective application may ultimately affect even powerful states like the United States who try to use the Council to make general law.

At this writing, the U.S. contentions that the ICC's provisions whereby U.S. nationals might be subject to the ICC's jurisdiction even if the United States is not a party to that treaty are illegal are less plausible than they otherwise would have been because, at the United States' urging, the ICTY and ICTR were established, with primacy over national courts, in the absence of a treaty and the Council has repeatedly urged that states have responsibilities to criminally prosecute those guilty of certain international crimes.[33] Because the Council has (1) re-invigorated the general principle that certain international crimes require that their perpetrators be brought to trial, no matter what their nationality, and in international courts if necessary, (2) affirmed that no states' nationals can be immune from charges arising from war crimes, genocide or crimes against humanity, and (3) repeatedly indicated that its agents, such as peacekeepers, need to be held to such standards as well, the United States has encountered considerable resistance to its plans to have the Council exempt on an annual basis U.S. peacekeepers from the jurisdiction of the ICC.[34]

The Charter also appears to anticipate that when the Security Council takes enforcement measures, it does so in response to discrete breaches or threats to the peace and that its enforcement measures end when the discrete threat ends. Yet, in recent cases, the Council has dramatically re-conceptualized its enforcement

[33] *See, e.g.*, SC Res. 1483 (May 22, 2003) (affirming the need to prosecute the Iraqi leadership).

[34] *See* Warren Hoge, "U.S. Drops Plan to Exempt G.I.'s From U.N. Court," *New York Times*, June 24, 2004, at A-1. But note that neither the Council nor anyone else has apparently had much effect on the United States' negotiation of bilateral agreements that guarantee that parties to such agreements would not transfer U.S. nationals to the ICC. *See generally* Salvatore Zappalà, "The Reaction of the US to the Entry into Force of the ICC Statute," 1 *J. Int'l Crim. Just.* 114 (2003).

capability to deal with threats to the peace that are not seen as discrete and are neither geographically nor temporally limited. While the Charter does not contemplate general law-making through enforcement action, it seems that the Council has done just that in response to the threat of terrorism.

In Resolution 1373, the Council decided, under Chapter VII, "that all States shall" take certain actions against the financing of terrorist activities as well as many other measures designed to prevent terrorism. With respect to terrorist financing, the Council selected certain provisions of the then recently concluded International Convention for the Suppression of the Financing of Terrorism, added to others, and omitted other portions (such as the explicit deference to requirements of international law, including the rights due to persons charged with terrorism-related offenses, the rights of extradited persons, the requisites of international humanitarian law, and the provisions on international dispute settlement).[35] The Council did not limit itself to the measures specified in that Convention (to which, of course, it was not a party), did not undertake transparent consultations to which all states and relevant NGOs would be invited, and chose not to wait until that Convention was even in effect.[36]

Further, the Council established a specific compliance arm, the Counter-Terrorism Committee (the CTC), composed of all members of the Council, to promote states' compliance with its legislative agenda. To date that body has received hundreds of reports from the UN's members purporting to explain how each has implemented the Council's edicts within their domestic law and practice.[37] The work of the CTC is backed by a legally binding order (and the possibility of further enforcement action) to all states to implement through their domestic law the many requirements of that resolution. In Resolution 1373 the Council is not reacting to discrete acts and it is not directing its enforcement measure at specific countries, as compared to its prior sanctions measures directed against Libya, the Sudan or the Taliban arising from specific terrorist incidents.[38] In these prior instances, it could readily be assumed that the Council's enforcement action would cease when such specific situations were resolved. Resolution 1373, by contrast, has no express or implied time or geographic limitations. It is the closest thing we have in international institutional law to real "law-making" as some

[35] This treaty had been adopted by the GA on December 9, 1999 but at the time that the Council adopted SC Res. 1373 (2001), on September 28, 2001, only four states had ratified it and these did not include the United States. The Convention entered into force considerably later, on April 10, 2002. Paul C. Szasz, "The Security Council Starts Legislating," 96 *AJIL* 901, at 903 (2002).

[36] *See* Ilias Bantekas, "The International Law of Terrorist Financing," 97 *AJIL* 315, at 326 (2003)(suggesting that the United States took advantage of sentiments stirred by the attacks of 9/11 to impose measures that the Council would otherwise not have adopted and that states would otherwise not have agreed to via treaty).

[37] Eric Rosand, "Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism," 97 *AJIL* 333 (2003); Eric Rosand, "The Security Council's Efforts to Monitor and the Implementation of UN Al-Qaeda/Taliban Sanctions," 98 *AJIL* 745 (2004).

[38] *Compare* SC Res. 748 (March 31, 1992)(imposing sanctions on Libya); SC Res. 1333 (December 19, 2000)(imposing sanctions on the Taliban); SC Res. 1054 (Sudan)(April 26, 1996).

define it. This is action that is binding, backed by the possibility of real coercive sanction, affecting all relevant actors, and capable of repeated application across time in comparable instances.[39]

Nor is this the only instance of Council "legislation." Resolution 1540, adopted on April 28, 2004, also combines the Council's declaratory, promotional, interpretative, and enforcement functions into a tidy tool of global law. In this case, deploying its Chapter VII enforcement authority and affirming that the proliferation of nuclear, chemical, and biological weapons, as well as their means of delivery, constitutes a threat to international peace, the Council decided that all states must refrain from providing any support to non-state actors that attempt to develop, acquire, manufacture, possess, transport, or transfer the weapons listed. It also ordered all states to adopt appropriate laws to bar such activity. That resolution also required all states to take and enforce effective measures to establish domestic controls over such weapons, and identifies in considerable detail the scope of the measures required. As in Resolution 1373, the Council established a subsidiary organ of the Council to collect reports from all states indicating how they are complying, while affirming its resolve "to take appropriate and effective actions" against this threat to the international peace. That Resolution's more promotional aspects are evident in paragraphs that merely "call upon" (but presumably not require) states to implement relevant treaty obligations, strengthen national laws, and engage in other cooperative efforts.[40]

As with Resolution 1373, the legislative nature of the Council's efforts in Resolution 1540 are apparent on its face. This is a resolution that also responds not to a discrete threat but to a generalized one. It purports to make general law for all states, thereby short-circuiting arduous treaty negotiations. As with Resolution 1373, the Council is acting to complement or supplement existing treaty regimes. It identifies these treaties as the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention, and the Biological and Toxin Weapons Convention, as well as the on-going activities of entities established to implement such treaty commitments (in this case the IAEA and the Organization for the Prohibition of Chemical Weapons). While the Council indicates that none of the obligations that it is imposing in Resolution 1540 should be interpreted so as to "conflict" with these treaty obligations,[41] its actions clearly anticipate reaching non-parties to these treaties (indeed that is the point presumably of Council legislation of this type).

[39] *See supra* Section 3.1.

[40] The Council's prior resolutions relating to weapons of mass destruction had arguably already established a legal regime with respect to such weapons. *See* Lori Damrosch, "The Permanent Five as Enforcers of Controls on Weapons of Mass Destruction: Building on the Iraq 'Precedent', " 13 *EJIL* 305 (2002). On this view, Resolution 1540 merely solidified and clarified this regime.

[41] This compares with comparable treaty provisions dealing with successive treaties between the parties. *See, e.g.*, NAFTA, article 104(1) (providing that obligations in certain enumerated environmental treaties shall prevail over obligations in the NAFTA).

Resolution 1540 also imposes obligations that go beyond those contained in existing treaties. Resolution 1540 reads like legislation. It includes detailed, lawyerly definitions of its terms ("means of delivery," "non-state actor," and "related materials") and both broadens and deepens states' obligations to account for, secure, and physically protect sensitive materials beyond those included in existing treaty regimes but which are included in such soft law instruments as the IAEA's Code of Conduct on the Safety and Security of Radioactive Sources.[42] States are now obligated, even if they were not before under their treaty obligations, to patrol the activity of non-state actors within their borders who might seek to use these weapons for "terrorist purposes." While this term is not defined (as it has not been in other relevant Council actions), the Council does provide states with at least one unsubtle hint of who ought to be reached by its terms at a minimum: those whom the Council itself has designated as alleged terrorists or their aiders and abetters. Resolution 1540's preamble indicates the Council's concerns are triggered by the threat of terrorism posed by the non-state actors identified on the Council's periodically revised 1267 sanctions lists as well as those "to whom Resolution 1373 applies."

At this writing, it is also becoming ever clearer that the sanctions regime imposed on members of Al Qaeda and the Taliban, imposed under Resolution 1267 (as expanded by Resolutions 1333 and 1455), discussed in Chapter 3, are no longer limited, time-limited nor restricted to the specific terrorist threat posed by the Taliban's support for groups within Afghanistan.[43] The Council's counter-terrorism efforts in Resolutions 1267, 1373, and 1540 are part of an interlocking legislative agenda to grapple with the generalized terrorism threat by choking off non-state actors' access to financing, travel, and weaponry. In these cases, the generalizable legal effects of the Council's work are not incidental to its efforts to enforce or the incidental consequence of lawyers' attempts to protect the Council's legitimacy by transforming its selective actions into general rule. These are express attempts to make global law. Nor are the Council's efforts limited to making law under the UN Charter and vis-à-vis states as members. Assuming that the Council's edicts in these resolutions meet with compliance, the rules of custom are likely to be affected. Whether intended or not, to the extent the Council's committees under Resolutions 1267, 1373, and 1540 succeed in their assigned tasks and state practice generally conforms to the Council demands, effects on general customary law are likely to follow.[44]

[42] SC Res. 1540, Preamble.

[43] While SC Res. 1333 sanctions were originally limited to one year, the Council has subsequently renewed these sanctions on an annual basis. *See* SC Res. 1455 (January 17, 2003) and 1526 (January 30, 2004).

[44] Few states or lawyers are likely to try to distinguish state practice pursuant to Council order from state practice accompanied by traditional *opinio juris*. In both cases, if states generally engage in consistent actions under a sense that they are legally obligated to do so, it would be hard to deny that customary international law, binding even on states that cease to be UN members, results. For consideration of the possible impact of Council actions on the rules of state responsibility, including

4.2 The Security Council: Between Power and Law

Law is a tool of power, as well as on occasion, its master. Historians of international law have long noted how those who established the field and its rules have usually been serving powerful states' interests, and not only (or not at all) moral precepts thought to be contained in natural law. The present Euro-centric nature of international law, and, as is discussed more fully in the final chapter, of international organizations generally, can also be explained in terms of the exercise of power. Colonial rulers exported their notions of law, national and international, onto their subjects and when IOs were established, their mandates, organs, procedures and delegations of authority all had to find favor with the powerful, who, as in the case of the UN, were the original framers of IO charters.

The results are what one would expect: the Security Council accords the veto and the privilege of permanent membership to the five powers at the end of World War II; when the P-5 are in agreement, all that they require for binding action is to cajole, pressure, or otherwise convince four of the remaining ten non-permanent members. It takes considerable unity of action, and considerable backbone, for six or more of those non-permanent members, all of whom are invariably weaker in economic and military clout and relevant Council experience than at least P-1, to exercise the rarely seen but conceivable "veto" that the Council's non-permanent members wield.

In modern times, with prominent exceptions such as the failure to secure a follow-up resolution to authorize the use of force against Iraq in the spring of 2003, the United States' "hyper-power" status has meant that what it wants from the Council it usually gets.[45] The result is a modern multilateral variation on a hoary concept: hegemonic international law (HIL). While some would argue that given its Western provenance, all of international law is by definition "hegemonic," this section adopts Detlev Vagts' more limited conception.

HIL jettisons or severely undervalues the formal and de facto equality of states, replacing pacts between equals grounded in reciprocity, with patron–client relationships in which clients pledge loyalty to the hegemon in exchange for security or economic sustenance. The hegemon or hegemonic powers promote, by word and deed, new rules of law, both treaty-based and customary. Hegemons are generally averse to limiting their scope of action via treaty; avoid being constrained by those treaties to which it has adhered; and disregard, when inconvenient, customary international law, confident that their breaches will be

the scope and use of "counter-measures," see, e.g., Vera Gowland-Debbas, "Security Council Enforcement Action and Issues of State Responsibility," 43 *Int'l & Comp. L. Q.* 55 (1994).

[45] As is suggested by the United States' relatively frequent resort to the veto since 1990, it also means that what the United States does not want the Council to do, it usually can block as well. *See* Wallenstein and Johansson, *supra* note 2, at 20 (enumerating the uses of the veto by the P-5 and noting that the United States has displaced the former USSR/Russia in the use of the veto since 1990).

hailed as new rule. Substantively, HIL is characterized by indeterminate rules whose vagueness benefits primarily (if not solely) hegemonic powers, recurrent projections of military force, and interventions in the internal affairs of other nations.[46]

Those who fear HIL usually point to its unilateral manifestations, such as a failure to participate in treaties or to submit to global forms of dispute settlement.[47] As is clear from Chapters 2 and 3, international lawyers (at least in the West) have not dwelled on the possibility that hegemonic power can be exercised at the collective or global level. We have not emphasized that the U.S. can and has used international organizations "to magnify its authority by a judicious combination of voting power and leadership."[48] Most of us have been too busy constructing the post-World War II institutions to closely scrutiny the "egalitarian" and "participatory" precepts of modern international law and organization on which they are said to be based. As is manifested by the presumptions of legality that attach to the actions of IOs, and especially UN political organs accorded implied powers under the principle of effectiveness, international lawyers in the West have tended to see multilateral processes (even those that manifestly deviate from the principle of sovereign equality that their preambles proclaim by their voting, financing, participation rules, or other procedures) as an alternative to the exercise of hegemonic power.[49] Our descriptions of what the Council does do not address whether it is or is becoming a vehicle for hegemonic rule through the collective processes of international law.[50] And most of our prescriptions for the Council, even those that focus on expanding its representative nature, emphasize the need to make the Council a more effective, but not necessarily a less hegemonic, instrument.[51]

Some of the Council's enforcement actions surveyed, particularly its "legislative" actions in Resolutions 1373, 1267, and 1540, demonstrate that perennial claims that the Council has been terminally weakened by its failure to act (as with respect

[46] Detlev Vagts, "Hegemonic International Law," 95 *AJIL* 843 (2001).

[47] *See, e.g.*, David M. Malone and Yuen Foong Khong, eds., *Unilateralism and U.S. Foreign Policy* 19 (Boulder, CO.: Lynne Rienner Publishers, 2003) (particularly chapters by David M. Malone and Nico Kirsch); "Symposium: Unilateralism in International law: Its Role and Limits: A United States-European Symposium," 11 *EJIL* 1–186 and 249–411 (2000).

[48] Vagts, *supra* note 46, at 846.

[49] *See, e.g.*, Konrad Ginther, "Hegemony," in Rudolf Bernhardt, ed., 2 *Encyclopedia of Public International Law* 685, at 687–8 (Amsterdam and New York: North-Holland, 1995) (discussing the "token" collective hegemony of the five Permanent Members of the Security Council and relegating collective HIL to exceptional instances of limited scope, such as the privileges extended to nuclear powers in the Nuclear Non-Proliferation Treaty).

[50] *Compare* The Pew Research Center Global Attitudes Project, "A Year After the Iraq War," Survey Report Released on March 16, 2004; and "Views of a Changing World 2003," report released June 3, 2003 (both texts available at http://people-press.org/pgap/) (addressing public perceptions).

[51] *But see* John Quigley, "The United Nations Security Council: Promethean Protector or Helpless Hostage?," 35 *Tex. Int'l L. J.* 129 (2000) (providing a prescient critique of a U.S.-dominated Council). In a world threatened by non-state actors bent on waging war on civilization as well as by a hyper-power that appears inclined to react unilaterally, most Western international lawyers

to Rwanda in 1994 or Iraq in 2003) are both premature and wrong.[52] While it is possible that all the Council's counter-terrorism decisions and efforts to control weapons of mass destruction will be ignored by states and its multilateral "war" on terrorism will be as ineffective as the United States' more unilateral one, the claim that the Council and its Charter powers are an irrelevancy because they are not exercised is clearly wrong. The Council's selectivity when it chooses to act is, for defenders of P-1 at least, a sign of its strength, not weakness: it demonstrates that the Council acts only when it is likely to be effective because it is backed by the will of the most powerful nation on earth (as was arguably intended in its design). That the Council, as well as other IOs, respond positively to U.S.-led initiatives is, to defenders of such efforts, exemplars of the United States' laudable "leadership" of the international community as well as its "institutionalized supremacy."[53] Despite the Council's refusal to explicitly approve in advance Operation Iraqi Freedom, there are corresponding worries from those who question such initiatives or resent the way that they are imposed by the Council.

The perils of an "imperial" Security Council are as real as is the promise that it will take effective action. An effective Council may well be an imperial one. As indicated in the previous section, the same great powers that openly went around Council paralysis on Iraq in March 2003 to use force are, more quietly, using the Council to create substantially intrusive and new counter-terrorism and arms control legal regimes. These regimes rely on the Council's exceptional powers to declare, promote, interpret, and enforce new Council-generated legal obligations to circumvent the "vehicle par excellence of community interest," namely, the multilateral treaty.[54] As discussed in Chapter 3, the United States and the United Kingdom have also used the Council, and the UN, to solidify their hold on Iraq as occupying powers, establish the preconditions for a future Iraqi government, and modify the existing rules under international humanitarian law.[55]

continue to pin their hopes on multilateral inter-state processes, including the Security Council, as the best vehicle to advance the diverse interests of the international community. *See, e.g.*, Vera Gowland-Debbas, "The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance," 11 *EJIL* 361 (2000). Those proposing Council reforms that would improve its effectiveness generally or in specific cases are presumably acting on the same premises. *See, e.g.*, Thomas M. Franck, "Inspections and Their Enforcement: A Modest Proposal," 96 *AJIL* 899 (2002); Rosand, "Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism," *supra* note 37.

[52] *Cf.* Michael J. Glennon, "Why the Security Council Failed," 82 *Foreign Affairs* 16 (May/June 2003)(arguing that the Council is not an effective enforcer of the peace).

[53] The Janus-faced nature of hegemonic international law is characteristic of hegemony. *See* Ginther, *supra* note 49, at 685. Some environmentalists, for example, have praised those unilateral U.S. actions that promote beneficial environmental outcomes. *See, e.g.*, Dan Bodansky, "What's So Bad about Unilateral Action to Protect the Environment?," 11 *EJIL* 339 (2000).

[54] *See* Bruno Simma, "From Bilateralism to Community Interest in International Law," 250 *Recueil des Cours* 217, at 323 (1994). Indeed, Bantekas describes Resolution 1373 as a "minitreaty." Bantekas, *supra* note 36, at 326.

[55] *See supra* Section 3.3, discussing SC Res. 1483 and 1511.

The Council's resort to de facto legislation evinces global HIL in action. In contrast to the glacial legal harmonization efforts of, for example, the ILC or United Nations Commission on International Trade Law (UNCITRAL), this kind of global law is instantaneous in its intended effects. Although the Council also relies on experts, its experts on the CTC and 1267 sanctions committee (and, one presumes, on the 1540 Committee) are not chosen on the basis of a need to represent all the diverse legal cultures of the world, their lack of affiliation with Council members, or their expertise in international law.[56] These Council committees are ideally placed to serve as hegemonic instruments for directly changing states' domestic laws, and not merely their international obligations. Shrouded by secrecy, largely untransparent in their operations, there is little to counter the suggestion that all three committees seek to export U.S. counter-terrorism laws to the world.[57]

The procedures by which these committees operate, inure to the benefit of the powerful: those Council members with the expertise and resources.[58] Although other state members of the 1267 Committee, for example, can in theory object to individuals or organizations sought to be listed by powerful states, their relative lack of power, resources, and expertise make them unlikely or ineffective candidates for this role.[59] The Council's resort to its own subsidiary organs, as

[56] *See, e.g.*, Letter dated 19 October 2001 from Chairman of CTC addressed to President of the Security Council, S/2001/986, Annex, at para. 2, available at http://www.un.org/Docs/sc/committees/1373/986e.pdf (describing the expertise of the CTC's principal experts to be legislative drafting, financial law, customs law, immigration law, extradition law, police and law enforcement, and illegal arms trafficking); Press Conference, CTC, January 10, 2002, available at http://www.un.org/Docs/sc/committees/1373/10jansum.htm (identifying the initial seven CTC experts: two from Austria and one each from the Netherlands, Peru, India, France, and Australia).

[57] *See, e.g.*, Serge Schmemann, "United Nations to Get A U.S. Anti-Terror Guide," *New York Times*, December 19, 2001 available at http://www.globalpolicy.org/unitedstates/unpolicy/gen2001/1219guide.htm (reporting that the U.S.'s 1373 report to the Council, indicating a broad range of actions taken under the USA Patriot Act, was intended as a "template for other countries in adapting their own laws"). The intended reforms of national law would also presumably embrace an entire web of other U.S. laws and practices, such as the U.S. Department of the Treasury's Voluntary Best Practices Guidelines for U.S.-based charities and private foundations. These guidelines attempt to assist organizations that are understandably perplexed by how they can be expected to comply with laws that ban financial assistance to foreign groups that can be seen as providing "material assistance" to terrorism. The Guidelines' attempts to impose "minimal reasonable" due diligence standards have been criticized as onerous, potential obstacles to global philanthropy. *See* Nina J. Crimm, "High Alert: The Government's War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy," 45 *Wm. & Mary L. Rev.* 1341 (2004).

[58] *See, e.g.*, Edith M. Lederer, "UN Agrees on Returning Frozen Assets," *Associated Press*, August 16, 2002, available at 2002 WL 25670813 (indicating that the vast majority of the 200 individuals identified on the Council's lists at that time were put there by the United States amidst complaints that Washington has not explained its criteria for naming these individuals). *See also* Congressional Testimony to the Committee on Senate Finance, October 9, 2002, Statement of Alan Larson, Under-Secretary of State for Economic, Business and Agricultural Affairs, available at 2002 WL 100237868 (describing listing procedures and those cooperating with U.S. efforts).

[59] Further, as Sweden's government representative discovered when he sought to challenge the listing of three Somali nationals living in Sweden, the Committee's procedures require an appeal to

opposed to using standing institutions in other relevant treaty regimes to engage in follow-up compliance with respect to these measures, seeks to enhance the probabilities for legislative success. It takes full advantage of the context in which the Council operates. The Council's efforts with respect to counter-terrorism, for example, are presented as a development that shows that the Council learns from its prior mistakes. The Council's turn to sanctions on identified alleged terrorists acquires a certain legitimacy precisely by contrast to its earlier blunderbuss sanctions regimes. If the alternative to the smart sanctions originally imposed under Resolution 1267 is to wreak havoc on women's and children's right to life and health through comprehensive economic sanctions, the prospect that a relatively small number of alleged terrorists are denied their access to their bank accounts and the right to vacation abroad without due process seems a small price to pay.[60]

Requiring that states report directly to the Council instead of to other treaty regimes also permits the Council to retain executive control over implementation. It is easier to adopt effective "carrots" and "sticks" on those states that lag on their reports, or their compliance, within an organ and an Organization that has a great many more issues on which to bargain, and more tools with which to do so, than, for example, a reporting body limited to examining compliance with the Chemical Weapons Convention. The Security Council can also rely on the Secretary-General, as it has on other issues, to play "good cop" and cajole states, with the ever-present threat of the "bad cop" (the Council or particular members) in the background.[61] By putting these obligations on states as members of the UN, the Council deploys its promotional functions (and the threat of future enforcement action) to suggest the universally compelling nature of the obligation

the state which initially listed the individual, in that instance the U.S. Office of Foreign Assets Control (OFAC), and that state can demand any relevant information and is in a position to block any attempted de-listing. Per Cramér, "Recent Swedish experiences with targeted UN sanctions: the erosion of trust in the Security Council," in Erika de Wet and André Nollkaemper, eds., *Judicial Review of the Security Council by Member States after 11 September 2001* (Amsterdam: University of Amsterdam, 2003). *See generally* Second Report of the Monitoring Group established pursuant to SC Res. 1363 (2001) and extended by Resolution 1390 (2002), S/2002/1050, Annex, September 20, 2002, available at http://www.un.org/Docs/sc/committees/1267/1050E02.pdf; Amb. Charles A. Heimbold, Jr., "Blocking Terrorist Financing: A Fundamental Tool," *Aftonbladet*, March 20, available at www.usis.usemb.se/bio/oped_eng_mar20.html.

[60] Thus, the UN's own website mentions that the Council's sanctions schemes have been criticized for their humanitarian effects as well as their impact on the economies of third countries and mentions, as a desirable alternative, the development of "smart sanctions" that target those whose behavior is the problem. *See* http://www.un.org/Docs/sc/committeees/Intro.htm (visited July 9, 2004). There is a growing literature on the compatibility of UN economic sanctions with human rights and humanitarian law. *See, e.g.*, Vera Gowlland-Debbas, *United Nations Sanctions and International Law* (The Hague: Kluwer International, 2001)(essays by Andrew Clapham, Rian Luca Burci, Jean Duprz, Djamchid Momtaz, Luigi Condorelli, and Marco Sassòli).

[61] For an interesting description of the "good cop/bad cop" phenomenon derived from the perceived as well as real differences between the office of the Secretary-General and the Council, see Giandomenico Picco, "The U.N. and the Use of Force," *Foreign Affairs* 14 (September/October 1994).

and the impossibility that any state can simply choose to opt out by withdrawing from the underlying treaty regimes that might have inspired the Council's enforcement action. Moreover, reporting schemes under the Council's authority and supervision present the possibility of coordinating among the Council's legislative schemes and their enforcement arms. The exchange of information derived from voluminous state reports to the CTC and 1540 Committee respectively, reports that may be generated by different agencies within states, may confirm or rebut states' claims of compliance; in any case, the sheer volume of reports required by the Council enhance the possibility of cross-checks among states.

As with other types of HIL, there is some evidence that the CTC, its 1267 sanctions committee, and other relevant Council monitoring bodies operate outside the context of the rest of international law. As noted, these subsidiary organs of the Council predictably reflect the security and not human rights priorities of the hegemonic powers that dominate the Council.[62] The CTC has so far not asked states whether their counter-terrorist efforts are in conformity with their other treaty obligations or whether these have generated any human rights concerns. This lack of curiosity is a predictable product of the Committee's non-confrontational "capacity-building" approach.[63] In addition, the welter of state reports filed to the CTC, identifying their own counter-terrorism efforts, include opportunistic reports from reliable human rights violators that attempt to justify both old and new repressive national measures, some directed at ill-defined "saboteurs" as well as "terrorists," and that extend to nationals, resident aliens,

[62] The CTC, for example, has resisted efforts by NGOs and the UN Commissioner for Human Rights to retain, among its seven principal experts charged with examining state reports, an expert in international human rights. *See* Rosand, *supra* note 51, at 340. While acknowledging that his work will interact with human rights concerns, the then Chair of the CTC indicated that "[m]onitoring performance against other international conventions, including human rights law, is outside the scope of the CTC's mandate." Presentation by Amb. Jeremy Greenstock, Chairman of the CTC at the Symposium: "Combating International Terrorism: The Contribution of the United Nations," held in Vienna on 3–4 June 2002, available at http://www.un.org/spanish/docs/comites/1373/ViennaNotesF.htm. *Cf.* Presentation Given to CTC by Bacre Ndiaye of the Office of the High Commissioner for Human Rights on December 11, 2001, S/2001/1227, Annex, at 4 available at http://www.un.org/Docs/sc/committees/1373/1227e1.pdf (noting "strong" human rights dimensions to several of the CTC's expert areas and requesting that those assisting the CTC have strong human rights expertise).

[63] *See, for example*, Statement by Jeremy Greenstock, *supra* note 62, (indicating that states are free to "decide what is terrorism with their own jurisdiction" since those issues are "political" and that the committee is engaged instead in capacity building and consciousness raising against terrorism). *See also* Note by the Chairman, Guidance for the submission of reports pursuant to para. 6 of SC Res. 1373 (September 28, 2001), issued October 26, 2001, available at http://www.un.org/Docs/sc/committees/1373/guide.htm. This helps to explain the fears that the template for national counter-terrorist legislation that the CTC will ultimately recommend, either as uniform law for all or as part of its efforts to assist particular state's efforts to comply with the many demands of SC Res. 1373, will not be sufficiently sensitive to human rights law. *See, e.g.*, William Orme, "Response to Terror[:] UN Fears Abuses of Terror Mandate Policy: Rights Monitors See Some Governments Using New Requirements to Justify Repression," *Los Angeles Times*, January 2, 2002, available at 2002 WL 2443320; UN Commission on Human Rights, E/CN.4/Sub.2/2002/L.2, August 6, 2002 (directed at effects of measures to combat terrorism on the enjoyment of human rights).

and would-be immigrants.[64] As noted, instances of opportunism may also be occurring in connection with the lists of individuals and organizations allegedly connected with Al Qaeda or the Taliban created by the 1267 Committee.[65] These predictable results, the product of the Council's refusal (or inability) to define "terrorism" in any of its resolutions, may be to some extent intended.

Some members of the Council may believe that it is easier to entice states to cooperate with its Resolutions 1373, 1267, and 1540 if states are given some discretion in how to apply these top-down rules within their own legal systems and institutions. Permitting this flexibility allows Council legislation to have less of a dictatorial imprint. It might even be seen as the Council equivalent of European efforts to afford a "margin of appreciation" or acknowledging a need to defer to local preferences (via subsidiarity) in the application of supranational European law.[66] The Council's inability to define terrorism also draws support from the UN's general inability to draft a comprehensive convention with a universally acceptable definition of "terrorism" that does not include vaguely worded exceptions for those engaged in lawful efforts to pursue self-determination or for those residing in occupied territories.[67] No one can expect the Council to define a crime that eludes a general definition.[68]

The human rights objections arising from Resolution 1267, previously mentioned, can also be re-cast in terms of HIL. The work of the 1267 committee, largely unbound by transparent rules and not subject to third party appeal, is ideally suited

[64] For a survey, see Human Rights Watch, "Opportunism in the Face of Tragedy, Repression in the Name of Anti-Terrorism," available at http://www.hrw.org/campaigns/september11/opportunismwatch.htm. For a specific example, see Report of the Republic of Cuba submitted pursuant to para. 6 of SC Res. 1373 (January 2, 2002), available at http://www.un.int/cuba/Pages/cubasreportonterrorism.htm.

[65] For examples, see generally *supra* note 37.

[66] *See, e.g.*, R. St. J. Macdonald, "The Margin of Appreciation," in R. St. J. Macdonald, ed., *The European System for the Protection of Human Rights* 83 (Dordrecht: M. Nijhoff, 1993); Paolo G. Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law," 97 *AJIL* 38 (2003).

[67] M. J. Peterson, "Using the General Assembly," in Jane Boulden and Thomas G. Weiss, eds., *Terrorism and the UN* 173 (Bloomington, Indiana: Indiana University Press, 2004)(surveying history of the Assembly's efforts); *but see* Arab Convention on the Suppression of Terrorism, issued by the Councils of Arab Ministers of Interior and Justice, Cairo, April 1998, Article 2(1) (providing that terrorism crimes not include "any struggle cases of all means, including the armed struggle, against foreign occupation and aggression, for liberation and self-determination, according to the principles of international law. And not be considered as such any act that endangers the soil [*sic*] unity of any Arab state").

[68] The closest thing to a definition adopted by a UN political body is one frequently used in Assembly resolutions: "Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, ideological, racial, ethnic, religious, or any other nature that may be invoked to justify them." Quoted in Peterson, *supra* note 67, at 178. For a survey of the evolving position of the General Assembly position towards terrorism, see Malvina Haberstam, "The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed," 41 *Colum. J. Transnat'l L.* 573 (2003). By avoiding this definitional quagmire, the Council permits disputes over the status of ostensible "freedom fighters" to be resolved outside the confines of law, that is subject to the usual forms of non-collective hegemonic pressures.

to hegemonic patron–client action. Neither the public nor other non-committee members know whether that committee's determinations are premised on carefully considered dossiers subject to identifiable standards of proof (whether preponderance of the evidence, beyond a reasonable doubt or some other consistent standard), or whether instead it works on the basis of implicit/explicit non-reciprocal threats characteristic of HIL.[69] Moreover, the ambiguity about what the Council is actually doing when it imposes sanctions on identified individuals, whether it should be seen as only a temporary deprivation of property (normally subject to minimal and quite flexible procedural constraints on state action) or more akin to a criminal measure (that ought in principle to trigger the full panoply of rights due criminal defendants), is useful for the same reasons as the lack of a definition of "terrorism."[70] The Council's refusal to deploy its declaratory or interpretative functions to clarify any ambiguity of relevant human rights standards permits a certain deniability with respect to consequential human rights violations.[71]

[69] *See, e.g.*, Second Report of Monitoring Group, *supra* note 59, at 9.

[70] The difficulties with the Council's imposition of sanctions have not gone unnoticed by NGOs and other UN members. Indeed even a UN Monitoring Group, established pursuant to Resolution 1363, complained in its Second Report, issued on September 19, 2002, that the 1267 Sanctions Committee was listing individuals without sufficient information, failed to respond quickly to inquiries, lacked clarity concerning its procedures for submitting names or for clarifying information regarding persons on the list, lacked guidelines for listing or de-listing, and operated without sufficient transparency to permit adequate assessment. Second Report, *supra* note 59, at 9. While the Council now permits individuals who prove their innocence to be de-listed and has accepted the possibility of some humanitarian exceptions to the scope of its sanctions (but only at the discretion of those states generous enough to permit them), it has not accepted the basic premise that those who it stigmatizes as terrorists ought to be entitled to the benefit of impartial or judicial scrutiny prior to being targeted for sanction. *See* Evelyn Leopold, "U.S. Strikes Six from U.N. Terrorism List," *Reuters*, August 22, 2002 available at http://www.webprowire.com/summaries/217005.html; Lederer, *supra* note 58; Larson, *supra* note 58. *See also* SC Res. 1452, paras. 1 and 5 (December 20, 2002) (authorizing humanitarian exceptions for its counter-terrorism financial sanctions on individuals). While that resolution bows to members' complaints that it was inhumane, particularly in the absence of due process, to deprive listed individuals of all forms of sustenance, including for basic expenses such as food or medical assistance, it authorizes such exceptions only to the extent that a state notifies the 1267 Sanctions Committee of its intent to apply this exception and that Committee fails to object within 48 hours. As a result, the 1267 Sanctions Committee, and those who dominate it, remain free to deny such basic necessities to anyone at any time.

[71] *See* Helen Mountfield, "Regulatory Expropriations in Europe," 11 *NYU Envt'l. L. J.* 136 (2002) (describing deferential approach taken in EHCR towards temporary deprivations of property by state action). *See also* Carol S. Steiker, "Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide," 85 *Geo. L. J.* 775 (1997)(discussing the line separating civil forfeiture penalties and traditional criminal sanctions within U.S. national law). *Compare Foti* v. *Italy*, 5 EHRR 313, 1982 ECHR 7604/76; *Corigliano* v. *Italy*, 54 ECRR 334, 1982 ECHR 8304/78 (noting that apart from an official notification that a person has committed a criminal offense, a criminal "charge" for purposes of article 6 of the European Convention may take the form of "other measures which carry the implication" that the individual has committed a criminal offense and which "substantially affect the situation of the suspect"); *National Council of Resistance of Iran* v. *Department of State*, 251 F.3d 192, at 203–5 (D.C. Cir. 2001) (the stigmatizing effect of a terrorist sanction and its impact are sufficient to trigger some guarantees of due process). Article 14 of the ICCPR provides in relevant part, "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." This is notably the one provision in that article that applies both to criminal

Although the Council is purporting to wage a global war against terrorism and WMD, its efforts smack of the lack of reciprocity that characterizes HIL. The Council's counter-terrorist and WMD efforts coincide with the United States' perceived self-interests. Sanctions under Resolution 1267 reach only those terrorist groups (namely members of the Taliban or Al Qaeda) that pose a particular threat to U.S. interests and those of its allies; the Council focuses attention on WMD in states that do not otherwise have them. Those with access to nuclear weapons retain their privileged status.

As noted, Resolutions 1373 and 1540, although striking examples of collective intervention of indefinite duration in what was formerly the internal affairs of states, shrink from recognizing legal limits on the Council's own actions. Like the U.S., which has suggested that international human rights may pose unwise constraints on the war against terrorism[72] and has been reluctant to expose its own unilateral actions to human rights scrutiny,[73] the Council has been reluctant to acknowledge that its counter-terrorist and WMD efforts may be subject to legal constraints.[74] The Council, uniquely positioned to rely on UN Charter Article 103 if necessary to trump inconvenient treaty law, is ideally suited to serve these ends. Having the Council act avoids the need for more embarrassing (if time-tested) resorts to unilateral acts, including breaches of law. To the extent the U.S. can rely on the Security Council to impose sanctions on alleged terrorists without due process, for example, it has less need to file a declaration of national emergency under article 4 of the ICCPR to achieve the same ends, which would expose its acts to greater scrutiny.[75]

defendants as well as to civil suits. The rest of article 14 (including the detailed rights to presumption of innocence, to examine witnesses, to trial without undue delay) apply only with respect to those charged with a crime. ICCPR, December 16, 1966, 999 UNTS 171 (entered into force, March 23, 1976). The Council, apparently unconcerned with protecting its listed individuals from the government actions that it is demanding, leaves such questions to the discretion of states (or their courts). Notably, Resolution 1373's distinct demand that states criminalize, under their domestic law, the actions of terrorists in their midst and bring such perpetrators "to justice" would suggest that the Council believes that its *own* imposition of financial sanctions on individuals would not be tantamount to a criminal sanction subject to full due process. SC Res. 1373, *supra* note 35, para. 2(e) (requiring as well that terrorist acts be "established as serious criminal offences in domestic laws and regulations"). This paragraph, unlike the freeze orders in para. 1 of the same resolution or those implemented under the 1267 Sanctions Committee, clearly anticipates the involvement of states' criminal justice systems, including presumably the applicability of rights due criminal defendants.

[72] *See, e.g.*, Brief for the United States as Amicus Curiae, *John Doe* v. *Unocal*, 9th Cir. Court of Appeals, May 8, 2003, available at http://www.hrw.org/press/2003/05/doj050803.pdf.

[73] *See, e.g.*, Richard J. Wilson, "United States Detainees at Guantanamo Bay," 10 *SPG Hum. Rts.* 2 (2003); Joan Fitzpatrick, "Jurisdiction of Military Commissions and the Ambiguous War on Terrorism," 96 *AJIL* 345 (2002).

[74] *Compare* SC Res. 1456, Annex, para. 6 (January 20, 2003) (non-binding "Declaration" stating that *states* must ensure that their counter-terrorism measures are in accordance with international law, including international human rights, refugee and humanitarian law).

[75] Despite its actions since 9/11, the U.S. government has not formally filed a derogation under article 4 of the ICCPR, perhaps because of the limits imposed on such derogations and because giving such notice would in itself subject the U.S. to scrutiny. *See* Fitzpatrick, *supra* note 73, at 350–2. Of course, as noted, the Council has no mechanism under which to file such derogations, a fact that has surely not escaped the notice of those who rely on it.

Global HIL may emerge other than through Council resolutions that exhibit legislative characteristics. Both in Resolution 1368, of September 12, 2001 and in its Resolution 1373, passed just days prior to the U.S. military action in Afghanistan, on September 28, the Council, presumably referring to the United States and its announced military threats to act against Al Qaeda wherever it operates, affirmed the right of individual and collective self-defense in ambiguous terms.[76] The Council also affirmed, in Resolution 1373, that "every state has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts." These statements appear to give the Council's prior consent to clearly anticipated invasion of Afghanistan and the United States' own invocation of self-defense. Unlike much else in the operative paragraphs of Resolution 1373, these brief preambular affirmations were not undertaken with any express general legislative effect. They were not directed at the membership as a whole and did not legally bind anyone to do anything. Especially if taken as simply approving of one country's reaction to a discrete event—as only intended to deal with the United States' then anticipated resort to force in Afghanistan—these affirmations are the quintessential Council declarative or interpretative action. They evince collective acquiescence in a member's self-help in a discrete case, presumably as its anticipated role under the "until" phrase of Article 51, without invoking the Council's own enforcement powers.

Given the Council's legislative efforts in at least one of those resolutions (Resolution 1373) and the tendency for even the Council's declarative and interpretative efforts to have broader normative effects, the Council's prospective endorsement of individual and collective self-defense, along with its later acquiescence in Operation Enduring Freedom, may signal, depending in part on how the Council's license comes to be interpreted by its licensee, three new general rules with respect to defensive force in the age of terrorism:

1. Terrorist violence, at least when of the scale of 9/11, even when undertaken by a non-state actor, may constitute an "armed attack" for purposes of the UN Charter's Article 51.
2. A state's assistance to, harboring of, post hoc ratification of violent acts undertaken by individuals within its territory, or perhaps even mere negligence in

[76] *See* SC Res. 1368 (September 12, 2001) ("recognizing the inherent right of individual or collective self-defense in accordance with the Charter"); SC Res. 1373, preamble, *supra* note 35 ("reaffirming the inherent or collective right of self-defense as recognized by the Charter of the United Nations as reiterated in resolution 1368"). Some have suggested that in addition to the preambles of these resolutions, para. 2(b) of SC Res. 1373 (indicating that all states shall "[t]ake the necessary steps to prevent the commission of terrorist acts") contains an "almost unlimited mandate to use force." *See* Michael Byers, "Terrorism, the Use of Force and International Law," 51 *Int'l & Comp. L. Q.* 401, at 402 (2002). But this would be an extraordinary *requirement* to use force and certainly a departure from the usual language by which the Council *authorizes* the use of force ("all necessary means"). The departure from that usual formula, in a resolution whose other operative paragraphs mandate only financial and criminal sanctions, strongly suggests that para. 2(b) was probably not intended to be a general mandate to use force.

controlling such individuals, may make a state responsible for such acts and enable military action to be taken against such a state. In other words, such state action (or inaction) may constitute a breach of a state's *own* duty not to violate UN Charter's Article 2(4).

3. The right to respond with military force against both terrorist individual and harboring state does not become impermissible retaliation, illegal anticipatory self-defense, or exceed the rules of proportionality merely because the threat of continued terrorist attack remains clandestine and unpredictable (as it has been since 9/11).

None of these rules had been previously endorsed, at least clearly, by international bodies such as the Security Council or the World Court.[77] The GA's 1974 definition of aggression, for example, had defined armed force to consist of force by one state against another.[78] And yet these Council actions have become lawyers' Exhibit One in making the case that the rules regarding the defensive use of force have changed since 9/11.[79] One suspects that had those attacks occurred

[77] *But see* Thomas M. Franck, "Terrorism and the Right of Self-Defense," 95 *AJIL* 839 (2001) (arguing that U.S. military action in Afghanistan required no adjustments to existing law). It is not entirely clear whether Franck would endorse the three general rules suggested in the text above or whether his arguments about the state of the law were intended to be limited to the particular facts of Afghanistan as of the fall of 2001. If intended as a statement of general law, some of Franck's assertions are dubious. He contends, for example, that the ILC Draft Articles on State Responsibility "make it clear that a state is responsible for the consequences of permitting its territory to be used to injure another state." *Id.*, at 841. If this implies that the ILC's Draft Articles endorse a kind of strict liability standard on these kinds of questions, this is incorrect. The ILC's Draft Articles attribute the action of non-state actors to states only in carefully delimited circumstances, as where those actors' conduct is directed or controlled by the state, the non-state actors are exercising elements of governmental authority, or the state acknowledges or adopts the conduct in question. *See* articles 8, 9, and 11, Draft Articles on Responsibility of States for International Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001). (*Compare Military and Paramilitary Activities in and against Nicaragua*, *supra* note 9, at paras. 86–93 (requiring a demonstration of "effective control" to impute actions to a state); *Prosecutor* v. *Tadic*, Judgment, No. IT-94-1-A, para. 137 (July 15, 1999)(asking whether a state has a role in organizing, coordinating, or planning the military actions)). It may be that neither the international judicial decisions cited nor the ILC's Draft Articles are the last word when it comes to the rules of attribution for terrorist acts but if, under existing law, a state is subject to full scale military defensive action against it simply because non-state actors within it injure another state, this requires considerably more documentation. As for Afghanistan, it is not altogether clear whether all U.S. actions during the course of that conflict were, in hindsight, legally justified. *Compare* Mary Ellen O'Connell, "Lawful Self-Defense to Terrorism," 63 *U. Pitt. L. Rev.* 889 (2002)(suggesting that not all U.S. actions during Operation Enduring Freedom met the requisites of proportionality).

[78] *See* GA Res. 3314 (XXIX), (1974), article 1 and article 3(f). The Resolution also deals with cases where a state permits its territory to be used by another state to launch an attack on a third state. While the resolution's article 3(g) deals with the possibility of aggression because of actions of "armed bands, groups, irregulars or mercenaries" within a state's territory, it envisages a considerable degree of state control over these actors, that is, that the state "sends" these individuals to carry out acts of armed force against another state.

[79] Thus, even Franck, who argues that existing rules sufficed to justify Operation Enduring Freedom, relies on the Security Council for every one of his propositions of established law. *See* Franck, *supra* note 77, at 839–40, 841, and 842.

elsewhere, particularly in a third state that was not an ally of the U.S., Exhibit One would probably not now exist—as international law and its institutions would not have reacted as quickly, if at all. To the extent these arguments prove correct, this would be a fine example of hegemonic powers' ability, via the Council, to promote new Charter, and presumably customary, international law. While it is too early to tell whether the Council's apparent re-interpretation of the use of force will be applied to other cases by the Council or states, these resolutions also evince the characteristics of global HIL. The statements in Resolution 1373 may be expressions of loyalty to the patron undertaken in the expectation of continued guarantees of security or economic assistance.[80] While the Council's actions here might indeed have resulted from initial shock and worldwide revulsion against the 9/11 attacks, the United States' ability to buy votes on the Council through the sheer exercise of power is one of the abiding inevitable characteristics of the post-Cold War Council.

Unless new constraints emerge, the three new general rules of use of force/self-defense (if that is what they are) are also exceptionally indeterminate, as would be expected of HIL. Since, as noted, the Council does not define what terrorism is, states generally, but more probably hegemonic powers in fact, remain free to define for themselves just what constitutes a non-state act to which they may forcefully respond under rule 1. Similarly undefined is the level of evidence needed to prove an actionable on-going threat of terrorism or indeed whether the victim state needs to present such evidence prior to taking action under rule 3.[81] And freed from the relative confines of the traditional rules of state responsibility, rule 2's rules for attribution are purposely vague, lying somewhere between the Taliban's apparently sufficient connections to Al Qaeda but presumably not extending as far as U.S. Secretary of State Donald Rumsfeld once suggested they should go, that is, to license military action whenever "we don't know what we don't know."[82]

There is a strong correlation here as well between Council action and the United States' perceived self-interests. While it is not yet clear how far the international community, or more specifically the Security Council, will go in endorsing or acquiescing in defensive actions pursuant to these ostensible new rules, it is

[80] These Council pronouncements were instigated by or strongly encouraged by the United States. Note that President Bush had already announced, prior to approval of Resolution 1373, that the U.S. would no longer distinguish between terrorists and those states harboring them. *See* President George W. Bush, Address to a Joint Session of Congress and the American People, Freedom at War with Fear (September 20, 2001), available at http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html. While we have only fragmentary knowledge of the pressures the U.S. (and other permanent members) regularly brandish to get their way within the Security Council, the drive to secure Council permission to wage war on Iraq, both prior to and subsequent to SC Res. 1441 (November 8, 2002) reportedly included a multitude of economic and other threats directed at even the least powerful members of the Council. For a critical account of U.S. pressures on the Council leading to adoption of SC Res. 678, see Burns H. Weston, "Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy," 85 *AJIL* 516 (1991).

[81] *Cf.* Franck, *supra* note 77, at 842–3 (arguing that the state taking forceful defensive action needs to prove its case after the fact).

[82] Secretary of Defense Donald H. Rumsfeld, Press Statement, May 22, 2002, available at http://www.defenselink.mil/news/May2002/t05222002_t522sdma.html.

strikingly useful for the hegemon to have achieved this collective endorsement of its "inherent" rights. Having the Council suggest that military action directed at a harborer of terrorism is licensed by an inherent right is far more useful to the hegemon than prior Council actions that recognized that particular terrorists' actions were discrete threats to the international peace.[83] The latter imply that the hegemon needs to get Council authorization prior to responding with force on a case-by-case basis, that use of force against terrorism generally demands a nuanced examination by the UN's collective security arm, and that the Council may actually impose conditions on the way force is used or the goals sought to be achieved. Having the Security Council suggest treaty-based constraints on its use of force in cases involving terrorism is hardly what hegemonic powers want.[84]

Since the new rules license recurrent projections of military force based on auto-interpretation and since they endorse *unilateral* military action, they are ideally suited to hegemonic sensibilities. Given the Council's oft-noted tendency to be extremely selective in its application of rules of conduct and its more recent history of responding promptly and effectively (if at all) only when U.S. concerns are paramount, the Council's new implicit rules regarding the use of defensive force may not prove to be fully reciprocal in operation. And since, as Thomas Franck indicates, it was not essential for the Council to recognize the United States' inherent right to use force,[85] no one would think it inappropriate if the Council fails to do so the next time the U.S. purports to act consistently with these new rules. This is the ideal form of collective legitimation for those powerful enough to deploy military force whenever it suits them: hegemons get to cite the Council's precedent for an inherent right that they can in the future deploy solely at their discretion. Like open-ended Council enforcement actions, such as its open-ended Iraqi sanctions under Resolution 687, this open-ended interpretative license can only be limited by further Council action—which of course requires the hegemon's (highly unlikely) acquiescence. Of course, hegemonic powers like the U.S. could have attempted to make these changes to (or clarifications of) existing law through unilateral action but having the Council do so accords greater legitimacy to the effort. It may also help to achieve a change in the law more quickly, rendering largely moot debates about the viability of creating new customary rules through their breach.[86]

There are, in addition, interesting ways in which the Council's affirmation of self-defense buttresses other instances of Council-generated HIL. The Council's finding that terrorist acts, the financing of these, and the failure to deny access to

[83] *See, e.g.*, SC Res. 748 (March 31, 1992) (imposing sanctions on Libya); SC Res. 1333 (December 19, 2000) (imposing sanctions on the Taliban).

[84] *See generally* Byers, *supra* note 76, at 412.

[85] Franck, *supra* note 77, at 840.

[86] There is, after all, only so much that even hegemons can do to alter the fundamental sources of international obligation on its own. *See, e.g.*, Stephen J. Toope, "Powerful But Unpersuasive? The Role of the United States of America in the Evolution of Customary International Law," in Michael Byers and Georg Nolte, eds., *United States Hegemony and the Foundations of International Law* at 287 (Cambridge, U.K. and New York: Cambridge University Press, 2003)(arguing that the U.S. has not been terribly successful in altering customary law through its own actions).

terrorists certain weapons all constitute on-going (and open-ended) "threats" to the peace presents a striking opportunity for those able to exercise military power, such as the U.S. Those who invaded Iraq in March 2003 argued that they had been impliedly authorized by the Council because that body: had found a threat to the peace, authorized force (in 1991), subsequently found additional threats to the peace in Iraq's subsequent behavior (e.g., its refusal to fully cooperate on arms inspections under Resolution 687), and had engaged in multiple findings that Iraq had "materially breached" prior Council resolutions to abide by its post-Gulf War responsibilities to the Council. They argued that in these circumstances the Council had in effect licensed those states that were able and willing to do so to come to the aid of the Council to prevent further material breaches of its enforcement measures and thereby assist in restoring and maintaining the peace.[87] While states have not generally accepted these claims, there is considerable ambiguity about the normative claims actually being made. Much may be at stake beyond Iraq.

The United States and those who joined its coalition of the willing against Iraq have opened a door to future "implied" authorizations by the Council for the use of force. Will it henceforth be legal for states in the future to use force "to come to the aid of the Council," whenever the Council finds a threat to the peace, a material breach of its enforcement actions, and yet fails to muster the votes to take the final authorizing step for force? It is but a short step to take, after all, to suggest that if it is legal for states to respond to Iraq's material breaches of the Council's mandates even when the Council does not specifically re-authorize force that it once permitted, members ought to be able to respond with force if the Council is paralyzed from the start and fails to authorize force but has found a threat to the peace and material breaches of its prior enforcement measures.[88] Under the circumstances, resolutions like 1373 and 1540, which proclaim open-ended threats to the peace with no time or geographic limitation, may pose opportunities for those with military power to use it to "assist" the Council with such threats, as well as grave risks for those charged with materially breaching the Council's orders.[89]

[87] *See* U.S., U.K., and Australian legal justifications offered for use of force against Iraq in 2003, *supra* note 10. Note that the U.S. also supported its claims by suggesting that members of the Council had, with respect to Iraq, acquiesced in military action to enforce the no-fly zones over parts of Iraq, thereby confirming the interpretation that SC Res. 678, and subsequent Iraqi resolutions, constituted standing authority to use force. *See* Taft and Buchwald, *supra* note 10.

[88] Compare the Uniting for Peace Resolution, discussed in Chapter 3, permitting the Assembly to recommend action by members, including the use of force, "if the Security Council, because of lack of unanimity, fails to exercise its primary responsibility for the maintenance of international peace and security." GA Res. 377 (V) (November 3, 1950). The U.S. was instrumental in securing this resolution in the 1950s when it was reasonably confident of securing majority support in the GA for its initiatives.

[89] For suggestions that the unilateral deployment of force might be justified hereinafter: to prevent the acquisition of weapons of mass destruction; to foil on-going acts of genocide and perhaps to deter a regime that has engaged in such acts in the past; to foil other large-scale or systemic abuses of human rights, including manmade famines or to prevent a flow of refugees; to protect global public goods such as key arteries or choke points of global commerce, telecommunications (including the Internet), or transportation; or to prevent threats such as large-scale epidemiological outbreaks or environmental disasters, see Ivo H. Daalder, "The Use of Force in a Changing World—US and European Perspectives," 16 *Leiden J. Int'l L.* 171 (2003).

The many ambiguities now evident with respect to the rules of force are inherent in Council-generated law. Having the Council, as opposed to some other international body, engage in law-making means that there will usually be considerable uncertainty about whether the Council is acting only on a case-by-case basis or whether it is intending to proclaim new general rules for defensive force. But this ambiguity is useful to a hegemon that may be as yet unsure about whether it needs these rules or whether they will prove more troublesome than they are worth, particularly if used by others in ways not consistent with hegemonic sensibilities. The Council's ambiguous action permits deniability. Only hegemonic powers know for sure whether the Council is in the midst of promulgating new rules on force. Further, since the new potential rules about permissible uses of force, to the extent they exist, are being touted by a political body (as opposed to the ILC or the ICJ), no one expects that body to spell out the rules' normative bases, possible limits, or consequences. Neither the Council (nor the hegemonic powers) can be blamed for the resulting indeterminacies.[90] No one knows whether the premise is that the new threats posed by undeterrable non-state actors or the possibility of terrorists using WMD are so novel that the old rules no longer retain the confidence of states. We do not know whether, if giving comfort to undefined terrorists or failing to secure weapons that fall into their hands, can trigger military retaliation by the Council or by others if the Council fails to take action, the new rules on resort to force may eventually permit "pre-emptive action" intent on toppling a regime that harbors or gives comfort. (Although the Security Council's apparent advance endorsement and apparent acquiescence in the toppling of the Taliban regime through its Resolutions 1368 and 1373 would suggest that at least some cases of "regime change" are permissible and proportionate.)

The Council's ambiguous deployment of its declarative and interpretative functions plays into the ever-present threat of continued military action that the United States has announced as part of its new National Security Strategy.[91] While the Council's refusal to acquiesce in Operation Iraqi Freedom suggests that a majority of Council members and probably the membership as a whole do not believe that this "pre-emption" doctrine as announced in that Strategy is consistent with international law, the effect of both the hegemon's announced

[90] Indeed, as Reisman indicates in another context, "the potential for abuse here does not derive from the power of a single state." W. Michael Reisman, "Assessing Claims to Revise the Laws of War," 97 *AJIL* 82, at 90 (2003). To paraphrase Reisman, the hegemon can always attribute the problematic ambiguities to a weak international legal system that licenses the Council to undertake such action. This is global HIL, in short, that leaves no fingerprints. *But see infra* note 100.

[91] *See* National Security Strategy of the United States (September 2002), available at http://www.whitehouse.gov/response/iondex/htm; National Strategy to Combat Weapons of Mass Destruction, (December 2002), available at http://www.whitehouse.gov/response/iondex/htm. As Reisman observes in the anodyne language of the Yale School, the doctrine to engage in pre-emptive force "contribute[s] to minimum order by stabilizing the expectations of all actors as to the consequences of certain types of action and thus aid[s] in avoiding adventures and mistakes." Reisman, *supra* note 90, at 90. Notwithstanding the language of Article 2(4) of the UN Charter, under its Security Strategy the hegemon apparently retains the right to *threaten* any and all.

pre-emptive force doctrine and the Council's *possible* endorsement of new defensive rules is to leave future "rogue" nations uncertain about whether the hegemon, with or without the Council, will act against them if they fail to cooperate in the war on terrorism to the hegemon's satisfaction.

A final potential example of Council-generated HIL is suggested by Resolution 1483 on the occupation of Iraq.[92] As noted in Chapter 3 discussion of its impact on Article 2(7), the Council has not been fully faithful to the relevant laws governing occupied territories, even though it ostensibly affirmed their application in this resolution.[93] Resolution 1483 gave Iraq's new occupiers essentially carte blanche without suggesting whether or how the Authority will be held to any of its relevant duties under international humanitarian law, from duties to protect Iraqi cultural and other forms of property to obligations to avoid cruel or inhuman forms of punishment or forcible transfers of persons.[94] Apart from calling for review of its implementation one year hence—part of the price the U.S. was forced to pay for its passage—Resolution 1483 did not establish any independent mechanism for ensuring that the Authority meets its obligations under existing law.

As is typical of global HIL, the Council imposes no other obligation on the Authority that might be appropriate given evident needs to restore and maintain international peace and security. There is no mention of a detailed accounting,

[92] The largely adverse reaction to the U.S. attempt to use the Council to authorize renewed military action against Iraq in March of 2003 stems at least in part from the Council's own prior innovative post-Gulf War efforts and a political backlash against them. Resolution 687, the "mother of all resolutions," was adopted at a unique bipolar moment in recent Council history: when both U.S. unilateral power was reaching its peak but also when hopes were riding high that the Council would finally "work as intended." The most contested portions of Resolution 687 that we have addressed, comprehensive economic sanctions with no sunset provisions, an intrusive and far-reaching arms control and inspection regime, and the Council's quasi-adjudicative efforts over boundaries and liability, are suggestive of global HIL in action. *See* Gerry Simpson, *Unequal Sovereigns: Great Powers and Outlaw States in the International Legal Order* (Cambridge, U.K. and New York: Cambridge University Press, 2003)(suggesting parallels between the Council's treatment of Iraq and the war guilt clause of the Versailles Treaty at the end of World War I).

[93] *See* SC Res. 1483 (May 22, 2003), paras. 4 (calling upon the Authority (namely the U.S. and the U.K.) to promote the welfare of the Iraqi people consistent with the Charter and "other relevant international law") and 5 (calling upon "all concerned" to comply fully with the Geneva Conventions of 1949 and the Hague Regulations of 1907). Whether this resolution was intended to be the equivalent of an adjudicative judgment that the U.S. and the U.K. are subject to the law governing occupying powers under the Geneva Conventions of 1949 and the Hague Regulations of 1907, see, e.g., Frederic L. Kirgis, "Security Council Resolution 1483 on the Rebuilding of Iraq," *ASIL Insights*, May 2003, available at http:www.asil.org/insights/insigh107.htm, remains to be seen. With the possible exception of its provision for review one year hence, nothing in that resolution recognizes that under the relevant Geneva Convention, for example, lawful occupation normally extends for only a one year period after the "general close of military operations." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, article 6, 75 UNTS 287 (12 August, 1949)(stating the Convention ceases to apply after the one-year period but providing that certain provisions continue to apply thereafter to the extent the occupier "exercises the functions of government"). Indeed, given the continuing violence in Iraq at least through 2004, it is not even clear that military operations have in fact closed despite prior U.S. statements to this effect.

[94] *See generally* Jordan A. Paust, "The U.S. as Occupying Power Over Portions of Iraq and Relevant Responsibilities Under the Law of War," *ASIL Insights*, April 2003, available at http: www.asil.org/insights/insigh102.htm (describing relevant obligations).

whether or not through the International Red Cross, of the number of Iraqis (civilian or other) killed in the recent conflict, even though such an accounting would surely be a necessary step towards the Council's announced goals, nor any requirement of UN participation in the criminal accountability foreseen in the resolution for Hussein or other high-level former Iraqi leaders despite considerable doubts about whether conditions in Iraq permit the secure and fair trials that the Council has endorsed on prior occasions.[95] Indeed, the Council did not react when the Authority, with the assistance of its appointed Iraqi Governing Council, passed a special statute to permit the trial of Hussein and others.[96] While Resolution 1483 was praised for bringing the UN back into Iraq, it left the UN (and the U.S.) role in post-war Iraq purposely vague and uncertain, refusing even to concede to the UN those tasks within its established expertise, such as verifying and supervising a free and fair election.[97]

Council-generated HIL is not identical to old-fashioned hegemony. The Council as a tool of global HIL faces limits that unilateral HIL does not. Even P-1 has to worry about the impact on the Council's legitimacy and on the likelihood that others will assist the Council in the future when it needs their help, as with respect to policing post-war Iraq or the broader war on terrorism. As is suggested by the Council's evident reluctance to renew prior resolutions exempting certain peacekeepers from the jurisdiction of the ICC, which led the United States to drop an insistence on a draft resolution to this effect in June 2004, global HIL through the Council requires the acquiescence of others.[98]

[95] While SC Res. 1483 affirms the need for criminal accountability for crimes committed (but only by the previous Iraqi regime and not by anyone else on Iraqi territory) and imposes on states a duty to freeze the assets of Hussein and other senior officials of the former regime, it stays clear of indicating how trials will be conducted, with no mention of any of the likely possible options or suggestions of involvement by the UN Special Representative or the international community as a whole. *See* SC Res. 1483, *supra* note 93, at para. 8. The Authority is left with full discretion about whether or not to conduct such trials itself (even through the application of U.S. military tribunals with no local Iraqi or UN participation), to implement a partial or full amnesty for such crimes, to undertake various forms of truth commissions, or to implement an Iraqi lustration program banning former Ba'ath party members from certain positions in government or perhaps civil society more generally.

[96] For a critical discussion of this statute and the proposal to try Hussein, see José E. Alvarez, "Trying Hussein: Between Hubris and Hegemony," 2 *J. Int'l Crim. Just*. 319 (2004).

[97] SC Res. 1483, *supra* note 93, para. 8 and 8(c) recognize a UN Special Representative with "independent responsibilities" but who needs to work with the Authority to "facilitate a process leading to an internationally recognized, representative government of Iraq." This ambiguous directive appears to be a studied effort to avoid any of the usual trigger words or preconditions for UN involvement in election supervision, thereby according the Authority wide latitude in administering Iraq and deciding its future. The Resolution's treatment of UN responsibilities is less vague with respect to the UN's role in "coordinating" humanitarian and reconstruction assistance. Para. 8(a). *Cf.* para. 8(g) (directing that the UN merely "promote" the protection of human rights). But whether para. 8(g) contemplates that the UN Special Representative will be able to object, much less take any action in response to, any possible violations of applicable human rights or international humanitarian norms by the Authority remains to be seen. *Cf.* Kirgis, *supra* note 93.

[98] *See* SC Res. 1422 (July 12, 2002), renewed as SC Res. 1487 (June 12, 2003). That resolution, adapted as a result of U.S. pressures on a reluctant Council (see 96 *AJIL* 725 (2002)), took the U.S.'s campaign against the ICC, formerly consisting of U.S. unilateral threats to deprive aid or other

Council-generated HIL remains law. Like the imperialist bilateral treaties of another era, if some Council actions pose risks of hegemonic abuse or are the product of hegemonic power, it is not because the hegemon is, at least in these instances, violating existing law but because, like more common examples of HIL, these Council actions meld hegemonic power with law.[99] Global HIL results from the privileged position that certain hegemonic powers are accorded under the existing rules and institutions of international law. Neither P-1 nor the other permanent members of the Council are violating the law by taking advantage of the privileges that they have been granted.[100] As is suggested by the many promotional and other efforts of the Council to promote human rights, the exercise of such leadership has done considerable good. And none of the resolutions addressed here were manifestly illegitimate in a political sense; all were adopted unanimously or nearly so.

Global HIL, whether generated by the Council or by other IOs, is a complex phenomenon. Although it is characterized by demonstrable power disparity, it may preclude the exercise of even greater power disparities. The alternatives to Council action, such as arduous treaty negotiations, are not always a better option, as defenders of the Council-generated ad hoc war crimes tribunals—which some within the Former Yugoslavia and Rwanda would regard as exercises in global HIL—would be the first to argue. On the other hand, global HIL is more insidious than unilateral HIL precisely because blame for it is shared. Unilateral action, particularly in defiance of established rule, historically generates

benefits to ICC-party states, efforts to negotiate article 98 bilateral agreements with ICC party states, and passage of the American Servicemembers Protection Act, to the global level. (For background to these other actions, see 93 *AJIL* 186 (1999), 96 *AJIL* 724 (2002), and 97 *AJIL* 200 (2003).) Like SC Res. 1373, this resolution and its anticipated annual extensions, undertaken not in response to any concrete or discrete threat to the peace or directed at any particular target state, has the effect of legislating globally, in this instance not by serving as an alternative to an international treaty not yet in effect but by amending one already in force. After the announced opposition of various Council members, as well as the Secretary-General, the U.S. dropped a proposed extension in June 2004. *See* Hoge, *supra* note 34. Prior to this defeat, the presumed intent was to use the Council to help secure the blanket exemption from ICC jurisdiction that the U.S. had sought for itself during the negotiations on the Rome Statute. *See generally* Carsten Stahn, "The Ambiguities of Security Council Resolution 1422," 14 *EJIL* 85 (2003); Zappalà, *supra* note 34.

[99] *See* Vagts, *supra* note 46, at 846; Ginther, *supra* note 49, at 686.

[100] This restates, in different fashion, a point recently made by Michael Reisman. Reisman suggests that blame for the risk of uncontrolled superpower abuse of the Bush Administration's proclaimed pre-emptive self defense doctrine rests not with the hegemon but with the entire international community for building only weak central institutions and therefore reserving to each state a "*droit naturel*" to use unilateral force in self-defense. Reisman, *supra* note 90, at 90. For those who see the Council as doing the bidding of the hegemon, Reisman's argument seems Orwellian. Taken literally, it would appear to absolve the hegemon of any moral or political blame for global or unilateral HIL, while shifting the burden onto the "college of international lawyers" to solve the resulting problems through "legal creativity and factual realism." *See id.* It would appear to be more in line with factual realism to recognize that in these cases the hegemon is taking advantage of the acknowledged weaknesses in international law and that the solution to global HIL lies partly, if not wholly, in its hands.

resistance.[101] But remedies for global HIL are harder to find. As is suggested by the backlash generated by actions taken by other possible agents of global HIL (such as the IMF), global HIL, even when it generates resistance, may undermine the legitimacy of the collective institutions deemed responsible, thereby making it harder to manage multilateral solutions.[102]

4.3 Standard-Setting in Other IOs: A Selective Survey

As with respect to the work of UN political organs, IO law-making in UN specialized agencies, the international financial institutions, and other "technocratic" IOs are characterized by ambiguities of intent and effect. The normative impact of much of what they do is not traceable to a discrete moment when states cede, for reasons clearly stated in the *travaux preparatoires* of a specific treaty or charter, specific powers to identified institutional agents licensed to act on behalf of the collective. As with respect to many aspects of UN law-making, they, too, appear to be engaging in legislative or regulatory activity in ways and for reasons that might be more readily explained by students of bureaucracy than by scholars of the traditional forms for making customary law or engaging in treaty-making. They also often engage in law-making by subterfuge. As with the UN's political organs, their impact on law is multifaceted and "de-formalized."[103]

The toolbox for standard-setting in these IOs contains even more compartments than the one used by UN political organs. It includes the traditional sources of international law, an ever-expanding set of "soft law" instruments, but also materials that on their face do not purport to set normative standards at all, including policy programs for action, modes of assessment or enforcement devices such as reporting and monitoring, and even conditions attached to loans. Although some of these

[101] For a cogent short history, see Jack Snyder, "Imperial Temptations," 71 *The National Interest* 29 (2003).

[102] *See generally* Balakrishnan Rajagopal, "International Law and Social Movements: Challenges of Theorizing Resistance," 41 *Colum. J. Transnat'l L.* 397 (2003).

[103] *See, e.g.*, Dinah Shelton, "Introduction," in Dinah Shelton, ed., *Commitment and Compliance*, 1, at 12 (Oxford, U.K.: Oxford University Press, 2000). For accounts of the regulatory efforts of UN specialized agencies, see, e.g., David M. Leive, *International Regulatory Regimes: Case Studies in Health, Meteorology, and Food* (Lexington, MA: Lexington Books, 1976); Evan Luard, *International Agencies: The Emerging Framework of Interdependence* (Dobbs Ferry, NY: Oceana Publications, 1977); and Robert E. Riggs, "The UN and the Development of International Law," 2 *BYU L. Rev.* 411 (1985). For more recent accounts, see, e.g., R.I.R. Abeyratne, *Legal and Regulatory Issues in International Aviation* (Irvington-on-Hudson, NY: Transnational Publishers, 1996)(describing the ICAO's efforts); Lawrence Roberts, "A Lost Connection: Geostationary Satellite Networks and the International Telecommunications Union," 15 *Berkeley Tech. L. J.* 1095 (2000); Paul Szasz and Reinhardt H. Rainer, *The Law and Practice of the IAEA: 1970–1980* (Vienna: IAEA, 1993); and chapters on "Education," "Science," "Culture and Information," "Outer Space," "Shipping," "Posts and Telecommunications," "Aviation," "Health," "Labor," and "Food and Agriculture" in Oscar Schachter and Christopher Joyner, eds., *United Nations Legal Order* (Washington DC: ASIL and Cambridge, U.K.: Grotius, Cambridge University Press, 1995).

IOs engage in standard-setting through methods that leave the subjects of regulation—which include states, other IOs, sub-government units, and even in some cases individuals and private companies—with as little effective choice as some Security Council enforcement actions, much is accomplished through softer modes of regulation and methods of compliance. These "managerial" modes of standard-setting and enforcement are often justified by the need to adjust to local circumstances, the technical complexities or fine-grained behavior sought to be affected, "sovereign" sensitivities that preclude harder forms of obligation, the need for flexibility given changing technology or other conditions, or the need for a rapid response.[104]

Quite apart from these functionalist rationales, the diversity of standard-setting tools and the soft way they are frequently deployed may be a natural result of institutionalization itself. Permanent institutions have the luxury of time—whether to induce states to accept a new constraint or to assess their performance with existing rules of conduct. Hard law and hard enforcement, such as binding forms of dispute settlement or the threat of economic sanction, may be less necessary when states can be socialized over time into accepting rules of conduct.[105] But while the approaches to rule-making in these diverse IOs do not always correspond to those evident in UN political organs, the substantive results are the same in one important sense: the cumulative effect of their actions across time is an ever more shrinking *domaine réservé* for states.

Other IOs aspiring to global reach have, like the UN, extensive literatures devoted to their work and comprehensive description is neither possible nor necessary in this brief section. In its stead, selective examples will be used to suggest some of the characteristics of IO regulatory activity, outside the UN proper.

Although UN specialized agencies and most of the other IOs canvassed here serve as the venue for treaty-making, as does the UN GA—the subject of the next chapters in this volume—most of them engage, to different degrees, in continuous forms of regulation through the production of formally binding regulations or standards and ostensibly hortatory advisory guides, codes, and recommendations. This much is suggested by their charters, which, as discussed, delineate enumerated powers to their plenary and other organs, including their secretariats. But institutional charters do not reveal how organs in ICAO, IMO, WMO, FAO, and the WHO, for example, have responded to changes in the world just as the Security Council has responded to perceived changes in security threats. While their attempts at global standard-setting usually do not receive the high-profile attention that the Security Council does, and usually involve less controversial areas of the law than the rules governing the administration of territories or the use of force or self-defense, their efforts resemble in some respects the techniques that UN political organs have used. They also have needed to respond to the

[104] Shelton, *supra* note 103, at 12.

[105] *Id. See also* Derek Jinks and Ryan Goodman, "How to Influence States: Socialization and International Human Rights Law," *Duke L.J.* (forthcoming 2005).

deficiencies of old-fashioned stand-alone treaty regimes that can only be amended through arduous re-negotiations or to the inefficiencies and uncertainties attendant on 19th-century methods for making customary law.

In some instances, standing bodies in these organizations are used to permit the timely responsiveness that is otherwise difficult to achieve in stand-alone treaty regimes that lack their own institutionalized follow-up mechanisms. Organs of the IMO and the WHO, for example, have sometimes been given delegated authority to enact regulations pursuant to authority granted in other treaties whose parties have identified a need for periodic modification.[106] Such instances of authorized law-making are not evident from the text of the IMO's or the WHO's charter. The 1965 Convention on Facilitation of International Maritime Traffic, for example, relies on an annex to identify uniform "standards" and "recommended practices" for states to apply in the documentary requirements that they impose on ships calling at their ports as well as with respect to health, customs, and immigration procedures. Amendments to its Annex are considered by the IMO Facilitation Committee (open to all IMO members), which can approve changes by a two-thirds vote, and these enter into force fifteen months later unless, within one year, one-third of the IMO membership object. These changes take effect on all members except those that notify the IMO. Such implied consent/opt-out procedures, which constitute a departure from the one state/one vote model for traditional treaty-making, are replicated in other IMO Conventions and appear in varied forms elsewhere, as with respect to COPs/MOPs in multilateral environmental agreements.[107]

A variation of this approach is suggested by the Convention on Psychotropic Substances (1971). The Convention relies on both the UN Commission on Narcotic Drugs and the WHO. The UN Commission is charged with adding or deleting substances to the Convention's various schedules identifying drugs that ought to be subject to various degrees of state control. In doing so, the Commission must rely on the WHO's assessments as to whether a psychotropic substance has the capacity to produce dependence and is likely to be abused. The WHO is therefore charged with making determinative factual findings that include, for example, scientific assessments of likely effects. Should it decide that

[106] But the WHO has rarely used its "legislative" powers to promulgate health regulations. *See, e.g.*, Michelle Forrest, "Using the Power of the World Health Organization: The International Health Regulations and the Future of International Health Law," 33 *Colum. J. L. & Soc. Probs.* 153 (2000); Yves Beigbeder, *The World Health Organization* (The Hague: Martinus Nijhoff, 1998). *But see* David P. Fidler, "Global Challenges to Public Health: SARS: The Political Pathology of the First Post-Westphalian Pathogen," 31 *J. Med. & Ethics* 485 (2003)(discussing the possible implications on sovereignty of the WHO's issuance of SARs warnings).

[107] *See* Frederic L. Kirgis, Jr., "Specialized Law-Making Processes," in Christopher C. Joyner, ed., *The United Nations and International Law* at 70–3 (Washington DC: ASIL, and Cambridge, U.K.: Cambridge University Press, 1997); Robin R. Churchill and Geir Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law," 94 *AJIL* 623 (2000).

a substance ought not be restricted for public health purposes, its inclusion in the Convention's schedule would be "incompatible" with its ability to make determinative findings for this purpose.[108] The Single Convention on Narcotic Drugs (1961) instructs the UN Commission that it may not include or remove a narcotic substance under the Convention's control or change the level of control over it except "in accordance with the recommendation of the World Health Organization."[109]

Examples whereby more than one IO is involved in law-making are becoming ever more abundant. The Convention on the Law of the Sea (UNCLOS), for example, incorporates by reference "generally accepted" international "rules, standards, regulations, procedures and/or practices." This effectively transforms a number of the IMO's codes, guidelines, regulations, and recommendations (dealing with such matters as pollution control measures to be obeyed by vessels while traveling their international straits or exclusive economic zones, for removal of installations to ensure safety of navigation, or relating to sea lanes or traffic separation) into binding norms, even for states that may not have approved of these standards within the context of the IMO but have become parties to the Law of the Sea Convention. Even though the IMO formally has no power under its constitution to take formally binding decisions, UNCLOS, a treaty whose scope and history suggest its comprehensive impact on general customary law binding even on non-parties, has remedied that handicap at least with respect to some of the IMO's work products.[110] Similarly, as is further discussed below, the World Bank makes use of a wide number of non-binding instruments produced by other IOs, such as the FAO's Code of Conduct on the Distribution and Use of Pesticides, in effect turning such instruments into binding rules for its staff, and when incorporated into its loan agreements with states, perhaps even into binding forms of international or national law.[111]

Another example is contained in the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), part of the treaty obligations of numbers of the WTO. The SPS Agreement forbids government measures directed at protecting health that "arbitrarily or unjustifiably discriminate" between products from WTO members; WTO members can seek relief from such measures under the WTO's dispute settlement scheme.[112] But the SPS Agreement permits WTO members to base their SPS measures on international standards where these exist, thereby creating a presumption that such measures

[108] Kirgis, *supra* note 107, at 80 (citing the Commentary to the Convention).

[109] *Id.*, at 80–1.

[110] *See, e.g.*, A.E. Boyle, "Some Reflections on the Relationship of Treaties and Soft Law," 48 *Int'l & Comp. L. Q.* 901, at 906 (1999).

[111] *See* David A. Wirth, "Commentary: Compliance with Non-Binding Norms of Trade and Finance," in Shelton, *supra* note 103, 330, at 335 (citing the Bank's Operational Policy on Pest Management, which cites the FAO Code).

[112] Agreement on the Application of Sanitary and Phytosanitary Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex, article 2(3) (hereinafter "SPS Agreement").

are not discriminatory and actionable.[113] In this fashion, the SPS Agreement gives privileged status, for purposes of the WTO regime, to government standards based on, for example, the FAO–WHO's Codex Alimentarius (discussed below). Another WTO agreement, the Agreement on Technical Barriers to Trade (TBT Agreement), takes this phenomenon in a new direction by granting similar status to international standards produced by the International Organization for Standardization (ISO).[114] The TBT Agreement presumes that governmental standards that adhere to those produced by the ISO are presumptively legitimate and not contrary to WTO law.[115] As David Wirth has noted, what is unusual (and arguably illegitimate) about this last example is that the ISO is a body that consists of both governmental and industry representatives; it is not an intergovernmental organization.[116] (U.S. representatives to the ISO, for example, are primarily representatives from private industry.) In the TBT example, the "soft law" that the WTO is "hardening" into an outer limit for permissible public regulation to protect health and the environment is arguably a form of self-regulation produced by industry to protect its own interests, and not government standards produced by a public agency accountable to consumers or the greater public.

These examples show one reason why provisions in the UN specialized agencies' charters for enumerated powers cannot be taken as the last word: in some cases an IO's recommendations, otherwise non-binding under these organizations' charters, acquire legally binding authority through express provision in another treaty.

In other cases, as where recommendations issued by the IMO or ICAO have been incorporated into states' national laws, standards or recommendations issued by the UN specialized agencies have acquired legal force for the same reasons some General Assembly resolutions have had this effect: because they have been widely relied upon in practice by states, whether or not positivist lawyers would characterize the result as customary law.[117] As with respect to certain UN GA resolutions, which are sometimes seen as "catalysts" for new interpretations of treaty obligations or new rules of custom or general principles, recommendations

[113] SPS Agreement, *supra* note 112, article 3(2).

[114] Wirth, *supra* note 111, at 339. *See also* Naomi Roht-Arriaza, " 'Soft Law' in a 'Hybrid' Organization: The International Organization for Standardization," in Shelton, *supra* note 103, at 263 (describing the ISO standards, produced by a federation of some 120 national standard bodies from around the world consisting of both members of private industry and government representatives, as intended to facilitate global trade).

[115] *See* Agreement on Technical Barriers to Trade (hereinafter "TBT Agreement"), Uruguay Round of Negotiations and Agreements, at paras. 2.4, 2.9, and definition of "standard" in Annex 1; Wirth, *supra* note 111, at 339.

[116] Wirth, *supra* note 111, at 338–41; *see also* David Wirth, "International Trade Agreements: Vehicles for Regulatory Reform?," *U. Chi. Legal F.* 331 (1997).

[117] Kirgis identifies the IMO's International Maritime Dangerous Goods Code (IMDG), intended to harmonize the practices of states for carrying dangerous goods by sea, as an example. Although the Code complements the International Convention for the Safety of Life at Sea (SOLAS), that treaty does not makes it legally binding. Nonetheless, Kirgis reports that it has been widely incorporated into the domestic legislation of IMO member states. Kirgis, *supra* note 107, at 84.

issued by these UN Agencies are part of institutionalized law-making processes that have emerged since World War II.[118]

As examples like the Convention on Psychotropic Substances' resort to the WHO's "determinative factual findings" illustrate, the ambiguity about the legal status of much of the work of the UN specialized agencies often stems from another reason: a conscious effort to side-step the question of binding effect in favor of standard-setting that intentionally lies along a spectrum of authority, from binding to non-binding. One of the abiding characteristics of IO "technocratic" regulation is the tendency to blur positivist distinctions between non-binding/binding action.[119] The select examples of IO regulatory activity that follow all share this normative ambiguity.

4.3.1 The Codex Alimentarius

The FAO's and the WHO's joint Codex Alimentarius, established in 1962 and intended to protect health and to facilitate the international food trade, is a collection of about 200 standards adopted by the Codex Alimentarius Commission, composed of more than 172 states that are members or associate members of both sponsoring organizations.[120] The standards in the Codex deal with maximum limits on pesticide, food hygiene, food additives, and even labeling. The Codex's legal status is a matter of some doubt. Although states are said to be obligated to adhere to its standards, and to require food producers within their jurisdiction to adhere as well, governments are under no obligation to accept the Codex and are free to withdraw their acceptance at any time merely by informing the Commission's secretariat, although they are urged to give reasons if possible and to provide advance notice.[121] While scholars have treated the Codex as obligatory, given the ease with which government acceptances may be withdrawn or amended, the existence of such an "obligation" might be doubted.[122] Yet except in contexts like that described above with respect to the WTO's TBT Agreement where another treaty makes the question relevant, it does not appear to be terribly important to determine whether governments have formally "accepted" Codex standards as they would a treaty obligation. Even though many states have not filed their acceptances and the Codex is formally only a "recommendation" in such cases, there is abundant

[118] *See, e.g.*, Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* at 290 (London: Sweet & Maxwell, 5th edn., 2001) (describing GA resolutions as "catalysts" for the emergence of custom). *See also* Christopher Joyner, "UN Resolutions and International Law," 11 *Cal. Western Int'l L. J.* 464 (1981).

[119] Leive, *supra* note 103, at 561 ("There is no clear and sharp line that divides the two categories, aside from the obvious and important difference in binding force, which as a practical matter is often more apparent than real").

[120] For a description of the Codex in the broader context of the food and agriculture regime dominated by the FAO, see Jean Pierre Dobbert, "Food and Agriculture," in Schachter and Joyner, *supra* note 103, at 907.

[121] Kirgis, *supra* note 107, at 86. [122] *Id.*

evidence that its terms are widely accepted by those engaged in the food trade as well as governments, and that the pressures of the market (as well as those imposed by the WTO as described above) render its standards binding in practice, irrespective of whether governments have formally consented to them.[123]

4.3.2 ICAO's Standards and Recommended Practices (SARPs)

Another example of IO regulation existing in a netherworld between binding and non-binding are the Standards and Recommended Practices (SARPs) issued by ICAO. With the exception of those rules of the air over the high seas issued by that organization (which are stated to be legally binding under ICAO's charter, the 1944 Chicago Convention),[124] ICAO members merely undertake to "collaborate in securing the highest practicable degree of uniformity" with respect to such standards and only undertake to notify the organization should they find it "impracticable" to comply in all respects with such standards and procedures.[125] This purposeful ambiguity has led to debates among ICAO scholars as to the binding nature of SARPs.[126] The ICAO Assembly, which is not given any express power to interpret the Chicago Convention, has weighed in on the side of a firm division between obligatory "Standards," which necessarily require "uniform application" and to which members "will conform" unless they notify the Council otherwise, as opposed to "Recommendations," with which members are only expected to "endeavour to conform."[127] Despite such claims, the practice of the organization suggests that the question is open to interpretation, especially since members have not treated notification to the Council of their non-acceptance of Standards as compulsory as the Assembly suggests. Accordingly, while the Chicago Convention directs the organization to assume compliance with SARPS unless an ICAO member affirmatively notifies the organization of its decision not to comply, the ICAO Secretariat now "no longer presumes compliance from lack of notification."[128]

As Thomas Buergenthal has suggested in his classic study of ICAO, however, positivistic debates over the binding nature of SARPs misses the point. Although

[123] *See generally* Leive, *supra* note 103, at 574 (discussing how states may be forced to comply with the Codex regime if they wish to engage in international trade in the food product covered by the standard); Steve Charnovitz, "The Supervision of Health and Biosafety Regulation by World Trade Rules," 13 *Tulane Envt'l L. J.* 271, at 286–7 (2000) (discussing the SPS Agreement's incorporation of the Codex standards).

[124] Article 12, Convention on International Civil Aviation, (adopted December 7, 1944), 15 UNTS 295 (see 2000 revision at www.icao.int/icaonet/dcs/1300.html).

[125] Articles 37 and 38, Convention on International Civil Aviation, *supra* note 124.

[126] *See, e.g.*, Thomas Buergenthal, *Law-Making in the International Civil Aviation Organization*, at 98–101 (Syracuse, NY: Syracuse University Press,1969); Kirgis, *supra* note 31, at 307–8.

[127] Kirgis, *supra* note 31, at 304 (citing ICAO Assembly resolutions from 1989).

[128] *Id.*, at 306.

the Chicago Convention appears to weaken the binding force of SARPs, as compared to the more clearly binding regulations that had been promoted under the preceding 1919 Paris Convention, the sole test for judging the efficacy of international regulatory schemes should not be "the compulsory or non-compulsory character of their enactments."[129] Buergenthal argues that the more flexible, modern SARPs have encouraged states to participate in ICAO and have proven to be a more effective approach to the regulation of aviation.[130]

Whether Buergenthal is right or wrong with respect to the wisdom of ICAO's managerial approach, examples comparable to ICAO's SARPs abound in the work of the specialized agencies. The WMO's Technical Regulations, to cite another example, are "binding," but only in the sense that members "do their utmost" to comply with them.[131] The Health Regulations of the WHO, by contrast, although formally binding in the traditional sense, have traditionally employed a "silence is consent" approach (requiring members to opt out within a specified period if they wish to reject) that results in nearly universal "acceptance" without necessarily eliciting any greater degree of compliance than do the WMO Regulations.[132]

4.3.3 IO "Advisory" Material

Leive's path-breaking survey of IO regulatory regimes in health, meteorology, and food is replete with examples of the wide array of regulatory instruments issued by the WMO, WHO, and FAO, from formally adopted "regulations" to codes and guidelines, which adopt a highly flexible and elastic conception of obligation and yet often result in rules of conduct that elicit rates of compliance by states comparable to those achieved via "hard" sources such as treaty. The difficulty of drawing firm lines between binding and non-binding regulatory standards in these contexts is not merely a matter of the blurred lines that often occur in international law given its difficulties of enforcement. They result from standards that include, as do some GA resolutions already discussed, distinct rules with differing intent grouped under the same label.

The WMO's Technical Regulations, for example, though all equally "binding," contain detailed mandatory rules of conduct (such as aeronautical meteorology) as well as long-term goals intended for flexible adoption in developing countries depending on available resources.[133] In yet other cases, as in conjunction with regularly updated interpretations of the WHO's Health Regulations, which are annotated to these "binding" regulations but have no authorized status, the ambiguous nature of such interpretations may be due, in part, to their origins. The Health Regulations interpretations emerge from the WHO's Director-General, who issues

[129] Buergenthal, *supra* note 126, at 119. [130] *Id.*, at 120.
[131] Leive, *supra* note 103, at 562.
[132] For a description of the WHO's approach to adopting and interpreting its health regulations, see *id.*, at 43–88. [133] *Id.*, at 561.

them after approval by the WHO Committee on the International Surveillance of Communicable Diseases, an expert group.[134] They accompany the Regulations that the Health Assembly approves and are placed as footnotes in the official publication of the Regulations. These interpretations, which result from informal allegations by one member state that another is not in compliance with the Health Regulations, are the equivalent, in an organization like the WHO that has not resorted to more regularized or formal means of dispute settlement and has deployed its authority to promulgate regulation sparingly, to decisions that in other organizations, such as the WTO, would be issued by authorized dispute settlers. (They are accordingly also briefly discussed in this book's chapter on non-adjudicative forms of dispute settlement.) At this point it is sufficient to recognize that such opinions, a type of "soft" law since they enjoy no *stare decisis* effect and are not meant to add to the existing obligations of members generally, are also part of some IOs' legislative processes even though they do not enjoy a clear legal status.

Other IO secretariats sometimes issue legally relevant interpretations as well. Among the many "legislative" techniques employed by the ILO, apart from its involvement in promulgating labor conventions (discussed in later chapters) and issuing recommendations (discussed below), are the continuous stream of opinions issued by the International Labor Office. That Office has given, when requested by states, hundreds of advisory opinions relating to both general legal matters, such as whether reservations are permitted to labor treaties adopted within the ILO, to interpretations of specific ILO conventions. Such interpretations, along with other practices by the IO secretariat dealing with "internal" matters such as attempts by states to withdraw from the organization or to denounce ILO conventions, have established a considerable body of ILO institutional law that is difficult to disentangle from the substantive international labor law produced by ILO conventions. As would be expected given the prior discussion of the "external" effects of UN's "internal" law, the practice of that organization and the opinions of the Labor Office with respect to questions of succession or the effects of war on ILO conventions, for example, have emerged as legal precedents that have given clearer meanings to general public international law rules. The Labor Office's interpretations have tended to support claims that human rights treaties, for example, like treaties that accord labor rights, are presumed to continue in effect and should be regarded as merely suspended during wartime.[135]

The opinions of the International Labor Office provide an interesting example of institutional standard-setting, despite persistent disclaimers of any such effects. That Office has always noted that since the ILO Constitution provides for various methods to resolve interpretative disputes, including resort to a special tribunal and to the ICJ, the opinions that it issues enjoy no official status and are not

[134] *See, e.g.*, Kirgis, *supra* note 31, at 431; Leive, *supra* note 103, at 569.

[135] *See, e.g.*, J. F. McMahon, "The Legislative Techniques of the International Labour Organization", 1965–6 *Br. Yrbk Int'l L.* 1, at 73–7.

intended to be authoritative.[136] In addition, unlike the WHO Secretariat, that Office has refused to give an opinion when a matter is actively contested by members and it is being asked essentially to be a dispute settler. It has also refused to pass judgment on the conformity of a member's internal legislation with the provisions of an ILO Convention.[137] Nonetheless, as that Office has also acknowledged, once it issues its opinion, those affected accept it, and it meets with no objection from the membership upon publication in the Official Bulletin of the organization, such opinions "constitute important authority which can always be invoked for that interpretation."[138] Important principles of international labor law—such as the proposition that reservations are not legally possible for ILO Conventions since these would be inconsistent with these conventions' object and purpose—have been established in this fashion. Acquiescence in International Labor Office opinions is a significant mechanism for promulgating international labor legislation, distinct from the promulgation of labor conventions.[139]

The ILO secretariat, without explicit constitutional warrant, is the principal organ for rendering these effectively conclusive but formally "advisory" interpretations. Such interpretations result from a process that is comparable to the way UN rules on financing and budgeting have emerged—through interactions among political organs, the ICJ, and the membership. (While, as is discussed in later chapters, the ILO has resorted to its own informal dispute settlers far more often than to the ICJ, the opinions of those dispute settlers have played a comparable intermediating role in that organization.) The authoritativeness of the Labor Office's opinions has been attributed to various institutional factors, particularly that Office's privileged access to the preparatory materials for particular conventions (on which its opinions extensively rely despite the disparagement of *travaux* by the Vienna Convention on the Law of Treaties) as well as to the subsequent practice of members in handling these conventions. But one observer has attributed that Office's interpretative and promotional successes in part to the soft nature of its opinions. J. F. McMahon writes:

> Paradoxically, it is precisely because the Labour Office has claimed so little that it has achieved so much. By making such modest claims for its opinions, the Labour Office deflects any possible challenges of its constitutional power to give them at all. As a consequence its unquestioned practice over a long period has given its opinions such great authority that now there is little likelihood that they will ever be disregarded. The Labour Office has assisted this process by restricting its opinions to a concise and practical

[136] *See, e.g.*, *id.*, at 87. [137] *Id.*, at 90 and 98.

[138] Kirgis, *supra* note 31, at 430 (quoting a 1921 memorandum from the International Labor Office).

[139] *See* Kirgis, *supra* note 31, at 278–81 (citing a 1951 Labor Office memorandum on the permissibility of reservations). McMahon, writing in 1965 with nearly 100 such opinions issued, notes that such opinions have never been controverted and have determined the meanings of particular phrases if these are used again in a subsequent ILO convention. McMahon, *supra* note 135, at 90. Other IOs, such as the WHO, have also developed techniques that modify the flexible approach to treaty reservations contained in the Vienna Convention on the Law of Treaties. *See, e.g.*, Leive, *supra* note 103, at 559 (describing the Health Assembly's elaborate procedures for reviewing the acceptability of proposed reservations).

memorandum, by developing a body and repertory of jurisprudence, by taking care never to give an opinion which would be inconsistent with a previous opinion, by quoting from its previous opinions and by acting on the presumption that an opinion determines the meaning of a provision if the same provision is contained in a subsequent convention. The value of its opinions lies, first, in ensuring uniformity of interpretation and application in the various countries; and, secondly, in the fact that by satisfying States concerning the interpretation of an ambiguous provision, an opinion frequently removes obstacles inhibiting ratification. In this manner the system plays an important part in facilitating the ratification of labour conventions.[140]

Labor Office opinions are not the only other type of "advisory" material issued by these organizations that may be deceptively labeled. In other cases—as with respect to the WHO's recommended International Drinking-Water Standards, "non-binding methods of analysis" provided to supplement the Codex Alimentarius, ILO guidelines for inspections of labor conditions on board ships, or an abundant set of detailed recommendations issued by the IAEA to protect the accounting, control, and transport of nuclear materials—these materials prove more suitable for adoption as ready-made legislation within states, and accordingly have more binding effects, than the ostensibly binding, but sometimes fatally vague, rules contained in the regulatory instruments that they often accompany.[141] In these cases, "soft" IO products may be effective at the national level because they are not "soft" in terms of being imprecise but because they are so precisely detailed that they can be readily used for example, by the harried government inspector at dockside who needs to comply with the settled expectations of the maritime industry. As this suggests, IO hortatory standards, such as "recommendations" issued by the plenary bodies of the specialized agencies, serve differing purposes depending on context. Not all IO forms of hortatory action can be dismissed as the outcome of political venting unconnected to law.

4.3.4 ILO Recommendations

ILO recommendations are adopted by its General Conference in the course of adopting labor conventions that only bind members that ultimately ratify them. The uses and effects of such recommendations need to be examined alongside the labor conventions that they are meant to elucidate or interpret. Under the ILO Constitution, such recommendations are, upon adoption by the General Conference, to be communicated to all members for their consideration with a view to giving them effect and to be presented not later than eighteen months after the closing of the Conference before the domestic authorities that might be

[140] McMahon, *supra* note 135, at 100.

[141] Leive, *supra* note 103, at 562 (noting how the International Drinking Water Standard defines the chemical and bacteriological standards while the actual binding Health Regulations merely require that members provide adequate drinking water at international airports).

expected to enact appropriate legislation or otherwise take action.[142] Members are also expected to inform the Director-General of the ILO of measures taken to bring recommendations before the competent national body, and members remain subject to further reporting obligations whenever requested by the Labor Office.[143] Since they are produced with the same care and as a result of the same lengthy procedures as ILO Conventions, and, except for the fact that members are not expected to ratify them as they would treaties, ILO members are required to undertake comparable procedures with respect to them, ILO recommendations have been generally treated by ILO members and the ILO Labor Office as part of the ILO legislative process.[144] Indeed, those who have attempted to measure the level of compliance with ILO recommendations conclude that, while these recommendations' effectiveness varies with the subject matter, it cannot be said that compliance with them is necessarily less than compliance with ILO conventions, even though only the latter are formally binding.[145]

Some ILO recommendations serve comparable roles to those performed by COPs/MOPs in environmental framework agreements: they keep a treaty regime reasonably current by elaborating its requirements with greater detail or updating these as necessary—in response to changing technology, for example.[146] They may also, as do "flexibility" clauses routinely adopted in ILO conventions, permit the differentiation of obligations among the ILO's diverse membership, which includes both wealthy states and those that have sometimes been accused of engaging in a "race to the bottom" in order to entice multilateral enterprises to their shores. It may prove difficult for a party to the relevant convention to deny the authoritative impact of such ILO recommendations, particularly if it is clear that ILO members believed that they constitute a good faith interpretation of the convention's requirements.[147]

[142] ILO Constitution, article 19(6)(a)–(b) (as amended; entered into force April 20, 1948) 15 UNTS 35. [143] ILO Constitution, article 19(c)–(d).

[144] *See generally* Francis Maupain, "International Labor Organization Recommendations and Similar Instruments," in Shelton, *supra* note 103, at 372 (examining the level of state compliance with ILO recommendations in the areas of child labor, termination of employment, maternity protection, protection of workers' health, and employment).

[145] *Id.* (explaining that states comply with ILO recommendations because they provide a convenient accessible standard, out of a sense of moral duty, and as a result of internal and external influences or pressures, including those that result from the tripartite membership of the organization).

[146] This appears to be a fundamental purpose of, for example, recommendations issued in connection with the Convention Concerning Safety and Health in Construction, ILO Convention No. 167, adopted June 20, 1988, such as the Recommendation Concerning Safety and Health in Construction, ILO Recommendation No. 175, adopted June 20, 1988 (providing detailed guidance on measures governments need to take concerning, for example, the safety of workplaces, the use of scaffolds, or the marking of hazardous substances).

[147] But note that even in these cases, an ILO Assembly recommendation as to the meaning of a particular ILO Convention is not identical to the "subsequent practice" of treaty parties envisioned in article 31 of the Vienna Convention on the Law of Treaties. The parties to ILO Conventions vary in number; few ILO Conventions draw unanimous ratifications. Parties to labor conventions do not overlap with the plenary membership of the ILO Assembly. Further, in the case of the ILO the matter is further complicated by the tripartite composition of the Assembly, composed of representatives of

Although the purposes of ILO recommendations vary with the ILO convention that they accompany, some serve comparable declarative, interpretative, promotional, or enforcement functions as do some Security Council resolutions (see Section 4.1 above). Where the ILO has passed a promotional convention, such as its 1951 Convention Concerning the Equal Remuneration for Men and Women Workers for Work of Equal Value, requiring parties to "promote" and apply the "principle of equal remuneration for men and women workers for work of equal value,"[148] an ILO recommendation issued in conjunction with such a vague treaty appears intended to provide states that ratify the treaty with concrete guidance on how to implement the open-textured provisions of a convention. The ILO's 1951 Recommendation issued in conjunction with the Equal Remuneration Convention, accordingly, anticipates that states will implement, "as rapidly as practicable," the principle of equal remuneration in connection with those who work for the government at all levels. It also provides more guidance on what "equal remuneration" means, since it identifies the need for minimum wage rates where these are set by public authority, as in the case of public employees, publicly owned utilities, and government contracting.[149] To that extent, this ILO recommendation serves an interpretative function: to indicate to members of the underlying Convention their minimum obligations if they are seeking to comply in good faith with treaty obligations that are otherwise extremely vague. As this suggests, ILO recommendations also complement or substitute for other methods of interpretation evident in that organization, including the opinions issued in the course of ILO dispute settlement or the interpretations issued by the International Labor Office previously discussed.[150]

ILO recommendations can also be a significant element in the ILO's primary mechanisms for enforcement since they may warn members of what the ILO bodies charged with supervising implementation of the Convention, including the ILO secretariat authorized to receive state reports as well as dispute settlement bodies charged with handling complaints by other states, ILO non-governmental delegates, or others, will regard as their minimum obligations. They also serve more general promotional purposes, such as to indicate desirable practices even for those members that have not adhered to the underlying convention but might be induced to do so. And for those members that have no intention of ratifying an

labor and industry, as well as government representatives. ILO Conventions produced by that Assembly are, however, ratified by states and arguably the Vienna rules anticipate that it is those state parties alone that can help determine, through their subsequent practice, the meaning of their treaty. To the extent the practice of the ILO differs, this would appear to be a departure from the traditional rules of treaty interpretation.

[148] ILO Convention No. 100, adopted June 29, 1951, article 1, 165 UNTS 303.

[149] Recommendation Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, ILO Recommendation No. 90, adopted June 29, 1951.

[150] *See, e.g.*, Kirgis, *supra* note 31, at 426–31 (describing the practice of the Labor Office in issuing interpretations). But Kirgis notes that the Labor Office typically refrains from offering an interpretation if the meaning of a provision (as within an ILO convention) is "actively disputed between two member states." *Id.*

ILO convention, they serve as a self-standing recommendation of desirable policy to adopt through national law. In some cases, as where there is growing support within the organization for declaring the fundamental nature of some "core" labor rights, ILO recommendations may serve to affirm general principles of law that all ILO members are obligated to follow merely because they are ILO members.[151] Finally, the declaratory purposes of some ILO recommendations, such as those that identify members for opprobrium in connection with the ILO's elaborate mechanisms for "mobilizing shame," are quite similar to GA and Council resolutions noted above that condemn members for human rights violations or other breaches of the UN Charter.[152]

As is suggested by occasional actions taken by the ILO's Governing Body, there are gradations of "softness," even within soft law. That body has deployed its promotional function to identify eight ILO conventions as being "fundamental to the rights of human beings at work, irrespective of levels of development of individual member States" and has devoted considerable efforts to encourage widespread ratification and attention to these "core" ILO rights.[153] This attempt to elevate some ILO conventions to the ILO equivalent of *jus cogens* status responds to the proliferation of ILO Conventions and a felt need to direct members' implementation priorities. Such Governing Body's declarations are another kind of informal labor standards that do not carry the same authority as ILO conventions and recommendations. Another example of such a declaration, the Governing Body's 1977 Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy, purports to be the only universal text relating to the labor and social responsibilities of multinational enterprises.[154] This declaration provides guiding principles for both private companies and governments concerning employment policies, conditions of work, safety and health, industrial relations, and collective bargaining. Its adoption in this form—rather than as an ILO recommendation attached to an ILO convention—suggests the intent to render this a truly "soft" form of soft law. This presumably reflects the sensitivity of the norms in the declaration as well as the emphasis on affecting the conduct of private entities within states. As with respect to other ILO products, such as ILO recommendations, that Declaration nonetheless has been part of an important inter-organizational dialogue concerning the legal responsibilities of multinational corporations. That Declaration is the ILO's response to the OECD's Guidelines for Multinational Enterprises (originally done in 1976, amended in 2002) as well as to unsuccessful efforts to produce a Code of

[151] *See generally* McMahon, *supra* note 135, at 21–5. In addition, the ILO's General Conference produces resolutions that may play a part in the "gestation" of what subsequently become conventions or recommendations. *See id.*, at 25–31.

[152] For discussion of these techniques, see, e.g., Kirgis, *supra* note 31, at 388–425; 533–49.

[153] *See* Fundamental ILO Conventions, at www.ilo.org/public/english/standards/norm/whatare/fundam/index.htm.

[154] Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, Declaration adopted by the Governing Body at its 204th session (Geneva, November 1977), at www.ilo.org/public/english.standards/norm/sources/mne.htm.

Conduct on Transnational Corporations within the UN General Assembly's broader attempts to establish a New International Economic Order.[155]

4.3.5 IAEA Standards

In the case of the IAEA, its abundant recommendations, along with "advisory" material, are also connected to separate agreements and serve many of the same purposes as ILO recommendations. IAEA members with nuclear energy capabilities must negotiate comprehensive as well as specific bilateral agreements with the IAEA. Although such agreements now include virtually all UN members, given the differences between members, the high sensitivity of the matter to be regulated, and the fact that in many states nuclear energy involves the action of non-governmental bodies, a great deal of the relevant obligations are a complex interweaving of treaty and IAEA "soft" law. IAEA recommendations, like some ILO recommendations, perform a gap-filling role by providing the elaborate, context-specific, and changing implementation details that are impossible or impractical to achieve via treaty. Arms control experts attribute the relative success of IAEA recommendations—which are widely adopted within governments and industry—to the fact that they are not perceived to "intrude on sovereignty" while enabling a complex regulatory system to operate smoothly by avoiding the "cumbersome treaty-making or amending process."[156]

As with respect to some of the other IO products discussed, such as the Codex Alimentarius, competitive pressures within the market serve to "harden" IAEA soft law. For example, those seeking to transport radioactive materials internationally have little alternative but to comply with IAEA recommendations to protect nuclear materials. Certain actions by the UN Security Council, such as its reliance on IAEA procedures and personnel to assist in arms inspections in Iraq authorized under Resolution 687, have affirmed and strengthened the IAEA's authority and legitimacy as an organization and provided additional clout for its recommendations and advisory procedures. In addition, Council Resolution 1540, which establishes a legal regime to control, among other weapons, nuclear weapons, draws heavily, as noted, on such IAEA soft law and can be expected to serve to harden much of it.

4.3.6 The FAO's and UNEP's Prior Informed Consent Regime

In other cases, as with respect to the FAO's and UNEP's joint effort to construct an international legal regime to provide global procedures for the handling of

[155] For discussion of the OECD's regulatory efforts, see Ronald Charles Wolf, *Trade, Aid, and Arbitrate*, at 65–78 (Burlington, VT: Ashgate, 2004). *See also* United Nations ECOSOC Draft Code of Conduct on Transnational Corporations, UN Commission on Transnational Corporations, Report of the Secretariat, UN Doc. E/c.10/1984/S/5 (May 29, 1984), reprinted in 23 *ILM* 626 (1984); an unofficial text of agreed provisions for this Code was published in 4 *ICSID Rev. For. Inv. L. J.* 135 (1989).

[156] Barry Kellman, "Protection of Nuclear Materials," in Shelton, *supra* note 103, 486, at 487.

hazardous chemicals and pesticides, IOs have used soft law to entice states to conform with a regime that ultimately became the subject of a global treaty. These IOs took initial action as a result of concerns, particularly from developing country representatives, that they needed ways to deal with the importation of harmful substances from developed exporting countries. The result, the 1985 FAO International Code of Conduct on the Distribution and Use of Pesticides and the 1987 UNEP London Guidelines for the Exchange of Information on Chemicals in International Trade, relied on similar concepts of "prior informed consent" (PIC). These codes made it illegal for states to export banned or severely restricted pesticides or chemicals without the explicit agreement of the importing countries.[157] These two soft law approaches relied on comparable approaches and procedures thanks to joint expert and governmental consultations and close coordination between the two organizations. In neither case was the participating organization relying on a constitutional procedure anticipating or authorizing such action. Although the 1998 Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade was the ultimate product of the FAO's and UNEP's efforts, the preceding soft law obligations were reportedly widely accepted and implemented for some of the economic reasons suggested in other contexts, namely that failure to comply would inhibit trade in the products at issue.[158] The soft codes were also instrumental in convincing states that a more formal regime was achievable and practical. At the same time, as is suggested by states' ultimate resort to a treaty, the non-binding nature of the FAO Code and the UNEP Guidelines, and the lack of hard sanctions or enforceable dispute settlement, was deemed insufficiently conducive to firm and regular commitments. As this suggests, despite the proliferation of institutional soft law, states sometimes need to resort to clearly binding forms of law.

4.3.7 WTO Soft Law

Ambiguity with respect to binding effect also can be found even within organizations most known for "hard" treaty obligations subject to relatively "hard" forms of adjudicative dispute settlement. For the most part, the WTO members have not taken advantage of their "legislative" authority to take "decisions," adopt "amendments" to their agreement, or issue "interpretations," all of which, under the practice of that organization, would be taken on the basis of consensus.[159] They have instead preferred to modify their mutual commitments through elaborate multi-year trade rounds that have culminated over the years in considerable adjustment of their mutual treaty commitments, and, at the end of the Uruguay Round in 1994, led to

[157] *See* Mohamed Ali Mekourar, "Pesticides and Chemicals: The Requirement of Prior Informed Consent," in Shelton, *supra* note 103, 146. [158] *Id.*, at 156 and 163.

[159] *See supra* Section 3.1. *See also* Steve Charnovitz, "The Legal Status of the Doha Declarations," 5 *J. Int'l Ec. L.* 207 (2002).

the formal establishment of the WTO as an organization.[160] Nonetheless, on occasion, as with respect to one of the Declarations issued in launching the current Doha Round of negotiations, the WTO parties have unmistakenly relied on their authority under Article IV:1 to issue a document subtitled "Decision" that explicitly begins its recital of new obligations with the phrase "The Ministerial Conference, having regard to (*inter alia*) article IV:1 . . . ."[161]

Yet, in connection with the launching of that same Doha Round, the negotiators from the 142 countries involved issued two other Declarations, one launching the Round and another on intellectual property rights and health, that are not formally cast as "Decisions" taken by the Ministerial Conference or that cite article IV:1 as their basis.[162] The latter Declaration especially appears highly significant since it has been regarded as a "pact" or "deal" in which the U.S. assured developing states that it would not use WTO rules on intellectual property to deny access to essential medical supplies, especially in connection with (but not limited to) pandemics like AIDS.[163] A knowledgeable observer of the WTO concludes that the legal status of these two Doha Declarations is ambiguous given their text and negotiating history since they could be viewed alternatively as (1) merely political commitments no different from G-7 declarations, (2) binding decisions whose provisions may or may not be subject to interpretation and enforcement under the WTO's dispute settlement scheme, or (3) a new kind of secondary law emerging from the "constitutive process of decision-making of the WTO as an organization."[164] Only subsequent developments within the WTO can clarify which of these alternatives will prevail.

[160] For more on the WTO dispute settlement's contributions to law, see *infra* Sections 8.1 and 8.2.

[161] *See* Charnovitz, *supra* note 159, at 208 (citing WT/MIN(O1)/DEC/17, which addressed a number of implementation-related issues and concerns).

[162] *See* WT/MIN(O1)/DEC/2, WT/MIN(O1)/DEC/1, discussed in Charnovitz, *supra* note 159, at 208.

[163] The Declaration states in relevant part:

> We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public heath and, in particular, to promote access to medicines for all.

Declaration on the TRIPS Agreement and Public Health, para. 4 (quoted in Charnovitz, *supra* note 159, at 209.) As Charnovitz points out, this provision, as well as another which states that least-developed country members will not be obliged with respect to pharmaceutical products to implement certain TRIPS obligations until January 1, 2016 and instructs the Council for TRIPS (which normally grants extensions only on a case-by-case basis) to implement this new general exception, certainly appear intended to have legal effect. *Id.*, at 209.

[164] *Id.*, at 211. Charnovitz points out that nothing in the WTO covered agreements authorize "declarations" that are not decisions of the Ministerial Conference and that most have assumed that Ministerial Declarations launching prior trade rounds were just such decisions—as indeed did the Doha Conference Chair when he introduced the Declarations in question. In addition, he notes that the text of these two Doha declarations read like official decisions since they purport to instruct WTO bodies, including the Council for TRIPS, the Committee on Trade and Environment, the General Council, the WTO Secretariat, the Director-General, the Committee on Budget, Finance and Administration, the WTO Sub-Committee for Least-Developed Countries, and the Committee on Trade and Development. *Id.*, at 208–9.

4.3.8 The WHO's Code on Marketing of Breast-Milk Substitutes

In other cases, as with respect to the WHO's International Code of Marketing of Breast-Milk Substitutes, UN specialized agencies appear to have created a new species of international legal obligation. That Code, a detailed set of guidelines purporting to prohibit forms of marketing, advertising, and labeling by private companies, was formally adopted in 1981 in the WHO Assembly as a recommendation under article 23 of the WHO's Constitution.[165] It was the outcome of a contentious battle between NGOs and industry that had been initiated by a UN Protein Advisory Group set up to review infant nutrition in the developing world. The UN group's conclusions, published in 1972 in a document called Declaration 23, attempted to define the respective responsibilities of governments and industry in fighting against a perceived decline in breast-feeding in developing countries. A far more contentious cast on the issue was presented a year later in *The New Internationalist*, a publication of the NGOs Oxfam, Christian Aid, and Third World First. That periodical accused manufacturers of breast-milk substitutes, such as Nestlé, of selling poor quality products in developing countries, encouraging illiterate mothers to adopt more modern forms of feeding their children, and even using sales personnel disguised as nurses to sell their product in countries where unsanitary drinking water would pose serious hazards for anyone using powdered breast-milk substitutes. The cover of the periodical suggested its tone: it showed a child's grave on which was placed an empty feeding bottle and the packaging of Lactogen (a Nestlé product).

Within a short time, NGOs, which created INFACT (the Infant Formula Action Coalition) were waging a pitched battle, premised on the slogan "Nestlé kills babies," against breast-milk manufacturers, including those that had created a new association, the International Council of Infant Food Industries (ICIFI). At a U.S. Congressional hearing on the subject a proposal was made to entrust WHO with organizing a conference to elaborate a marketing code for breast-milk substitutes. Amidst an INFACT-generated consumer boycott of Nestlé products in the United States, a stormy meeting was convened by WHO and UNICEF of industry representatives and NGOs that only succeeded in establishing a broader network of NGOs committed to pursuing the Nestlé boycott on a worldwide basis. Partly in response to NGO pressure, the WHO Assembly recommended in 1980 that its Director-General prepare an international code either in the form of a regulation as a recommendation. Since a recommendation was believed to have nearly universal support, the Executive Board of the WHO recommended that option and the Assembly adopted the Code on May 21, 1981 by a vote of 118 votes in favor, one against (by the United States' Reagan Administration) and three abstentions. Three years later, during negotiations carried out at UNICEF

[165] For thorough accounts see Yves Beigbeder, *The World Health Organization* at 75–83 (The Hague: Martinus Nijhoff, 1998); Kathryn Sikkink, "Codes of Conduct for Transnational Corporations: The Case of the WHO/UNICEF Code," 40 *Int'l Org.* 815 (1986).

in New York, Nestlé signed an unprecedented agreement with the NGOs that had organized the boycott against its products, the Nestlé Boycott Committee (INBC). In the joint agreement, the industry leader in the breast-milk substitute market, Nestlé, agreed to abide by the WHO Code in exchange for INBC's recommended suspension of its seven-year consumer boycott. In addition, as a result of negotiations between INBC and Nestlé, the assistant director general of the WHO developed a plan whereby WHO and UNICEF would provide clarifying technical advice to governments on one of the provisions of the Code.[166] By July 1984, of 134 countries surveyed by the International Organization of Consumers Union, only four (including the United States), planned no action to regulate the marketing of baby food under their domestic law and seven countries had adopted the Code in its entirety as domestic law.[167]

The circumstances surrounding the adoption of the WHO Code suggest a law-making process very much at odds with the positivist conception of traditional sources of law. In that instance, states, ostensibly the only actors with authority to make international law, were only one group of actors in creating the relevant rules of conduct. To a considerable extent, these rules emerged as a result of the work of non-state actors: IOs, NGOs, and multinational corporations. These other actors, to a great extent, took the initiative, served as the venue for negotiations, and drafted the relevant rules. To a considerable extent, these non-state actors were responsible for enforcement and even on-going interpretation. Positivists may respond in distinct ways. Perhaps the Code does not involve international law at all—after all, it is not primarily or only inter-state law. It also purports to govern most directly the actions of private companies, not states. Alternatively if it is international law, it earns this status because it is the product of a treaty—the WHO's charter that authorizes recommendations—or alternatively, to the extent states adopt the Code into domestic law, because it has been transformed into custom.

4.3.9 The World Bank Guidelines

The World Bank's Guidelines, intended primarily for the use of Bank officials in the course of their work, are yet another form of particularly potent institutional law. Like many other institutional developments described in this chapter, the Guidelines have emerged in the interstices in the Bank's institutional structure and are not the product of any explicit provision in the Bank's charter governing what

[166] The Code provided that industry could donate supplies of breast-milk substitutes to hospitals for infants who "have to be fed on breast-milk substitutes." It was thought that governments would need technical advice to develop workable definitions indicating when this condition was satisfied. While the WHO had initially resisted providing such advice on the grounds that since the Code was adopted by governments, only governments could interpret it, the plan for interpretation was announced at the same joint press conference convened by Nestlé and INBC to announce the termination of the Nestlé boycott. Sikkink, *supra* note 165, at 833 and n. 55.

[167] *Id.*, at 835.

its loan policies ought to be.[168] The Guidelines, which serve to grant access to the Bank's considerable economic resources, are very different in form and purpose from the prototypical IO recommendation. Some of the Guidelines are process-oriented, requiring, for example, that certain groups be consulted before action is taken. Others prescribe certain behavior for Bank staff but also indicate what borrowers must do before the Bank will provide financing.[169] Unlike a GA resolution that purports to declare human rights, ILO Recommendations, or the WHO Code effort, the Guidelines are not promulgated with general normative intent. They were intended to be used by Bank staff for approving loans or for guiding the development of projects, such as the construction of dams. They were not directed at changing either the general rules applicable to states or even members of the Bank.

The Guidelines are also promulgated by an institution whose claim to institutional legitimacy differs in some respects from the UN and the other UN specialized agencies. They were not adopted by a political body with claims to universal representative legitimacy but by internal bank staff, albeit through notice and comment procedures that permit consultation with civil society and that resemble in some respects those that characterize the making of administrative law within executive agencies in some states.[170] The World Bank is also considerably more precise with respect to the intended binding force of its Guidelines than are many other IOs with respect to the effect of their recommendations. Since 1992, the Bank has identified distinct categories of its Guidelines, indicating that some "Operational Standards" (such as "Operational Policies" and "Bank Procedures") are mandatory for Bank staff while others (such as "Good Practices") are merely persuasive.[171] It is also easier to find clear cases of hard enforcement of the Bank's Guidelines than for the typical GA resolution. Operational standards that are incorporated in loan and credit agreements between the Bank and borrowing states become binding as a matter of at least contract and possibly as a matter of bilateral treaty.[172] The World Bank's ombudsman, its Inspection Panel, created in 1993 by resolution of the Bank's Board of Executive Directors, receives and investigates complaints from those adversely affected by the Bank's activities and enforces compliance with the Bank's standards

[168] *See* Wirth, *supra* note 111, at 333.

[169] Laurence Boisson de Chazournes, "Policy Guidance and Compliance: The World Bank Operational Standards," in Shelton, *supra* note 103, 281, at 285.

[170] *See, e.g.*, Benedict Kingsbury, "Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples," in Guy S. Goodwin-Gill and Stefan Talmon, eds., *The Reality of International Law* 323, at 325 (Oxford, U.K. and New York: Clarendon Press, 1999).

[171] *See, e.g.*, Boisson de Chazournes, *supra* note 169, at 284–5.

[172] For a discussion of the Guidelines' ambiguous legal status, see Wirth, *supra* note 111, at 334–5 (indicating that to the extent the Guidelines are explicitly or implicitly incorporated into loan agreements they become part of the appraisal of individual loans and part of the Bank's oversight of contractual obligations). But, as Wirth indicates, the Bank's policies may have legal effects even if they are not incorporated into its loans, as where the Bank declines to finance projects that involve international shipments in violation of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. *Id.*, at 336.

on the Bank's staff.[173] The adoption of an internal "disclosure policy" that made its policies accessible to the public at large and the creation of the Inspection Panel, nowhere explicitly authorized in the World Bank's charter but which "judicialized" its policies by empowering private guardians to ensure compliance with their terms, transformed the Bank's Guidelines effectively into law, at least in terms of general perceptions.[174]

Yet despite the differences between the Guidelines and the typical declaratory General Assembly resolution, some of the matters covered by the Bank's Guidelines—sensitivity to environmental conditions, the rights of indigenous populations, involuntary resettlement—overlap with those considered by the UN General Assembly and other UN specialized agencies.[175] The Guidelines even incorporate by reference some of the UN's products, such as the UN Convention on Biological Diversity, the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, the FAO Guidelines for Packaging and Storage of Pesticides, and programmatic instruments generated from UN policy conferences such as Agenda 21 and the 1995 Global Program of Action for the Protection of the Marine Environment from Land-based Activities.[176] By requiring that the Bank, and, to the extent the terms are incorporated in its loans, its borrowers, comply with such instruments, the Bank strengthens compliance with both soft and hard law produced by it and other IOs.[177] The World Bank Guidelines, no less than some treaties, are a mechanism to "harden" a dense network of otherwise "soft law" norms or treaties whose terms are vague or that have drawn few parties.

As with the GA's own actions and other IO-generated law discussed in this section, it is possible to shoehorn the Guidelines into article 38 sources of law. To the extent the Guidelines are incorporated in loan agreements between international legal persons, the Guidelines might enjoy treaty status. To the extent they encourage or compel states to adopt certain norms as a matter of national law, they are helping to implement treaty norms, solidify state practice that may generate custom, or encourage the development of general principles of law.[178] But as Benedict Kingsbury has noted, these descriptions do not begin to capture

[173] Boisson de Chazournes, *supra* note 169, at 292–7. The Bank incorporates its Guidelines into instruments that would not be deemed to be treaties under international law, such as guarantee agreements, grant agreements, such as Global Environment Facility grants, as well as other legal documentation needed for financing specific projects.

[174] *See, e.g.*, Kingsbury, *supra* note 170, at 329–38. *See also* Christine Chinkin, "Normative Development in the International Legal System", in Shelton, *supra* note 103, at 33. On the Bank's disclosure policy, see I.F.I. Shihata, "The World Bank and Non-Governmental Organizations," in F. Tschofen and A. Parra, eds., *The World Bank in a Changing World: Selected Essays*, at 265–6 (Dordrecht, Boston: M. Nijhoff, 1991–2000).

[175] *See, e.g.*, Kingsbury, *supra* note 170; John D. Ciorciari, "The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretative Analysis of the IBRD and IDA Articles of Agreement," 33 *Cornell Int'l L. J.* 331 (2000).

[176] Boisson de Chazournes, *supra* note 169, at 298–9.

[177] *Id.*, at 298.

[178] *See, e.g.*, *id.*, at 297–301.

the qualities of this kind of institutional law.[179] Like some of the actions of UN political bodies, the Guidelines are internal administrative law that, incidentally, binds some states directly (through loan commitments) and other states indirectly, by casting normative ripples far afield. Unlike the state-centric traditional sources of international law, the Guidelines take seriously the agency of non-state actors, such as indigenous peoples, who, under the Guidelines, are entitled to informed participation on matters that affect them. They both empower some non-state actors—like indigenous peoples—and attempt to secure them rights, such as support for some forms of self-determination; protection from dispossession, exploitation, and abuse of basic human rights; and respect for traditional knowledge, relations with land traditionally occupied, established community structures, patterns of group decision-making, and some forms of customary (indigenous) law.[180] Since they result from the operational practices of a bureaucratic expert community, if they are forms of customary law or general principles, they are neither created nor evinced in the ways those sources traditionally are. As do other rules emerging from institutional practices discussed in this chapter and in Chapter 3, the Guidelines also raise novel questions about the ways this new law applies to other IOs or to the Bank itself (should it choose to renounce the Guidelines or should those injured by the Bank's actions seek alternative ways to enforce them other than through the Inspection Panel).[181]

The Bank's Guidelines are also different from traditional sources of law because, as with many other examples of institutional law discussed in this section, they are part of an inter-institutional web of hard and soft law that is denser and qualitatively different from sources of international law before the age of international organization. As Kingsbury notes, the Guidelines emerged from, and now operate within, a diffuse normative process involving iteration, elaboration, and application of norms among a much wider set of actors than the Article 38 sources of law presume: other IOs, national law-makers, indigenous peoples, NGOs, market actors, scholars, and many others.[182] The Bank's policies relating to indigenous peoples, for example, reflect other institutional legal developments, such as ILO Conventions going back to 1957 as well as work produced by the UN Working Group on Indigenous Population, and the Guidelines, in turn, affect normative instruments as wide-ranging as the UN and OAS declarations on the rights of

[179] *See generally* Kingsbury, *supra* note 170, at 338–40.

[180] *Id.*, at 326.

[181] Thus, the Bank's Environment Assessment policy requires extremely rigorous environmental assessments prior to undertaking Category A projects that are likely to have significant environmental impact; they also require identification of ways to minimize, mitigate, or compensate for adverse impact. *See* Boisson de Chazournes, *supra* note 169, at 286–7. There are obvious parallels between the duties imposed here and those under study by the ILC as part of its on-going effort to address "international liability for injurious consequences arising out of acts not prohibited by international law." *See* Report of the International Law Commission on the Work of its 55th Session, UN Doc. A/58/10 (2003). The Bank's actions raise questions about the extent to which the Commission's emerging draft principles of duties to prevent, notify, or compensate apply to IOs and not merely to states.

[182] Kingsbury, *supra* note 170, at 340.

indigenous peoples, decisions taken by the Conference of the Parties to the 1992 Biodiversity Convention, and operational policies in the Asian Development Bank and the Inter-American Development Bank.[183]

Nor is the Guidelines' legal impact limited to the law governing the rights of indigenous peoples. The World Bank's Environmental Assessment policy has served as a model for national legislation, for other multilateral development banks, and for the Rio Declaration on Environment and Development.[184] Bank policy on international waterways, also part of the Guidelines, contributed to the UN Convention on the Law of the Non-Navigational Uses of International Watercourses and has played a significant role, it is argued, in enabling *lex ferenda* to become customary *lex lata*.[185] The Guidelines phenomenon also provides a window into how institutional learning takes place. Much of what the Bank has done has influenced the work of other regional banks and some of those have adapted their own versions of the World Bank's enforcement methods for their own use. Versions of the Bank's inspection panels now appear elsewhere.[186]

The Bank's practices also raise a significant set of questions about how it, as well as other IOs, operate. The Bank's power over its borrowers—its ability to deny funds or to suspend disbursement of a loan or credit or accelerate its maturity—means that the Bank's policy prescriptions are enforced in ways that may be more effective than is possible with respect to even the Security Council's edicts. The Bank is in a position to impose its views of "good governance" and "sustainable development," including its views of desirable social policy on environmental protection, social issues, and human rights, on any government that requires its resources. In doing so, the Bank is not restricted in making reference only to treaties that the borrower has ratified but can refer to or apply other hard or soft law that it deems desirable.

Not all observers (and borrowers) believe that the Bank's "mission creep"—its expansion of its original mission, once narrowly seen to embrace only assistance with the building of infrastructure projects, to embrace the liberalization of trade and capital markets, equitable income distribution, environmental sustainability, the elimination of corruption, tax reform, and privatization—is either desirable or legitimate.[187] For some observers the Bank's turn to encouraging principles of "good governance" violates articles III(5) and IV(10) of its Articles of Agreement, which bar interference in the political affairs of member states, and

[183] *Id.*, at 340–1. Thus, even the Bank's decisions to include indigenous ethnic groups, tribal groups, and scheduled tribes, along with its definitional criteria focusing on issues of vulnerability and distinctiveness, has had an impact on the emerging law of indigenous peoples. *See* Boisson de Chazournes, *supra* note 169, at 288.

[184] Boisson de Chazournes, *supra* note 169, at 299.

[185] *Id.*, at 300.

[186] *Id.*, at 341–2. For more on the Inspection Panel, see Daniel Bradlow, "International Organizations and Private Complaints: The World Bank Inspection Panel," 34 *Va. J. Int'l L.* 553 (1994); Daniel Bradlow, "Lessons from the NGO Campaign Against the Second Review of the Inspection Panel: A Participant's Perspective," 7 *ILSA J. Int'l & Comp. L.* 247 (2001).

[187] *See, e.g.*, Jessica Einhorn, "The World Bank's Mission Creep," 80 *Foreign Affairs* 22 (September/October 2001); Wolf, *supra* note 155, at 113–22.

runs counter to the principles of the UN Charter respecting sovereign equality and non-interference in domestic affairs (Article 2(1), (7)).[188] On the other hand, some have criticized the Bank for not deploying its promotional or enforcement functions more forcefully. To date, the Bank has refused to incorporate customary human rights directly into its loan commitments or by making it possible for those injured by its policies to be awarded compensation.[189] Conditionality may also work as a sovereign tool. Borrower countries can use the Bank as a legitimating fig leaf for taking unpopular action, as for resettlement or compensation pursuant to it. The Bank's conditions can also benefit domestic groups that may take advantage of the Bank's consultative requirements (and access to its Inspection Panel) to become involved in governmental decision-making in ways not otherwise sanctioned by local law. As this suggests, the new forms of IO soft law pose distinct political possibilities at both the horizontal level (between states inter se) and vertically (vis-à-vis a state and its people).

Other parts of the World Bank group of organizations contribute, along with the IMF discussed below, to a growing and interlocking set of international regimes and institutions intended to protect the foreign investor and promote foreign investment around the world. The World Bank's ICSID encourages the settlement of investment disputes between private investors and the host states in which they are located. States that have become parties to the ICSID Convention agree to permit legal disputes "arising directly out of an investment" between themselves and a national of another contracting state that have been submitted to ICSID to proceed to arbitration.[190] Such disputes, which can be submitted to ICSID either in advance through, for example, bilateral investment agreements that include an ICSID clause, or after a particular dispute has arisen, are heard by three-person panels of arbitrators, wherein the contracting state appoints an arbitrator, the investor appoints a second, and the two chosen arbitrators agree upon a third.[191] Contracting states, which can make their consent to ICSID arbitration conditional on exhaustion of local remedies, gain the assurance that claims

[188] *See, e.g.*, Wolf, *supra* note 155, at 115–17; Mark E. Wadrzyk, "Is it Appropriate for the World Bank to Promote Democratic Standards in a Borrower Country?," 17 *Wis. Int'l L. J.* 553 (1999). But Wadrzyk suggests that the Bank's policies are justified under a new conceptualization of "popular sovereignty" and an emerging norm of democratic governance. *Id.*, at 570–7. Indeed, Wadrzyk implies that IOs have not just a right but a duty to promote human rights, including the right to democracy. *Id.*, at 573.

[189] *See* Wirth, *supra* note 111, at 336–7.

[190] Article 25, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 UNTS 159 (entered into force October 14, 1966)(hereinafter ICSID Convention).

[191] Article 37, ICSID Convention, *supra* (indicating that while the parties are free to agree to a sole arbitrator or any uneven number of arbitrators, this is the method of appointment unless the parties agree otherwise). ICSID maintains a panel of arbitrators, designated by contracting states, whose qualifications are described as "persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment." Article 14, ICSID Convention. Parties are free to appoint arbitrators from outside the panel of arbitrators provided they possess the same qualities. Article 40, ICSID Convention.

submitted to this denationalized forum will not be subject to diplomatic espousal by the state of which the private investor is a national.[192]

The World Bank's Multilateral Investment Guarantee Agency (MIGA) also contributes to the protection of foreign investors by issuing guarantees, including co-insurance and re-insurance, against non-commercial risks, defined to include expropriation, breaches of contract, or war and civil disturbance.[193] MIGA, along with another part of the World Bank group of organizations, the International Finance Corporation (IFC), also disseminates information and provides technical assistance to states that want to improve their prospects for drawing incoming foreign investment or want to re-assure foreign investors already in place. The World Bank's private sector development agenda, which includes the efforts of the IFC, extends beyond improving conditions for foreign investors and provides detailed technical advice on improving the regulatory environment for business generally. The efforts of the IFC, for example, include encouraging benchmarking for countries so that they can achieve a pro-business environment as measured by such indicators as the ease with which private entrepreneurs can start a business, can hire and fire workers, can enforce their contracts, secure credit, and secure the benefits of good bankruptcy laws if needed.[194]

4.3.10 IMF Conditionality

The same general framework for standard-setting, but not always the same conditions upon loans, emerges from the operational policies of the IMF. In finance, the IMF's 2,000 employees facilitate transactions in currency and allow governments both to carry out exchange transactions (such as dollars into euros) and to cover short-term deficits in foreign exchange; these and other IMF benefits, however, come with a price: many countries have re-shaped their economic and social policies to conform with conditions that the IMF has attached to its loans to states in need of economic assistance, that is, conditionality.[195] While conditionality does not constitute the only way that the IMF has an impact on law,[196] it has become the most dramatic way that the IMF has affected sovereign decision-making across the globe.

The IMF introduced conditionality in the 1950s with the creation of stand-by arrangements under which a member could obtain Fund financing beyond its

[192] Article 27, ICSID Convention, *supra* note 190.

[193] MIGA, 24 *ILM* 1605 (1985); *see also* Sands and Klein, *supra* note 118, at 91–2.

[194] *See, e.g.*, IFC, *Doing Business in 2004* (Washington, D.C.: Oxford University Press and the World Bank, 2004).

[195] *See generally* Edith Brown Weiss et al., eds., *The World Bank, International Financial Institutions, and the Development of International Law* (Washington DC: ASIL, 1999).

[196] The IMF also issues definitive interpretations of its Articles of Agreement, sometimes accepted as such by domestic courts in the U.S. and elsewhere, a subject that will be briefly addressed in Chapter 7 on non-adjudicative forms of dispute settlement. *See generally* Paul B. Stephan, Don Wallace, and Julie A. Roin, *International Business and Economics* at 50–2 (Charlottesville, VA: Michie Co., 1993).

automatic "gold tranche" on condition that it implements an economic and financial adjustment program that the Fund considers satisfactory.[197] Authority for conditionality was based on the vague requirement in the Fund's articles that its resources be made available under "adequate safeguards."[198] The Fund first released guidelines on stand-by arrangements and conditionality in 1979, indicating the macro-economic factors that it would use to evaluate programs.[199] By 1997, the Fund was following in the path of the World Bank and broadening its concept of appropriate conditions to embrace good governance generally. Its new guidelines indicated that it would now take note of a broad range of institutional reforms "needed to establish and maintain private sector confidence and lay the basis for sustained growth."[200] Like the World Bank, the IMF decided to condition its loans based on such questions as whether public policies were in place to avoid bribery, corruption, and fraudulent activity in the management of public resources. Accordingly, IMF letters of intent, in which states record their commitments once they obtain IMF assistance, today embrace a considerable number of detailed and intrusive obligations that sometimes overlap with those suggested or imposed by other IOs, like the WTO, including, for example, commitments to totally overhaul a state's banks, securities firms, insurance companies, and accounting firms; to harmonize practices with securities practices endorsed by the OECD; to transform a state's labor laws concerning unemployment benefits, the minimum wage, or permitted leaves; or requiring legislatures to refrain from imposing new quantitative restrictions on trade.[201] IMF conditionality forces governments to adopt local laws, reform governmental institutions, or refrain from taking certain actions that would otherwise be within their sovereign discretion.

Although IMF conditions are not formally imposed on states but are the products of state consent, critics charge that states are economically coerced into ceding their sovereign rights to govern their polities through conditionality. The perception of inequity is aggravated by the voting structure of the organization since it permits the wealthy G-7 countries, and the U.S. in particular, who contribute the most financially to the organization, to in fact control it.[202] For some, the IMF, like the World Bank, is a tool for imposing Western economic principles, along with Western laws, and is a modern, more subtle version of 19th-century capitulations once extracted by colonial powers. As with respect to

[197] *See* Andre Newburg, "The Changing Roles of the Bretton Woods Institutions: Evolving Concepts of Conditionality," in Mario Giovanoli, ed., *International Monetary Law: Issues for the New Millennium* 81, at 84 (Oxford, U.K. and New York: Oxford University Press, 2000). [198] *Id.*, at 85.

[199] *Id.* Under Decision 6056-(79/38), March 2, 1979, the Fund indicated that in helping members devise adjustment programs, it would pay regard to "domestic social and political objectives, the economic priorities, and the circumstances of members, including the causes of their balance of payments difficulties." *Id.*

[200] *Id.*, at 88 (quoting a Guidance Note issued by the IMF Executive Board of July 25, 1997).

[201] *Id.*, at 89–91; Wolf, *supra* note 155, at 104–8. Letters of Intent are available under the country index of the IMF website: www.imf.org.

[202] *See* Daniel Bradlow, "Stuffing New Wine Into Old Bottles: The Troubling Case of the IMF," 3 *J. Int'l Banking Reg.* 9 (2001).

capitulations, conditionality is not grounded in reciprocity. IMF conditions are imposed by those who are not themselves subjected to the IMF's strictures since they have no need for its funds.[203] Defenders of the IMF do not deny these facts: they simply assert that those who provide the IMF with its funds can fairly determine the terms under which those funds are provided. As with the World Bank, the IMF's "mission creep" via conditionality has also been criticized by lawyers on the basis that it imposes an "exogenous reform agenda" not directly connected to ensuring repayment and therefore is not authorized under the IMF Articles of Agreement.[204]

Like the World Bank's Guidelines, ICSID and the efforts of its IFC, IMF conditionality is part of an increasingly dense web of international regulation intended to promote free markets and the protection of the rights of entrepreneurs. The IMF's actions interrelate with these other types of international standard-setting and though it is not often recognized as part of the more formal treaty regimes governing foreign investment, its efforts may be among the most potent of this emerging global regime.[205] The global regime that protects foreign investment has no presiding single IO at its helm, unlike the trade regime, but consists of a number of overlapping hard and soft obligations subject to varying degrees of institutionalization. IMF conditionality is yet another mechanism intended to ensure, in part, that foreign investors are compensated if expropriated, face no discrimination relative to national investors, enjoy rights to fair and equitable treatment, and have reliable access to a legal remedy in an unbiased, preferably de-nationalized, forum (which usually means international arbitration as through recourse to ICSID). From this perspective the IMF's efforts are an essential component of an interlocking set of international legal obligations imposed under customary international law, over 2,000 bilateral investment treaties, investment guarantees contained in regional free trade agreements such as the NAFTA, the WTO's General Agreement on Trade in Services (GATS) and its Trade-Related Aspects of Investment Measures (TRIMs), the OECD's Code of Liberalization of Capital Movements, as well as a number of other treaty regimes permitting international arbitration of investment disputes and the enforcement of arbitral

[203] *See generally* Wolf, *supra* note 155, at 101–11; David P. Fidler, "A Kinder, Gentler System of Capitulations? International law, Structural Adjustment Policies and The Standards of Liberal, Globalized Civilization," 35 *Tex. Int'l L. J.* 387 (2000). There are also, of course, numerous critiques of the types of structural and other reforms imposed by the IMF and their long-term effects on the economic and social health of borrowers. *See, e.g.*, Joseph E. Stiglitz, *Globalization and Its Discontents* (New York: W.W. Norton, 2003).

[204] *See* Daniel Kalderimis, "IMF Conditionality as Investment Regulation: A Theoretical Analysis," 13 *Soc. & Leg. Stud.* 104, at 113–19 (2004)(arguing that conditionality is an indirect form of regulation that, by prescribing investment liberalization, violates states' sole right to regulate capital transactions). *But see* John D. Ciorciari, "The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement," 33 *Cornell Int'l L. J.* 331 (2000)(interpreting the World Bank articles of agreement to consider human rights violations as legitimate "economic concerns" to the extent these may adversely affect prospective borrowers' ability to repay and contending that the Bank's involvement in such issues does not constitute impermissible political interference).

[205] *See* Kalderimis, *supra* note 204.

awards in local courts.[206] As is discussed more in depth in Chapter 10, critics charge that IMF conditionality effectively transfers "regulatory power from the developing to the developed world, exacerbating an already unequal situation," thereby undermining one of the foremost goals of all of these efforts: the alleged human right to democratic governance.[207]

4.3.11 Emerging Global Administrative Law

Whether or not the modes of standard-setting canvassed in this section constitute vehicles for exporting United States' conceptions of the desirable regulatory state to the world as some have suggested,[208] it is apparent that much of what the UN specialized agencies and the international financial institutions are producing bear similarities to the work of administrative agencies in the modern Western

[206] *Id.*, at 108–11. Apart from the ICSID Convention and MIGA, discussed above, international arbitration is promoted through treaties such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38 (entered into force June 10, 1958), and regional treaties to the same effect, which generally permit local courts of party states to refuse enforcement of arbitral awards rendered, as under ICSID procedures, only on the basis of very narrow grounds.

[207] *Id.*, at 121–2. The argument with respect to democracy, made by Kalderimis and many others, see generally Wolf, *supra* note 155, at 101–11, is that to the extent conditionality leaves borrowing governments with little room to follow alternative policies, it effectively removes from the table the truly significant issues of governance that ought to be for the electorate to decide. *See* Kalderimis, *supra* note 204, at 122–3. If true, this provides an ironic counterpoint to these financial institutions' actions since IMF and Bank officials defend the conditions they impose on borrowers precisely on the grounds that these encourage democracy and the rule of law. *See generally* Stiglitz, *supra* note 203. For arguments that World Bank and IMF policies enable the policies promoted by a "rich club" of states in the OECD to "quietly govern the world," see Wolf, *supra* note 155, at 65–75.

The OECD, based in Paris, with a membership that includes most of the world's richest nations, including the U.S., has undertaken measures, some formally binding and some ostensibly only hortatory, which have constrained even its most powerful members, as with respect to the entry, and treatment upon establishment, of foreign investors within their territories. *See, e.g.*, Jan Klabbers, *An Introduction to International Institutional Law* at 211–12 (Cambridge, U.K.: Cambridge University Press, 2002). For an example of a legally binding OECD decision, see OECD Code of Liberalization of Capital Movements (2003 Edition), available at http://www.oecd.org/dataoecd/10/62/4844455.pdf, in combination with articles 2(d) and 5(a) of the Convention on the Organization for Economic Co-operation and Development of December 14, 1960. The OECD's soft power over developing countries is considerable. These countries, although not parties to OECD arrangements, have faced strong economic pressures to conform their investment, trade, and financial laws and arrangements to its edicts. Indeed, the prospects that a Multilateral Agreement on Investment, to be negotiated in the OECD, would in effect transform the world's rules governing the subject was the subject of considerable resentment in many foreign capitals. *See generally* Edward M. Graham, *Fighting the Wrong Enemy: Antiglobalist Activists and Multilateral Enterprises* (Washington DC: Institute for International Economics, 1999). The fear that such an Agreement, negotiations for which were postponed indefinitely in 1998, would have such effects was not academic. In 1997, OECD countries accounted for some 85 percent of world outflows of foreign direct investment and about two-thirds of the inflows. *See* http:// www.oecd.org/ af/mai/.

[208] *See, e.g.*, Anne-Marie Burley, "Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory States," in John G. Ruggie, ed., *Multilateralism Matters: The Theory and Praxis of an Institutional Form* 1 (New York: Columbia University Press, 1993).

state. The subsidiary forms of rule-making that many of these IOs engage in, whether or not connected to treaty-making and whether or not formally binding, increasingly affect the policy options of governments, especially those in the developing world whose government ministers have no choice but to follow the edicts of the World Bank or the IMF and whose economic traders need to follow the lead of powerful competitors and adhere to harmonized rules for trading in certain goods.

Unlike the classic state-centric sources of law, many of the institutional standards discussed have their greatest effects not on the inter-state level but, like national administrative law, directly on non-state actors. In an increasing number of instances, what IOs do affect, directly or indirectly, individuals and private companies—and often without the need for mediating domestic implementation efforts within the states in which they reside. Although they are not "supranational" sources of international law as these are normally described, ostensibly soft instruments such as the Codex, the WHO's Code for the Marketing of Breast-Milk Substitutes, or the FAO's and UNEP's codes for handling certain pesticides and chemicals have sometimes proven effective *because* they do not require implementing legislation by states to affect the actions of industry that are the principal target. Other kinds of IO regulation, such as ILO recommendations or the opinions of its Labor Office, purport to affect governments but are not expected to be presented to parliamentary processes for approval. In some of these cases—as with respect to interpretations issued to accompany the WHO's health regulations or advisory material produced by the IAEA—authority over standards that affect both government officials and private industry is delegated to expert communities working together with international civil servants. In cases such as IMF conditionality, governmental acceptance is required but such consent has often occurred "off stage," without the public consideration or open parliamentary debates expected when states give their consent to treaties.

While the most familiar complaint about these modes of standard-setting is that they are "undemocratic"—a subject that will be addressed in the final chapter of this book—a less noticed aspect is that they trigger many of the same issues as do national administrative agencies. Like administrative agencies within the executive branches of governments, IOs, when they engage in regulatory activities, turn to a diverse set of governmental and non-governmental actors. The Codex's subsidiary committees, ultimately responsible for the standards contained within it, for example, are composed of a mix of national delegations (usually from the agriculture ministries of states), representatives of the industry, and other government representatives to address health or consumer aspects.[209] While some of the Codex committees remain dominated by governmental interests and industry

[209] For a general description of the Codex committees, including a full table of the impressive Codex committee bureaucracy, see Dobbert, *supra* note 120, at 939–53. Other IOs, apart from the ILO whose tripartite membership perforce includes industry representatives, sometimes include industry representation in their standard-setting efforts. For example the three sectors for the International Telecommunications Union (radiocommunication, telecommunication standardization,

spokesmen with a common interest in promoting production and trade in the product concerned, other, more expert-reliant committees are much more independent of governments and rely on and establish independent epistemic communities based on a common technocratic expertise and a particular agenda (e.g., safety and health). The Codex committee charged with the toxicological effects of additives, for example, has consisted of scientific experts in their personal capacity.

As with respect to national administrative law, the composition of those delegated standard-setting authority triggers doubts about whether these have been "captured" by particular interests or unfairly exclude perspectives that have been denied access. These complaints cut across the political spectrum. Scholars and NGOs have frequently complained, for example, that the Codex faithfully reflects the concerns of industry and some governments but that consumer interests have not been well represented in the subsidiary committees responsible for its elaboration.[210] Defenders of the free market, on the other hand, have contended that IO regulatory processes generally have been either openly hostile to corporate concerns or insufficiently open to industry participation.[211]

As scholars of administrative law have long realized, it matters how standard-setting is delegated and to whom. Not all "technocratic" efforts dominated by experts are alike. As is suggested by the examples of the Security Council's subsidiary committees in prior sections of this chapter, it matters who appoints the experts, what they are charged to do, and to whom they are ultimately responsible. As David Leive points out, the WHO Committee on International Surveillance of Communicable Diseases, which is composed of members appointed by the WHO's Director-General and is responsible for proposing revisions to the WHO's various regulatory instruments, including its Health Regulations, needs to abide by a WHO regulation that affirms that its experts serve the WHO exclusively and may not request or receive instructions from any government.[212] That body is likely to act differently from, for example, the 1267, 1373, and 1540 Security Council committees discussed in prior sections, or even various technical commissions in the WMO (the latter composed of experts that are employed within their governments' respective meteorological services).[213]

and telecommunication development), include participation by both private and public telecommunication companies, including equipment manufacturers, regulators, financing institutions, scientific organizations telecommunications carriers, and service providers. *See* ITU Constitution, article 19 (entered into force July 1, 1994) 104 UNTS 19 (for a current version, see www.itu.int/aboutitu/basic-texts/constitution.html). For a description of standard-setting in the ITU, see Francis Lyall, "Posts and Telecommunications," in Schachter and Joyner, *supra* note 103, 789, at 801–22.

[210] *See* Riva Krut, *Globalization and Civil Society: NGO Influence in International Decision-Making*, at 21 (Geneva: United Nations Research Institute for Social Development, 1997); Leive, *supra* note 103, at 550.

[211] *See, e.g.*, Carol C. Adelman, "Conclusions," at 197–207, in Carol C. Adelman, ed., *International Regulation*: *New Rules in a Changing World Order* at xi (San Francisco, CA: Lehrman Institute, 1988).

[212] Leive, *supra* note 103, at 551.

[213] *Id.*, at 552.

The degree of independence is not merely a matter of whether the body with delegated standard-setting authority is composed of government employees or not. Not all government-dominated processes or committees are alike. As would be expected given the more technical subject matter of many of these efforts, states' foreign ministries are not always the principal governmental representatives involved, when they are involved at all. Governments are complex bureaucracies whose departments do not always coordinate or even consult regularly. Particular parts of a single government may have distinct policy preferences. It might be expected that representatives of the meteorological ministries of governments, for example, may be less sensitive to certain high-profile political concerns that may be on the minds of foreign ministries. They are also more likely to cooperate with one another as they are likely to have more in common with their counterparts in foreign countries than they do with their own foreign ministries.[214] Indeed, public choice theory suggests that government officials in such cases may be more likely to cooperate because they share a common interest in securing new international regulations that reinforce their agency's position back home.[215] As Anne-Marie Slaughter has argued, when sub-units of governments interact, the results may not always be the same as when these governments interact solely at the diplomatic level through their foreign ministries.[216]

The role accorded to IO secretariats, as well as the particular leadership qualities of those who lead different IOs, also influences the process and impacts on the ultimate product. The discretion accorded IO secretariats in connection with the production of "technocratic"codes varies—from the relatively active engagement of the WHO secretariat in producing revisions to its Health Regulations, to the more supervisory and coordinating role of the FAO secretariat in overseeing the work of the various Codex committees, to the active discouragement of secretariat participation in connection with WMO regulatory instruments. These differences may affect the profile of these efforts within particular IOs and the level of formality needed to secure acceptance of their regulatory products. As Leive points out, the Codex regime, which has not been led by a single executive officer of rank comparable to the Secretary-General, needs to rely on the joint actions of both the Directors-General of the FAO and the WHO to take any necessary action, such as submitting recommendations to members.[217] IO regulatory processes also vary, as do national ones, in terms of whether they are subject to systematic and repeated opportunities for review (including by states) or for debate,

[214] *See, e.g.*, *id.*, at 582 (noting that engineers, meteorologists, and public health experts have "ties born of common professional outlook and interests and long association with each other"). For this reason, Leive argues that the relevant international communities within the food, meteorological and health regimes are organized "horizontally" as well as "vertically." *Id.*

[215] *See, e.g.*, Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," 54 *Int'l Org.* 421 (2000), at 453 (citing work by Colombatto and Macey).

[216] Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004) (discussing transnational networks of government regulators).

[217] Leive, *supra* note 103, at 554.

objections, revisions of drafts, and considerations of varied committee views (as in the lengthy, discursive Codex process) or are only subject to far more cursory and less formal mechanisms (as in the health and meteorology regimes). Whether such processes for iteration and review exist may affect the ultimate acceptance of the final product, the degree to which governments or international NGOs have been educated and become committed to its successful implementation, or the level of "grass roots" support.

Accountability questions of the kind administrative lawyers have long confronted now are the concern of international lawyers as well. At the global level, there are now serious questions about the nature and scope of the delegated authority apparently now ceded to IOs, from the WHO to the IMF. Questions about whether IO charters (or general international law) impose implicit limits on the scope of delegation are now starting to appear with respect to the Security Council but have emerged elsewhere in subtler forms, as with respect to concerns about the "mission creep" of the World Bank or the IMF.[218] In some cases IOs anticipate and attempt to deflect such concerns. As was noted in connection with the Security Council's counter-terrorism and WMD legislative efforts, IO techniques for deferring to national preferences may operate in the same manner as do the doctrine of subsidiarity and the judicially created notion of margin of appreciation in European Community and European human rights law. The Codex, for example, sometimes permits states to choose from a range of options with respect to food standards and on some issues defers to national legislation.[219] In other cases, as with respect to the WMO, regional standards or worldwide standards subject to minimum and maximum ranges, are used.[220]

As is addressed in Chapter 9, delegation issues sometimes take the form of disputes about whether institutionalized dispute settlers—as in the WTO—have been given authority to "complete the contracts" of the treaty negotiators that created them through judicial law-making, must fill in gaps as necessary to avoid a finding of *non liquet*, or need, on the contrary, to resolve disputes in favor of residual state sovereignty or state discretion. Demands for greater accountability and transparency by NGOs and sometimes private industry, endemic to many of these organizations, resemble pressures at the national level for such things as notice and comment procedures, along with judicial review over agency action.

As a result of these IO processes, "international soft law" has come into its own as a field of study. A number of definitions of "soft law" have emerged. These norms are "soft" either because of their pedigree (that is, not within the three traditional sources of international law) or because of their lack of binding force, or both. Christine Chinkin, for example, has identified the following categories as "soft law": norms that (1) have been articulated in non-binding form; (2) contain

[218] *See* Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the U.N. Security Council of its Chapter VII Powers* (New York and Oxford, U.K.: Oxford University Press, 1999).

[219] *See, e.g.*, Leive, *supra* note 103, at 564–5.

[220] *See, e.g.*, *id.*, at 565–7.

vague and imprecise terms; (3) emanate from bodies lacking international law-making authority; (4) are directed at non-state actors whose practice cannot constitute customary international law; (5) lack any corresponding theory of responsibility; or (6) are based solely upon voluntary adherence.[221] Soft law, defined in such broad terms, may have a number of different relationships to traditional sources of international law. The many types of IO-generated soft law canvassed in this chapter and Chapter 3—formal resolutions adopted by plenary bodies, recommendations or less formal declarations issued by organs with more limited membership, advisory material or commentaries issued by expert bodies, legal opinions issued by IO secretariats, advisory opinions issued by institutionalized dispute settlers, the institutional practice of organs over time—may guide the interpretation, elaboration, or application of hard law; constitute rules that aspire to "harden" either by being incorporated into article 38 sources of law or otherwise; be treated as evidence of binding law produced elsewhere; exist in parallel with treaty or customary legal obligations and act as a fall-back; constitute general principles to guide the good faith interpretation of a treaty or backdrop norms within sub-fields in international law; or serve as a source of institutional obligation produced through acquiescence of the membership or estoppel claimed by IO officials.[222]

International lawyers have long argued that IOs generally "enhance the forces that make for law observance."[223] But the emergence of institutional soft law has led, in more recent years, to more sophisticated accounts of how, why, and when states comply with international law. In the initial excitement over the discovery of the uses of institutional soft law, some observers became convinced that it was a superior regulatory tool. They argued that its vaunted flexibility made it less threatening to state interests and its use less likely to provoke adversarial forms of dispute settlement and unproductive resorts to the threat of hard sanctions. Scholars such as Abram and Antonia Chayes, inspired by the work of IOs, advocated a "managerial" model of compliance based on the premise that states' failure to comply with international law stemmed from ambiguities in the underlying rules, lack of capacity to comply, or time lags between promulgation and implementation.[224]

They argued that states were more likely to be persuaded rather then coerced into complying and that IOs worked best when they were fora for discourse that addressed the underlying reasons for the failures to comply. They contended that the best tools for compliance were the soft, non-coercive modes suggested by

[221] Chinkin, *supra* note 174, at 30.

[222] *Id.*, at 30–1; Boyle, *supra* note 110. *See also supra* Chapter 3, note 193.

[223] Louis Henkin, "International Organization and the Rule of Law," 23 *Int'l Org.* 656, at 664 (1969) (arguing that an IO "fosters expectations and habits of compliance, creates a bureaucracy and a constituency with an active interest in keeping the obligation intact, subjects would-be violators to pressures to observe and the threat of unpleasant consequences if they do not").

[224] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* (Cambridge, MA: Harvard University Press, 1995).

examples in this section. They focused on modes to enhance transparency and opportunities for interaction; diverse and intersecting modes of reporting and data collection; verification and monitoring systems; active management tools such as capacity building and non-adversarial forms of dispute settlement and authoritative interpretation (such as legal interpretations by IO secretariats and modifications of treaty obligations through methods short of formal amendment); continuous forms of policy review and assessment of members' performance (as through the policy dialogues performed by the IMF/World Bank over time); and NGO supervision and monitoring to complement the functions performed by the IOs themselves.[225] Managerialists argued that their soft modes of implementation and enforcement were more likely than coercive top-down methods to: reassure those inclined to comply that they were not being victimized by free-riders, deter would-be cheaters, and clarify the extent of obligation for those who were uncertain about the rules. Soft law and soft enforcement methods were seen as deflecting "sovereignty costs," from loss of authority over decision-making to the need to expend political resources to secure legislative agreement to an international binding commitment.[226]

Doubters, like George Downs, of a more realist inclination, countered that while managerial models for compliance might perhaps work fairly well when states were already predisposed to comply (or had few incentives to defect), hard law, accompanied by hard sanctions or hard methods of dispute settlement, remained necessary for effective cooperation.[227] In the view of Downs, states had more important things to worry about than mere "coordination games," like deciding whether air traffic controllers should follow harmonized procedures under ICAO standards. States needed more than soft reporting obligations and carrots in the form of technical assistance to achieve truly deep cooperation, that is, to resolve problems that were, for example, prisoners' dilemmas in which all had every incentive to cheat.[228]

Closer examination of the examples of IO law-making surveyed here suggests that the dichotomy between the use of carrots or sticks is overly simplistic. Most IO regimes involve a mix of "soft" and "hard" law and "soft" and "hard" enforcement techniques. Much of IO law involves a deeply entangled treaty/soft law web of obligations. Many IO-generated rules have an ambiguous legal pedigree or are ambiguous as to legal effect precisely because of this enmeshment. Many require only soft reporting obligations on the inter-state or organizational level but are subject to harder forms of enforcement in the real world of markets, where competitive pressures among traders compel compliance or where the threat of consumer boycotts loom. This is true even with respect to technocratic regimes such as those of ICAO whose standards are enforced by multiple

[225] *Id.*, at 135–270.

[226] *See, e.g.*, Abbott and Snidal, *supra* note 215, at 436–41. *See generally* Jutta Brunée and Stephen Toope, "Environmental Security and Freshwater Resources: Ecosystem Regime Building," 91 *AJIL* 26 (1997).

[227] George W. Downs, Kyle W. Danish, and Peter N. Barsoom, "The Transformational Model of International Regime Design: Triumph of Hope or Experience?," 38 *Colum. J. Trans'l L.* 465 (2000).

[228] *Id.*

methods, including the possibility of denial of landing rights to those who fail to meet certain standards, adherence by those who build aircraft lest their product does not find a market, incorporation of SARPs in bilateral agreements (such as those relating to aviation security) or into states' national law, and even as a result of indirect enforcement because of Security Council-mandated measures to deal with the threat of terrorism involving aviation. On closer inspection, purely managerial or entirely coercive regimes rarely exist, especially if the subject matter they regulate may trigger behavioral changes in private parties who became the regime's de facto enforcers, such as buyers and sellers or professional advisers such as insurers or lawyers. As noted, even those IOs associated with relatively hard law enforced through adversarial modes of dispute settlement, such as the WTO, contain rules with more ambiguous status (such as the Doha Declaration or preambular principles such as the need to promote "sustainable development"), deploy many of the managerial tools surveyed by Chayes and Chayes (such as capacity-building efforts and technical assistance), and anticipate that most trade disputes will be settled quietly, softly, before appointment of a formal panel.[229] On the other hand, the managerial policy dialogues of the IMF and World Bank have a considerably harder edge once imposed through conditionality.

Managerialists and those inclined to use more coercive methods have much to learn from each other as well as from IOs. There are wide gradations of softness even among soft managerial regimes; ranges of informality even within regimes that rely on informal forms of regulation.[230] While, as will be discussed in Chapter 7, the ILO implements its labor code, hard and soft, through, among other things, a series of "mobilization of shame" techniques based in part on advisory rulings issued by non-judicial dispute settlers, the WHO, and to a lesser extent the WMO, has opted for exhortation and persuasion and has not generally employed "mobilization of shame" techniques.[231] With rare exceptions such as the issuance of public warnings concerning the outbreak of severe acute respiratory syndrome (SARS) in 2003, the WHO has not publicized the failure of its members to comply with notification or other requirements presumably from a desire to maintain a working relationship with relevant health officials.[232] Whether this exceptionally soft managerial approach is effective depends on the context and the matter sought to be regulated. In the case of SARS and the failure of authorities in,

[229] *See generally* Brett Frischman, "A Dynamic Institutional Theory of International Law," 51 *Buffalo L. Rev.* 679 (2003).

[230] *See, e.g.*, Leive, *supra* note 103, at 584–6 (discussing the range of formal/informal approaches to regulation within the food, meteorology, and health regimes).

[231] *See, e.g.*, *id.*, at 568 and 576; 285–99.

[232] *See generally id.*, at 71–88; 576–9. For descriptions of the WHO's departures from its customary procedures when it issued specific travel advisories directed at travelers during the SARS outbreak in 2003, see Fidler, *supra* note 106 (noting that the WHO global alerts, directed at national public health authorities, and travel advisories, directed at travelers, are not specifically authorized by the WHO's constitution or by its international health regulations and were influenced by the WHO's decision to include non-governmental sources of information in monitoring threats to public health).

for example, China initially to cooperate, the WHO opted for a more public and confrontational approach.[233] In the environmental area, at least, it has been argued that institutional mechanisms for oversight, coordination, information exchange, as well as NGO watchdogs that can trigger the "mobilization of shame," are needed for soft norms to be taken seriously by governments.[234] On the other hand, there are many ostensibly hard obligations, contained in treaties that authorize relatively hard dispute settlement, that in the absence of more managerial institutionalized mechanisms for compliance have not been very effective. This is particularly the case when, as is usual, states are reluctant to use the authorized inter-state dispute settlement mechanisms provided.[235]

It is inaccurate to dismiss standard-setting in technocratic IOs as demonstrative of coordination games, if this is meant to signal that such regimes encompass only politically non-controversial matters softly enforced. There are complex governmental and commercial interests implicated in regimes such as those governing the transshipment of nuclear materials, dangerous pesticides or hazardous waste, or the labeling of food intended for the lucrative international food trade. As Walter Mattli and Tim Buthe have argued, merely because states entrust some decisions to epistemic communities of scientists and other professionals does not mean that "technical rationality trumps power."[236] Merely because standards in many of these IOs appear to involve technical issues does not mean that they are shielded from political or commercial concerns or that, as where experts from developed states dominate, the concerns of those states do not receive prominence. It is risky to assume that knowledge is uncontested even in technical fields and "cannot be instrumentalized for other ends."[237] Even internal decisions within such regimes, such as whether to delegate authority to an expert body

[233] *See* Fidler, *supra* note 106. Interestingly enough, as Fidler points out, the WHO's decision to issue public travel advisories, with serious economic consequences, directed at Hong Kong, Taiwan, China, and Canada, were undertaken without formal decisions or recommendations authorizing its actions.

[234] *See, e.g.*, Lyuba Zarsky, "Environmental Norms in the Asia-Pacific Economic Cooperation Forum," in Shelton, ed., *supra* note 103, at 303 (discussing unsuccessful soft environmental efforts in the 1990s in APEC). *See also* Edith Brown Weiss, "Conclusions: Understanding Compliance with Soft Law," in Shelton, ed., *supra* note 103, at 535, 545–6 (identifying the significance of institutional factors in achieving compliance with soft norms).

[235] This has been the case, for example, in human rights treaty regimes. The inter-state dispute settlement provisions provided in the ICCPR, for example, have rarely been invoked. International interpretation of that Convention has resulted, in the usual case, from individual petitions brought under its optional protocol. *See, e.g.*, Louis Henkin et al., *Human Rights* at 491–515 (New York: Foundation Press, 1999).

[236] *See* Walter Mattli and Tim Buthe, "Setting International Standards: Technological Rationality or Primacy of Power?," 56 *World Pol.* 1, at 13 (October 2003). *See also* Leive, *supra* note 103, at 552 (noting that to the extent that the work of expert bodies in the health, food, and meteorological regimes is not performed by international secretariats, they can be dominated by the more developed member states).

[237] Mattli and Buthe, *supra* note 236, at 15. *See also* Leive, *supra* note 103, at 583 (noting the "entangled combinations" of technical, economic, administrative, and political aspects of the food, meteorological, and health regimes and pointing out that decisions taken in these regimes have financial and operational consequences). Leive points out, for example, that deciding the acceptable toxicological aspects of food additives for purposes of the Codex is a highly complex, political decision combining both the application of expert knowledge and the exercise of policy judgments. *Id.*, at 583–4.

composed of governmental representatives or one that includes members of industry, is a political, contested question. Even technocratic organizations and organs within them serve strategic, and possibly hegemonic, interests.[238] Certainly the U.S. would never consider ceding its privileged seat on ICAO's 36-member Council, for example, given the economic and political stakes embedded in the international aviation regime.

The dismissal of some IOs because they allegedly do not involve "high" politics also fails to consider the phenomenon of mission creep. ICAO serves as a reminder that even technocratic organizations sometimes find themselves engaged in seriously contested matters of high politics. That organization has been the site of highly visible controversies over powerful states' use of force against civilian airliners. During the course of such disputes, the ICAO's Council, not usually described as a political body, behaved in ways that are difficult to distinguish from the interpretative, promotional, and quasi-adjudicative modes of the Security Council. When the former Soviet Union shot down a plane that it claimed was either a military aircraft or on a spy mission that strayed over its airspace in 1983, ICAO conducted an investigation that concluded, among other things, that there was no evidence that the Soviet Union had engaged in visual identification procedures that would have clearly demonstrated that a civilian airliner was involved.[239] As a result, the ICAO Council "condemned" the action and the failure to cooperate thereafter.[240] When the United States shot down an Iranian airbus in 1988, again claiming mistake, the subsequent ICAO investigation refrained from findings that were tantamount to conclusions of law but nonetheless noted that the U.S. warnings to the plane were not on the proper frequencies likely to be monitored by a civilian airliner and were not in conformity with ICAO standards.[241] In that instance, the Council only "deeply deplored" the "tragic incident."[242] As with respect to some of the actions of the Security Council, these actions had legal consequences. In the wake of these cases, the Council's recommended amendment to the Chicago Convention, article 3 *bis*, indicating, *inter alia*, that "every State must refrain from resorting to the use of weapons against civil aircraft in flight," is now regarded, by many observers, as customary international law.[243] These incidents appear to have clarified the rules of use of force, the application of aviation law, and even perhaps certain rules of state responsibility in ways that may be binding even on non-members of ICAO.[244]

[238] *See, e.g.*, Peter Ateh-Afac Fossungu, "The ICAO Assembly: The Most Unsupreme of Supreme Organs in the United Nations System? A Critical Analysis of Assembly Sessions," 26 *Transp. L. J.* 1 at 27 (1998–9) (noting that control of international aviation has become "strategic and vital to a state's hegemonic and economic interests")(footnotes omitted).

[239] Kirgis, *supra* note 31, at 469–71.

[240] ICAO Council Resolution on Korean Airliner Incident, March 6, 1984, ICAO Doc. 9442-C/1082, at 10 (1984), 23 *ILM* 937 (1984).

[241] Kirgis, *supra* note 31, at 471–5.

[242] ICAO Council Resolution on Iran Airbus Incident, March 17, 1989, 28 *ILM* 898 (1989).

[243] Article 3 bis(a), Convention on International Civil Aviation, *supra* note 124 (entered into force October 1, 1998).

[244] *See, e.g.*, Kirgis, *supra* note 31, at 471. The U.S. offered to pay an indemnification to surviving family members of the Iranian plane that it had shot down. It argued that such payments were provided on an *ex gratia* basis (without acknowledging legal liability) and were not payable to the

As is addressed in later chapters, ICAO also has been the chosen venue for the negotiation of numerous counter-terrorism conventions, most recently a Convention on the Marking of Plastic Explosives for the Purpose of Detention that permits an expert International Explosives Technical Commission appointed by the ICAO Council to recommend amendments to its technical annex.[245] As this suggests, ICAO has long been associated with counter-terrorism and security concerns (the subject of Annex 17 of its SARPs), and has deployed the full range of managerial techniques on this high-profile and sensitive issue. This includes periodic re-assessment of standards, the issuance of policy manuals to provide guidance on implementation, training programs on aviation security, networking initiatives among relevant aviation and security experts, and cooperative ventures with states, other IOs, and private companies through "regional aviation security partnerships."[246]

Closer examination of the range of ICAO's activities reveals that it is also an organization whose interest in sustainable development overlaps with other legal regimes. ICAO attempts to provide a comprehensive "code of international air law" that encourages and promotes a sector that states regard as vital economically and politically. That code includes rules dealing with the international recognition of property rights in aircraft, damage done by aircraft to third parties, the liability of the air carrier to its passengers, crimes committed on board aircraft and in international airports, and other forms of unlawful interference with civil aviation.[247] The organization's standard-setting and technical assistance programs intersect with the work of other IOs that deal with development and equity issues, the transport of hazardous materials, the environment, and the regulation of trans-boundary services.[248] ICAO lawyers have to coordinate with specialists in national commercial aviation laws, WTO specialists in trade in services, and economists engaged in policy dialogues with developing countries. Its facilitation efforts, reflected in Annex 9 of its SARPs, involve the organization in increasingly

Iranian government. Iran brought a claim in the ICJ challenging these contentions, but this claim was ultimately dismissed at the request of the parties upon settlement. *See, e.g.*, Harold G. Maier, "Ex Gratia Payments and the Iranian Airline Tragedy," 83 *AJIL* 325 (1989); Application of Iran in Aerial Incident Case, May 17, 1989, 28 *ILM* 843 (1989).

[245] Articles V–VII Convention on the Marking of Plastic Explosives for the Purpose of Detection, 30 *ILM* 726. (Parties to the Convention can opt out of such amendments if they express a timely objection.) *Id.*, Article VII.

[246] *See, e.g.*, the Security Manual for Safeguarding Civil Aviation Against Acts of Unlawful Interference (ICAO Doc. 8973/5, 6th edn., 2004)(containing guidance material on the interpretation and implementation of the SARPs of Annex 17). For an overview of the Aviation Security Mechanism and the 2002 Plan of Action, see http://www.icao.int/cgi/goto_atb.pl?icao/en/atb/avsec/overview.htm.

[247] *See, e.g.*, ICAO's aims at www.icao.int/icao/en/aimstext.htm.

[248] *See, e.g.*, Annex 18 to the ICAO Convention on the Safe Transport of Dangerous Goods by Air, 3rd edn., July 2001, as amended July 14, 2003 (text at http://www.icao.int/cgi/anx/anx18.pl) (dealing with the safe transport of dangerous goods by air); Annex 16, SARPs (July 1993, as amended March 2003)(dealing with aircraft noise (Vol. I) and engine emissions (Vol. II)). ICAO is also becoming more concerned with the effect of aircrafts on greenhouse emissions and ozone layer depletion. *See* Memorandum on Civil Aviation and the Environment (see text at http://www.icao.org/icao/en/env/index.htm).

sensitive questions concerning harmonized rules for essential travel documents, the liberalization of visa requirements and entry procedures for visitors, and even the development of machine-readable passports.[249] Its funds for technical assistance and capacity-building have been used, among other things, to establish and organize national departments of civil aviation, national inter-governmental agencies to operate air navigation services, civil aviation development plans, and civil aviation laws.

It would not be accurate then to contend that the IOs discussed in this section are spared the tensions between power and law that bedevil the activities of the Security Council.[250] Politics plays a role in determining the types of regulatory activity with which these IOs are involved. It helps to explain as well the gaps in international regulation: the places where global IOs have been forbidden to go. In the late 1970s and early 1980s, for example, there was considerable alarm within the Reagan Administration concerning proposals for what then U.S. Ambassador to the UN, Jeanne Kirkpatrick, dubbed "The New Regulatory Order."[251] That Administration, joined by many U.S. business interests, helped to defeat IO efforts for codes of conduct or other initiatives that were seen as hostile to business or to the free market or were perceived as seeking a global redistribution of wealth under a New International Economic Order. These efforts included the original deep seabed mining in the Law of the Sea Convention and codes of conduct for multinational corporations, restrictive business practices, consumer protection, the transfer of technology to developing countries, and trans-border data flows, as well as the one code that was adopted despite the opposition of the Administration, the WHO Code on Marketing Breast-Milk Substitutes. Reagan Administration officials sought, usually successfully, to defeat these efforts by encouraging alternatives, such as self-regulation by industry. In other cases, they helped shift negotiations to more favorable IO venues, such as to the OECD (as with respect to guidelines for multinational corporations), INTELSAT (with respect to regulation over the geostationary orbit), or the WTO (as with respect to intellectual property). Reagan Administration officials argued at the time that regulatory efforts, even by technocratic organizations like the FAO (then interested in regulating ownership in seeds, for example), were tainted by politicized common precepts, such as the principle that there were some resources in the world that ought not be subject to appropriation by private industry on a "first come, first served" basis but were part of the "common heritage."[252] It is important to recollect this recent history, especially when some suggest that current modes of technocratic regulation, now

[249] *See, e.g.*, Memorandum on Status of Annex 9 (Facilitation) and Related Guidance Material, http://www.icao.org/icao/en/atb/fal/annex-9-status.htm.

[250] ICAO is not the only UN specialized agency whose "technocratic" responsibilities overlap with other legal regimes, including some of obvious political import, such as international trade and development. For a comparable account of the cross-disciplinary nature of the work of the FAO, see, e.g., Dobbert, *supra* note 120.

[251] Jeanne J. Kirkpatrick, "Foreword," in Adelman, *supra* note 211, at xi.

[252] Carol C. Adelman, "Introduction," in Adelman, *supra* note 211, at xv, xxiii.

usually favored by the wealthy countries in the West, do not have an ideological content or reflect non-controversial common purposes reflective of mere consideration games.[253]

Fortunately, sterile debates about the relative merits of managerial models for compliance are now giving way to a closer look at the emerging global administrative process. Examination of the techniques for implementation and compliance now being used and developed within and among these IOs suggests the prospect for fruitful collaborations between students of administrative law and international law. To the extent institutionalized approaches emphasize the need to provide parties with leeway with respect to compliance or cooperation instead of confrontation, such approaches tend to be associated with regulatory forms of enforcement that, in general, stress the prevention of problems rather than reparations after the fact, permit multiple parties to become involved in the promulgation as well as implementation of norms, and use adjudicative methods of enforcement only as a last resort.[254]

Many of those who examine national administrative law in the U.S. at the federal and state levels, as well as regulatory techniques within the European Union, describe a "new paradigm" for regulation in national law with such characteristics. They describe national administrative processes that incorporate many of IO techniques surveyed in this section and by the Chayes and Chayes "managerial" model. The new forms of national and EU regulation that scholars are now praising as new forms of "soft law," "collaborative governance," "democratic experimentalism," "responsive regulation," or "regulatory pluralism," are less novel to those familiar with IOs.[255] Out of necessity as well as conviction, those who designed many IO standard-setting processes departed from command-and-control, top-down forms of regulation. In other cases, such departures occurred without advance planning or design but merely from the haphazard actions of bureaucrats trying to resolve certain problems (such as getting the IO's bills paid). IOs have, as the Chayes recognized, long resorted to some of the same flexible, non-coercive, and decentralized techniques that now increasingly appear within national administrative law, including public/private partnerships, modes of self-regulation, disclosure regimes, modes of subsidiarity, and on-going benchmarking as an alternative to before and after the fact judicial judgments.[256] As is suggested by Chapter 3 and by this chapter, all of these tools for national administrative law have their IO equivalents, for example, IO/NGO joint implementation efforts, IO-generated codes of conduct, reliance on disclosure and reporting obligations in place of hard dispute settlement, and regimes containing common but flexible or differentiated obligations. The result is that today many administrative lawyers

[253] *See* Leive, *supra* note 103. *See also* Chapter 10.

[254] *See, e.g.*, Boyle, *supra* note 110, at 912.

[255] *See generally* Orly Lobel, "The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought," 89 *Minn. L. Rev.* 262 (2005).

[256] *See, e.g.*, *id.*, at Table 2.

working within national systems, as well as international lawyers, are dealing with common approaches to standard-setting that are more open to diverse participants (apart from governments) and more likely to emerge from "bottom-up" modes of collaboration.

4.4 Interim Conclusions

The work of the UN's political bodies renders the UN Charter a less than reliable guide for lawyers. The collapse between forms of internal/external law-making, the diverse legal impacts of some GA resolutions, and the developing powers of the Security Council are not apparent on the face of the Charter. Entire areas of UN-developed law, from peacekeeping to Security Council-generated legislation, suggest that Organization's considerable "mission creep" both in terms of subject matter and the normative powers of its organs.

The work of the UN's political bodies renders questionable the three general propositions about the characteristics of IO law-making stated at the end of Section 3.1. It is not clear whether UN-generated law is solidly premised on treaty law, if by this is meant law based on demonstrable consent and subject to the rules of the familiar Vienna Convention on the Law of Treaties. Nor is it clear that UN political organs adhere in practice to the differentiated, circumscribed, and enumerated powers granted to each in the UN Charter. Finally, the distinction between external law-making capacity, rarely authorized and even more rarely deployed, and internal law-making, collapses the more closely we look at it, even with respect to classic "internal" rules on budgeting or the rights and duties resulting from legal personality. The final nostrum in Section 3.1—the realist proposition that IOs' law-making powers are negligible as compared to states—also appears in need of qualification. At least the recent activities of the UN Security Council, if nothing else, suggest that "global law" may not be such a fiction after all. For some states in the world—and perhaps for all except those wielding a Council veto—it is no longer tenable to suggest that they continue to wield more law-making power than any international organization.

The charters or constitutions of other IOs also prove to be poor guides to how they engage in standard-setting. Other IOs with global aspirations reveal considerable deviations from strict forms of consent such as one state/one vote, the development of institutional powers nowhere expressly enumerated, a decided preference for various forms of soft law difficult to encompass within traditional sources of international law, a tendency to expand institutional missions beyond those foreseen in original charter mandates, dynamic forms of IO/IO interaction not explicitly licensed by charter or treaty, dynamic forms of interaction between IOs and other actors (individuals, NGOs, and multinational corporations) not licensed by charter or even general international law since these other non-state actors are not even recognized international legal persons, reliance on both expert-generated and

more political forms of regulation (sometimes in combination), and resorts to various forms of non-judicial forms of interpretation and enforcement, including by international civil servants who, in theory, at least, do not owe allegiance to any government.

The positivist doctrine of sources that underlies the flawed general propositions about IO law-making at the end of Chapter 3's survey of charter provisions appears to be an unequally unreliable guide to IO law-making. It is not just that the many forms of institutional soft law canvassed in this and the prior chapter are not mentioned in article 38 of the ICJ. It is that attempts to shoehorn IO modes of standard-setting into the familiar three sources of international legal obligation do not do justice to the complex and creative law-making techniques now being deployed. IOs and the lawyers who work for them do not always care about whether the standards that they are elaborating are formally binding. Although the doctrine of article 38 sources recognizes no "in-between" category in terms of legally binding effect, this is the category in which much of the regulatory work product of these IOs fits. While ultimately some of these IO standards (from SARPs to the Codex standards to aspects of the Doha Declarations) might be recognized as having legally binding effect, as where a state decides to incorporate these within its domestic law, we cannot always count on relevant actors to clarify these matters merely to please the positivists among us.[257] Neither states nor their organizations will always be willing to resolve quandaries as to the legal status of IO-generated norms—especially if those that produce such rules perceive benefits from ambiguous legal effect. There is a need to have recourse to the notion of soft law or some functional equivalent to describe the ambiguous authoritative authority of many IO products.

Describing GA or ILO resolutions as potential catalysts for generating customary law, perhaps the most popular way of describing their legal effect, does not begin to describe the diverse declarative, interpretative, condemnatory, or other functions of this kind of IO action.[258] It fails to capture the unique qualities of this or other forms of IO law-making. The suggestion that IO normative outputs such as GA resolutions or codes of conduct matter only to the extent they provide grist for fully fledged article 38 sources of law but not yet the full sausage, suggests that questions of binding effect will be resolved in the fullness of time. This misleads first because, even assuming that the problem is only a matter of time, it tells us little about what to do in the meantime. It fails to fully describe or account for the unique qualities of IO norms during this transitional period—a period that experience suggests may

[257] *See* Buergenthal, *supra* note 126, at 101–12 (citing various examples of ICAO SARPs being incorporated into hard national law).

[258] *See, e.g.*, *American Law Institute Restatement of the Law (Third) of the Foreign Relations of the United States* (1987), sec. 103, comment c (stating that declaratory resolutions of universal international organizations, "if not controversial and if adopted by consensus or virtual unanimity, are given substantial weight" in proving the existence of international law) and sec. 102, comment i (noting that some multilateral agreements may contribute to custom, and thus be binding on non-parties, where the agreement is "designed for adherence by states generally, is widely accepted, and is not rejected by a significant number of important states").

last decades. Secondly, soft law is not just law in transition. Many IO products are either designed to or in fact remain in an ambiguous posture both in terms of pedigree and effect. Indeed, this helps explain their diverse impact, including the effects on non-state actors not usually bound by state-centric sources of law.

What IOs do and how they engage one another as well as other actors, including states and NGOs, constitute dynamic law-making processes unique to the age of international organization. That organs as different as the UN General Assembly and the ICAO Council engage in standard-setting is only partly due to the powers that have been given to each of these bodies. All IOs need to be understood through their politics as well as their constitutive instruments. These organs engage in law-making to the extent that they have come to represent unique organs for collective action with distinct claims to legitimacy.

The GA, acting as a collective deliberative body, cannot be equated to the actions of the contracting parties of a bilateral treaty.[259] The GA, the "only universal organization of broad competence,"[260] is something distinct from the actions of states writ large. Its declarations of law, successful or not, reflect the views of a collective. They are not, for better or worse, the functional equivalent of diplomatic correspondence intended to reflect the *opinio juris* of individual foreign ministries, as in the traditional conception of the evolution of custom. Neither does the action of states in voting in favor of particular resolutions constitute "practice" comparable to the actions and reactions of states in forming custom.[261] But the fact that what states do within the GA is not comparable to *opinio juris* or state practice as traditionally understood does not mean that some GA resolutions do not have normative effects of interest to lawyers.

Customary international rules were said to emerge, under the traditional formulation, when there was (1) concordant practice by a number of states with reference to a situation within the domain of international relations, (2) continuation or repetition of that practice over a considerable period of time, (3) conception that the practice is required by or is consistent with law, and (4) general acquiescence in the practice by other states.[262] GA resolutions appear ideally suited to meet (and exceed) these requirements in an expeditious and efficient manner. They correct the various difficulties that result from the four enumerated criteria: namely, that custom is unintentional, unconscious, disorderly, uncertain in its form, uneven or unequal in who participates in its formation, and tediously slow to develop.[263] The GA's practice, along with that of other UN organs, helps

[259] For a description of the unique interactions between law and politics created by the dynamics between these bodies in the work of the GA, see María Del Luján Flores, "The Role of Law in the U.N. Decision-Making Process of the Sixth Committee of the General Assembly," 27 *NYU J. Int'l L. & Pol.* 611 (1995).

[260] Klabbers, *supra* note 207, at 211.

[261] *See, e.g.*, *id.*, at 209 (suggesting that at best the practice of states in the Assembly relates to the practice of debating and voting and not much else).

[262] Frederic C. Kirgis, "Custom on a Sliding Scale," 81 *AJIL* 146, at 146 (1987)(citing Manley Hudson *circa* 1950).

[263] *See, e.g.*, "Comments by E. Jimenez de Arechaga," in Antonio Cassese and Joseph H. H. Weiler, eds., *Change and Stability in International Law-Making*, at 1 (Berlin, Germany: Walter de Gruyter, 1988).

define what is within the "domain of foreign relations" for purposes of rule 1. The "concordant practice" of states, which formerly needed to be collected and assembled by dutiful historians from among those relatively few states that manage to make available an accessible record of their relevant practice, now has a focal point: what states say and do in the GA itself. The repetition of practice for purposes of rule 2, which understandably used to require decades if not centuries to accumulate given the need for states to become aware of each other's actions and to react on a bilateral basis, now can occur nearly automatically, especially when the matter is subject to a renewed call for attention as an annual agenda item in the GA. Moreover, rules 1 and 2 presuppose that the nascent practices take a form that makes them suitable for transformation into a rule of law—that there must be sufficient expression in a legal form.[264] While this posed difficulties when the haphazard practices of states failed to take the form that lawyers expect (but consisted of, for example, diplomatic correspondence that did not set forth a clearly articulated legal rule), the problem is considerably reduced when the GA casts its purported rule in precisely this form. For similar reasons, GA resolutions can be an efficient mechanism for finding rule 3's *opinio juris*, especially as compared to the annoying tendency of states to omit any discussion of the concept in their bilateral diplomatic discourse. Fulfilling the expectations of rule 4's general acquiescence is considerably reduced as well when all states are present and participating in now readily discernible repetition of the relevant practice. The prospect that only those states powerful enough to engage in the relevant practice or to protest (or rich enough to make a record of either) will be counted is also lessened by the GA's more egalitarian structure and processes. Thanks to the GA, all states have a transparent and accessible centralized forum in which to react. Related problems, such as discerning the prospect of likely objectors, are considerably reduced as well since they, too, are present and given fair notice of the need to persistently object.[265]

As is suggested by the disputes over the classification of GA resolutions canvassed in Chapter 3, not all agree with this rosy picture. The strict positivist contends that Assembly norm-setting practices wreak havoc on custom. Practice and *opinio juris* across decades or centuries merge and become mere verbal texts adopted within one or a few GA sessions. The texts that give "legal form" to the proposed rule result not from diplomatic wrangling over a concrete dispute grounded in specific facts and limited to them, but from disembodied formulations no different from those proposed by a publicist spinning fantasies in space. Diplomatic objections to the proposed rule or considered refusals to join general acquiescence become rare occasions when UN members, perhaps on the advice of their lawyers, dare to disturb consensus by abstaining or voting against, without being able to indicate the reasons why.

These debates are not resolvable if article 38 sources of law continue to be the touchstone for legal effect. The forms of IO-generated "new custom" may simply

[264] *See, e.g.*, H. Meijers, How is International Law Made?—The Stages of Growth of International Law and the Use of its Customary Rules, 3, 9 *Netherlands Yrbk. Int'l L.* 3, at 14 (1978).

[265] For suggestions along the lines of this paragraph, see Meijers, *supra* note 264.

be unlike the old in terms of how they emerge, the degree of intentionality required of individual member states, the time needed for their formulation, or their relationship to the new kinds of multilateral treaties. Alternatively, as ICJ Judge M. Sörenson has noted in connection with the impact on general principles of law of modern codification processes, "the word 'custom,' with its traditional time connotation, may not even be an adequate expression for the purpose of describing this particular source of law."[266]

The legitimating force of IO bodies stems from different factors. In the case of the UN General Assembly, legitimacy stems largely from its claim to represent all the nations of the world. The legitimacy of the Security Council lies, as noted, at least partly in the authority it wields because of the military and economic powers of the states that have the veto.[267] In the case of the ICAO Council, which is the real power within that organization, its legitimacy derives from the fact that its thirty-six members include those with greatest interests in (and influence over) international civil aviation. The ICAO Council's legitimacy lies with the power it has over a specific domain.[268] And none of these bodies has the kind of legitimacy that can be claimed by one of ICAO's expert groups or the ILC, whose legitimacy is premised on their respective niches within broader epistemic communities of transnational experts on particular subjects.

The interaction of these unique organs with each other and with other ostensible representatives of the "international community" (each with their own claims to legitimacy and expertise), such as IO secretariats and NGOs, produces a new kind of international law. It has been labeled in various ways: a new kind of "supranational" law, "world law," "declaratory law," "universal international law," "*ius gentium*."[269] Regardless of the label, those willing to look beyond the article 38 sources have been able to see law produced by a different set of actors reacting to each other in different ways than was possible in the 19th century before the age of formal IOs. IO-generated law is sometimes premised solely on normatively softer forms of legal obligation (such as some GA resolutions); but it can also emerge from the incidental normative ripples of binding action on the so-called internal plane of IOs (such as the legalization of peacekeeping in the course of affirming the GA's power over the UN purse). It can purport to bind all states at all times without

[266] *North Sea Continental Shelf Cases* Judgment of 20 February 1969, 1969 ICJ Rep. 3, 244.

[267] *See generally* David D. Caron, "The Legitimacy of the Collective Authority of the Security Council," 87 *AJIL* 55 (1993).

[268] *But see* Fossungu, *supra* note 238 (critiquing the unrepresentative nature of ICAO standard-setting and recommending challenges to the Assembly, including more frequent sessions).

[269] *See, e.g.*, John W. Head, "Supranational Law: How the Move toward Multilateral Solutions is Changing the Character of 'International' Law," 42 *U. Kan. L. Rev.* 605 (1994)(describing new kind of "supranational" law); Benedict Kingsbury, "The Emergence of Global Administrative Law," *L. and Contemp. Probs.* (forthcoming 2005)(*ius gentium*); Jost Delbruck, "Prospects for a 'World (Internal) Law'?," 9 *Ind. J. Global Leg. Stud.* 401 (2002)(world law); Louis Sohn, "Ways to World Law," *The Federalist* 13 (March 1952)(world law); Jonathan I. Charney, "Universal International Law," 87 *AJIL* 529 (1993)(universal international law); Hiram E. Chodesh, "Neither Treaty nor Custom: The Emergence of Declarative International Law," 26 *Tex. J. Int'l L.* 87 (1991)(declarative international law).

respect to pre-existing rules of treaty or custom (as in the case of some Security Council actions) or it can appear only to impose a duty to report (as in the case of ICAO SARPs). It may not even be primarily directed at states at all (as in the WHO's Code on Marketing Breast-Milk Substitutes).

The picture that emerges is of many IO organs, not just a select few, acting as law-makers in some sense, even though few of them are given explicit authority to legislate or to recommend, and even though much of their work product does not fit easily into the classic sources of international obligation. This in turn raises a classic theme: an inherent, somewhat paradoxical, tension between the formal independence or sovereignty of states and the limits that can be said to emerge on their authority through their membership in IOs.[270] To the extent IO law-making limits state sovereignty, such limits appear to be self-imposed since states voluntarily consented to participation in these organizations and all of these IOs were created by states to serve their needs, including needs for security, territorial integrity, and independence.[271] Much of what IOs do is intended to strengthen national governance by making national efforts more effective.[272] In many, perhaps most ways, IOs do not *subdue* governments as much as *assist* them. Yet IOs are regarded, simultaneously, as the servants, agents, or instruments of governments *and* as a challenge to their authority. To say that IOs' evolving powers constitute an "extension of their authority over governments" does not seem wholly accurate when governments are, through their actions within these organizations, effectively extending their own authority vis-à-vis each other.[273]

Upon reflection, this tension is neither surprising nor unusual. When individuals enter into a contract they simultaneously constrain themselves *and* exercise their individual initiative. IOs' capacity to serve as both agents of states and, on occasion, their masters arises from their separate existence, their relative autonomy, and the sheer passage of time. While it remains formally true that states, by entering into the charters that establish these organizations, have given their consent to everything that an IO does (at least to the extent than an organization is not acting *ultra vires*), this consent, like the consent given by the governed in national constitutions, tends to have been given some time ago, often under strikingly different circumstances (such as the existence of the Cold War), and often in contexts where it was not entirely clear that all states gave their consent equally willingly and were equally able to influence the final charter that established the organization.[274] That organizational creations so often surprise those that create

[270] *See, e.g.*, Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity Within Diversity* at 2 (The Hague and Boston: M. Nijhoff, 4th edn., 2003).

[271] *See, e.g.*, OAS Charter, article 1; UN Charter, Articles 1–2.

[272] *Id.*

[273] Luard, *supra* note 103, at 310–11.

[274] Nonetheless, state "consent" remains essential to IO authority—as much as democratic rule within states is said to rely on the "consent of the governed." For a trenchant critique of traditional international lawyers' reliance on notions of consent, see Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* at 270–91 (Helsinki: Lakimiesliiton Kustannus, 1989).

them results from the various forms of explicit and implicit delegations of authority contained in IO charters coupled with teleological forms of charter interpretation.[275] Delegations of law-making capacity may emerge from seemingly innocuous charter provisions. Who would have guessed that a clause delegating administrative, internal responsibilities to an international civil service recognized to be independent from the nation states that contribute to it would provide a fundamental premise for the conclusion that the organization is capable of espousing a claim on the international level, as do states? Yet this was the conclusion reached by the ICJ in the *Reparation for Injuries case*. And that case, in turn, formed the basis for the general conclusion that IOs are international legal persons. As is suggested in Chapter 3, it now appears increasingly plausible to articulate additional rules that derive, in the absence of express agreement to the contrary, from these organizations' status as international persons. As international persons, IOs are presumptively entitled to some of the other rights normally given only to states, including the right to conclude treaties, and to claim immunity from the jurisdiction of national courts, if these can be reasonably said to arise as a matter of "functional necessity."

IO law-making powers have expanded because their agents and organs have been given the benefit of a presumption—itself a creator of international institutional law—that they can accomplish legally whatever furthers a legitimate organizational purpose. As is shown by the risks of Council-generated hegemonic international law, this principle is problematic. Pushed to its farthest extreme it is destructive of the rule of law itself. It presumes, wrongly, that international organizations are invariably a good thing: that furthering their functioning, even by permitting them to expand their missions beyond that which was originally envisioned, always promotes world order and stability.[276]

It is also true that just as some states are more powerful than others, some IOs have shown a greater tendency to extend their law-making powers more than others, while some (most prominently the UN's Security Council) have even purported to extend their authority to entities that were not parties to them, from non-members of the UN, to non-state actors, including NGOs, TNCs, and even individuals.[277] As this suggests, IOs are not mere vessels for the wishes of their state members or, as strict positivists would argue, the mere repositories of state consent. Their relative autonomy from states enables some IOs to take actions

[275] *See generally* A.W.B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford, U.K. and New York: Oxford University Press, 2001) (examining the genesis of the European Convention of Human Rights and noting the many ways that subsequent developments in the wake of such "living instruments" would have surprised those present at its creation within the United Kingdom).

[276] Klabbers, *supra* note 207, at 36–9.

[277] Commentators have sometimes bemoaned the reserve of organizations like the WHO, which have not deployed their quasi-legislative powers as creatively as other IOs have. *See, e.g.*, Forrest, *supra* note 106. But this may be changing. For a description of the WHO's efforts to pursue a legal strategy with respect to tobacco regulation, see Chapter 5.

that individual states or even states as a non-institutionalized group would not be able to take. One state acting alone, even the most powerful, cannot alter what all states expect from each other or the fundamental interpretation of a treaty in the way that some IO organs do through their day-to-day operations.[278] No state acting alone has the legitimacy, for example, of a group of ICAO experts charged with identifying plastic explosives that need to be subjected to close regulation.

At the same time, IOs' relative autonomy from states means that their actions can be criticized for failing to represent the will of all members or of groups within states. Non-representative institutional organs, like the Security Council, or expert bodies, such as those that collaborate to produce the Codex, are subject to capture, either by hegemonic powers or members of industry. Their legitimacy may wane or grow over time, depending on such perceptions, the reactions of other actors (such as the NGOs), or other developments (such as the amendment of their powers via treaty or even institutional dissolution).

IO processes, yet another set of methods by which states acting together make up for the absence of the traditional, more hierarchal and unitary forms of governance evident within nation states, have changed what sovereignty means.[279] Some IOs, such as the UN, the World Bank, regional banks, the IMF, and the WTO, serve as gatekeepers to modern statehood, either assisting or precluding a state from securing the set of rights and responsibilities now essential to remaining an economically and diplomatically viable nation. Others, including the ILO, the WHO, ICAO, IMO, FAO, UNESCO, and more regional organizations, such as the OECD, go further to grease the wheels of statehood, thereby enabling states and their nationals to enjoy rights they would otherwise not have. In the modern world, a state's sovereignty is in large part measured by its institutional affiliations.[280] States in their international relations, as students in the study of law, would be foolish to attempt to travel alone, and few (at least states) do.

[278] *See, e.g.*, Toope, *supra* note 86 (arguing that customary international law is "relatively autonomous" from material power).

[279] *See, e.g.*, Myres S. McDougal and W. Michael Reisman, "The Prescribing Function in the World Constitutive Process: How International Law is Made," in Myres S. McDougal and W. Michael Reisman, eds., *International Law Essays* at 355 (Mineola, NY: Foundation Press, 1981). *See also*, Susan Strange, "*Cave! Hic dragones*: A Critique of Regime Analysis," in Stephen D. Krasner, ed. *International Regimes* 337, at 345 (Ithaca, NY: Cornell University Press, 1983)("a single, recognized locus of power over time is the one attribute that the international system so conspicuously lacks").

[280] For this reason, Abram and Antonia Handler Chayes argue that

> sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life. To be a player, the state must submit to the pressures that international regulations impose . . . Sovereignty, in the end, is status—the vindication of the state's existence as a member of the international system.

Chayes and Chayes, *supra* note 224, at 27.

States also ignore, at their peril, the consequences of the sheer density of international standard-setting now taking place across and among IOs and other non-state actors. Kal Raustiala and David Victor describe the rising density of international institutions as a "regime complex" consisting of partially overlapping and non-hierarchical regimes. They suggest that this complex evinces (1) path dependence, that is, a tendency for existing arrangements in the various regimes to constrain and channel the process of creating rules; (2) considerable forum-shopping as states and other actors seek out the fora most favorable to their interests; (3) inconsistencies between legal regimes leading to consideration of how to handle problems at the "joints" between regimes (e.g., between the WTO and environmental regimes); and (4) a tendency towards reliance on broad aspirational rules that require delegated interpreters and appliers.[281] While not all the IO processes described in this chapter or Chapter 3 reflect these four characteristics, many do. They begin to suggest the complex new environment in which international law-making occurs, a topic that is re-examined in the final chapter of this book, once the role of IOs in treaty-making and dispute settlement is more fully explored.

This chapter and Chapter 3 begin to suggest how the work of IOs has transformed the meaning of Article 2(7) of the UN Charter and therefore the very meaning of sovereignty. Most states find that there is little left of their right to be left entirely alone. This is a world, after all, where the General Assembly, Security Council, and UN Secretary-General have, either singly or jointly, engaged in election assistance, supervision and verification, amidst considerable rhetoric about the "right to democratic governance," and where all three have suggested that a principal goal for the UN ought to be to promote democracy.[282] It is also an epoch, still flush from the West's victory over the Soviet economic model, of increasing IO-sanctioned uniformity with respect to how states are expected to run their economies, even amidst emerging evidence of a new, post-9/11 "clash of civilizations." We live in an age when the same General Assembly that had once sought a New International Economic Order (NIEO) now passes resolutions extolling the virtues of entrepreneurism; where UNCTAD has remade itself into a promoter of foreign direct investment and deregulation policies comparable to those touted by President Ronald Reagan and Prime Minister Margaret Thatcher; where WTO rules requiring liberal trade and enforcement of intellectual property rights extend to the vast majority of the world's population; where much of the developing states that once were prominent advocates for socialist economic models within the Group of 77 have willingly subjected themselves to Thomas Friedman's "Golden Straitjacket" through commitments to the IMF, the World Bank, and other regional banks; and where an extensive web of other treaty bilateral and multilateral commitments, many of which permit foreign investors to submit their complaints of unfair or discriminatory treatment to arbitral

[281] Kal Raustiala and David G. Victor, "The Regime Complex for Plant Genetic Resources," 58 *Int'l Org.* 277, at 279–80 (2004).

[282] *See generally* Malone, *supra* note 16.

institutions such as those organized by ICSID in the World Bank, have created an army of private attorney generals to enforce commitments to respect the principles of an increasingly global free market.[283]

It is a world where even with respect to technocratic regimes governing food, meteorology, and health, in which developing countries are ostensibly equal members, knowledgeable observers report that such countries have had a very limited impact on the resulting rules.[284] And one where, at least on high-profile security issues, such as efforts to counter terrorism and the proliferation of weapons of mass destruction, those with privileged access to the Security Council can legislate for others. As will be discussed in the concluding chapter of this book, these cumulative developments prompt a growing body of IO critics to charge that IOs' highly touted universality is a fraud since they promote an ideology reflecting the interests of developed countries in the West, and particularly of Europe and the United States.[285] Even if that assessment is wrong, it is surely error to suggest that no forms of governance exist at the global level.

For those for whom institutional practice and the general acceptability of what IOs do provides the ultimate test for legality, there are no inherent legal limitations on IOs' powers, apart from the procedural rules clearly established in the underlying charters (such as the need for requisite votes in the proper organ). Once the Security Council has the votes, it has, on this view, untrampled discretion to declare anything (or nothing) a threat or breach of the peace and, since the international community has not defined what an act of aggression actually is, it has pretty much carte blanche to use that label as well, although it has not needed to do so. If the Council goes too far, the anticipated remedy is political, not legal: members should exercise their right of civil disobedience and fail to comply with the Council's demands, even in breach of the Charter. If the Council chooses to authorize sanctions in cases where no sanctions are truly warranted, these will be porous and futile. If it purports to authorize force, perhaps no one will respond (a very real possibility since no standing military agreements whereby states

[283] *See, e.g.*, GA Res. 180 (December 21, 1993) (noting important role of government in encouraging entrepreneurship and facilitating privatization for purposes of economic growth and sustainable development). On the "golden straitjacket," see Thomas L. Friedman, *The Lexus and the Olive Tree*, at 101–10 (New York: Anchor Books, 2000). For a general account of many of these developments, see Wolf, *supra* note 155.

[284] Leive, *supra* note 103, at 588–9 (noting that work of these regimes is formulated in small committees or groups led by the United States, Canada, the Western European countries, and, in the case of the WMO, Russia).

[285] *See generally* Wolf, *supra* note 155, and see *supra* note 207. *But see* Onuma Yasuaki, "The ICJ: An Emperor Without Clothes? International Conflict Resolution, Article 38 of the ICJ Statute and the Sources of International Law," in Nisuke Ando et al., eds., *Vol. 1 Liber Amicorum Judge Shigeru Oda* 191, at 206–7 (The Hague: Kluwer, 2002) (arguing that as compared to "Westcentric" traditional forms of international law, including traditional modes for finding custom, the GA norm-creating process is "far more legitimate" in terms of "global participation, identification of the sovereign will of States, transparency, and other substantive and procedural requirements); Antonio Cassese, *International Law in a Divided World* at 187 (Oxford, U.K.: Clarendon Press, 1986) (discussing how the "old" law played into the hands of stronger states).

commit to supply troops on demand were ever concluded). Such were the arguments presented by the United States in the ICJ when Libya implicitly challenged U.S. actions in the Security Council.[286] For those inclined to this view, the prospect of judicial review over the legality of the Council's actions is ludicrous not merely because the Charter drafters never anticipated such a thing. It is inconceivable because the ICJ (or any other international or national court), even if it did have jurisdiction to decide the matter, would simply have no law to apply since no legal limits exist on a political body authorized to take legally binding action under Chapter VII under Articles 24 and 25.[287]

Others, for whom such discretion is incompatible with the limited purposes for which the UN Charter collective security scheme was established, have attempted to find legal limits on what the Council—and other IOs—can do. For the legalists, the stakes are high indeed. If the Council is unbound by law, the UN is only nine votes away from evolving into a peculiar species of world government—and one largely based on the accident of which five states happened to emerge on top in 1945.

Legalists searching for limits on the Security Council disagree about many things. They do not agree about whether the Council has discretion to take legal action outside Chapter VII, about whether it has unfettered discretion only with respect to deciding whether a situation comes within Article 39, and about what kinds of legal limits apply either with respect to Article 39 determinations or with respect to the ways the Council reacts to actionable threats and breaches of the peace. More generally, as is suggested by the debates over the financing powers of the UN discussed in Chapter 3, those looking for legal limits on IO action disagree about the applicable rules and where they can be found.

Some try to find them in the concept of legal personality as defined by the *Reparation for Injuries case*. Since all legal persons have circumscribed rights and responsibilities under international law and since IOs are not superior to states, they cannot have greater rights than do states and must be subject to at least the same limits as states. They must, on this view, be subject to comparable limits imposed under treaty, custom, and general principles. IOs as legal persons whose rights and duties are derived from states must therefore be assumed to owe core duties that all states owe one another, including those recognized as *jus cogens*, such as the duty to respect states' sovereign equality (implying, for example, the need for equality of arms under international tribunals created by IOs), and rights owed to persons under international humanitarian law and international human rights law. In addition, IOs, like states, must act in good faith.[288]

[286] *See Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (*Libya* v. *United States and United Kingdom*), Request for Indication of Provisional Measures, 1992 ICJ Rep. 3, and 114 (1992).

[287] *See, e.g.*, Hans Kelsen, *The Law of the United Nations*: *A Critical Analysis of its Fundamental Problems* 294 (London: Stevens, 1950).

[288] *See, e.g.*, Elias Davidson, "The UN Security Council's Obligations of Good Faith," 15 *Fla. J. Int'l L.* 541 (2003).

Others turn to the law of state responsibility for guidance to argue, for example, that states injured by IO action can suspend or even terminate their respective obligations, seek compensation, or engage in proportionate counter-measures—as would any state injured by another state's violation of an international legal obligation. Others would argue that the UN—and all IOs or at least those subject to relationship agreements with the UN—are subject to the limits imposed by the Charter itself, or at least its Principles and Purposes. This means at a minimum that IOs need to respect states' rights to self-determination, sovereign equality, political independence, and territorial integrity, and are also required to promote and encourage respect for human rights, including presumably evolving notions of *jus cogens*. Others pin their hopes on the institutional practice of IOs themselves, arguing that prior acceptance of limits on their action binds them as matter of the rules of the organization itself.

PART II

MULTILATERAL TREATY-MAKING

Sovereign states have closely guarded their prerogative to make treaties as between themselves. The same institutional charters that, as discussed in Chapters 2 to 4, have generally refrained from granting IOs general legislative capacity also evince a tendency to deny these IOs a general treaty-making capacity. The charters of IOs with global aspiration do not generally include a general treaty-making clause authorizing these organizations to make any and all treaties that would advance the purposes for which these IOs were established. For the most part, IO charters are silent with respect to delegating treaty-making power, and when they address the issue, their conferral of treaty-making power is closely circumscribed by subject matter. The broadest grant of delegated treaty-making power is arguably contained, as is discussed in Chapter 5, in the Constitution of the International Labor Organization. But even that organization is charged only with the making of international labor conventions, and not treaties on any other subject. The UN Charter's provisions granting specific treaty-making powers to that organization are typical. The broadest delegation of treaty-making power within the UN Charter is conferred on ECOSOC, which is permitted to propose draft conventions on matters within its competence to the General Assembly under Article 62. The other forms of treaty-making envisioned in the Charter relate to treaties between the UN and other legal persons and are much more narrowly defined: relationship agreements with UN specialized agencies under Article 63, trusteeship agreements under the now defunct Trusteeship System under Article 77, and the unused power to conclude special agreements to provide stand-by military forces under Article 43.

Yet, as with respect to the demand for IO-generated forms of standard-setting, the demand for multilateral treaties has stimulated the supply, and IOs have increasingly been relied upon to supply treaties. The UN, as is clear from the following chapters, as well as to a lesser extent other global IOs, has become the venue of choice for a myriad of multilateral treaties. The UN has not been reticent about using its "implied powers" for this purpose. In the case of the UN, as is the case with other IOs, the vehicle for multilateral treaty-making under organizational auspices has been the general power to make recommendations.

The following two chapters canvass how international organizations have changed multilateral treaty-making.

5

International Organizations as Treaty-makers

5.1 Introduction

The presence of international organizations in the modern world has changed the classic mode of international law-making, namely, the negotiation and conclusion of treaties, in at least one respect: such compacts are no longer limited to states as parties but, as discussed in the chapter on legal personality, now include international organizations as parties. In this part we will discuss ways that such organizations have, *other than by becoming parties to treaties themselves*, altered modern multilateral treaty-making.[1]

As of 1995, of some 1,500 multilateral treaties in existence, nearly half were attributable to UN system organizations and the rate of production of new treaties undertaken within the auspices of international organizations appears to be steadily increasing.[2] Indeed, according to Roy Lee, the former head of the Codification Division of the UN's Office of Legal Counsel, a substantial number of the approximately 3,500 meetings undertaken annually within the UN involve some kind of treaty-making activities and that Organization alone has been involved in the conclusion of hundreds of multilateral agreements.[3] From 1970 through 1997, the number of international treaties more than tripled.[4] Some of these agreements are of fundamental importance and since 1945, 38 of these instruments, registered with the UN, have more than half the states of the world

[1] For a thorough discussion of IOs as parties to treaties, see, e.g., Henry Schermers and Niels Blokker, *International Institutional Law: Unity Within Diversity*, at §§81–5, pp. 62–7 (Boston and Leiden: M. Nijhoff, 4th edn., 2003).

[2] Paul C. Szasz, "General Law-Making Processes," in Christopher C. Joyner, ed., *The United Nations and International Law* at 39 (Washington DC: American Society of International Law, and Cambridge, U.K.: Cambridge University Press, 1997).

[3] Roy Lee, "Multilateral Treaty-making and Negotiation Techniques: An Appraisal," in Bin Cheng and Edward D. Brown, eds., *Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger on his 80th Birthday* at 157 (London: Stevens & Sons, 1998).

[4] Stewart Patrick, "Multilateralism and its Discontents: The Causes and Consequences of U.S. Ambivalence," in Stewart Patrick and Shepard Forman, eds., *Multilateralism and U.S. Foreign Policy* at 10 (Boulder, CO: Lynne Rienner Publishers, 2002).

as treaty parties.[5] For this reason, Lee's assessment that the UN is responsible for creating a "gigantic treaty network . . . regulating all major international activities" is scarcely an exaggeration.[6] Whole areas of modern international law, including human rights, would be unimaginable without treaties concluded under IO auspices.[7]

But the conclusion of multilateral conventions in organizational settings does not mean that the "international community" (or subsets of that community) is "legislating" collectively. With the exception of some aspects of "treaty-making with strings attached" discussed in Section 5.2.4 below, treaties concluded under the auspices of IOs remain in form ordinary multilateral treaties within the meaning of the Vienna Convention on the Law of Treaties. States, including members of the organization in which such treaties are concluded, ordinarily retain complete freedom of choice on whether to become parties to such agreements. Accordingly it is hard to disagree with the assessment that organizational treaty-making processes are "not real law-making by international organizations but rather the preparation of inter-state law-making within an international organization."[8] Yet this statement fails to do justice to how the involvement of IOs has changed the relevant actors, the processes, and even the content of multilateral treaties.

Prior to the advent of IOs, the traditional method for treaty-making at the multilateral level involved the convening of ad hoc conferences for such purposes. Multilateral treaty-making in the 19th century required the particular initiative of at least one state sufficiently aroused about an issue that it was willing to devote scarce diplomatic resources to motivate others and convene such a conference on its territory. Usually, the initiator state determined which states to invite. Through such invitations, as well as the establishment of the specific agenda, host states to treaty-making conferences attempted to limit, with some success, the scope of the subsequent negotiations. Once such conferences were convened, success or failure turned on the acumen and leverage exercised by the government representatives present during those negotiations. In accordance with the principle of sovereign equality, decisions were usually taken on the basis of unanimity. Those present determined whether there would be subsequent efforts to complete the treaty or, if the treaty was concluded, whether there would be any procedures for follow-up (such as subsequent efforts to exchange information) or dispute settlement. In the usual case, enforcement was left to reciprocal tit-for-tat action by individual treaty parties; in the usual case it was assumed that parties aggrieved by another's breach

[5] Nico Krisch, Discussion Paper, Conference on U.S. Exceptionalism in Treaty Practice September 29, 2001.

[6] Lee, *supra* note 3, at 158.

[7] *See generally Review of the Multilateral Treaty-Making Process*, UN Doc. ST/LEG/SER.B/21 (1985)(hereinafter "UN Study"). For a survey of UN-sponsored conventions dealing with human rights, see *supra*, at 177–216.

[8] Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* at 277 (London: Sweet & Maxwell, 5th edn., 2001) (quoting Sommer).

would respond by, for example, suspending treaty obligations. Except in unusual circumstances, each multilateral treaty negotiation was a free-standing and ad hoc undertaking, with no necessary connection to other treaty arrangements among all or some of the participants.

As tools for effective treaty-making, 19th century ad hoc conferences had numerous shortcomings. Since they were dependent on the willingness of a particular state host, treaty-making was haphazard and proposals for negotiations on such compacts usually came long after after the need for international regulation had become acute. Even when treaty conferences were convened, there were no guarantees that all states needed to resolve the underlying problem, or that would be affected by any proposed solutions, would be present. Complications could ensue due to the failure either to include as participants all relevant state parties or those interests not adequately represented by the invited delegations. Those invited and present at those conferences could not be sure that the full dimensions of an issue, much less related questions that might be of interest only to some states, would be aired—especially if such issues were deemed outside the scope of the host state's announced agenda or would raise prickly issues from that state's perspective. Since preparations for such conferences were typically left to each state that managed to send a delegation, there was no assurance that negotiations would be based on all available technical or factual data or that all states would have equal access to any such information or to applicable legal precedents. Individuals at such negotiations usually met for the first time at the negotiating site and, given the absence of instantaneous communications, were relatively cut off from their national capitals during the negotiation period. All of these factors led to rigidities in states' negotiating positions.[9]

International organizations were established in part to improve multilateral treaty-making processes.[10] Accordingly, specific provisions within the charters of the UN, its specialized agencies, and a number of regional institutions list, among the functions of these organizations, the conclusion or approval of multilateral conventions. Article 92(3) of the UN Charter is typical, providing that ECOSOC may "prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence." In some cases, as with respect to the FAO, which permits its conference to approve and submit to member states conventions relating to food and agriculture by a two-thirds majority of the votes cast, the provision authorizing organization treaty-making also departs, albeit to a limited extent, from the unanimity rule.[11] Today, even in the absence of an explicit constitutional provision empowering them to formulate

[9] *Id.*, at 3–4.

[10] *See e.g.*, *id.*, at 276 (noting examples of institutional charters that anticipate the preparation of draft conventions).

[11] Article XIV(1), Constitution of the Food and Agriculture Organization of the United Nations, TIAS 1554 (entered into force October 16, 1945). For other examples, see Sands and Klein, *supra* note 8, at 276–7.

draft conventions, IOs generally assume the power to assist in multilateral treaty negotiations—at least when this is not inconsistent with their charters and the proposed subject lies within the organization's mandate. Treaty-making, if not by the international organization as a party, at least as an initiator or convenor, is regarded as one of the usual implied powers for such organizations.[12] Some international organizations—such as the UN itself and the ILO—have become virtual treaty machines.

The dynamics of multilateral treaty-making—and its consequences—have changed dramatically as a result of the involvement of international organizations. Even the casual observer of modern treaty-making recognizes the most obvious of these changes. Modern treaty-making is characterized by more government negotiators present, by more non-state actors of various kinds involved (even if still not permitted to vote), and by ever higher numbers of seemingly "successful" treaty negotiations that create ever more institutions or treaty bodies in their wake. IOs are at least partly responsible for each of these changes.

The 1899 Peace Conference, called by Nicholas II, the Tsar of Russia, largely in part to deal with quantitative restrictions on the armaments that were proving to be a financial strain on his country,[13] involved twenty-six governments, of which twenty were European. None of the six African states that claimed sovereignty were invited.[14] By contrast, the Diplomatic Conference on the Establishment of an International Criminal Court (ICC) in July 1998, convened by the UN and discussed further below, was attended by virtually every nation then claiming sovereign status, namely, 160 states. Whereas an invitation to the 1899 Conference was regarded as a "gift of the Russian government,"[15] invitations to modern treaty-making conferences, at least when issued by organizations aspiring to universal membership such as the UN, are routinely extended even to non-IO members. Invitations to join in multilateral treaty-making efforts are today regarded as matters of sovereign right, unless the treaty is intended to be of merely regional interest.[16]

[12] For discussion of "implied powers," see Chapter 2.

[13] Detlev F. Vagts, "The Hague Conventions and Arms Control," 94 *AJIL* 31, at 33 (2000).

[14] Thus, according to one commentary on the 1899 Peace Conferences, that conference was explicitly non-universalist in perspective and "originated within a context emphasizing the concerns of Europe, and resting on Christian beliefs and Western civilization." David D. Caron, "War and International Adjudication: Reflections on the 1899 Peace Conference," 94 *AJIL* 4, at 6 (2000)(indicating the influence of people like William Ladd who believed that peace could only be established through the teachings of Christianity).

[15] George H. Aldrich and Christine M. Chinkin, "A Century of Achievement and Unfinished Work," 94 *AJIL* 90, at 97 (2000).

[16] Indeed, in some cases, as in the Rome negotiations on the ICC, IOs have provided financial assistance to enable poorer states to participate in treaty negotiations. *See* Roy S. Lee, "Introduction," in Roy S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute* at 9 (Boston and The Hague: Kluwer Law International, 1999) (discussing the GA's Trust Fund established to permit least developed states to participate in the Preparatory Committee as well as the Rome conference on the ICC and which was used by delegates from fifty-two states).

Despite the interests of contemporaneous social groups (including peace movements and humanitarian organizations) in the subjects to be addressed at the 1899 Peace Conference, its organizers kept such non-state actors away from the proceedings and strove for complete secrecy over those exclusively governmental proceedings, issuing few invitations to plenary sessions and even refusing to maintain a transcript of the proceedings.[17] This was not unusual. Matters of inter-state diplomacy were, at least in the 19th century, regarded as confidential inter-state matters. Modern treaty-making under IO auspices, by contrast, is characterized by a much greater openness to the accumulated wisdom, shared experiences, and institutional biases and blind spots, of a variety of actors beyond the government representatives sent to negotiate. The ICC negotiations at Rome in 1998 involved 33 inter-governmental organizations and 236 NGOs. While the ICC negotiations still restricted (at least officially) the formal drafting and voting processes to states, non-state actors were involved at virtually every other level.[18] As is also suggested by the ICC negotiations, modern treaty-making is often characterized as well by the extensive involvement of IO personnel, typically members of its legal staff, who now engage at all stages, from the initiation of draft proposals to post-ratification implementation efforts. The involvement of both IO staff as well as NGOs, undertaken through modern forms of communication, has also led to ever higher levels of openness. As commentators on the ICC negotiations have noted, NGOs took it upon themselves in the course of those negotiations to issue daily broadsheets covering virtually every aspect of the process, including draft proposals for the edification of delegates as well as for millions who stayed abreast of progress through the Internet. These efforts, in turn, put considerable pressures on the government representatives present and may have helped to spur the changes in many governments' positions reflected in the final result: an overwhelming vote in favor of a treaty that on a number of crucial issues, such as jurisdiction, was considerably more expansive (and invasive of "sovereignty") than the initial draft that had been provided by the ILC.

There is also considerably more treaty-making than there used to be, with the plethora of subjects addressed as diverse as the sponsoring IOs involved. Moreover, the sheer number of treaties now being concluded understates the nature of the change in treaty-making. Treaty-making in the age of IOs tends to be ambitious in scope. There are, in the modern age, many more examples comparable to the great treaty-making conferences of 1899 and 1907, with numerous contemporary examples of attempts to progressively develop or codify large (not to say unmanageable) areas of the law in a single undertaking—from

[17] Aldrich and Chinkin, *supra* note 15, at 98.

[18] There have been numerous reports that some delegations from states too resource poor to field a full-scale governmental delegation relied on the considerable assistance and expertise of NGO representatives present. *See*, *e.g.*, Statement by H.E. Mr. Albano L.T. Asmani, United Republic of Tanzania, June 16, 1998 (recognizing the role of NGOs in enabling delegations from Southern Africa to participate more fully in the negotiations for the ICC), from www.un.org/icc/speeches/616urt.htm.

the law of the sea to the prosecution of international crimes. As might be expected, ambitious scope is often accompanied by controversy. More than a few contemporary examples of treaty-making involve topics—from land mines to the regulation of trade—that many governments regard as essential to their national interests. In addition, more treaties than ever before are part of a network of interrelated obligations or evince considerable awareness of prior or concurrent treaty efforts. This too stems in part from the efforts of IOs and "institutional learning." Thanks to the accumulated experience of IO secretariats and other permanent bodies, there is less need to "re-invent the wheel" for purposes of each treaty negotiation. But the expansive aspirations of some of these treaty networks have also led to "constructive ambiguities"—vague provisions intended to paper over differences too great to be solved, at least initially.[19] These ambiguities are often made tolerable by attempts to embed them in yet more institutions that can assist in clarifying them over time. Modern treaty-making is accordingly more likely to rely on permanent institutional mechanisms, especially for purposes of supervision, dispute settlement, and/or amendment or revision.

The changes in treaty-making wrought by the involvement of IOs are canvassed in Sections 5.2 and 5.3 below. Section 5.2 surveys the impact of IOs on the initiation of treaty negotiations while 5.3 describes characteristic modes for concluding treaties under IO auspices. Chapter 6 surveys how IOs have spurred the conclusion of ever higher numbers of multilateral treaties and attempts to evaluate the substantive impact, that is, whether IOs have changed the quality of modern treaties.

A caveat is, however, in order.

Modern treaty-making efforts are built on numerous continuities as well as discontinuities. Even pre-IO treaty-making efforts sometimes provoked the curiosity—and even ire—of members of what we would call today "international civil society." The 1899 Peace Conference, like many modern treaty-making efforts, drew considerable public attention and the tensions that we now sometimes see between members of "international civil society" and negotiating governments were not unknown in the 19th century.[20] Moreover, as the 1899 Peace Conference demonstrates, the agenda for even those ad hoc conferences could never be totally controlled by their principal organizers. Even 19th century treaty-making agendas sometimes proved fluid, as regularly occurs with modern endeavors. The achievements of such conferences could not always be predicted from the outset. Despite Tsar Nicholas's intentions, his Peace Conference did not achieve the quantitative restrictions on armaments that he intended but is best known for other achievements, including planting the seed that would eventually blossom into a Permanent International Court.[21] In addition, reforms in favor of the inclusion of a wider number of states and more flexible approaches to voting

[19] *See* Section 5.3.3 *infra* for more on "managerial" treaties.
[20] Caron, *supra* note 14, at 15.
[21] *Id.*, at 30.

were already underway prior to the advent of modern IOs.[22] By the Second Hague Conference, in 1907, for example, participation had already expanded to include 44 of the then 57 states claiming sovereignty.

In some respects, the more things change the more they have remained the same. As discussed below, the rationales offered today for using "consensus" as the prevalent mode for taking decisions at treaty-making conferences are suggestive of the reasons once given for requiring unanimous affirmative votes at 19th century treaty-making conferences. Pre-IO conferences, such as the 1899 and 1907 Hague Conferences, also inspired basic structural elements still used in today's treaty-making conferences. Those conferences originated the division of business between a plenary of all participants (responsible for adopting a final draft) and more selective sub-commissions (which would report progress on select issues to the plenary). They also proved adept in devising innovative non-treaty instruments that would reflect the sentiments of those present without formally binding them.[23] The 1899 Peace Conference, for example, resorted to an early precursor to what we might call today "soft law," namely, "declarations" that purported to bar certain forms of weaponry or methods of deployment.[24] While these continuities are not the focus of this chapter, they suggest caution in ascribing all aspects of modern treaty-making to the involvement of modern IOs.

5.2 Initiating Treaty Negotiations

As is suggested by a review of the "multilateral treaty-making process" concluded in 1985 within the UN, the wide diversity of processes for initiating treaty negotiations among international organizations makes generalizations difficult.

Proposals to initiate treaty negotiations today may be made by a multitude of actors: governments, IO organs, rapporteurs or others working for IOs (including the secretariat), and NGOs. Thus, the International Convention on the Rights of the Child emerged from a draft resolution introduced by Poland on behalf of a group of states at a meeting of the Commission on Human Rights in 1978; drafting on the "International Bill of Human Rights" (namely the ICESCR and ICCPR) stemmed from an initiative of that Commission in 1947, subsequently endorsed by ECOSOC and the GA; UNESCO's Convention on Discrimination in Education was conceived in a study prepared for the Sub-Commission on Prevention of Discrimination and Protection of Minorities; various human rights organizations successfully lobbied the GA and the Commission on Human Rights

[22] *See*, *e.g.*, Louis Sohn, "Voting Procedures in Early International Conferences for the Codification of International Law," in Gabriel M. Wilner, ed., *Jus et Societas: Essays in Tribute to Wolfgang Friedmann* (The Hague: M. Nijhoff, 1979).

[23] *See* Aldrich and Chinkin, *supra* note 15, at 98.

[24] George H. Aldrich and Christine M. Chinkin, "Symposium: The Hague Peace Conferences, Introduction," 94 *AJIL* 1, at 2 (2000).

for what ultimately became the International Torture Convention. In an age with multiple IOs with overlapping jurisdictions, it is no surprise that proposals initiated in one institution may be taken up in another, that IOs propose treaty-making efforts to one another, and that the initiation of some treaties engage the efforts of more than one IO.[25]

Once a suggestion for a treaty negotiation is made, IOs have various options. In a number of organizations, particularly those with a more firmly structured treaty-making process established by either clear rules (e.g., as within the ILC) or prior practice (e.g., the UN Commission on International Trade Law (UNCITRAL)), pre-initiation studies may be requested before any formal decision is taken to commence formal negotiations.[26] The purposes of such studies vary. In some cases they survey pre-existing laws; in other instances, they elicit the views of states. The general intent is to determine the need for the exercise, the optimum method for approaching the subject, and the prospects for success so as to avoid embarking on legally incoherent, politically non-viable, or likely to be interminable projects. Preliminary studies, prepared by an IO's secretariat or its outside consultants, for example, are usually undertaken before UNEP, the Committee of Ministers of the Council of Europe, or UNESCO respectively decide to embark on a particular topic; such studies also help to determine the relative priority of distinct treaty-making efforts.

The actual initiation of a treaty negotiation may occur on an ad hoc basis, as in the case of most treaty-making processes begun by UN General Assembly resolution recommending a treaty-making conference,[27] or it may be the subject of a formal decision by a specified organ. Whereas the GA adheres to no standard language in this respect and subsequent sessions of the GA may either confirm or cast doubt on the wisdom of a particular negotiation, in the ILO, for example, the placement of an item on the agenda of the International Labor Conference, almost always at the instigation of the Governing Body, is the first serious step in a predictable sequence of events, governed by established ILO procedures that usually yield, within a period of some thirty months, a labor convention adopted at the Conference.[28] Similarly formal is a decision by UNESCO's Executive Board to include a suitable item in the provisional agenda of its General Conference or inclusion of an item in the ILC's or the International Institute for

[25] Although as a formal matter, the UN GA and ECOSOC are entitled to make recommendations to other IOs that the latter may be required to report on, the UN has not used its power of recommendation to suggest any systematic reorganization or even coordination of the international legislative process as a whole. UN Study, *supra* note 7, at 24 (citing UN Charter Articles 58, 62(1), 63(1), and 64). Nonetheless, particular IOs have, on occasion, worked side by side to promote certain treaty efforts. As is discussed further below, for example, the World Bank worked, alongside the IMF and the WHO and within the UN System's Ad Hoc Inter-Agency Task Force on Tobacco Control, on the Framework Convention on Tobacco Control (hereinafter FCTC). *See, e.g.*, Paul C. Szasz, "The World Bank and Tobacco," in Sabine Schlemmer-Schulte and Ko-yung Tung, eds., *Liber Amicorum Ibrahim F. Shihata: International Finance and Development Law* (The Hague, Boston: Kluwer Law International, 2001).

[26] *See infra* at Section 5.2.4.

[27] *See infra* at Section 5.2.1.

[28] *See infra* at Section 5.2.3.

the Unification of Private Law's (UNIDROIT) respective work programs as adopted by the UN General Assembly.[29]

Organizations vary as well with respect to whether formal initiation of a negotiation in effect determines that the final product will be a treaty or some other type of instrument. The UN General Assembly, usually acting upon the recommendation of its Sixth (Legal) Committee, has not been adverse to adopting declarations or other normative texts in advance of formulating a treaty on a particular subject, particularly but not exclusively concerning human rights. While the normative standing of such declarations and of GA resolutions as such are discussed in Chapter 3, a number of GA declarations have been ultimately followed by treaties, including the Universal Declaration of Human Rights, the Declaration on the Elimination of All Forms of Racial Discrimination, the Declaration on the Rights of the Child, the Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment and the Declaration of Principles Governing the Sea-Bed and Ocean Floor and the Subsoil thereof, beyond the Limits of National Jurisdiction.[30] In these cases, it appears that the GA has resorted to pre-treaty declarations for various reasons, including to ameliorate or address a situation pending the more time-consuming treaty negotiation, to serve as a guideline for subsequent treaty negotiations, or to encourage conforming state practice (and perhaps the evolution of custom) before a treaty can be concluded and enters into force. In other instances, however, as with respect to the GA's 1994 Declaration on Measures to Eliminate International Terrorism, no general treaty immediately emerged and the GA's action was probably intended at the time to forestall this outcome.[31]

Other organizations have followed a gradualist approach comparable to what the UN's General Assembly has done with respect to human rights. The OECD took its first steps toward what would eventually become, in 1997, a legally

[29] *See infra* at Section 5.2.2.

[30] *See*, *e.g.*, UN Study, *supra* note 7, at 178. The UN Study also points out that in a number of cases, as with respect to proposed conventions on freedom of information and religious intolerance, the GA deferred consideration of draft conventions submitted to it and opted to adopt declarations on these topics at least initially. *Id.*

[31] *See* Declaration on Measures to Eliminate International Terrorism, GA Res. 49/60 (December 9, 1994) (condemning "all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whoever committed" and proclaiming that all states must refrain from such acts and take effective and resolute measures to eliminate terrorism, including the apprehension, prosecution, or extradition of all perpetrators). Recent UN-sponsored conventions, namely the International Convention for the Suppression of Terrorist Bombings (adopted by the GA on December 15, 1997) and the International Convention for the Suppression of the Financing of Terrorism (adopted by the Assembly on December 9, 1999), suggest a greater willingness by the international community to criminalize "terrorist" acts more generally defined. *See* International Convention for the Suppression of Terrorist Bombings, GA Res. 52/164, (1998) (entered into force May 23, 2001); International Convention for the Suppression of the Financing of Terrorism, GA Res. 54/109, 39 *ILM* 270 (2000). *But see* Arab Convention on the Suppression of Terrorism, issued by the Councils of Arab Ministers of Interior and Justice, Cairo, April 1998, article 2(1)(see note 67, Chapter 4).

binding convention making foreign bribery in pursuit of business a crime through soft (and initially vague) OECD recommendations aimed at transnational bribery in 1994, 1996, and 1997.[32] The U.S., which had raised the prospect of a binding convention on the subject as early as 1988, apparently developed this strategy as a way to overcome initial European resistance to hard regulation.[33] In other organizations, such as UNCTAD and UNCITRAL, considerable work on a topic and, as with respect to UNCTAD's efforts to draft a "code of conduct" for restrictive business practices or the Centre on Transnational Corporations' attempt to negotiate a Code of Conduct for Transnational Corporations, even lengthy negotiations, may precede a decision as to whether the ultimate result would be a binding treaty, a model national law, or merely voluntary international "guidelines" for the use of private actors. In other organizations, however, such as in UNESCO and the ILO, the organization formally decides, before committing itself to serious negotiations or attempts at drafting, whether or not to attempt a legally binding treaty instrument.

As the foregoing implies, there is also considerable variation with respect to whether negotiations will proceed on the basis of an initial working draft. Some organizations routinely entrust the drafting of such texts to a body with a restricted composition, such as a small committee of governmental representatives, an expert group or the secretariat of the sponsoring IO, leaving final consideration to a more representative body (whether a plenary organ or a specially convened conference with a membership that coincides with that of the organization). In other instances—as was the case with the Third United Nations Conference on the Law of the Sea (UNCLOS III)—negotiations may begin without any such drafts and in a principal organ or a widely representative conference which, after an initial set of meetings, establishes various subcommittees to deal with distinct topics. Where a decision is made to proceed on the basis of a working draft, these may be produced by as variegated a group of actors as those involved in initially proposing treaty negotiations. UN organs (or expert bodies within them such as the Sub-Commission on Prevention of Discrimination and the Protection of Minorities) submitted initial drafts for the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the International Convention on the Elimination of All Forms of Racial Discrimination, the ICESCR, the ICCPR, and the International Convention on the Elimination of All Forms of Religious Intolerance. The UN Secretariat submitted initial drafts for the Convention on the Crime of Genocide, the Protocol amending the Slavery Convention, and the Convention on the Non-Applicability of Statutory Limitations to War Crimes

[32] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 37 *ILM* 1 (entered into force February 15, 1999)(29 ratifications as of January 2001). For a description of the evolution of the Convention within the OECD, see Kenneth W. Abbott, "Rule-Making in the WTO: Lessons from the Case of Bribery and Corruption," 4 *J. Int'l Econ. L.* 275 (2001).

[33] Abbott, *supra* note 32, at 280.

and Crimes Against Humanity, for example. Of course, governments remain a principal source of draft texts. Proposals formally presented by an IO organ may amalgamate or bridge conflicting proposals made by governments.

Efforts to produce an initial working text may or may not involve surveying in detail the existing practices of states or soliciting states for draft provisions. When serious efforts to secure the views of as diverse a group of states as are anticipated will become eventual parties occur, such efforts may last anywhere from months to decades. Expert bodies, such as the ILC and UNCITRAL, commonly solicit the views of governments at an early stage in the process. Thus, the ILC, when it decides to undertake work on a given topic, will usually ask the UN Secretary-General to address a request to governments to furnish it with data and information relevant to the topic, which may take the form of texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence, and other materials. The request may also take the form of a questionnaire elaborated by the Commission. The Secretariat systematizes the data gathered, which is typically transmitted to the Special Rapporteur and published as a document of the Commission.[34] UNCITRAL undertook a similar initiative when it finished its original program of work and began to consider new topics in 1976.[35] As a matter of general policy, UNCITRAL will not refer a subject to one of its working groups until after preparatory studies have been made by the Secretariat and these indicate that the subject is suitable for unification and harmonization and that "the preparatory work was sufficiently advanced for a working group to commence work in a profitable manner."[36] But in some cases, as where an ILO questionnaire sent well before negotiation on a convention solicits governmental reactions to precisely worded draft provisions, serious consideration of alternative texts may precede both the compiling of the views of a multitude of states and actual face-to-face negotiations.

* * *

But the seemingly disordered nature by which IOs become involved in initiating treaty-making does not preclude general conclusions about their impact.

First, international organizations have been instrumental in expanding the diversity of actors involved in the initiation of treaty negotiations. Thanks to the use of IOs as venues for treaty-making, it is now far more likely that small or less powerful states will be able to make an impact on the types of issues that are subject to treaty negotiations. Thanks to such venues, such states are also more likely to be able to secure the benefits of a treaty obligation with powerful states. In the absence of IO venues, after all, powerful states remain free to engage bilaterally or multilaterally only with those states with whom they have an interest in contracting. IOs have made multilateral treaty-making processes more truly multilateral, thereby "democratizing," at least in this respect, such processes.

[34] UN Study, *supra* note 7, at 285, para. 42.
[35] *Id.*, at 373, paras. 10–11.
[36] *Id.*, at 374, para. 16 (quoting the Commission's 1978 Report).

Since the establishment of IOs also established these non-state entities as international legal persons with the capacity to engage in many, if not all, of the activities of states, IOs have also made it more likely that other non-state entities (such as NGOs) will become involved in treaty-making. Certain structural aspects of IOs, including provision for access to documents and for "observer" or other forms of non-voting status, have provided entry points for NGOs' growing participation in various forms of inter-state diplomacy, including treaty-making. The subject matter foci of distinct IOs also encourages domestic business interests to direct their lobbying efforts to those IOs (along with relevant domestic government agencies) that are the most promising venues for the initiation of treaty negotiations. Thus, business groups in the U.S. whose competitive interests were threatened by the United States' Foreign Corrupt Practices Act sought to multilateralize the regulation of bribery in the forum most likely to reach their main European and Japanese competitors, the OECD; similarly, a transnational alliance of business leaders anxious to secure enforceable intellectual property rights, dissatisfied with WIPO's efforts, were able to frame the issue as a WTO issue.[37]

In addition, the conception of an "international civil service" as a breed apart, distinct from the governments from which these individuals emerge, has licensed and helped to legitimate the participation of another set of distinct actors in treaty-making. The power of secretariat members to become active in treaty-making, while sometimes explicitly conferred (as in a resolution inviting their participation in the compiling of state views or in drafting an initial negotiating text), has been generally assumed as part of a secretariat's "implied powers." Establishment of various forms of "expert" treaty-drafting bodies, including groups specifically charged with codifying or progressively developing the law, has licensed yet another type of non-state actor, namely, the individual legitimated by his/her expertise and claim to independence from either his/her government or any IO. In other IOs, most notably the ILO, the participation of distinct domestic constituencies or interest groups is built into the constitutional structure of the organization and prevails throughout all or most of its organs or committees. In these additional respects as well, the involvement of IOs in treaty-making has "democratized" the initiation of treaties. The wider diversity of state and non-state actors may help to explain the wider diversity of treaties concluded in the age of IOs, as well as the variety of pressures brought to bear on those governmental representatives who are still, in most respects, at least formally in charge of the initiation of treaty-making.

Secondly, the establishment of IOs has multiplied the options for treaty initiators. Today, the initiation of a multilateral treaty negotiation requires, as a key and crucial

[37] *See* Abbott, *supra* note 32, at 282–3. Abbott goes on to explain that business interests did not pursue their interests in transnational regulation on bribery within the WTO because leveling the playing field against the smaller non-OECD competitors "was not a sufficiently high priority." *Id.*, at 282.

decision, the matter of treaty-making venue. Those intent on negotiating modern international compacts need to decide not just between whether to convene a special ad hoc conference or to resort to a standing IO but also as between different organizational venues or different organs within particular organizations. In recent decades, the international community has confronted a number of such choices in prominent cases. Thus, Kenneth Abbott has surveyed the constraints and opportunities, for both those demanding treaty-making as well as those IOs most likely to supply such opportunities, in connection with treaty efforts on bribery (involving regional IOs such as the OECD, the European Union, the OAS, the Council of Europe, the international financial organizations, and even the UN General Assembly but not the WTO) and intellectual property (WTO over WIPO).[38] Similar choices have emerged in other areas. Should the threat of nuclear proliferation be considered solely in the IAEA or in fora such as the UN General Assembly? Should multilateral arrangements concerning foreign investment be folded into the WTO or only considered in regional organizations such as the OECD?

Determining which organization or which sub-organ within an organization ought to be the venue to initiate a treaty process may determine whether the process will involve time-consuming but exhaustively thorough analysis of the current state of the law by legal experts (e.g., the ILC for some treaties undertaken within the UN), more superficial examination of the need for a treaty by those attentive to the political desires of states (e.g., the assemblies of various IOs representing the full membership) or thorough examination of the need for a treaty relegated to technical experts in relatively narrow specialities (e.g., ICAO's Legal Committee). Alternatively, treaty initiators may opt for processes that contain elements of all of these (e.g., the ILO processes described in Section 5.2). Organizational venues may also determine whether negotiators will be able to take advantage of a credible dispute settlement process (e.g., the WTO), other supervisory procedures (e.g., those in the ILO), be able to engage in a gradualist strategy that relies initially on "soft" law and "soft" enforcement (e.g., the United States' efforts on bribery within the OECD), or be able to secure efficacious regional credibility (e.g., the use of regional organizations in a variety of contexts).[39] The choice of IO may determine whether treaty negotiations will be more or less transparent or open to participation by civil society since distinct IOs have different traditions in this respect.[40] Given this range of choices, the ability

[38] *See generally id.*

[39] *See*, *e.g.*, *id.*, at 289–90 (noting how the U.S.'s strategy with respect to regulation of bribery was highly congenial to the OECD given that organization's tendency to act through a variety of both hard and soft instruments, as well as reliance on peer review and public pressure rather than litigation).

[40] *See*, *e.g.*, *id.*, at 294 (noting how the WTO has restricted transparency and civil society participation more than some IOs and how this may hamper its ability to serve as a legitimate treaty-making forum on certain topics). Abbott also contends that the WTO remains a "member-driven organization" that is more reluctant than some to afford its supranational officials any independent role. *Id.*, at 295. This too may serve to enhance or detract from its ability to serve as a successful treaty venue depending on the subject.

to choose among organizational venues implicitly forces treaty initiators to consider matters relating to the substance of the proposed treaty even before formal negotiations begin.

The choice of organizational venue speaks volumes concerning the intent of principal treaty backers. Those who attempt to insert a new issue in a WTO trade round, for example, would appear to be suggesting that the issue has an implicit link to trade (since that is the WTO's domain) and that it is an issue that can be appropriately made the subject of WTO dispute settlement as well as be amenable to organizationally sanctioned trade retaliation if necessary (since these remedies have, at least since the Uruguay Round, been assumed to be applicable to all or most matters within the WTO). Anticipation that both the linkage to trade and WTO enforcement methods will need to be addressed casts a shadow—positive and negative—over the prospect of initiating such negotiations within the WTO.[41] While it might be assumed that the prospect of binding dispute settlement would tend to discourage the initiation of new negotiations in entities such as the WTO, it would appear that in at least some cases, such organizational realities may enhance the attractiveness of this forum. Certainly the pressure to "link" some issues to the trade regime, such as labor rights or environmental concerns, stems in part from penance-envy: the perception, accurate or not, that WTO dispute settlement constitutes the most effective enforcement tool available at the global level and that such a potentially effective tool ought to be made applicable to these other concerns.[42] At the same time, IOs develop distinct institutional cultures that may hinder attempts to use them as venues for the negotiation of certain treaty commitments. Thus, Abbott argues that the WTO's tradition of including issues in trade rounds only if these can be the basis of reciprocal (quid pro quo) concessions made it difficult to build into that regime treaty commitments barring bribery since "no one in USTR or its business constituencies was willing to trade off concrete, near-term market access for specific goods and services in exchange for the uncertain future benefits of rules on transnational bribery and corruption."[43]

Thirdly, because IOs increase the number of actors involved as well as the options available to states, they have a third impact on the initiation of treaties: they alter the role of state power. The involvement of IOs may decrease the salience of traditional state power. Unlike in the 19th century, a serious multilateral treaty negotiation is less likely to require the initiative or the backing of powerful state actors. Suggestions for such a negotiation may be and are made

[41] *See generally id.*

[42] Joel P. Trachtman, "Institutional Linkage: Transcending 'Trade and . . .', " 96 *AJIL* 77 (2002). Trachtman originally coined the colorful term "penance envy" in earlier drafts but unwisely deleted it prior to final publication.

[43] Abbott, *supra* note 32, at 286, 291. Abbott also contends that the WTO's culture of focusing on market access to the exclusion of more normative dimensions as well as emphasis on hard law rather than softer obligations also made it an unlikely forum for focusing on the normative aspects of the bribery and corruption issue in the ways that the OECD was able to do. *Id.*, at 286–91.

even by the least powerful state representatives to an IO, as in the UN General Assembly or comparable plenary bodies where the formal rules for voting (one state one vote), can secure majority support over the opposition of a minority of powerful states. Thus, the 1990 action by the GA that ultimately led to the successful conclusion of the Rome Statute for an International Criminal Court on July 17, 1998 stemmed from a 1989 initiative by Trinidad and Tobago in that body. Some IOs' access rights to NGOs (noted above) also increase the proportionate power of NGOs over decisions to initiate treaty-making. Intense and successful NGO lobbying efforts to promote treaty negotiations—as with respect to land-mines or to establish an individual complaints mechanism for CEDAW—are the predictable result.[44] As this suggests, the increasing attention given to the role and power of NGOs (or "international civil society") misses part of the picture to the extent if it fails to acknowledge that the role of traditional IOs is enabling or promoting the growing clout of NGOs. Further, to the extent that institutionalized forms of treaty-making involve, as is discussed in more detail in Section 5.3.2 below, experts in particular fields that are independent of governments, this also lessens the hold of governments over such processes. It has been suggested that expert groups may be more concerned with achieving certain ends—from enhancing the quality of the environment to serving the needs of commerce—than with protecting sovereign powers or their regulatory discretion.[45]

The very existence of IOs may condition the use of power even by powerful states. In theory, treaty negotiators retain the option of starting multilateral treaty negotiations the old-fashioned way, namely, through a diplomatic approach to select states and invitations to a special treaty ad hoc conference for this purpose. In practice, while such special negotiation conferences continue to be a mode for the negotiation of some multilateral treaties, most have been authorized by an IO, such as the UN General Assembly, and, as discussed in Section 5.3 below, most continue to involve that organization (or others), along with its legal staff, even after a text is concluded. The reasons are straightforward: most treaty initiators want to secure the advantages of an organizational setting and even when key players do not, there may be considerable political pressure brought to bear to secure the endorsement of the organizational body whose established competence

[44] For discussion of the early evolution of an Optional Protocol to CEDAW, and the impact of UN-sponsored human rights conferences at Vienna (1993) and Beijing (1995), see Lilly Scharipa-Behrmann, "An Optional Protocol to CEDAW: A Further Step Towards Strengthening of Women's Human Rights," in Gerhard Hafner et al., eds., *Liber Amicorum: Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday* at 683 (Boston and The Hague: Kluwer Law International, 1998). But not everyone regards the growing impact of NGOs positively. *See, e.g.*, Kenneth Anderson, "The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society," 11 *EJIL* 91 (2000)(providing a critical assessment of the significant role played by NGOs with respect to the Landmines Convention).

[45] *See*, *e.g.*, Thomas W. Wälde, "Non-Conventional Views on 'Effectiveness': The Holy Grail of Modern International Layers: The New Paradigm? A Chimera? Or a Brave New World in the Global Economy," 4 *Australian Rev. Int'l & Eur. L.* 164, at 197 (1999).

appears most directly relevant. Today, even a powerful state would find it difficult to attempt a major multilateral treaty-making effort (not related to a distinct regional issue) regarding international civil aviation, for example, without at least attempting to involve ICAO or presenting credible reasons why that institution's involvement would be inappropriate. In addition, should the relevant organs of ICAO, including the expert bodies normally involved in such efforts, reject such a proposal, the prospects for a successful negotiation involving a credible number of participants are considerably diminished. To this extent, where an IO exists with jurisdiction over a matter that is proposed for treaty-making, its mere existence affects the decision of whether, when, and where to initiate such a negotiation.

At the same time, IOs remain vehicles for the assertion of state power. The choice among organizational venues is often influenced (not to say determined) by the continuing realities of relative power. It was important, for example, for the primary movers of counter-terrorism conventions, principally the U.S., to have these negotiations initiated in the 1970s when airline hijackings dominated the headlines undertaken at ICAO, and the U.S. and its allies got their way. Western preferences have also prevailed with respect to other choices of venue—as with respect to the trade regime (over WIPO) for intellectual property; the IAEA (over the GA) for certain proliferation conventions; and the OECD (over the WTO) for the aborted Multilateral Agreement on Investment (MAI). As this suggests, the role of power and the powerful in multilateral negotiations has not disappeared with the onset of IOs. The powerful continue to use their leverage to favor one organizational forum over another.[46]

Nonetheless the presence of IOs affects the state-centric realities of initiating treaty negotiations. Since states rightly assume that the choice of organizational forum—as well as the remaining option to forego any established IO and opt for a free-standing negotiation—matters, they expend considerable resources to make sure the "right forum" is chosen. Strenuous and diplomatically costly efforts may be necessary to make sure that, for example, foreign investment negotiations are initiated in the OECD and not the WTO. And even when powerful states get their way with respect to such venues, the exercise of such options is not entirely cost free. While the U.S., for example, would have preferred back in the 1970s (as well as today) a comprehensive treaty regime leading to the suppression of the most serious acts of terrorist violence regardless of setting, the ICAO setting for such negotiations, while far more preferable from the U.S. standpoint than the UN General Assembly, compelled a narrower and more piecemeal approach to

[46] Nor, of course, does power cease to be relevant once negotiations begin or a treaty is concluded. As ICAO's anti-terrorism conventions remind us, use of an organizational venue for purposes of negotiation does not ensure that organizational mechanisms will be used for enforcement. Those conventions avoid the use of established ICAO fora, including the methods of dispute settlement within ICAO's constitution (resort to the ICAO Council and to the ICJ). Instead, the extradition/prosecute regime on which those treaties rely effectively puts the onus of enforcement back on state parties, thereby giving states that are powerful enough to exert leverage on others considerable free rein.

such negotiations. Pursuit of such treaty negotiations within ICAO virtually ensured criminalization only for acts directly relating to civil aviation, namely, violence on board aircraft or targeting aircraft for destruction, airplane hijacking, and offenses at international airports.[47] In addition, while the U.S. initially sought a regime that would permit joint enforcement action such as an international civil aviation boycott against a state that failed to honor its obligations (as in the wake of a skyjacking), it quickly abandoned this goal when its negotiators realized that such joint action is not characteristic of ICAO (as opposed to the Security Council) and indeed was a non-starter in an organization with an ethos that identifies the right to engage in civil aviation as a fundamental sovereign right.[48] Similarly, while the U.S. and many of the other leading exporters of capital would have preferred a regime for foreign investment with a global reach, thereby suggesting a negotiation within the WTO and not an organization with a more limited membership such as the OECD, the choice to pursue negotiations in the MAI reflected a desire to forego geographical reach in favor of presumptive depth of obligation.

Fourthly, IOs have vastly increased the amount of information available to treaty initiators. The information supplied by organizational venues may encourage the initiation of treaty-making directly, through proposals made by IOs, or indirectly, by inspiring certain governments to act. Many have contended that the negotiations leading to the 1987 Montreal Protocol would never have been initiated, for example, but for the level of scientific data concerning ozone depletion generated by various entities established by the Vienna Convention for the Protection of the Ozone Layer.[49] The supply of information may alter not only the decision of whether to initiate treaty-making but how and where to do so. Today, decisions to pursue particular topics in a distinct organizational setting are likely to be taken with full awareness of the prior history of that forum with respect to the topic in question and may reflect an intention to affect the substantive result on many matters—and not merely enforcement method (as in the WTO example above). A decision to initiate today the subject of foreign investment in the next WTO trade round, for example, would appear tantamount to a decision to conclude a treaty on that subject that would be a great deal less comprehensive with respect to the rights accorded foreign investors than the draft MAI (attempted within the more investor-friendly confines of the

[47] Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, 20 U.S.T. 2941, 704 UNTS 219, September 14, 1963; Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 22 U.S.T. 1641, 860 UNTS 105, December 16, 1970; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 24 U.S.T. 564, TIAS 7570, 1971 *U.N. Jurid. Yrbk* 143, September 23, 1971, and its Protocol for the Suppression of Unlawful Acts at Airports Serving International Civil Aviation, ICAO Doc. 9518, 27 *ILM* 627 (1988), February 24, 1988.

[48] *See* Geoffrey M. Levitt, *Democracies Against Terror* at 10–11 (New York: Prager, 1988) (discussing history of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft).

[49] For more on "managerial" regimes, see Section 5.3.3 *infra*.

OECD).[50] Those who, desiring a successful conclusion to such a negotiation, propose adding investment issues to the next WTO Round would presumably be doing so because they desire multilateral investment regulation that is more sensitive to the views of the WTO's pluralistic membership, because even the "lesser" investor rights (and possible duties) would presumably be subject to binding WTO dispute settlement open only to WTO members (and not directly to investors themselves as under BITs and the NAFTA's Chapter 11), because the failure of the OECD's prior effort leaves no other credible organizational option, or because of some other presumed benefit (such as possible trade-offs with respect to other issues anticipated within the same trade round). As this suggests, organizational venues and the information they produce considerably enhance the likelihood of "nesting" issues in a broader context so that the "fabric of one provides the foundation of another," as well as making links between issues that facilitate package deals.[51]

A decision to pursue negotiations in a particular organization might also be tantamount to a decision *not* to conclude a full-scale multilateral treaty on the subject but some other kind of instrument. Thus, a decision to initiate discussions on a particular topic in, for example, UNCITRAL, may be taken with the full knowledge that, given prior discussions in that forum with respect to that issue or with respect to comparable subjects, this decision is tantamount to one of avoiding the negotiation of a multilateral treaty in favor of, for example, a "model law" that can inspire the harmonization of domestic laws or the drafting of non-binding "guidelines" instead of a treaty.[52] Also, certain organizational settings are suited to regulatory or recommendatory action and not the initiation of binding treaty instruments—and prove themselves attractive negotiating sites precisely for that reason.

As this suggests, IOs may hinder in discrete cases the initiation of multilateral treaty negotiations. Judging from the large number of multilateral efforts sponsored annually under IO auspices, however, it would appear that the existence of permanent organizational venues for such negotiations have historically made states more

[50] This would certainly be the implication a prospective treaty initiator would take from the diversity of views among WTO members with respect to the need for and nature of investment regulation. *See*, *e.g.*, WTO, WT/GC/W/280, July 29, 1999, Preparations for the 1999 Ministerial Conference. *See also* the extremely hedged commitments made in the context of the Doha Declaration with respect to incorporating investment issues in that round. *See* Section 22, DOHA Ministerial Declaration, WT/MIN(01)/DEC/1 (text available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm).

[51] On nesting, see, e.g., Duncan Snidal, "The Game Theory of International Politics", 38 *World Pol.* 25, at 45 (1985). *See also* Section 5.3, *infra*.

[52] *See, e.g.*, Jay Lawrence Westbrook, "The Transnational Insolvency Project of the American Law Institute," 17 *Conn. J. Int'l L.* 99, at 100 (2001)(noting that UNCITRAL pursued a Model Law on cross-border insolvency in the belief that the time was not ripe for a treaty approach). In other cases, UNCITRAL has opted for yet other alternatives to the usual treaty route. *See, e.g.*, Catherine Pedamon, "How is Convergence Best Achieved in International Project Finance?," 24 *Fordham Int'l L. J.* 1272, at 1300 (2001)(noting UNCITRAL's decision to develop a "Legislative Guide" on international project finance rather than a model law).

amenable to multilateral treaty-making—or at least made it more likely that a shrewd initiator will be able to find a forum that would favor treaty negotiations. Whether that will remain the case in the future as the density of international regulations increases amidst a proliferation of IOs remains an open question.

Absent a change from what we have seen in the first half-century of the existence of global IOs, the age of IOs implies a fifth change from 19th century treaty-making efforts: particularly to the extent the anticipated treaty negotiations are to take place within established organizational fora and not through the convening of a special ad hoc conference, support for initiating treaty negotiations may emerge much more easily and quickly than in an earlier age when states were required to mobilize and devote substantial diplomatic and other resources for such efforts. Treaty negotiations are, in short, more likely when they can take advantage of organizational venues whose "sunk costs" have already been absorbed by their members. Voting in favor (or, more commonly, merely refusing to disturb consensus) in favor of a resolution that directs that international civil servants ought to study "topic x" with respect to the "propriety of concluding an international convention" on said topic is often seen as an anodyne or at least a relatively cost-free decision. Even when a state representative realizes that such a decision is not really cost-free and that it may begin a process whose momentum may prove difficult to stop, it is usually less painful politically for a state representative to an IO to join consensus in favor of initiating treaty negotiations than to resist. This may be particularly true when the need to engage in such treaty negotiations has the backing of a particular epistemic community whose treaty promotion efforts have been at least partly legitimated by institutional processes. Thus, the strong NGO movement that backed the Landmines Convention and prodded states to conclude that treaty had the powerful backing of such prominent institutional actors as the then UN Secretary-General, who threw his office's full weight of support on behalf of concluding such a treaty.[53] In addition, to the extent organizational venues with a diverse membership tend to expand the potential negotiating agenda and increase the potential for nesting and package deals, these realities may increase the numbers of states willing to engage in negotiations or for whom such negotiations are of interest.

5.3 Organizational Patterns for Treaty-making

While states conclude to establish bilateral, regional, and occasionally, multilateral treaty arrangements outside the auspices of any existing IO, to the extent they resort to existing IOs for this purpose, several distinct patterns for treaty-making have

[53] *See*, *e.g.*, Boutros Boutros-Ghali, "The Land Mine Crisis," *Foreign Affairs* 8 (September/October 1994).

emerged. These are described below. Note that these patterns for organizational treaty-making are not necessarily alternatives. General UN treaty-making conferences (described at Section 5.3.1 below) are commonly (but not invariably) vehicles for the final negotiation of instruments initially drafted by expert bodies (described at Section 5.3.2). And both general conferences and expert bodies might be involved in the "managerial" treaty regimes described at Section 5.3.3. Finally, the type of treaty-making "with strings attached" characterized by the ILO (described at Section 5.3.4) might be regarded as merely an adaptation (in constitutional garb) of the patterns described in 5.3.1, 5.3.2, and 5.3.3.

5.3.1 UN Treaty-making Conferences

As noted, the UN does not adhere to any one method for pursuing treaty negotiations. Plenipotentiary treaty-making conferences convened by the UN General Assembly, the Security Council, the UN Conference on Trade and Development (UNCTAD), the UN Environmental Programme (UNEP), or other UN bodies may occur only after an exhaustive canvassing of views, decades-long study by an expert body (such as the ILC), and agreement on a draft text by other intermediary entities (such as the Sixth (Legal) Committee of the Assembly or, as with respect to human rights treaties, the Third Committee). They may also be convened with minimal advance preparation. Treaty negotiations called for by the GA may convene with a draft text that has been drafted by one of the permanent expert bodies considered at Section 5.3.2 below, by any number of ad hoc committees that the GA may have established for various purposes, or by another UN organ such as ECOSOC or another organization, such as UNEP or UNCTAD. Negotiators may also gather for formal negotiations with no such text in hand. Treaty negotiations in UN-organized conferences may conclude in a few weeks or reconvene periodically over a course of years. Various types of voting majorities have been used in UN conferences, including simple majority (used particularly in immediate post-World War II conferences), two-thirds majority on matters of substance (as provided as a default rule in article 9(2) of the Vienna Convention on the Law of Treaties), and, more recently, consensus.[54] All that can be said is that UN-sponsored treaty negotiations involve a multistage process, often but not always involving multiple fora, such as a restricted body (such as a small committee of governmental representatives, an expert group, or the secretariat), which often meets at the outset, and a more representative entity, generally involved towards the end for purposes of finalizing a text. The 1985 UN Study of Treaty-Making attributes the lack of a fully structured, predictable process to the diversity

[54] *See*, *e.g.*, UN Study, *supra* note 7, at 34. For a history of voting procedures at UN conferences, see Louis Sohn, "Voting Procedures in United Nations Conferences for the Codification of International Law," 69 *AJIL* 310 (1975)(concluding that in a period of some 100 years the pendulum has swung from unanimity to consensus).

of the UN's membership as well as the diversity and difficulty of the proposed treaty-making topics; it concludes that while narrowly defined topics are assigned to more specialized organizations, the UN is the favored venue for broader and often more controversial subjects, including disarmament, human rights, the general restructuring of international, political, and economic relations, or general efforts to progressively develop and codify international law.[55]

It is also the case that even when such UN-sponsored conferences form sub-committees with similar titles, such as "drafting committees," the tasks assigned to such entities vary greatly from conference to conference. As the UN Study indicates, there is no uniformity concerning the formation, form, responsibilities, or significance of "drafting committees." Such committees may be relatively large, including representatives from all the various legal systems represented in the negotiation, or extremely small, representing only those fluent in the language in which the treaty is being formulated. In some cases, members of the UN Secretariat assume major responsibilities for technical assistance; in others, not. More importantly, the influence and impact of drafting committees within particular negotiations varies greatly. While in some instances, such committees are the principal or only source for initial and final drafts, as well as compromise formulations on the basis of discussions held in other fora, in other instances, as in the course of UNCLOS III, their competence is severely restricted from the outset. In that Conference, the drafting committee was cautioned not to "reopen . . . substantive discussion on any matter" and to "coordinate and refine the drafting of all texts referred to it, without altering their substance;" that committee was also told that it had "no power of or responsibility for initiating texts."[56] Similar restraints were put upon the drafting committee at the Rome Conference to negotiate a treaty on the PICJ.[57] By contrast, the Legal Drafting Committee at the Inter-governmental Committee to Draw Up a Constitution for UNIDO as a Specialized Agency (Vienna, 1976–7) had primary responsibility for preparing all the legal provisions of the draft Constitution and for rendering advice as to other organs.

A comparison of two of the most significant treaty-making UN conferences undertaken in the modern era, UNCLOS III and the 1998 Rome Conference on the ICC, suggests commonalities as well as differences among such conferences. The assessments of these treaty-making exercises have differed considerably. Many commentators were quite critical of the results of UNCLOS III. Although that conference culminated in the adoption in 1982 of a seemingly impressive and massive Convention covering virtually every aspect of the law of the sea by a recorded vote of 130 in favor, 4 against, and 17 abstentions, many contemporaneous observers were critical of the result and the process. Bruno Simma, writing shortly after the April 1981 announcement by the U.S. Government that it was

[55] UN Study, *supra* note 7, at 16, para. 8.
[56] *Id.*, at 30, para. 39.
[57] Lee, *supra* note 16, at 19.

re-examining its position towards deep-sea mining and was voting against the final result, cited UNCLOS III as a principal example of the flaws of the modern treaty-making process and especially of the tendency to formulate texts "before it is clear whether and about what consent can actually be attained."[58] For Simma, the negotiators of UNCLOS III slavishly adhered to a draft text, unrealistically regarded as a *fait accompli*, through no less than 10 sessions of that Conference, only to be rudely interrupted, "like a child in the tale about the emperor's new clothes," by reality in the form of U.S. opposition.[59] He questioned whether the shock of reality, the "moment of truth," would force the UNCLOS negotiators to "find ways towards genuine, productive compromises."[60]

By contrast, the seemingly comparable results achieved at Rome in the summer of 1998—adoption of a treaty establishing the first permanent international criminal tribunal in history by a vote of 120 in favor, 7 against (including again the opposition of the U.S.), and 20 abstentions—has generally drawn extensive, even exuberant, praise by contemporaneous observers. The Rome Conference was "a momentous step in the history of mankind," a "giant step forward in the march towards universal human rights and the rule of law;" its negotiators managed to "enormously enrich . . . the content of international law" with a single stroke.[61] The Rome Conference has produced to date a stream of highly favorable assessments of "what went right," intended to present valuable lessons learned. By contrast, two of the principals involved in UNCLOS III, Tommy T.B. Koh and Shanmugam Jayakumar, engaged in a rueful assessment of that negotiating process, indicating "what went wrong," intended to inspire salutary lessons for future treaty-makers.[62]

Koh and Jayakumar's assessment of UNCLOS III begins by identifying the five major ways those negotiations failed to conform to patterns established at prior conferences on the law of the sea, in 1930, 1958, and 1960. They note that, first, unlike at least some of these prior conferences, UNCLOS III did not entrust a specialized or expert body of limited size, such as the ILC, with the task of preparing for the conference. Indeed, Koh and Jayakumar report that it was difficult even after the Conference convened to establish groups of limited size since all states argued for the right to attend all sessions, and since so many "vital interests" were implicated, delegations would not easily agree to allow others to represent their points of view. Secondly, unlike prior conferences, UNCLOS III negotiators had no single basic text from which to work when full-scale

[58] Bruno Simma, "Consent: Strains in the Treaty System," in R.St.J. Macdonald and Douglas M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory* at 487 (Boston: M. Nijhoff, 1983).

[59] *Id.*, at 488.

[60] *Id.*, at 488. For more on Simma's critique of modern treaty-making, see Section 6.2 *infra*.

[61] *See*, *e.g.*, Lee, *supra* note 16, at 26–7 (quoting in part the UN Secretary-General).

[62] Tommy T.B. Koh and Shanmugam Jayakumar, "The Negotiating Process of the Third United Nations Conference on the Law of the Sea," in Myron H. Nordquist, ed., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. I, at 29 (Dordrecht, Boston: M. Nijhoff, 1985).

negotiations began. Indeed, many delegations apparently believed that since the issues involved were primarily ones of policy (whether involving political, economic, strategic, or environmental concerns), it was inappropriate to assign the task of working out an initial text to a legal or apolitical body such as the ILC. For Koh and Jayakumar, the absence of a single negotiating text posed innumerable hurdles for the negotiations and ultimately resulted in the "unprecedented" decision to leave the task of drafting a principal text to essentially only four individuals, namely, the President of the Conference and the Chairmen of its three main committees (committees on the sea-bed and ocean floor; on the marine environment, scientific research and transfer of technology; and on everything else (from the territorial sea to the rights of island states)). For Koh and Jayakumar, quite apart from the burden posed on these four individuals who were expected to serve as national representatives and the general conference, this affected the negotiation dynamics by encouraging states to influence the four draftsmen, even if this meant time-consuming lobbying efforts and denigrating meetings or sessions where one of the four was not present. Thirdly, unlike at least some of those earlier conferences, which operated under the standard assumption that votes would be taken whenever necessary, UNCLOS III operated under Rules of Procedure and a "Gentleman's Agreement" deliberately framed to avoid the taking of votes whenever possible.

Fourthly, unlike in 1958 when, to the extent sub-groups or caucus operated, these tended to reflect well-established regional groupings within the UN, UNCLOS III relied on a host of novel interest groups that emerged in the course of negotiations and reflected common positions on a variety of substantive issues, such as the group of archipelagic states, the group of broad-shelf states, states supporting the median line or equidistance principle for delimitation of the European Economic Zone (EEZ) and continental shelf, and the great maritime powers. For Koh and Jayakumar, while these groups assisted in the identification and sharpening of issues, their commencement and formation, along with the process of coalition-building and resolution of internal differences, consumed a great deal of time and encouraged the taking of extremist positions that proved difficult to bridge. The formation of these groups also led to two parallel structures for negotiation: the official plenary and its three main committees and the unofficial universe of numerous special interest group meetings.

Fifthly, unlike prior conferences, UNCLOS III was convened, in December 1973, without a fixed, predetermined duration. (It eventually concluded in December 1982.) For Koh and Jayakumar, the length of the negotiations permitted delegations to re-evaluate their positions, led to the unraveling of prior agreements achieved at prior sessions, enabled unilateral actions by states designed to affect the negotiations, and led to complications as a result of inevitable changes within national governments or with respect to responsible personnel. The length of these negotiations enabled the U.S. Congress to threaten legislation to permit unilateral deep sea-bed mining, thereby giving that issue a central importance that

it probably would otherwise not have had and hardening reactions among some of the Group of 77 States. Legislative action within individual states establishing fisheries or EEZ zones made those states less amenable to undermining their domestic laws via an inconsistent treaty and made it more difficult to deal flexibly with respect to such issues. References to such action as constituting "state practice" or "emergent custom" made it more difficult to regard such issues as still under negotiation or part of potential "package deals." In the words of Koh and Jayakumar, this "provided unilateralist States with a self-serving, substantive argument."[63]

Koh and Jayakumar enumerate many other reasons for the difficulties of UNCLOS III. They argue that negotiations were hampered and prolonged by the "extraordinarily wide and comprehensive agenda" adopted. They attribute this flaw to numerous factors, including the strategy of distinct groups of states of using the conference to resolve particular long-standing issues and the concomitant argument that these issues were interrelated or required "linkage" to secure package deals or trade-offs that would make the convention acceptable to the widest number of states. As Koh and Jayakumar point out, the search for widely accepted packages proved difficult given the large number of participants involved (164 registered states, 6 non-independent states, 8 national liberation movements, 12 specialized agencies and the IAEA, 19 other IOs, and an unspecified number of other UN bodies and NGOs) and the need to introduce and secure agreement on highly controversial or novel concepts (including straits, economic zone, continental shelf) deemed essential to many states' perceptions of their national interests. Accordingly, Koh and Jayakumar take a dim view of the notion of package deals, indicating that the "real or imagined" linkages between many issues often led to delaying tactics, frequent objections to tentative agreements or to compromise formulas between sets of issues, and disputes over the allocation of time devoted to particular topics. Negotiation difficulties are also attributed to the level of complexity or technical nature of some of the topics (as on aspects of deep sea-bed mining) and the inability of some states to successfully coordinate the disparate views of their own internal governmental agencies, including ministries of defense, fisheries and other resources, environment, and communications.

But Koh and Jayakumar praise other aspects of UNCLOS III. They commend the UN Secretariat for providing considerable assistance, including conducting consultations on difficult procedural problems and preparing and revising draft texts.[64] They also applaud NGOs and independent experts for providing independent sources of information with respect to technical issues, for helping to narrow the "technical gap" between representatives from developed and developing nations, for establishing informal venues to discuss difficult issues away from the stylized atmosphere of the formal meetings, and for influencing the position

[63] *Id.*, at 61.

[64] Thus, Koh and Jayakumar note that "proposed texts must originate somewhere in draft form" and that the UN Secretariat, including its Office of Legal Counsel, was "asked to prepare these drafts pursuant to instructions from, and under the supervision of, the Chairman or President." *Id.*, at 66.

of some states. Koh and Jayakumar also single out for praise the role of a "private group on the settlement of disputes," convened by U.S. law professor Louis Sohn and consisting of about thirty delegations, which met on a regular basis to exchange ideas on the chapter relating to dispute settlement. They credit this private informal group not only with providing a forum for serious negotiations but with the production of compromises among opposing groups whose credibility proved "extremely useful" to those charged with drafting the official text. Generally, Koh and Jayakumar commend the "unofficial negotiating process" conducted outside the framework of the conference or its formal interest groups but convened at the initiative of individuals, with participation only by invitation. For Koh and Jayakumar these informal private negotiating groups, which were not part of the official Conference structure, helped to bring together leading actors from the special interest groups and helped to establish a dialogue that cut across such interests. Finally, Koh and Jayakumar approve of UNCLOS's strenuous and successful efforts to avoid, until the very end, a vote. They indicate that this emphasis on consensus, while it prolonged the conference, helped to produce a text which "would enjoy the widest possible support."[65]

They are more equivocal with respect to whether UNCLOS III would have been better off relying on the prior assistance of the ILC:

> We believe that the International Law Commission, or any other specialized body of jurists or lawyers, might have approached the issues in a slightly more detached and more lawyer-like manner less motivated by nationalistic interests of any State or group of States. And with a relatively more detached approach, it might have been possible for such an expert body to have produced a single text.[66]

Yet, they doubt whether the ILC's involvement would have produced a single text more quickly and indicate that even if it had done so, it is not clear that any such text would have proven an acceptable basis for negotiations among states who would be expected to be cynical about any text in which they had no role in drafting.[67]

Roy Lee, who spearheaded the UN legal office's efforts during the Rome negotiations for the ICC, has written an assessment of those negotiations comparable to the insider account provided by Koh and Jayakumar. His assessment of the Rome negotiations for the ICC implicitly accentuates the sharp differences between these negotiations and UNCLOS III. Whereas UNCLOS III was perceived to have been hampered by the lack of advance preparation, including the absence of consideration by apolitical expert groups such as the ILC, the negotiators at Rome worked off of a draft Statute, which not only had been completed in 1994 by the ILC after four years of work, but which had been reviewed by the Assembly's Ad Hoc Committee (in 1995) and by a Preparatory Committee created in December of 1995 and charged with preparing a "widely acceptable consolidated" text that took into account not only the ILC's draft but some 500 additional proposals and amendments that had been submitted by states. Thus, by the time that states

[65] *Id.*, at 104. [66] *Id.*, at 52. [67] *Id.*, at 52.

gathered in Rome on June 15, 1998 to finalize a text, a preparatory stage of some nineteen weeks had occurred (apart from the years spent on the project by the ILC). In addition, by contrast to UNCLOS III, the negotiators at Rome were given a fixed and tight timetable, namely, five weeks, in which to complete their task.

At the same time, Lee's assessment of the negotiations at Rome identifies numerous continuities between the two negotiations. Despite the existence of a draft text, the ICC negotiators faced a challenge comparable to those faced by UNCLOS III. Like those involved in the law of the sea negotiations, those who gathered at Rome were expected to finalize a highly complicated text involving diverse issues (the final convention had 128 articles) concerning highly sensitive matters considered vital to the national interests of most states of the world and which, as with respect to the rules governing the sea, required governments to coordinate the views of diverse governmental departments (including defense, justice, and other executive branch officials).[68] The negotiators at Rome faced as well the formidable task of finding ways to bridge innumerable differences among states, reflected in over 1,700 sets of brackets to the draft text, indicating alternative formulations (some of which were diametrically opposed to one another), proposed amendments, or deletions. Moreover, they were expected to complete the task in the largest treaty-making exercise ever—comparable to but exceeding that involved in UNCLOS III and involving, in addition to the extensive number of governmental and NGO representatives, some 474 journalists sent to cover the high-profile event. Like UNCLOS III, negotiators in Rome worked across various official languages (six languages in total) and conducted their work in both formal bodies (principally the General Committee, the Committee of the Whole, the Drafting Committee, and the Credentials Committee) and informal working groups and negotiating bodies. As with respect to UNCLOS III, enormous delegated responsibility came to be accorded to a handful of individuals, and especially to the chairman of the Committee of the Whole, the principal organ in which all negotiations on the core issues would be conducted (originally Adriaan Bos of the Netherlands and, on the eve of the actual conference, Philippe Kirsch of Canada). Thanks in large part to a set of standard final clauses submitted by the UN Secretariat, which included a provision that, as with respect to UNCLOS, no reservations would be allowed, negotiations on core issues were conducted on the basis of comparable "package deals" and linkages across issues considered vital to distinct groups of states.

Negotiations at Rome were also conducted to some extent against a backdrop of threatened unilateral action by some states (particularly U.S. threats to target for adverse action states who supported the emerging text) but also the strong possibility that many provisions in the draft would be treated as "emergent custom," both by individual states as well as the ad hoc war crimes tribunals previously established by the Security Council. In addition, ICC negotiations, like those in

[68] *See* Lee, *supra* note 16, at 5.

UNCLOS III, were conducted under rules that strongly discouraged the taking of votes on substantive issues and required that all efforts to reach agreement by consensus had failed. The rationales given for avoiding vote-taking during negotiations were essentially the same as those articulated at UNCLOS III. The constant taking of votes could permit haphazard development of provisions without regard to their interrelationship or the need for consistency among provisions; resort to consensus would facilitate not only a coherent, integrated text but would help secure the political support of as many states as possible.[69] Securing widespread political support was, after all, as essential for those gathered at Rome as it had been for those engaged in the law of the sea efforts. As at UNCLOS III, those responsible for organizing the Rome Conference believed that the taking of votes would be divisive and could "permanently alienate States and groups of States whose support was essential for the effectiveness of the Court."[70] As with UNCLOS III, the agreement to avoid the taking of votes held until the very end when the United States insisted on a non-recorded up or down vote on adoption.[71]

The results achieved at Rome are also comparable in some respects with those achieved by UNCLOS III. In both cases, huge, complex treaties were adopted by overwhelming votes, over the active dissent of only a handful of states but which included state(s) whose cooperation was arguably crucial to the overall success of the effort. For contemporaneous observers of the law of the sea negotiations and their immediate aftermath, the opposition of the U.S. and a handful of its allies (such as the U.K. and then Federal Republic of Germany) cast into doubt the success of the entire exercise since these industrialized states' opposition to the deep sea-bed mining regime threatened crucial elements of the "package deal" on which that Convention was built. The argument, perhaps most clearly articulated by Hugo Caminos and Michael R. Molitore in a 1985 article, was that the Convention's complex and "indivisible" package was gravely endangered by the possibility that non-parties to it would treat the "package" as a basket from which they could pick only those "cherries" that they liked and attempt to create or declare customary obligations only with respect to those elements.[72]

Caminos and Molitor acknowledged that those innovative provisions of the Convention that had achieved customary status before the package had "crystallized"—such as state practice establishing 200-mile resource zones whose effects were, under disparate municipal laws creating them, not identical in all

[69] Philippe Kirsch, "The Development of the Rome Statute," in Lee, *The International Criminal Court, supra* note 16, 451, at 453.

[70] *Id.* (also expressing concerns that voting, "which is inherently unpredictable, could prevent the Statute from developing coherently, by allowing haphazard developing of its provisions without regard to the relations between different parts of the Statue and consistency among its provisions").

[71] With respect to the majority needed should a vote be required, the ICC negotiations were conducted under rules requiring a two-thirds vote in the plenary and a three-fifths vote in the Committee of the Whole. Lee, *supra* note 16, at 17.

[72] Hugo Caminos and Michael R. Molitor, "Progressive Development of International Law and the Package Deal," 79 *AJIL* 871, at 877 (1985).

respects with the EEZ regime recognized in the Convention—could be excluded "from the effects of the package deal," but they contended that for those innovative provisions of the Convention which, as of April 30, 1982, had failed to achieve customary status, such status ought to be precluded.[73] In any case, they argued that à la carte customary status for some of the Convention rights could not lightly be presumed.[74] As is well known, even before the U.S. took the initiative to alter the Convention's deep sea-bed mining provisions, the U.S. approached other "like-minded" states and concluded in 1984 a reciprocal arrangement to avoid mine site conflicts in the issuance of national authorizations to explore and exploit sea-bed resources; in addition the U.S. argued that most of the rest of the Convention did indeed reflect customary law. The U.S. became, in short, the principal "cherry-picker." As of 2001, the U.S. and a handful of other states remain non-parties to the Convention, even as modified in 1992 with respect to the deep sea-bed regime. The "package deal" envisioned at the close of UNCLOS III took effect after considerable modification and great delay, thanks in large part to the unilateral actions of the U.S. Yet viewed from the perspective of 2001, UNCLOS cannot be regarded as a failure. Although that Convention did not achieve all its changes to the basic principles of the law of the sea immediately and did not draw the support of major maritime powers for at least a decade after it was first concluded, its impact on customary rules is now largely unquestioned, even with respect to continued ratification hold-outs such as the United States.

As of 2001, the viability of the package deals attempted in the Rome Statute for an ICC remains an open question. As was the case in the immediate wake of the UNCLOS negotiations, it seems highly likely that non-parties such as the United States will argue that many parts of the ICC Statute, including the innovative definitions of crimes against humanity and war crimes as well as perhaps some of the Court's procedural innovations, such as the protections accorded defendants, constitute customary law while disputing those aspects, such as the Court's jurisdiction over non-party nationals, which were, at least at Rome, essential parts of the overall package. In the wake of the Rome negotiations, the U.S. Congress has authorized measures that would permit U.S. unilateral action, such as denial of assistance or NATO cooperation, with respect to states that become parties to the ICC Statute. Other dissenters at Rome, such as China, could also seek to play a similar "spoiler" role. But the possibility that the package deals of Rome may unravel through the "cherry picking" actions of some is not the most realistic set of threats faced by the ICC. This treaty does not lend itself to "cherry-picking" as readily as did the Law of the Sea Convention.

The ICC remains vulnerable to the unilateral actions of powerful states in other respects. As numerous observers have pointed out, U.S. support (financial, logistical, and other (such as information it may supply to facilitate prosecutions)) has been fundamental to the viability of the ad hoc war crimes tribunals. It remains

[73] *Id.*, at 888. [74] *Id.*

to be seen whether the ICC will become an effective institution, capable of undertaking the formidable trials envisioned for it, if it is required to do so in the face of open defiance by the world's foremost power or by its most populous state; or, in the best case scenario, if it is to operate without the financial or other support of the world's richest state. Whether the ICC will be able to avoid the fate of the last great international institution to face a similar predicament—the League of Nations—remains to be seen.

These risks, well known to those who labored on behalf of the ICC, have not altered the generally positive assessments at the close of those negotiations because of the perceived differences between Rome and UNCLOS III. While the results of UNCLOS III might justifiably be seen as disappointing from the standpoint of twelve years of active negotiations; the results at Rome appear strikingly successful, even miraculous, for negotiations that only lasted five weeks. Of course, as is suggested by the descriptions of both of these treaty-making exercises above, these time lines are misleading. Given the lack of advance preparation for UNCLOS III, the period of actual negotiations engaged on substantive and not merely procedural questions was a great deal less than twelve years while, given the degree of advance work undertaken by the ILC and others with respect to both substantive and procedural issues pertaining to the ICC, actual negotiations on the ICC greatly exceeded the five weeks spent in Rome.

The "success" of Rome is at least partly due to perceptions that lessons have been learned from prior treaty efforts, and especially from the difficulties of UNCLOS III. Thus, Roy Lee has enumerated the strategies and techniques successfully applied at Rome that might be instructive for future treaty negotiations as follows:

> anticipation of principal contentious issues and early preparation of middle-ground papers thereon to isolate extreme positions; clear division of work between formal and informal meetings (for instance, limiting the former to making official statements and evaluating interim results of negotiations); identification and making use of interest groups; initiation of informal meetings for serious negotiations; avoidance of multiple open-ended negotiations; designation of competent persons to conduct negotiations on specific core issues; consolidation of proposals in the form of options and alternatives which can serve as a means for assessing the degree of support of the divergent proposals; and channelling results from the specific negotiations into one single negotiating forum to allow trade-offs and the making of a package deal, if so required.[75]

[75] Lee, *supra* note 16, at 37. As Roy Lee has elsewhere suggested, if treaty-making efforts are to succeed in forums involving as many participants as appeared at Rome, they should avoid UNCLOS-style marathon plenary sessions concluded under formal rules of procedure and a verbatim record in favor of smaller informals, colloquia, consultations, working groups, and intra-group consultations subject to neither; stress leadership and managerial skills over geographic representation or regional representation for the selection of those few individuals that are expected to take charge of negotiations; seek creative ambiguity to bridge the un-bridgeable, even at the expense of clarity; avoid taking negotiators' time on less controversial provisions (such as regarding entry into force) and assign these to small bodies such as drafting committees, expert groups,

This list of recipes for treaty-making success would appear to owe a great deal to the perceived failings, as well as the achievements, of UNCLOS III.

But the above comparison of UNCLOS III and the ICC negotiations pays insufficient regard to the degree of continuity between UN treaty-making conferences in one respect: formal rules of procedure. As Robbie Sabel's study of the rules of procedure followed at most international conferences and organizational fora indicates, even otherwise diverse treaty-making conferences convened at the recommendation of the GA adhere to a surprisingly uniform set of procedures. As Sabel demonstrates, there are now fairly established, reasonably clear rules with respect to: how states adopt rules of procedure for such negotiations; the duty of states to abide by such rules; the ways invitations to attend and to participate are extended as well as the types of credentials needed; the duties and responsibilities of presiding officers, rapporteurs, and others; rules for quorums, suspensions, adjournment, and for distinctions between "open" and "closed" meetings; the rights of delegates and observers to speak, reply, and explain their votes as well as the limits on such rights (such as "offensive" speech); the submission of procedural and substantive proposals by delegates and observers and for voting on such proposals; the discretion accorded legal counsel (as with respect to voting on the competence of a conference to deal with an issue); adjournment and closure of debate, the submission of amendments, the withdrawal or reconsideration of motions and proposals, the priorities due distinct types of proposals, and the method of voting (from show of hands, to role calls, to mechanical or electronic means, the use of secret ballots, voting by proxy, and decisions without vote); majorities needed (whether unanimity, consensus, or various types of majority); distinct types of consensus; the need for and forms of separate voting and the conduct of the voting process (such as rules regarding its commencement and permissible interruptions); languages and records to be kept; committees that can be formed (such as a general, main, and drafting committees); and the suspension or amendment of the rules of procedure. Indeed, Sabel's study concludes with a detailed enumeration of rules, which, given the consistent practice attending them, now constitute, in his view, binding rules of custom regarding the conduct of international conferences

or the Secretariat; avoid the taking of decisions through voting by opting for adoption via "general agreement" or "consensus;" and pursue viable trade-offs leading to package deals. Lee, *supra* note 3. Lee describes a decision reached by "general agreement" or "consensus" as reflecting the following facts (1) that a decision has been reached; (2) no one officially or formally objects to it being declared as adopted; and (3) those not in complete agreement are prepared "simply to make their views known and have them placed on record." Lee, *supra*, at 165. By contrast, unanimity requires an affirmative vote by all present or, where no formal vote is taken, the full agreement of all present. Lee stresses that the requirement that all participants make every effort possible to achieve a generally acceptable decision by general agreement or consensus is as important as the lack of voting itself since it is this effort at cooperative behavior which helps to produce the desired outcome, namely, widespread political approval for the decision ultimately reached. *See id.*, at 166.

and the assemblies of inter-governmental organizations.[76] For purposes of this part, Sabel's characterization of these rules as norms of custom are less important than his broader conclusion: the inescapable fact is that modern treaty-making conferences now generally adhere to a set of regular procedures that considerably expedite the negotiation process.

Even though Sabel's conclusions apply with respect to all international conferences today, including those not organized under or by international organizations, his study attributes the uniformity of these procedures, as well as their successful application to all types of states and all types of multilateral negotiations, to the establishment of international organizations. Sabel bases his survey of relevant procedural rules on the Draft Standard Rules of Procedure for UN conferences proposed by the UN Secretary-General in 1985.[77] This is not, as Sabel explains, an arbitrary choice since these rules draw heavily from the rules of procedure used in the GA that are nearly identical to those followed by the League of Nations and have had the single greatest impact on the rules followed by every international conference. Sabel notes that the League's rules bear hardly a trace of those followed by 19th century diplomatic conferences and do not suggest any direct borrowing from parliamentary procedures.[78]

The modern rules of procedure to which we owe much of the procedural efficiencies of modern treaty-making conferences are therefore essentially the creatures of international organizations, and particularly of the League of Nations. The influence of the League and the GA's rules is due to the fact that these rules were the most fully developed sets of procedural norms for international use in existence. It appears that the GA's rules, as well as those followed by the assemblies of the IAEA, the ILO, and the WHO, are the usual models for international treaty-making conferences, with deviations from the standard practices followed by these plenary bodies requiring some justification or rationale. The role of international organizations in establishing such rules is hardly surprising: it stands to reason that a full set of procedural rules would most likely develop in permanent venues whose regularity of meetings and general consistency of participation over time would require the fashioning of such rules and encourage reliable adherence by the repeat players involved.[79] By contrast, diplomatic conferences held before

[76] *See* Robbie Sabel, *Procedure at International Conferences* at 420–2 (Cambridge, U.K.: Cambridge University Press, 1997)(these include rules requiring that delegations have credentials, that presiding officers act impartially and are able to rule on certain procedural issues (subject to other rules permitting challenges to their rulings), and rules establishing certain hierarchies among procedural motions, as well as consistent rules with respect to voting).

[77] *Id.*, at 5 (citing the Draft Standard Rules of Procedure for UN Conferences, Report of the Secretary-General, UN Doc. A/40/611 of September 11, 1985).

[78] *Id.*, at 10.

[79] Compare, in this respect, Tammes' evaluation of procedures adopted at ad hoc international conferences: "The conference is a preparatory phase in a law making process; a passing event doomed to be buried in archives together with all its rules and its organisational structure and leaving behind nothing except the living result." *Id.*, at 1 (quoting Tammes).

the 20th-century, including the First Hague Conference of 1899, generally operated without formal rules of procedure.[80]

5.3.2 Treaty-making by Experts

More regularized, predictable patterns for engaging in treaty-making are evident among expert treaty-drafting bodies such as the ILC and UNCITRAL, charged with preparing drafts that can form the basis of further negotiations should the GA decide to make a recommendation to that effect.

The ILC was established by UN General Assembly resolution in 1947 in order to give effect to Article 13(1) of the UN Charter (calling on the GA to initiate studies and make recommendations for the purpose of progressively developing and codifying international law).[81] In GA Res. 174(II) creating the ILC, the GA attempted to distinguish the tasks of "codification." The GA defined "progressive development" as involving the preparation of draft conventions "on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States."[82] With respect to efforts involving progressive development, the Assembly asked its new ILC to adhere to carefully delineated procedures requiring the appointment of a rapporteur, the formulation of a plan of work, the circulation of questionnaires to governments, consultation with scientific institutions and experts, circulation of ILC drafts to States for their comments, and reconsideration by the ILC of these drafts in light of comments before submission to the GA.[83] With respect to codification, defined as the "more precise formulation and systematization of rules of international law in fields where there already has been extensive state practice, precedent and doctrine,"[84] the GA delineated a more simplified process. The ILC's codification efforts required a survey of international law with a view to selecting topics for codification, submitting recommendations of suitable topics to the GA, and giving priority to those topics that the GA chose.[85] The GA anticipated that States would then be requested to supply the legal texts needed to demonstrate consistent practice (such as laws, decrees, and judicial decisions) and that the ILC would simply prepare drafts in the form of draft articles, together with commentaries indicating relevant precedents as well as divergences and disagreements that exist.[86]

[80] *Id.*, at 7 (indicating that the first conference to adopt such rules was the Second Hague Conference of 1907).

[81] The ILC is the subject of an extensive literature. *See, e.g.*, Shabtai Rosenne, "Codification Revisited After 50 Years," 2 *Max Planck Yrbk Int'l L.* 1, at 5–7 (1998); Ian M. Sinclair, *The International Law Commission* (Cambridge, U.K.: Grotius, 1987); B.G. Ramcharan, *The International Law Commission: Its Approaches to the Codification and Progressive Development of International Law* (The Hague: M. Nijhoff, 1977); Shabtai Rosenne, "The International Law Commission 1949–1959," 36 *Br. Yrbk Int'l L.* 104 (1960).

[82] Resolution 174(II), November 21, 1947, article 15. [83] *Id.*, at article 16.

[84] *Id.*, at article 15. [85] *Id.,* at article 18(1). [86] *Id.,* at article 18(2).

Chart 5-1 Treaties Prepared by the International Law Commission and/or the Sixth Committee (as of 26 July 2004)

	Treaty	Entry Into Force	Parties, 5 Years From Date of Treaty	Parties, 10 Years From Date of Treaty	Parties, 15 Years From Date of Treaty	Parties, 20 Years From Date of Treaty	Parties, as of 26 July 2004
1	Convention on the Territorial Sea and Contiguous Zone, 29 April 1958	10 September 1964	20	31	41	42	51
2	Convention on the High Seas, 29 April 1958	30 September 1962	25	38	49	53	62
3	Convention on Fishing and Conservation of the Living Resources of the High Seas, 29 April 1958	20 March 1966	12	24	33	34	37
4	Convention on the Continental Shelf, 29 April 1958	10 June 1964	18	35	48	50	57
5	Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, 29 April 1958	30 September 1962	21	29	32	33	37
6	Convention on the Reduction of Statelessness, 30 August 1961	13 December 1975	1	3	6	10	27
7	Vienna Convention on Diplomatic Relations, 18 April 1961	24 April 1964	52	96	112	134	181
8	Optional Protocol Concerning the Acquisition of Nationality, 18 April 1961	24 April 1964	19	29	32	37	50
9	Optional Protocol Concerning the Compulsory Settlement of Disputes, 18 April 1961	24 April 1964	17	30	33	38	62
10	Vienna Convention on Consular Relations, 24 April 1963	19 March 1967	31	58	86	101	166

Chart 5-1 (*Continued*)

	Treaty	Entry Into Force	Parties, 5 Years From Date of Treaty	Parties, 10 Years From Date of Treaty	Parties, 15 Years From Date of Treaty	Parties, 20 Years From Date of Treaty	Parties, as of 26 July 2004
11	Optional Protocol Concerning Acquisition of Nationality, 24 April 1963	19 March 1967	12	20	25	31	39
12	Optional Protocol Concerning the Compulsory Settlement of Disputes, 24 April 1963	19 March 1967	11	23	31	38	46
13	Convention on Special Missions, 8 December 1969	21 June 1985	4	17	19	22	32
14	Optional Protocol Concerning the Compulsory Settlement of Disputes, 8 December 1969	21 June 1985	1	8	9	10	15
15	Vienna Convention on the Law of Treaties, 23 May 1969	27 January 1980	17	32	42	55	98
16	Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973	20 February 1977	37	56	70	84	150
17	Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, 14 March 1975	Not yet in force	14	20	21	29	30
18	Vienna Convention on Succession of States in Respect of Treaties, 23 August 1978	6 November 1966	5	8	12	14	18

19	International Convention Against the Taking of Hostages, 17 December 1979	3 June 1983	25	56	75	84	141
20	Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 8 April 1983	Not yet in force	0	2	5	—	6
21	Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations,* 21 March 1986	Not yet in force	10	23	26	—	37
22	International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989	20 October 2001	7	19	—	—	25
23	International Convention on the Safety of United Nations and Associated Personnel, 9 December 1994	15 January 1999	29	—	—	—	—
24	Convention on the Law of Non-Navigational Uses of International Watercourses, 21 May 1997	Not yet in force	12	—	—	—	12
25	International Convention for the Supression of Terrorist Bombings, 15 December 1997	23 May 2001	—	—	—	—	124
26	Rome Statute of the International Criminal Court, 17 July 1998	1 July 2002	—	—	—	—	94

* The Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations shall come into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession by States. Instruments of formal confirmation deposited by international organizations, which can become parties, are not counted towards entry into force of the Convention. The chart only records States Parties. As of 26 July 2004, there are in total 37 parties to the Convention: 26 States and 11 international organizations.

It did not take long for the ILC and, in turn, the GA to realize that this bifurcation of ostensibly distinct tasks was impossible. The ILC immediately realized that progressive development and codification were "indissolubly linked" and abandoned the attempt to distinguish its two roles.[87] As the ILC indicated in 1956 in its final report on the law of the sea:

> In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the distinction established in the Statute between these two activities can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already "sufficiently developed in practice," but also several of the provisions adopted by the Commission, based on a "recognised principle of international law," have been framed in such a way as to place them in the "progressive development" category. Although it tried at first to specify which articles fell into one and which into the other category, the Commission has had to abandon the attempt, as several do not wholly belong to either.[88]

As this suggests, the ILC discovered what many public international lawyers already knew: attempts at codification necessarily involve and may even be overtaken by the "legislative" element of progressive development.[89]

But while the ILC has for the most part not adhered to the Assembly's anticipated two-fold procedures and has effectively consolidated its approach to progressive development and codification, it has nonetheless tended to follow an extremely structured, predictable pattern of work. This involves three stages: (1) preliminary consideration (devoted mainly to the organization and planning of the work, the gathering of relevant materials, and the appointment of a special rapporteur from within the ILC's thirty-four expert members, each appointed in their personal capacity); (2) a first reading (involving the full Commission's examination of the draft articles submitted by its rapporteur); and (3) a second reading (involving full examination of the draft articles in light of the comments and observations made by governments as well as inter-governmental organizations).[90] Throughout these stages, which may take years or even decades to complete, the ILC solicits the views

[87] R.Y. Jennings, "Recent Developments in the International Law Commission: Its Relation to the Sources of International Law," 13 *Int'l & Comp. L. Q.* 385, at 386 (1964).

[88] *Id.*, at 386 (quoting the ILC's report). The ILC has made virtually the same point with respect to its efforts on consular relations, the law of treaties, special missions, representation of states in their relations with international organizations, succession of states in respect of treaties, and most-favored nation clauses. *See* UN Study, *supra* note 7, at 272–3.

[89] *See*, *e.g.*, Jennings, *supra* note 87, at 386 (quoting Brierly, *circa* 1931, as follows: "The legislative element in the attempt to codify any part of international law is not merely incidental and subordinate; it outweighs the codifying element to such an extent that it becomes misleading to describe the process as one of codification at all"). Jennings concludes that the "progressive development . . . predominates at all stages of the Commission's work." *Id. But see* Alain Pellet, "Responding to New Needs through Codification and Progressive Development," in Vera Gowland-Debbas, ed., *Multilateral Treaty-Making* 13, at 15 (The Hague: Martinus Nijhoff Publishers, 2000) (arguing that while distinguishing between "pure" codification and progressive development "has proven practically impossible," the task of the ILC remains to engage in "lawyers' law" not "politician's law" in the sense that it should "try to understand the logic of existing rules and to develop them in the framework of this logic, not to change the underlying logic").

[90] UN Study, *supra* note 7, at 283.

of governments in various ways. Its annual report, including preliminary draft provisions submitted by special rapporteurs, are reviewed annually by the more political Sixth Committee of the Assembly, which reacts to the ILC's on-going work and priorities and ideally anticipates likely reactions within the Assembly.[91] The result of a first reading by the ILC, a set of provisional draft articles with extensive commentaries, is usually transmitted to governments, through the Secretary-General, for their comments and observations. Provisional draft articles, sometimes even before a full set is available, may also on occasion be transmitted to governments or inter-governmental organizations for comment. At the conclusion of the ILC's second reading, after the draft and commentaries, together with government reactions, have been considered by the ILC's Special Rapporteur, the full Commission and its drafting committee, the ILC adopts the final articles and makes a formal recommendation to the Assembly. At that point, the ILC typically recommends convening an international conference of plenipotentiaries to study the draft articles with a view to concluding a convention on the subject.[92] In the ordinary case, the Assembly adopts the ILC's recommendation.[93]

As is shown on the Chart at 5-1 (at p. 305), UN-sponsored conferences, relying on the ILC's extensive prior work, have resulted in the adoption of some of the most widely ratified and important founding documents of the international legal order, including the four conventions on the Law of the Sea of 1958, the Convention on the Reduction of Statelessness of 1961, and the Vienna Conventions on Diplomatic Relations of 1961, Consular Relations of 1963, and the Law of Treaties of 1969. As that chart suggests, not all of the ILC's efforts have resulted in widely ratified treaties. Examples of arguable ILC "failures" would presumably include the 1978 Vienna Convention on Succession of States in Respect of Treaties (in force but with only eighteen ratifications as of July 2004) and the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (not yet in force with only thirty ratifications as of July 2004).[94] If we regard those ILC treaty efforts that have secured less than forty

[91] For a description of the membership and function of the Sixth Committee in relation to the codification efforts of the ILC, see Rosenne ("Codifications Revisited . . ."), *supra* note 81, at 5–7.

[92] Although the ILC's formal rules provide for majority voting, it has commonly operated on the basis of consensus. UN Study, *supra* note 7, at 269. The Codification Division of the Office of Legal Affairs of the UN serves as the ILC's secretariat and supplies the Commissioners with studies, research, surveys, and compilations that occasionally find their way into the Yearbook of the ILC. *Id.*, at 270. As the UN Study indicates, the text of relevant ILC recommendations to the GA vary and occasionally the ILC merely recommends adoption of the draft treaty without referring to the need to convene a conference. *Id.*, at 288–9.

[93] For examples of instances in which the GA has either rejected the ILC's recommendation to convene a treaty-making conference or has delayed such a decision to permit members more time for reflection, see UN Study, *supra* note 7, at 297–8. On other occasions, the GA has modified the ILC's recommendation for the convening of a treaty-making conference in some respect, as by requesting another round of state comments on the ILC's draft text. *See id.*, at 300–4.

[94] *See* http://untreaty.un.org/English/bible/englishinternetbible/partI/chapterIII/treaty36.asp (ratification record for Vienna Convention on the Representation of States in their Relations

ratifications within the first five years after completion as not meeting expectations, eleven of the ILC's twenty-six treaty efforts would fit into this category.[95] Whether this constitutes a disappointing performance or a significant achievement is in the eye of the beholder, but it is the case that the ILC's successes form part of the "constitutional law" of international society in the sense that they are "part of the legal basis in which international society is rooted;" or for readers of H.L.A. Hart, part of the essential "secondary rules" of public international law.[96]

In 2001, the ILC completed its Draft Articles on the Responsibility of States for Internationally Wrongful Acts.[97] This culmination of an effort by the ILC that spanned over forty years was firmly in line with the ILC's prior efforts to clarify basic constitutive rules for the international legal order that have been undergoing development over centuries (like its efforts with respect to the rules governing treaties and consular relations). Like those prior efforts, this was an attempt to codify (and progressively develop) rights and duties of states that operate at the horizontal level as reciprocal obligations on sovereigns.[98] At the same time, the release of these Draft Articles was something of a departure for the ILC in one significant respect: the ILC did not recommend completion of its endeavors by convening a negotiating conference to transform its draft into a multilateral treaty. It was instead an attempt to engage in "soft codification."[99] The UN General Assembly followed the lead of the ILC and merely commended the ILC's articles "to the attention of Governments without prejudice to the question of their future adoption or other appropriate action."[100] While the issue of convening a treaty-making conference for this purpose remains, at the time of writing, on the agenda for the GA, the decision not to immediately seek one reflects simultaneously at least three disparate sentiments: (1) the controversial aspects of some of the draft articles themselves, (2) the dysfunctional aspects of treaty-making conferences and fears of the possible outcome, and (3) the distinct possibility that the articles would have a greater impact on the law in their current "soft" form.[101]

The necessarily controversial aspects of the ILC's efforts in this instance are manifest in the topic. The ILC's Articles on State Responsibility reflect a significant

with International Organizations of a Universal Character); http://untreaty.un.org/English/bible/englishinternetbible/partI/chapterXXIII/treaty2.asp (ratification record for Vienna Convention on Succession of States in Respect of Treaties).

[95] For further discussion of the success or failure of contemporary treaty-making, see Chapter 6.

[96] *See* Pellet, *supra* note 89, at 21–3 (arguing that the ILC's task remains to facilitate and encourage uniform international law that responds to the international society's "constant" or "everlasting" needs).

[97] Draft Articles on Responsibility of States for International Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001) (hereinafter "Draft Articles").

[98] *See generally* Franz Cede, "New Approaches to Law Making in the UN-System," 1 *Austrian Rev. Int'l & Eur. L. 51*, at 56–7 (1996).

[99] *See*, *e.g.*, *id.*, at 59 (comparing such efforts to the Restatements issued by the American Law Institute).

[100] GA Res. 56/83, para. 3 (December 12, 2001).

[101] *See* David D. Caron, "The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority," 96 *AJIL* 857 (2002).

synoptic aspiration: they aspire to tell us when and how states are responsible for breaching all international legal obligations at a time when public international law appears to be splintering into disparate specialized legal regimes, many of which have their own compliance or adjudicative procedures or institutions.[102] The Articles define "internationally wrongful acts," "breaches," and the standing rules that permit states to complain of these, rules of attribution that clarify when governments can be held responsible for acts or omissions of non-state actors within their territory, the circumstances and prerequisites for excusing states from their breaches (as through defining the scope of *force majeure*, distress, and necessity), permissible remedies for wrongful acts (e.g., compensation, restitution, satisfaction), and permissible counter-measures that can be taken in the face of breaches. The Articles aspire to do more than engage in the gap-filling that is typical of most ILC codification efforts. They reflect an underlying premise (or hope) that all international legal regimes, including those with specialized forms of dispute settlement presiding over the interpretation of increasingly finely grained rules, are not fully self-contained but are unified by certain general rules that, unless specifically departed from through *lex specialis* rules on responsibility, continue to apply.[103] The ambition and range of the Articles—which aspire to provide rules of attribution, for example, that would potentially resolve problems as disparate as deciding whether a government's inactions with respect to terrorists acting within its territory render that government responsible for the terrorists' actions to whether governmental inactions with respect to consumer boycotts may make a government responsible for resulting restraints on trade—begin to suggest the necessarily controversial aspects of the ILC's Articles.[104]

But the ILC's and the Assembly's reluctance to go forward with a treaty-making conference in this instance also reflects a more mature assessment of both the perils and promises of such negotiations. As opponents to such a conference, both within the ILC and in the Assembly's Sixth Committee suggested, the attempt to turn the Articles into a treaty would achieve clarity of binding effect at considerable cost: namely, the premature termination of a continued process of legal development for rules that needed to remain flexible at least for a time as dispute makers and judges used them in particular contexts. In addition, the attempt to negotiate a treaty on state responsibility could result in a lengthy drawn-out process whose results were at best unpredictable and at worst would fundamentally unbalance the ILC's laborious efforts. Further, unless the resulting treaty barred reservations,

[102] *See*, *e.g.*, Daniel Bodansky and John R. Crook, "Introduction and Overview, Symposium: The ILC's State Responsibility Articles," 96 *AJIL* 773, at 774 (2002).

[103] *Id.*, at 774–5 (noting the continuing and perhaps growing need for "clear and comprehensive rules that decision makers can use to fill gaps when deciding particular cases" or at least "useful points of departure" for specialized regimes that are not yet fully developed). *See generally* Bruno Simma, "Self-Contained Regimes," 1985 *Netherlands Yrbk Int'l L.* 111 (questioning the contained nature of ostensibly self-contained regimes).

[104] *See*, *e.g.*, Draft Articles, *supra* note 97, articles 4–11 (on Attribution of conduct to a State).

these could further upset the structured compromises built into the ILC's Articles.[105]

The perceived need to keep the rules "soft" for the sake of flexibility has an ironic counterpoint, however. It would appear that the ILC's Articles might achieve considerably more force in their current "soft" form than in the form of a treaty, particularly if the resulting treaty achieved relatively few ratifications or was subject to significant reservations. As David Caron has argued, courts and arbitral panels, such as those charged with resolving investor-state disputes arising under bilateral investment treaties (BITs), will turn to whatever is available and the ILC's Articles, soft or not, provide a handy recourse for those who need to fill a legal vacuum or who simply desire ostensibly "neutral" authoritative distillation of what would otherwise be an arduous search through innumerable digests of state practice to find applicable rules of custom. The ILC's Articles, and especially the commentaries to these, although doubtless of varying quality, provide just the ready-made shortcut to finding customary rules that many harried lawyers and arbitrators need. Indeed, the ILC's decision to structure its conclusions in the form of black letter "articles" in the style of the American Law Institute's numerous (and generally influential) restatements of the law, is likely to enhance the influence of the Articles and suggest a misleading concreteness or consensus about both their content and universal acceptance.[106]

At this writing, the ILC's ambitious program of work extends to diplomatic protection, reservations to treaties, unilateral acts of states, international liability for injurious consequences arising out of acts not prohibited by international law, responsibility of international organizations, fragmentation of international law, and shared natural resources.[107] All of these are highly complex and potentially controversial issues. Indeed, some of its newest topics, such as unilateral acts and the responsibility of international organizations, appear to be timely responses to some of the contentious issues canvassed in this book.[108] It is highly likely that some of these issues will lead to "soft" ILC efforts in lieu of attempts at treaty-making.

UNCITRAL, established by the Assembly in 1966 to further the "progressive harmonization and unification of the law" in this field, is charged with, among other things, "preparing or promoting the adoption of new international conventions."[109] The Commission is composed of thirty-six individuals, elected by the GA for six-year terms and representing the various geographic regions and the principal economic and legal systems of the world. UNCITRAL adheres to a pattern of work

[105] *See*, *e.g.*, Caron, *supra* note 101, at 862–4.

[106] *See, e.g.*, *id.*, at 868–73.

[107] *See* Michael J. Matheson and Sara Bickler, "The Fifty-fifth Session of the International Law Commission," 98 *AJIL* 317 (2004). *See generally* www.un.org/law/ilc/reports.

[108] *See*, in particular, Chapters 3 and 4.

[109] Resolution 2205 (XXI), December 17, 1966. Unlike the ILC, it is also charged with responsibilities that extend beyond treaty-making as such, including promoting the wider acceptance of international trade terms, provisions, customs, and practices as well as promoting ways and means of ensuring uniform interpretation and application of international conventions in the field of international trade law. Resolution 2205 (XXI), para. 8.

that is not unlike that of the ILC, involving multiple readings of a draft text, frequent solicitation of the views of governments and interested international organizations, as well as the extensive assistance of the UN Secretariat (in this case the International Trade Law branch of the Office of the Legal Affairs) with respect to research into existing law, the preparation of questionnaires for states, and analysis of the replies. As with the ILC, once UNCITRAL adopts a final draft text, it typically submits it to the Sixth Committee and the Assembly, along with a recommendation that a conference be convened to finalize the treaty. While UNCITRAL has not produced as many conventions as has the ILC and is perhaps better known for its non-treaty efforts (as with respect to various model rules or guidelines for the use of states or to assist the harmonization of national laws), among its most successful treaties are the 1958 New York Convention on the Recognition of Foreign Arbitral Awards (134 ratifications as of 2004) and the 1980 UN Convention on Contracts for the International Sale of Goods of 1980 (with sixty-two ratifications as of 2004).[110] Like the ILC, UNCITRAL has had its share of failures as well, among them its UN Convention on the Carriage of Goods by Sea of 1978 ("Hamburg Rules"), which, although ratified by twenty-nine countries, does not include major maritime powers.[111]

As with the ILC, UNCITRAL treaty-making is characterized by exhaustive advance preparation, sometimes spanning years. While it addresses international economic law and not the general public international law topics that characterize the bread and butter of the ILC's work, and it allocates its projects to Working

[110] *See generally* www.uncitral.org/en-index.htm. For a description of the perceived benefits of a typical UNCITRAL model law project, see, e.g., Jenny Clift, "UNCITRAL: The UNICITRAL Model Law on Cross-Border Insolvency—A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency," 12 *Tulane J. Int'l & Comp. L.* 307 (2004). The work of UNCITRAL, as well as the standardization or legal harmonization efforts of other IOs like the Hague Conference on Private International Law and UNIDROIT, and non-governmental organizations as varied as the Grain and Feed Trade Association and the International Chamber of Commerce, have contributed to a growing sense that the rules of transnational commercial law (or *lex mercatoria*) are also being increasingly codified. *See*, *e.g.*, Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (The Hague and Boston: Kluwer Law International, 1999)(describing an informal codification process that is divorced from state control in which draft or model rules are increasingly used by private parties (as in their transnational contracts), courts, and arbitrators). *See also* Charles N. Brower, "The Interaction of International Organizations and Arbitral Tribunals in the Development of Transnational Commercial Law," in Wybo P. Heere, ed., *From Government to Governance, Proceedings of the Sixth Hague Joint Conference held in The Hague, The Netherlands, July 3–5, 2003* at 44 (The Hague: T.M.C. Asser Press, 2004)(describing the use of the UNIDROIT Principles of International Commercial Contracts by arbitrators who are charged with applying "generally accepted principles of international commercial law," "international practices," "rules of natural justice," "general principles of equity," or "Anglo-Saxon principles of law").

[111] For a general evaluation of the reasons, pro and con, given for harmonization of international commercial law through the efforts of IOs like International Institute for the Unification of Private Law (UNIDROIT) and UNCITRAL, see Sandeep Gopalan, "Transnational Commercial Law: The Way Forward," 18 *Am. U. Int'l L. Rev.* 803 (2003). At present UNCITRAL has the following working groups: transport law, electronic commerce, security interests, public procurement, arbitration, and insolvency law. It is also contemplating establishing another working group on commercial fraud. *See generally* www.uncitral.org/en-index.htm.

Groups and not special rapporteurs, its craftsmanlike approach to treaty-drafting also attempts to elevate technical expertise over political concerns. The same general approach characterizes other comparable permanent expert bodies for specialized topics, including the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space, as well as expert bodies in ICAO and the IMO.[112]

While these expert treaty-making bodies differ in a number of ways, they evince a distinct way of "law-making." While certain of them, such as UNCITRAL and the International Institute for the Unification of Private Law (UNIDROIT) (which has a more limited membership) have been historically more willing to consider recommending the adoption of instruments, such as guidelines or principles, in place of treaties than has the ILC (except in recent years)[113] all of them have discovered the advantages of turning to "soft" instruments in lieu of multilateral treaty-making. Thus, commentators have noted the successful harmonization effects of products like UNIDROIT's Principles of International Commercial Contracts, which, like authoritative restatements of the law, are suited to voluntary adoption by parties and attract such adoption because they are seen as "neutral" contract principles that have not been formulated by any government.[114] Such "soft" principles are not fairly characterized as reflective of the lowest common denominator among different legal systems but may instead aspire to attain the advantages of much of harmonized international commercial law, namely, to avoid problems caused by divergent national laws, adopt innovative solutions not found in any single national system more suitable to international transactions, reflect modern techniques of contracting, reduce transactions costs, and provide a neutral choice of law.[115]

As noted, the ILC's impact on law-making similarly has not been limited to the promulgation of draft treaties, which, if adopted and ratified by a sufficient number of states, are binding on particular parties. As Jennings has noted, international law relating to the continental shelf was not quite the same in 1958 when the ILC's

[112] There are also many ad hoc committees that have been established for special purposes, including, in the UN, Ad Hoc committees on International Terrorism, the Special Committee on Principles of International Law concerning Friendly Relations and Cooperation Among States, and the Special Committee on the Charter of the UN. UN Study, *supra* note 7, at 270. For a general description of treaty-making procedures in ICAO and the IMO, see UN Study, *supra* note 7, at 405–35. For a critical (but dated) look at the Legal Committee of ICAO, see Werner Guldimann, "International Air Law in the Making," 27 *Curr. Leg. Probs.* 233 (1974).

[113] *But see* the ILC's 1958 Model Rules on Arbitral Procedure, intended to be given effect not as a treaty but only to the extent these are incorporated by states in treaties regarding arbitration or in a compromise to a particular arbitration. *See* GA Res. 1262(XIII) (November 14, 1958) (bringing the rules on arbitral procedure to the attention of members for such purposes). Even that effort, however, suggests the ILC's historical aversion to non-treaty products. These Model Rules had been initially proposed by the ILC, in 1953, as draft articles on arbitral procedure to be considered for adoption as a convention. The Assembly's rejection of that proposal, in 1955, led the ILC to convert its proposed convention into the model rules of 1958. *See* UN Study, *supra* note 7, at 297.

[114] Gopalan, *supra* note 111, at 310 (noting how the UNIDROIT principles have proven attractive since both parties can adopt them "without losing face").

[115] *See id.*, at 278–89, 310.

convention on the subject was formally adopted for signature and ratification as it was before this event "and this was not merely because there was some prospect of eventually collecting the required twenty-two ratifications to bring the convention into operation."[116] The ILC's Articles on State Responsibility, together with detailed commentaries, have been relied upon by governments and international dispute settlers even before they were finally issued in 2001. Even though the ILC's Articles on State Responsibility remain controversial and these rules have not been exposed to the harsh glare of scrutiny that accompanies an attempt to translate the ILC's work product into a ratified codification treaty, the authority and legitimacy of the ILC appears to be having an effect on a significant number of actors, including international arbitrators, judges and scholars.[117]

Nor are the ILC's rules on state responsibility unique in this respect. When the ILC does its work well (or perhaps even when it does not but presents its product in a rhetorically authoritative fashion), and its work product is endorsed by the Sixth Committee and the full General Assembly, what it does acquires the diverse forms of legitimacy conveyed by all of these multilateral processes and its work product is likely to have global effects associated with general rules of custom *whether or not its efforts achieve widespread acceptance as treaty*. Thus, as James Crawford has pointed out, international courts have turned to the ILC's Vienna Convention on the Law of Treaties quite often but, on almost every occasion, they have applied it not as a treaty but as customary international law.[118] Of course, when what the ILC produces leads to a multilateral treaty negotiation and a treaty is ultimately confirmed by the votes of at least two-thirds within a diplomatic conference representing most nations of the world, this process may have further legitimating effects on the ultimate treaty produced, and appears to have had such an effect at least with respect to those ILC-generated treaties that have achieved significant levels of ratifications (see Chart 5-1 at p. 305). Such general legal effects are not entirely precluded even with respect to those ILC-generated treaties that appear, based on the level of ratifications, to be relative failures. The low level of ratifications (thirty-seven as of July 2004) for the ILC's Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations understates the degree to which that treaty reflects the institutional practices of IOs and the resulting institutional customary law. Perhaps the low level of ratifications in that case reflects not disagreement with

[116] Jennings, *supra* note 87, at 387.

[117] *See, e.g.*, David D. Caron, "The Basis of Responsibility: Attribution and Other Trans-substantive Rules," in Richard B. Lillich et al., eds., *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* at 109 (Irvington-on-Hudson: Transnational Publishers, 1997)(discussing how the Iran-U.S. Claims Tribunal tended to accept and not independently assess the ILC's draft articles even before their completion); Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility," 96 *AJIL* 833 (2002)(citing examples within the ICJ and the International Tribunal for the Law of the Sea).

[118] James Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect," 96 *AJIL* 874, at 899 (2002).

much of what that treaty contains but general satisfaction with using the treaty's rules as de facto customary law without the need for time-consuming parliamentary approval through the treaty process.

In other cases, as with respect to the ILC's Vienna Convention on the Representation of States in their Relations with International Organizations, while the low level of ratifications (especially from the host states of IOs that are critical to the overall effectiveness of the Convention) probably does reflect dissatisfaction with the "imbalanced" nature of the obligations imposed on host states of IOs (as related to, for example, the privileges and immunities granted to IO observers), this does not mean that certain provisions in that unratified treaty have not attained greater status. It has been suggested, for example, that article 23(2)(a) of that treaty, which provides that host states must take all appropriate steps to protect the premises of states' missions to IOs located in their territory, constitutes a principle of law that the host states of IOs generally accept and abide by, even in the absence of a specific treaty obligation to comparable effect.[119]

Moreover, even when ILC efforts fail and its product is not endorsed at any of these levels, its actions may nonetheless have an effect on the law. Thus, Jennings indicates how the ILC's initial attempt to require parties' unanimous consent to proposed treaty reservations, rebuffed by the GA in favor of the result reached by the ICJ in the *Genocide case*, helped to establish the rule with respect to reservations now codified in the Vienna Convention on the Law of Treaties.[120] Such instances are prominent examples of how the law develops through the dialogue between organizational organs, and why the processes anticipated in Article 13(1) of the UN Charter have become genuine "law-shaping" machinery, albeit in ways that probably were not anticipated by the Charter's drafters.[121]

5.3.3 "Managerial" Forms of Treaty-making

Except for occasional clauses permitting treaties to be extended under certain procedures, 19th century treaties generally did not provide for on-going assessment

[119] *See, e.g.*, Frederic L. Kirgis, *International Organizations in Their Legal Setting* at 58 (St. Paul, Minn.: West Publishing, 2nd edn., 1993).

[120] The GA directed the Secretary-General to adhere to the *Genocide case*'s flexible approach to treaty reservations for purposes of the Genocide Convention and recommended that a state should be guided by the Court's opinion. *See generally Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 ICJ Rep. 15. It also directed the Secretary-General to act as depository of documents containing reservations without passing on their legal effect but simply communicating these reservations and any objections made to states for states to draw their own conclusions. This "compromise" approach marked a "decisive" turn towards the flexible approach to treaty reservations since states registering reservations were in fact counted for the purpose of determining the date of entry into force of treaties. For Jennings, this is a "striking example of the power of article 13(a) procedures assisting and accelerating a change of practice and opinio juris." Jennings, *supra* note 87, at 392. *See also id.*, at 390–1 (discussing the effects of the 1930 Hague Conference's failure to agree on a three-mile maximum breadth for the territorial sea).

[121] For discussion of the interplay between modern treaty-making processes and codified custom, see *infra* Section 6.3.

or established procedures to encompass change or development of the substantive obligations assumed by the parties. Modern treaties undertaken under IO auspices, by contrast, often embrace a "managerial" framework that anticipates continuing collective gatherings to develop normative context and/or to supervise implementation. Such "living treaties" provide for continuing interpretation/modification or for supervision/monitoring through an existing IO, an IO created by the treaty itself, or "treaty organs" that may or may not constitute an "international organization" with distinct legal personality or a secretariat of its own. Which of these institutional mechanisms is used is often determined by the subject matter of the treaty in question. Once a particular model has been successfully negotiated in a given field, negotiators in that field will tend to follow it simply because it is familiar or has been shown to work.[122]

Treaties that establish IOs form, of course, the subject of this book and require little discussion at this point. Many IOs, such as the International Whaling Commission (established by the International Convention for the Regulation of Whaling of 1946), established for narrow purposes, are more easily perceived to be vehicles for the implementation and supervision of particular treaty commitments than are more general purpose organizations, such as the United Nations. But even the UN is, in a very real sense, a "managerial" vehicle to interpret, monitor, and enforce particular treaty commitments over time and the same can be said for most other IOs, including the WTO. Treaties that assign supervisory functions to existing IOs, such as the International Convention for the Prevention of Pollution of the Sea by Oil of 1954 (which uses the IMO) or the International Plant Protection Convention of 1951 (which uses the FAO), also require little discussion. Such treaties demonstrate the adaptability of existing institutions to new purposes.

Modern treaty regimes that have established distinct patterns for using newly created institutional mechanisms for on-going assessment, interpretation, or supervision are prevalent with respect to human rights, arms control, and especially the environment. It is important to remember, however, that even older entities, such as the pre-WTO GATT, were "managerial" regimes in the sense described here.

Human rights conventions have tended to establish a single expert monitoring body, such as the Human Rights Committee of the ICCPR or the Committee on the Elimination of Discrimination Against Women under CEDAW.[123] These expert bodies are usually tasked with drafting reports in response to complaints filed by individuals as well as in response to the periodic reports filed by the states

[122] Paul Szasz, "The Complexification of the United Nations System," *Max Planck UNYB* 3, at 20 (1999); Robin R. Churchill and Geir Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law," 94 *AJIL* 623, at 630 (2000) (quoting Lang for the fact that institutional arrangements tend to be used as precedents).

[123] But note that the Committee on Economic, Social and Cultural Rights is a subsidiary organ of ECOSOC, which has been assigned the task of monitoring the International Covenant on Economic, Social and Cultural Rights.

parties. Such bodies combine quasi-judicial dispute settlement with on-going interpretation and enforcement. (These aspects of "law-making" will be examined in Part III.)

Human rights expert bodies typically convene only for limited periods (e.g., four to eight weeks annually) and share the secretariat services of the Human Rights Centre in Geneva. The financing arrangements for such expert bodies vary. In some cases, only the parties to the convention bear the cost, in others, there is burden-sharing with the sponsoring organization (usually the UN), while in yet others, the UN has assumed (at least *ab initio*) the entire burden. To the extent human rights treaties anticipate a separate "meeting of the parties," the purpose of such gatherings is principally to elect members of the expert body; such meetings are also serviced by the UN Secretariat.[124] Outside the human rights area, other treaties, such as those dealing with illicit drugs and with specialized topics on the law of the sea, respond in similar fashion to the need for managerial follow-up, and rely on a separate body of experts for this purpose.[125]

Major multilateral arms control treaties concluded under UN auspices (typically under the Conference on Disarmament, a treaty organ of the UN serviced by the UN Secretariat, financed from the UN's regular budget and which reports to the GA) suggest a second pattern: the use of various types of "meetings of the parties" to revise or extend such agreements. While the Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction established the Organization for the Prohibition of Chemical Weapons (OPCW), a distinct full-scale IO for this purpose, this is extremely unusual. The most common approach is to anticipate in the body of an arms control treaty the need for periodic or episodic convening of its parties. Usually these treaties provide, or have been interpreted as providing, that such meetings be convened by UN organs and be serviced by UN staff. UN organs, in particular the GA, have been instrumental in convening such meetings, in influencing their agenda, and in considering and reacting to the results. Thus, an Amendment Conference anticipated under the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, repeatedly urged by the GA, was convened at UN Headquarters in January 1991,[126] and Review Conferences of the parties to the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) have been arranged by the UN Secretary-General at the

[124] *See generally* Szasz, *supra* note 122, at 21–2.

[125] Thus, the International Narcotics Control Board, the successor to the Permanent Central Narcotics Board and the Drug Supervisory Body, consisting of thirteen individuals appointed by ECOSOC in their personal capacity on the basis of nominations by WHO as well as states, performs various functions under the 1961 Single Convention on Narcotic Drugs, the 1971 Convention on Psychotropic Substances, and the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The Commission on the Limits of the Continental Shelf, established by Annex II to UNCLOS and consisting of twenty-one experts elected by the states parties to the Convention at meetings convened by the UN Secretary-General, is serviced by the Division of Ocean Affairs and the Law of the Sea of the UN Office of Legal Affairs. *See* Szasz, *supra* note 122, at 27.

[126] *Id.*, at 23.

request of the GA.[127] Given the degree of UN involvement in such conferences, these gatherings are usually regarded, by the media, as "UN conferences."

Regional arms control arrangements adhere to similar arrangements, as under the OSCE or the General Assembly of the OAS. As is documented by Paul Szasz, monitoring activities with respect to arms control treaties also rely on organizational venues, including the IAEA, the European Atomic Energy Community (Euratom), the OSCE, the UN Secretary-General, the General Secretariat of the OAS, and the UN Security Council.[128] Other regimes, such as the 1995 UN Agreement on the Implementation of the Provisions of the UN Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, also rely on review conferences to be convened by the UN Secretary-General. As Paul Szasz points out, these treaty bodies—expert groups in the case of human rights or conferences of the parties in the case of arms control—exist in a symbiotic relationship with their host organization (often the UN) from which they draw their administrative support. Yet such arrangements enable the specific parties to such treaties (which never includes all members of the UN) to carry out activities that only those who have agreed to be bound by the treaty have agreed to assume. While the UN has been the most active in creating institutionalized treaty bodies for on-going assessment, evaluation, and/or enforcement of treaty obligations, other IOs, including WIPO, the IMO, FAO, the IAEA, UNESCO, and international financial institutions such as the World Bank and regional organizations have also created treaty bodies for such purposes.[129] Indeed, in some cases, as with respect to WIPO, the prime function of the organization appears to have become servicing the various treaties that it has sponsored, as well as assisting states to negotiate new ones.

Another pattern of "managerial" treaty-making has emerged in multilateral environmental agreements (MEAs), a field that is generally and misleadingly considered to be "under-institutionalized." It is true that with the exception of UNEP, a quasi-autonomous body of the UN that does not have the status of a UN specialized agency[130] and the entities created by the very environmental treaties discussed below, no traditional IO exists to cover environmental concerns at the

[127] *Id. See also* the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, which although not negotiated under UN auspices, assigns the UN Secretary-General the function of convening various contemplated meetings of the parties. *See* GA Res. 52/38 A (December 9, 1997) and GA Res. 53/77 N (December 4, 1998) (welcoming the adoption of the Convention and instructing the Secretary-General to carry out the functions assigned to him under that treaty). *See also* Szasz, *supra* note 122, at 25.

[128] Paul C. Szasz, "The Proliferation of Arms Control Organizations," in Niels M. Blokker and Henry G. Schermers, eds., *The Proliferation of International Organizations*, Annex, at 135–49 (The Hague, Boston: Kluwer Law International, 2001).

[129] *See generally* Szasz, *supra* note 122, at 28. For a description of the IAEA's treaty-making, see Larry D. Johnson, "IAEA Treaty-Making Activities in 1997," 2 *Max Planck Yrbk Int'l L.* 51 (1998).

[130] For a description of the special characteristics of quasi-autonomous UN bodies such as UNEP, UNHCR, UNRWA, UNICEF, UNDP, UNCHS, UNU, and UNIDO, see Szasz, *supra* note 122, at 3–16.

global level. But while there are periodic calls to establish such an organization,[131] the absence of traditional IOs has not prevented treaty-drafters from creating institutional substitutes with respect to environmental regulation. MEAs have usually established institutional mechanisms that emulate the structures of traditional IOs but that avoid some of their perceived detriments. Such treaties usually establish the equivalent of a plenary political organ (typically a "meeting" or "conference" of the parties (MOP or COP)), expert organs, and a secretariat (except that the last is usually a part of the secretariat of an existing IO or of a quasi-autonomous body, such as UNEP). These institutional arrangements are typically vague about whether the ensuing entities have independent legal personality or enjoy privileges and immunities. Treaty-drafters, perhaps uncertain about the need to create yet another full-scale IO, typically do not provide for such rights, but in some cases the treaty organs themselves enter into the equivalent of a headquarters arrangement in their own names with their host states; alternatively, "COPs" have been known to adopt resolutions purporting to confer legal personality and privileges and immunities on themselves or their subsidiary organs.

For these reasons, scholars are uncertain about whether or not such organs ought to be considered IOs in their own right.[132] The innovative institutional arrangements found in MEAs presumably respond to the need for permanent arrangements that, unlike existing IOs, involve only those states that are parties to the MEAs, avoid the costs and bureaucracies associated with traditional IOs, and permit more flexibility (as with respect to when and where the COP is expected to meet).[133] The reluctance to turn to existing IOs would also appear to have a historical explanation: most of the major MEAs grew out of the 1972 UN Conference on the Human Environment, a period of widespread dissatisfaction with existing IO bureaucracies and politics.[134]

The 1971 Ramsar Convention on Wetlands preceded the wave of MEAs and was probably the first of this new kind of environmental treaty. That Convention provided that its COP, namely, the Conference on the Conservation of Wetlands

[131] *See*, *e.g.*, Daniel C. Esty, "The Case for a Global Environmental Organization," in Peter B. Kenen, ed., *Managing the World Economy: Fifty Years After Bretton Woods* at 287 (Washington, DC: Institute for International Economics, 1994); Frank Biermann and Udo Ernst Simonis, *Policy Paper 9: A World Environment and Development Organization* (Development and Peace Foundation 1998), available at http://www.bicc.de/sef/publications/pol-pap/no9/text.html; Geoffrey Palmer, "New Ways to Make International Environmental Law," 86 *AJIL* 259, at 278–82 (1992).

[132] Szasz, *supra* note 122, at 30–4.

[133] *See*, *e.g.*, Churchill and Ulfstein, *supra* note 122, at 630.

[134] *Id.*, at 629. Levy, Haas, and Keohane, argue, for example, that MEAs can fulfill their roles without large administrative bureaucracies and that running such bureaucracies may divert leaders from their quintessentially political task of creating and manipulating processes by which governments change conceptions of their interests and in which other interests can be mobilized on behalf of environmental goals. Marc A. Levy, Peter M. Haas, and Robert O. Keohane, "Institutions for the Earth," 34 *Environment*, Issue 4, 12, at 31–2 (May 1992). They also suggest that MEAs benefit from having to build mutually reinforcing networks and coalitions rather than establishing competing bureaucracies since "keeping the size of secretariats small forces them to build bridges to other groups and develop networks rather than hierarchies." *Id.*, at 32.

and Waterfowl, would meet as necessary to review implementation. The Ramsar COP, which now meets every three years, has an essentially advisory power to consider problems of implementation; it also meets to consider additions and changes to the list of protected wetland areas contained in the treaty. In that COP, each party to the Convention has one vote but that body may also, by simple majority of votes cast, make recommendations to the parties on conservation, management, and the wise use of wetlands and their flora and fauna. The Ramsar COP, which is serviced by a standing secretariat provided by the International Union for the Conservation of Nature and Natural Resources (itself a peculiar IO, established by a UNESCO-convened conference in 1948, whose members include states, governmental ministries, NGOs), has also established working groups to oversee implementation of decisions taken.[135]

Comparably flexible institutional arrangements characterize other treaties dealing with biodiversity. Thus, the 1973 (Washington) Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)'s COP meets at least every two years to adopt binding amendments to the Convention's appendices limiting trade in listed species, to review progress made, and to make recommendations for improving the treaty's effectiveness. CITES' COP also has a secretariat (to be provided by UNEP) and has established a number of committees, sub-committees, and working groups.[136] Comparable arrangements exist for the 1979 (Bonn) Convention on Migratory Species (with a COP assisted by a Scientific Council and a Secretariat (located in Bonn)) and the 1992 Convention on Biological Diversity (with a COP, a Subsidiary Body on Scientific, Technical and Technological Advice, and a permanent Secretariat (located in Montreal)).

In the field of atmospheric protection, UNEP's 1985 Vienna Convention for the Protection of the Ozone Layer, along with the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, uses its COP to adopt amendments to the protocols by qualified majority voting. A separate group with a distinct membership, the MOP, may adopt adjustments to the protocols that bind all the parties if two-thirds of the parties are present and voting (representing at least fifty percent of the total consumption of controlled substances), they may vote in favor. The secretariat for both the 1985 Convention and the 1987 Protocol is part of UNEP and functions out of Nairobi. The Montreal Protocol also established a Multilateral Fund governed by an Executive Committee with a separate secretariat that is located in Montreal and is associated with the Global Environmental Facility (GEF) (see below). An Implementation Committee (consisting of ten parties elected by the others) is charged with determining non-compliance, including the "amicable resolution" of inter-state complaints of violation.

[135] *See* Szasz, *supra* note 122, at 30, n. 88.

[136] CITES' reliance on UNEP is considerable. The UNEP Executive Director appoints the Secretary General of CITES who, in turn, appoints, in consultation with UNEP, the rest of the staff who are UN staff members. *Id.*, at 30.

A COP, two Subsidiary Bodies (for Scientific and Technological Advice and for Implementation), and a Secretariat function under the 1992 Climate Change Convention. The first COP of the Climate Change Convention adopted recommendations made by the UN Secretary-General for "institutional linkage;" under these arrangements, the UN Secretary-General in consultation with the COP appoints the Executive Secretary and the Secretariat, now located in Bonn, consists of UN staff financed by states parties. The model used for Climate Change was used in the 1994 UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Especially in Africa (encompassing a COP, a Committee on Science and Technology composed of governmental representatives with relevant expertise, and a permanent secretariat).

With respect to the marine environment, the 1971 International Convention on the Establishment of an International Fund for Compensation of Oil Platform Damage, established an entity, with legal personality under the laws of each party, to provide compensation to any person suffering pollution damage if that person has been unable to recover full and adequate compensation under the 1969 Civil Liability Convention, and to relieve ship owners from additional liability if they have complied with safety at sea and other conventions. The Fund comprises an Assembly, a Secretariat and, originally, an Executive Committee that was discontinued by a 1992 Protocol. The Assembly, which includes all parties to the Convention, acting generally by simple majority vote of those present and voting, approves the settlement of claims and decides on the distribution of funds. Since the Fund may also assume the obligations of a guarantor and has the right to recover from an owner if it would have been exonerated under the relevant provisions of the Convention, the Fund is actively involved in bringing and defending claims in various courts. The 1972 London Dumping Convention uses annual Consultative Meetings of the Parties, held under the auspices of the IMO, which provides secretariat services to review implementation, amend the Convention and its annexes, ensure the availability of scientific and technical information, and adopt procedures and criteria for exceptional and emergency situations. Subsidiary bodies, including a scientific group on dumping and an ad hoc group of legal experts, discuss questions such as the relationship between the London Convention and the Antarctic treaty regime.

Other environmental treaties similarly draw on the COP structure. Thus, the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, is reviewed by its COP and a number of sub-bodies. UNEP offices in Geneva, as Secretariat for this Convention, are charged with organizing the gathering and sharing of information and with examining notifications required under that Convention.

More innovative still, from the perspective of institutional structure, is the Global Environment Facility (GEF), established jointly by separate resolutions adopted within the World Bank, UNEP, and UNDP. The GEF provides grants for investment projects, technical assistance, and research for developing country

activities intended to protect the environment or to transfer environmentally benign technologies. The GEF, which was restructured in 1994, now has an Assembly (with representatives from all participants), a Council (sixteen members from developing countries, fourteen from developed, and two from central and eastern Europe), a Secretariat, and a Scientific and Technical Advisory Panel. The GEF draws from all three sponsoring organizations: UNDP is responsible for technical assistance and training, UNEP for environmental expertise, and the World Bank serves as repository for the Global Environmental Trust Fund.[137]

More significant than the innovations in institutional form canvassed above is the change in the nature of treaty-making that is epitomized by MEAs. In these cases, treaty-making has changed from a discrete one-shot affair; it is instead merely one element of a much more comprehensive action plan, involving continuous environmental assessment and management, and on-going reliance on permanent institutional and financial arrangements. Managerial treaties "offer the prospect of a virtually continuous legislative enterprise."[138]

The treaty structure of managerial models, initially established by MEAs and now evident in other contexts, is relatively straightforward. Typically there is a "framework" convention that addresses an international problem, often involving the "global commons" and therefore requiring the cooperation of an extensive number of states, to which no solution has yet emerged at the international level. The framework convention records the parties' joint objective to deal with the issue but usually does not immediately commit them to do anything other than conduct joint or individual studies or to gather and report to a central body. The framework convention also provides for mechanisms or an action plan to develop more concrete subsequent obligations to be given effect through modifications to the framework convention in the form of amendments, protocols, or annexes. These treaty modifications are usually (but, as noted above, not always) optional for parties to the original framework convention and bind only the particular signatories to these subsidiary instruments. The typical patterns include a framework convention that is (1) implemented by a single subsequent protocol, which itself might be amended as necessary (as in the 1985 Vienna Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer); (2) initially accompanied by one or more protocols to which

[137] Other conventions that create a COP along with other organizational venues for on-going assessment, include the 1998 (Rotterdam) Convention for the Application of Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (entered into force, February 24, 2004)(text available at http://www.pic.int.). Regional treaties that also adopt comparable structures include the 1983 (Cartagena) Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 1506 UNTS 157 (entered into force October 11, 1986) (text available at http://www.cep.unep.org/law/cartnut.html). For a listing of treaties, both global and regional, in the environmental field that establish "autonomous" institutional arrangements, see Churchill and Ulfstein, *supra* note 122, at 623–4.

[138] Gunther Handl, "Environmental Security and Global Change: the Challenge of International Law," in W. Lang et al., eds., *Environmental Protection and International Law* at 199 (London: Graham & Trotman, 1991).

others or amendments are added (as in the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects and its protocols); or (3) followed by a series of protocols, each of which addresses a different sub-issue (as in the 1979 Council of Europe Convention on Long-Range Transboundary Air Pollution and its 7 protocols).[139]

The European system for the protection of human rights, established by the European Convention for the Protection of Human Rights and Fundamental Freedoms, is a significant variation on the "managerial" concept. In that case, the initial, quite substantive, obligations imposed under the original Convention have been deepened, both in substance and procedurally, through the adoption of (now twelve) protocols, which have added both additional rights as well as widened individuals' access to a judicial remedy.[140] As Churchill and Ulfstein have noted, the European human rights system, as well as other human rights and arms control treaty regimes, differs from the "managerial" forms that characterize MEAs in four significant respects. First, MOPs to the extent that they occur or are anticipated in conventions on human rights and arms control, are typically ad hoc and convened at the request of a UN body, such as the GA. COPs in MEAs, by contrast, are typically autonomous entities that decide for themselves whether and when to convene, and normally do so on a regular basis. Secondly, COPs have, unlike treaty bodies in human rights and arms control, permanent secretariats to assist their functioning. Thirdly, COPs play a much broader role in developing the normative content of environmental regimes since they typically have the power to interpret treaty obligations, to amend these obligations or adopt protocols, and, in certain cases, to take what appears to be regulatory action binding all parties. (While some MEAs, such as article 10(1) of the Montreal Protocol, explicitly authorize its MOP to determine what an "agreed incremental cost" is, other COPs have assumed an "implied power" to undertake authoritative interpretation on some issues.)[141] Finally, COPs uniquely rely on the full membership of a treaty, and

[139] *See* Szasz, *supra* note 25, at 801 (using these categorizations and examples).

[140] For an account of the evolution of the Strasbourg system, see Andrew Moravscik, "Explaining International Human Rights Regimes: Liberal Theory and Western Europe," 1 *EJIL* 157 (1995); Andrew Moravscik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," 54 *Int'l Org.* 217 (2000).

[141] Explicit power to amend the Ramsar, London, Bonn Conventions, as well as CITES, is conferred on the respective COPs (but such amendments are generally to be adopted by consensus if possible and by two-thirds or three-quarters vote if necessary, and such amendments only take effect if ratified by the same proportion of parties as are required for their adoption and only with respect to those states that have ratified them). Provisions for modification via Protocol are similar and appear in the Vienna Convention, the Basel Convention, the Climate Change Convention, and the Biodiversity Convention. In some environmental accords, such as the London, Bonn, and Basel Conventions, CITES, and the Montreal Protocol, COPs have, in addition, the power to amend annexes attached to these respective treaties in order to reflect changing technology, increased knowledge, or other changes in circumstances which, as in the case of "adjustments" authorized to the Montreal Protocol, take effect for all parties to the convention and do not require ratification (even though they only require a two-thirds vote in the COP). In some cases, as with respect to the COP's change to the

not an expert or quasi-judicial body for supervision over compliance or for resolution of disputes alleging non-compliance. Indeed, as Churchill and Ulfstein indicate, MEA procedures assiduously avoid traditional bilateral forms of dispute settlement, even of the arguably non-binding variety that characterizes some UN human rights treaties such as the Human Rights Committee under the ICCPR. Although some MEAs anticipate binding resolution by mutual consent of the disputing parties (e.g., CITES in article XVIII(2)), through binding arbitration (e.g., Bonn Convention at article XIII), or by submission to arbitration or the ICJ (e.g., Basel Convention at article 20(2)), most opt for negotiation or non-binding forms of conciliation and envisage the COP as engaging in "multilateral consultations" to resolve allegations of non-compliance in a non-adversarial and cooperative manner. (Another "managerial" regime whose design elements and institutional history is otherwise similar to MEAs but which deviates considerably with respect to dispute settlement is, of course, the WTO.)[142]

For these reasons, Churchill and Ulfstein consider the institutional arrangements provided under human rights and arms control accords to be closer to "ad hoc

London Convention, which introduced a scheme for regulating the incineration of waste at sea and later banned such incineration altogether, or its phasing out the dumping of industrial and radioactive wastes, such changes can radically alter parties' treaty obligations and constitute de facto concessions of law-making powers that can be seen as "regulatory" in nature. Yet other environmental accords, such as the Kyoto Protocol, enables the COP to adopt "rules" relating to the operation of the system for trading in emissions of greenhouse gases; see also article 4(2)(d) of the Climate Change Convention which authorizes the COP to take certain "decisions."

[142] Like MEAs, the original GATT was an "institutional orphan" forced to improvise when it came to devising permanent structures. At the outset, the GATT did not exist as an organization except for periodic formal meeting of its "contracting parties," usually held once or twice a year. An inter-sessional Committee was formed in 1951 to organize inter-sessional voting and to address questions concerning balance of payments restrictions and a number of committees and working groups emerged over that decade. The inter-sessional Committee was replaced by a Council of Representatives in 1960, a body able to take over more housekeeping chores but still unable to handle matters of substance unless it collected the affirmative votes that would be required if the Contracting Parties were meeting in full session. While formal voting rules for meetings of the Contracting Parties varied depending on the issue at hand, the taking of formal votes was discouraged and generally that body operated on the basis of consensus. As respect to most MEAs, the GATT's meeting of the parties originally had no secretariat of its own but used the secretariat of a largely defunct UN body, the Interim Commission for the International Trade Organization (ICITO). For more on the GATT's early years and its operation through the early 1970s, see Gerard and Victoria Curzon, "GATT: Traders' Club," in Robert W. Cox and Harold K. Jacobson, eds., *The Anatomy of Influence: Decision Making in International Organization* at 298 (New Haven: Yale University Press, 1974). Another example of a regime that might be characterized as "managerial" and that predates modern MEAs is the Antarctic regime produced by the Antarctica Treaty of 1959. The "consultative parties" of that treaty meet regularly and have adopted over 150 "recommendations;" they have also served as a forum for the negotiation of further treaties, such as the 1980 Convention for the Conservation of Antarctic Marine Living Resources. *See* Churchill and Ulfstein, *supra* note 122, at 655–6. For discussion of the unique nature of Antarctic "soft law" produced by the consultative parties' recommendations, see Christopher C. Joyner, "Recommended Measures Under the Antarctic Treaty: Hardening Compliance with Soft International Law," 19 *Mich. J. Int'l L.* 401 (1998).

conferences" whereas MEAs establish "autonomous" institutions that function in many respects like traditional IOs. They contend that COPs under these treaties are legitimately assuming attributes associated with international institutional law, including "constitutional" powers (including rights to "implied powers") and aspects of international legal personality (such as the power to conclude treaties with other subjects of international law).[143]

MEAs' relatively exclusive reliance on gatherings of all the treaty parties for law-making defines a type of "managerial" treaty with clear design principles. Such treaties are regarded as arenas for interactive discourse among their parties. It is assumed that a self-enforcing dynamic will be generated by the COPs and other institutional fora; that is, that states initially reluctant to commit to specific obligations will be led to deepen their cooperation and will be nudged into entering into increasingly ambitious commitments. MEAs are therefore characterized as treaties (1) aspiring to universal or nearly universal participation; (2) encompassing treaty commitments that are, at least initially, vague and unthreatening, consisting of few if any specific performance targets or timetables and which are not subject to enforceable dispute settlement at either the international or domestic level; and (3) that rely on decision-making rules that encourage consensus and discourage reservations.[144]

Managerialists defend these design elements on several grounds. With respect to a variety of problems, especially environmental concerns, they argue that it is important to secure wide participation as early as possible. It is suggested that in at least certain cases, regimes with wide participation "deepen" quicker; that "socialization" works better with a more nearly universal membership because of its greater legitimacy and authoritativeness.[145] Inclusive regimes permit "community pressures" to be brought on laggard states, while smaller regimes might be more easily dismissed as "user's clubs that further only narrow and usually environmentally unfriendly interests."[146] It is argued that establishing a low threshold of commitment entices states to join, permits the diffusion of information, and begins the collective deliberation that will lead to a deepening of the regime since what is important is to "engage states" such that they are encouraged to create a domestic bureaucracy capable of seeing the treaty regime as part of its core mission. At the same time, reporting and other inter-state compliance tools (short of binding dispute settlement) facilitate the gradual solidification of treaty norms, while helping to establish the operation of supportive "epistemic communities" both in and outside the treaty regime. Legally binding commitments, such as obligations to report, are combined with "soft" or vague commitments (particularly at the outset) to reduce the price of admission. Consensus decision-making within the COPs

[143] *See generally* Chapters 2 and 3.

[144] George W. Downs, Kyle W. Danish, and Peter N. Barsoom, "The Transformative Model of International Regime Design: Triumph of Hope or Experience?," 38 *Colum. J. Transnat'l L.* 465, at 471 (2000).

[145] *See, e.g., id.*, at 477–8.

[146] *Id.*, at 478.

also serves to lessen predictable objections concerning national sovereignty and reportedly widens the sense of commitment.[147]

Avoidance of binding bilateral dispute settlement or economic sanctions (as in the WTO regime) as tools of enforcement is defended on the basis that treaty violations should not be assumed to be the product of deliberate cheating subject to an adversarial court decision, but ought to be treated as resulting from interpretative ambiguities, unavoidable time lags between reform and performance, or the lack of technical or administrative capacity to comply.[148] It is also argued that many of the issues are too "highly policy-centric" to lend themselves well to a single plaintiff versus defendant model of resolution and that such a model may, in any case, be too adversarial and alienating to be effective.[149] Thus, Churchill and Ulfstein contend that since "questions of compliance with MEA commitments are multilateral in character and usually affect all parties equally rather than any particular party or parties specifically, they should preferably be addressed in a multilateral context."[150]

MEAs' design principles reflect three assumptions about the primary types of constraints such regimes face. As regime theorists have argued, they are intended to overcome low levels of concern about the relevant environmental threat (at least on the part of laggards), the lack of capacity to manage the threat, and the inability to overcome problems of collective action. Accordingly, MEAs' initial attention to the generation of scientific consensus is intended to elevate concern regarding the environmental problem by, among other things, magnifying public pressure on governments (as through information provided to NGOs), fostering pro-environmental competition among governments, and providing institutional legitimacy to what might otherwise be seen as contestable reflections of national interest.[151] The dramatic reduction of the use of CFCs, attributed to the adoption of the 1985 Vienna Convention, its 1987 Montreal Protocol, and the

[147] *Id.*, at 480–2 (citing views of Oran Young). *See also* Jutta Brunnée and Stephen J. Toope, "Environmental Security and Freshwater Resources: Ecosystem Regime Building," 91 *AJIL* 26, at 32 (1997).

[148] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty*, at 10–17 (Cambridge, MA: Harvard University Press, 1995).

[149] Downs et al., *supra* note 144, at 484. This draws, of course, on insights provided by Lon Fuller, among others. *See also* Alan Boyle, "Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions," 3 *J. Envt'l L.* 229, at 230 (1991). Boyle argues that traditional dispute settlement is inherently bilateral and confrontational and assumes, as do domestic tort actions, that "injured states" are the primary actors seeking compliance. Certain environmental regimes, by contrast, adopt a more preventive or administrative approach not primarily based on an award of damages. Such regimes take a more "sophisticated" and "less confrontational" approach that appreciates that environmental problems require a "community response" attentive to the needs of many states, future generations, peoples, or non-human species. *Id.*, at 229–30. Of course, as Boyle points out, the efficacy of even binding dispute settlement, such as recourse to the ICJ, ultimately rests on community pressure. *Id.*, at 230–1.

[150] Churchill and Ulfstein, *supra* note 122, at 644.

[151] *See* Peter M. Haas, Robert O. Keohane, and Marc A. Levy, eds., *Institutions for the Earth: Sources of Effective International Environmental Protection* (Cambridge, MA: MIT, 1993).

1990 amendments to that protocol to phase out CFCs and help fund developing countries' compliance, is regarded as a victory with respect to MEAs' ability to increase the level of governments' concern by helping to evolve scientific understanding, by serving as a vehicle for strong national leadership, and by structuring the inter-state dialogue to promote helpful linkages among issues.[152] MEAs are said to enhance the contractual environment by helping to make commitments more credible and by ensuring regular interactions among participants on the same set of issues. While this is most relevant with respect to international common problems, it is contended that MEAs may be helpful as well with respect to developing norms for national responses not necessarily perceived as involving common concerns, such as the use of pesticides in developing countries.[153] Finally, MEAs are seen as vehicles for increasing national capacity by creating an external demand for effective domestic action or by transferring resources (such as technical assistance) to facilitate domestic enforcement.[154]

Skeptics of MEAs' managerial approach argue that such regimes, to the extent they are effective, succeed in spite of their design elements and not because of them. They argue that incentives in the marketplace or relative price changes arising from technological advances may drive the success of some environmental efforts, for example, and that MEAs ignore the wider community of agents and factors that are usually involved in solving many environmental problems. Critics also contend that such regimes, however universal their ostensible membership, may in reality serve the interests of one or more hegemonic powers; that the degree to which such regimes "transform" states may be attenuated by the lack of autonomy of state representatives and their distance from the actual actors who are key to the effectiveness of the regime; or that the continuing effectiveness of such regimes may require, as specific obligations are sought to be imposed on states, turning to binding dispute settlement (as seen in the GATT's transformation into the WTO).[155] It is also possible that the multilateral ethos of such regimes might break down over time should, for example, differing groups of states opt for subsequent amendments or protocols or if efforts to take decisions by consensus in

[152] *See*, *e.g.*, Edward A. Parson, "Protecting the Ozone Layer," in Haas et al., eds., *supra* note 151, at 27. Another oft-cited example is the 1979 Geneva Convention on Long-Range Transboundary Air Pollution (LRTAP). LRTAP is credited with elevating concern with respect to acid rain by serving as a focus for evolving scientific consensus with respect to the problem as well as with respect to possible solutions. *See*, *e.g.*, Marc A. Levy, "European Acid Rain: The Power of Tote-Board Diplomacy," in *id.*, at 75.

[153] *See, e.g.*, Robert L. Paarlberg, "Managing Pesticide Use in Developing Countries," in *Institutions for the Earth*, *supra* note 151, at 309.

[154] Marc A. Levy, Robert O. Keohane, and Peter M. Haas, "Improving the Effectiveness of International Environmental Institutions," in Haas et al., *supra* note 151, at 404–8 (citing examples, such as the Ozone Fund, which enables less developed countries to find alternatives to CFCs or the technical assistance provided by the FAO to help national pesticide registrars and promote integrated pest management). The prospect of international environmental regulation may also stipulate economic demand for alternative technologies (as to CFCs), thereby bringing more environmentally sensitive technologies into being and, in turn, making states more amenable to changing their behavior. *See id.*, at 420–1.

[155] Downs et al., *supra* note 144, at 493–505.

COPs fail. Yet, at the end of the day, even the harshest critics of MEAs' managerial model contend not that these regimes have been proven to be ineffective but that the evidence is not yet in on whether they have been shown to be effective in dealing with the problems that they are created to solve. Other skeptics of "managerial" models argue only that such approaches are not effective for all contexts, and that no single strategy ought to be applied to all issues sought to be regulated via treaty.[156]

There is little doubt that MEAs respond to the concerns of *realpolitik*. MEAs grew out of perceived needs in the environmental area to find more instruments more amenable to rapidly developing new knowledge and technology than the traditional treaty of the 19th century. They emerged from states' initial reluctance to enter into more concrete commitments and from the absence of other alternatives, both with respect to speedy amendment of international obligations as well as with respect to less contentious remedies for non-compliance. Despite the unproven success of the MEA managerial model, it is being emulated elsewhere.

The World Health Assembly of the WHO, in that organization's first venture into treaty-making, passed a resolution in May 1999 calling for a multi-year effort to secure a Framework Convention on Tobacco Control.[157] That Framework Convention was adopted by the World Health Assembly on May 21, 2003 as an annex to a resolution by that body.[158] As of February 2005, that Convention had achieved 168 signatories, including the United States, 55 of which had ratified the treaty in accord with their domestic procedures.[159] The Tobacco Framework Convention adheres to the basic structural elements of the MEA managerial model. The legal obligations imposed under it include "guiding principles" and "general obligations," under an even more general overall clause that provides that the "objective of this Convention and its protocols is to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke."[160]

[156] *Id.*, at 507–9.

[157] WHA, Resolution WHA52.18. For a description of the justifications offered by the WHO for an international regulatory strategy for global tobacco control, see Allyn L. Taylor and Ruth Roemer, Programme on Substance Abuse, WHO/PSA/96.6P (1996); Allyn L. Taylor, "An International Regulatory Strategy for Global Tobacco Control," 21 *Yale J. Int'l L.* 257 (1996). *See also* further discussion in Chapter 6 *infra*.

[158] *See* WHO Framework Convention on Tobacco Control, WHA56.1, May 21, 2003 (Health Assembly Resolution and Annex), at www.who.int/tobacco/areas/framework/en (hereinafter "Tobacco Framework Convention").

[159] Under article 36 of the Tobacco Framework Convention, forty ratifying states are needed for the treaty to come into force. After reaching the magic number of ratifying parties on November 29, 2004, the Convention will finally enter into force on February 27, 2005. *See* www.who.int/tobacco/areas/framework/signing_ceremony/countrylist/en, for an up-to-date list of signatories and ratifying states.

[160] Article 3, Tobacco Framework Convention, *supra* note 158.

The guiding principles, though vague, are cast in terms that suggest an intent to create general principles of customary law comparable to, for example, the precautionary principle in environmental law. They include the principle that "every person should be informed of the health consequences, addictive nature and mortal threat posed by tobacco consumption and exposure to tobacco smoke."[161] The general obligations are comparable to those in MEAs insofar as they impose on ratifying states only vague duties to maintain national coordinating mechanisms or focal points, adopt and implement effective legislative, executive, administrative, and/or other measures, and cooperate "as appropriate."[162] Although the Convention also contains more specific obligations relating to reducing the demand for and supply of tobacco, protecting the environment and health of persons, relating to issues of criminal and civil liability, and encouraging scientific and technical cooperation and exchange of information, these are, like comparable provisions in MEAs, cast in terms that permit parties certain discretion albeit within categories of required national measures.[163] The Convention also establishes a COP charged with reviewing implementation, promoting and facilitating the exchange of information, and capable of adopting (by three-quarters majority vote) amendments, annexes, and protocols.[164] The WHO's secretariat is charged with assisting the COP, pending establishment of a permanent secretariat for the new tobacco regime.[165]

As with MEAs, it is envisioned that the subsequent amendments, protocols or annexes adopted by the COP will include more specific (and potentially more controversial) obligations, including with respect to transboundary advertising of tobacco products (as now occurs in connection with major broadcasting of sporting events), the smuggling of tobacco products, or the establishment of additional smoke-free environments (as during international flights or locations such as

[161] Article 4(1), Tobacco Framework Convention, *supra* note 158.

[162] Article 5, Tobacco Framework Convention, *supra* note 158.

[163] Articles 6–22, Tobacco Framework Convention, *supra* note 158. But the treaty does envision specific types of action, at the national level, with respect to each of these general categories of tobacco control measures. For example, with respect to reducing demand, the treaty states that parties "should" implement price and tax measures (article 6) and "shall" adopt effective national measures providing for protection from exposure to tobacco smoke in "indoor workplaces, public transport, indoor public places, as appropriate, other public places" (article 8), guidelines for testing and measuring the contents and emissions of tobacco products (article 9), national measures requiring manufacturers and importers to disclose information about the content and emissions of their tobacco products (article 10), and, within three years, effective national measures on packaging and labelling that prevent false or misleading health claims and include specific health warnings of requisite size and visibility (article 11). Some believe that these provisions depart from the usual MEA framework and will make it more difficult for the COP in this case to agree to more specific commitments through annexes or protocols. *See*, *e.g.*, Gregory F. Jacob, "Without Reservation," 5 *Chi. J. Int'l L.* 287, at 299–300 (2004).

As with MEAs, among the most detailed and least vague provisions are those enumerating the specific types of scientific and technical information that the parties are obligated to undertake and exchange with each other at all levels. *See* articles 20–2, Tobacco Framework Convention, *supra* note 158.

[164] Article 23, Tobacco Framework Convention, *supra* note 158.

[165] Article 24, Tobacco Framework Convention, *supra* note 158.

international airports or ports).[166] Since, under the relevant provisions of the Tobacco Framework Convention, parties are free to pick and choose among those amendments, annexes, and protocols ultimately adopted by the COP, this could result in a piecemeal approach to regulation that responds to the differing commitments, technical capabilities, and legal constraints among the treaty's expected widely diverse parties.[167] This piecemeal approach is obviously intended to secure the cooperation (or at least avoid the active opposition) of some states that might otherwise be expected to oppose all or some of these measures.[168] The Tobacco Framework Convention appears to be a contemporaneous example of a "managerial" regime that seeks to appeal to states amenable to "à la carte forms of multilateralism."[169]

5.3.4 Treaty-making with "Strings Attached"

Except to the extent some COPs in MEAs have express or implied regulatory powers, managerial regimes, like other organizational venues for treaty-making generally, respect the power of sovereign states to decide for themselves whether to assume any treaty obligations, even in the form of amendments or protocols. As the 1985 UN Study on Treaty-making indicates, the general rule is that once a multilateral treaty is promulgated by an organ or a conference of an IO, the IO is not entitled to take steps to secure that states ratify the instrument or otherwise bring it into force, except to the extent that an IO may serve as depository for ratifications, periodically urge members or others to ratify the instrument, or conduct studies to record ratification progress.[170] In exceptional cases, however, some IOs adopt treaties "with strings attached," intended to secure subsequent ratification and/or domestic implementation.

The most famous example of an IO that imposes special voting or other procedures that constitute more direct challenges to the traditional principle that treaties are based on the free, unconstrained consent of states is the ILO. From its beginnings in 1919, the ILO has taken as its core mission the production of a full range of treaties dealing with all types of labor concerns, including worker health and safety, freedom of association, social security, and non-discriminatory treatment. The Constitution of the ILO incorporates a highly structured, relatively rigid set of procedures that produce, at predicable intervals, treaty instruments within the organization's mandate. At the end of its session in 2001, the International Labour

[166] *See* Szasz, *supra* note 25, at 801–2.

[167] *See* articles 28, 29, and 33, Tobacco Framework Convention, *supra* note 158, addressing the adoption of amendments, annexes, and protocols, each of which anticipates that these will be binding only with respect to parties to the convention that accept them. But note that with respect to protocols, each protocol may adopt particular rules with respect to entry into force. Article 33(6).

[168] *See generally* Allyn L. Taylor and Douglas W. Bettcher, "WHO Framework Convention on Tobacco Control: A Global 'Good' for Public Health," 78:7 *Bulletin of the WHO* 920, at 923 (2000).

[169] *See generally* Francesco Francioni, "Multilateralism á la Carte: The Limits to Unilateral Withholdings of Assessed Contributions to the UN Budget," 11 *EJIL* 43 (2000).

[170] UN Study, *supra* note 7, at 36.

Conference, its plenary body, had adopted over 170 conventions containing general norms, as with respect to human rights in "promotional" conventions, as well as more "duty-specific" agreements indicating, for example, the permitted use of asbestos in the workplace or the types of identity documents required of certain workers.[171] The body of "international labor standards" produced, known collectively as the International Labor Code, has proven influential in a variety of contexts. Apart from extensive use within the organization and its numerous dispute settlement bodies, these standards have been incorporated in domestic legislation, used by other IOs, and deployed, albeit imprecisely and controversially, as a unilateral tool of foreign policy (as in U.S. legislation threatening penalties for states that fail to respect "internationally recognized worker rights").[172] Most recently, the Social Summit in Copenhagen and the Governing Body of the ILO distilled, from the body of ILO conventions, seven treaties enumerating "core" labor rights, and these have subsequently been treated, as by the UN High Commissioner for Human Rights, as "international human rights instruments."[173]

The special attributes of ILO treaty-making are reflected at all stages, from initial negotiation to drafting to dispute settlement. Once the Governing Body of the ILO includes a proposed convention on the agenda for the annual session of the ILO's plenary body, the International Labor Conference, this sets off a predictable chain of events. First, as soon as possible after inclusion, the secretariat of the ILO, the International Labor Office, prepares a preliminary report concerning the relevant law and practice in different countries, possible specific provisions for the proposed convention, and a questionnaire for members asking for reactions. Secondly, once replies to the questionnaire are received, that Office prepares a second report indicating the principal questions that the full Conference needs to consider. Thirdly, a first reading of the proposed treaty occurs, usually within a specially constituted tripartite technical committee of the Conference, composed of equal numbers of government representatives, employer representatives, and employee representatives. Fourthly, a drafting sub-committee of the technical

[171] The ten categories in which ILO conventions have traditionally been promulgated are: (1) basic human rights (freedom of association, forced labor, discrimination in employment, equal pay); (2) employment; (3) conditions of work and social policy; (4) social security; (5) industrial relations; (6) employment of women; (7) employment of children and young persons; (8) special categories of workers (seafarers, dockworkers, plantation workers, tenants and sharecroppers, indigenous and tribal populations, workers in non-metropolitan territories, migrant workers, nursing personnel); (9) labor administration; and (10) tripartite consultation. Virginia A. Leary, "Labor," in Oscar Schachter and Christopher C. Joyner, eds., *United Nations Legal Order* 473, at 478 (Cambridge, U.K.: Cambridge University Press, 1995).

[172] For a critique of the U.S.'s use of "internationally recognized worker rights" and a comparison to the ILO's international labor rights, see Philip Alston, "Labour Rights Provisions in U.S. Trade Law: 'Aggressive Unilateralism'?," 15 *Hum. Rts Q.* 1 (1993).

[173] The seven conventions are No. 29 on Forced Labor (1930), No. 87 on Freedom of Association and Protection of the Right to Organize (1948), No. 98 on the Right to Organize and Collective Bargaining (1949), No. 100 on Equal Remuneration (1951), No. 105 on the Abolition of Forced Labor (1957), No. 111 on Discrimination in Employment and Occupation (1958), and No. 138 on Minimum Age (1973).

committee is established, consisting of one representative of each of the usual tripartite ILO constituencies, reporter(s) for the technical committee, and the legal adviser of the Conference. Fifthly, the report of this sub-committee is adopted by the technical committee and, thereafter, the Conference as a whole. Sixthly, once the Conference has approved the report, the International Labor Office prepares the text of the draft Convention based on the adopted report, circulates it to all member governments, with requests for amendments, and prepares a further report based on the replies received. Seventhly, a second reading occurs within the Conference comparable to the first except that as the report of the technical committee is considered by that body, each clause of the proposed treaty is considered separately for purposes of adoption. Eighthly, the adopted provisions are submitted to a conference drafting committee (usually consisting of the President, the Director-General of the ILO, the Legal Adviser, and various staff (including the technical committee's drafting sub-committee)). This body reviews the substantive provisions and adds the standard final provisions (covering topics such as entry into force) found in most ILO Conventions. Ninthly, the drafting committee's text is presented for a final vote before the full Conference, where amendments may be considered only under very severe restrictions. At the full Conference, the individuals voting consist of two government officials, one workers' representative, and one employers' representative from each ILO member state—with the non-governmental delegates assured, under the ILO's constitution, of the right to vote independently from their governments.[174] A two-thirds vote by these individuals is required for adoption. Steps 1 to 9, incorporating the ILO's "double discussion" procedures for adoption of ILO conventions, take up to thirty months.[175] Given these voting provisions, it is not impossible for substantial numbers of governmental representatives to the ILO to find that a convention has been adopted by the plenary body over their objection, although with the concurrence of one or more of its own delegation's non-governmental representatives to the conference.

ILO treaty-making differs as well with respect to the obligations imposed on ILO member states regarding conventions adopted by the Conference. Under the ILO Constitution, all member states must (1) bring adopted conventions before "the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action," normally within one year after the conference has closed;[176] (2) inform the ILO Director-General of the measures they have taken to satisfy (1) above;[177] (3) inform the Director-General of any ratification and "take any action as may be necessary to make effective the provisions of such

[174] ILO Constitution, article 4(1).

[175] An abbreviated "single discussion" process may be adopted in some cases, as with respect to conventions that merely revise pre-existing ILO instruments. UN Study, *supra* note 7, at 22.

[176] ILO Constitution, article 19(5)(b). It is assumed that "other action" refers to whatever executive or administrative action is needed under domestic law to secure ratification and to make the convention effective as domestic law. Frederic L. Kirgis, Jr., "Specialized Law-Making Processes," in Schachter and Joyner, *supra* note 171, at 113.

[177] ILO Constitution, article 19(5)(c).

Convention;"[178] and (4) in case its domestic authorities fail to consent to the convention, report to the Director-General "at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention."[179] In addition, the ILO's secretariat, the International Labor Office, has consistently taken the position that the "special considerations" applicable to ILO conventions require that such conventions not be ratified subject to any reservations except those specifically permitted.[180]

All ILO conventions, without exception, are also subject to a number of post-ratification procedures under the ILO constitution. Thus, all ILO members agree to make an annual report to the International Labor Office "on the measures which it has taken to give effect to the provisions of Conventions to which it is a party."[181] ILO members are also subject to "representations" made by groups of employers or workers complaining of failure to secure the "effective observance" of any conventions to which it is a party as well as complaints by other members and ILO delegates to the same effect.[182] Moreover, the amendment procedures of ILO conventions may permit changes or protocols that are much easier to adopt than is the case with respect to the typical stand-alone treaty. Finally, the ILO conference has the right to adopt "recommendations," also by majority of two-thirds votes cast, that will be "communicated to all members for their consideration with a view to effect being given to [them] by national legislation or otherwise."[183] These recommendations, which may or may not be adopted contemporaneously with a related convention, are also required to be brought before competent domestic authorities "for the enactment of legislation or other action." While ILO members are under no formal obligation to abide by recommendations, they are required to report on measures taken to give effect to them.[184]

[178] ILO Constitution, article 19(5)(d). [179] ILO Constitution, article 19(5)(e).

[180] *See* Kirgis, *supra* note 119, at 278–9 (quoting a Memorandum by the International Labor Office dated Jan. 12, 1951).

[181] ILO Constitution, article 22. In practice, the ILO is now requiring reports every four years, not annually. Kirgis, *supra* note 176, at 114. The Director-General is authorized to summarize these reports, as well as any information received under article 19 (discussed *supra*) to the conference. ILO Constitution, article 23. In practice this means that states' reports on compliance efforts with a ratified ILO Convention are scrutinized by the ILO Committee of Experts whose own published reports are published and reviewed by the ILO conference's Committee on the Application of Conventions and Recommendations (which in turn reports to the full Conference). Copies of members' reports must be given to representative associations of workers and employers in the reporting state, and these groups may submit their observations to the ILO. ILO Constitution, article 23(2).

[182] *See* ILO Constitution, articles 24–6. The procedures authorized for such representations and complaints, including commissions of inquiry, consideration by the Governing Body, and even resort to the ICJ under ILO Constitution, articles 24–7, are discussed below.

[183] ILO Constitution, article 19(2) and 19(6)(a).

[184] ILO Constitution, article 19(6)(a)–(d).

The ILO's "treaty-making with strings attached" attempts something of an end-run around the traditional requirement that states need only abide by those treaties to which they freely consent. In addition, aspects of these procedures, such as on-going reporting obligations with respect to measures taken after ratification, constrain states' traditional discretion to implement international obligations under their own domestic laws in ways that they see fit. The ILO procedures encourage peer pressure both to promote adherence to ILO conventions and to assure that ratification is meaningful.[185] In addition, the ILO's efforts at standard-setting are complemented by extensive research, training, education, and publication efforts, now involving some 900 ILO experts working on more than 300 technical cooperation projects in over 100 countries, many of which involve direct assistance to governments to implement aspects of ILO Conventions and Recommendations. The ILO system for standard-setting, information exchange, supervision, and technical assistance involves the use of political organs (such as the general conference), IO officials, and expert bodies in an attempt to reach both ILO member states that have ratified these conventions and those that have not. It constitutes the most elaborate system for treaty-making among UN system organizations. The various mechanisms attempt to maximize the impact of the well-defined constituencies (employer/employee/government) within the organization as well as the economic incentives that exist on behalf of treaty compliance in this area.[186] Although the ILO's constitution does not formally require its members to ratify conventions adopted by the general conference (and is therefore not a frontal attack on "sovereign equality" and the need for consent), its provisions are clearly intended to put pressure on states to ratify and subsequently implement even those conventions to which its governmental representatives did not vote for in the general conference.

Although the ILO's constitution does not attempt to delineate for states just what implementing legislation is required to give effect to ILO conventions, its reporting obligations with respect to domestic implementation, the constraints put on reservations, the opportunities afforded by interpretative recommendations, and the various provisions for dispute settlement (discussed in Chapter 7) all encourage uniformity of application within the territory of ILO members, despite differences in pre-existing labor standards and legal systems. Early in its history, the ILO rejected a "regionalist" approach to labor standards in favor of universal minimum standards for its heterogeneous membership.[187] Achieving relative uniformity at least with respect to "core" labor standards has been for a

[185] *See* Kirgis, *supra* note 176, at 115.

[186] It is suggested that the ILO reporting system works as well as it does in part because "influential governments wish to ensure that disparities in labor costs are minimized, for competitive purposes." *Id*., at 117 (comparing the relative ineffectiveness of UNESCO's reporting procedures where no such incentives exist).

[187] *See*, *e.g.*, Victor-Yves Ghébali, Roberto Ago, and Nicolas Valticos, *The International Labour Organisation: A Case Study in the Evolution of UN Specialized Agencies* at 205–6 (Dordrecht, Boston: M. Nijhoff, 1989).

long time part of the ILO's mission. Nonetheless, the ILO regarded standard-setting as requiring sensitive "package deals" attentive to the organization's diverse membership of states as well as to the tripartite sets of interests within states. As the Labor Office acknowledges, the ILO's general rejection of reservations stems in large part from a reluctance to disrupt the equilibrium of these deals.[188] It also reflects the sense, pervasive in that organization, that certain minimum labor rights, inherent to conceptions of human dignity, if not to the promotion of lasting peace, should not be negotiated or legislated away lest this encourage the "social dumping" that the organization was designed to prevent.[189]

A few other IOs have adopted treaty-making procedures that contain elements suggestive of the ILO's. As noted in Section 5.3.3, some MEAs, such as the 1987 Montreal Protocol, depart from the principle of unanimity for purposes of treaty amendments, for example. UNESCO's General Conference also adopts conventions by two-thirds vote and its members are also required to submit these to competent domestic authorities for possible ratification as well as to periodically report on actions taken with respect to ratified conventions.[190] (But, to date, few members have complied with these reporting obligations and it is difficult to assess their impact.[191]) The Universal Postal Union's system for postal conventions also contains elements that set it apart from traditional treaty-making based on state consent. Revisions to the basic Postal Convention, signed at the end of each session of the UPU's plenary Congress, enter into force simultaneously for all members on an agreed date (which normally precedes most members' submissions of their ratifications).[192] In addition, UPU member states interested in making a reservation to any UPU agreement or regulation must first propose it to the UPU Congress and have it confirmed by inclusion in a protocol. As one commentator suggests, this allows the UPU plenary body to determine at least in theory whether a reservation is compatible with the object and purpose of the treaty.[193]

Deviations from the requirements of positivist consent also occur with respect to amendment procedures in many IO constitutions. With some notable exceptions (such as ICAO's constitution which permits amendments to its terms to apply only with respect to those member states that have ratified the amendment), many IOs' constitutive instruments permit amendments to be made, with binding effect on all members, once a fraction of them (typically two-thirds) vote in

[188] Thus, a Memorandum by the International Labor Office discussing the "special considerations" that require the no reservations policy, notes the significance of adoption by the ILO's unique tripartite conference as well as the constitutional provisions envisioning submission of the conventions to domestic legislatures in the form they were adopted by that conference and consideration of employers' and workers' complaints of non-compliance. It states that "the purpose of all these provisions would be completely frustrated by the acceptance of reservations in regard to which governments alone had been consulted." Quoted in Kirgis, *supra* note 119, at 279.

[189] *See*, *e.g.*, Kirgis, *supra* note 119, at 277 (quoting Valticos).

[190] UNESCO constitution, article IV(B)(4); UNESCO General conference, 22d sess., Resolutions, at 105, 108 (1983). *See* Kirgis, *supra* note 176, at 116.

[191] *Id.*, at 117. [192] *Id.*, at 118. [193] *Id.*

favor. This deviation from the consent principle, deemed necessary to permit organizations to work for the benefit of all despite inaction by a minority, has what some describe as a "quasi-legislative" effect when the IO constitution contains substantive duties. Thus, IAEA members' rights and duties relating to safeguards for Agency-assisted nuclear agency projects, ITU members' substantive rights, and IMF members' rights and duties (as with respect to exchange arrangements and controls)—all could be impacted by a less than unanimous vote for a relevant constitutional amendment.[194] Other organizations, such as the WHO, with respect to the constitutional authority granted its Health Assembly, could, at least in theory, use less than unanimous amendment of its charter as a mechanism to expand the powers of sub-bodies. In such cases, the only remedy available to members that object to the impact of a charter amendment would be the highly unrealistic or impractical one of withdrawing from the organization.

[194] *Id.*, at 122–3.

6

Have International Organizations Improved Treaty-making?

6.1 The Facilitation of Cooperation

As indicated in Chapter 1's survey of theoretical approaches, there is a large and growing literature, grounded in international relations as well as economics, addressing how international "regimes" promote cooperation among rational, egotistic state actors in the absence of government. Many of the basic insights in this literature stem from the Coase theorem, that is, the prediction that problems of collective action can be overcome through bargaining and mutual adjustment provided there is a legal framework for establishing liability for action, perfect information, and zero transaction costs. As Keohane has argued, international cooperation through bargaining is facilitated to the extent that we approximate Coase's preconditions by establishing patterns of legal liability, providing relatively symmetrical information, and arranging the costs of bargaining so that agreements can more easily be made.[1] This literature draws attention to the ways in which barriers to information and communication can impede cooperation, and addresses how "norms" (including treaties) can help states overcome such impediments. It examines how "institutions" (typically defined to extend beyond brick and mortar intergovernmental organizations that are the subject of this book) "overcome the deficiencies that make it impossible to consummate even mutually beneficial agreements."[2]

As William Aceves, summarizing much of this literature, has noted, "regimes" promote cooperation by (1) enabling iteration; (2) reducing transaction costs; (3) establishing self-enforcing behavior; (4) recognizing property rights; (5) promoting issue linkage; (6) increasing access to information; (7) monitoring behavior; (8) mediating disputes; and (9) imposing sanctions. As he notes as well, treaties, a principal vehicle by which states cooperate, can and do accomplish most of these things.

Because they are based on a common understanding of *pacta sunt servanda*, backed by ageless principles of honor and the sanctity of contracts,[3] treaties are

[1] Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* at 86–8 (Princeton, NJ: Princeton University Press, 1984).
[2] *Id.*, at 83.
[3] *See* Detlev Vagts, "The United States and Its Treaties," 95 *AJIL* 313 (2001).

inherently instruments of iteration. By their very nature, they enable parties to escape prisoners' dilemmas by replacing short-term calculations of interest with long-term strategic analysis. Once a promise is made in the context of a treaty it becomes embedded in a normative system that is premised on a long-term perspective, namely the rule of law. By creating stable expectations between states, treaties also increase the importance of reputation.[4] They enable the use of specific and diffuse forms of reciprocity to enforce their obligations. They reduce transaction costs and encourage self-enforcing behavior. The time spent on their negotiation and supervision constitutes "sunk costs" that contribute to maintaining the agreement. They reduce uncertainty, often by themselves defining property rights, and always by creating a "property" right in other treaty partners who are given, in cases of breach, established rights to a variety of remedies under principles of state responsibility. Through a number of mechanisms, from monitoring to binding dispute settlement, treaties facilitate transparency, provide access to stabilizing or reassuring information about others' level of compliance, or provide methods to clarify expectations. To the extent IOs facilitate treaty-making, they are instruments of cooperation as well.[5]

Chapter 5 enumerates the many ways that IOs increase the likelihood that treaty negotiations will be initiated. The organizational patterns for treaty-making in Section 5.3 also identify prototypical styles of organizational involvement once a decision is made to initiate treaty negotiations. Compliance scholars have also addressed IOs' roles as monitors, mediators, and sanctioners (see Aceves' factors 7–9 above).[6] This chapter takes a broader look at IO forms of treaty-making canvassed in Section 5.3, in light of the other factors that Aceves enumerates. Has the turn to institutions improved or worsened the prospects for multilateral treaty-making or the end product?

6.1.1 Iteration and Access to Information

UN-sponsored treaty conferences provide a relatively stable negotiation forum that permit negotiators to continue their interaction beyond a single round of negotiations. Such fora promote iteration far more than discrete ad hoc conferences by being embedded in permanent organizations that afford the negotiators the advantage of previously established rules as to institutionalized "constitutional" interpretation, legal personality, and other matters, such as the privileges and

[4] *See, e.g.*, Edwin R. Smith, "Understanding Dynamic Obligations: Arms Control Agreements," 64 *S. Cal. L. Rev.* 1549, at 1589–91 (1991) (discussing how formalized obligations and sanctions provide a "critical adhesive" between total strangers contracting under domestic law, but that "the small number of states enhances the importance of reputation as a limiting factor upon state actions").

[5] *See generally* Kenneth W. Abbott and Duncan Snidal, "Why States Act Through Formal International Organizations," 42 *J. Conflict Res.* 3, at 15–16 (1998) (discussing the effects of norm elaboration and coordination).

[6] William J. Aceves, "Institutionalist Theory and International Legal Scholarship," 12 *Am. U. J. Int'l L. & Pol.* 227, 242–56 (1997).

immunities of those sent to negotiate. Unless negotiators want to deviate from established institutional precedents, a surprising number of issues are settled for them. Negotiators in UN-sponsored fora need not battle over which state parties to invite, the powers of officials who convene the conference, the immunity rights of those attending, the rights and responsibilities of the host state concerning the venue, or how the costs for negotiations will be allocated and paid. Although battles are still fought over the access rights of others, such as NGOs, even those issues are increasingly subject to more uniform treatment than ever before, as increasingly uniform precedents are set, at least within particular IOs (if not always among them). Even treaties not negotiated within an IO or that do not rely on a formal IO to implement their terms increasingly rely on precedents and procedural rules set within IOs. As is suggested by Churchill and Ulfstein's discussion of COPs' powers in environmental regimes, even once controversial ideas, such as the concept of implied powers, are now deployed without the benefit of a formal permanent entity on the basis of the standard constitutional practices undertaken within IOs.

A large number of procedural questions are settled as well, to the extent all agree to be ruled, as is usual, by standard practices. The impressive number of commonly accepted procedural rules to which all international conferences and IOs adhere, admirably surveyed by Sabel, generally enhances the prospects that such bodies will reach the merits of the matter for which the participants came together. The impact of comparable parliamentary procedures on the effectiveness of domestic legislatures is the subject of a large literature. The impact and importance of agreement on such procedures and of adherence to them can hardly be overstated for either international or national bodies. As then U.S. Representative to the UN, Daniel Moynihan once stated, procedure is "not an aspect of governance, it is the essence of government."[7] As Sabel indicates, the development of these procedures and the development of international forms of collaboration are interdependent and inextricably linked.[8] But if it is true, as he indicates, that no IO can today carry out its functions without such clearly defined rules, it is also true that such rules were perhaps not necessary absent the iterated discourse that characterizes modern IOs. Such rules are both essential to, and the products of, modern IOs.

The advantage of having a large number of issues—from the types of credentials needed of delegates to the rules for determining consensus—settled in advance of treaty negotiations is not simply that negotiators can get to the business at hand more quickly: it is that these rules provide the basis for and presume long-term relationships, thereby tending to replace short-term calculations with long-term concerns.[9] UN treaty conferences are not simply fora for continuing interaction.

[7] Robbie Sabel, *Procedures at International Conferences: A Study of the Rules of Procedures at Conferences and Assemblies of International Inter-Governmental Organizations* at 2 (New York: Cambridge University Press, 1997) (quoting Moynihan).

[8] *Id.*, at 2.

[9] *Cf.* Aceves, *supra* note 6, at 242.

Their grounding in international institutional law and their reliance on standard procedures reduce negotiators' incentives and abilities to cheat (at least insofar as institutional law or these rules cover the matter). At the same time, such rules enhance the value of reputation, both with respect to the individuals involved as well as the nations they represent. These conferences, organized around established, legitimate and standard rules of behavior, are themselves exemplars of decentralized enforcement founded on the basis of what Keohane calls "diffuse" reciprocity.[10]

UN conferences "lengthen the shadow of the future" in a variety of ways that serve to enhance their value as places for iteration. Institutional precedents that are not the subject of formal rules—such as the idea that certain controversial topics that might once have been regarded as within states' domestic jurisdiction, like human rights, are appropriate topics for General Assembly-promoted treaty conferences or that "drafting committees" should not disturb fragile package deals that have been the subject of prior tentative agreement—are usually respected with full awareness of the likely consequences on future negotiations. Indeed, UN conferences are subject to a wide body of expectations, recast as "institutional precedents," that look both to the past and the future or that, in the words of Abbott and Snidal, "constitutionalize" balances among states having different levels of power, interest, or knowledge.[11]

The extensive support for administrative functions performed by IO secretariats for UN conferences promote iterative discourse in myriad ways, including by providing information to both negotiators and others interested, such as NGOs. IOs possess "knowledge assets" which give them a competitive advantage to produce knowledge-based goods and services that enhance states' ability to cooperate.[12] If, as regime theorists contend, a principal impediment to cooperation lies in states' apprehension of systematically biased patterns of information that may permit one party to deceive or take advantage of another, the secretariats of IOs typically serve as providers of relatively unbiased information available to all.

[10] *Cf.* Aceves, *supra* note 6, at 243. Keohane defined "specific" reciprocity as situations where partners exchange items of equivalent value or engage in precise tit-for-tat actions, such as expelling country X's diplomat in response to country X's doing the same to one's own representative. "Diffuse reciprocity" is a situation where "the definition of equivalence is less precise, one's partners may be viewed as a group rather than as particular actors, and the sequence of events is less narrowly bounded." Robert O. Keohane, "Reciprocity in International Relations," 40 *Int'l Org.* 1, at 8 (1986). As Sabel, *supra* note 7, suggests, negotiators have multiple and complex reasons for complying with standard procedural rules at UN conferences. Whether or not one agrees with his assessment that such routine compliance suggests that these rules have customary international law status, it seems apparent that some of these reasons stem from diffuse concerns, including for the stability of the organization as well as the particular negotiator's own reputation in the "community of nations."

[11] Abbott and Snidal, *supra* note 5, at 10.

[12] The leading effort to put the organization and dissemination of knowledge at the heart of the study of IOs remains Ernst B. Haas, *When Knowledge is Power: Three Models of Change in International Organization* (Berkeley: University of California Press, 1990). For a more recent effort, see, e.g., Michael P. Ryan, "International Governmental Organization Knowledge Management," 15 *Am. U. Int'l L. Rev.* 1347 (2000).

IOs provide diverse forms of information. Treaty-making has no manual. States rely on national traditions and previous experiences. Effective treaty-making "means—by necessity—learning from past successes and failures."[13] With respect to access to such experiences, IO secretariats enjoy a significant comparative advantage. As is suggested by the lessons drawn by UNCLOS and ICC insiders (see Section 5.3.1 above), IO secretariats are the repository of abundant information about successful forms of negotiation techniques, and are uniquely able to transmit recipes across major conferences. This kind of institutional learning is a standard function of secretariats in all IOs and, as is clear from the number of shared secretariat arrangements in MEAs, is often the vehicle for cooperation among IOs concerning treaty-making. Thus, on-going efforts to negotiate a Framework Convention on Tobacco, discussed in Section 5.3.3, are the product of decentralized cooperation among IO secretariats at the World Bank, the WHO, the IMF, and the UN and its Secretary-General; they reflect the abundant treaty-making experiences of all of these IOs.

As the UNCLOS and ICC negotiations also suggest, IO secretariats can accomplish much more than merely coordinate agendas such that meetings run smoothly. They may exercise what Wayne Sandholtz has described, in the context of the European Commission, as "entrepreneurial leadership" with respect to not merely the supply of information but also its channeling on behalf of collective action.[14] These leadership functions include the ability to: (1) propose areas or topics on which collective treaty-making would be beneficial; (2) mobilize potential collaborators from both within and outside the organization; (3) shape the agenda by providing productive frameworks for negotiations; (4) build consensus; and (5) broker compromises.[15] All of these were apparent throughout the UNCLOS and ICC negotiations as IO staff provided background research that formed the basis for many of the legal and factual conclusions reached, transmitted assurances from one state to another, kept track of particular settled or as yet unsettled issues (as well as trade offs or "mini-packages"), and suggested compromise language.[16] In both negotiations, IO staff operated as honest brokers to transmit private offers or overcome bargaining deadlocks.[17] As occurred with respect to the ICC negotiations, IO secretariats may make ultimately crucial decisions during preparations leading to the conference. In that case, the UN Secretariat proved adept at handling the ILC's draft text and states' reactions, proposing effective procedures (i.e., a trust fund) to enable states who might not otherwise attend to come to the conference, preparing "standard" final clauses (which included such ultimately

[13] Wilfried Lang, "Diplomacy and International Environmental Law-Making: Some Observations," 3 *Yrbk Int'l Envir. L.* 108, at 110 (1992).

[14] Wayne Sandholtz, "Institutions and Collective Action: The New Telecommunications in Western Europe," 45 *World Politics* 242, at 250 (1993).

[15] *Id.*

[16] To cite another example, many observers have suggested that the draft negotiating text provided by GATT Director-General Dunket during the Uruguay Round "catalyzed the faltering negotiations and helped bridge substantive differences." Abbott and Snidal, *supra* note 5, at 17.

[17] *See generally id.*, at 22.

significant provisions as a general prohibition on reservations), and convincing negotiators to establish a preparatory commission for follow-up (which incorporated the critically significant suggestion that non-signatory states, such as the United States, would be able to participate).[18]

In rare cases, IO secretariats have assumed major responsibility for the substantive text of a treaty and not merely its "final" or entry into force provisions. This appears to have been the case, for example, with respect to the Genocide Convention which emerged from a GA resolution in 1946 that recommended that ECOSOC "undertake the necessary studies with a view to drawing up a draft convention on the crime of genocide . . . "[19] In 1947, ECOSOC in turn instructed the Secretary-General to undertake "with the assistance of experts in the field of international and criminal law, the necessary studies with a view to drawing up a draft convention . . . "[20] The Secretary-General had a preliminary draft convention prepared and requested three experts to provide him with their assistance, and this was the draft text from which others worked to create the Genocide Convention.[21] More recently, a comparable phenomenon occurred when the UN Security Council asked the Secretary-General to provide it with suitable "statutes" for war crimes tribunals. While the Secretary-General's efforts, which incorporated the work of UN staff as well as the suggestions of a number of governments, did not become treaties but were incorporated in the Council resolutions establishing, respectively, the ICTY and ICTR, the statutes for the ICTY and ICTR proved enormously influential during the ICC negotiations and generally to the development of contemporary international criminal law. Many provisions of the ICC stem directly from compromise formulations initially made by the UN secretariat and incorporated in the influential statutes for the ICTY and ICTR.

Iterative discourse and the provision of information are perhaps even more characteristic of the other organizational forms of treaty-making canvassed in

[18] *See* Roy Lee, "Introduction," in Roy Lee, ed., *The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, Results* at 7–13 (Boston: Kluwer Law International, 1999) Philippe Kirsch, "The Development of the Rome Statute," in *id.*, at 451–2; Christine Byron and David Turns, "The Preparatory Commission for the International Criminal Court," 50 *Int'l & Comp. L. Q.* 420 (2001). *See also* Roy Lee, "Multilateral Treaty-Making and Negotiation Techniques: An Appraisal," in Bin Cheng and Edward D. Brown, eds., *Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger on his 80th Birthday* at 162–4 (London: Stevens & Sons, 1998) (discussing contributions made by IO staff during informal consultations prior to negotiations on the Convention on the Law of Treaties between States and International Organizations and Between International Organizations).

[19] Resolution 96(1), December 11, 1946.

[20] ECOSOC Resolution 47 (IV), March 28, 1947.

[21] *Review of the Multilateral Treaty-Making Process*, UN Doc. ST/LEG/SER.B/21 (1985)(hereinafter "UN Study") at 179. As that Study indicates, the UN Secretariat supplied draft texts for the following additional treaties: the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the Protocol amending the Slavery Convention, and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. *Id.,* at 207. That Study also asserts that the Secretariat played an important role with respect to the drafting of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. *Id.*

Section 5.3. Game theorists have argued that the benefits of iteration tend to rise with repeated play among a small group of players.[22] Expert bodies, such as the ILC, UNCITRAL, UNIDROIT, and comparable bodies in ICAO and the ILO charged with treaty-making, discussed in Section 5.3.2, promote iteration among a relatively small number of repeat players, all of whom are keenly aware of their own personal reputations. The frequently lengthy tenure of such experts, as well as (often) their common professional background, provides an even stronger basis for long-term relationships and for common reliance on collegial reputation and reciprocal cooperation. Such experts know that their work is regarded as establishing institutionally significant precedents. Their self-awareness is clear, for example, from the care and time lavished on the lengthy commentaries prepared by the ILC. Bodies such as the ILC, engaged in simultaneous progressive development of the law as well as its codification, or UNCITRAL, engaged in effort to harmonize domestic laws, consciously attempt to affect the future through the stabilization of rules. Expert bodies are, most obviously, repositories of specialized knowledge grouped among distinct epistemic communities, such as general public international lawyers, experts in *lex mercatoria* and commercial law, or specialists in labor or aviation law. They themselves develop or process a tremendous amount of information that is provided to them by IO staff or through questionnaires to member states. Expert bodies are also primary vehicles for interpreting the information developed or received and for transmitting it, in hopefully more useable form, to those who will be engaged in final treaty negotiations.

The promotion of iteration, along with increasing access to information, is the very essence of "managerial" forms of treaty-making, discussed in Section 5.3.3 above. Human rights and arms control regimes presume the need for continued forms of discourse among treaty-makers. Treaty organs established under such regimes signal the value attached to long-term over short-term considerations and enhance the value of reputation and reciprocity. Supervisory treaty bodies in these regimes serve to gather and transmit information, helping to overcome one of the principal causes of prisoners' dilemmas. The monitoring techniques used by such regimes and by others, including the ILO—such as reporting obligations, consultation procedures, surveillance, verification procedures, and dispute settlement—are intended to make it more difficult for states to conceal violations. They aspire to increase transparency, reduce uncertainty, and inspire confidence among treaty parties.

Multilateral environmental agreements (MEAs) are most clearly venues for iterative discourse. Reliance on a variety of "technical" or expert bodies for data development also suggests these regimes' strong emphasis on information exchange as a mechanism to promote agreement as well as build confidence among the parties to the regime. MEAs clearly focus on continuing inter-state cooperation over the long term, thereby enhancing reliance on reputation and

[22] *See, e.g.*, Keohane, *supra* note 1, at 75.

reciprocity. Indeed, as noted in Chapter 5, to their critics, such framework conventions evince too much faith in the value of discourse and information to provide specificity to their vague provisions or to compel actual compliance.

The ILO's constitutionally grounded treaty-making mechanisms, discussed in Section 5.3.4, attempt maximum use of the iterative benefits conferred by international organization. As Abbott and Snidal suggest, traditional IOs are characterized by "centralization," namely, a concrete and stable organizational structure and an administrative apparatus to manage collective activities, and "independence," that is, the authority to act with a degree of autonomy, and often with a degree of neutrality, in defined spheres.[23] While the other treaty-making venues surveyed in Section 5.3 attempt to secure these benefits either by being associated with IOs (UN-sponsored conferences), because they are a subsidiary organ of an IO (expert bodies), or because they create treaty bodies that emulate IOs (MEAs), the ILO itself is constitutionally mandated to engage in treaty-making. ILO treaty-making procedures are themselves sanctioned by binding treaty obligation. Whether these characteristics produce qualitatively different treaties is addressed in Section 6.2 below. But this relatively efficient treaty-making apparatus undoubtedly has produced, on a regular and predictable basis, a considerable number of treaties.

As a permanent organization with its own secretariat, the ILO attempts to secure the maximum cooperative benefits of institutional law. Its constitutional and procedural rules are regularly interpreted by ILO staff, as well as the numerous dispute settlement bodies canvassed in Chapter 7. Its composition attempts to balance the varying interests of states having different levels of power and knowledge with relevant constituent tripartite interests (government/labor/employer). This balance is constitutionally mandated through voting rules and decision structures that, to members at least, are legitimate or at least unquestioned. The ILO's treaty-making apparatus obviates the need to create new treaty bodies (as compared to MEAs). Its regularized procedures render treaty-making far more predictable than at UN-sponsored treaty conferences. Its institutionalized procedures for treaty-making reduce the need to draw lessons from one treaty-making exercise to the next (as occurred less formally between UNCLOS and the Rome negotiations on the ICC). The use of a number of both expert and more political entities—from ILO staff to various types of more expert committees subject to tripartite participation—in the preparation of draft conventions maximizes the opportunity for iterative discourse among the relevant epistemic communities, presumably enhancing the legitimacy of the final product. Finally, ILO methods for continued supervision, interpretation (as through recommendations), and technical assistance, generate a tremendous amount of information that, as with respect to states' reports on compliance, is readily available to the tripartite interests represented within the ILO and that can be expected to generate continuous mobilization of shame directed at treaty violators. These constitutional mechanisms continue the

[23] Abbott and Snidal, *supra* note 5, at 9.

iterative process over the life of an ILO convention, thereby institutionalizing "managerial" treaty-making within a formal permanent organization.

6.1.2 Reduction of Transaction Costs

For many of the reasons discussed, organizational mechanisms for treaty-making also reduce transaction costs associated with the conclusion of an agreement and with its maintenance once concluded. The costs of arranging and concluding a treaty are significantly reduced to the extent parties have no need to address the many issues resolved by international institutional law or previously agreed procedural rules. The costs associated with IO secretariats or meetings of experts are "sunk" costs that would largely be incurred whether or not a particular treaty negotiation occurs. While UN-sponsored conferences are costly endeavors, even such conferences realize significant cost savings as compared to ad hoc arrangements not associated with any IO, to the extent they rely on the assistance of standing IO secretariats or rely on standing rules of the game. Costs associated with treaty amendment, on-going interpretation, supervision, or dispute settlement may be reduced to the extent these activities can be assigned to standing IOs or treaty bodies, whether COPs, standing courts (such as Strasbourg), or ILO supervisory committees.[24] The existence of plenary IO bodies, such as the General Assembly with its regularly scheduled meetings, provides a handy venue for the continuation of informal consultations in between formal negotiations.[25] Such plenary bodies, or their subsidiary organs, may provide useful, relatively cost-free venues for continued discourse even with respect to treaty negotiations that were not originally sponsored by the IO in question.[26] Moreover, to the extent treaty negotiators are able to defer contentious questions to standing interpretative bodies such as the IO's dispute settlers, or even lawyers within an IO's secretariat, the ex ante costs of negotiation are reduced, and the possibility of reaching a final agreement considerably enhanced.[27]

The opportunity to pool activities, assets or risks, associated with all stable organizational structures, applies as well to IOs and provides further opportunities for treaty creation or expansion. The pooling of capital contributions and commitments represented by the World Bank, for example, enables that entity to undertake a variety of activities, including applying its technical expertise to treaty endeavors

[24] *See, e.g.*, Gunther Handl, "Environmental Security and Global Change: The Challenge to International Law", in W. Lang et al., eds., *Environmental Protection and International Law* at 5 (London: Graham & Trotman, 1991)(noting how simplified amendment procedures in environmental regimes lower transaction costs by reducing opportunities for "opportunistic" behavior).

[25] *See, e.g.*, Lee, *supra* note 18 ("Multilateral Treaty-Making"), at 163 (discussing the use of free periods during regularly scheduled UN meetings for this purpose).

[26] *See, e.g.,* UN Study, *supra* note 21, at 216 (noting how discussions on a nuclear test ban received active consideration by the GA even though the relevant treaty was negotiated and concluded outside the UN).

[27] *See* Joel Trachtman, "The Domain of WTO Dispute Resolution," 40 *Harv. Int'l L. J.* 333 (1999).

such as the WHO's Framework Convention on Tobacco (see Section 5.3.3).[28] Pooling, economies of scale and the efficiency gains inherent to both, help to explain treaty enforcement mechanisms as varied as the Global Environmental Facility, the IAEA nuclear safeguards system, and the Appellate Body of the WTO.[29]

Further, once such institutions are established, the marginal costs of dealing with more issues through additional treaty-making within them are lower than they would otherwise have been. The increasing returns to scale encourage ever more extensive international treaty networks.[30] Pooling benefits apply as well to the most pervasive form of treaty preparation: the gathering of information from member states. No state individually has available the vast information routinely provided to IO secretariats in response to questionnaires prepared in advance of a treaty negotiation. This gathering of relevant information from around the world has been indispensable to most treaty efforts. It is hard to imagine, for example, a successful negotiation regarding TRIPS, services, or investment in the WTO absent the inquiries of WTO staff and working groups that result in a significant accumulation of data concerning the legal protections accorded these matters in numerous jurisdictions.

The benefits of economies of scale also help to explain why certain treaty networks—the diverse treaty obligations encompassed with the WTO regime, for example—are "nestled" together. There are efficiencies associated with applying a common principle—e.g., national or most-favored nation treatment—to different issues, from trade in goods to services. Agreement on the justice of some of these principles may prove to be a catalyst for agreement with respect to seemingly different topics. In addition, once the meaning of such principles is settled, it becomes unnecessary to revisit the question each time it is applied to new subject matter.[31] There may even be a tendency to apply such principles across regimes to secure the benefits of reducing costs.

6.1.3 Self-Enforcing Behavior

IO involvement in treaty-making also helps to secure what economists (particularly game theorists) have called self-enforcing behavior, that is, a stable equilibrium in which compliance with treaty obligations is maintained by the self-interested

[28] *See* World Bank, *Curbing the Epidemic: Governments and the Economies of Total Control* (1999); *see also* Allyn L. Taylor and Douglas W. Bettcher, "WHO Framework Convention on Tobacco Control: A Global 'Good' for Public Health," 78:7 *Bulletin of the World Health Organization* 920, at 926 (2000)(drawing support from work by the World Bank for the WHO's efforts on tobacco control).

[29] *See generally* Abbott and Snidal, *supra* note 5, at 13–14.

[30] *See generally* Keohane, *supra* note 1, at 90.

[31] *Cf.* Keohane, *supra* note 1, at 90. It is also quite possible for principles continually interpreted and developed in one institutionalized regime to be applied in another. *See, e.g.*, Todd Weiler, "Prohibitions Against Discrimination in NAFTA Chapter 11," in Todd Weiler, ed., *NAFTA Investment Law and Arbitration: Past Issues, Current Prospects, Future Prospects* at 27 (Ardsley, NY: Transnational Publishers, 2004)(arguing that global discrimination standards developed in the WTO in the context of trade in goods ought to apply in the context of the NAFTA's investment chapter).

behavior of states without centralized enforcement.[32] Quite apart from the use of specific supervisory mechanisms to facilitate compliance among parties to treaties (from reporting schemes to binding forms of dispute settlement), IOs make it more likely that states will enter into, and thereafter comply with, treaty norms (1) through "path dependencies," (2) by cultivating technocratic as well as more politicized forms of legitimation, and (3) by providing mechanisms for "laundering" and for the allocation of resources.[33]

IOs, by allowing or encouraging states to coordinate their actions along a chosen norm or rule (e.g., the non-discrimination norm in the WTO) facilitate "path dependencies" associated with habitual behavior or compliance. Path dependencies are promoted by large sunk costs, learning effects, coordination effects, and adaptive expectations.[34] In accord with Max Weber's insights into the nature of bureaucracies, permanent organizations' reliance on rules (both those emerging from international institutional law as well as their rules of procedure whether or not legal in nature), routines and standard operating procedures, trigger predictable responses.[35] IOs generate ritualized behaviors among both their clients and their staffs. They elicit expectations of "adherence to group goals" and encourage or reward "inertia" in the form of conforming behavior.[36] Like international

[32] *See, e.g.*, Duncan Snidal, "The Game Theory of International Politics," 38 *World Pol.* 25, at 46 (1985). Note, however, that self-enforcing or "self-reinforcement" is defined differently by different economists. As W. Brian Arthur has noted, comparable phenomena may be discussed in terms of increasing returns, cumulative causation, virtuous and vicious circles, or threshold effects. Self-enforcing behavior usually results from large set-up or fixed ("sunk") costs (which present the advantage of falling unit costs on increased output), learning effects (such as product improvements or the lowering of costs as their prevalence increases), coordination effects (conferring advantages to joint action), and adaptive expectations (where, for example, dominance in the market leads to expectations of continued dominance). W. Brian Arthur, "Self-Reinforcing Mechanisms in Economics," in *The Economy as an Evolving Complex System*, SFI Studies in the Sciences of Complexity 9, at 10 (1988). Arthur gives the example of a particular video technology which comes to dominate the market, and therefore comes to exhibit the characteristics of market self-reinforcement, due to an initial lead in the market which may encourage video stores to stock more film titles in that format, coordination benefits to new purchasers of machines in that format, and, later, "lock-in" effects (since it is difficult or expensive for consumers to change formats). *Id.* Arthur suggests that such cases may also illustrate path dependence, since the early history of market shares (a small initial market lead for the ultimately dominant VHS format, for example), combined with small cumulative events and even chance circumstances (e.g., a major film company opting to release its films more quickly in one format over the other), can determine which solution prevails. *Id.*, at 10–11.

[33] *See generally* Abbott and Snidal, *supra* note 5.

[34] *See, e.g.*, Arthur, *supra* note 32; Aceves, *supra* note 6, at 246. A classic example of "path dependencies" is Paul A. David's story of why the modern computer keyboard's topmost row of letters spell out QWERTYUIOP. David argues that the QWERTY format dominated over its arguably "superior" early rivals because of technical interrelatedness, economies of scale, and the quasi-irreversibility of investment. Paul A. David, "Clio and the Economics of QWERTY," 75 *ALE Papers and Proceedings* 332 (May 1985).

[35] *See* Max Weber, *Economy and Society* at 956–1005 (Guenther Roth and Claus Wittich, eds., Berkeley: University of California Press, 1968).

[36] *See, e.g.*, Michael N. Barnett and Martha Finnemore, "The Politics, Power, and Pathologies of International Organizations," 53 *Int'l Org.* 699, at 718 (1999); Keohane, *supra* note 1, at 101. For these reasons, it is said that international regimes generally are easier to maintain than to construct. Keohane, *supra* note 1, at 102.

law itself, IOs reduce uncertainty by making "human actions conform to predictable patterns so that contemplated actions can go forward with some hope of achieving a rational relationship between means and ends."[37]

An institutional decision to, for example, involve the UN in election assistance and supervision at a time when few other credible suppliers exist for that type of aid produces a cottage industry of private businesses and think tanks to work with the UN, a cadre of UN professionals with relevant expertise, and encourages the mainstreaming of such expertise within national agencies dealing with international aid. It may spur other IOs to condition their cooperation on the acceptance of such UN assistance. These phenomena create path dependencies that reinforce the UN's original decision and its "market share" in election assistance. Such UN involvement, to the extent treated as presumptively legal institutional practice, may entail direct and indirect normative consequences.

As shown in Chapters 3 and 4, an operational decision by the UN Secretary-General and the GA to engage in election supervision widens the scope of that organization's legitimate sphere of action, while shrinking the domain of prohibited "intervention in domestic jurisdiction." But the UN Charter is not the only treaty whose meaning and scope is thereby affected. UN election assistance, even if it is voluntarily requested by a state and not imposed by UN fiat, indirectly strengthens the credibility and enforcement prospects of, for example, article 25 of the International Covenant on Civil and Political Rights (ICCPR) (which recognizes the right of citizens to engage in public affairs and to vote at genuine periodic elections subject to universal and equal suffrage and secret ballot). It makes it more likely that parties to the ICCPR and the Human Rights Committee, charged with overseeing its implementation, will take this obligation seriously. At the same time, the various interests involved in UN election assistance, including, on the "demand" side, states' interest in getting such assistance to promote their own political legitimacy or to secure other aid, may help sustain a self-enforcing stable equilibrium, without the use of more coercive tools of enforcement, to secure compliance with an "emerging right to democratic governance."[38]

Draft treaty texts suggested by expert bodies such as the ILC have, in the usual case, a technocratic legitimacy absent from proposals made by presumptively

[37] Keohane, *supra* note 1, at 97 (quoting Michael Barkun, *Law Without Sanctions* (New Haven: Yale University Press, 1968)).

[38] *See generally* Thomas Franck, "The Emerging Right to Democratic Governance," 86 *AJIL* 46 (1992)(drawing this right, from among other things, the practice of the UN in assisting with plebiscites in the wake of decolonization and various forms of election assistance). Note that path dependencies with respect to election assistance do not merely promote compliance with this interpretation of the UN Charter; they also encourage bilateral arrangements between the UN and the recipients of such assistance as well as promote compliance with such arrangements. This does not mean that path dependencies or other self-enforcing mechanisms will invariably avoid the need for hierarchal forms of enforcement in certain cases. *See, e.g.*, SC Res. 940, August 1, 1994 (authorizing "all necessary means" under Chapter VII against a military regime in Haiti that had refused to respect the results of a UN-sponsored election).

"self-interested" states. While in certain cases, as with respect to UNCLOS III, it is assumed that draft treaty proposals should emerge from more politicized bodies, one of the lessons drawn for purposes of the negotiations on the ICC was that even with respect to politicized topics, there are benefits to be had from the "rational-legal" authority of experts, such as those on the ILC.[39] The credibility of the ILC, and similarly technical treaty-drafting bodies in other IOs, rests on their claim to be deploying, through rational, less partial discourse, recognized expertise to create rules. Further, such bodies most clearly embody the "independence" or autonomy that many observers attribute generally to IOs. The ILC's authority rests on the appearance of political independence conferred upon it by the methods of selection for its members as well as by its carefully cultivated "deliberative" process. The ILC is perceived to be acting in an impersonal, technocratic, and neutral manner, and its work product is accorded deference and respect to the extent such values are viewed as necessary to the success of a particular treaty negotiation. To the extent the work product of expert bodies such as the ILC prove influential to others, this is due as well to the knowledge or information gathered by those bodies and often solely available to them.

ILC commentaries produced in the course of codification efforts tend to have singular import, even before a final text of a treaty is concluded, in part because few states have available to them equally comprehensive analyses of relevant state practice or *opinio juris*. Even when states have had access to the same underlying data (for example, through responses to questionnaires sent to states), few of them have the personnel with the time to examine this information in as comprehensive a fashion as an ILC special rapporteur. Most states have no alternative but to defer to the impressive documentation and analysis of data contained in ILC commentaries, even when contained in ILC products that do not became fully fledged treaties (such as the ILC's Commentaries on its Articles of State Responsibility).

The rewards of technocratic expertise may extend beyond the "expert" groups to the organizations of which they are a part. ICAO's success in promulgating counter- terrorism conventions is an example of relatively successful treaty-making through reliance on an organization's particular technocratic legitimacy. ICAO was able to conclude relatively rapidly this set of treaties that attempted to respond to a difficult and highly politicized common set of problems precisely because it was *not* the UN General Assembly. It was also able to provide the technocratic expertise of, for example, the International Explosives Technical Commission, appointed by the ICAO Council, which, as noted in Chapter 4, enables the continuing development and effective implementation of one of those treaties,

[39] For discussion of the "rational" cognitive style and its impact on learning and issue-linkage, see Ernst B. Haas, "Why Collaborate? Issue-Linkage and International Regimes," *World Pol.* 357, at 380–1 (1980). *See also* Barnett and Finnemore, *supra* note 36, at 707 (describing the two sources of legitimacy for international bureaucracies as resulting from their rational-legal authority and their control over technical expertise and information).

the Convention on the Marking of Plastic Explosives for the Purpose of Detention.[40]

While it was useful to those who favored counter-terrorism treaties to negotiate in a forum that had a nearly universal composition, ICAO bodies and, specifically, its Legal Committee charged with the preparatory and drafting work for multilateral aviation conventions, were viewed as favorable fora precisely because they were not, by tradition, open to the airing of all types of disputes as well as all points of view. As a commentator on the history of these conventions has noted, when terrorism initially burst upon the international scene in the late 1960s, those states that felt most threatened initially turned to the UN but went elsewhere once it became clear that that forum was problematic for this purpose.[41] By contrast, ICAO's relatively narrow focus—not just on civil aviation but on the need to promote the *safety* of aviation for all—was regarded as its principal negotiating advantage. In that instance, a narrowing of the envisioned terms of the debate was deemed essential to securing agreement across a wide spectrum of states. While a comparable negotiation in the GA would have been expected to focus on the relevant actors that are the subject of these conventions, thereby generating innumerable and, in all likelihood, inconclusive debates as to the differences between a "freedom fighter" and a "terrorist," within ICAO it was more likely that the debate would focus (as it did) on the precise types of acts that ought to be subject to the "extradite or prosecute" regime. Those who negotiated these conventions opted for an ICAO forum since this was the organization whose very ethos was most sympathetic to banning certain acts as unacceptably criminal, no matter the political context surrounding the act or the motivation of the actor. The same phenomenon also appears to explain, for example, the use of the IAEA as the venue to conclude two multilateral conventions for dealing with early warning and assistance in case of nuclear accidents.[42]

As this suggests, IO secretariats serve legitimation functions that derive from what Thomas Franck has called their "administrative impartiality."[43] Crucial

[40] 1991 Montreal Convention on the Marking of Plastic Explosives for the Purpose of Detection, 30 *ILM* 726 (1991)(adopted March 1, 1991; not yet in force)(text available at http://www.unodc.org/terrorism_convention_plastic_explosives.html), articles V–VII.

[41] Thus, Levitt notes how, in 1972, in the wake of the massacre of Israeli athletes at the Munich Olympics, the United States circulated a draft "Convention for the Prevention and Punishment of Certain Acts of International Terrorism" at the 27th General Assembly. Although the GA created an ad hoc Committee on International Terrorism, the heavily splintered resolution that created it, GA Res. 3034 (XXVIII)(1972), adopted by a vote of 76 to 35 with 17 abstentions, foreshadowed the Committee's later lack of success with respect to either defining "terrorism" or with respect to agreeing on methods to stem it; indeed, GA Res. 3034 (XXVIII) itself attempted to justify the armed struggle of "national liberation movements." The U.S. draft committee did not survive the Committee process. Geoffrey M. Levitt, *Democracies Against Terror: The Western Response to State-Supported Terrorism* at 22–3 (Westport: Praeger Publishers, 1988).

[42] *See, e.g.*, Franz Cede, "New Approaches to Law Making in the UN-System," 1 *Austrian Rev. Int'l & Eur. L.* 51, at 57 (1996)(addressing the Convention on Early Notification of a Nuclear Accident (1986) and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (1986)).

[43] Thomas Franck, *Fairness in International Law and Institutions* at 173–217 (New York: Clarendon Press, 1995)(discussing the UN Secretary-General's good offices and other functions as mediator, conciliator, and dispute settler).

decisions made during the ICC prepcom, discussed above, were perceived as legitimate in part because they were made by "neutral" international civil servants who were only attempting to adhere to "established" institutional precedents. The "politically neutral" decision made during the ICC prepcom that there would be a standard "no reservations" clause proved difficult to displace in later negotiations not only because delegations saw it as the basis for necessary package deals but also because such a clause had independent institutional legitimacy. Such a clause had been used at UNCLOS, for example, another case in which agreement on uniformly applicable rules of law, not undermined by reservations, appeared vital to the credibility of the effort being undertaken.

More generally, IOs assist the construction and maintenance of what Ian Johnstone has called "interpretative communities" that, by facilitating continued agreement on treaty interpretation, make it less likely that parties will renege on their obligations.[44] As Johnstone explains, such interpretative communities emerge when participants inhabit a common world and are forced to justify their positions on specific grounds other than self-interest. While IOs are not necessary to the creation of such interpretative communities, they provide a common focal point around which treaty expectations may converge. At their best, IOs institutionalize such interpretative communities, helping to perpetuate them even as governments change or original drafters depart from the scene. Behind the immediate interpretative community consisting of those who are parties to a treaty, IOs in which a treaty is based or has been negotiated remain a prominent part of a broader, more amorphous interpretative community (consisting of knowledgeable experts and professionals as well as NGO observers, for example), available to appraise conduct or evaluate legal interpretations offered. As Johnstone argues, this outlying interpretative community of mediators "represents the institutional mechanism closest to an impartial arbiter that the structure of treaty auto-interpretation provides. It constrains interpretation primarily because States have an interest in maintaining a reputation for good faith adherence to treaties."[45]

Public international lawyers themselves are a principal interpretative community whose relative cohesion in terms of shared vocabulary and even perhaps normative agenda enhances the prospect of inter-state cooperation. Although as noted in Chapter 2, the Vienna rules on treaty interpretation are malleable, they are not infinitely so and, in fact, constrain the scope of inquiry to a relatively narrow range of data. The resulting rules of constitutional interpretation, discussed in that chapter, though containing principles susceptible to considerable expansive interpretation—such as the principle of effectiveness—are nonetheless considerably less susceptible to manipulation than arguments based purely on desirable political or policy outcomes. As Rosalyn Higgins and many other knowledgeable observers have noted, the constraints imposed on governments by the need to

[44] Ian Johnstone, "Treaty Interpretation: The Authority of Interpretative Communities," 12 *Mich. J. Int'l L.* 371 (1991).

[45] *Id.*, at 390.

justify their behavior on the basis of law, including the law of the UN Charter, exist—even in the context of political organs such as the Security Council. Contemporary arguments—over whether the action by NATO in Kosovo was unlawful or ultimately sanctioned by the Security Council, or even highly debatable arguments by the United States and its allies that Operation Iraqi Freedom in 2003 was authorized by the Security Council—show a significant degree of uniformity about how such debates ought to be conducted and the range of permissible interpretative tools. Even in such contentious cases, the relevant interpretative communities agreed on a narrow range of permissible interpretative tools: legal texts, context as defined by the Vienna rules of treaty interpretation, prior institutional practice, and a limited number of interpretative principles (such as interpretation in "good faith"). Excluded, as outside the terms of relevant constitutional discourse, were overtly "political" arguments such as, for example, the need to destabilize Milosevic's or Hussein's regime or improve regional stability, whether in Europe or the Middle East.

The legal debates over NATO's intervention in Kosovo or Operation Iraqi Freedom illustrate that institutionalized constitutional discourse is a process of justification that seeks to engage others, 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, such constitutional discourse implies recognition of the existence of a world beyond the speakers' "immediate subjectivity."[46] As even a prime critic of the political neutrality of law, Koskenniemi, has pointed out, legal discourse, of which constitutional discourse is a prime example, involves a "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 . . . "[47] As Koskenniemi contends 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."[48] 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 both were making public the normative basis and objectives of their actions and presuming that even military actions in the

[46] *See* Martti Koskenniemi, "The Place of Law in Collective Security," 17 *Mich. J. Int'l L.* 455, at 478 (1996).
[47] *Id.* (adapting Robert H. Jackson's concept of "situational ethics").
[48] *Id.*

arena of "high politics" must involve accountability to the relevant "interpretative community."

Constitutional discourse is, as Ian Johnstone has argued, a structure of self-imposed constraints within an interpretative community that agrees on the ultimate source of authority.[49] It is a form of social communication that both shapes and is shaped by states' behavior. It supplies a common frame of reference that is all the more important in those IOs, like the UN, 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 be the case with respect to more static, contractual arrangements between states, nonetheless signals to all that certain analogies from the practice 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 such 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."[50] Even the U.S. understands that the legitimacy of its arguments will turn 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 U.S. 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 characterized by reciprocity."[51]

But the situational ethics of the interpretative communities that IOs rely on also encourage new forms of legitimating arguments on behalf of modern treaty-making efforts. The text of the WHO's Framework Convention on Tobacco Control, discussed in Chapter 5, suggests the diverse rationales offered for that effort to regulate a product not previously regarded as appropriate for international regulation. The preamble of that Framework Convention specifically mentions the effects of tobacco products on the health of children and adolescents, on women and young girls, and on indigenous peoples; it also notes the social and economic difficulties posed by tobacco control programs within developing countries, and draws attention to the following legal instruments: the Constitution of the WHO, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child.[52] These otherwise

[49] *See generally* Johnstone, *supra* note 44. [50] *Id.*, at 381. [51] *Id.*, at 384.

[52] Preamble, WHO Framework Convention on Tobacco Control, WHA56.1, May 21, 2003 (WHO Assembly resolution and Annex), at www.who.int/tobacco/areas/framework/en.

mystifying cross-references evince a sustained endeavor by many IO officials, NGOs and others to justify the WHO's involvement in an effort whose final product consists largely of legal constraints at the national level voluntarily assumed by states.

The arguments presented by Allyn Taylor, a WHO adviser, provide the needed context for the Tobacco Framework Convention preamble's cross-cutting references. During that treaty's gestation period, Ms. Taylor argued that it reflected a "scientific, evidence-based approach to global tobacco control" based on considerable research into the economic and social consequences of smoking as well as work on successful "demand reduction strategies."[53] Drawing from studies generated by a variety of IOs, she argued, on behalf of those seeking to justify international legal efforts, that there was a need to regulate tobacco internationally because the evidence suggests that the "globalization of the tobacco pandemic restricts the capacity of countries to unilaterally control tobacco within their sovereign borders" and because tobacco control issues "including trade, smuggling, advertising and sponsorship, prices and taxes, control of toxic substances, and tobacco package design and labeling require multilateral cooperation and effective action at the global level."[54] As this suggests, the advocates for this treaty contended that international tobacco regulation is linked to the regulatory work of other IOs, including the WTO, efforts by the World Bank to assist sustainable economic development, and the work of various human rights treaty bodies charged with promoting the rights of children and gender equality.

At the same time, advocates for the treaty sought to portray international regulatory efforts as having universal appeal. They argued that this was not just a concern of rich states but one that was at least equally of direct interest to the developing world since tobacco consumption in low- and middle-income countries had risen, at least partly, as a result of the WTO's success in reducing barriers to the tobacco trade.[55] Such arguments were all the more convincing when made by universalist institutions with such varied interests as the World Bank and the WHO. The strategic decision to have the tobacco treaty be a joint initiative between these two institutions permitted advocates, such as Ms. Taylor, to draw from, among other things, studies by the World Bank that concluded that "tobacco control is highly cost-effective as part of a basic public health package in low- and middle-income countries."[56] The contention that curbing this "epidemic" made economic, and not just social, sense, despite the considerable revenues from taxes and tariffs generated by tobacco products, was all the more convincing because of such references.[57]

The arguments of advocates of tobacco regulation also showed the effects of institutional learning—or at least borrowing. As was suggested in Chapter 5, the

[53] Taylor and Bettcher, *supra* note 28, at 925. [54] *Id.* [55] *Id.*, at 924.

[56] Epidemic report, at 9 (cited in Paul Szasz, "The World Bank and Tobacco," in Sabine Schlemmer-Schulte and Ko-yung Tung, eds., *Liber Amicorum Ibrahim F. Shihata: International Finance and Development Law* at 798, n. 7 (The Hague, Boston: Kluwer Law International, 2001)).

[57] Taylor and Bettcher, *supra* note 28, at 925.

tobacco treaty that was ultimately proposed and adopted was strongly influenced by the perceived success of "managerial" MEAs, and those treaties served as the template upon which the Tobacco Framework Convention was built. As with respect to environmental concerns, tobacco control was successfully represented as a problem associated with the global commons and not the subject of sacrosanct "domestic jurisdiction." (This was partly the point of consequentialist arguments that drew connections between the need for tobacco regulation and the success of the WTO regime, for example.) The use and marketing of tobacco was successfully presented as an "international" public health inextricably linked to globalization. Advocates for the Convention argued that global norms and standards were necessary because the underlying problem had been aggravated due to the liberalization of global trade flows as well as the effects of cross-border cultural flows (as because of advertising).[58] No less than ozone or climate control, trade in and consumption of tobacco was perceived as a growing problem because of scientific consensus that this was the case; and the same health care professionals were behind the growing consensus that this was a problem amenable to resolution through national, regional, and international regulatory efforts.[59]

The Tobacco Framework Convention relied on various forms of legitimation on a number of levels. This was treaty-making strongly dependent on the "rational-legal" authority of experts and IO secretariats within IOs as varied as the WHO and the World Bank, as well as within more politicized plenary bodies such as the WHO's Assembly. Treaty advocates relied on the authority of institutional precedents, as in MEAs, to suggest that a gradualist, piecemeal approach had the best prospects for drawing widespread and geographically diverse support as well as permitting deepening cooperative efforts over time. The alleged "spillover" effects of the tobacco trade—from corruption to adverse impacts on economic development—successfully "nestled" the problem within contexts that had already been subject to international regulatory efforts. As is suggested by the Convention preamble's references to multiple constituencies and other legal regimes, the IOs and NGOs involved in negotiating this treaty expanded the scope of interested epistemic communities by connecting tobacco regulation to existing human rights concerns involving children, women, and indigenous peoples. At the same time, they successfully dampened concerns that tobacco regulation would be at odds with the free trade regime of the WTO or the development efforts of the international financial institutions. This expanded the constituencies in favor of tobacco regulation while also drawing from the legitimacy of those existing regimes.

The institutional venues in which international tobacco regulation was addressed enhanced the prospects that it would be seen as consistent with states' perceptions

[58] *See id.*, at 925.

[59] *Id.*, at 922–3. *See also id.*, at 921 (arguing that tobacco control is part of a growing number of "public health concerns that are bypassing or spilling over national boundaries," thereby ushering in a "new era of global public health policy").

of their own self-interest and fundamental values. The WHO's arguments drew connections between that organization's primary concern (public health) and the economic concerns of the World Bank, helping to convince developing states that international tobacco regulation was consistent with their primary interest in economic development. The litany of health statistics on the impact of smoking provided by the WHO sought to alter states' perceptions of relative priorities; it was clearly a strategy directed at those who might be inclined to postpone or delay consideration of the issue. At the same time, its efforts, as well as those of the Bank, to show the broader interconnections between tobacco regulation and other "sovereign" concerns that were already subject to international interference or regulation were aimed at those who were not yet convinced that international interference with such "domestic" concerns was warranted.

The Tobacco Framework Convention suggests the complexity of modern treaty-making efforts. A successful multilateral treaty-making effort in the modern age of IOs requires convincing states and NGOs that the proposed treaty is at the very least consistent with an increasingly dense web of other institutionalized, international regulatory efforts. As a result, when such efforts prove successful, as it appears to have been with respect to convincing states to notify the Tobacco Framework Convention, the effort to establish connections with other legal regimes is likely to have an impact on those other regimes.[60]

More politicized forms of legitimation arise in connection with treaty-making efforts by more clearly political or "representative" plenary IO organs, such as the UN General Assembly or the Meetings of the Parties in various regimes. Notwithstanding the ICAO example noted above, frankly political bodies, such as the UN's General Assembly or the ILO's General Conference, may sometimes credibly advance certain treaty making efforts. These organs may legitimately initiate treaty making or help produce a credible result when they are regarded as legitimate "community representatives."[61] The credibility of action taken by such Meetings of the Parties rests on the premise that these reflect the considered judgment of *all* the relevant parties to an agreement. A decision reached in such fora, usually through consensus, may have at least the same legitimacy as does "the subsequent practice" of states under the Vienna Convention on the Law of Treaties and appears to stem from the same fundamental rationale: the notion that those who establish a rule ought to have the power to interpret it by joint or collective action.[62]

[60] Not surprisingly, at least one commentator is now proposing that the human rights regimes mentioned in the Tobacco Framework Convention, as well as national courts, should take the human rights aspects of tobacco more seriously in their own work. *See* Melissa E. Crow, "Smokescreens and State Responsibility: Using Human Rights Strategies to Promote Global Tobacco Control," 29 *Yale J. Int'l L.* 209 (2004).

[61] *See, e.g.*, Abbott and Snidal, *supra* note 5, at 23–6 (surveying the UN General Assembly ("the town square of international politics"), the ICJ (sometime "expositor of fundamental community values"), and the Security Council ("the most controversial example of community representation")).

[62] *See* Vienna Convention on the Law of Treaties, article 31(3)(b). *See also* articles 39 and 40 (permitting parties to agreements to modify their terms).

The feasibility of such collective action is considerably enhanced by the availability of standing bodies that can claim to represent the views of all treaty parties. In some cases, most notably for the UN's General Assembly, the legitimation involved stems largely from its universal or quasi-universal membership. The UN General Assembly's endorsement of a treaty negotiation or of a final treaty text may be valuable precisely because of the absence of possible alternatives for determining, in a relatively expeditious manner, the shared views of a community that now numbers over 190 states.[63] In other instances, as with respect to the ILO's General Conference, the plenary body's legitimation function does not necessarily rely on claims to universal government representation but on the credible claim that it properly balances the interests of relevant constituencies (such as labor and industry concerns with respect to the ILO).

ICAO's usefulness to those concerned with regulating some international crimes suggests another related function: IOs and their staffs provide formidable mechanisms to "launder" treaty norms that would appear illegitimate if proposed by a state or a group of states.[64] "Laundering" with respect to treaty-making can occur in all kinds of IOs. The UNCLOS and the ICC negotiations suggest both the power and potential limitations of "UN laundering." It is difficult to see how states could establish rules to govern the world's oceans or jurisdiction over universal crimes except through a UN-sponsored conference that draws the participation of nearly all the states of the world as well as the political legitimacy of the world's principal debating forum, namely, the GA. At the same time, the success of such laundering is threatened to the extent those negotiations expose, as through a divided final vote, the fragility of global consensus. Regional IOs or those with a more specialized purpose can also engage in "laundering" within their mandate, but these organizations' regional reach or functional specialization serves to demarcate their capacity to "launder." Few expect the WHO, for example, to be the venue for the next set of negotiations on human rights, arms control, or trade, but the effort to regulate, via treaty, tobacco, would appear to gain legitimacy because of the WHO's involvement.

The legitimacy and perceived neutrality conferred on IOs or treaty bodies to act as "community representatives" also enable these entities to assume responsibility for a function that is critical to the success of many treaties, namely, the allocation of financial or other resources. As Abbott and Snidal point out, IOs have been used as "trustees" for funds. As discussed in Chapter 3, a UN member's treaty duty to pay UN dues is legitimated to the extent the GA is recognized as a legitimate trustee for determining which are the "expenses of the organization" that are subject to that duty.[65] But IOs serve as allocators of financial resources in a variety of contexts apart from serving as collectors of membership dues, whether for purposes of development, for environmental goals (e.g. the GEF), or for a multitude

[63] Jonathan I. Charney, "Universal International Law," 87 *AJIL* 529 (1993).
[64] On "laundering" see Abbott and Snidal, *supra* note 5, at 18–19.
[65] *See id.*, at 22; Article 17, UN Charter.

of other treaty-based reasons requiring the establishment of trust funds.[66] The existence of, for example, GEF funds, provides economic incentives for beneficiary countries to become parties to certain MEAs. Similarly, the "common heritage" principle of UNCLOS, even as modified by the U.S.-sponsored de facto amendment to that Convention, makes the Seabed Authority a trustee for the world's sea-bed resources.[67] Treaty regimes that require the use of fair or impartial procedures to allocate treaty benefits, as does the ILO with respect to technical assistance to facilitate compliance with ILO Conventions, also find a ready tool in IOs.

6.1.4 Creation of Property Rights

There are many examples of IO-sponsored treaty regimes that create or recognize property rights among various rights holders. The TRIPs Agreement under the WTO regime is perhaps the most familiar example.[68] It establishes global rights of private property on behalf of individuals and businesses. It recognizes that these rights are entitled to protection, as against infringement by other private parties or by the state itself, through state action.

Treaties that establish such property rights on behalf of private rights holders may be subject to, and inspire, particular forms of inter-state cooperation. Kal Raustiala and David Victor argue that the creation of property rights, at the international or national levels, responds to the particularistic interests of economic actors, and not necessarily to aggregate efficiency concerns.[69] They illustrate the complex rise of the multiple international regimes to protect plant genetic resources—developments that over the past seventy-five years have revolutionized concepts of ownership in response to the rise in value of plant genetic resources and the incentives thereby created to capture this new wealth. Raustiala and Victor demonstrate how the development of biotechnology and genetic engineering created a strong push for intellectual property protection that would ultimately displace a common heritage system, based on open access, to one based on private property rights and more secure access. They describe how this occurred through pressures brought by those seeking to benefit from these rights, from pharmaceutical industry interests in the United States to countries of the south rich in raw

[66] *See, e.g.*, Ibrahim F.I. Shihata, "The World Bank's Contribution to the Development of International Environmental Law," in Nisuke Ando et al., eds., *Liber Amicorum Judge Shigeru Oda* 631, at 645–8 (New York: Kluwer International, 2002)(discussing the World Bank's role as an instrument for the progressive development of international environmental law through its efforts to establish and manage the GEF).

[67] The GA adopted an Agreement of the Implementation of Part XI in 1994; see *Agreement Relating to the Implementation of Part XI of the UNCLOS*, UN Doc. A/RES/48/263, July 28, 1994. *See* David H. Anderson, "Law-Making Processes in the UN System—Some Impressions," 2 *Max Planck UNYB* 23, at 46–7 (1998).

[68] *See generally* Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex 1C to the WTO Agreement)(hereinafter "TRIPs Agreement").

[69] Kal Raustiala and David Victor, "The Regime Complex for Plant Genetic Resources", 58 *Int'l Org.* 277, at 282 (2004)(citing Harold Demsetz's theory of the rise of property rights).

biological resources that are now increasingly seen as sources of wealth. The U.S., they argue, as has been a key driver of change in this field and the results are overlapping regimes within the FAO, the WTO, and treaties, such as the 1961 International Convention for the Protection of New Varieties of Plants and the 1992 UN Convention on Biological Diversity.[70]

Raustiala and Victor contend that the density of legalization in this field suggests a new phenomenon, namely a "regime complex" with definable characteristics. Within such regime complexes, treaty negotiators are required to coordinate among overlapping and possibly conflicting treaty rules and encouraged to adopt broad rules that either paper over differences, allow for multiple interpretations, or permit legal development to occur through bottom-up responses to implementation issues as these develop. They also contend that regime complexes require treaty negotiators to engage in forum shopping to select venues for negotiation most favorable to their interests and to address problems at the "joints" between these regimes, such as "savings clauses" that deal with the status of pre-existing treaties.[71]

The characteristics of "regime complexes" may be found outside the context of international property regimes narrowly defined. Most modern multilateral treaties create new kinds of property rights, at the very least, among the states that are parties to them. The WTO agreements, for example, recognize and protect the property rights of traders of goods as well as service providers. Both of these groups have now acquired rights at the international level to engage in business without undue interference by the foreign states in which they want to do business. Although the WTO dispute settlement system does not grant these business interests direct access to an international adjudicative remedy, they now have legally cognizable claims against protectionist tariffs or other forms of discriminatory restraints on engaging in business, and these groups can now pressure their own governments to bring claims against the WTO party that is doing them harm.[72]

Similarly, UNCITRAL's efforts with respect to contracts for the international sale of goods define the rights of private contract holders as between themselves. The World Bank's International Center for the Settlement of Investment Disputes (ICSID) exists to recognize and protect the respective rights of foreign investors and their host states to settle their disputes in a denationalized arbitral forum. Also, as noted in Chapter 4, at least some of the conditions imposed on certain IMF structural assistance loans are intended to complement the ICSID regime by requiring borrowing countries to respect the rights of foreign investors. Of course, human rights conventions establish a state's duty to avoid violating the rights of

[70] *Id.*, at 283–95. [71] *Id.*, at 295–305.

[72] For a description of the special hybrid nature of WTO "transnational" dispute settlement, involving government litigants acting on behalf of private business interests, see Robert O. Keohane, Andrew Moravcsik, and Anne-Marie Slaughter, "Legalized Dispute Resolution: Interstate and Transnational," 54 *Int'l Org.* 457 (2000). *See also* Chapter 9.

individuals, including its own citizens. When states adhere to such treaties they are affirming that at least part of the social contract between themselves and their citizens is now the subject of international regulation and, within the limits of international law, can be "enforced" by individuals as against their own governments (as in various treaty bodies that accept the right of individual petition or in national courts when the underlying treaty rights are either self-executing or have been implemented through domestic law).

Even when treaties do not provide for recognizable property rights or remedies on behalf of private individuals, at the very least they establish a new kind of right by one state party vis-à-vis another. A state that enters into an MEA thereby acquires a property right vis-à-vis other parties to that treaty since, unless the treaty provides to the contrary, at the very least a party acquires established customary rights recently recognized by the ILC's Articles on State Responsibility—such as rights to monetary compensation for any damage suffered if another party to the MEA violates its commitments and injury or damage results. Except when displaced by their own specialized remedies, all treaties are subject to standard rules of state responsibility that assume that "a state that has violated a treaty obligation owed to another state is required to terminate the violation and, ordinarily, to make reparation, including, in appropriate circumstances, restitution, or compensation for loss or injury."[73] Unless they state otherwise, all treaties are presumed to establish entitlements to customary international law remedies for breach.

IOs engaged in amending, interpreting, or supervising such treaty rights are engaged in settling perceived conflicts in property rights. IOs which attempt to mediate or settle disputes concerning treaty rights allocate resources to the same end. Reliance on IOs for such purposes—from the WTO's dispute settlement body to an MEA's COP—helps provide assurances to parties that their treaty (property) rights will be less susceptible to the exercise of relative power (as may occur through unilateral self-interpretation). Such assurances may help convince states that a treaty is worth negotiating, concluding, and ratifying—or worth their continued participation. It should not be a surprise if at least some of these treaty regimes evince the same qualities that Raustiala and Victor attribute to complex regimes involving plant genetic resources, such as reliance on bottom-up approaches to legal development in the course of implementation.

More generally, participation in IOs is in itself a relatively new kind of property right that states want very much to possess. If, as the Chayes' have pointed out, the "new sovereignty" is "status—the vindication of the state's existence as a member of the international system . . . through participation in the various regimes that

[73] *See, e.g.*, *Restatement (Third) of Foreign Relations Law of the United States*, §901 cmt. H (1987); Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission, 53rd Session (2001), in Report of the International Law Commission on the work of its 53rd Session, Official Records of the General Assembly, 56th Session, Supp. No. 10 (A/56/10), Chap. IV. E. 1, article 31 (duty to make reparation).

regulate and order the international system,"[74] IOs provide a principal form of entree to this bundle of sovereign entitlements, tangible and intangible. As is suggested by the efforts expended by even economic powerhouses like China to enter into organizations like the WTO, IOs possess benefits that states want to attain, especially, but not only, if a state's bona fides to statehood status are in doubt.

In addition, as constructivists contend, the IOs that states create in turn affect how states define themselves over time. Once states become members in good standing of organizations as vital to participating in the modern world as the WTO and the UN, they have achieved a status in the community of states, a form of property right, that most are loath to disturb. The status conferred by IO membership is dependent on being perceived as generally law-abiding members of the IO in question. Thanks in part to their membership and dependence on IOs, most states come to see themselves, and want others to see them, as law compliers. Their interest in protecting their property right in the "new sovereignty" as conferred by IO membership leads rational, egoistic states to consider more carefully, when contemplating treaty breach, the likely consequences on their standing in the community and in the IOs of which they are a part.

For these reasons, treaty negotiations within IOs are more likely to involve bargaining "in the shadow of the law." In cases where the treaties in question contemplate the creation of cognizable property rights on behalf of private parties as well as third party dispute settlers charged with adjudicating such rights, states contemplating entering into such agreements (as well as those contemplating breach) are bargaining in light of predictions about how a certain tribunal or other established third party will interpret the parties' respective property rights. In some cases, the rules are clear enough—as are the prospects of being called to account—that these become bargaining chips favoring the side with the better legal endowments.[75] But even in cases not involving treaties with binding forms of dispute settlement to defend private property rights, states now negotiating treaties in IO venues are doing so, as Raustiala and Victor put it, in the absence of a "clean slate."[76] More cases of multilateral treaty-making than ever before occur amidst a growing density of pre-existing institutions, treaties, and other legally significant constraints, all of which require careful considerations of the best negotiating forum, the type of "savings clauses" needed to resolve problems at the "joints" of overlapping or even conflicting regimes, and a growing reluctance to enter into inflexible rules that foreclose legal development or that do not permit adjustment as implementation problems emerge.[77]

[74] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* at 250–70 (Cambridge, MA: Harvard University Press, 1995).

[75] G. Richard Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization", 44 *Duke L. J.* 829, at 835 n. 27 (1995). *See also* Robert H. Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," 88 *Yale L. J.* 950, at 968–9 (1979) (discussing the "bargaining endowments" of legal rules).

[76] Raustiala and Victor, *supra* note 69, at 296.

[77] *See generally id.* For other descriptions of forum-shopping among institutionalized treaty-making fora, see, e.g., Kenneth W. Abbott, "Rule-Making in the WTO: Lessons from the Case of

6.1.5 Issue Linkage

There is a substantial literature indicating how institutions, including IOs, promote issue linkage.[78] As is suggested by the UNCLOS and the ICC negotiations, treaty efforts in UN fora often consist of "package deals."[79] The multiple issues introduced in the course of these negotiations, the product of the diversity of states involved, as well as organizational efforts to faithfully incorporate the diverse views of these states, provide the necessary starting point for "linkage." As those two negotiations indicate, the more issues that are brought into a treaty negotiation, the easier it is to find side-payments among them. As Keohane points out, the "clustering of issues under a regime facilitates side-payments . . . more potential quids are available for the quo."[80] Organizational structures such as the tripartization of interests encouraged by the ILO's approach to representation, the regional sub-groupings of states that characterize most IOs with global reach, and the various ad hoc associations of specialized interests encouraged within particular UN conferences encourage groups of states with common interests to join forces, thereby suggesting the possibility of "trades" among such groups. IO secretariat or NGO suggestions for compromise formulations, encompassing trade-offs on one set of issues in exchange for gains in other areas, put pressure on participants to find issues on which they are willing to deal.

As in UNCLOS and ICC negotiations, the resulting package deals may involve exchanges among both substantive and procedural issues. Issues linked for one purpose may suggest linkage for other purposes, such as enforcement. In some cases, as with respect to some issues in trade negotiations, the prospect of enforcement linkage may drive linkage on matters of substance. Intellectual property concerns were incorporated into the WTO's trade round agenda in 1994 at least in part to secure the benefits of the WTO's standing dispute settlement bodies with respect to such issues, for example. For states threatened by the prospect of unilateral enforcement of intellectual property protection by the U.S. under section 301 of its Trade Act, multilateral dispute settlement with respect to such rules was a more attractive prospect. In other cases, linkage may be driven by the potential to expand the possibility of retaliation for breach across a range of issues—as a result of the normal operation of doctrines of state responsibility or the Vienna rules governing remedies for material breach.

Negotiators typically attempt issue linkage through characteristic modes of argument: (1) normative (because a link is demanded by justice or fairness);

Bribery and Corruption," *J. Int'l Econ. L.* 275 (2001); Lawrence R. Helfer, "Regime Shifting: The TRIPS Agreement and the New Dynamics of International Property Lawmaking," 29 *Yale J. Int'l L.* 1 (2004).

[78] *See* Aceves, *supra* note 6, at 249.

[79] For a description of the factors leading to issue linkage in UNCLOS, see Haas, *supra* note 39, at 366–7. Of course, "package deals" are endemic to UN treaty negotiations, *See generally* Lee, *supra* note 18 ("Multilateral Treaty-Making"), at 169–76.

[80] Keohane, *supra* note 1, at 91.

(2) coherence (because a link to issue X makes sense given prior links already made by the regime); (3) consequentialist (because issue X has an effect on issue Y); (4) strategic or tactical (because linkage is needed to come to an agreement); or (5) effectiveness (because making the link will permit more effective regulation over the issue sought to be linked or other matters within the regime).[81] Organizational venues, characterized by diverse actors operating under different cognitive modes of thinking and capable of generating abundant information, facilitate making these types of arguments.[82]

IOs can strengthen or weaken the possibility of issue linkage through (re)definitions of their institutional mandate, whether accomplished through major policy addresses by its leading officials, through the establishment of working parties, through involvement in new activities or, more rarely, through formal amendment of an IO's constituent instruments. The World Bank, as is well known, has redefined its mission or the issues with which it is concerned so that today it is associated with sustainable development (particularly in developing countries) and the protection of the environment, and not only with assisting European countries devastated by World War II. The WTO has, through more formal treaty negotiations, achieved in succeeding trade rounds, managed to extend its mandate to encompass anti-competition policy, services, intellectual property, and some forms of investment regulation.[83] As is discussed in Chapter 8, its dispute settlement bodies have also taken action that suggest further expansions of the WTO's boundaries. That organization may yet emerge as a serious promoter of "sustainable development" and expand its links to matters that are now the focus of MEAs or the ILO. While there are fewer examples of IOs which, over time, have intentionally narrowed their institutional mandates, the ICJ's response to the WHO's inquiry in the *Nuclear Weapons case* might be seen as a judicial rebuff to that organization's attempt to expand (or re-interpret) its own institutional boundaries.[84] Nonetheless, as discussed in Chapter 5, the WHO has not let the doctrine of specialty dampen its missions. It is trying to establish, at least through its Tobacco Framework Convention, links between health, trade, development, and environmental concerns. And once an organization expands its institutional mandate to encompass a new issue for one purpose, path dependencies, including its bureaucrats' ritualized behavior, may ensure that subsequent treaties negotiated under an IOs' auspices are likely to address that issue as well.[85] This is indeed one

[81] *See* David Leebron, "Linkages," 96 *AJIL* 5 (2002). *See also* Haas, *supra* note 39, at 370–3.

[82] *See generally* Haas, *supra* note 39 (discussing how issue linkage and learning can take place in inter-state negotiations with such characteristics).

[83] For a discussion of the GATT's "boundary" decisions vis-à-vis other IOs, see Gerard and Virginia Curzon, "GATT: Traders' Club," in Robert W. Cox and Harold K. Jacobson, eds., *Anatomy of Influence: Decision-Making in International Organization* 298, at 310–13 (New Haven: Yale University Press, 1973).

[84] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 ICJ Rep. 66 (WHO Opinion).

[85] For discussion of "boundary decisions" in a variety of IOs, as well as the factors both external to IOs and internal, that influence such decisions, see Cox and Jacobson, *supra* note 83, especially at 381–5.

of the patterns by which the missions of IOs expand. Having embraced, at the Uruguay Round, some investment issues into a regime formerly concerned primarily with trade in goods, makes it more difficult for the WTO, for example, to resist such issues in subsequent trade rounds; at the very least, it requires active efforts to reject the institutional precedent established.

6.2 Impeding Cooperation

The existence and operation of IOs does not ensure that a treaty negotiation will be initiated, or that once such negotiations begin, that these will conclude with a final text. Many projects, proposed by idealistic international lawyers during the Cold War, including proposals for negotiations for human rights or war crimes courts, floundered precisely when exposed to the harsh political realities of organizational venues of diverse membership such as the GA, its Sixth Committee, or even expert bodies such as the ILC. Proposals for a permanent international criminal court withered for decades in prominent organizational venues until revived in 1990 due to political circumstances that cannot be solely attributed to developments within IOs. As noted in Chapter 1, the inability of IOs to assist in the conclusion of legally binding and enforceable agreements relating to a multitude of topics vital to the security, economy, or other vital interests of nation states has formed the core of the familiar critique of such organizations (and international law), mounted by realists and neo-realists.[86] As neo-realists have suggested, many of the functions above that we attribute to IOs—from iteration to issue linkage—can and do occur without the benefit of IOs.[87] States have managed to cooperate multilaterally without the benefit of IOs, and they will continue to do so.

The existence and use of IOs in treaty-making can also prove counterproductive. Choosing a "wrong" organizational forum has sometimes been fatal to particular treaty-making efforts. That IOs generally promote iteration, reduce transaction costs, and promote cooperation in the variety of ways discussed in Section 6.1 does not mean that in any particular instance an IO will efficiently or competently do any of these things. Some organizational venues may delegitimate attempts at treaty-making before relevant constituencies or states. Efforts by the "Group of 77" to establish a "New International Economic Order" (NIEO)—as through legally binding duties on multinational enterprises through a Code of Conduct—floundered, in part, because the UN negotiating fora had, from the perspective of business groups in states such as the U.S., delegitimated themselves through efforts such as the UN General Assembly's Charter of Economic Rights and Duties of States. As this example illustrates, the readiness by an IO to adopt soft law can sometimes undermine, as well as support, attempts to establish hard law obligations via treaty. Despite the claim of managerialists, there is evidence to suggest

[86] *See, e.g.*, John J. Mearsheimer, "A Realist Reply," 20 *Int'l Security* 82, at 87 (1995). [87] *Id.*

that IOs with smaller or more selective forms of membership manage cooperation better, or may evolve deeper forms of cooperation more quickly than more inclusive regimes.[88] But even IOs with more homogeneous members may flounder with respect to particular treaty efforts, as did the OECD's failed effort to negotiate a Multilateral Investment Agreement (MAI) in the 1990s.[89]

Those failed MAI negotiations also indicate that many of the factors that make IOs effective venues for initiating and concluding large numbers of treaties may actually derail some treaty-making efforts under the right set of circumstances. What IOs do well—spur the involvement of a more diverse set of actors in treaty-making, make the role of powerful states less salient, multiply options for treaty-makers, and increase information—may be counterproductive with respect to the successful conclusion of some treaty negotiations. In such cases, it may be better to defer recommendations for initiating treaty negotiations—as the UN GA has occasionally done. In particular instances, even powerful states have become leery of initiating treaty negotiations precisely because of the more diverse set of actors, including NGOs, that are likely to be involved, or because they believe the matter ought to be discussed bilaterally, with fewer actors, or where it is possible for the governments involved to control the agenda or the flow of information to outsiders. The increase in treaty-making options or potential institutional venues is small comfort if all of these are seen as equally subject to growing expectations of "transparency" when circumspection is needed instead or if, as in connection with the failed MAI, the next most likely organizational sponsor, namely the WTO, is seen as only magnifying, thanks to its even more diverse membership, the number of contentious issues.

The clustering of issues that characterizes much IO treaty-making may complicate negotiations and may be counterproductive, as with respect to the OECD's failed MAI. While package deals may indeed be facilitated by organizational venues, the difficult business of putting such packages together may be the *only* route to success once more issues are loaded onto the agenda. The failure to fully link labor or environmental issues into the MAI was, from the perspective of some, a primary failing in those negotiations but so were some of the linkages attempted. Thus, one of the principal problems with the MAI appears to have been its reliance on direct investor/state dispute settlement mechanisms that had originated in prior bilateral investment treaties concluded by most of the OECD parties primarily with lesser developed states anxious to secure the benefit of industrialized states' foreign investment flows. Making such mechanisms applicable as between industrialized OECD members meant that these states' own policies and laws would come under much greater scrutiny, an unsettling prospect to those who were afraid

[88] *See, e.g.*, George W. Downs, David M. Rocke, and Peter N. Barsoom, "Managing the Evolution of Multilateralism," 52 *Int'l Org.* 397 (1998).

[89] For a highly readable account of the governmental forces and NGOs that brought down the OECD's negotiations on the MAI in 1998, see Edward M. Graham, *Fighting the Wrong Enemy* (Washington, DC: Institute for International Economics, 2000).

that denationalized international arbitration in the hands of private investors could lead to politically unpopular challenges to states' environmental or other laws.

The increasing numbers of actors involved in modern treaty negotiations—from NGO observers to IO legal staff—may increase the political legitimacy of the organizational venue at the expense of the efficiency of negotiations. Whatever else might be said about 19th-century ad hoc treaty conferences, some of the circumstances surrounding such conferences, such as the relatively small numbers of pre-selected states and the relatively focused agenda, enhanced the prospects for agreement among those invited. By comparison, the regional or ad hoc associations of state interests encouraged by today's organizational structures may, as has been suggested occurred during UNCLOS III, hamper efforts to find common ground or only serve to harden extremist positions.

The virtues of modern IOs, such as their supportive or administrative functions, may not compensate for such difficulties. Indeed, particular IO venues may detract from self-reinforcing behavior. There is at least anecdotal evidence that suggests that the "entrepreneurial leadership" needed for IO staff to serve as effective agents on behalf of collective action requires some initial grant of authority to the IO that permits it to take the lead, a substantively knowledgeable, well-prepared and adequately resourced and staffed secretariat, IO leaders with the requisite charisma, expertise, negotiating and other abilities, and external conditions that favor IO action.[90] All too often, these conditions are not fully met. As noted in Chapter 3, most IOs, with the exception of certain European institutions, are not given explicit law-making authority. Often they are poorly staffed or not given adequate resources. An IO's leadership may include prominent individuals who have been appointed to their post for reasons having little to do with their abilities. In other instances, external conditions, such as the absence of a perceived crisis in the area under discussion, may preclude the initiation or conclusion of treaty initiatives even when the other preconditions are met. Moreover, as Ernst Haas has pointed out, some IOs' influence declines over time as where these prove incapable of adaptation or learning, or where they fail to retain legitimacy with either members or non-members.[91] Even having pre-existing rules of procedure dutifully implemented by IO staff may not yield the cooperative benefits anticipated. Perhaps ad hoc conferences that need to work out such procedural matters benefit from this exercise—to the extent negotiating such rules became a trust-building exercise among the participants who thereby build a modicum of mutual trust among one another.

Traditional conceptions of IOs as Pareto-optimal mechanisms for iteration need to yield to a more nuanced description that recognizes, as Barnett and Finnemore do, that such institutions share the "pathological" features of any bureaucracy.[92] IO bureaucrats, like those within governments, can be inefficient,

[90] *See, e.g.*, Sandholtz, *supra* note 14, at 251–2 (discussing how these factors helped the European Commission to take the lead on telecommunications policy).

[91] Haas, *supra* note 12.

[92] Barnett and Finnemore, *supra* note 36.

ineffective, repressive, unaccountable, and, as the scandal involving the UN and the oil for food program in Iraq implies, even corrupt.[93] Any of these flaws can serve to undermine IOs' tremendous potential to facilitate treaty-making. IO secretariats, like other bureaucratic agents, may develop their own agendas at the expense of the state principals that they serve. Their touted "independence" or "autonomy," along with their control over technical expertise and information, may lead to proposals or methods that prove counter-productive to the successful conclusion of a treaty. Certainly the values manifested by UNCTAD or the UN's Centre for Transnational Corporations were, during the NIEO period, at odds with the sentiments of many industrialized states and undermined, as noted, those entities' treaty-making efforts. Ritualized IO practices, particularly within specialized and compartmentalized fields such as health care or trade law, may limit bureaucrats' field of vision. IOs may encourage the formation of international subcultures that "flatten diversity" or are "inattentive to contextual and particularistic concerns."[94] Precisely because they respond to institutional precedents and tend to adopt universalist "lessons" from the past, IO staff may inappropriately recommend similar approaches to problems arising in radically different contexts. The very professionalism that characterizes international civil servants may insulate them from the pressures of domestic groups that keep at least some government officials accountable. The denationalization of the international civil service may encourage proposals for treaties or compromise formulations at odds with the realities faced by nation states.

Attempts to draw upon IO's technocratic legitimacy may fail if the issues under negotiation come to resemble those politicized issues that have not been amenable to comparable legitimation efforts at the domestic level. The involvement of "faceless" IO bureaucrats allegedly dependent on a "trade mafia" within the WTO has generated, justly or not, the opposition of many members of international civil society to WTO-generated agreements. Many of these groups, emboldened by a perceived victory in terms of "toppling" the MAI within the OECD, are actively challenging the WTO bureaucracy's legitimacy (as well as that of the World Bank and the IMF). The apolitical neutrality of international civil servants may be seen as a problem and not a benefit when the problems with which they deal require political solutions. It remains to be seen how the WHO's efforts to secure a treaty on tobacco control, driven by epistemic communities of health care professionals, based on IO expertise, and grounded in various IOs' access to information, will fare against strongly embedded cultural norms as well as other market interests at odds with the Tobacco Framework Convention, for example. It is not clear that

[93] *Id.*, at 726. *See, e.g.*, William Safire "Scandal at the U.N.," *New York Times*, section A-1, at 25 March 17, 2004; Warren Hoge, "U.N. Chief Rebuts Critics of the Iraq 'Oil for Food' Program," *New York Times*, section A-1, at 3, April 23, 2004; William Safire, "Tear Down This U.N. Stonewall," *New York Times*, section A-1, at 19, June 14, 2004; William Safire, "The Great Cash Cow," *New York Times*, section A-1, at 23, June 23, 2004. [94] Barnett and Finnemore, *supra* note 36, at 721.

this WHO-led "evidence-based" effort will escape the political dimensions of regulatory attempts regarding tobacco that have emerged nationally, as within the U.S.[95]

Even when IO-generated treaty-making is ostensibly successful, a closer look may reveal strains that may undermine either the particular treaty in question or the organization's prospects for serving as a desirable venue for future efforts. The WHO's Tobacco Framework Convention is a case in point. Negotiations on that treaty began officially in May 1996 but it took the WHO, which had never before attempted to serve as a venue for multilateral treaty-making, several years merely to organize the negotiation process such that the first meeting of the International Negotiation Body did not occur until October 2000. Thereafter, it took six formal negotiating sessions, involving 192 participating states, and nearly three years, to work out an agreement. According to one observer, the negotiating process was undermined and nearly destroyed by the WHO's penchant for regional organization along six regions in lieu of permitting states with common interests to band together and form common negotiating positions.[96] This led to gross inefficiencies, as artificially created voting blocks periodically stalled the sessions and precluded the possibility of finding common ground among like-minded states. Those negotiations were also subject to increasingly common complaints about treaty-making within global IO venues: the presence of a large number of delegates sent to Geneva with their expenses fully paid by the organization and who had no incentive to reach agreement quickly, the reliance on well-organized and outspoken groups of NGO representatives with "undue influence" on many ill-prepared government delegations, and the failure to hold simultaneous negotiation sessions on different subjects due to the inability of many delegations to staff more than two meetings at any one time.[97] Moreover, the negotiations on the Tobacco Framework Convention shared the problem of many comparable technocratic treaty efforts: those sent to the negotiations were primarily from only one government agency (in the usual case, the ministry of public health). As one critic indicates, this meant that many government delegates had an ulterior agenda: to use the international forum to pursue policies that were not favored by their own governments or that would otherwise not have cleared their home parliaments.[98] While this encouraged international agreement and may have helped bring about a successful conclusion

[95] For a survey of some of the political/legal tensions evident with respect to U.S. efforts to regulate tobacco, see, e.g., Margaret Gihooley, "Tobacco Unregulated: Why the FDA Failed, and What to Do Now," 111 *Yale L. J.* 1179 (2002)(reviewing David Kessler's *A Question of Intent: A Great American Battle with a Deadly Industry* (2001)); Peter Pringel, "The Chronicles of Tobacco: An Account of the Forces that Brought the Tobacco Industry to the Negotiating Table," 25 *Wm. Mitchell L. Rev.* 387 (1999).

[96] Gregory F. Jacob, "Without Reservation", 5 *Chi. J. Int'l L.* 287, at 291–2 (2004). Jacob contends that the only real pressure to stay on schedule came from the WHO Secretariat since Director-General Dr. Gro Harlem Bruntland wanted to have a tangible achievement by the end of her time in office. *Id.*, at 293.

[97] *Id.*, at 292–7.

[98] *Id.*, at 298–9.

to the negotiations, it bodes less well for the prospects for widespread ratification (or the prospects that even if ratified, the Convention's obligations will be faithfully implemented at the local level). Finally, some criticisms of the Tobacco Framework Convention suggest the hegemonic critique of the Security Council in Chapter 4. Although this was an international negotiation involving every state in the world and a substantial number of interested NGOs, the substantive framework for tobacco regulation adopted, as well as, with very rare exception, the standards incorporated in that treaty were those already in place in the United States. This is "multilateral" treaty-making that apparently seeks to bring the rest of the world up to one particular country's standard.[99]

6.3 Have IOs Made Treaties Better?

Critics of modern multilateral treaty-making conducted under IO auspices contend that the final product is all too often characterized by inexactitude and instability. Bruno Simma has argued that the rise of new political ideologies and the sudden entry of peoples of highly diverse civilizations into modern international law-making has "reduced the common ethical basis of international law,"[100] thereby increasing the need for ever greater numbers of multilateral treaties (over increasingly controversial custom), but also reducing the quality of the treaties concluded. Simma points to numerous "strains" in modern treaty-making, including: increasingly "politicized" treaties that replace strict legal rules with "soft" "programs and declarations parading in the garb of treaties;"[101] few treaties in areas where they are most needed and too many treaties on "peripheral" topics; and a multitude of treaties lacking in ratifications by the very states most needed to make such agreements effective.[102]

Simma's explanations for these strains emphasize the continued importance of genuine state consent. Problems emerge because "for most multilateral treaties the formulation of the text begins before it is clear whether, and about what, consent can actually be attained."[103] Simma argues that all too often, modern treaties succumb to the lowest common denominator or to meaningless compromise formulations

[99] *See, e.g., id.*, at 300 (noting that the U.S., which ultimately announced its intention to ratify the Tobacco Convention without reservation, viewed that treaty negotiation as an opportunity to "bring the rest of the world up to its standards").

[100] Bruno Simma, "Consent: Strains in the Treaty System," in R.St.J. Macdonald and Douglas M. Johnston, eds., *The Structure and Process of International Law* at 485 (Boston: Martinus Nijhoff, 1983)(quoting Charles De Visscher).

[101] Simma, *supra* note 100, at 486.

[102] *See also* Martti Koskenniemi, "Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol," 3 *Yrbk Int'l Envt'l L.* 123, at 146–7 (1992)(arguing that law's "special kind of justifying power lies in the formalism which submits the exercise of constraint to previously agreed rules," and that we cannot do away with such formalism altogether "without serious difficulties regarding the political acceptability of the whole regime").

[103] Simma, *supra* note 100, at 487.

reached by consensus when it would be better to simply call off negotiations but, of course, this possibility may itself be foreclosed because of sunk costs, including the investment by IO secretariats and the organization's prestige in the project. For Simma, "programmatic" or "promotional" treaties, reflective of a "not yet 'matured' consensus," threaten the normative value and stability of treaties as a source of real obligations. All too many modern treaties are wrongly used "to define a consensus which is still too imprecise, fluid or weak to be able to live up to the rigid demands of *pacta sunt servanda*."[104] Treaty provisions framed in deliberate ambiguities prove impossible to interpret under the standard rules of treaty interpretation "because there is no common intention of the parties to be discovered . . ."[105] In other cases, the absence of real commitment to a treaty may be shown by provisions that weaken its normative status by excluding the possibility of legal sanctions in case of non-performance (as where the only real sanction arguably permitted may be the mobilization of shame provided through a reporting scheme) or by provisions permitting easy ways out (such as unrestricted reservations or withdrawal clauses). In yet other contexts, modern treaty interpreters undermine the stability of the parties' original consent through the adoption of "dynamic" forms of treaty interpretation at odds with original intent. For Simma, outside of the human rights sphere where such dynamic interpretations might be needed to achieve a treaty's own aims, "the liberal use of a 'dynamic' method of treaty interpretation can only overstrain the capacities of international law."[106]

Many, perhaps most, of these critiques of multilateral treaty-making can be attributed to the involvement of IOs, and specifically to the institutionalized forms of treaty-making surveyed in Chapter 5. If the proliferation of treaties is indeed displacing custom, as Simma suggests, part of the blame must surely lie with "treaty-machines" such as the ILO and the UN General Assembly. If modern multilateral treaties do indeed reflect the absence of a "common ethical basis" or the lack of real agreement among those negotiating them, this is surely the result of the increasingly common reliance on negotiating venues that reflect universal or nearly universal membership.[107] If there is a rush to initiating treaty negotiations and to concluding such efforts by succumbing to the lowest common denominator, or before the most significant states are in real agreement, or if modern treaties are multiplying on matters of "peripheral" importance, surely these "strains in treaty consent" stem, at least in part, from IOs' tendencies to encourage

[104] *Id.*, at 490. [105] *Id.*, at 491. [106] *Id.*, at 497.

[107] *See, e.g.*, Lee, *supra* note 18 ("Multilateral Treaty-Making"), at 158 (noting how the large number of diverse participants in UN treaty-making conferences makes such negotiations more difficult, requires the consolidation of positions, undermines confidentiality, increases the potential for procedural wrangling, and may lead to selecting of influential leaders for negotiations on the basis of geographic representation or regional rotation rather than competence). *See also* Handl, *supra* note 24, at 13–14 (noting that limiting participation in a treaty to a region offers opportunities for custom-built regimes with more stringent environmental standards based on a high common denominator).

the initiation of treaty negotiations and to unduly encourage the conclusion of such instruments. If too many flawed treaties are being produced before states are really ready for them, this must be partly the product of the pressures on various organizations, such as the ILO and its secretariat, to produce treaty products for some of their principal constituencies (such as labor unions or relevant NGOs). If older multilateral treaties, by contrast, were, as Simma suggests, better able to reflect the hard rules of their more harmonious (and more limited) number of state parties, this is surely attributable to the ad hoc conference method by which such treaties were vetted among specially invited (and pre-selected) states genuinely eager and willing to do business.

The connections between these critiques and the involvement of international organizations are also suggested by Simma's specific examples of the failings that he addresses, including the results of the Third UN Conference on the Law of the Sea, the ILC's Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, the ILO's Equal Remuneration Convention of 1951, and the UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. If these conventions are as flawed as is suggested, it is difficult not to attribute many of the problems to the IOs from which these treaties emerged. "Promotional" treaties with both vague obligations and vague enforcement follow-up structures, such as the ILO's Equal Remuneration Convention, whose principal provision is that parties "shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, and in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value," and that is subject only to the standard supervisory mechanisms of the ILO, cannot be disentangled from the organizational venues that gave birth to it. A text as carefully calibrated to avoid giving offense to the opposing interests at stake as that in the Equal Remuneration Convention—and therefore, as Simma suggests, as fatally vague—is clearly the product of the tripartite organizational constituencies in the ILO.

Many of the "strains in treaty consent" identified can be ascribed to the characteristic way that these organizations operate: by resort to consensus whenever possible. As noted, consensus is now the usual rule for UN conferences as well as many managerial regimes, including those in MEAs, although there is considerable variation on how "consensus" is interpreted, on how long or how strenuous efforts must be to avoid a vote, and on what the residual voting rules are.[108] Simma argues that treaties formulated by means of consensus, a method "chosen precisely in order to compel basic agreement which is in reality lacking," are most likely to rest on false concord among states.[109] According to this view, consensus

[108] *See, e.g.*, Lee, *supra* note 18 ("Multilateral Treaty-Making"), at 165–6 (discussing possible differences in how "consensus" may be determined, as well as possible differences between reaching decisions on the basis of "general agreement" or "without a vote").

[109] Simma, *supra* note 100, at 488.

results in the opposite of what it seeks to achieve. It does not, as its advocates suggest, build a stronger or more widespread political base of support for decisions reached but is instead a vehicle for divorcing a treaty from real world considerations of power.[110] As is suggested by insider accounts of UNCLOS III and the ICC negotiations, the "deliberate ambiguities" that Simma bemoans in modern treaties are often the products of compromise formulations proposed by secretariats of IOs or by expert bodies anxious to safely "land" a treaty that has already consumed too many organizational resources to be conceded as a failure.[111] Consensus is the procedural mechanism through which pseudo agreement is reached.

IOs would also appear at least partly to blame for many weaknesses of modern treaty remedies, including resort to mere reporting obligations in place of hard tit-for-tat measures, enforceable sanctions, or binding dispute settlement in case of non-performance. Soft remedies, as noted, characterize most of the managerial regimes described in Section 5.3.3 and are impossible to imagine in the absence of modern IOs. Further, to the extent modern treaty regimes adopt the forms of treaty interpretation that Simma argues stretch any realistic conception of the actual consent given by the treaty parties, it appears that such methods of interpretation are inspired by the constitutional forms of treaty interpretation that entities such as the ICJ have repeatedly used with respect to their own institutional charters, including the UN Charter (see Chapter 2). These are the same dynamic forms of treaty interpretation that, for example, commentators like Churchill and Ulfstein see being applied by the institutions created in environmental managerial regimes—and that enable COPs, for example, to assume implied powers nowhere expressly conferred.

If modern treaties are too easy to initiate and to conclude, IOs must surely take some of the blame. Nineteenth-century treaty-making conferences, because they involved time-consuming efforts by those involved, is said to have resulted in non-frivolous treaty commitments to which parties were seriously committed, and not merely face-saving rhetoric. By contrast, the patterns of organizational treaty-making described in Chapter 5 are readily amenable to the latter. A decision by the UN General Assembly to convene a UN treaty-making conference may be the product of politically unreal consensus decision-making that fails to reflect the genuine commitment of relevant states. Other institutional entities involved in treaty-making, from expert bodies to IO secretariats, may be overly invested in achieving success and too removed from the realms of power to serve as a counterpoint. Similarly, the framework conventions of managerial regimes may be rhetorical, "feel good," or face-saving devices that, as critics of such regimes imply, undermine the rule of law by devaluing international compacts as a tool for concretizing sincere, reciprocal, and solemn obligations backed by national honor.

[110] *Cf.* UN Study, *supra* note 21, at 35 (noting that it has been suggested that the modern trend in favor of consensus in UN conferences "is more likely to result in generally acceptable instruments").

[111] *See, e.g.*, Lee, *supra* note 18 ("Multilateral Treaty-Making"), at 161 (arguing that adoption of a deliberately general or ambiguous formulation may be the only way to reconcile divergent positions).

Organizational treaty-making that departs even further from the traditional model of state consent, such as the ILO's scheme for treaty-making with strings attached described at Section 5.3.4, may pose the gravest risks. ILO treaty-making can easily lead to the lowest common denominator risks that Simma criticizes, that is, a proliferation of ever more conventions, ratified by an ever growing number of parties but whose substantive rules, promotional or vague to suit the heterogeneous interests within that organization, fail to elevate labor standards as intended. Moreover, to the extent some ILO conventions really do attempt meaningful change in national labor standards, they may fail to achieve change to the extent the formal adoption by the organization of such conventions reflects more the interests of the ILO's non-governmental representatives than of those in a position to give these conventions effect as domestic law.

Empirical attempts to assess the effectiveness of modern treaties do not easily refute such critiques of modern treaty-making. The easiest measure of treaty-making "success"—high rates of ratifications within a reasonable period of time—present a decidedly mixed picture. Despite the involvement of IOs, UN-sponsored studies have repeatedly expressed concern with the non-ratification or slow ratification rates of treaties. This was certainly a theme in UNITAR studies in the 1970s and the 1980s, and it is repeated in the 1985 UN Study on Treaty-Making as well.[112] Even the UN regime with arguably the most extensive system for assuring treaty ratification, the ILO, has not been an unqualified success by this measure.

To the extent "strains in treaty system" are evinced by the failure of ILO members to ratify ILO conventions, the results are mixed. Despite the ILO's reporting and other efforts, the number of ratifications to particular ILO conventions vary greatly. While approximately eight ILO conventions (mainly dealing with human rights) have received more than 100 ratifications, over 90 conventions have received ratifications from only 10 to 50 member states, while a handful have received no ratifications whatsoever.[113] The ILO's efforts to secure consideration and ratification

[112] *See, e.g.*, Oscar Schachter, Mahomed Nawaz, and John H. Fried, *Toward Wider Acceptance of UN Treaties* (New York: Arno Press, 1971); Mohamed El-Baradei, Thomas M. Franck, and R. Trachtenberg, *The International Law Commission: The Need for a New Direction* (New York: United Nations Institute for Training and Research Policy and Efficacy Studies, January 1981/August 1981); UN Study, *supra* note 21, at 35.

[113] Virginia A. Leary, "Labor," in Christopher C. Joyner, ed., *The United Nations and International Law* 208, at 222, n. 7 (Washington, DC: American Society of International Law, and Cambridge, UK: Cambridge University Press, 1997)(identifying, as of 1995, the following ILO conventions with no ratifications: the Conventions on Reduction of Hours of Work (Public Works) of 1926 (No. 51), Reduction of Hours of Work (Textiles) 1927 (No. 61), and Migration for Employment 1929 (No. 66)). As of the mid-1980s, an ILO Study of the 157 ILO conventions adopted through that date indicated that some 32 of these conventions had received fewer than 20 ratifications while 53 others had received between 20 and 40 ratifications. Victor-Yves Ghebali, *The International Labour Organisation: A Case Study on the Evolution of U.N. Specialised Agencies* at 213 (Boston: M. Nijhoff, 1989). According to a review of the ILO's database, ILOLEX, as of April 12, 2002, of the 163 ILO conventions and protocols adopted through that date, 50 of these had fewer than 20 ratifications and an additional 42 had received more than 20 but less than 40 ratifications. *See* http://ilolex.ilo.ch:1567/english/newratframe.E.htm.

of its conventions have not borne fruit with respect to some countries, most notoriously the U.S. As is well known, the U.S. has taken advantage of the ILO constitution's "federal/state" clause. Under article 19(7) of the ILO's constitution, the federal authorities of federal states assume comparable responsibilities for the ratification and implementation of only those ILO conventions which it "regards as appropriate under its constitutional system for federal action." Although, in theory, under that provision federal states also assume duties to bring ILO conventions to the attention of the appropriate domestic authorities for implementation, states such as the U.S. have repeatedly cited the federal/state loophole as justifying its refusal to adhere to all but thirteen of the ILO's conventions; further, the U.S. is one of the few ILO members that has not nearly ratified any of the seven "core" ILO conventions.[114]

As noted in Chapter 5, some expert bodies, such as the ILC, have produced similarly mixed results with respect to the rate of ratification. As Chart 5-1 (at p. 305) indicates, the numbers of ratifications for ILC codification conventions varies and the speed with which states appear to be ratifying these conventions seems to be slowing.[115] Although all ILC conventions aspire to universal participation and some have achieved widespread ratifications (particularly the Vienna Convention on Diplomatic Relations with 181 parties and the Vienna Convention on Consular Relations with 166), a number have been, from this perspective, major disappointments, including the 1996 Vienna Convention on Succession of States in Respect of Treaties (18 parties) and the 1975 Convention on the Reduction of Statelessness (27 parties). As Chart 5-1 indicates, ratification by over 50 states is relatively rare. Further, the numbers of ratifications for some ILC agreements, such as the 37 ratifications shown for the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, are deceptive. Since few of those 37 ratifications are from the states whose support is vital to the success of that regime—namely states that are major hosts to IOs, many of whom have voiced grave reservations about the convention's overly solicitous treatment of issues involving privileges and immunities—that convention can hardly be seen as a real success story.[116] In other cases, high participation may not reflect the actual willingness of states to comply. The most notorious instance of this may be the case of a UN treaty that was not the product of the ILC, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)(179 parties as of 2004). As many commentators have suggested, the

[114] Of the seven ILO Conventions indentified as "core" conventions, the U.S. has ratified only the ILO Convention on the Abolition of Forced Labor (1957)(No. 105). For a critique of the United States' proffered justifications for its failure to ratify ILO Conventions, *See generally* Walter Galenson, *The International Labor Organization: An American View* at 198–202 (Madison: University of Wisconsin Press, 1981).

[115] *See, e.g.*, Shabtai Rosenne, "Codification Revisited After 50 Years," 2 *Max Planck UNYB* 1, at 17–18 (1998) (contending that the slowing rates of ratification reflects the ILC's greater difficulties with North/South issues as opposed to East/West divides over the Cold War period).

[116] For a list of other arguable ILC "failures," see, e.g., *id.*, at 15.

number of filed reservations alongside these ratifications, as well as the purported scope of many of these reservations, has arguably gutted that convention.[117]

IOs have also achieved mixed success in terms of another possible measure of success: time from conclusion of a treaty to its entry into force (achieved by a minimum number of ratifications). Compare, for example, the entry into force record of the UN Charter itself, a treaty that entailed considerable infringements on state sovereignty, was not itself the product of an IO, and did not therefore enjoy any of the presumptive benefits of IO involvement, with the comparable record of the Vienna Convention on the Law of Treaties, an ILC product. By its terms, the UN Charter posed high hurdles for entry into force: not only did it require ratification by five particular states (the permanent members of the Security Council) but also by a majority of other signatory states (51 states).[118] Despite this, the UN Charter entered into force less than four months after the first signature, on October 24, 1945. Every signatory state had ratified that treaty by the end of 1945. By contrast, the Vienna Convention on the Law of Treaties, a fairly innocuous treaty which simply provides for entry into force after 35 states have ratified it, drew only 32 signatures on the date in which it was opened for signature (May 23, 1969). It did not enter into force until more than ten years thereafter. Over twenty-five years later, a number of the original signatory states had still not ratified it.[119] While many different reasons may explain the difference between these two treaties, it seems apparent that IO involvement in treaty drafting, in and of itself, provides no assurance of prompt ratification.[120]

The open-endedness of obligations imposed by many modern treaties (such as environmental framework conventions) complicates other attempts to measure rates of "implementation" or "compliance."[121] The few serious attempts to measure whether states implement or comply with the treaties they ratify suggest that the involvement of IOs is only one factor that influences compliance. Jacobson and Weiss's examination of the record of eight countries and the European Union with respect to five environmental treaties suggests that many factors may be responsible for greater or lesser rates of compliance, implementation, or effectiveness.[122]

[117] *See, e.g.*, Rebecca J. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women," 30 *Va. J. Int'l L.* 643 (1990); Belinda Clark, "The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women," 85 *AJIL* 281 (1991). For a list of declarations and reservations to CEDAW, see http://www.unhchr.ch/html/menu3/b/treaty9_asp.htm (visited April 12, 2002).

[118] UN Charter, Article 110(3). For a brief discussion of the ratification history, see John K. Setear, "Law in the Service of Politics: Moving Neo-Liberal Institutionalism from Metaphor to Theory by Using the International Treaty Process to Define 'Iteration'," 37 *Va. J. Int'l L.* 641, at 709 (1997).

[119] *See* Setear, *supra* note 118, at 710–11.

[120] *See, e.g.*, Charles N. Brower, "The International Treaty-Making Process: Paradise Lost, or Humpty Dumpty?," in Vera Gowland-Debbas, ed., *Multilateral Treaty Making* at 75 (The Hague: Martinus Nijhoff, 2000)(attributing the ratification difficulties of contemporary multilateral treaties to the proliferation of states, the growth of democracy, the post-Cold War spread of strife among ethnic and other grounds, the readiness to attempt to regulate in the "domestic" sphere, and the rise of non-state actors).

[121] *See generally* Koskenniemi, *supra* note 102.

[122] Edith B. Weiss and Harold K. Jacobson, eds., *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge, MA: MIT Press, 1998). For Weiss and

Jacobson and Weiss conclude that the level of states' compliance with their treaty obligations is affected by the characteristics of the activity involved (the number of actors involved, the effect of economic incentives, the role of multinational corporations in the activity, and the concentration of activity in major countries), the characteristics of the accord (the perceived equity of the obligations, their precision, provisions for obtaining scientific and technical advice, reporting requirements, other forms of monitoring, secretariat, incentives, and sanctions), the international environment (whether the treaty was the subject of a major international conference or of worldwide media attention, the presence of international non-governmental organizations, the number of parties to the accord, and the role and significance of other international organizations), as well as factors involving the country.[123] As this indicates, IO involvement is implicated only with respect to some of their factors.

The Jacobson and Weiss study is also a useful reminder of the variety and complexity of treaty regimes in existence—even within those addressing the environment—as well as the futility of attempts at mono-causal analysis.[124] The Jacobson and Weiss study suggests the difficulties of undertaking comparative compliance assessments. Unless such studies direct our attention to the extent the treaties force states to alter their behavior, the fact that any particular country does a better job of complying with or implementing, for example, the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) may simply tell us that the country in question had in place, long before the treaty was negotiated or was ratified, domestic laws to protect such species. Indeed, there is evidence that at least with respect to some of the treaties examined by Jacobson and Weiss, some of the richer, democratic states that Jacobson and Weiss suggest are better compliers were far ahead of others in terms of "compliance" long before the treaties were negotiated. Multilateral treaty negotiations may only succeed in codifying at the international level regulation what was already in place or about

Jacobson, "implementation" concerns the methods (from executive order to legislative acts) by which states transform international obligations into acceptable rules within their domestic legal system; "compliance" examines whether states actually abide by their procedural and substantive treaty obligations, whether or not they have enacted domestic legislation that appears to do so; "effectiveness" looks at whether the international norm achieves its intended policy objective (e.g., whether, for example, at the end of the day MEAs improve the environment).

[123] Weiss and Jacobson, *supra* note 122, at 511–42.

[124] For these reasons, Beth Simmons' attempt to measure what drives states to obligate themselves to certain IMF commitments and to abide by these once they accede to them attempts to distinguish between factors that some liberal theorists assume invariably go together. *See* Beth A. Simmons, "Money and the Law: Why Comply with the Public International Law of Money?," 25 *Yale J. Int'l L.* 323, at 355 (2000)(distinguishing between the existence of participatory democracy and a strong domestic commitment to the rule of law (the latter shown by the existence of a strong court system, sound political institutions, and provisions for orderly succession)). Contrary to the assumptions of some liberal theorists (see Chapter 1), Simmons finds that "the quality of being democratic actually contributes little or nothing when other factors are held constant," while a strong commitment to the rule of law contributes positively to international compliance. *Id.*, at 357. In addition, she finds that other factors, not encompassed by liberal theory, such as the pervasiveness of non-compliance within a region, also usually affects a state's tendency to comply. *Id.*, at 356–7.

to be put in place nationally within some of the treaty's powerful backers. In such cases, the states that are asked to change their behavior, or are expected to do so, are, not surprisingly, the ones that we find are having "compliance" or "implementation" difficulties. It is difficult to attribute the success of any particular treaty to the involvement of IOs either at the negotiation stage or after conclusion when we do not really know the extent to which the treaties merely codified pre-existing preferences, laws, or regulations.[125] Disentangling cause and effect with respect to either treaty "successes" or "failures" is an endemic problem with studies of treaty compliance.[126] Judging the quality of compliance is rendered even more difficult when a treaty anticipates or relies on compliance by private actors and not just states. Particularly to the extent a treaty purports to affect the behavior of non-state actors, it becomes relevant to consider, for example, the degree to which it is "user friendly" or too complex to be accessible by those that it is seeking to influence.[127]

Similarly, the necessarily incomplete attempts to measure the impact of ILO conventions in terms of successful implementation, compliance, or effectiveness concluded to date have yielded decidedly mixed results. Even with respect to ratified ILO conventions, ILO members have been notoriously lax in complying with the ILO's reporting requirements. It is also clear that not all ILO members have brought their domestic law into full compliance with even with those ILO Conventions that they have ratified.[128] Quantitative evaluation of effectiveness—that is,

[125] *See, e.g.*, Beth A. Simmons, "Compliance with International Agreements," 1 *Ann. Rev. Pol. Sci.* 75, at 89 (1998)(discussing the problems of selection bias and endogeneity in compliance studies). In a country such as the U.S., which generally ratifies only those treaties that do not pose significant conflicts with pre-existing national law, one would expect to find less evidence of legal changes brought on because of the assumption of a treaty obligation. Whether this means that the U.S. is, in any objective sense, more likely than other states to be in compliance with those treaties to which it adheres remains to be seen but this characteristic of the U.S. suggests that we cannot easily conclude that the U.S. is more inclined than other states to change its behavior *because* of a treaty obligation. We do not have hard data on whether all other liberal states, particularly those that require treaty obligations to be transformed into domestic law, are similarly disinclined to assume treaty obligations that require significant changes to domestic law. *Cf.* Thomas W. Wälde, "Non-Conventional Views on 'Effectiveness': The Holy Grail of Modern International Lawyers: The New Paradigm? A Chimera? Or a Brave New World in the Global Economy?," 4 *Austrian Rev. Int'l & Eur. L.* 164, at 202 (1999) (contending that a treaty is more effective "the less it is actually necessary," since a treaty "that reinforces existing values and patterns of behavior and facilitates transactions that relevant actors desire to carry out anyway is the most accepted and thereby useful one"). *See also* George W. Downs, Kyle W. Danish, and Peter N. Barsoom, "The Transformational Model of International Regime Design: Triumph of Hope or Experience?," 38 *Colum J. Transnat'l L.*, 465 (2000)(drawing distinctions between coordination games and international regimes that evince "deep" cooperation).

[126] For an examination of some of the endemic difficulties with compliance studies, see Simmons, *supra* note 125. Notably, the 1985 UN Study on Treaty Making concludes, without explanation, that the quality of treaties produced by UN processes in terms of their "adequacy in meeting the needs to which they are addressed" is a matter that is "not susceptible of measurement, except subjectively by the rate by which ratifications are deposited and thus entry into force is achieved." UN Study, *supra* note 21, at 23.

[127] *See* Wälde, *supra* note 125 (noting the need for "treaty impact assessments" that would include cost-benefit analysis addressing whether measures are "too complex and hermetic" and therefore suffer neglect by their prospective users).

[128] *See, e.g.*, General Reports of the Committee of Experts on the Application of Conventions and Recommendations, para. 187 (identifying countries which have not complied with their reporting

attempts to determine whether, even among those states that have conformed their domestic laws, the underlying labor practices now conform to those required by the relevant ILO convention or those laws are not enforced—are rarer, and the few studies that exist are inconclusive.[129] If the best measure of an effective treaty is whether parties to it have, *as a result of ratification, changed* their behavior in any significant respect, there is very little evidence one way or the other on that question with respect to ILO conventions. It is possible (and indeed likely) that most of the states that have "successfully complied" with particular ILO conventions would have satisfied the relevant treaty standards in the absence of a treaty, under their pre-existing law. There is no clear evidence that the proliferation of ILO conventions has affected the relevant behavior of most states or, more importantly, significantly raised labor standards as intended around the world.[130]

It is difficult, therefore, to assess Simma's critique of the modern treaty-making process on the basis of empirical measures of success or failure. Although we may suspect that, as Simma suggests, treaty regimes that are subject to binding forms of dispute settlement or that have recourse to other forms of enforceable sanctions may have higher levels of compliance, we do not know for sure whether these institutional mechanisms are responsible for the level of compliance, or whether states entered into such mechanisms precisely because they anticipated a general willingness to comply for other reasons, such as economic self-interest.[131] We simply do not know whether treaties concluded under IO auspices generally do "better" or "worse" in terms of possible measures of success, from levels of ratification to degrees of behavior modification. Least of all, we do not know whether the game is worth the candle: that is, whether the treaties generated by IOs are more effective in remedying the problems (from ozone depletion to marine pollution) sought to be addressed by international regulation.

Neither economists nor political scientists would be surprised by such equivocal conclusions. Game theorists do not contend that the self-interested behavior of states necessarily leads to either cooperation or conflict. They do not contend that the emergence of international institutions are "either inevitable or utopian."[132] Not all forms of games yield greater cooperation with repeated play; iteration

obligations) (2001), at www.iloles.ilo.ch. *See also* Ernst Landy, *The Effectiveness of International Supervision: Thirty Years of ILO Experience* (Dobbs Ferry, NY: Oceana, 1966).

[129] *See* Galenson, *supra* note 114, at 208–51. As Galenson indicates, the studies that have been undertaken have been plagued with cause/effect problems that are endemic to many efforts to measure compliance with international law. It is usually difficult (or impossible) to discover how much "conforming" behavior on the part of states is actually due to treaty ratification.

[130] Thus, Virginia Leary acknowledges that "cause and effect in the field of labor standards is difficult to prove" even while suggesting that there is clear evidence that some countries have adopted new labor legislation "due to the influence of ILO standards and supervision." Leary, *supra* note 113, at 222.

[131] *Cf.* Ronald B. Mitchell, "Regime Design Matters: International Oil Pollution and Treaty Compliance," 48 *Int'l Org.* 425 (1994)(finding that in the context of treaties governing ocean dumping, the prior regime relying on fines and sanctions was less effective than its successor, which relied on licensing tankers that were incapable of dumping oil).

[132] Snidal, *supra* note 32, at 56.

may sometimes provide incentives to break existing cooperation agreements.[133] Incentives may arise for states engaged in such games to "take a 'final move' and sacrifice future collaboration for immediate advantage."[134] (This is one interpretation of the U.S.'s decision with respect to UNCLOS in 1982 or its decision with respect to the ICC in 1998.[135]) Moreover, even in the absence of such unilateral decisions, the results of voluntary bargaining in good faith (or continued iterated discourse) are not necessarily benign.[136] Package deals, particularly when characterized by strategic or tactical linkages between issues, may prove unstable or less than Pareto-optimal.[137] Path-dependent processes conducive to deep multilateral cooperation may emerge in less inclusive organizations, such as regional IOs.[138] And some forms of "path dependencies," to the extent they suggest a type of "lock-in by historical events," are interesting precisely to the extent that they imply that rational actors acting on the basis of full information may sometimes opt for inefficient outcomes or inferior products.[139] To the extent that IOs promote such forms of "inherited inefficiencies,"[140] their potential to serve as vehicles for path dependencies is not a good thing. "Institutional learning" may be applied to advance bureaucratic agendas rather than to further genuine inter-state cooperation. IOs' norm diffusion or "laundering" functions may be vehicles for neo-imperialism, intended to teach the uninitiated "how to 'be' market economies."[141] This can occur through IO-generated fora for treaty-making and not merely through global legislation (as by the Security Council). Even the ILC commentaries on its proposed treaties (or for its Articles on State Responsibility) may reflect subtle biases in deference to power if only because rich and powerful states are most likely to produce the state digests of practice upon which such commentaries rely. Organizational treaty regimes can be used by the powerful to impose rules on the weak (as may be true of IMF-generated agreements on borrowing states or treaties promoted or enforced by the Security Council); they can be cartels that impose costs on non-members (as is the case with the Organization of Petroleum Exporting Countries (OPEC)); or they can serve as impediments to stronger action at the national level, or as vehicles for influential patrons, such as multinational enterprises or "norm entrepreneurs" with narrow ideological agendas (from saving the whales to

[133] *Id.*, at 49–50 (discussing continued plays of coordinated games). [134] *Id.*, at 51.

[135] *See also* Handl, *supra* note 24, at 13 (noting how global regimes are susceptible to the de facto power of strategic countries and citing, as an example, U.S. unilateral action that has undermined various oil pollution treaties). [136] Keohane, *supra* note 1, 72–3.

[137] *See, e.g.*, Haas, *supra* note 39, at 373.

[138] *See, e.g.*, Downs, Rocke, and Barsoom, *supra* note 88.

[139] *See, e.g.*, David, *supra* note 34 (discussing how QWERTY emerged as the dominant if inferior computer keyboard thanks to path dependencies). *But see* S. J. Liebowitz and Stephen E. Margolis, "Path Dependence, Lock-in, and History," 11 *J.L. Econ. & Org.* 205 (1995)(arguing that the examples of inefficient path dependencies, such as QWERTY and the victory of VHS over BETA, are misleading and that such forms of path dependencies are a great deal rarer than has been suggested).

[140] Liebowitz and Margolis, *supra* note 139, at 223.

[141] Barnett and Finnemore, *supra* note 36, at 714.

banning the death penalty).[142] The universal membership of IOs is not a guarantee that they are genuine fiduciaries for the collective membership or that their treaty efforts will yield overall welfare benefits.[143] Neo-realists continue to warn, with some justice, that the norms promulgated by institutions, both domestic and international, may be "both revolutionary and evil."[144]

It is not at all clear that IOs' involvement in treaty-making has improved this key vehicle for inter-state cooperation. But it is also not clear that the institutionalization of treaty-making has made things worse. Simma's enumerated strains in the modern treaty process presume the existence of a golden age of treaties in which these were serious undertakings where states meant what they said, when treaty obligations were not only precisely defined but were always subject to clear enforcement, such as tit-for-tat reciprocal measures. But there is no serious empirical basis of comparison to be able to determine whether pre-IO treaties were indeed more precise in terms of their substantive obligations or whether more states ratified them or, if they did so, whether they took their obligations seriously enough to alter domestic law as necessary and enforce the new obligations with full vigor. Without such comparisons, it is impossible to gauge whether, on any of these grounds, modern treaty-making has actually deteriorated.

Even if we were to generate data concerning, for example, the relative rates of ratification of pre- and post-IO multilateral treaties, *meaningful* comparisons will be, for reasons already suggested, extremely difficult. Existing studies of implementation, compliance, and effectiveness—as with respect to ILO treaties or MEAs—have usually engaged in comparative evaluations within a particular regime for a reason. Evaluative complications, difficult to begin with, magnify when we attempt to compare levels of implementation, compliance, or effectiveness across distinct subject matter. Even if we were to conclude that states really were in more effective compliance with, for example, the Hague Conventions of 1899 than they are today with the ILO's "core" labor conventions, to what extent is successful implementation or compliance with the rules for inter-state war (*circa* 1899) comparable to compliance with ILO conventions that require equal remuneration or that grant domestic labor unions the right to organize? Is the failure to implement successfully these ILO agreements suggestive of the flaws of the modern treaty-making process, including ILO processes, or does it suggest the greater difficulties of attempts to give effect to more intrusive forms of regulation involving a substantial number of state and often non-state actors whose actions are not limited temporally to how they conduct themselves in wartime?

[142] *See generally* Lloyd Gruber, *Ruling the World: Power Politics and the Rise of Supranational Institutions* (Princeton, NJ: Princeton University Press, 2000)(arguing that membership in supranational institutions, often imposed by the North on the South, is neither genuinely voluntary nor always welfare-promoting). *See also*, Alan E. Boyle, "Nuclear Energy and International Law: An Environmental Perspective," 60 *Brit. Yrbk Int'l L.* 259 (1989)(criticizing the IAEA on several of these grounds); *supra* at Section 4.1.

[143] Keohane, *supra* note 1, at 73.

[144] Robert Jervis, "Realism in the Study of World Politics," 52 *Int'l Org.* 971, at 974 (1998) (citing, as examples, Hitler's Germany and Stalin's Soviet Union).

Further, how are we to deal with the fact that greater numbers of treaties today aspire to achieve the (universal or nearly universal) participation of the organizational venues that inspire them? The failure to achieve such universal participation should not, in all cases, be taken as a flaw in current methods of organizational treaty-making. That international lawyers seek to reach ever more numbers of states with ever more intrusive forms of regulation should not, by itself, be seen as a sign of *weakness* in modern treaty-making. While critics are correct that universal fora for treaty-making present greater opportunities for lowest common denominator solutions, certain international problems, from those involving trade to the environment, require attention at the global level—or at least it appears that many states think so. Many political scientists and economists tell us that achieving successful cooperation is generally rendered more difficult as the numbers of participants rise and yet this chapter identifies many ways that the involvement of IOs makes the making of pacts that approach such global participation more likely. Attempts at universalistic treaty-making also advance the prospects of unification or harmonization of law. It is also reasonable to assume that a greater number of treaty negotiations that include vast numbers of states will reflect the interests of more than the usual powerful state actors, although, as noted, there is no assurance that power will not prevail even with respect to such treaties. It may not be entirely naive to begin with the premise that IOs function as intermediaries for universalism and that as such, they have spurred treaty (as well as soft law) developments—such as the rise in human rights obligations—that would not otherwise have occurred or would have occurred with much less speed.[145]

And for all the doubts concerning IOs' overall impact on rates of ratification, there is little question that IOs have encouraged a more *diverse* set of states to ratify treaties than in earlier eras. Nineteenth century multilateral treaties typically relied on one of several likely "great powers" to serve as the central depository for ratifications. Such powers were not likely to receive, nor certainly to accept, ratifications from sovereign nations that they did not recognize. For this reason alone, and quite apart from the (limited) intentions of their 19th-century drafters, those treaties were not capable of serving as instruments for the entire community of states. By comparison, modern multilateral treaties' reliance on a single UN depository for treaty ratifications and reservations has, in and of itself, markedly altered the possibilities for, as well as the probabilities of achieving, treaties of truly global scope. From the perspective of securing a truly cosmopolitan base for the international rule of law, it is difficult to see IOs' role in the universalization of treaties as a flaw in modern treaty-making.

Another criticism—the suggestion that modern treaty-making processes focus on "peripheral" topics—appears to be dated or subject to severe qualification. This argument reflects the level of dissatisfaction, prevalent in the early 1980s

[145] *See* Daniel Vignes, "The Impact of International Organizations on the Development and Application of Public International Law," in Macdonald and Johnston, *supra* note 100, at 809.

especially, with the ILC. In 1981, UNITAR concluded in a prominent study that the ILC was "no longer playing the central role in the law-making process that it could and should play."[146] At that time, the ILC's agenda was widely regarded as a "veritable What's What of drafting trivia, a parody of the world's urgent agenda."[147] At a time of active ferment especially between North and South on a number of prominent international economic law subjects, the ILC was engaged in attempts at codifications of law on such topics as the succession of states in respect of matters other than treaties, treaties concluded between states and IOs or between two or more IOs, the status of the diplomatic courier and diplomatic bag, relations between states and IOs, and jurisdictional immunities of states and their property.[148] UNITAR's Study reflected the criticism that the ILC "had allowed itself to concentrate unduly on topics of peripheral interest to the international community."[149] Many longed for a return to an age when the ILC had successfully produced draft conventions of ambitious scope, including on the law of the sea (1958), diplomatic relations (1961), consular relations (1963), and the law of treaties (1969). The UNITAR Study also reflected frustration with the ILC's slow rate of progress. It found that the average time between the ILC's initial consideration of a topic and its production of final draft articles was between seven and ten years, and that some subjects, such as state responsibility, had been (through 1981), on its agenda for over twenty-five years.[150]

But, as two of the authors of the UNITAR Study noted, even at that time, it was becoming increasingly clear that the ILC was losing its central place as the primary expert treaty-making body. Even at that time, the UN General Assembly was increasingly inclined to bypass the ILC and assign significant treaty-making tasks to other ad hoc bodies, such as the Committee on the Peaceful Uses of Outer Space (resulting in the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space). In 1980 the Assembly decided to entrust UNITAR, not the ILC, with examining the emerging legal principles applicable to economic relations between developed and developing states.[151] Today, while the ILC remains what it always was—the only expert drafting organ with versatile jurisdiction over all public international topics—no one considers its activities to define the scope of modern treaty-making. The critique that the ILC is notoriously slow and ill-suited to venturing onto legal terrain calling for change in the status quo, is increasingly irrelevant given the proliferating number of alternative organizational venues and processes for treaty-making. It may also be unfair even with respect to the ILC, at least to the extent that the ILC might be more inclined today to pursue more expeditious forms of "soft codification"—as is

[146] El-Baradei, Franck, and Trachtenberg, *supra* note 112, at 3.

[147] Thomas M. Franck and Mohamed El-Baradei, "The Codification and Progressive Development of International Law: A UNITAR Study of the Role and Use of the International Law Commission," 76 *AJIL* 630, at 634 (1982).

[148] *Id.*

[149] *Id.*, at 630 (quoting a British delegate to the Sixth Committee).

[150] *Id.*, at 634.

[151] *Id.*, at 632.

suggested by its release of its Articles on State Responsibility.[152] Given the number of recent multilateral treaty-making efforts—involving "hot button" issues such as trade, intellectual property, investment, land-mines, international criminal law—few would suggest today that such negotiations focus only on "peripheral" matters.

The critique of modern treaty-making is unfair in another, more significant, sense. It judges modern treaties—as with respect to their "imprecise" or "ambiguous" provisions—as if they were the products of single-play prisoners' dilemmas. It evaluates modern treaties at a single moment in time. Whether or not such a static perspective accurately captures the design or the impact of 19th-century treaties, it certainly does not reflect the design or arguable impact of today's multilateral convention. A "promotional" convention such as the ILO's Equal Remuneration Convention, subject to on-going re-interpretation, thanks to related recommendations issued by the ILO and by a number of dispute settlement or other ILO "enforcement" bodies, cannot fairly be judged in terms of its original text as if that treaty was forever frozen in time. The value or normative impact of such treaties needs to take account of, for example, ILO recommendations which have attempted to give precision to even the vaguest obligations in ILO conventions. At the same time that the ILO promulgated its Equal Remuneration Convention, in 1951, the ILO's General Conference also issued Recommendation No. 90 concerning the interpretation of that Convention. As was discussed in Chapter 5, that Recommendation was presumably intended to serve as a kind of interpretative protocol to the Equal Remuneration Convention.[153]

ILO Recommendation No. 90 is no more imprecise than many statutes with respect to related topics, and it is a great deal less vague than constitutional provisions that have been interpreted in some contexts as meriting equal treatment. As discussed in Section 4.3.4, that Recommendation served notice on what parties to the convention needed to do, at a minimum, to show good faith compliance with its admittedly vague terms. In addition, the Equal Remuneration Convention, although vague, has guided other institutional treaty interpreters, such as the Committee under the Covenant on Economic, Social, and Cultural Rights, in determining the scope of reporting obligations under that treaty.[154] Under the circumstances, it is misleading to treat the Equal Remuneration Convention as if it was, or was intended to be, a one-off commitment instead of being embedded in diverse organizational mechanisms for on-going interpretation.

[152] *See supra* at Section 5.3.2 (discussing the use of expert groups like the ILC, including that body's release of its Articles on State Responsibility).

[153] ILO recommendations are frequently more specific than their parallel conventions and are adopted to "offset the flexibility" of the latter. Ghebali, *supra* note 113, at 210. ILO recommendations often enable states "to form a better idea of the intent of the Convention." *Id.*, at 211. ILO "programmatic" recommendations have become the sole means for formulating standards on such matters as vocational training, occupational health, and termination of employment. *Id.* ILO recommendations appear as likely to be taken into account by states for purposes of national legislation as conventions and they have been used by ILO supervisory bodies. *Id.*, at 211–12.

[154] *See generally* Philip Alston, "The International Covenant on Economic, Social and Cultural Rights," in *Manual on Human Rights Reporting*, UN Doc. HR/PUB/91/1 (Rev. 1), at 65 (1991).

It is also misleading to suggest that subsequent attempts to interpret the vague standards of ILO conventions, as in ILO dispute settlement bodies, are illegitimate because there is no "common intent" of the parties to interpret. This assumes that the intention of treaty parties is frozen, along with the original text of these framework conventions, or that dynamic re-interpretation is only legitimate, as Simma suggests, in connection with human rights regimes. The design of numerous managerial regimes suggests, on the contrary, that treaty drafters anticipate ongoing re-interpretation and subsequent modification. They embed their treaty obligations within institutions to achieve such ends (among other things).[155] Dynamic forms of treaty interpretation may not exceed either the consent given by treaty parties or the capacities of international law.

The same can be said of critiques offered of environmental framework conventions or of other treaties that are essentially part of the "regime complexes" described by Raustiala and Victor (see discussion at Section 6.1.4 above). Critiques that the substantive obligations of such treaties are vague or non-existent mistake their nature. In such regimes, the parties anticipate from the outset "a certain open-endedness of the legislative enterprise."[156] Treaties that permit legal development to occur in the course of their implementation may not even be traditional top-down rule-making treaties but "vehicles for transferring skills and expertise and for empowering domestic actors to solve domestic problems of international importance."[157] In these cases, treaties do not establish a "single well-defined product carried by expectations of stability for a foreseeable future" but rather an institutionalized process for "controlled instability."[158] A fair evaluation of such regimes, faithful to the aims of their drafters, needs to go beyond an evaluation of the black letter rules that they expressly contain (whether in original framework conventions or in subsequent protocols or amendments), to consider the effectiveness of the institutional mechanisms for discourse established under them.

While managerial models for treaty-making may prove to have little discernible impact on the likelihood that greater numbers of states ultimately will comply with their treaty obligations, organizational context nonetheless alters the relevant measures of success. It does a disservice to IO treaty-making to judge their likely normative impact as if the treaty they produce constitutes a snapshot instead of a moving image across time. As game theorists have shown, cooperation that is not individually rational in single-play prisoners' dilemmas may be rational in iterated contexts.[159] In the

[155] *See generally* Trachtman, *supra* note 27 (discussing the use of "standard" versus "rules" in that organization).

[156] Handl, *supra* note 24 at 6. As Haas, Keohane, and Levy indicate, an MEA is designed to foster an "open-ended process of knowledge creation" that begins by the diffusion of information and by establishing initially weak forms of regulation. Peter M. Haas, Robert Keohane, Marc A. Levy, *Institutions for the Earth: Sources of Effective International Environmental Protection* at 410–12 (Cambridge, MA: MIT Press, 1993).

[157] Haas, Keohane, and Levy, *supra* note 156, at 414–15 (discussing MEAs).

[158] Handl, *supra* note 24, at 6–7 (quoting Sax).

[159] *See, e.g.*, Snidal, *supra* note 32, at 49.

context of dynamic games involving interactions among states through time, "regime complexes," or more contractual arrangements that are nonetheless embedded in long-term organizational relationships among their parties, the impact of multiple decisions as well as mutual adjustments among states over time need to be considered.[160] Labor conventions or multilateral environment agreements may yield greater benefits than would appear initially to be the case if, over time, the concomitant information exchanges are taken seriously by both the organizational entities involved and their members, if organizationally sponsored technical assistance brings laggard members' laws up to treaty standards, or if interpretative decisions rendered by supervisory mechanisms add precision and depth to vague injunctions. Evaluating the substantive qualities of such treaties requires being attentive to law as a process of communication and not merely as a series of rigid consensual rules.[161]

It also implies a conception of "effective enforcement" that embraces possibilities other than tit-for-tat retaliation. While such reciprocal means among states may indeed have been the primary or most credible means for securing enforcement in the 19th century, organizational treaty-making has opened the door to alternatives. Treaties embedded in institutions have, as noted, the potential to affect the propensity of states to comply by emphasizing the value of reputation over time and by creating incentives for continued discourse in fora that states view as furthering their interests.[162] Certain types of managerial regimes, such as MEAs, attempt to reshape actors' perceptions of the problems they face while promoting a technocratic consensus on possible solutions.[163] Such regimes ought to be evaluated on whether they succeed in promoting such learning, as well as on whether they create clearly defined rules that can be applied by positivist lawyers.

For all these reasons, concerns that modern treaty-making and IOs' involvement in it are gravely weakening the consensual basis of treaties appear misplaced or at least exaggerated. While it is true that ILO's "treaty-making with strings attached" presents a potential threat to sovereign consent, the erratic record of ratifications with respect to ILO conventions suggests that even in that regime, states retain (and apparently exercise) considerable discretion with respect to whether to ratify treaties. While, in theory, supervisory mechanisms that rely on dynamic or teleological forms of treaty interpretation could become vehicles for deviations from state consent, this is true only to the extent treaty parties fail to anticipate these results. It appears that drafters of at least managerial regimes—and not only those involving human rights—foresee the need for dynamic

[160] *Id.*, at 48; G. Shell, *supra* note 75, at 869. *See also* Smith, *supra* note 4 (discussing how states enter into "dynamic obligations" knowing from the beginning that these will require adaptation to uncertain or unpredictable circumstances).

[161] *See, e.g.*, W. Michael Reisman, "International Law-Making: A Process of Communication," *ASIL Proceedings of the 75th Annual Meeting* (1981) at 101; Handl, *supra* note 24, at 8.

[162] *Cf.* Vagts, *supra* note 3, at 328 (criticizing the emphasis on tit-for-tat reciprocity by some international relations scholars and ignoring treaties' other effects).

[163] *See, e.g.*, Haas, *supra* note 39.

interpretative modes in the discursive processes that they are establishing, even if they cannot foresee the particular substantive obligations that will be established through interpretation.

Critics of modern treaty-making are particularly alarmed by the strains in the treaty process because they assume that modern treaties are, as Simma suggests, "displacing" customary international law or rendering custom a less significant source of international obligation. The strains in the treaty process pose particularly serious threats to international law because, on this view, they are increasingly the only legitimate source of international law. It is said that treaties are replacing custom because treaties better respond to ever increasing needs for international regulation. Custom, the cumulation of the bilateral practices of states over time, is subject to well-worn critiques that its evolution is uncertain or unclear. It is "biased" in favor of powerful states, and its (usually unwritten) rules are uncertain and open to manipulation. Further, since states do not gather around a table to create custom, it takes too long to evolve or change. The absence of explicit evidence of the joint intent of all states or a focal point for its establishment makes custom questionable or illegitimate.[164]

This assumes that modern treaty-making processes have left intact the old methods for evolving custom. This is wrong. A new form of custom has emerged, alongside the new forms of organizational treaty-making that responds to the enumerated flaws of traditional custom. The new *codified custom*, itself largely a product of IOs, does not necessarily take longer to establish than the treaty in which it is embedded. It emerges from a "more structured method" for law-making, usually embedded in multilateral fora, that does not conform to traditional methods for creating custom, but which responds to states' contemporary needs for a more rapid, less vague, and deliberative process for the establishment of preferably written and clear global rules.[165] As Jonathan Charney has argued, the new form of custom is not grounded in the idealism of international lawyers but, like all state-centric sources of international obligation, is based on the actual needs of states for such forms of regulation, and specifically in the need states have for universally applicable rules to deal with universally applicable problems. Codified custom, on this view, emerges from the insurmountable difficulties of ascertaining, through

[164] *See, e.g.*, Lang, *supra* note 13, at 108 (noting that custom is "unlikely to be the outcome of a process during which states conscientiously act in a result-oriented manner"). For a trenchant critique of custom along many of these lines, see J. Patrick Kelly, "The Twilight of Customary International Law," 40 *Va. J. Int'l L.* 449 (2000)(arguing that custom lacks Franck's four indicators of legitimacy, namely, determinacy, symbolic validation, coherence, and adherence, and accordingly should be eliminated as a source of international law).

[165] *See* Charney, *supra* note 63. Charney argues that states are entitled to modify lawmaking *processes* no less than the underlying norms to which they are obligated and in fact did so "through the United Nations Charter and the system that evolved from it." *Id.*, at 545. *See also* Anderson, *supra* note 67 (discussing the impact of law-making conferences as a new form of legislative process); Paul Szasz, "General Law-Making Processes," in Oscar Schachter and Christopher C. Joyner, eds., *United Nations Legal Order* 35, at 61 (Cambridge, U.K.: Cambridge University Press, 1995) (arguing that IO treaty-making processes produce "by-products in the form of soft law and new or strengthened customary law, or possibly even new general principles of law").

traditional methods, the views of nearly 200 states.[166] Codified custom optimizes the collective interests of states no less than multilateral treaties.[167] Its grounding in rational self-interest provides it with legitimacy and a "strong pull toward compliance."[168] Unlike traditional, pre-IO custom, the new codified custom has a focal point, namely, universalistic fora such as the General Assembly, and it reflects the legitimacy of those institutions. It also more closely approximates the legislative process found in domestic legal systems in that it is as much an outcome of a conscious, result-oriented negotiation process as the treaties in which such forms of codified custom are found.[169]

As is suggested by the checkered ratification record of modern treaties, modern treaty-making processes have not "displaced" this new kind of custom or eliminated states' need to have recourse to this source of law. While the proliferation of treaty-making includes a great number of efforts to codify international law, most of these efforts, as noted, have not yielded, to date, treaties with the universal or even quasi-universal ratification rate anticipated. Even such established codification treaties as the Vienna Convention on the Law of Treaties (98 ratifications as of 2004) have achieved their "universal" reach through a combination of treaty adherence and consistent state (and IO) practice. The reason the Vienna Convention on the Law of Treaties has the global reach that it now has and can be cited, for example, even by the WTO's dispute settlers in disputes that include non-parties to that treaty (such as the U.S.), is that it is universally regarded as codified custom. As with respect to traditional custom, non-parties to the Vienna Convention on the Law of Treaties are formally bound to its substantive obligations only to the extent that these reflect state practice and *opinio juris*. For all practical purposes, however, the text of that Convention has displaced the search for actual state practice or *opinio juris*. For most states of the world, whether or not they are formally parties, as well as for most judicial or quasi-judicial interpreters, the Vienna Convention itself supplies the relevant rules of custom. Except for procedural obligations contained in that Convention (as with respect to the duty to submit disputes regarding treaty conflicts with *jus cogens* to the ICJ), states attempting to displace the provisions of that treaty as rules of codified custom need to overcome a high burden of proof.

The statement that, for example, most human rights norms are now based on treaties is both accurate—after all, these norms appear in treaties—and profoundly misleading, at least to the extent that this implies that global participation in such treaties has displaced the need to rely on codified custom. The varying numbers of states that have adhered to many human rights conventions, as well as the likelihood that states may want to assert such norms in fora that do not have a clear treaty nexus with particular human rights regimes—as in the WTO, in U.S. courts, ad hoc war crimes tribunals, or in the ILO—ensures that arguments based on codified custom will remain important tools in the international lawyers' toolbox.

[166] *See, e.g.*, Charney, *supra* note 63, at 530. [167] *See, e.g.*, *id.*, at 533. [168] *Id.*
[169] *Id.*, at 547–8.

The involvement of IOs in the formulation of treaties or in their interpretation enhances the possibility that particular multilateral conventions or provisions within them will be considered binding on non-parties as rules of custom. As Jennings indicates in connection with the interplay between the efforts of the ILC and the General Assembly, codification treaties that secure the approval of politically representative bodies are frequently cited as evidence of customary international law.[170] Moreover, as the ICJ suggested in the *North Sea Continental Shelf case*, even treaties that do not purport to codify pre-existing customary rules may come to be seen as establishing such rules if there were "a very widespread and representative participation in the convention . . . provided it includes that of States whose interests were particularly affected."[171] There is little question that the substantial rise, since the establishment of the UN, in the number of multilateral conventions has been accompanied by an even more obvious increase in instances in which treaties have been cited as sources of a general customary rule, even in some cases prior to the treaty's entry into force.

The increased salience of arguments premised on codified custom is due, in no small part, to the involvement of universalistic IOs in the treaty-making process. Many of the reasons that make IOs effective purveyors of multilateral treaties apply, perforce, with respect to their concomitant role as creators, communicators, legitimizers, and disseminators of codified custom.

IOs' singular importance as creators of codified custom is obvious. It is easier to secure the widespread participation of members of the international community in both the negotiation and drafting of such conventions as well as in securing uniform practice in accordance with such conventions (or even with draft provisions) when this is done within the context of an organization whose membership is seen as representative of the international community of states.[172] IOs are a handy vehicle for overcoming the expensive and insurmountable difficulties of attempting to discover the actual state practices (much less *opinio juris*) of nearly 200 states. The ILC's Vienna Convention on the Law of Treaties is an example of a treaty whose impact vastly exceeds the number of official ratifying parties. As its example suggests, the universal or quasi-universal membership of IOs involved in multilateral treaty-making has changed the normative impact of many treaties concluded under their auspices.

The "communicative" role of IOs as it relates to the propagation of codified custom is also hard to ignore. IOs provide innumerable opportunities for all states, and not merely the select few and including those who for many reasons do not ratify a convention, to express their views, as in responses to official questionnaires

[170] *See supra* at Section 5.3.2.

[171] 1969 ICJ Rep. 3, at 42. *See also* article 38, Vienna Convention on the Law of Treaties; *Restatement*, *supra* note 73, Section 102, Reporters' Note 5.

[172] As Rosalyn Higgins has noted, "The existence of the United Nations—and especially in its accelerated trend toward universality of membership since 1955—now provides a very clear, very concentrated, focal point of State practice." Rosalyn Higgins, *The Development of International Law Through the Political Organs of the UN* at 2 (London and New York: Oxford University Press, 1963).

or in statements on the floor of the Assembly or in its Sixth (Legal) Committee. This significantly enhances the prospects that the official or unofficial drafting history or *travaux preparatoires* of such conventions will refer to the relationship between the proposed treaty provisions and pre-existing rules of custom. As is suggested by the dynamic between the ILC and its various interlocutors, organizational venues present opportunities for states to express approval of the underlying norms as either existing or emerging rules of custom.[173] Such statements put the onus on those who do not wish such an outcome to clearly state otherwise or to take actions (such as domestic legislation) to demonstrate their disagreement. The information unleashed by organizational fora, as well as the communicative dynamic they foment, turns many multilateral treaty-making exercises into conscious stratagems for reaffirming, modifying, or elaborating codified custom. As Charney suggests, states are increasingly aware that codification conferences engage in both treaty-making and the elaboration of codified custom. Such conferences are, to this extent, intentional law-making fora for purposes of not one but two potential sources of international obligation.[174]

The involvement of an organization with diverse or nearly universal membership considerably enhances the legitimacy of codified custom claims. IO processes "heighten the ability of every state to participate in the legislative process and assure all that they will be given both reasonable notice of the development of new law and information about its details."[175] The actual, as opposed to presumed universality of custom, is all the more real in the context of the new codified custom. The relative transparency of IO processes makes it plausible to contend that "the failure to act communicates voluntary and knowing consent."[176] As Jennings implies in his description of the byplay between ILC and General Assembly, such processes blend technocratic and political sources of legitimation in the service of

[173] Precisely for these reasons, Higgins argues that it is wrong to focus exclusively on GA resolutions, as such, as evidence of custom. Such resolutions are, in her view, only part of the picture:

> The political bodies of international organizations engage in debate; in the public exchange of views and positions taken; in expressing reservations upon views being taken by others; in preparing drafts intended for treaties, or declarations, or binding resolutions, or codes; and in decision-making that may or may not imply a legal view upon a particular issue.

Rosalyn Higgins, "International Law and the Avoidance, Containment and Resolution of Disputes" (General Course on Public International Law) 230 *Recueil Des Cours* 50 (1991). For a description of the impact of law-making conferences, drawing from the experiences of negotiating the UN Convention on the Law of the Sea as well as the negotiations on the Vienna Convention on the Law of Treaties, see Anderson, *supra* note 67.

[174] This is suggested, for example, in the pressure put on the President of the Rome Conference on the ICC to make a statement concerning the impact of the Rome Statute on customary law relating to the death penalty. At the time that the Rome Statute was adopted in Rome, the President stated, "It should be noted that not including the death penalty in the Statute would not in any way have a legal bearing on national legislations [*sic*] and practices with regard to the death penalty. Nor shall it be considered as influencing, in the development of customary international law or in any other way, the legality of penalties imposed by national systems for serious crimes." A/CONF.183/C.1/WGP/L.14/Add.3/Rev. 1 (July 17, 1998). The perceived need for such a statement, concerning a topic which was not directly addressed by the treaty, suggests the widespread expectations concerning that treaty's likely impact on customary law and perhaps the practice of states.

[175] *Cf.* Charney, *supra* note 63, at 550.

[176] *Cf. id.*, at 550.

a relatively new kind of law-making. The diverse set of characters involved in IO venues assists the legitimation process. Jennings stresses that since candidature for membership in the ILC, for example, depends upon straight governmental nomination, many of the ILC members themselves are not merely recognized experts on international law but are also official or unofficial governmental legal advisers. He suggests that this may enhance the legitimacy of the ILC's work since that body has had to confront, within its own procedures, the "varied interests of different states."[177] Whether or not this is the case, the high-profile membership of the ILC, and of other IO-based expert groups engaged in treaty-making, puts states on notice that what these groups propose may matter for purposes of codified custom. This helps to explain why the ILC's extensive commentaries—at least when not disputed—are regarded as a legitimate evidentiary source of codified custom, even when the underlying treaty is not yet in effect.[178] It also means that the law-making impact of the ILC's efforts—including its release of Articles on State Responsibility—cannot be judged merely by its failure to produce hard law expeditiously ratified by large numbers of states.

Continued IO promotional efforts are part of the legitimation processes for new custom. The GA's periodic efforts, canvassed in Chapter 3, to nudge states to ratify certain conventions, patrol states' compliance with the underlying norms, or encourage relevant treaty amendments, makes it more credible to argue that the underlying norms constitute or reflect general norms for "the international community of states" that can be legitimately applied even with respect to non-treaty parties. The institutional legitimation conferred on such norms may make it politically difficult even for non-parties to the underlying treaties to refuse to acknowledge the rules at issue. Thus, Charney suggests that neither South Africa (in the context of apartheid) nor the U.S. (in relation to targeting rules contained in Geneva Protocol I) have been able to escape the reach of codified custom.[179]

This dynamic is clearly suggested as well by the type of arguments that are increasingly made on behalf of treaty ratification. The legitimacy attached to certain global treaty negotiations, particularly when these are the outcome of institutionalized processes, is partly due to the anticipation that any treaty resulting from such processes may lead to general rules for all states. This helps explain the claim, made by European public international lawyers especially, that there is a "law of coexistence" generally requiring states to exhaust multilateral remedies before

[177] R.Y. Jennings, "Recent Developments in the International Law Commission: Its Relation to the Sources of International Law," 13 *Int'l & Comp. L. Q.* 385, at 390 (1964).

[178] *See* Szasz, *supra* note 165, at 59 (noting reliance on ILC reports by courts, governments, and other scholars and contending that such reliance serves to strengthen further the customary nature of the rule); Rosenne, *supra* note 115, at 13–15 (discussing the use of the ILC's commentaries by the ICJ). *See also* Anderson, *supra* note 67, at 42 (noting that law-making conferences have shaped the conduct of the international community as a whole "except where there has been a centre of determined and reasoned opposition to a particular provision or set of provisions").

[179] Charney, *supra* note 63, at 547, n. 77 and 549, n. 85.

turning to unilateral ones, a "duty to cooperate" multilaterally by engaging in treaty negotiations in good faith and continuing to be involved in such negotiations while these last.[180] As Pierre-Marie Dupuy puts it, international law now requires states to "choose the path of compromise and negotiated settlement."[181] The alleged "duty to cooperate" is invoked, for example, to criticize the U.S., along with a handful of other states that remain outside global regimes such as the Convention on the Rights of the Child, the Land Mines Convention, and the Rome Statute for the ICC. Such states are regarded, at a minimum, as being "out of step" with the international community. As this suggests, the action of multiple IOs, active in both treaty-making and codified custom with respect to overlapping subjects, has a normative dimension that is not evident if one focuses on the success or failure of any single treaty-making effort.[182]

Codified custom may be produced as well outside UN-sponsored treaty-making conferences. Many ILO conventions, including some that might be unfairly dismissed as "promotional" in nature or that have managed only erratic rates of ratification, have secured an effect on governments merely because of the circumstances of their adoption. Many of these conventions have achieved considerable authority as "a sort of international common law," even with respect to non-parties to them, precisely because they are the product of "an assembly composed of representatives of governments, employers and workers of practically all countries of the world."[183] With respect to the ILO's "core conventions," the membership as a whole appears to accept the view that such conventions are fundamental human rights or

[180] *See generally* Bruno Simma, "From Bilateralism to Community Interest in International Law," 250 *Recueil des Cours* 217 (1994-VI).

[181] Pierre-Marie Dupuy, "The Place and Role of Unilateralism in Contemporary International Law," 11 *EJIL* 19, at 25 (2000).

[182] Finnemore and Sikkink, for example, have described, particularly with respect to human rights, the broad and rapid acceptance of new norms among states as "norm cascades." *See* Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," 52 *Int'l Org.* 887 (1998). They describe the "life cycle" of successful norms as involving three stages: (1) norm emergence; (2) norm cascade (involving broad acceptance); and (3) internalization. *Id.*, at 895. They postulate that the first two stages are "divided by a threshold or 'tipping' point, at which a critical mass of relevant state actors adopt the norm;" at the far end of a norm cascade, successful norms acquire a "taken-for-granted quality and are no longer a matter of broad public debate." *Id.* Thanks to the proliferation of IOs, "norm cascades" now seem to be appearing with respect to subjects far removed from human rights. Abbott, for example, identifies the "norm cascade" suggested by a rapid and widespread adoption of anti-bribery and anti-corruption principles by a diverse set of institutions and involving both hard treaty and "soft" norms. Abbott, *supra* note 77, at 276–8 (2001) (outlining efforts by the OECD, the European Union, the OAS, the Council of Europe, international financial institutions (including the IMF and the World Bank), and the UN General Assembly).

[183] Frederic C. Kirgis, "Specialized Law-Making Processes," in Schachter and Joyner, *supra* note 165, at 115–16. *See also* Ghebali, *supra* note 113, at 213, n. 2 (discussing why the uneven level of ratifications of ILO conventions should not be given too much importance given the influence even unratified conventions have on national legislation and practices). Note as well that some ILO Conventions, Nos. 87 and 98 (on freedom of association), have been made the subject of a supervisory system applicable to all ILO members whether or not they have ratified these conventions. *See generally* Galenson, *supra* note 114, at 197–251.

erga omnes obligations.[184] Such efforts make it more likely that such norms will increasingly be seen as equally "fundamental" in other treaty regimes, including in those dealing with regional human rights or even trade.[185] Organizational efforts that prevent states from adopting general reservations to particular treaties (as in the ILO and in UN conferences such as UNCLOS and the ICC negotiations) may, in some cases, be seen as suggesting the fundamental nature of the treaty norms (or at least the package deals) contained in such agreements, thereby enhancing the credibility of claims that these norms are "customary."

Quite apart from their role as communicators and legitimators of codified custom, IOs are also disseminators of rules that are used by states and the IOs themselves as custom. Organizational processes for codification and progressive development, particularly when they involve continuous interaction between expert bodies, such as the ILC, and more political organs, such as the General Assembly's Sixth Committee, result in wide circulation of evidence of state practice and *opinio juris* among influential members of the international community. As in the case of draft provisions for what became the Vienna Convention on the Law of Treaties, dissemination of such information may itself promote greater reliance on the underlying rules long before the proposed treaty enters into force.[186] The status of some treaties as binding codifications of universal norms is greatly enhanced when these are cited by organs or individuals that are seen as credible spokespersons for "the international community," such as the subsidiary bodies of the Assembly, legal counsel within IO secretariats, the ICJ or even more specialized bodies, such as the WTO's Appellate Body.[187] Such citation in turn further encourages reliance on such rules by states.

[184] This is most clearly the case with respect to ILO Conventions Nos. 98 and 87, which have been made the subject of special dispute settlement procedures. *See supra* note 183 and *see also* Frederic L. Kirgis, Jr., *International Organizations in Their Legal Setting* at 413–25 (St. Paul, MN: West Publishing Co., 2nd edn., 1993).

[185] *See, e.g.*, Robert Howse and Makau Mutua, "Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization," Int'l Centre for Human Rights and Democratic Development, Policy Paper, 2000)(arguing for incorporation of human rights and labor rights into the existing WTO regime). While such attempts may prove counterproductive or fail, see, e.g., José E. Alvarez, "How Not to Link: Institutional Conundrums of an Expanded Trade Regime," 7 *Widener L. Symposium J.* 1 (2001), there is little doubt that the increased viability of such codified custom claims stems from the impact of IOs.

[186] Szasz, *supra* note 165, at 60. This may explain how most of the provisions of the Vienna Convention on the Law of Treaties were able to secure rapid acceptance as rules of custom even though that treaty did not enter into force until 1980 and even then was only in force for the thirty-five states that had ratified it as of that date. *Id.*, at 60, n. 42. With respect to the impact of attempts at progressive development, Szasz argues that solemn declarations, such as those issued by the GA issued when a draft treaty is completed but at the very beginning of a long ratification process, have the "effect of putting the international community on record that the declared new rules have at least in principle already attained a high degree of acceptance," thereby generating conforming state conduct and possibly supplying the necessary *opinio juris* required for new customary law. *Id.*, at 60–1.

[187] As Rosalyn Higgins reminds us, however, the subsequent practice of an IO may soften as well as harden an international obligation. She cites the example of the IMO's issuance of Guidelines and Standards for the Removal of Offshore Installations and Structures, which, following the adoption of article 60(3) of the Law of the Sea Convention, softens states' duties to remove petroleum rigs and

The impact on the actual practice of states of organizational modes for treaty-making was most clearly evidenced during the multi-year negotiations regarding the law of the sea, when a number of states, even those resistant to many aspects of the negotiations such as the U.S., proclaimed a twelve-mile territorial sea or exclusive economic zones in accordance with the terms being negotiated as matters of entitlement under customary international law.[188] More recently, the same dynamic appears to be occurring with respect to international criminal law as a result of the establishment of the ICC. The ICC Statute, as well as its procedural rules and "elements of crimes," include unprecedentedly detailed definitions of international crimes as well as procedural rights due defendants, that are largely based on recent decisions issued by the ICTY and ICTR or these tribunals' statutes. Even before the ICC treaty came into effect with the establishment of the Court, there was evidence that states (including some national courts and even states that are not expected to become parties to the ICC) were treating many of the ICC's provisions and rules as statements of generally applicable law.[189]

6.4 Interim Conclusions

Determining whether multilateral treaty-making in the age of IOs is "better" requires a point of comparison as well as clarification of the basis for evaluation. We might evaluate treaty-making processes along various modes suggested by distinct models for democratic governance, that is, to determine whether they are sufficiently representative of those peoples sought to be governed by the treaty, sufficiently representative of the diverse governments of the world, sufficiently transparent and open to the voices of international civil society (NGOs), or contain checks to prevent the treaty from being used by the powerful as instruments of their "structural power." We might evaluate the quality of the substantive rules contained in a treaty along various lines as well, that is, by whether they are textually precise, whether, even if initially vague, they are subject to procedures for interpretation or adjudication that can render them sufficiently

installations after an oil field has been exhausted, as compared to article 5(5) of the Geneva Convention of 1958 on the Continental Shelf, which had imposed a mandatory duty to remove. Higgins, *supra* note 173, at 59–61. Higgins argues that "it will always be harder to show an emerging mandatory requirement that is obligatory for States than to show an emerging relaxation of a mandatory requirement, upon which States are entitled to rely." *Id.*, at 61.

[188] *See, e.g.*, Lee, *supra* note 18 ("Multilateral Treaty-Making"), at 171–2; Charney, *supra* note 63, at 548; Anderson, *supra* note 67, at 41.

[189] *See, e.g., Wiwa* v. *Royal Dutch Petroleum Co.*, 2002 WL 319887 (2002)(relying and applying the definition in article 7 of the Rome Statute for "crimes against humanity" for purposes of the U.S. Alien Tort Claims Act). There is also no question that the Rome Statute and the elements of crimes used by the ICC will have a profound impact on academic commentators' views of the relevant law. It is already being suggested, for example, that since the advent of the Rome Treaty, general amnesties for perpetrators of international crimes are no longer legal under customary international law. *See, e.g.*, Robert Cryer, "A 'Special Court' for Sierra Leone?," 50 *Int'l & Comp. L. Q.* 435, at 442 (2001).

clear, whether they are subject to effective forms of sticks or carrots likely to produce compliance, or whether they are fundamentally "fair" (as along North/South lines). We might also evaluate established treaties by measuring the level of compliance achieved, beginning at least with the number of ratifications achieved, the levels of national implementation efforts (by measuring either formal laws adopted or, better still, actual levels of national enforcement), and levels of compliance among non-state actors (if relevant). We might also, of course, attempt to evaluate the effectiveness of a treaty, irrespective of levels of formal ratifications or formal national implementation levels; that is, measure whether conclusion of the treaty actually helped resolve the problem sought to be addressed, e.g., reduced the level of human rights violations targeted by a human rights treaty, the environmental harms addressed by an MEA, or level of weaponry addressed by an arms control agreement. While some of these bases of comparison are easier to apply than others (e.g., determining rates of ratification is fairly mechanical as opposed to making subjective determinations of the relative fairness of treaty provisions),[190] all presuppose a basis of comparison. Better as compared to what? It is one thing if the standard is a 19th century treaty, quite another if the standard is national law or international "soft law" efforts addressing the same matter.

If the question is whether, *as compared to 19th-century treaty-making processes,* multilateral treaty-making in the age of IOs tends to involve greater numbers of states and a greater diversity of non-state voices—and therefore, IOs as venues for negotiation have made such processes more "democratic"—the answer is a qualified yes. As compared to the 19th century—a world divided between the "civilized," entitled to having rights under law, and those not entitled to the benefits of international law—the age of IOs, premised on the juridical equality of all states at least with respect to the equal right to participate in making law, is a much more egalitarian domain. IO-inspired treaty-making is more "democratic" than the 19th century diplomatic conference because the UN Secretary-General (or someone like him) invites the guests, because the invitation to negotiate is to a neutral spot, because all the guests are given considerable opportunities to get the same information, and because independent civil servants keep track of progress both before and after a treaty is concluded. But the comparison with 19th-century ad hoc treaty-making conferences is not entirely apt since not all of those conferences sought to establish "global law" in the sense that many present day multilateral treaties purport to do. Nineteenth century efforts often involved treaty-making among, and for alliances of, the like-minded; they usually did not purport to make rules for the uninvited, whether these were wealthy European states not currently in the favor of the host state or colonized states deemed beneath everyone's notice. Even though this comparison *appears* to compare like with like, that is, treaties with treaties, it turns out that since not all treaties are alike, the comparison may still be comparing apples with oranges.

[190] For an attempt to define and evaluate the fairness of international rules, see Franck, *supra* note 43.

In any case, a conclusion that modern treaty-making processes are more "democratic" in the limited sense noted above says relatively little. If all this means is that current IO processes permit more governments, regardless of their own respect for democratic forms of governance, to participate in treaty-making, a true democrat is not likely to be very impressed. Since many governments today remain notoriously undemocratic, there is doubt about whether processes that involve more of them can be said to enhance truly "democratic" global governance as the Greeks would have understood the term, to mean representation of persons ("demos"), not governments. Further, treaty-making may enhance the power of executive branches within governments, at the expense of national parliaments or legislatures, and sometimes permits the executive branch to accomplish legal changes that it alone could not accomplish or, in those states that accord treaties superior status to a national constitution, even to take legal actions otherwise not authorized to any branch of government.[191] Public choice theorists argue that executives might use their treaty-making powers to "produce public-regarding agreements that provide general benefits for their nations, welfare-diminishing agreements that reflect successful rent-seeking by well organized interest groups, and vague generalities that appear to do something without helping or harming anyone."[192] To those familiar with U.S.-styled conceptions of democratic governance involving checks and balances among the three branches of government, and much deeper involvement by national legislatures than is typically involved in the up and down vote to which concluded treaties are subject, modern treaty-making remains at least as flawed from the standpoint of democratic legitimacy as it ever was. To the extent IOs, and not just globalization, have encouraged greater numbers of treaties, as well as treaties involving deeper intrusions into matters formerly considered to be free of international regulation, or involving the rights or duties of private parties, IOs are perceived to be part of a growing "democratic deficit" in global forms of governance.[193]

[191] These complaints span the spectrum of political sentiments within the U.S. from the political right, see, e.g., John C. Yoo, "New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause," 15 *Const. Comment* 87 (1998), to the left, Ralph Nader, William Greider, Margaret Atwood et al., *The Case Against Free Trade: GATT, NAFTA, and the Globalization of Corporate Power* (San Francisco, CA: Earth Island Press and Berkeley, CA: North Atlantic Books, 1993). *See also* Andrew Moravcsik, "Conservative Idealism and International Institutions," 1 *Chi. J. Int'l L.* 291 (2000)(suggesting that some critiques of IOs and treaty-making on the basis of its alleged inconsistency with U.S. constitutional modes of governing mask a partisan or ideological agenda).

[192] Paul B. Stephan, "Accountability and International Lawmaking: Rules, Rents and Legitimacy," 17 *Nw. J. Int'l L. & Bus.* 681, at 697 (1996–1997).

[193] *See, e.g.*, Stephan, *supra* note 192; Paul W. Kahn, "Popular Sovereignty, Human Rights and the New International Order," 1 *Chi. J. Int'l L.* 1 (2000); Curtis A. Bradley, "The Treaty Power and American Federalism," 97 *Mich. L. Rev.* 391 (1998). Thus, Stephan argues against the democratic accountability of, for example, the "fast track" legislation under which the U.S. Executive Branch concludes trade agreements, which provides for congressional approval prior to entering into serious multilateral negotiations, insists on a stark choice (up or down) by the legislature within a limited period of time once a treaty is concluded, and waives congressional power to insist on amendments or the requirement of a special super majority vote in the U.S. Senate. Stephan, *supra* note 192, at 687–8;

Nor can it be said without qualification that merely because IOs facilitate the involvement of NGOs, that this alone makes up for the democratic deficit inherent in treaty-making or enhances the level of democratic participation in treaty-making. NGOs need not be accountable to anyone, and they may not "represent" significant numbers of people, other than perhaps the web master in charge of the NGO's public face.[194] To date, there are no uniform procedures to which NGOs must submit to prove their representative nature or to show the origins of their funding, the number of their members, or the basis for their claims of "trans-national" participation. Not everyone believes NGOs are effective stand-ins for genuinely representative "international civil society." There are, on the contrary, persistent claims that the most powerful NGOs unfairly represent the interests of constituencies within rich, Northern states, whose citizens have the luxury and the excess income to be concerned about, for example, environmental issues rather than basic existence, and whose governments encourage their participation at the international level because it often coincides with their own interests and magnifies their organizational effectiveness.[195]

Partly as a result of the growing clout of NGOs on treaty-making, the mere fact that a treaty negotiation occurs under the auspices of an IO to which all states are invited does not mean that the final product will necessarily reflect the desires of either the majority of the world's governments or of their peoples. As noted in connection with the discussion of the Tobacco Framework Convention, the views of public health officials and certain NGOs may not fully represent the views of governments or of a majority of voting citizens within a polity. In addition, organizational processes for treaty-making, as with respect to other forms of standard-setting discussed in Chapters 3 and 4, might be deployed on behalf of the powerful since hegemonic powers might simply prove more adept at navigating the complexities of "regime complexes" and be simply better able, for example, to choose the right fora to favor their own interests. They might exert greater and subtle forms of organizational power because they have greater resources to provide the information needed to produce on-going interpretative decisions in

697–700. Stephan argues that international treaty-making is likely to reflect a higher rate of rent-seeking, that is, a higher number of rules to satisfy discrete rent-seekers and not necessarily the collective good, because executive branches have the advantage of going first (since they present the treaty to the congress), normally have informational advantages, tend to be specialists and repeat players, and enjoy the advantage of the great degree of secrecy usually evident in international negotiations. *Id.*, at 699–700. But Stephan argues that treaty-making is just as likely to produce open-ended, inoffensive, but ineffective norms that essentially reify the status quo but permit executive branches to claim rhetorical, but empty diplomatic victories. *Id.*, at 700.

[194] *See, e.g.*, Kenneth Anderson, "The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society," 11 *EJIL* 91 (2000); Peter Spiro, "New Global Potentates? Nongovernmental Organizations and the 'Unregulated' Marketplace," 18 *Cardozo L. Rev.* 957 (1996).

[195] *But see* Gregory C. Shaffer, "The World Trade Organizations Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environmental Matters," 25 *Harv. Envt'l. L. Rev.* 1 (2001)(concluding that divisions between North and South within the WTO largely mirror divisions between northern and southern NGOs with respect to environmental issues and that the WTO is, at least on such issues, not an "antidemocratic institution").

the course of compliance or the more exacting annexes that give technical precision to vague principles or because, more simply, they control the organizations' purse strings, as the U.S. largely does in IOs as diverse as the UN and the IMF, or because its experts (and NGOs) dominate intellectually or otherwise. Even IO-generated treaties may serve to convert the most powerful state's pre-existing national law into global rules for all or efficiently kill treaty efforts proposed by less powerful developing states.[196] The involvement of greater numbers of negotiators or of IO secretariats, even if it is assumed that the latter do more than attempt to maximize their own budgets and the scope of their own discretion, may be insufficient to overcome the advantages that have always come with wealth and power that IO structures do not ameliorate (and may even magnify).

Moreover, the "softness" of many treaty obligations, or of approaches to compliance, has a dual edge. The vaunted flexibility achieved by managerial approaches may also permit the powerful to do what they always wished to do—but to do so now through organizational processes that "launder" their self-interests so that these are perceived as being in the interests of the collective. The vagueness of treaty obligations may mean largely symbolic treaties that have few, if any, real world effects. They may produce rules merely for public relations, what Thomas Wälde has called "pretend rules," that are good for maintaining governments in power and rule-makers and administrators "in full employment."[197] Dynamic forms of treaty-making may be merely pseudonyms for permitting open-ended reservations, the exclusion of self-execution or failure to enact implementing national law, or refusals to accord judicially enforceable rights. Such "dynamism" can accrue to the benefit of any state, rich or poor, which has no intention of complying with a treaty despite ratification.[198] Managerial forms of compliance may enable both those with resources and those without to file misleading, inaccurate, or incomplete state reports (when these are filed at all), without fear of coercive sanction.

The fact that some modern treaties are the product of expert-driven procedures or experts' initial drafts is also not an unalloyed good. A substantial and growing literature, especially within national administrative law, questions the benefits of expert-laden law.[199] As is suggested by the Tobacco Framework Convention, rules decided by public health ministers may not have firm democratic backing; treaties produced by such officials are no less problematic, from the standpoint of accountability to the electorate, than rules produced by administrative agencies responsible only to the executive branch.[200] To the extent treaties are dominated by

[196] There is no international treaty enforcing the "right to development" or imposing a code of conduct on multinational corporations, as some developing states sought, for example. The absence of certain multilateral treaties suggests the lack of parity in IO treaty-making processes and outcomes.

[197] Wälde, *supra* note 125, at 201.

[198] *See, e.g.*, Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?," 111 *Yale L. J.* 1935 (2002).

[199] *See generally* Stephan, *supra* note 192.

[200] *See, e.g.*, Sandeep Gopalan, "The Creation of International Commercial Law: Sovereignty Felled?," 5 *San Diego Int'l L. J.* 267, at 292–3 (2004) (addressing critiques that expert groups "cannot satisfy conventional democratic standards imposed on national legislatures").

executive branches within governments and receive only cursory or ineffectual consideration by national legislatures that are permitted to consider them (usually only when refusal comes with too heavy a price to contemplate), the involvement of only certain executive branch officials in their elaboration only exacerbates their inevitable democratic deficiencies. Rules promulgated by particularized epistemic communities, such as the ILC or UNCITRAL, do not necessarily reflect the "public interest" broadly construed, either as inclusive of the full range of interests within a polity (e.g., consumers as well as producers of goods) or the full diversity of interests globally (e.g., across North and South). Paul Stephan argues that groups like UNCITRAL, dominated by academics, and not professional diplomats or lawyers serving private industry, are likely to produce completely open-ended rules or those whose "internal contradictions permit decisionmakers to reach whatever result they wish."[201] This may be all the more the case when expert groups include representatives of private industry, when the ideological or other biases of certain countries' experts dominate, or when they reflect only one kind of technical expertise (e.g., expertise in commercial or trade law but not environmental or labor law). Public choice theorists argue that such groups provide ripe territory for rent-seeking by particularized interest groups.[202]

Since expert processes are not known for their transparency or open participation to those not specifically invited, what experts produce becomes accountable to the greater community of states to the extent more overtly political bodies, such as the General Assembly's Sixth Committee in the case of the ILC, closely scrutinize and critique their work product. But, as is suggested by an Austrian reform proposal made with respect to the ILC during the General Assembly's 50th session, it is not always the case that the Sixth Committee, much less the General Assembly as a whole, devotes the time or has the expertise needed to be more assertive vis-à-vis the work of the ILC.[203] While it is true that the work product of such expert groups has to secure the approval of both the executive and legislative branches of governments when it is transformed into a treaty requiring the usual ratification processes, even this relatively weak form of accountability is severely attenuated when expert bodies are charged with developing "technical" annexes or protocols to the treaty that do not require full-fledged consideration by both executive and legislative branches or such review does not exist at all, as in the case of the ILC and the Articles on State Responsibility, when their work product achieves legal status in less formal ways. Managerial forms of treaty-making and regime complexes (or, for that matter, "soft" restatements of the law such as the ILC's Articles of State Responsibility), win their dynamism or their vaunted "effectiveness" at the expense of the forms of democratic accountability (weak as they are) to which treaties are subject. To the extent IO-generated treaties are more likely to rely on expert-driven management, they may be less and not more democratic than the

[201] *Id.*, at 714 (discussing UNCITRAL's Convention on the International Sale of Goods).
[202] *See, e.g., id.*, at 694.
[203] *See, e.g.*, Cede, *supra* note 42, at 55–63.

non-managerial top-down treaties of old. This is especially true to the extent that all that national legislatures have given their approval to are notoriously vague, general principles contained in a framework convention.

As this suggests, if the basis for evaluating treaty processes is the quality of the resulting product and not the processes that give rise to the treaty, determining whether, substantively, modern treaties generated under IO auspices are "better" is difficult even if one had an agreed basis of comparison based on a (mythical?) golden age of treaties. "Objective" stand-ins for making this evaluative judgment—such as examining the number of states that have decided a treaty is worthwhile enough to undertake the trouble to ratify it—are flawed and inconclusive. Looking to the number of ratifications that modern treaties have secured within a period of time does not tell us how many of these are good faith ratifications by those intending to comply with its terms as opposed to opportunistic ones by those seeking only the symbolic or "status" benefits ratification sometimes achieves. In any case, the products of modern IO processes have not always achieved high rates of ratification, although they usually aspire to secure ratification by all states. Of course, the fact that states ratify a treaty does not clarify whether the treaty was efficiently concluded or properly drafted. Rates of ratification do not indicate the level of actual compliance, and they certainly do not indicate whether a treaty will resolve the problem to which it was directed. Even ratified and duly implemented treaties may not constitute "better" modes for regulation than laws passed by national legislatures, transnational agreements between private parties or other forms of *lex mercatoria* not incorporated in inter-state agreements, or the many forms of soft law canvassed in Chapters 3 and 4.[204]

Evaluating the quality of treaty texts is a notoriously subjective exercise. The fact that modern treaties contain more vague provisions or general principles—even if true—is neither a necessary indictment nor an unmitigated benefit. Vagueness can be an intelligent device to promote dynamic reinterpretation sensitized to changing circumstances or a lowest common denominator solution that achieves nothing, or worse, such as lulling some into thinking that the fundamental problem has been resolved. There is no substitute for judging the quality of treaties through the same procedures many of them increasingly rely upon: context-specific inquiries over time.

[204] *See generally* Wälde, *supra* note 125, at 94 (noting that evidence for the comparative advantage of "statist" regulatory solutions is scant, and that such solutions may represent the exercise of structural power by powerful states).

PART III

INSTITUTIONALIZED DISPUTE SETTLEMENT

IOs have long sought to facilitate dispute settlement—for purposes of resolving disputes between states or other international legal persons, disputes between states and private interests (such as multinational corporations), and internal disputes (particularly between the organization or a particular organ and member(s)). The following three chapters engage this phenomenon in search of generalizable propositions concerning the characteristics of institutionalized international dispute settlement and its contribution to law-making.

Since the establishment of the United Nations, IOs, their officials, or their organs have attempted to fulfill the demands of Article 2(3) of the UN Charter, which requires all members to settle their "international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."[1] IOs, within and outside the UN system, have devoted a great deal of effort to encouraging resort to the methods of dispute settlement enumerated in Article 33 of the UN Charter ("negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangement, or other peaceful means of their own choice"). With respect to dispute settlement, IOs have played distinct roles: (1) to develop the norm that, apart from self-defense, states should resort to peaceful forms of dispute settlement; (2) to encourage or even on occasion compel disputants to settle their disputes by particular means; and (3) to provide fora for the peaceful resolution of all international disputes, including economic or regulatory disputes that do not pose threats to the international peace. The first role is the subject of an abundant literature enumerating the efforts of IOs devoted to the development of rules, hard and soft, that facilitate the peaceful settlement of disputes. The second role has been addressed through specific example in this book, particularly in Chapters 3 and 4, with examination of the consequences of the UN Security Council's attempts to serve as the international community's principal enforcer of the law. This part will primarily focus on the third role. We examine here the impact of IO dispute settlers, from the political to the judicial, on the formulation, concretization, and interpretation of international legal norms.

Chapter 7 illustrates through example how IOs in non-judicial settings have engaged in dispute settlement. It also enumerates, through necessarily selective examples in distinct institutions, the possibilities for wider normative impact. Chapter 8 does the same for quasi-judicial and fully judicialized international dispute settlers. The challenge of defining, more broadly, the domain of international institutionalized dispute settlement is expressly taken up in Chapter 9. That part considers the underlying dynamics of distinct dispute settlement modes and whether it is accurate to describe their primary function as engaging in "dispute settlement" at all. That chapter also considers the characteristics and limitations of law-making in the political, quasi-judicial, and judicial settings discussed,

[1] *See, e.g.*, Chapter XXXII of Ian Brownlie, *Principles of Public International Law* at 671–94 (New York and Oxford, U.K.: Oxford University Press, 6th edn., 2003).

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International Judicial Bodies

General Jurisdiction

EXISTING
- International Court of Justice (1946 →)

EXTINCT
- Permanent Court of International Justice (1922-1946)

Law of the Sea

EXISTING
- International Tribunal for the Law of the Sea (1996 →)

Environment

PROPOSED
- International Court for the Environment

International Criminal Law/Humanitarian Law

EXISTING
- International Criminal Tribunal for the Former Yugoslavia (1993 →)
- International Criminal Tribunal for Rwanda (1995 →)
- International Criminal Court (2004 →)

EXTINCT
- African Slave Trade Mixed Tribunals (1819-1866 circa)
- International Military Tribunal at Nuremberg (1945-1946)
- International Military Tribunal for the Far East (1946-1948)

ABORTED
- International Prize Court (1907)

Human Rights

EXISTING
- European Court of Human Rights (1959-1998 / 1998 →)
- Inter-American Court of Human Rights (1979 →)

NASCENT
- African Court on Human and Peoples' Rights (1998)

  The Protocol to the African (Banjul) Charter on Human and Peoples' Rights entered into force in January 25, 2004. However, by the time this synoptic chart was updated (November 2004), the ACHPR had not yet started operating.

PROPOSED
- International Human Rights Court

Trade, Commerce and Investments

EXISTING
- World Trade Organization Dispute Settlement Understanding (1995 →)

  The DSU created a dispute settlement system based on a standing political organ (the Dispute Settlement Body), comprising all members of the WTO, a set of ad hoc expert panels, and the Appellate Body. The reports of the Panels and the Appellate Body can be rejected by the DSB only by consensus. Strictly speaking, only the Appellate Body belongs in this column, while the DSB and the panels should be listed in the section, "Permanent Arbitral Tribunals/Conciliation Commissions".

PROPOSED
- International Loans Tribunal

Quasi-Judicial, Implementation Control and other Dispute Settlement Bodies

Human Rights and Humanitarian Law Bodies

EXISTING
- ILO Commission of Inquiry (1919 →)
- ILO Committee of Experts on the Application of Conventions and Recommendations (1926 →)
- ILO Conference Committee on the Application of Conventions (1926 →)
- United Nations Commission on Human Rights (1946 →)
- ILO Governing Body Committee on Freedom of Association (1950 →)
- Committee of Independent Experts under the European Social Charter (1965 →) Renamed in 1998 European Committee of Social Rights
- Committee on the Elimination of Racial Discrimination (1969 →)
- International Civil and Political Rights Committee (1976 →)
- Inter-American Commission on Human Rights (1979 →)
- Committee on the Elimination of All Forms of Discrimination Against Women (1981 →)
- Committee on Economic, Social and Cultural Rights (1987 →)
- Committee Against Torture (1987 →)
- African Commission on Human and Peoples' Rights (1987 →)
- European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1989 →)
- Committee on the Rights of the Child (1990 →)
- European Commission Against Racism and Intolerance (1993 →)

EXISTING
- Commission for Displaced Persons and Refugees (Bosnia Herzegovina) (1995 →)
- Commission to Preserve National Monuments (Bosnia Herzegovina) (1995 →)
- Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (2004 →)
- International Humanitarian Fact-Finding Commission (1992 →)

EXTINCT
- European Commission on Human Rights (1959-1998)
- Human Rights Chamber for Bosnia and Herzegovina (1996–2003)
- Human Rights Commission Within the Constitutional Court of Bosnia and Herzegovina (2004-2005)

International Administrative Tribunals

EXISTING
- International Labour Organization Administrative Tribunal (1946 →)
- United Nations Administrative Tribunal (1949 →)
- Appeal Board of the Organization for Economic Cooperation and Development (1950 →)
- Appeals Board of the Western European Union (1956 →)
- Council of Europe Appeals Board (1965 →)
- Appeals Board of NATO (1965 →)
- Appeals Board of the Intergovernmental Committee for Migration (1972 →)
- Appeals Board of the European Space Agency (1975 →)
- Administrative Tribunal of the Organization of American States (1976 →)
- World Bank Administrative Tribunal (1980 →)

EXISTING
- Inter-American Development Bank Administrative Tribunal (1981 →)
- International Monetary Fund Administrative Tribunal (1994 →)
- Asian Development Bank Administrative Tribunal
- African Development Bank Administrative Tribunal
- Latin American Integration Association Administrative Tribunal

EXTINCT
- League of Nations Administrative Tribunal (1927-1945)
- Appeals Board of the European Space Research Organization (1966-1974)
- Appeals Board of the European Space Vehicle Launcher Development Organization (1966-1974)

Non-Compliance / Implementation Monitoring Bodies (Environmental Agreements)

EXISTING
- Implementation Committee under the Montreal Protocol on Substances that Deplete the Ozone Layer (1990 →)
- IMO Sub-committee on Flag State Implementation (1992 →)
- Implementation Committee of the Protocols to the 1979 ECE Convention on Long-Range Transboundary Air Pollution (1997 →)
- Committee for the Review of the Implementation of the Desertification Convention (2002 →)

EXISTING
- Basel Convention on Control of Transboundary Movements of Hazardous Wastes and their Disposal Compliance Committee (2003 →)
- Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters Compliance Committee (2003 →)
- Compliance Committee of the Cartagena Protocol on Biosafety (2005 →)

EXISTING
The date in parenthesis indicates the year in which the body started operating.

Note: this is not the date on which the agreement establishing the body was signed, nor necessarily the date of the agreement's entry into force.

EXTINCT
The dates in parenthesis indicate the period during which the body was in operation.

ABORTED
Certain bodies, after having had their constitutive instruments adopted, never started functioning. The date in parenthesis indicates the year in which the constitutive instrument was adopted.

DORMANT
Certain bodies, while formally still operating, have not received any submission for several years.

NASCENT
The date in parenthesis indicates the year in which the constitutive instrument was adopted.

PROPOSED
These are bodies whose establishment has been considered in the past by academics and law-makers, but which have not yet become reality.

Version 3.0 (November, 2004)

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Regional Economic and Political Integration Agreements

Europe

EXISTING

- Court of Justice of the European Communities (1952 →)
- Benelux Economic Union Court of Justice (1974 →)

  The Benelux College of Arbitrators has been listed in the section "Permanent Arbitral Tribunals / Conciliation Commissions".
- Court of First Instance of the European Communities (1988 →)

  The European Court of Auditors (1977→) is not quite an international judicial body (see back). It is an internal control body of the European Union. It examines whether EU budgetary revenue has been received, and the corresponding expenditure incurred, in a legal and regular manner. The Court does not formally adjudicate disputes (although it can render advisory opinions). When auditors discover cases of irregularities, including suspected fraud, the information is communicated to the Community bodies responsible in order that they may take appropriate action.
- EFTA Court (1994 →)

DORMANT

- European Nuclear Energy Tribunal (OECD) (1957)
- Western European Union Tribunal (1957)
- European Tribunal on State Immunity (Council of Europe) (1972)

Europe / Central Asia

EXISTING

- Economic Court of the Commonwealth of Independent States (1993 →)

Africa / Middle East

EXISTING

- Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa (1997 →)
- Court of Justice of the Common Market for Eastern and Southern Africa (1998 →)
- Court of Justice of the African Union (2003)
- Court of Justice of the Economic Community of West African States (ECOWAS) (2001 →)
- Court of Justice of the West African Economic and Monetary Union (1996 →)
- Court of Auditors of the West African Economic and Monetary Union (2000 →)
- East African Court of Justice (2001 →)

EXTINCT

- East African Community Court of Appeal (1967-1977)
- East African Community Common Market Tribunal (1967-1977)
- Economic Community of West African States Tribunal (1975-1991)

DORMANT

- Judicial Board of the Org. of Arab Petroleum Exporting Countries (1980)
- Court of Justice of the Economic Community of Central African States (1983)
- Court of Justice of the Arab Maghreb Union (1989)
- Court of Justice of the African Economic Community (1991)

NASCENT

- Southern Africa Development Community Tribunal (2000)

PROPOSED

- International Islamic Court of Justice
- Arab Court of Justice

Latin America / Caribbean

EXISTING

- Court of Justice of the Andean Community (1984 →)
- Central American Court of Justice "Corte Centroamericana de Justicia" (1994 →)

EXTINCT

- Central American Court of Justice "Corte de Justicia Centroamericana" (1908-18)

ABORTED

- Central American Tribunal (1923)

NASCENT

- Caribbean Court of Justice (2001)

PROPOSED

- MERCOSUR Court of Justice
- Inter-American Court of Intl. Justice

Inspection Panels

EXISTING

- World Bank Inspection Panel (1994 →)
- Inter-American Development Bank Independent Investigation Mechanism (1995 →)
- Asian Development Bank Inspection Policy (1995 →)

NASCENT

- Kyoto Protocol Compliance System (1997)
- Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998)
- Multilateral Consultative Process for the United Nations Climate Change Convention (1998)
- Stockholm Convention on Persistent Organic Pollutants (2001)

International Claims and Compensation Bodies - Multilateral / Bilateral

EXISTING

- Iran-United States Claims Tribunal (1980 →)
- Marshall Islands Nuclear Claims Tribunal (1983 →)
- United Nations Compensation Commission (1991 →)
- Claims Resolution Tribunal for Dormant Accounts in Switzerland (1997 →)
- German Forced Labour Compensation Programme (2000→)
- Eritrea-Ethiopia Claims Commission (2000 →)

EXTINCT

- American-Mexican Claims Commissions (1868, 1923 and 1924)
- Conciliation Commissions under the 1947 Peace Treaty with Italy (1947-1965*)
- UN Tribunal for Eritrea (1951-1954)
- UN Tribunal for Libya (1951-1955)
- Commission for Real Property Claims of Displaced Persons and Refugees (Bosnia and Herzegovina) (1995-2003)

EXTINCT

- Property Commissions under the Peace Treaty with Japan (1951-1961*)
- Arbitral Tribunal and Mixed Commission under the 1953 London Agreement on German External Debts (1953-1980*)
- Arbitral Commission on Property, Rights, and Interests in Germany (1956-1969)
- Austro-German Property Arbitral Tribunal (1961-1973)

This list is not exhaustive, but only illustrative. There are more than 80 mixed arbitral tribunals and claims commissions that were created in the nineteenth and twentieth centuries in the wake of armed conflicts and revolutions. Most of them were created in the aftermath of World Wars I and II.

* This is the date in which the last award was made.

Permanent Arbitral Tribunals / Conciliation Commissions

EXISTING

- Permanent Court of Arbitration (1899 →)
- International Joint Commission (1909 →)
- Bank for International Settlements Arbitral Tribunal (1930 →)
- International Civil Aviation Organization Council (under the 1944 Chicago Convention the ICAO Council has certain dispute settlement competences) (1944 →)
- International Centre for the Settlement of Investment Disputes (1966 →)
- Gulf Cooperation Council Commission for the Settlement of Disputes (1981 →)
- Court of Arbitration for Sport (1984 →)
- North American Commission on Environmental Cooperation (1993→)

EXISTING

- NAFTA Dispute Settl. Panels (1994 →)
- Arbitration and Mediation Center of the World Intellectual Property Organization (1994 →)

EXTINCT

- Upper Silesia Arbitral Tribunal (1922-1937)
- OAU Commission of Mediation, Conciliation and Arbitration (1964-1999)

DORMANT

- Arbitral Tribunal of the Inter-governmental Organization for International Carriage by Rail (OTIF) (1890)
- Arbitral College of the Benelux Economic Union (1958)
- Court of Arbitration of the French Community (1959)
- Arbitration Tribunal of the Central American Common Market (1960)
- OSCE Court of Conciliation and Arbitration (1994)

Internationalized Criminal Courts and Tribunals

EXISTING

- Special Court for Sierra Leone (2003 →)
- "Regulation 64" Panels in the Courts of Kosovo (2000 →)
- Serious Crimes Panels in the District Court of Dili (East Timor) (2000 →)

NASCENT

- Extraordinary Chambers in the Courts of Cambodia (2003)

PROPOSED

- Special War Crimes Chamber for Bosnia-Herzegovina

The so-called Lockerbie Trial Court was not an international body nor an internationalized one. It was a Scottish court, applying Scottish criminal law. Unlike the bodies listed in this column, it did not carry out its functions under international supervision.

Truth and reconciliation commissions (like the ones created for South Africa, Guatemala, Argentina, etc.) are not listed in this chart because, although of international interest, they are essentially domestic endeavours.

The Iraqi Special Tribunal (2004 →) is not listed here as it is neither a fully international nor an internationalized criminal body. It is an Iraqi tribunal, composed of Iraqi judges, and applying Iraqi law. Be that as it may, under the IST Statute, non-Iraqi nationals may (and in practice do) assist or observe the work of the Special Tribunal.

The International Judiciary in Context:
A Synoptic Chart

The purpose of this chart is to provide international legal scholars and practitioners with a compendium of all international judicial bodies. Yet, this apparently straightforward task is riddled with traps and dilemmas. Perhaps the greatest challenge is to portray what can be called oxymoronically "an anarchic system" without exaggerating its level of order. The grouping and sub-grouping of all these bodies and mechanisms into a taxonomy does not imply the existence of an "international judicial system," if by system it is meant "a regularly interacting or interdependent group of items forming a unified whole" or "a functionally related group of elements" (Webster's Collegiate Dictionary, 10th ed.). Whether they ought to exist as a system is open to debate.

The second challenge is that in order to capture the dynamism and fluidity of the international judicial domain, any chart of the international judiciary needs to have a temporal dimension. Thus, alongside existing institutions, such as the International Court of Justice, the chart portrays bodies that have been closed down (labeled "extinct"), such as the Permanent Court of International Justice. There are also bodies provided for in treaties that never entered into force (aborted), such as the International Prize Court; idle ones, like the Organization for Security and Cooperation in Europe's European Nuclear Energy Tribunal (dormant); and nascent bodies, like the International Criminal Court. Moreover, the synoptic chart also includes bodies that have been debated and remain confined to the realm of ideas, such as a possible International Court for the Environment (proposed). In sum, the chart depicts the past, present and potential make-up of the international judiciary.

The main focus of the chart is on international judicial bodies. On the top portion of the chart, there are 43 different institutions (of which only 16 are currently functioning) grouped by subject-matter jurisdiction in seven clusters. All the entities listed in this group meet certain fundamental criteria, which set them apart from all other entities listed in the bottom part of the chart. Namely, these entities:

a) are permanent institutions;

b) are composed of independent judges;

c) adjudicate disputes between two or more entities, at least one of which is either a State or an International Organization;

d) work on the basis of predetermined rules of procedure; and

e) render decisions that are binding.

Altogether, these entities form the so-called "international judiciary." However, in order to fully understand the reasons for the rapid quantitative increase in the number of international judicial bodies, the extensive transformation of their competencies, and the success of certain subject-matter jurisdictions over others, it is necessary to include also those bodies and mechanisms which, while not meeting several or all of the above mentioned standards, also play a role in the enforcement, interpretation and implementation of international law. When these international judicial bodies are placed in a much larger historical and analytical context, 82 other entities and mechanisms, referred to as "Quasi-Judicial, Implementation Control and other Dispute Settlement Bodies," and gathered in seven autonomous clusters, need to be accounted for (excluding extinct International Claims and Compensation Bodies).

The institutions and mechanisms listed in this chart have very few legal or functional links among one another, either within or across each major grouping or cluster. Admittedly, until 1995, the International Court of Justice could review judgments of the United Nations Administrative Tribunal, but the link was then severed by the UN General Assembly. Certain institutions listed in the group "human rights bodies" (e.g., the Inter-American Commission on Human

Rights) act as a mandatory filter for certain international courts and tribunals (in this case the Inter-American Court of Human Rights). Again, there are several cases of potentially competing "jurisdictions," both among bodies within the same group (e.g., the International Court of Justice and the International Tribunal for the Law of the Sea) and bodies in different groups (e.g., the non-compliance procedures, the International Court of Justice or the World Trade Organization Dispute Settlement Body, to cite but a few). However, beyond such links, each institution is formally unrelated to any other.

Nonetheless, in their staggering diversity, these 125 international bodies and mechanisms have certain commonalties that justify their presence on the same layout. First, all of these entities make legal determinations, and this sets them apart from other bodies, such as the UN General Assembly or the Parliamentary Assembly of the Council of Europe, which share the same aspiration towards a "just world" but are of a quintessentially political nature. To be precise, these 125 bodies determine whether certain acts are congruous with certain norms. And this leads to a second commonality, which is the fact that in order to make their determinations they all resort to the same body of law: international law. Third, all of these international bodies have been established directly or indirectly (i.e., through a decision taken by a body established by treaty) by international agreements. It follows that they are subject to a legal order that is different from that of national systems, but, at the same time, that they are subject to (and materially dependent on) State support. Finally, and perhaps more importantly, collectively they are the expression of a widely shared need to abandon a world where only States count and the mighty rule, in favor of an order where certain fundamental common values are shared, protected and enforced by all members of a wide society, composed of States, International Organizations and individuals in all their legal incarnations (NGOs, peoples, corporations, natural persons, etc.).

Like any chart, this one is most likely incomplete. It is the result of an ongoing research effort carried out within PICT, and should be considered at best a partial representation of what exists, or has existed. Certain groupings have a mere illustrative function, for the enormous number of bodies that have been created in the past could not properly fit in the scheme. Other entries might change status in the near future, and new institutions and mechanisms might be created. Therefore, this chart will be updated regularly. To this end, any comments and suggestions will be greatly appreciated and can be sent to <cr28@acf2.nyu.edu>.

Cesare P.R. Romano

Note to Version 2.0

This is an updated version of the Synoptic Chart that was prepared in 1998 as a supplement to the special issue of the NYU Journal of International Law and Politics, Vol. 31, 4. That version listed 41 bodies in the top group and 55 in the bottom one. Some of the additions are new bodies that have been created or proposed since 1998, while others are simply past omissions that have been kindly pointed out by readers.

New features of this chart include a special category for "dormant bodies" and a new sub-grouping in the bottom part called "Internationalized Criminal Courts and Tribunals" (i.e., domestic criminal tribunals with international supervision created in the aftermath of regional and domestic armed conflicts, such as those for Sierra Leone, Kosovo, East Timor, and Cambodia). These are the latest additions to the multitude of bodies populating the international legal scene.

Note to Version 3.0

This is an update to Version 2.0 of the Synoptic Chart, prepared in August 2001. We added six new bodies to the top section (International Judicial Bodies), while three bodies changed status, and a few corrections were made. For what concerns the bottom part (Quasi-Judicial, Implementation Control and Dispute Settlement Bodies), we added five bodies, changed the status of nine, and made a few corrections needed. As compared to the previous version, most changes occurred in the "Regional Economic and Political Integration Agreements" section, in particular under the tab "Africa", where a series of bodies previously not listed where added, and, in the bottom part, in the "Non-Compliance" section, where several bodies and procedures changed status."

and concludes with an attempt to situate these issues within broader theoretical frameworks.

Chapters 7 and 8 distinguish between two exceedingly broad types of dispute settlers (1) non-judicial entities (including IO organs composed of individuals selected on the basis, and with the assumption, that they will represent their respective governments) and (2) quasi-judicial or judicial bodies (primarily commissions, courts or tribunals composed of persons selected on the basis or with the assumption that they will be relatively impartial from their governments). The dichotomy, based on relative independence from governments, is adopted for ease of discussion. In reality, of course, a spectrum of independence exists among international dispute settlers, not a sharp dichotomy, and many variables influence an adjudicator's degree of independence beyond his or her professional background, method of selection, or type of tenure.[2] Relative "independence" from the disputing parties is only one way of classifying international dispute settlers. Dispute mechanisms differ in many other ways from one another, including by degree of institutional permanency, formality, and transparency of procedures, subject matter or geographic jurisdiction, applicable law, types of entities with *locus standi*, remedies available for enforcement, and finality of any written or oral rulings issued.[3]

For these reasons, the spectrum of independence is wide and substantial differences exist among the select dispute settlers discussed in Chapters 7 and 8. While the Human Rights Committee under the ICCPR and the European Court of Human Rights (ECHR or Strasbourg Court), both discussed in Chapter 8, are quasi-judicial or judicial bodies engaged in the examination of individual communications or complaints concerning a similar set of human rights obligations imposed on states, the distinctions between these two bodies are as great as their similarities. The Human Rights Committee is not a "court" in the sense that the ECHR is.[4] While the latter is composed of individuals who possess the qualifications required for high judicial office, are barred from activities incompatible with their judicial duties, are elected for renewable six-year terms, engage in public proceedings with public pleadings, and are empowered to issue binding judgments, including just satisfaction, that can be executed by, if necessary, the responsible political body (the Committee of Ministers), the Human Rights Committee lacks all of these

[2] *See, e.g.*, Robert O. Keohane, Andrew Moravcsik, and Anne-Marie Slaughter, "Legalized Dispute Resolution: Interstate and Transnational," 54 *Int'l Org.* 457, at 459–62 (2000).

[3] *See, e.g.*, Benedict Kingsbury et al., "Symposium Issue: The Proliferation of International Tribunals: Piercing Together the Puzzle," 31 *NYU J. Int'l L. & Pol.* 679 (1999); Keohane, Moravcsik, and Slaughter, *supra* note 2; James McCall Smith, "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts," 54 *Int'l Org.* 137 (2000); Philippe Sands et al., eds., *The Manual of International Courts and Tribunals* (London: Butterworths, 1999). *See also* Cesare P.R. Romano and Thordis Ingadottir, "The Cost and Financing of International Justice," Policy Paper Series, Project on International Court and Tribunals (September 2004)(discussing the enormous variations in costs among dispute settlers).

[4] *See* Henry Steiner, "Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?," in Philip Alston and James Crawford, eds., *The Future of UN Human Rights Treaty Monitoring* 15, at 28 (Cambridge, U.K. and New York: Cambridge University Press, 2000).

attributes. The Human Rights Committee is charged only with "forwarding its views," not the issuance of legally binding judgments, is expected to serve nearly over one billion people from the vast number of heterogeneous state parties to the ICCPR, engages in less clearly "judicial" activities (such as the issuance of general comments and the examination of periodic state reports) along with the examination of individual communications, functions without benefit of public proceedings or pleadings, oral argument by the parties, or oral testimony of witnesses, has no provision for remedies or for assuring that its views will be complied with, and is composed of persons who, while competent in the field of human rights and serving in their personal capacity for staggered four-year terms, need not be lawyers and have been known to hold simultaneous appointive office in their own state's governments.[5] Inclusion in Chapter 8 should not be equated to a determination that the entity is necessarily like a domestic court in a state that respects the rule of law.

Comparably wide differences also exist among the "non-judicial" entities addressed in Chapter 7. Nonetheless, the distinction between Chapters 7 and 8 encompasses real, if relative, differences in independence. Thus, even though Henry Steiner contrasts the Human Rights Committee and the Strasbourg Court, he expresses no doubt that these two bodies' relatively "independent and impartial members, limited discretion and norm-to-fact decision-making" make them recognizably "legal" bodies as distinct from "political" entities operating on the basis of "power, pressure, bargaining, and compromise."[6] It is for these reasons that both of these entities, despite their differences, are grouped together here, while, for example, the UN Human Rights Commission, composed of government representatives, is discussed in Chapter 7.

Given the scope of this book, we are primarily concerned with international dispute settlers that have a strong claim to institutional permanency. Such permanency is not necessarily defined by the continuous service of individuals serving as dispute settlers. The Human Rights Committee's staggered four-year terms can lead to substantial and rapid turnovers in its membership, for example, while some ILO dispute resolution bodies are formed only to consider particular disputes.[7] Permanency may arise from temporal continuity of the entity as a whole, adherence to regularized procedures or rules within defined subject matter, or affiliation to an IO. We are here primarily concerned with dispute settlers embedded within IOs or which are themselves self-standing entities. Arbitral arrangements that merely retain rosters of experts and are likely to deal with any kind of issue submitted by disputing parties (as under the Permanent Court of Arbitration or the International Chamber of Commerce) are not the focus of discussion.[8]

[5] Steiner, *supra* note 4, at 27–30.

[6] Steiner, *supra* note 4, at 49. Thus, Steiner contrasts the Human Rights Committee from the UN Commission on Human Rights. *Id.* (noting that the latter consists of state representatives who control the agenda and reflect the "political influence of states, patron-client relationships, internal voting blocs, and other factors related to power and bargaining").

[7] *See* Steiner, *supra* note 4, at 28. On the ILO, see *infra* Chapter 7.

[8] For a description of such mechanisms and the differences between institutionalized and ad hoc forms of commercial arbitration, see Walter Mattli, "Private Justice in a Global Economy: From

One final caveat is needed. As with any attempt to classify the unclassifiable, some of the allocations made between Chapters 7 and 8, as, for example, the choice to classify the UN Compensation Commission (UNCC) (composed of both agents of states and commissioner-experts to adjudicate claims against Iraq), certain ILO bodies (whose compositions reflect the tripartite divisions in that organization generally), along with the UN Secretary-General (capable of acting both as an agent of political bodies and as an "impartial" mediator or arbitrator) as "non-judicial" dispute settlers are debatable. It is also important to remember that many of the entities discussed in this book, such as the Security Council and the Human Rights Committee, engage in multiple roles—including "enforcement" or general "compliance" efforts apart from the resolution of disputes. These other functions may impact upon their abilities to settle disputes as well as to make law.

The numbers of international or internationalized dispute settlers preclude comprehensive description here. The synoptic chart produced by the Project on International Courts and Tribunals (PICT), reproduced at page 404, identifies a staggering 125 mechanisms for international dispute settlement that have either existed but are now terminated or are either now operating or are seriously under consideration.[9] In some respects, the PICT Chart may actually underestimate the degree of institutionalized forms of dispute settlement now occurring. As noted in Chapters 3 and 4, a degree of "dispute settlement" occurs among virtually all IOs, involving political organs, IO secretariats, and more specialized "expert" bodies whose main function is not to settle disputes and are therefore not included on that Chart. Some of these dispute settlers, such as the UN Secretary-General and the Security Council, are nonetheless discussed in Chapter 7. Still, the PICT Chart is a useful starting point for this section of this book. As it indicates, there are nearly twenty permanent, international, or regional courts now in existence (including the International Criminal Court and the nascent African Court of Human and Peoples' Rights), three additional "hybrid" internationalized criminal tribunals (in Kosovo, East Timor, and Sierra Leone),[10] nineteen quasi-judicial

Litigation to Arbitration", 55 *Int'l Org.* 919 (2001). More difficult to classify are ad hoc arbitral arrangements affiliated with an IO, such as the World Bank's ICSID, but capable of hearing disputes arising under a variety of agreements, including bilateral investment treaties and commercial contracts between private parties, or comparable arrangements adhering to a common set of procedures but embedded in treaties that, as yet, have not established an IO in the sense used in this book, such as NAFTA's various dispute settlement arrangements. These less institutionalized arrangements for dispute resolution will not be the focus of discussion here.

[9] That synoptic Chart of international dispute settlers existing, extinct, nascent, and proposed, is contained in the website maintained by the Project on International Courts and Tribunals (PICT) Synoptic chart (updated through October 2004) at www.pict-pcti.org/publications.synoptic_chart2.pdf. That website also contains a "matrix" with brief descriptions of each, including geographic scope and number of state parties. *See* www.pict-pcti.org/matrix/Matrix-main.html.

[10] These courts are located within countries that have suffered mass atrocities but are subject to international supervision and assistance. Their statutes and rules of procedure have been influenced by those for the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC), but have jurisdiction over serious crimes recognized under both national and international law. *See e.g.* Suzannah

human rights bodies, fifteen international administrative tribunals, eleven existing or nascent monitoring bodies (usually created under multilateral environmental agreements (MEAs)), three inspection panels within international financial institutions, six international claims and compensation bodies, and ten arbitral tribunals or conciliation commissions (usually operating on an ad hoc basis).[11] With the exception of those monitoring mechanisms established under MEAs and arbitral or conciliation proceedings that arise only on an ad hoc basis when triggered by specific requests that such bodies be formed, most of these entities are either formally embedded in an IO, self-standing institutions with a considerable degree of permanence, or fora that are at least loosely affiliated with an IO (as are, for example, bodies charged with overseeing implementation of human rights treaties negotiated under UN auspices). As is evident from the dates included in the PICT Chart (at p. 404), the most significant increase in the numbers of international judicial bodies has occurred in the post-Cold War period.

The focus on dispute settlement, in a book devoted to law-making by IOs, is likely to elicit skepticism, particularly, but not only, from public international lawyers. As was suggested in Chapters 3 and 4, the possibility that political IO organs such as the UN Security Council might be involved in dispute settlement does not sit well with lawyers for whom that task is reserved to judges, arbitrators, conciliators, and mediators. Moreover, the idea that not only do political entities like the Council but also officials employed by IOs, like the UN Secretary-General or lawyers in its Legal Office, both resolve inter-state disputes with some degree of finality and make law in the course of doing so, is antithetical to how international sources of legal obligation are believed to arise. Article 38 of the Statute of the International Court of Justice does not contemplate such a possibility and only mentions undefined "judicial decisions" as a "subsidiary means for the determination of rules of law." It is also contrary, many would contend, with the concept of the rule of law as understood within national legal orders. National law does not formally sanction law-making by those charged with adjudication, and particularly not politicians engaged in such activity. Nations that respect the rule of law also tend to reserve dispute settlement to those who are relatively removed from

Linton, "Cambodia, East Timor and Sierra Leone: Experiments in International Justice," 12 *Criminal Law Forum* 185 (2001). As the PICT Chart indicates (at p. 404), there is, in addition, a nascent hybrid internationalized criminal court for Cambodia.

[11] For a description of most of these forms of adjudication and an attempt to enumerate emerging trends based on the establishment of an "international judiciary" and a new discipline of "international judicial law and organization" to displace older concerns with the "peaceful settlement of disputes," see Cesare P.R. Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle," 31 *N.Y. Univ. J. Int'l L. & Pol.* 709 (1999). (The Romano article includes an earlier version of the synoptic chart of these international dispute settlers that is reproduced at pp. 404–407.) For a more critical view of emerging trends and consequences, see José E. Alvarez, "The New Dispute Settlers: (Half) Truths and Consequences," 38 *Tex. Int'l L. J.* 405 (2003). The chart produced by the Project on International Courts and Tribunals, reproduced at pp. 404–407, identifies over eighty existing judicial, quasi-judicial, implementation, and other international dispute settlers grouped under the eight categories described in the text to this note.

direct political accountability, as through selection on the basis of merit, entitlement to lengthy tenure, or removal only for cause. Like article 38 of the ICJ statute, national law usually says nothing about making law even with respect to judges authorized to settle disputes. Moreover, lawyers in civil law jurisdictions that do not recognize a doctrine of strict judicial precedent that binds judges to follow their prior decisions (the common law notion of *stare decisis*) are, by tradition, particularly hostile to the notion of judicial law-making.

For these reasons, the subject of Chapter 8, law-making in the course of more judicialized forms of dispute settlement, is only slightly less controversial. The traditional international law sources of law do not include, as noted, judicial decisions even by international courts, as one of the three sources of law. Further, while the idea of judicial law-making is somewhat more familiar to lawyers within the common law tradition, even they would recognize that the proliferating number of international dispute settlers identified in the PICT Chart are not operating within a hierarchy likely to be favourable to accepting precedents adopted by one superior court. Unlike common law courts such as those in the United States, in which courts in the federal system need to adhere to precedents set by the U.S. Supreme Court on matters relating to federal and all U.S. courts, state and federal, need to respect judgments of that one superior court on matters relating to constitutional law, the international system has no agreed rule indicating that the judgments of the International Court of Justice (or any of the other international courts or tribunals in the PICT Chart, for that matter) prevail over judgments reached by "inferior" or "specialized" international courts. With the rare exception of specialized dispute settlers that have established the equivalent of courts of first instance or trial courts subject to appeals to an appellate court charged with review (as in the WTO dispute settlement system, the ICTY, and ICTR), international courts do not sit in review over each others' decisions and are not bound to adhere to (or even be informed of) the judgments reached by their brethren in other internationalized fora or in national courts, even when these are addressing comparable issues or even the identical question of law. For the most part, the dispute settlers identified in the PICT Chart operate under treaties that say nothing about coordination with other dispute settlers elsewhere.

International dispute settlers also operate under treaties that either say nothing about the doctrine of *stare decisis* or, more typically, decline to extend that doctrine to the international realm. Thus, even the most judicialized courts or tribunals on the PICT Chart generally operate under rules like that in article 59 of the Statute of the ICJ, providing that decisions of that Court have "no binding force except between the parties and in respect of that particular case." If what is meant by "law-making" is the enactment of rules that are generally applicable to those in comparable circumstances—and not merely the enforcement of a rule on particular parties before a court—international courts that operate under a rule like article 59 cannot, by definition, make general law in the course of deciding disputes. This would appear to be all the more the case when an international dispute settler,

such as within the WTO dispute settlement system, operates under an express injunction only to "clarify" the existing law and not to "add to or diminish the rights and obligations" to which the parties are subject.[12] Finally, it is difficult to see how dispute settlers, which are usually based within specific treaty regimes and charged only with resolving disputes dealing with such specific treaties, even if they might become engaged in developing the law of such regimes, could ever do more than that. At best, international dispute settlers might engage in regime-specific law-making. We might expect at most that WTO dispute settlers clarify issues relating to trade law, that the ICTY might clarify the scope of the three types of international crimes over which it has jurisdiction, or that the Strasbourg Court would fill obvious gaps in the enumerated rights contained in the European Convention for the Protection of Human Rights, and so on. But it is difficult to see how WTO dispute settlers, for example, charged only with clarifying the rights under the WTO covered agreements in light of customary rules of interpretation of public international law,[13] could ever become makers of *general* public international law.

If international dispute settlers are in fact engaging in such general law-making, this would be yet another example of institutionalized law-making at odds with IO charters and with the positivistic conception of sources of law.

[12] Article 3(2), Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the WTO Agreement, (the Dispute Settlement Understanding or "DSU").

[13] *Id*.

7

Dispute Settlement by "Non-judicial" Actors

Adjudicative activity within IOs is frequently a three ring circus in which all the non-judicial or political components of the institution are involved, namely, its "executive" organ with limited membership, its plenary body, and its Secretariat (including top officials as well as the IO's legal office). The United Nations itself is the premier, and arguably most extreme, example.

7.1 Within the UN

Within the UN itself, an institution established largely to promote the peaceful settlement of disputes (see UN Charter, Article 1(1)), this central responsibility is shared among all its political organs. The Charter gives multiple bodies overlapping responsibilities to engage in dispute settlement. While it indicates a preference for referring "legal disputes" to the "principal judicial organ," namely, the International Court of Justice (Articles 33 and 92), the Charter anticipates that its political organs, namely, the GA, Security Council, and the Secretary-General,[1] will all play roles in resolving disputes among member and even non-member states. The UN Charter's Chapter VI anticipates that the Security Council will nudge states to settle their disputes through the various models suggested in Article 33. Articles 10 to 14's expansive licenses to the Assembly to "discuss" any question within the scope of the Charter, initiate studies and make recommendations, including for the "peaceful adjustment of any situation," does the same for that body, while Article 99's authorization to the Secretary-General to call the Council's attention to any matter that threatens the international peace opens the door for that office's intervention. The Charter also encourages members to resort to a number of standard techniques by which each of these organs and the Secretary-General can assume the mantle of dispute settler (Article 33, listing

[1] While the status of the Secretary-General as either an "organ" of the UN or as "political," has been oft-debated, in most of the instances in which the Secretary-General has attempted to settle disputes there has been no doubt that he has been expected to report back to the UN's political bodies, and he has often acted at their direction. This section will, however, also consider other instances, as when disputing parties have turned to the Secretary-General as a neutral third party dispute settler. In these latter cases, when acting in his personal capacity, the Secretary-General is not a "political organ."

negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or "other peaceful means of their own choice").

7.1.1 The Security Council

Dispute settlement efforts by the Security Council can occur at the request of: all disputing parties (Article 38), any one party (Article 37(1)), other UN member(s) (Article 35(1)), the GA (Articles 11(3) and 12), the Secretary-General (Article 99), the Council itself (Articles 33(2) and 34), or "regional arrangements or agencies" (Article 52(2)).[2] In some cases, even non-UN members can secure the Council's attention for this purpose.[3] Given the Council's defined responsibilities, it is often assumed that only serious disputes that either pose a threat to the international peace or are likely to do so are within its competence.[4] But since the Council may decide to label any matter, including "any situation which might lead to international friction" (Article 34), a cognizable "dispute," it is difficult to see any real limits to the Council's competence in this regard.[5] Although Article 33(1) of the Charter suggests that disputes only reach the Council after the parties have first sought a solution through negotiation or other peaceful means, the various routes to secure the Council's attention, enumerated above, imply that the Council can assume its dispute settlement role whether or not the states have consented, even by

[2] It is understood that the Council may intervene "even against the will of the parties to the dispute." C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, at 427 (Cambridge, U.K. and New York: Cambridge University Press, 1996). On the Council's ability to intervene *proprio motu*, see Louis Sohn, "The Security Council's Role in the Settlement of International Disputes," 78 *AJIL* 402 (1984). The standard definition of "regional arrangements or agencies" presupposes that such regional entities define themselves, at least in part, as dispute settlers and have dispute settlement procedures of some kind at their disposal. Waldemar Hummer and Michael Schweitzer, "Article 52," in Bruno Simma, ed., 1 *The Charter of the United Nations: A Commentary* at 828 (Oxford, U.K. and New York: Oxford University Press, 2002)(hereinafter "Simma, Charter") (defining these as "a union of states or an international organization based upon a collective treaty or a constitution and consistent with the Purposes and Principles of the UN, whose primary task is the maintenance of peace and security under the control and within the framework of the UN. Its members, whose number must be smaller than that of the UN, must be so closely linked in territorial terms that effective local dispute settlement by means of a specially provided procedure is possible. Accordingly, regional agencies are internally focused, thereby distinguishing themselves from, *inter alia*, externally focused systems of collective self-defense under Article 51"). Non-controversial examples of regional arrangements are the OAS, the OAU (or now the African Union), and the League of Arab States; NATO is traditionally excluded by this definition. *Id.*

[3] *See* Articles 32, 2(6) and Amerasinghe, *supra* note 2 at 427.

[4] *See* Articles 24–5, UN Charter, Chapters VI and VII; and see J.G. Merrills, *International Dispute Settlement*, at 221 (Cambridge, U.K. and New York: Cambridge University Press, 3rd edn., 1998). But note that Article 2(3) of the Charter imposes a general obligation on members to settle disputes by peaceful means.

[5] *See* Merrills, *supra* note 4, at 221–2; Benedetto Conforti, *The Law and Practice of the United Nations* at 162–5 (The Hague and Boston: Kluwer, 2000). For the ICJ's views of the Council's ability to categorize a matter as a "dispute" and its consequences, see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, 21 June 1971, 1971 ICJ Rep. 16, p. 16.

the Council's own action.[6] Once seized of the dispute, the Council has considerable discretion and a variety of tools to handle the matter, including by initiating an investigation either itself or, more commonly, through a subsidiary organ or commission;[7] by laying down "principles" to govern the settlement of the dispute;[8] by recommending particular procedures for settling the matter;[9] by instructing a third party, such as a commission or the Secretary-General, to serve as conciliator or mediator;[10] or by referring the matter to a regional organization.[11] The Council has deployed these powers, even during the Cold War and certainly since, and has engaged in virtually every form of dispute settlement method anticipated in the UN Charter's Article 33. Of course, the Council is formally subject, when not taking enforcement action, to the vague limits imposed by article 2(7) (barring UN interventions on matters "essentially within the domestic jurisdiction of any state" and indicating that states would not be required to submit such matters to dispute settlement).

Council action, particularly during the Cold War, usually took the form of formally non-binding action intended to encourage states to resort, voluntarily, to various forms of dispute settlement. The Council, like any conciliator, has frequently recommended "terms of settlement" to disputing parties. It appears to be authorized to make such recommendations under Chapter VI and has interpreted the requisites of that Chapter's Article 37 quite flexibly. The Council has entered into the merits of disputes without waiting for all the parties to ask it to do so, even in instances submitted to it as "situations" and not "disputes," and without making express findings that other means of settlement under Article 33 have been exhausted.[12] On occasion, as discussed in Chapters 3 and 4, particularly since the end of the Cold War, the Council has gone further, especially but not exclusively, pursuant to its expansive Chapter VII powers to "make recommendations" or "decide" on measures "to maintain or restore international peace and security" (Articles 39–42). While it has not formally constituted itself as an "adjudicative" body, the Council has also, particularly in the wake of the Gulf War, undertaken presumptively "binding" action to settle concrete disputes or to settle significant underlying legal issues within a broader dispute either through its own action or through the action of a delegated body. As discussed in Chapters 3 and 4, in some of these instances, as with respect to Iraq, after the Gulf War, its adjudicative determinations have been imposed under threat of (renewed) force. Whether or not anticipated by the Charter, the Council is the only de facto international dispute settler with the power, thanks to Chapter VII, to enforce its decisions by force if necessary.

[6] *See* Merrills, *supra* note 4, at 221.
[7] *See* Article 34 and examples given in Amerasinghe, *supra* note 2, at 427.
[8] *See* examples given in Amerasinghe, *supra* note 2, at 427.
[9] *See*, *e.g.*, Resolution 385 (Jan. 30, 1976)(requesting free elections for Namibia under UN supervision); Amerasinghe, *supra* note 2, at 427.
[10] Amerasinghe, *supra* note 2, at 427–8.
[11] Amerasinghe, *supra* note 2, at 428.
[12] *See*, *e.g.*, Conforti, *supra* note 5, at 169–71 (citing numerous examples).

Chapters 3 and 4 canvass the normative impact of some of the Council's adjudicative decisions. Its ability to mediate or even settle disputes might arise in the context of Chapter VI peacekeeping as much as in the course of undertaking Chapter VII sanctions. This is yet one more reason why modern peace operations (or "second generation" peacekeeping), in particular, tend to occupy a conceptual space that may, depending on the context, partake of collective enforcement, the peaceful settlement of disputes, or regulation, thereby leading to multiple arguable bases in the Charter for such operations.[13] Other Council enforcement action, including orders to conduct fact-finding or election assistance as part of efforts to resolve disputes among members (or even to resolve intra-state disputes within factions of a single polity) whether rendered in the course of peacekeeping or not, might easily be regarded as "adjudicative," depending on the context. The Council's decisions to establish criminal tribunals for the Former Yugoslavia and Rwanda, for example, have been seen as an attempt to mediate predictable conflicts that arise in societies that have suffered mass atrocities. Even if the Council's inability to interfere with the independence of these tribunals is conceded,[14] it is hard to deny the Council's normative impact: it was the Council, after all, which made it both possible and probable that persons would be indicted in these regions of the international crimes that the Council proclaimed had occurred there. These developments have, in turn, helped to make the adjudication of international crimes a viable proposition in the modern era.[15] Those Council actions, and the ad hoc tribunals' subsequent decisions, undoubtedly hastened the conclusion of the Rome Statute establishing the International Criminal Court (ICC), the establishment of "hybrid" international courts in Kosovo, East Timor, and Sierra Leone, and may have spurred certain national courts to prosecute international crime or to act on international human rights complaints.[16] In addition, in the wake of the ICC's Statute, the Security Council gained a power that it had never enjoyed before: authority to refer a situation to the ICC prosecutor for prosecution and thereby trigger that Court's jurisdiction.[17] That separate treaty also conferred on the Council the power to defer investigations or prosecutions before that Court, authority that the Council has since deployed, albeit in ways probably not foreseen by the drafters of the Rome Statute.[18]

[13] *See* Merrills, *supra* note 4, at 238–45 (discussing peacekeeping operations' contribution to dispute settlement).

[14] For suggestions along these lines, see *Dusko Tadic*, Case No. IT-94-1-AR72, October 2, 1995, paras. 15 and 19 (Appellate Chamber) (discussing the ICTY's "judicial" character and suggesting that the Council cannot interfere in the operation of this independent court).

[15] *See* discussion in Chapter 4.

[16] For an attempt to describe these human rights developments in terms of a "norms cascade" involving the interaction of a multitude of actors, including IOs and NGOs, see Ellen L. Lutz and Kathryn Sikkink, "International Human Rights Law and Practice in Latin America," 54 *Int'l Org.* 633 (2000). *See also* Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca and London: Cornell University Press, 1998). *See also* note 182 in Chapter 6.

[17] Article 12, ICC Statute.

[18] Article 16, ICC Statute. The Council has purported to exercise its article 16 authority by directing the ICC not to commence prosecutions directed at acts or omissions relating to UN-established or

The Council's sanctioning activity with respect to Iraq after the Gulf War and with respect to Libya in the wake of the bombing over Lockerbie contained, as discussed in Chapters 3 and 4, adjudicative aspects. For purposes of this chapter, it suffices to note, for example, the number of discrete disputes sought to be resolved through the Council's Resolution 687: disputes between Iraq and Kuwait with respect to territorial boundaries, as between the Council and Iraq with respect to the types of weapons Iraq may continue to possess, and as between a number of member states, individuals, and Iraq with respect to kinds of financial liability that Iraq incurred as a result of the Gulf War. While in all these instances the Council delegated important discretionary functions to sub-entities—a boundary demarcation commission, a special commission for weapons inspections (along with the IAEA), and the UN Compensation Commission (UNCC)—in all three the Council made binding determinations that are normally expected of an adjudicator only after hearing the respective parties, engaging in due deliberation, and through issuance of a reasoned opinion in accordance with law.[19] In all of these cases, in accordance with prior restrictive interpretations of the ostensible "duty to abstain" contained in Article 27 of the Charter, Council members with direct as well as indirect interests in the consequences of these determinations fully participated in these adjudicative decisions.

Even if one regards the role of the respective sub-entities referred to or created in Resolution 687 as quasi-judicial, in the case of Iraq, the Council itself assumed considerable legal authority to settle substantial legal issues. The Council itself closely circumscribed the role and jurisdictional mandate of each of these bodies—as would a court directing, for example, designated special masters. Under the Council's edicts, its boundary commission could only demarcate a boundary that the Council had already determined, over the protests of Iraq, needed to be in accord with the 1963 Agreed Minutes Between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations.[20] Its weapons inspectors

UN-authorized operations involving persons from a state that is not a party to the ICC. *See* SC Res. 1422 (July 12, 2002) (renewed in SC Res. 1487 (June 12, 2003)). For discussion of these Council acts and their dubious legality, see Carsten Stahn, "The Ambiguities of Security Council Resolution 1422," 14 *EJIL* 85 (2003).

[19] Even the U.S., a strong supporter of the resolution, indicated that normally border disputes, historically the most common type of case within the ICJ's docket, should be resolved in adjudicative fora of the parties' choosing. *See*, *e.g.*, UN Doc S/PV.2981, at 86 (1991)("Certainly the United States does not seek, nor will it support, a new role for the Security Council as the body that determines international boundaries"). Doubts about the legality of the Council's role in this regard given Chapter VI of the UN Charter have driven the UN Secretary-General, along with some commentators, to argue that Iraq "consented" to the Council determinations in SC Res. 687 as expressed in its letters of April 6, 1991. *See*, *e.g.*, UN Doc. S/22558, at 8 (1991). *See also* Chapter 4.

[20] For the view that since the boundary was not "delimited" in the 1932 exchange of letters between Kuwait and Iraq, the Council's Boundary Commission was in fact asked to delimit, not merely demarcate, the boundary see, e.g., Victor Prescott, "Contributions of the United Nations to Solving Boundary and Territorial Disputes," in Martin Ira Glassner, ed., *The United Nations at Work* 239, at 275 (Westport: Praeger, 1998). Further, ignoring Iraq's claims that the Boundary Commission's subsequent demarcations were unacceptable, the Council approved them by subsequent resolution, warning

were tasked with assuring Iraq's compliance with the specific limits on weapons (chemical, biological, and ballistic) that the Council itself set—restrictions that included some imposed by the Council and that were not contained in Iraq's prior treaty commitments. The UNCC was tasked with applying the Council's expansive determination, Resolution 687 itself, that Iraq was "liable, under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait." The Council presumed that while Iraq might contest the application of this principle to particular situations, it could not contest, in either the UNCC or elsewhere the principle itself or its scope.

The debate over the legality, legitimacy, and wider normative impact of the judgments issued by these council-generated subsidiary bodies and the Council itself continues today. Some contend that in some or all of these instances the Council improperly took cognizance of, and resolved, "legal disputes" that ought, consistent with the Charter's Chapter VI, to have been submitted to fora for dispute settlement agreed to by the parties or, under Article 36(3) of the Charter, to the ICJ. The Charter's drafters, after all, had carefully protected the discretion of states with respect to how they were to resolve their disputes and where; the Charter did not include a clause on the compulsory settlement of disputes. Even the ICJ's jurisdiction was clearly premised on states' voluntary consent under Article 36 of the Court's Statute. The Charter prohibits the Organization itself from requiring members to submit matters essentially within their domestic jurisdiction to settlement (Article 2(7)); it authorizes the Council only to "call upon" parties to settle disputes peacefully (Article 33(2)) and "investigate" such disputes (Article 34). Moreover, it appears to contemplate only recommendatory action in this regard (see Articles 36(1), 36(3), 37).[21] Those that argue that the Council was

Iraq that it was prepared to maintain the boundaries by "all necessary means." UN Doc. S/24044 (1992); SC Res. 773 (1992). *Cf.* Identical Letters dated 6 April 1991 from the Permanent Representative of Iraq to the UN, S/22456, 6 April 1991(complaining of the "iniquitous" imposition of a boundary in SC Res. 687).

[21] *See*, *e.g.*, John W. Halderman, *The United Nations and the Rule of Law: Charter Development Through the Handling of International Disputes and Situations* at 65–89 (Dobbs Ferry: Oceana, 1966) (arguing that the Charter anticipates a division between "peaceful settlement" involving only recommendations as to the substantive merits of disputes under Chapter VI, and binding "police" actions under Chapter VII that cannot decide such issues). But, as Halderman acknowledges, from the UN's earliest days, members have pressured the Council to take what are essentially judicial determinations. Thus, in the wake of Albania's actions in the Corfu Channel, Britain attempted (unsuccessfully) to secure a Council finding that the laying of mines in peacetime constitutes an "offense against humanity" and that Albania must have had knowledge of such mining. *Cf. id.,* at 72–3 (arguing that such issues were only appropriate for judicial determination and not the Council). In addition, in the course of the same case before the ICJ, the United Kingdom argued that a recommendation of the Security Council under Article 36(3), referring a dispute to the ICJ, could ground jurisdiction of that Court under article 36(1) of the Court's Statute (providing jurisdiction for "all matters specifically provided for in the Charter"). Although the Court as a whole found it unnecessary to resolve the question, seven of the judges rejected the United Kingdom's contention on the grounds, *inter alia*, that Council recommendations were non-compulsory. *Corfu Channel*, Preliminary Objection,

well within its rights in taking these actions note, by contrast, that "enforcement measures under Chapter VII" are left undefined and are expressly excepted from Article 2(7)'s strictures, that the scope of Chapter VII actions are expansively defined in non-exclusive lists of permissible measures under Articles 41 and 42, and, that even under Chapter VI, the Charter leaves open the possibility that the Council itself may take "action" to resolve disputes (Article 37(2)) and indicates only that the Council "should . . . take into consideration" that legal disputes should, "as a general rule," be submitted to the ICJ (Article 36(3)).

Protests that the Council, a body that holds no hearings, operates largely in secret, hears no arguments from the parties' respective legal counsels, and provides no extensive legal justifications for its "quasi-judicial" determinations, has been improperly "converted from a political into a judicial body,"[22] has so far not dissuaded the Council from acting as de facto dispute settler. Nonetheless, these legalistic complaints may yet deter the Council from rendering comparably adjudicative decisions in other contexts and may, in turn, limit the precedential impact of these decisions.[23]

As with respect to the Council's declarative, interpretative, and promotional efforts (discussed in Chapers 3 and 4), the Council's quasi-judicial determinations generate doubts about whether these ought to be seen as having general law-making impact. As noted in Chapter 4, some contend that lawyerly readings of the Council's quasi-judicial determinations, particularly when such determinations are taken under the Charter's Chapter VII, are fundamentally misconceived. Since the Council need not determine that any illegality has occurred to make the triggering determination of threat to the peace, breach of the peace, or act of aggression,[24] we should be cautious about viewing its resolutions, even if legally binding under

Judgment of March 25, 1948, 1947–48 ICJ Rep. 15, at 31–2. Most commentators have agreed with this view. *See* Ian Brownlie, *Principles of Public International Law* at 683 and n. 74 (New York and Oxford: Oxford University Press, 6th edn., 2003). For a survey of other attempts by the Council to intervene or settle territorial disputes, see Prescott, *supra* note 20, at 265–77.

[22] UN doc. S/22643, at 2–3 (1991)(quoting Iraq). *Cf.* Burns H. Weston, "Security Council Resolution 687 and Persian Gulf Decision Making: Precarious Legitimacy," 85 *AJIL* 516 (1991) (criticizing the Council's actions leading to the Gulf War on many of the same grounds). For the exchange of letters between Iraq and the UN Secretary-General concerning the boundary issues, see Report of the Secretary-General Regarding Paragraph 3 of Security Council Resolution 687 (1991), S/22558, May 2, 1991 (annexes). In his letter, the UN Secretary-General relies on Iraq's acceptance of SC Res. 687. For a detailed critique of the Council's quasi-judicial actions with respect to Iraq, see Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* at 352–67 (Oxford, U.K.: Hart Publishing, 2004); for a defense, see Oscar Schachter, "United Nations Law in the Gulf Conflict," 85 *AJIL* 452 (1991).

[23] This is particularly the case to the extent that the Council is not explicitly empowered to compel a state to adjudicate a dispute in the ICJ. *See supra* at text to note 21. It seems perverse that a body incapable of sending a legal dispute to the judicial forum established to resolve such disputes can nonetheless impose its own adjudicative solution on the parties.

[24] As Kelsen noted, the purpose of enforcement action is not to maintain or restore the law, but to maintain or restore the peace, "which is not necessarily identical with the law." Vera Gowland-Debbas, "Comments," in H.H.G. Post, ed., *International Economic Law and Armed Conflict* at 163 (Dordrecht, Boston: M. Nijhoff, 1991) (quoting Kelsen).

Chapter VII, as saying anything definitive about general international law, treaty regimes outside of the Charter, or even about customary law reflected in the Charter. These arguments, reminiscent of those suggested by Bruno Simma for the rarely encountered "self-contained regime,"[25] resonate for those who believe that the Security Council needs to retain its political flexibility, including its ability to brand situations as "unique" and not intended to establish a legal precedent. From this perspective, the Council itself has a self-interest in delimiting its normative impact if it is to continue to be able to repond flexibly to new, unanticipated threats to the peace. Under this view, Council determinations, while legally binding to the extent provided by the Charter itself on the parties to whom they are directed, should be regarded as having no general value on the interpretation of international law except perhaps in terms of the UN's "internal" institutional law.[26]

Yet the wording of some of the Council's resolutions suggests that it intends to create normative ripples beyond the immediate disputes that it is resolving. The Council could have simply required Iraq to undertake certain enumerated actions because they were required to "maintain the international peace," namely, to submit the boundary disputes and financial claims against it to binding dispute settlement. It could even have required Iraq to ratify certain arms control agreements, and required it to cooperate with IAEA inspections. Instead, for example, the Council expressly linked its triggering determination (that is, its finding of a threat to the international peace) to express determinations of illegality, notwithstanding its discretion not to do so.[27] The Council's further invocation of the law in Resolution 687—as in its suggestion that Iraq bore legal liability for its actions—makes the link between its decisions and rules of state responsibility, including the scope of permissible counter-measures, plausible.[28] If lawyers take this language seriously, Resolution 687 seems, by its terms, intended to be cited as an application of general principles of state responsibility that can be applied elsewhere. Similarly, the way that the Council resolved the Iraq–Kuwait boundary dispute appears to suggest, for example, the general rule that registry of an agreement by one party under Article 102 of the Charter is sufficient to determine its legal status as a binding treaty, despite the more limited language in Article 102.[29] The Council seems to invite a party faced with a comparable situation in the future to

[25] Bruno Simma, "Self-Contained Regimes," XVI *Netherlands Yrbk Int'l L.* 111 (1985).

[26] Few would try to deny that SC Res. 687 establishes institutional precedents concerning such "internal" matters as the scope of the Council's (implied) Chapter VII powers, the broad meaning of Article 103 (permitting Charter override of pre-existing treaties), and the expansive scope of unenumerated powers that can be delegated by the Council to UN officials such as the Secretary-General. *See also* Chapter 4.

[27] *See* SC Res. 662 and 664 (1990) declaring illegal Iraq's purported annexation of Kuwait and declaring this a "nullity." *See also* Gowlland-Debbas, *supra* note 24, at 164 (discussing other examples and noting that what has been involved is not just any unlawful conduct but breaches of the most fundamental norms of international law).

[28] *See* Gowlland-Debbas, *supra* note 24.

[29] Article 29 of the Charter states only that treaties not so registered may not be invoked before UN organs but it does not suggest, for example, that a party challenging the validity of such an agreement can no longer raise the question before the ICJ or any arbitral body outside of the UN.

cite this precedent on the effects and scope of Article 102. The Council's limitations on Iraq's weaponry might be interpreted as suggesting, as defenders of these decisions like Oscar Schachter have argued, a new general rule that states subjected to Chapter VII sanction for having breached the peace waive their sovereign rights for an undetermined period (or until the Council says otherwise) and do not, for example, have full control over their territory and even full control over their national security needs.[30] These Council actions might also suggest, more broadly, that the requirements of the Treaty on the Non-Proliferation of Nuclear Weapons are binding on non-members as general customary international law (or even perhaps *jus cogens*);[31] as expanding, on either a permanent or ad hoc basis, the normal mandate of the IAEA and that entity's subjection to the Council;[32] and as endorsing the legal validity of UN-designated geographical zones that are to be free of a newly established category of weapons, namely, "weapons of mass destruction."[33]

Other Council determinations in Resolution 687 and related resolutions thereafter, including the Council's delegation to the Secretary-General to determine the composition of the UNCC, to establish the level of Iraq's contribution to the compensation fund, and to design appropriate procedures for resolving claims and allocating payments,[34] also appear to have considerable value as institutional precedents. These are likely to be cited in the future, as institutional practice routinely is, to affirm the legitimacy of, among other things, comparable Council schemes for determining a member's liability (and possibly not just in the course

[30] *See e.g.*, Schachter, *supra* note 22.

[31] Compare para. 11, SC Res. 687, "inviting" Iraq to reaffirm its obligations under that Treaty. Alternatively, consistent with Professor Schachter's arguments at *supra* note 22, this might be regarded as required only of Iraq due to the continuing shadow of Chapter VII action.

[32] *See* paras. 12–13 of SC Res. 687. In subsequent resolutions, the Council defined the weapons commission's access rights within Iraq's territory, approved a detailed monitoring plan submitted by the Secretary-General, ordered Iraq to permit the inspection of any facility designated by the Commission, and deemed conclusive the IAEA's Board of Governor's determination that Iraq has failed to comply with its safeguards agreement with the IAEA. SC Res. 707 (August 1991), SC Res. 715 (October 1991). Much like other entities subjected to intrusive court-ordered plans (as with respect to school desegregation in the United States), Iraq objected that these orders amounted to "super government" imposition. Trevor Rowe, "Special Envoy to Carry UN Concerns to Iraq," *Washington Post* at A22, February 19, 1992. At least one author has suggested that the last determination by the Council recognizing the IAEA Board of Governors as authoritative judge for violations of agreements within its organizational jurisdiction, supported a "developing" norm of "international institutional law" that "the relevant supervisory body of an organization may authoritatively determine whether or not member states have breached regulatory agreements within the organizations's ambit." Frederic L. Kirgis, *International Organizations in Their Legal Setting* at 679 (St. Paul, MN: West Publishing, 2nd edn., 1993). SC Res. 715's grant to the IAEA, of unrestricted freedom of entry, exit, and movement within Iraq, using its own means of transportation, and right to remove any material from that country extends that organization's powers beyond that granted in the Treaty on Non-Proliferation of Nuclear Weapons in ways that either implicitly extend the IAEA's powers or suggest the Council's powers to "amend" treaty commitments under Chapter VII in ways that challenge the notion of "sovereign equality" reflected in Article 2(1) of the Charter. *See* Kirgis, *supra*, at 681.

[33] *See* para. 14, SC Res. 687. For discussion of the reasons why some international lawyers find these generalized legal effects plausible, see Chapter 4.

[34] *See* para. 19, SC Res. 687.

of Chapter VII),[35] the prioritization of distinct types of financial claims against states liable for violations of international law,[36] the scope of permissible action by the Secretary-General in such cases,[37] and the range of permissible Council delegation to "administering" sub-entities.[38] As is discussed in Chapter 3, none of these wider normative ripples would be a surprise: determinations of "internal" institutional law have, not infrequently, wide "external" effects.

7.1.2 The UN Compensation Commission

Possibly the most significant set of "legal precedents" set by the Council's actions in the wake of the Gulf War arise from the powers delegated to the UN Compensation Commission (UNCC) to determine the exact scope of Iraq's financial liability. The Council gave its legal imprimatur to the numerous specific determinations that it anticipated would be rendered by the body—an entity charged with both interpreting the scope of Iraq's liability and administering a compensation fund from which payments would be made. The UNCC's subsequent decisions have the potential of affecting future international bodies tasked with assigning a financial value to violations of state responsibility, from human rights tribunals to ICSID arbitrations.[39] Such normative effects are rendered more likely by the relatively

[35] *See* Chapter 3 (discussing the impact of the *Certain Expenses* and *Reparation for Injuries* opinions rendered by the ICJ on the duty to pay and the doctrine of legal personality).

[36] *See*, *e.g.*, SC Res. 986 (1995)(requiring payment by Iraq to service and repay its foreign debt and allocating particular percentages of its oil revenues to UN humanitarian work with Iraqi Kurds as well as food and medicine).

[37] *See generally* Thomas M. Franck and Georg Nolte, "The Good Offices Function of the UN Secretary-General," in Adam Roberts and Benedict Kingsbury, eds., *United Nations, Divided World: The UN's Role in International Relations* 143, at 166 (Oxford, U.K.: Clarendon Press, 2nd edn., 1993).

[38] *See* Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the U.N. Security Council of Its Chapter VII Powers* (Oxford: Clarendon Press, 1999). Another "ancillary" action taken in SC Res. 687 with potentially wide normative impact included the Council's prohibition on Iraqi claims in domestic courts (para. 29). This broad ban on claims, reminiscent of those occasionally imposed by the U.S. as part of the executive's sanctions powers (as with respect to Iran in the wake of that country's seizure of U.S. diplomats), has since reappeared in other Council resolutions (see, e.g. para. 9 SC Res. 757 (May 30, 1992)) (banning claims brought by the Federal Republic of Yugoslavia). In these cases, the Council appears to be seizing authority that might have surprised the Charter's original drafters; after all, the Council appears to be intruding on how members deal with their internal domestic courts. This suggests a gloss on Article 41: the Council can tell states *how* they are to implement economic sanctions and not merely that they must do so. Another innovation in SC Res. 687 was its insistence that Iraq renounce "all acts, methods and practices of terrorism" (para. 32). In this instance the Council was requiring renunciation of acts that the international community has repeatedly been unable to define. *See* Chapter 4. Indeed, the difficulty of defining "terrorism" as such helps to explain the more specific types of action banned by multilateral conventions, such as the hijacking of aircraft. *Cf.* Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 24 UST 564, TIAS 7570, 1971 *UN Jurid. Yrbk* 143 (September 23, 1971). Whether the Council's action will be cited (as in domestic criminal proceedings) to demonstrate the alleged international illegality of certain actions not presently covered by more specific conventions, remains to be seen.

[39] As discussed in Chapter 5, the customary law on state responsibility, while undoubtedly influenced by the ILC's Articles on the subject, will continue to be affected by the on-going practices of states and IOs. *Cf.* ILC 53rd Session Report, Draft Articles on the Responsibility of States for Internationally Wrongful Acts (adopted 2001).

sparse international judicial precedents concerning states' financial liability for violations of international law, the lack of consistency in judicial determinations of available remedies in such cases, and the arguable gaps that exist with respect to the law of remedies within specific international legal regimes.[40]

As might be expected, the precedential impact of decisions rendered by UNCC is the subject of some controversy. The UNCC, established by the Council in accordance with plans drawn up by the Secretary-General, is a hybrid of political and quasi-judicial elements. Structurally, the UNCC consists of a fifteen-member Governing Council (replicating the rotating membership of the Security Council but operating without the veto power),[41] a Committee on Administrative Matters (composed of a subset of members of the Governing Council to deal with budgetary and administrative matters), an Executive Secretary (appointed by the Governing Council) and his appointed staff, and nine commissioners (appointed by the Governing Council and divided into three panels of three to evaluate claims). According to the UN Secretary-General, the UNCC is neither court nor arbitral body but "a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved."[42] On this view, the UNCC's commissioners are mere claims adjusters engaged in the routine administration of claims. On this view, since they are not empowered to derogate from what they have been ordered to do by the Council, neither the UNCC Governing Council nor its commissioners individually are capable of exercising independent judgment, except to examine the facts of underlying claims.[43]

Given the determinations issued by the Governing Council since its creation, these views appear increasingly difficult to sustain. As even those who disparage the idea that UNCC decisions will constitute "precedents" in international law acknowledge, there are a number of similarities between the UNCC and prior international claims commissions established by bilateral or multilateral action whose decisions also have proven to be influential in international claims practice.[44] The

[40] *See generally* Malcolm D. Evans, ed., *Remedies in International Law: The Institutional Dilemma* (Oxford, U.K.: Hart Publishing, 1998); Dinah Shelton, *Remedies in International Human Rights Law* (Oxford, U.K. and New York: Oxford University Press, 2nd edn., 2004). For the difficulties encountered by one domestic court attempting to determine the relevant law for purposes of providing a remedy for a human rights violation that accords with international law, see *Filartiga* v. *Pena-Irala*, 577 F. Supp. 860 (E.D. N.Y. 1984).

[41] For most decisions (regarded as final and subject to no appeal), the Governing Council requires only nine votes. *See* Gregory Townsend, "The Iraq Claims Process: a Progress Report on the United Nations Compensation Commission & U.S. Remedies," 17 *Loy. L.A. Int'l & Comp. L.J.* 973, at 983 (1995).

[42] UN Doc. S/22559, at 7 (1991)(report by Secretary-General).

[43] *See*, *e.g.*, Richard B. Lillich and Charles N. Brower, "Opinion Regarding the Jurisdiction and Powers of the United Nations Compensation Commission, February 10, 1992", 38 *Vir. J. Int'l L.* 25 (1997).

[44] For a description of the UNCC that suggests that it is merely an adaptation of procedures established by prior international claims tribunals, see David J. Bederman, "The United Nations Compensation Commission and the Tradition of International Claims Settlement," 27 *NYU J. Int'l L. & Pol.* 1 (1994).

UNCC is, in all likelihood, likely to be regarded not as a ministerial adjunct to the Security Council but as an efficient mechanism for resolving massive numbers of claims whose structural elements are adapted from international and national models. The UNCC merges elements from the Iran-United States Claims Tribunal, with procedures adapted from U.S. mass tort litigation arising from claims for injury for asbestos or the Dalkon Shield. Notwithstanding doubts about the law that the UNCC applies,[45] it seems probable that, as with prior claims commissions, its decisions will have a wider impact in at least some areas of general public international law, despite its unusual composition and unique origins. Even the UNCC's dependence on the Security Council for applicable law and jurisdictional basis, while arguably rendering its decisions mere *lex specialis*, has a double edge. As discussed in Chapter 3, the institutional practice of the UN at times has been seen as evidence of customary international law; the UN's imprimatur may afford the UNCC's decisions a pedigree and legitimacy missing from, for example, decisions issued by the Iran-United States Claims Tribunal—a tribunal whose decisions have nonetheless proven influential in international claims practice. In addition, it seems likely that lawyers will be able to distinguish those UNCC decisions that apply only "Iraq-specific" law, perhaps invocable only against states that are the subject of Chapter VII enforcement action. Some decisions rendered by the Governing Council, such as its decision to deny Iraq's right to invoke *force majeure* as a defense to certain claims,[46] are arguably consistent with the Council's determination of Iraq's liability, but clearly depart from established general international law and are unlikely to change the applicable rules (at least with states not subject to Chapter VII sanction).[47] But other UNCC decisions appear to rely on international law and are more likely to be cited in the future to buttress, while also developing general claims under customary international law or general principles of law.[48] If the example of the Iran-United

[45] The UNCC's Provisional Rules state that the Commissioners will apply SC Res. 687 and other relevant Council resolutions, the criteria established by the Governing Council and its decisions, and, where necessary, "other relevant rules of international law." UNCC Provisional Rules for Claims Procedure, article 31, UN Doc. S/AC.26/1992/10 (June 26, 1992). As Bederman suggests, this subordinated reference to international law raises concerns about whether decisions issued either by the Commissioners or the Governing Council will or should be seen as consistent with international law or "exquisitely-developed *lex specialis*." Bederman, *supra* note 44, at 37–40. Note, however, that the choice of law clause for the Iran-United States Claims Tribunal was equally ambiguous since it directed that tribunal to "decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances." Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Article V (Algiers Accords), 20 *ILM* 223 (1981).

[46] Decision taken by the Governing Council of the United Nations Compensation Commission During its Resumed Fourth Session, at the 23rd Meeting, held on March 6, 1992, UN Doc. S/AC.26/1992/9 (1992), at 3, para. 9.

[47] For discussion of the precedential impact of SC Res. 687 with respect to the Council's options generally under Chapter VII, see Chapter 4.

[48] *See*, *e.g.*, Bederman, *supra* note 44, at 38–9 (citing UNCC references to the duty to mitigate damages and respecting compensation for lost profits, as well as to respect the rights of subrogators).

States Claims Tribunal is a guide, ambiguity as to the UNCC's choice of law or its institutional legitimacy will probably not prevent some UNCC's decisions from being cited, as have the decisions of bilateral claims tribunals, as precedents for determining the standard of compensation for nationalized property, for attribution rules governing the conduct of "agencies or instrumentalities" of states, and for principles of state responsibility for actions as varied as the "wrongful expulsion" of aliens, the "failure to protect," or "denials of justice."[49]

In addition, while the sheer magnitude of the UNCC's workload (nearly two million claims) and the unique circumstances of its creation will probably ensure that it will not become the new model for future international claims settlements, even some of the UNCC's arguable deviations from established international law may yet serve to nudge existing law in new directions. The Governing Council's contentious decision to exclude sizeable embargo-related claims are one example.[50] While some observers have criticized this exclusion as a lawless concession intended only to conserve scarce funds for relatively more meritorious claims, and argue that it is not based on either Resolution 687 or international law,[51] that decision might influence the future direction of the law. It might revive arguments raised in the Alabama Claims arbitration of 1872, for example, that international legal remedies need to distinguish between "direct" and "indirect" claims of injury.[52] Another example of a controversial UNCC decision with potential to affect the general law is its Decision 27. In that decision, the UNCC opted to give priority to the claims of individuals over the claims of governments, including Kuwait's. Although dismissed as a "calculated public relations gesture" that is not reflected in the practice of prior claims tribunals (such as the Iran-United States Claims Tribunal), the UNCC's decision might, on the contrary, come to be appreciated as a progressive, and justified, amendment to the rules of state responsibility appropriate to an age that increasingly recognizes the priority of individual rights over certain rights of states.[53] The same might be said of the Governing Council's unusually flexible, human rights-oriented acceptance of claims brought by states on behalf of not only their nationals but residents, stateless persons, and certain dual nationals.[54] These UNCC rulings may come to influence the rules governing the espousal of claims.

Interestingly, even Lillich and Brower argue that the UNCC, while in no sense an independent judicial body, must render decisions that are in accordance with international law since the Council reaffirmed Iraq's liability "under international law" in SC Res. 687. Lillich and Brower, *supra* note 43, at 26–7.

[49] *See* Bederman, *supra* note 44, at 37.

[50] Criteria for expedited processing of urgent claims [Decision 1], UN Compensation Commission, 1st Sess., 10th mtg., UN Doc. S/22885, Annex II (1991), reprinted in 30 *ILM* 1712 (1991).

[51] *See*, *e.g.*, Townsend, *supra* note 41, at 996–7; Lillich and Brower, *supra* note 43.

[52] *Compare* Lillich and Brower, *supra* note 43, at 41–9 (arguing against such a result) with John R. Crook, "Recent Development, The United Nations Compensation Commission—A New Structure to Enforce State Responsibility", 87 *AJIL* 144, at 154 (1993)(the "decision not to compensate embargo losses reflected a legal judgment that the causal link . . . was not sufficiently direct").

[53] *See generally* Shelton, *supra* note 40.

[54] *See* Townsend, *supra* note 41, at 1000–1.

Yet other possibilities for normative impact are suggested by the ways that the UNCC has applied a presumption in favor of Iraq's responsibility—evident, for example, in its Governing Council's Decision 1 extending liability to all entities "controlled by" Iraq. Such decisions may not be easy to dismiss as mere *lex specialis* arising solely from, or as the predictable consequence of, the Council's controversial grant, in Resolution 687, of "summary judgment" against Iraq for all breaches of international law.[55] Particularly if seen as decisions rendered in favor of individuals who have had their human rights violated, UNCC decisions applying such limited presumptions might be justified, and might, in turn, serve to buttress more expansive presumptions in favor of state responsibility that have been applied by, for example, the Inter-American Court of Human Rights.[56] (Note that, as with respect to other legal determinations made by the Council, public international lawyers themselves may encourage such views since the unattractive alternative would be to contend that such Council determinations were lawless, ad hoc determinations not intended for general consistent application.) In addition, not all the UNCC's decisions constitute deviations from established law. Many attempt to apply the existing rules to the actual claims being presented and, as such, are all the more likely to be cited in the future as clarifications of, or precedents under, existing law, particularly given the relative scarcity of other published precedents regarding such issues. The Governing Council's decision to solicit information from Iraq and other governments about claims pending in domestic courts, intended to avoid double recovery, while "novel" with respect to prior international claims processes,[57] for example, may ultimately be seen as only a justifiable procedural device to implement general principles of law against double recovery recognized long ago by the ICJ.[58]

7.1.3 The General Assembly

While the GA is not given the authority conferred on the Security Council to issue legally binding decisions, its powers to "discuss" and "recommend" measures

[55] *Cf.* Stanley J. Gold, "International Claims Arising from Iraq's Invasion of Kuwait," 25 *Int'l Lawyer* 713, at 715 (1991).

[56] *See*, *e.g.*, the novel burden of proof applied by the Court in the *Velásquez Rodríguez case*, 1988, Series C. No. 4, 9 Hum. Rts. L. J. 212 (requiring Honduras to prove that it had not engaged in government-sponsored "disappearances"). While this example suggests that a presumption in favor of state liability may also apply at some level in certain human rights cases, such proceedings are radically different from those in the UNCC where Iraq is severely constrained in challenging the UNCC's jurisdiction or the basis for liability. *Cf.* Rudolf Bernhardt, "Thoughts on the Interpretation of Human Rights Treaties," in Franz Matscher and Herbert Petzold, eds., *Protecting Human Rights: The European Dimension, Studies in Honour of Gérald J. Wiarda* at 70 (Köln: Carl Heymanns Verlag, 1988) (questioning the maxim, occasionally cited by the European Court of Human Rights, that individual liberties require a broad interpretation while state sovereignty requires a restrictive interpretation).

[57] *See* Townsend, *supra* note 41, at 1006 (citing Governing Council Decision 13).

[58] *See Reparation for Injuries Suffered in the Service of the UN*, Advisory Opinion, 1949 ICJ Rep. 174, at 185–6 (urging the UN to adopt unspecified procedural mechanisms to avoid the possibility of double recovery should individuals seek recovery from domestic courts while the UN pursues claims for its agents at the international level).

on any "matters within the scope of the present Charter,"[59] gives that body, at least in theory, greater discretion to engage in dispute settlement in terms of subject matter than the Council since, unlike the Council, it need not justify its involvement on the grounds that the dispute at issue poses a potential threat to international peace and security. Subject only to the vague and, as discussed in Chapter 3, historically contingent limit that it not "interfere" in states' domestic jurisdiction and not intervene in disputes or situations presently pending before the Council,[60] the GA enjoys ample discretion to involve itself in all types of disputes since it is hard to conceive of an issue that is not arguably connected to the UN's broadly defined "Purposes and Principles" (Preamble, Article 1). In addition, the GA has ample discretion to recommend virtually any action, not necessarily connected to peace and security, "for the peaceful adjustment of any situation, regardless of origin which it deems likely to impair the general welfare or friendly relations among nations" (Article 14).[61] Disputes may come to the GA at its own initiative (Articles 10 and 14) or at the request of a member (Article 35(1)), a non-member (Article 36(2)), or the Security Council (Article 11(2)).[62] Further, while the GA often contents itself with an anodyne recommendation to the disputing parties to have recourse to "peaceful means of dispute settlement" or merely recommends that the Security Council take action,[63] Article 14 anticipates that the GA itself may recommend measures for the peaceful adjustment of "any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations." While the GA is prohibited from making recommendations on disputes pending before the Council (Article 12(1)), this limit has been given a narrow (and flexible) interpretation.[64] Like the Council, the GA is empowered to set up subsidiary

[59] Apart from Articles 10 and 14, see Article 11(2) (requiring that matters on which "action is necessary" be referred to the Council). But note that the ICJ, in its Advisory Opinion in the *Certain Expenses case*, suggested that the GA could do more than take recommendatory action, since Article 18 of the Charter authorizes it to take "decisions." *Certain Expenses of the United Nations*, Advisory Opinion, 1962 ICJ Rep. 149, at 162–7. Of course, in that case, as is discussed in Section 3.2, the Court found that the GA could take legally binding action at least insofar as assessing members for the expenses of the Organization.

[60] Articles 2(7) and 12. *See also* Merrills, *supra* note 4, at 222 (noting that the "domestic jurisdiction" limit of Article 2(7) has not in practice prevented the GA from discussing human rights, civil conflict, and other highly sensitive issues).

[61] Article 14; Merrills, *supra* note 4, at 222; Conforti, *supra* note 5, at 210–14.

[62] While Article 11(2) anticipates that the Assembly may refer disputes to the Council, the Council may in effect refer a matter to the Assembly by convening a special session of the Assembly or by removing a "dispute" from its own agenda. Merrills, *supra* note 4, at 225, n. 10.

[63] *See* Amerasinghe, *supra* note 2, at 429.

[64] *See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ Rep. 136 para 28 (finding that the Assembly did not violate Article 12(1) in asking for an advisory opinion on a matter that has been under the active engagement of the Security Council). The Court noted in that case "the increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security" and indicated that "it is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects." *Id.,* at para. 27. Scholars have tended to agree with this flexible view of Article 12. *See*, *e.g.*, Conforti, *supra*

organs, including judicial bodies for purposes of dispute settlement or commissions for investigation or fact-finding, and has in fact done so.[65]

While the normative consequences of GA resolutions undertaken in its "adjudicatory mode" tend to merge with familiar debates concerning the legal impact of GA resolutions generally (see Chapter 3), the characteristics of some of the measures taken by the GA in this capacity merit separate attention. Consider two examples: the GA's repeated recommendations over time to settle long-standing disputes between Israel and Palestine and Namibia and South Africa, respectively. The normative impact of repeated Assembly actions in these cases—either in terms of resolving the underlying disputes or in proclaiming rules of law intended to be of wider consequence—are questionable, but for very different reasons.

One typical outcome—ineffectual Assembly action subsequently followed, over the long term, by possible (but inconclusive, indirect, and limited) normative implications—is suggested by some of its Middle East resolutions, such as Resolution 36/120 (D) of December 10, 1981 and subsequent GA actions to the same effect. In Resolution 36/120 the GA attempted to proclaim the following legal terms of settlement between the parties, without elaboration, attempt at legal justification, or a clearly articulated connection to the facts at issue, including: the inadmissibility of the acquisition of territory by force; the "inalienable" right of uprooted Palestinians to return to their homes and property, to exercise their right of "self-determination" without external interference, and to establish their own "sovereign state;" the duty of Israel to withdraw from all occupied Palestinian and Arab lands, including Jerusalem, and to respect prior Council resolutions regarding the historic character of that city; the illegality of the Israel Knesset's basic law proclaiming Jerusalem as the capital of Israel; and the required participation of the PLO, "the representative of the Palestinian people," in all UN efforts.[66] The controversial nature of most of these contentions, years later, suggests the GA's ineffectiveness as either a settler of disputes or general law-maker in the course of engaging in dispute settlement.[67]

note 5, at 212–13 (approving the GA's invitation to the U.S. to give effect to the ICJ's ruling in the *Nicaragua case* notwithstanding the Council's refusal to do so and rejecting the argument by the U.S. that Article 94(2), which confers on the Council the discretion to enforce ICJ decisions, deprives the GA of power to make recommendations on the matter).

[65] *Compare* UN Charter, Articles 22 to 29; for examples of commissions of investigation, mediation, and conciliation established by the GA, see Amerasinghe, *supra* note 2, at 429; Merrills, *supra* note 4, at 223–6. As Merrills notes, the Council or the GA may also appoint individuals to act as mediators or fact-finders. *Id.* On the GA's power to establish an independent judicial body, see *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 1954 ICJ Rep. 47. As that case indicates, the GA may be required to establish an independent judicial body, to the extent it seeks that type of dispute settlement, since it is itself incapable of organizing itself as such a body. For a review of the merits of UN fact-finding, see, e.g., E.A. Plunkett, "UN Fact-finding as a Means of Settling International Disputes," 9 *Va. J. Int'l L.* 154 (1968–9); M. Cherif Bassiouni, "The Institute for Global Legal Studies Colloquium: The UN and the Protection of Human Rights: Appraising UN Justice-Related Fact-Finding Missions," 5 *Wash. U.J.L. & Pol'y* 35 (2001).

[66] A/Res/36/120, December 10, 1981.

[67] Notably, the GA's subsequent attempts to secure international legal recognition for Palestine, as in Resolution 43/177 (1988)(acknowledging the proclamation of the "State of Palestine" by the Palestine

Yet even in this instance, the GA's actions have probably had some subtle, if difficult to measure, legal effects. The line of normative development between Resolution 36/120, comparable resolutions before and since, and the controversial inclusion of forcible displacement of internal groups as a crime against humanity in the Rome Treaty to establish the ICC, for example, while impossible to trace and undoubtedly faint, probably exists.[68]

The GA's comparably legalistic terms of settlement with respect to Namibia, coincidentally issued on December 10, 1981, provide an interesting point of comparison. That resolution, viewed in light of the UN's ultimately successful efforts to secure Namibian independence and supervise that country's first elections, would appear to fare much better in terms of probable normative impact. The GA's purportedly legal determinations in that resolution, *inter alia*, recognizing the legal rights of the South West People's Organization "as the sole and authentic representative of the Namibian people," proclaiming the need to protect the "inviolable" resources of Namibia from exploitation from a foreign power, affirming the inalienable rights of the people of Namibia to self-determination, freedom, and national independence, and the rights of the UN Council for Namibia as legal administering authority for the territory pending independence—all would become essential components of the final settlement of the Namibia controversy, culminating in Namibian independence.[69] In this case, the GA's efforts to settle the dispute concerning South Africa's claims over Namibian territory, consisting of numerous efforts to assist Namibia's transition from a mandated territory to statehood, led to a number of purportedly legally binding determinations, including resolutions to terminate South Africa's Mandate (Resolution 2145 (1966)), to establish an administrating authority (Resolution 2248 (May 19, 1967)), and to assure members' compliance with legal proclamations issued by that administering authority (see, e.g., Resolution 3295 (Dec. 1974)(requesting members to take all appropriate measures to comply with Council Decree No. 1)). Moreover, some of these legal actions won the imprimatur of the UN's judicial organ. The ICJ affirmed the GA's legal power to terminate the Mandate as well as the Council's power to enforce the consequences on South Africa in a 1971 Advisory Opinion that, as discussed in Chapter 2, significantly broadened these organs' respective implied powers.[70]

It is tempting to suggest, as some have, that the GA played a rare "constitutive" role in this instance, that is, in helping to establish Namibian statehood. Yet that

National Council and deciding that the designation "Palestine" should be used throughout the UN system) failed to secure Palestine's admission to the WHO a year later. *See* Kirgis, *supra* note 32, at 158–63. Nonetheless, the GA did secure the PLO's legal right to observer status in 1974 and many UN specialized agencies followed the Assembly's lead. *See*, *e.g.*, Kirgis, *supra* note 32, at 373.

[68] *See* articles 7(1)(d) and 7(2)(d), Rome Statute of the International Criminal Court, 2187 UNTS 3 (entered into force July 1, 2002)(defining crimes against humanity to include "deportation or forcible transfer of population").

[69] A/Res/36/121, December 10, 1981.

[70] *See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution, supra* note 5, and see Chapter 2.

understates the normative consequences of the Assembly's role in that instance. In that case the GA's decisions also proved to have consequential effects on UN institutional law (as with respect to the doctrine of implied powers and the legal authority of the UN to administer a territory in certain instances), on the scope of cognizable human rights under customary law (as with respect to the illegitimacy of apartheid and its inconsistency with South Africa's duties under the Mandate system), and on the interpretation of the right to "self-determination." But such conclusions must be tempered by the number of actors that came to be involved over the years in the *Namibia case*, including other UN organs such as the Security Council and the ICJ, and lingering uncertainties as to the viability and the scope of any legal precedents sought to be established under the GA's mere recommendatory powers. It is, to this date, unclear whether, for example, the GA's attempt to secure for the UN Council for Namibia all the powers and functions needed to administer that territory was ever regarded by all members as a legitimate exercise of its power, fully legal under the Charter, or whether any comparable attempt by the GA, in the course of dispute settlement, as for Palestine and the West Bank, would be regarded as legitimate or legal.[71]

Similar uncertainties bedevil the evaluation of the normative consequences of another singular GA action, this time taken in response to a request by the British government for the GA to resolve disputes over that country's Mandate for Palestine. What are we to make of Resolution 181, A/519 (November 29, 1947) which recommended the termination of that Mandate and, in effect, established the Jewish state? The consequences of the GA's action on the ground could not have been clearer: immediate recognition of the "state of Israel" in some quarters, complaints that the action threatened the peace and created a legal vacuum in others, and armed violence between Arab and Jewish groups within the territory.[72] The debates over the legality of what the GA did, however, continue to this day. On one side have been those for whom what the GA did in 1947 was nothing more than what in 1971 the ICJ proclaimed it was authorized to do with respect to South Africa/Namibia: terminate a League of Nations mandate pursuant to its supervisory powers over such mandates and, in effect, set in motion events that would result in a new state. On the other side are those who have challenged the UN's (or the GA's) "capacity to convey title," since the UN cannot assume the role of territorial sovereign, is not a state, and the GA cannot undertake binding decisions, particularly when matters of domestic jurisdiction are implicated. For commentators such as Ian Brownlie, "the resolution of 1947 containing a partition plan for Palestine was probably *ultra vires*, and, if it was not, was not binding on

[71] *See*, *e.g.*, Halderman, *supra* note 21, at 65–6 (arguing that even reportedly "recommendatory" action by the GA that assumes a quasi-adjudicative power to settle a dispute assumes a power never conferred on the GA and constitutes "wrongful intervention"). As Fredric Kirgis indicates, doubts were expressed by some member states as to the legality of the GA's action with respect to Namibia. Kirgis, *supra* note 32, at 384 (noting the UK Minister of State for Defence Procurement's statement, in 1988, that the GA's action was outside its competence and "null and void").

[72] *See*, *e.g.*, Kirgis, *supra* note 32, at 370–1.

member states in any case."[73] In light of such debates, a key question with respect to normative effect, namely, whether a legal precedent was established that can be applied to comparable instances, remains unresolved.

7.1.4 The Secretary-General

While the Secretary-General's dispute settlement powers are sparsely defined in the Charter, in practice, that office has been an even more active participant in trying to resolve disputes than either the GA or the Security Council. The Secretary-General's role in this respect has been to fill gaps in the system instituted by the Charter—as where the political organs are either deadlocked or disinterested.[74] As with respect to the Council and the GA, the Secretary-General has tried to nudge members to settle their disputes peacefully, and has functioned as "catalyst for compromise."[75] Most often, the Secretary-General has acted—on his own initiative or at the request of particular parties, a regional organization or grouping, or another UN organ—as fact-finder, negotiator, mediator, conciliator, or (more rarely) de facto arbitrator. As commentators have noted in describing the Secretary-General's "good offices" function, much of this activity is necessarily not visible—either to the public or even perhaps to other UN organs. Indeed, as one Secretary-General put it, that office's effectiveness in preventing or resolving disputes may turn on making the UN's glass structure "opaque when necessary."[76] On the other hand, as is suggested by the prominent and substantive roles played by the Secretary-General in negotiations involving five Central American republics (Esquipulas II), Nicaraguan elections (under ONUVEN), the El Salvadorean civil war (resulting in the San Jose Human Rights Accord of 1990), and in obtaining South Africa's agreement to hold Namibian elections, some of the Secretary-General's successes in mediating conflicts and proposing concrete terms for resolution are now reflected in "hard" sources of law, such as treaties.[77]

Much of the normative impact of the Secretary-General's dispute settlement efforts has been felt within UN institutional law and, specifically on the powers of that office and the Secretariat. As early as 1946, Secretary-General Trygve Lie, for example, claimed an independent power of investigation in order to try to solve a concrete dispute, even though the Council was considering establishing in that instance its own commission of inquiry. Other Secretary-Generals since have claimed the same power, as well as the power to propose specific solutions to an on-going dispute, independent of proposals made by other UN organs.[78]

[73] Brownlie, *supra* note 21, at 164.

[74] Amerasinghe, *supra* note 2, at 429.

[75] Franck and Nolte, *supra* note 37, at 179; see also Merrills, *supra* note 4, at 226–32.

[76] Franck and Nolte, *supra* note 37, at 144 (quoting Perez de Cuellar).

[77] *See*, *e.g.*, *id.*, at 152–5; 164–5.

[78] *Id.*, at 144–5; see also Edward McWhinney, *United Nations Law Making: Cultural and Ideological Relativism and International Law Making for an Era of Transition* at 145–50 (New York: Holmes & Meier Publishers, 1984); Conforti, *supra* note 5, at 222. Indeed, Franck and Nolte attribute a number of the Secretary-General's notable failures to resolve disputes to instances in which

Institutional practice has also generated some clear limits to these inchoate powers, such as the Secretary-General's duty to step aside if the political organs act to rescind his authority, to comply with the express or implied directions suggested by those organs, and to abide by the Charter.[79]

The Secretary-General's good offices function has also led to a substantial body of institutional practice with respect to delegation. The Secretary-General has often delegated his mediator's role (to "Special Representatives" when acting on the basis of a mandate from a political organ and to "Personal Representatives" when acting on the Secretary-General's own authority), except when delegation is specifically excluded (as when the Secretary-General is tasked with a role in his personal capacity).[80] As Franck and Nolte's description of the history of that office's roles in particular disputes suggests, the Secretary-General's inducements to disputing parties to craft solutions that may deviate from the official positions taken by the GA or the Council imply at least one substantive addendum to the rules on the peaceful resolution of disputes contained in the GA's Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States:[81] a state may reject GA resolutions and still enter into negotiations with the Secretary-General without violating its Charter responsibilities.[82] The Secretary-General's role as fact-finder/investigator has also laid the groundwork for later action by UN political organs: as with respect to the Secretary-General's findings, from March 1984 onwards, that Iraq had indeed used chemical weapons on Iran.[83]

But while the Secretary-General's deference and ultimate responsibility to the UN's political organs explains why that office is included in this part as a non-judicial dispute settler, the Secretary-General's success as an adjudicator may be greatest when that official acts outside those organs' political constraints and on the basis of his own personal authority as an impartial or independent third party.[84] This is clearest when the Secretary-General is called to act as a "binding mediator," as he did when asked by the governments of France and New Zealand in 1986 to resolve questions, on the basis of "principle and equity," arising from the sinking of the *Rainbow Warrior* in Auckland Harbor, New Zealand, as a result of the acts of two French government agents. In that instance, the Secretary-General was asked to give a ruling as to reparations and as to the handling of the two French agents who had pleaded guilty, been convicted, and were serving a ten-year sentence in New Zealand. The Secretary-General issued a brief "ruling"

his office is given little independent room to maneuver by the UN's political organs. Franck and Nolte, *supra* note 37, at 162–4 (discussing the Council's role in the dispute over Libya's failure to extradite suspected terrorists and the Assembly's attempts to mediate the Middle East conflict).

[79] Franck and Nolte, *supra* note 37, at 145, 174–5.

[80] *Id.*, at 176–7 and n. 161.

[81] GA Res. 2625 (XXV) (October 24, 1970).

[82] Franck and Nolte, *supra* note 37, at 149 and 151 (discussing disputes involving Afghanistan and Cambodia respectively).

[83] *See id.*, at 160. *See also* Christiane Bourloyannis, "Fact-Finding by the Secretary-General of the UN," 22 *NYU J. Int'l L. & Pol.* 641 (1990).

[84] Thomas M. Franck, *Fairness in International Law and Institutions* at 206–17 (New York: Clarendon Press, 1995); Merrills, *supra* note 4, at 229–31.

in response, finding in relevant part (1) that the Prime Minister of France should convey "a formal and unqualified apology for the attack, contrary to international law;" (2) that the French government pay $7 million to New Zealand as compensation; (3) that the two convicted individuals be transferred to a French military facility on the island of Hao in French Polynesia where they would serve a sentence of three years; and (4) that France not oppose certain actions on New Zealand imports being contemplated by the EEC entities.[85] The ruling also anticipated binding arbitration with respect to any differences that would arise concerning its implementation.[86] As is expected of any arbitral decision, that ruling resolved the dispute between the parties, but it is impossible to tell to what extent the Secretary-General genuinely acted as an arbitrator and to what extent he merely legitimated an agreement between the two parties. Despite the ambiguity of the Secretary-General's role, his laconic ruling has been subsequently cited by then Special Rapporteur Arangio-Ruiz, charged with codifying rules on state responsibility within the ILC, as an example of the forms of satisfaction needed to satisfy injured states.[87]

7.1.5 The Human Rights Commission

Another well-known UN "political" entity which has assumed a role in dispute settlement, in this instance disputes between individuals asserting the existence of situations involving a "consistent pattern of gross and reliably attested violations" of human rights and the states that they accuse, is the UN Human Rights Commission, established by ECOSOC in 1946, to serve as the UN's principal organ for human rights. Unlike most other human rights compliance mechanisms, which are composed of experts appointed in their personal capacity, the members of the Human Rights Commission consist of government representatives. The efforts of that body to promote compliance with human rights include a "petition-redress" procedure adopted pursuant to ECOSOC Resolution 1503 (XLVIII). Under that procedure, the Commission's fifty-three elected state representatives, selected with an eye to regional representation, attempt to identify, from petitions submitted to the committee by individuals and non-governmental organizations, which "situations" of alleged gross human rights abuses merit consideration.[88] Under the

[85] *Ruling Pertaining to the Differences Between France and New Zealand Arising From the Rainbow Warrior Affair*, (dated July 6, 1986), 81 *AJIL* 325 (1987).

[86] *Id.*, at 327–8. Indeed, the Secretary-General's ruling was affirmed in an agreement between the parties that became the subject of a later arbitral ruling. *See Rainbow Warrior* (*New Zealand* v. *France*), France-New Zealand Arbitration, 82 ILR 499 (1990).

[87] *See* Stephen C. McCaffrey, "The Forty-Second Session of the International Law Commission," 84 *AJIL* 930, at 940 (1990)(discussing Arangio-Ruiz's report).

[88] For a description of these procedures, see, e.g., Analysis of Existing UN Procedures Dealing with Communications Concerning Violations of Human Rights, E/CN.4/1317, February 8, 1979, reproduced in B.G. Ramcharan, *The Principle of Legality in International Human Rights Institutions: Selected Legal Opinions*, at 304 (Boston: M. Nijhoff, 1997); Philip Alston, "The Commission on Human Rights," in Philip Alston, ed., *The United Nations and Human Rights: A Critical Appraisal* 126 (Oxford, U.K.: Clarendon Press, 1992). The Commission and its various sub-commissions' rules

Commission's much criticized procedures for handling 1503 complaints, governments may be invited to respond but neither the complainant nor the public generally is necessarily given much information. In the absence of a decision to go public with a particular situation, as with respect to cases that result in Resolution 1235 procedures or in appointment of a special rapporteur,[89] Commission deliberations are shrouded in secrecy. Those familiar with the Commission's processes—in which detailed and credible complaints from human rights NGOs, met with only a brief government reply, may be dismissed after only one hour of discussion[90]—complain that the highly political Commission functions as "an undisguised stratagem for using the United Nations" to conceal, not expose, human rights violations.[91] As a result, the Commission, at least in this capacity, has not had the normative impact of, for example, certain ILO committees charged with investigating alleged violations of labor rights.[92] Nonetheless, it seems clear that the establishment of the 1503 procedure itself has had some impact, even if indirect, on the law—as is suggested by the U.S. Restatement of Foreign Relations Law. The Restatement, echoing Resolution 1503, includes a "consistent pattern of gross violations of internationally recognized human rights" in its relatively short list of customary "*erga omnes*" norms.[93] In addition, when the Human Rights Commission "goes public" with a case, as it did with respect to Chile during the Pinochet era, its own findings, and, more significantly, those of its commissioned experts, at times include normative conclusions that echo (and help to affirm) those issued by the more "judicial" human rights bodies discussed in Chapter 8.[94]

7.1.6 The Secretariat

The role of the UN Secretariat in resolving disputes extends beyond the relatively high-profile disputes handled by its Secretary-General. It is not uncommon for

for handling these complaints include detailed "standards and criteria" for "admissible" communications, including rules as to contents, exhaustion of domestic remedies, and timeliness. *See*, *e.g.*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution 1 (XXIV), 1971, in Henry J. Steiner and Philip Alston, *International Human Rights in Context* at 614 (New York: Oxford University Press, 2nd edn., 2000). Steiner and Alston estimate that the Commission receives, on average, some 50,000 complaints each year and that the 1503 procedure has subjected 75 states to some level of scrutiny between 1972 and 1999. *Id.*, at 616.

[89] *See* Alston, *supra* note 88.

[90] Steiner and Alston, *supra* note 88, at 615–18 (describing the handling of Amnesty International's complaint against Saudi Arabia during the Commission's 1999 session).

[91] Steiner and Alston, *supra* note 88, at 618 (quoting Amnesty International).

[92] *See* discussion of ILO procedures in this Chapter and in Chapter 9.

[93] *Restatement (Third) of the Foreign Relations Law of the United States*, sec. 702 and comments m and n (1987).

[94] *See, e.g.*, the statement by the Human Rights Committee of April 26, 1979 containing Chile's responses, and the views of the UN's legal office, in Ramcharan, *supra* note 88, at 95–100 and the Reports of the Expert on the Question of The Fate of Missing and Disappeared Persons in Chile, contained in *id.*, at 359 and 369 (including detailed findings as to the imputability of disappearances to the Chilean state and that government's responsibility under the doctrine of state responsibility).

members or political organs to refer a legal question to the UN's legal office for interpretative assistance, even when that issue clearly involves an active, highly contentious dispute among members. While such questions frequently involve matters of procedure, the pages of the UN Juridical Yearbook are filled with memoranda from the UN Office of Legal Affairs (OLA) dealing with contentious matters of legal substance, touching on virtually every subject typically covered in treatises on international institutional law.[95] While such memoranda do not purport to be legally authoritative and derive no support from an explicit Charter provision to this effect, they often prove conclusive and are routinely cited in support of institutional practices that may, de facto and perhaps de jure, bind members once "accepted" by them (see Chapter 2's discussion of institutional practice). The authoritative nature of OLA opinions is enhanced by the fact that the many substantive specialized units within the UN do not have their own lawyers and rely on that office for legal advice, thereby permitting that office to offer advice that both assumes and, in turn, enhances consistent institutional practices.[96] With respect to human rights, for example, OLA legal memoranda have successfully resolved disputes concerning alleged jurisdictional conflicts between various UN bodies capable of handling human rights disputes,[97] or contesting the legality of actions delegating investigating authority to the Secretary-General.[98] Such legal memoranda have also addressed the ability of the Human Rights Commission to study situations involving gross violations or to exercise its discretion with respect to disclosure of complaints.[99] Its decisions have provided legal justifications not merely for the adoption of Resolution 1503 procedures discussed above but, as through its opinions concerning the broad scope of privileges and immunities enjoyed by individuals tasked by the Human Rights Commission or its sub-bodies, have made the work of such bodies possible.[100]

Further, OLA opinions have been the basis for giving more precise content to the distinct dispute settlement roles exercised by UN bodies, including the Secretary-General. Thus, an OLA opinion of 1977 enumerates the criteria for selection of cases and the types of action that can be taken by the Secretary-General when asked to extend "good offices" in connection with certain human rights matters.[101]

[95] For one representative sample, containing legal opinions issued by the UN Legal Office in response to requests by UN human rights bodies, see Ramcharan, *supra* note 88.

[96] *See* Philip Alston, "Book Review: B.G. Ramcharan, *The Principle of Legality in International Human Rights Institutions*," 8 *EJIL* 686 (1997) (noting the formalistic, legalistic style of argumentation in such memoranda, which, although not cast as "legal opinions," rely heavily on prior institutional practice). But there is no guarantee that all offices within the UN will invariably adhere to the same legal view. *See*, *e.g.*, examples presented in Kirgis, *supra* note 32, at 81–3, wherein the UN Secretary-General in 1988 and the UN Legal Counsel in 1963 appeared to take different legal routes to justify the conclusion that the organization had the right to visit an imprisoned staff member.

[97] *See*, *e.g.*, Ramcharan, *supra* note 88, at 7, 98 (memoranda establishing the legality of concurrent action by various human rights bodies).

[98] *Id.*, at 15.

[99] *Id.*, at 79–81.

[100] *See, e.g., id.*, at 125 and 307.

[101] *See*, *e.g., id.*, at 271 (indicating that the Secretary-General can, in such cases, request information, request the government to take measures to guarantee the safety of threatened persons, ask for a stay of execution, clemency or pardon, or request that the person be permitted to leave the country).

Other memoranda have enumerated the contents, evidentiary criteria, standards, and rules of procedure applied in human rights fact-finding,[102] and defined the meaning of "direct contacts," as well as the categories of issues that may be raised with governments under such human rights procedures.[103] It is apparent that the OLA's opinions have "clarified" the law in ways that have probably prevented disputes from arising in more formal fora.[104] Of course, not all OLA opinions have settled the disputes presented to that office and there is evidence that this office has, on occasion, refused or delayed giving a response as a result of political pressure.[105]

7.2. In Other IOs

7.2.1 Regional Organizations

All three of the UN's main organs have, at times, coordinated their efforts with those of regional organizations or attempted to refer matters to such bodies. At other times, members of the Security Council, especially the U.S., have attempted to argue that certain regional interventions (as with respect to the OAS's intervention in Guatemala in 1954) can displace action by the Security Council.[106] Such incidents have led to normative debates concerning the interplay of Chapters VI and VIII of the UN Charter and, more specifically, the respective rights of regional organizations, as compared to the Security Council, concerning intervention in disputes likely to disrupt at least the "regional" peace.[107]

Contentious debates along these lines, in respect of Latin America, have led to a number of high profile confrontations in which particular states, most notably Cuba and Nicaragua, have attempted to have their disputes considered before UN

[102] *Id.*, at 280. [103] *Id.*, at 293.

[104] *See*, *e.g.*, Alston, *supra* note 96 (discussing a November 1997 OLA opinion given to North Korea that concluded that its planned unilateral denunciation of its ratification to the International Civil and Political Covenant would not be legal absent agreement by all other state parties to the Covenant).

[105] *See*, *e.g.*, McWhinney, *supra* note 78, at 150–3 (citing various Cold War-era instances of timidity and attributing these to the pressures imposed by the super-powers on the UN Secretariat).

[106] *See*, *e.g.*, Merrills, *supra* note 4, at 280–4.

[107] Under Article 52(2) of the UN Charter, there appears to be a presumption in favor of the use of regional institutions to attempt to solve disputes over peace and security but Article 52(4)'s "savings clause," permitting the Council to investigate disputes and permitting states to refer such disputes to the Council, has served to confuse matters. *Cf.* Merrills, *supra* note 4, at 283 (arguing that the presumption in favor of regional settlement does not displace the Council's ultimate responsibility for such matters or the right of a state to take a dispute to the Council) with Hummer and Schweitzer, *supra* note 2 (arguing that the Council's ability to propose recommendations to resolve disputes under Articles 36–7 does not become effective until regional attempts at dispute settlement fail). For discussion of relevant practice, see *id.*, at 843–53. *See also* "An Agenda for Peace," A/47/277-S/24111, June 17, 1992 (UN Secretary-General's report outlining frameworks for peacekeeping, including for required involvement in peacekeeping and dispute settlement).

political bodies and not just OAS fora.[108] In 1962, Cuba's efforts to secure an ICJ advisory opinion challenging the legality of the OAS's embargo measures, and, specifically, the OAS's suspension of Cuba's membership, were narrowly averted amidst Security Council debates that some regard as establishing certain general legal precedents. In that instance, the Council affirmed the legality of the OAS's freedom of action. It therefore affirmed the general principle that regional organizations were free to determine their own membership based on "genuine affinities."[109] Nicaragua appealed to the Security Council in 1982 and again in 1983 against acts taken by the U.S. and resisted appeals by some other OAS states to have the matter resolved by the OAS Council.[110] Neither the Security Council nor the OAS Council took definite action in the *Nicaragua case* and the conflict of jurisdiction issue emerged in the course of Nicaragua's complaint to the ICJ in 1984. The ICJ rejected U.S. arguments that mediation under the Contadora process involving the OAS constituted a "regional arrangement or agency" within Article 52 whose potential needed to be exhausted before the Court could properly assume jurisdiction. A majority of the ICJ judges denied that the Contadora process could properly be regarded as a "regional arrangement" for Chapter VIII purposes and denied that there was any requirement of prior exhaustion of regional negotiation processes as a precondition to seizing the Court.[111] While the question of the relative primacy of regional and UN dispute settlement remains murky under the Charter, cases such as these, involving simultaneous attempts by IOs to engage in dispute settlement, have led to important interpretations of key Charter terms, including the meaning to be given to "regional arrangement or agencies" for purposes of Chapter VIII. They have also led to regional attempts to clarify such questions, including through constitutional amendment.[112]

Whether defined to include only those "arrangements" anticipated by Article 52 of the UN Charter or more broadly,[113] regional organizations have been frequently

[108] For a survey of many of these, see Hummer and Schweitzer, *supra* note 2, at 843–8 (summarizing cases which were initially brought to the SC but that were referred back to the OAS by the SC as well as instances in which both the OAS and UN organs were used in parallel). For a survey of the practice of the OAU (now African Union) and the Arab League with respect to the question of regional versus UN priority on dispute settlement, see *id.*, at 850–3 (concluding that with respect to these organizations, the principle of the priority of regional dispute settlement "has been consistently realized").

[109] *See id.*, at 844–5.

[110] *See id.*, at 847–8.

[111] *Nicaragua case*, Jurisdiction of the Court and Admissibility, 1984 ICJ Rep. 391, at 440; *see also* Hummer and Schweitzer, *supra* note 2, at 847–8.

[112] *See, e.g.*, Hummer and Schweitzer, *supra* note 2, at 849–50 (discussing modifications to the Rio Treaty as well as interpretations issued by the legal department of the OAS's Secretary-General).

[113] *See, e.g.*, *supra* note 2 (definition of regional organizations). For one UN Secretary-General's attempt at a broader formulation of "regional arrangements and agencies," see "An Agenda For Peace," *supra* note 107, at 970 (para. 61)(arguing the Charter deliberately omits a precise definition of the term and allows flexibility to consider not only treaty-based organizations, but those created for mutual security and defense, for general regional development or cooperation on a particular economic topic or function, or for groups "created to deal with a specific political, economic or social issue of current concern"). The Secretary-General identified, as examples, apart from the usual

involved in dispute settlement independent of UN action, although few of them have been as fully engaged in these efforts as the UN Secretary-General.[114] Many regional organizations, like the UN, have, as one of their aims, the encouragement of peaceful settlement of disputes by the methods enumerated in Article 33 of the UN Charter.[115] All such organizations, whether explicitly established with dispute settlement in mind, provide opportunities for prior consultation and negotiations in connection with existing or potential disputes.[116] While some IOs have attempted more formal structures for this purpose,[117] the most common form of institutional involvement has been informal—as through the "good offices"

organizations, the Organization of the Islamic Conference, the Association of South-East Asian Nations, the Friends of the Secretary-General (involving El Salvador and the OAS), and the Conference on Security and Cooperation in Europe (CSCE). *Id.*, at para. 62. For discussion of the CSCE's claim to Article 52 status, see Hummer and Schweitzer, *supra* note 2, at 832–5 (concluding that it fulfills all the Chapter VIII requisites except that it is not based on an international treaty serving as its charter and proposing that the UN's practice suggests an emphasis on real capacity to act as a regional entity and not formal criteria).

[114] According to one estimate, the OAS attempted mediation in 13 out of the 23 internal American disputes arising between 1948 and 1978; the Arab League in 16 out of the 27 significant internal Arab conflicts that arose between 1945 and 1978; and the OAU in 20 of 31 internal African disputes between 1963 and 1977. Hummer and Schweitzer, *supra* note 2, at 846, 851, and 852.

[115] *See*, *e.g.*, article 4(e) of the Constitutive Act of the African Union (entered into force May 26, 2001) (text available at http://www.africa-union.org/About_AU/AbConstitutive_Act.htm); article 25, Charter of the OAS.

[116] This may even be the case with respect to arrangements premised on "collective security"and not "dispute settlement." Thus, Merrills notes that the North Atlantic Council of NATO indicated, in 1956, that disputes among members which cannot be settled by direct negotiation should be submitted to the good offices of the organization before turning to any other organization. Merrills, *supra* note 4, at 260. For an attempt to distill legal commitments within NATO to engage in prior consultation prior to undertaking certain acts, see Fredric L. Kirgis, "NATO Consultations as a Component of National Decision-Making," 73 *AJIL* 372 (1979).

[117] The predecessor to the African Union, the OAU, for example, initially created a Commission of Mediation, Conciliation and Arbitration, permitting these functions to be undertaken by a panel of twenty-one members elected by the OAU assembly, but these procedures have never been used. Merrills, *supra* note 4, at 264. *See also* T.O. Elias, "The Commission of Mediation, Conciliation and Arbitration of the Organization of African Unity," 40 *Br. Yrbk Int'l L.* 336 (1964). Although later renamed and turned into an ad hoc committee on inter-African disputes, it was never utilized. Hummer and Schweitzer, *supra* note 2, at 829, n. 144. For a description of the various forms of dispute resolutions contemplated under MERCOSUR, consisting of consultations (through MERCOSUR's Trade Commission), ordinary litigation in national courts, and binding arbitration, see Nadia de Araujo, "Dispute Resolution in MERCOSUR: The Protocol of Las Lenas and the Case Law of the Brazilian Supreme Court," 32 *U. Miami Inter-Am. L. Rev.* 25 (2001). The Arab League's Council of Foreign Ministers is empowered to consider disputes and can refer them to a "*commission de règlement pacifique des differends arabes*." Hummer and Schweitzer, *supra* note 2, at 831. On occasion, the Security Council has referred disputes back to the Arab League for regional dispute settlement. *Id.* Many of the OAS's political organs, including its General Assembly, Meeting of Consultation of Ministers of Foreign Affairs, Permanent Council, and the now-defunct Inter-American Committee on Peaceful Settlement, have played some role in dispute settlement, as has its Secretary-General. Merrills, *supra* note 4, at 262–3. There is a substantial literature on the role of regional organizations in dispute resolution and the broader question of conflict prevention. *See*, *e.g.*, Davis Brown, "The Role of Regional Organizations in Stopping Civil Wars," 41 *A.F.L. Rev.* 255 (1997); Paul Martin, "Regional Efforts at Preventive Measures: Four Case Studies on the Development of Conflict-Prevention Capabilities," 30 *NYU J. Int'l L. & Pol.* 881 (1998).

intervention of their respective Secretaries-General or other high-level officials, or through establishment of ad hoc commissions to apply "familiar techniques in an institutional setting."[118] As with respect to UN political bodies, the involvement of political organs of regional organizations may produce normative effects that extend beyond the dispute at issue. The involvement of the OAS and the UN Secretaries-General in the Contadora process, for example, produced resolutions in both the UN and the OAS General Assemblies that implicitly expanded the institutional competence (and, arguably, implied powers) of both of those officials.[119] Indeed, regional proposals for settlement or for sanctioning states that violate proposed terms often have won the endorsement of bodies such as the UN General Assembly or the Security Council.[120]

7.2.2 The IMF

The IMF is one of the few organizations that explicitly puts some modes of dispute settlement in the hands of political organs. The IMF Articles put the power of interpretative judgments, including with respect to disputes among members, in the hands of its Executive Directors, a body of twenty that is at least technically, in permanent session at the Fund's headquarters in Washington, DC. Appeals from Directors' judgments go before the Board of Governors of the Fund.[121]

[118] *See*, *e.g.*, Merrills, *supra* note 4, at 270; for examples, see, e.g., *id.*, at 266–72.

[119] *See* Hugo Caminos and Roberto Lavalle, "New Departures in the Exercise of Inherent Powers by the UN and OAS Secretaries-General: The Central American Situation," 83 *AJIL* 395 (1989)(discussing the impact of GA Res. 42/1, OAS Resolution 870 (XVII-O/87), and the Esquipulas II Agreement, including the unprecedented involvement of both of these officials in a body whose other members included governments, and the International Verification and Follow-up Commission).

[120] *See*, *e.g.*, GA Res. 104 (XIX), December 5, 1984, endorsing the OAU's setting of a referendum for the Western Sahara despite Morocco's resistance.

[121] Article XXIX (formerly article XVII). Article XXIX provides:

(*a*) Any question of interpretation of the provisions of this Agreement arising between any member and the Fund or between any members of the Fund shall be submitted to the Executive Board for its decision. If the question particularly affects any member not entitled to appoint an Executive Director, it shall be entitled to representation in accordance with Article XII, Section 3(*j*).
(*b*) In any case where the Executive Board has given a decision under (*a*) above, any member may require, within three months from the date of the decision, that the question be referred to the Board of Governors, whose decision shall be final. Any question referred to the Board of Governors shall be considered by a Committee on Interpretation of the Board of Governors. Each Committee member shall have one vote. The Board of Governors shall establish the membership, procedures, and voting majorities of the Committee. A decision of the Committee shall be the decision of the Board of Governors unless the Board of Governors, by an eighty-five percent majority of the total voting power, decides otherwise. Pending the result of the reference to the Board of Governors, the Fund may, so far as it deems necessary, act on the basis of the decision of the Executive Board.
(*c*) Whenever a disagreement arises between the Fund and a member which has withdrawn, or between the Fund and any member during liquidation of the Fund, such disagreement shall be submitted to arbitration by a tribunal of three arbitrators, one appointed by the Fund, another by the member or withdrawing member, and an umpire who, unless the parties otherwise agree, shall be appointed by the President of the International Court of Justice or such other authority as may have been prescribed by regulation adopted by the Fund. The umpire shall have full power to settle all questions of procedure in any case where the parties are in disagreement with respect thereto.

Provisions similar to those in the Fund's Articles of Agreement have been adopted for other international financial institutions, and are usually discussed as forms of internal "interpretation" and not "dispute settlement."[122] Nonetheless, it is clear that the decisions issued by the Fund and these other bodies, published and unpublished, include many directed at a particular member and attempting to resolve a particular query or dispute concerning interpretation.

The general reluctance of the Fund and Fund commentators to categorize this aspect of the organization's work as involving "dispute settlement," can be understood as part and parcel of the Fund's efforts to create, within that organization, a *sui generis* regime that (1) puts the responsibility of interpreting substantive Fund commitments in the hands of its members and not in the Fund's secretariat or in an external "expert" or judicial body such as the International Court of Justice;[123] (2) aspires primarily to anticipate, prevent, and avoid elevating interpretative questions to the category of contentious "disputes;"[124] (3) attempts to reach decisions that achieve routine compliance because they reflect consensus or at least widespread concurrence;[125] and (4) permits "the adjustment of policies to changing

Neither the Board of Governors nor the Executive Directors of the Fund can be characterized as "impartial" or "expert" bodies. The Board of Governors consists of one Governor and one alternate appointed from each Fund member, with votes cast under the Fund's weighted voting scheme. *See* article XII, sections 2 and 5. Five members of the Executive Board are appointed by the five members having the largest quotas; the other fifteen are elected by the other members. It too votes in accordance with the Fund's weighted voting formula. Article XII, sections 3 and 5.

[122] *See*, *e.g.*, F. A. Mann, "The 'Interpretation' of the Constitutions of International Financial Organizations," 1968–9 *Br. Yrbk Int'l L* 1; Joseph Gold, *Voting and Decisions in the International Monetary Fund: An Essay on the Law and Practice of the Fund* at 171–89 (Washington, DC: IMF, 1972); Ervin P. Hexner, "Interpretation by Public International Organizations of their Basic Instruments," 53 *AJIL* 341 (1959). *See also* Chapter 4.

[123] *See*, *e.g.*, J.E.S. Fawcett, "The Place of Law in an International Organization," 36 *Brit. Yrbk Int'l L.* 321, at 322–4 (1960)(discussing the Fund's interpretative provisions as a "substitute for judicial control"). Both the Executive Directors of the Fund and, of course, its Board of Governors are usually described as individuals "who do not owe their duty exclusively to the Fund" but who "speak on behalf of the members that appointed or elected them." Gold, *supra* note 122, at 173; *see also* Fawcett, *supra* note 122, at 324–5 (arguing that Fund directors represent both the Fund itself as well as the governments that elected or appointed them). Gold argues that the internal power to interpret the Fund's articles reflects the implicit principle not only "that the membership should be involved in the process of taking the decisions of the Fund but also that, to the maximum extent possible, the full membership should be involved." *Id.,* at 173 (citing as additional evidence for this proposition the fact that only in rare instances is a member's vote excluded from the votes that can be cast to adopt an interpretative decision). Gold argues that "an external tribunal that did not reflect the full membership of the Fund might not command the same confidence as the organs of the Fund." *Id.,* at 174. Hexner suggests, less diplomatically, that the demands of *realpolitik* required keeping "decision-making on delicate policy issues" in the hands of financial experts and subject to the weighted voting scheme of the Fund. Hexner, *supra* note 122, at 344.

[124] *See*, *e.g.*, Gold, *supra* note 122, at 175 (describing the Executive Directors' negotiation and advance consultation efforts with particular members to secure understandings that prevent the possibility of subsequent disputes).

[125] *See*, *e.g.*, Gold, *supra* note 122, at 195–201 (discussing the tendency to avoid formal vote-taking by the Fund's Executive Directors). This is also suggested by the reluctance of Fund members and organs to formally invoke article XXIX itself. *See*, *e.g.*, Mann, *supra* note 122, at 2 (noting that the "overwhelming proportion" of interpretations have been adopted outside this article).

political and economic circumstances."[126] The IMF's approach to dispute settlement reflects, to this extent, the "soft" modes of compliance that characterize managerial regimes.[127] This procedure for dispute settlement is unusual in that it explicitly grants "final" interpretative authority to executive organs and not an external, impartial tribunal, because it merges the role of resolving current disputes with a legislative or regulatory role of assuring uniform application to prevent future controversies from emerging, because it appears to grant the Fund's executive organs the exclusive jurisdiction to decide interpretative questions, and because those exercising the interpretative function are understood to be interested parties.[128]

As a dispute settlement provision, the Fund's article XXIX provides extraordinarily wide standing. Any member, whether or not affected by the issue in question, is entitled to ask "any question of interpretation," and the Fund's organs appear not to have explicit discretion to refuse to answer. Further, any member, whether or not affected by the Executive Directors' initial decision, is entitled to refer the issue to the Board of Governors. Moreover, nothing in that article excludes the Fund's executive organs from themselves initiating the interpretative procedure. These rights might be considered the Fund's answer to the much discussed (but seldom seen in actual practice) *actio popularis* in international law (but in this case available only to members of the Fund).[129] IMF insiders argue that this open-ended license implicitly grants the Fund's executive organs the power to establish precedents binding on all members and not merely those bringing the interpretative dispute. The failure to request formal interpretations of Fund actions or the failure to appeal from the Executive Directors' decisions "may justify a presumption that a member is satisfied" with these interpretations.[130] As is clear from Part II of this book, this much at least is consistent with modes of development of "internal" institutional law, which generally operates on the premise that institutional precedents that are routinely accepted by the membership become binding interpretations within the organization.

Some of the debates over the meaning to be given to article XXIX's provision indicating that decisions by the Board of Governors "shall be final"—particularly over whether these decisions should be regarded as "binding" by international arbitral or judicial bodies or by domestic courts and should be treated as binding

[126] *See*, *e.g.*, Hexner, *supra* note 122, at 344. [127] *See generally* Chapters 4 and 5.

[128] *See* Hexner, *supra* note 122, at 344. Note that resort to an arbitral tribunal is reserved, under article XXIX(c), to instances where the Fund articles are, either generally or in respect to a particular member, no longer operative. But apart from this provision, the GA authorized the Fund, Bank, and the IFC to request advisory opinions from the ICJ if, within the scope of their activities, any legal questions should arise other than questions relating to the relationship of these organizations to the UN and to specialized agencies. *See* GA Res. of November 15, 1947, A/349 and A/519; GA Res. of February 20, 1957, A/3529, Rev. 1. The authority to ask for advisory opinions is also included in the Agreement of the Fund and Bank on their relationship with the UN. *See* Hexner, *supra* note 122, at 346, n. 11; Relationship Agreement between the United Nations and the IBRD, 16 UNTS 346, article 8; Relationship Agreement between the United Nations and the IMF, 16 UNTS 328, article 8.

[129] Hexner, *supra* note 122, at 347. [130] *Id*.

prospectively for the organization—reveal underlying concerns with the use of such a non-judicial process to resolve interpretative disputes. Thus, F. A. Mann has argued that the Fund's internal interpretative decisions, while "final" in the sense that they cannot be revisited by the Fund itself (except by the administrative process envisioned under the articles), do not bind any international tribunal having jurisdiction[131] or any municipal court considering at least some Fund-related issues.[132] Mann makes his case, seemingly at odds with the position of respected Fund commentators such as Sir Joseph Gold, partly on the basis that interpretative "guidelines" issued by an administrative authority "do not bear the hall-mark or carry the authority of a judicial pronouncement."[133] While it would appear that in practice, the Fund's decisions have been seen as generally authoritative by both international and domestic courts despite Mann's qualms, difficult interpretative questions have arisen with respect to the meaning of IMF decisions, and their applicability in such fora and the consequences of "final" Fund interpretations are not altogether resolved.[134] Others, and not just academics like Mann, appear to be troubled by this less than judicious mode of settling disputes and making law. But it is clear that IMF decisions have had direct consequences on suits between private parties in national courts. This occurs most commonly when governments impose currency controls that greatly reduce the value of creditors' rights and those harmed challenge these controls in local courts. In such cases, a complaint's success may depend on whether the country acted in violation of international law, that is, whether or not in conformity with the IMF articles. When such questions become significant in suits in national courts, the IMF's decisions may prove determinative to the rights of the respective parties.[135] To this extent, the IMF's interpretative authority over its articles give it a valuable privilege that it holds over states: it has it within its power to determine whether states or private parties will be able to avoid liability in other countries' courts.[136]

Mann's arguments illuminate the underlying legitimacy questions raised by the IMF's method for settling interpretative disputes. Mann argues that the Fund's interpretations should not be seen as authoritative (1) because neither the Fund's Executive Directors nor the Board of Governors apply the rule *nemo judex in re sua* to exclude from the decision-making processes individuals from countries to the dispute, (2) because these rulings are ultimately subject to a weighted voting system "wholly alien to the judicial process," (3) because Fund procedures do not

[131] This would include an arbitration tribunal under article XXIX (c), the ICJ (as in a reference for an advisory opinion), or by any tribunal appointed by treaty between members.

[132] Mann, *supra* note 122, at 17. [133] *Id.*, at 9.

[134] *See* Hexner, *supra* note 122, at 351; Kirgis, *supra* note 32, at 432–5.

[135] *See*, *e.g.*, *West* v. *Multibanco Comermex*, *S.A.* 807 F.2d 830 (9th Cir.), *cert. denied*, 484 U.S. 906 (1987)(Mexican currency control found not to be illegal expropriation because IMF staff approved it). *See generally* Paul B. Stephan, "Accountability and International Lawmaking: Rules, Rents and Legitimacy," 17 *Nw. J. Int'l L. & Bus.* 681, at 692 and n. 24 (1996–7).

[136] Stephan, *supra* note 135, at 719 (noting that those who refuse to cooperate with the Fund "face not only a denial of access to IMF funds, but also an increased risk of legal liability outside of its borders").

ensure that parties to the dispute are given an adequate opportunity to state their case,[137] (4) because such proceedings are not limited to an inquiry concerning the scope of existing rights but can become vehicles for imposing new rules for the future, (5) because the process is administered by bankers engaged in interpretations that are in "good faith" or "reasonable" and not judges limited to considering only the requisites of the law, and (6) because the decisions typically do not explain their rationales, beyond citing the obvious language of the Articles of Agreement.[138] As will be addressed in Chapter 9, Mann's arguments reflect broadly accepted notions of the structure and purposes of "international adjudication." Of course, Mann's premises for legitimate interpretative processes are violated not merely by the IMF and other international financial institutions, but by virtually all the political fora for dispute settlement canvassed in this chapter.

Interestingly, even those who disagree with Mann's conclusions regarding the finality of Fund decisions, and who defend the article XXIX mode of interpretation, agree with at least some of his premises. Defenders of the Fund's decision-making processes have argued that the Fund's interpretative decisions have not been quite as "lawless" or as purely political as Mann suggests. The leading commentator on the Fund for many years, Sir Joseph Gold, argued, for example, that the Fund's decisions, as "acts in the law," are subject to implicit limits: namely, those drawn from "general principles of law." For Sir Joseph, this included the familiar principle that decisions should not normally apply retroactively (except by way of removing benefits conferred)[139] and must be equitable.[140] Similarly, another defender of the Fund's interpretative methods, Hexner, has contended that Fund decisions are necessarily governed by two fundamental principles of treaty interpretation, namely the need to give effect to the intention of the drafters of the Fund's Articles of Agreement and to make their agreement "effective rather than ineffective."[141] He also has suggested that Fund decisions are constrained by the "internal law of the Fund" (including the Fund's prior decisions), substantive provisions in the articles themselves (such as its definition of terms), and public international law.[142] He answered Mann's complaint concerning violation of the

[137] But note that under article XXIX(a), as under the previously applicable article XVII, members particularly affected that are not entitled to appoint an Executive Director shall have the right to have one appointed for this purpose. Hexner argues that while no other provisions guarantee a fair hearing to affected parties, no other provisions are really necessary. Hexner, *supra* note 122, at 348.

[138] Mann, *supra* note 122, at 5–9.

[139] *See*, *e.g.*, Gold, *supra* note 122, at 189 (noting, by way of example, a 1962 decision).

[140] *See*, *e.g.*, *id.*, (noting that the Fund has not applied a decision to a member where the member has argued, on the basis of estoppel or because of undue delay by the Fund, that application would have been inequitable).

[141] Hexner, *supra* note 122, at 349. Hexner does not address why the Fund's executive organs need to adhere to these principles. Further, he does not address what Fund organs are supposed to do in the all too common instance where these two principles conflict.

[142] Hexner, *supra* note 122, at 350. *See* also Fawcett, *supra* note 123, at 336–42 (discussing the respective roles of public international law and muncipal law in the Fund). Hexner's analyses of the Fund's interpretative decisions is suggestive of a common lawyer's analysis of judicial case law. *See*, *e.g.,* Hexner, *supra* note 122, at 356–66 (discussing the "*ratio decidendi*" versus "*obiter dicta*" in Fund decisions).

nemo judex in re sua principle by suggesting that this principle is not *jus cogens* and can be dislodged by inconsistent treaty arrangements such as the Fund's Articles of Agreement.[143]

Fawcett's defense of the Fund's interpretative arrangements is a bit more candid about its unusual nature and less reliant on strained attempts at judicial analogies. He accepts that these arrangements do not envision "judicial" behavior or treatment of disputes as in a court of law.[144] But Fawcett is not quite as sanguine about the alternatives, such as the ICJ. He argues that there are good reasons why the ICJ has not proven to be very effective in asserting indirect judicial control over the UN,[145] and points to the various factors that avoid "arbitrary or capricious" decisions in the context of the Fund: the Executive Director's frequent meetings, relatively infrequent changes of membership, high level of debate, sense of "common purpose," close regard for legal arguments, coherence and consistency of results over time, along with the possibility of appeal to the Board of Governors.[146] For Fawcett, the absence of judicial control is compatible with the Fund's "regulatory" function and is "not wholly an evil" since "it can sharpen the sense of international responsibility in those who must make decisions with it."[147] This appears to be a defense of the IMF's unusual form of regulatory dispute settlement on the basis of expertise rather than reliance on the adversarial process. Fawcett's answer to the *nemo judex in re sua* problem is that the principle is, in effect, observed "through a measure of political restraint by the economically stronger members of the Fund," that is, by a process of consultation and avoidance of the use of weighted voting to abuse or deny rights of members.[148]

Whether or not they question the legitimacy of the Fund's interpretative arrangements, observers of the Fund uniformly agree that these interpretations have quasi-legislative effects.[149]

[143] Hexner, *supra* note 122, at 368. While Hexner acknowledges that both appointed and elected executive directors of the Fund are, in practice, directly or indirectly subject to the instructions of the governments whom they serve, he argues that a government would be in violation of the Fund agreement were it to give instructions to an executive director to act in his/her "interpretative function in a manner inconsistent with the Fund Agreement or with international law," but acknowledges that in the absence of practical sanctions, this possibility does not ensure "independent status to persons exercising the interpretative function." *Id.*, at 369–70.

[144] Fawcett, *supra* note 123, at 326–7. [145] *Id.*, at 342. [146] *Id.*, at 326–7.

[147] *Id.*, at 328–9. The establishment of a special Committee of Interpretation, not subject to weighted voting but appointed by the Board of Governors, as a precursor to the Board's final decision on appeal—a modification made to the articles since the time when Mann was writing—also appears intended to inject elements of a more formal dispute settlement process to the Fund's "regulatory" proceedings. *See supra* at note 121 (text of Article XXIX).

[148] Fawcett, *supra* note 123, at 327–9, 331.

[149] *See*, *e.g.*, Hexner, *supra* note 122, at 370 (acknowledging that in the Fund "interpretation often involves lawmaking, and this on a much broader basis than that on which judicial lawmaking operates in the framework of a modern national government").The focus on the Fund's article XXIX should not, however, be taken to mean that these procedures are the sole method used in the Fund, or in other international financial institutions with comparable provisions, to resolve interpretative disputes. Like some (but not all) IOs, the Fund also turns to its own legal department to resolve, less formally, many disputes, and that department's legal opinions may be adopted, without discussion, by

7.2.3 The International Civil Aviation Organization

While ICAO's plenary body, its Assembly, has rarely concerned itself with controversies among its members,[150] the role of adjudicator is expressly conferred on ICAO's executive body, the Council, composed of thirty-six government representatives of contracting states elected by the Assembly (with due regard to their states' respective importance in air transport).[151] ICAO's Convention, as well as its two companion agreements, the International Air Services Transit Agreement and the International Air Transport Agreement, situate the Council at the heart of an elaborate process for the settlement of inter-state "disagreements" or "complaints," despite the evident fact that the Council is a political body with no necessary legal expertise.[152] While these instruments do not explicitly state that the Council's final decisions on such matters are binding, all three empower the Council to undertake sanctions for non-compliance with its adjudicative judgments.[153] In addition, various other multilateral and bilateral international agreements, perhaps hundreds, bestow adjudicatory functions on the Council to make at least non-binding recommendations with respect to disputes under these agreements.[154] Despite these

the Executive Directors or by members individually as a final ruling on a contested issue. Fawcett, *supra* note 123, at 331. WTO insiders report the same phenomenon within that organization: that is, members concerned about the GATT legality of either their own actions or those of other members may resolve their doubts after informal consultations with the GATT secretariat.

[150] *See*, *e.g.*, Thomas Buergenthal, *Law-making in the International Civil Aviation Organization* at 132 (Syracuse, NY: Syracuse University Press, 1969)(reporting on the Czech delegation's unsuccessful attempt to introduce a draft resolution relating to its then pending dispute with the U.S.).

[151] *See* article 50, ICAO.

[152] Article 84 of ICAO's Constitution provides: "If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any state concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice . . ." Convention on International Civil Aviation, 15 UNTS 295, December 7, 1944. *See also* the International Air Services Transit Agreement, 84 UNTS 389 (entered into force January 30, 1945), article II, sec. 1; Transport Agreement, 171 UNTS 387 (entered into force February 8, 1945), article IV, sec. 2 (providing that contracting states to these instruments which deem that another's action is causing "injustice or hardship" may request the Council to "examine the situation;" that the Council shall inquire, demand consultations, and, should these fail, make "appropriate findings and recommendations," failing which it may recommend to the GA that it suspend the contracting State's treaty rights and privileges or, by two-thirds vote, suspend such contracting State "for such period of time as it may deem proper or until the Council shall find that corrective action has been taken by such State").

[153] The ICAO Convention provides that where the Council renders a decision that an airline is not in compliance, it can demand that contracting states bar that airline from operating through its airspace, Convention, article 86. States deemed to be in default must have their voting rights suspended in the Assembly and the Council. Convention, article 87. For an argument that the relevant articles imply that Council decisions, unless reversed or modified on appeal, must be deemed to be final and binding, see Buergenthal, *supra* note 150, at 140–1; *see also* Convention, article 86. For the sanctions anticipated under the Transit and Transport Agreements, see prior note.

[154] *See* Buergenthal, *supra* note 150, at 166–79 (surveying a great variety of arrangements from those that provide for resort to the Council as one of several possible fora to those granting the Council exclusive competence).

provisions, the ICAO Council has only rarely donned its anticipated adjudicative role—perhaps because states have been given a powerful incentive to settle their disputes under the shadow of ICAO Council action/sanction, because states doubt that a political body such as the ICAO Council would truly be able to exercise the function assigned to it, or because the Council itself has "shown very little enthusiasm" for its assigned role.[155]

While the ICAO Council has assumed its adjudicative role on only a handful of occasions, the first complaint brought under article 84, by India against Pakistan in 1952, led that body to do something that the UN Security Council, for example, has never done: adopt formal "Rules for the Settlement of Differences" indicating the procedures that would be followed in such cases. While these Rules are not as detailed as, for example, UNCITRAL's rules for conducting international arbitrations, they resolve some of the many procedural ambiguities left open by the cryptic treaty provisions providing for the ICAO Council's involvement in dispute settlement. The Rules provide that "applicants" must file written "memorials" containing, *inter alia*, a statement of facts and of relevant law, as well as an indication of relief required. They also set time limits for "counter-memorials" by "respondents," for "preliminary objections" to the jurisdiction of the Council, and for written "decisions" by the Council, and the latter must contain, in addition to a summary of the proceedings and the numbers of Council members voting for or against, "the conclusions of the Council together with its reasons for reaching them."[156]

In 1971 when Pakistan asserted that certain actions by India violated the Chicago Convention and other aviation agreements, these formal procedures came into play. In that instance, India filed preliminary objections to the Council's jurisdiction, arguing, among other things, that there was no disagreement as to the interpretation or application of relevant treaties as required by article 84 of the ICAO charter since those treaties had been terminated or suspended as between the parties.[157] After hearing oral arguments by both sides on these preliminary objections, the ICAO Council deliberated in the presence of the Indian representative to the Council and Pakistani observers, and issued a decision rejecting India's objections. The Council gave no reasons for its decision on this preliminary jurisdictional issue. India appealed the Council's decision to the ICJ, asserting that the Court had jurisdiction even over this preliminary ruling by the Council on the

[155] *See* Buergenthal, *supra* note 150, at 123–4.

[156] ICAO Doc. 7782/2 (1975). *See* Buergenthal, *supra* note 150, at 183–95. Interestingly, the Rules do not provide a right to an oral hearing, although the Council has discretion to accord it. Rules, at article 9; Buergenthal, *supra* note 150, at 189. They also provide that the Council cannot delegate its decision to another body but can seek expert advice (article 8), that Council members that are parties to the dispute cannot vote (article 15(5)), and that dissenting opinions to the Council's decision are permitted (article 15(3)). Buergenthal, *supra* note 150, at 187–90. The Rules were approved by the Council on 9 April 1957 and amended on 10 November 1975. *See* ICAO Council, *Rules for the Settlement of Differences* (2nd edn., 1975, reprinted May 2000).

[157] The case is described in detail in Kirgis, *supra* note 32, at 448–68.

basis of article 84 of the ICAO Convention. The ICJ agreed with India that it indeed had jurisdiction to consider the Council's preliminary decision but upheld the substance of the Council's decision.[158] In the wake of the ICJ's judgment, the parties reached a settlement and did not pursue the matter further before the Council.[159]

If the Pakistan/India dispute is any indication, on those few occasions when it has attempted dispute settlement, the ICAO Council tends to act, under article 84, less as a court of law than as a facilitator for settlement. This is the role that is suggested by the ICAO Convention itself as well as the Council's own Rules for the Settlement of Disputes.[160] In his classic book on ICAO, Buergenthal argued that this was also the case with respect to the Council's anticipated role under the Transit and Transport Agreements. He argued that those agreements provide a machinery for the adjustment of economic or political disputes and the possible (but not required) imposition of sanctions; he contended that these agreements anticipate discretionary judgments akin to those exercised by those empowered to take decisions *ex aequo et bono*.[161] He concluded that the members of the Council were predisposed, by temperament and relevant skills, to favor settlements by "political and diplomatic rather than judicial means," and that the ICAO Council's primary role in dealing with complaints was "to provide a forum where difficulties between Contracting States can be ironed out in an institutional setting that is particularly well suited for compromise solutions."[162] For Buergenthal the ICAO Council's extensive adjudicatory powers, formally conferred on it, were not useless since they put it "in a much stronger position to compel negotiated settlements than a body lacking this authority."[163]

The ICAO Council may encourage the settlement of disputes in less formal ways. As noted in Chapter 4, that body performed an investigative, if not precisely an adjudicative, role with respect to incidents involving the Soviets' missile attack on Korean Air Lines flight 007 in 1983 and the U.S. downing of Iran Air Flight 655 in 1988. In both instances, it directed the ICAO Secretary-General to institute a fact-finding investigation and in both cases, the Council issued

[158] Appeal Relating to the Jurisdiction of the ICAO Council, 1972 ICJ Rep. 46.

[159] Kirgis, *supra* note 32, at 467. On March 14, 2000, the U.S. initiated a dispute resolution proceeding before the ICAO Council by filing an application and memorial challenging the legality, under the Chicago Convention, of an EU regulation relating to aircraft noise, which especially affected the products of U.S. companies. The EU's challenge to its jurisdiction, arguing that the U.S. needed to exhaust EU remedies prior to resorting to the Council, was rejected by the Council. In the wake of the Council's order, which invited the parties to resume negotiations to resolve their dispute with the facilitation of the ICAO legal counsel, the EU filed a counter-memorial. *See* Sean D. Murphy, "Admissibility of U.S.-EU 'Hushkits' Dispute Before the ICAO," 95 *AJIL* 410 (2001).

[160] Buergenthal, *supra* note 150, at 136, 184–5.

[161] *Id.*, at 159–61.

[162] *Id.*, at 162, 195.

[163] *Id.*, at 195. By contrast, Buergenthal doubts whether the Council's aversion to adjudicating disputes on a legal basis is appropriate concerning the interpretation of other multilateral and bilateral agreements. He contends that the clarification of the meaning of such agreements requires case-by-case arbitral adjudication. *Id.*, at 196–7.

resolutions upon receipt of the resulting investigative reports.[164] The reports issued in these cases have drawn considerable controversy, not only because of the merits of their substantive conclusions, but because both reports made findings that could easily be interpreted as findings of law as well as fact. While, as discussed in Chapter 4, the ICAO Council's actions in these cases proved influential in settling disputes between particular state parties and helped to establish general rules as to the (non-use) of force, in neither the Soviet nor the U.S. case did the ICAO Council suggest sanctions or insist (as compared to the UN Secretary-General's ruling in *Rainbow Warrior*, for example) that reparations be made.[165] If the ICAO Council did act as a "dispute settler" in these cases, its actions are more consistent with those of soft enforcers under the managerial model of compliance.

7.2.4 Other UN Specialized Agencies

The IMO's Convention gives its Assembly a role in settling questions or disputes concerning the interpretation or application of that Convention and anticipates that any questions not so resolved can be submitted by the organization to the ICJ for an advisory opinion.[166] Unlike ICAO, the IMO Assembly has not adopted procedural rules to handle such disputes.[167] On the few occasions when the IMO Assembly has been asked to exercise this power, it has tended to refer the question to other standing bodies, such as its Legal Committee or the organization's Legal Adviser.[168] At least one commentator reports that while interpretative questions have come up with some frequency within the organization, most often these have been resolved through its Maritime Safety and Marine Environment Protection Committees. These committees have resolved such disputes by circulating draft interpretations among committee members and adopting these (or modifications of former interpretations) by consensus.[169] IMO members have been reluctant to

[164] In both instances, the Council referred the investigative teams' respective reports to the standing ICAO Air Navigation Commission for review as to the safety recommendations. Kirgis, *supra* note 32, at 474.

[165] While the U.S. offered, ex gratia, reparations in connection with the Iran Airbus incident, these were ultimately accepted only after Iran pursued the case before the ICJ. *See Aerial Incident of July 3, 1988* (*Islamic Republic of Iran* v. *United States of America*), Order of 22 February 1996 (Discontinuance of Case) 1996 ICJ Rep. 9. *See also* Chapter 4.

[166] Article 69 of the IMO Convention states: "Any question or dispute concerning the interpretation or application of the Convention shall be referred to the Assembly for settlement, or shall be settled in such other matter as the parties to the dispute may agree. Nothing in this Article shall preclude any organ of the Organization from settling any such question or dispute that may arise during the exercise of its functions." Article 70 provides that any questions not settled under article 69 or 74, "shall be referred by the Organization to the International Court of Justice for an advisory opinion in accordance with Article 96 of the Charter of the United Nations." Convention on the International Maritime Organization, 289 UNTS 48 (entered into force, March 17, 1958)(for a current version, see http://www.imo.org/home.html).

[167] Kirgis, *supra* note 32, at 479.

[168] *See*, *e.g.*, *id.*, at 480–1.

[169] Kirgis, *supra* note 32, at 480. According to Kirgis, these who disagree with an interpretation tend not to flout them but to propose a modification. *Id.*

give the organization or its secretariat interpretative authority, as in connection with particular conventions adopted within that organization.[170]

In other IOs, resort to the organizations' secretariats to resolve disputes, comparable to the use of the UN Secretary-General's good offices role, has been more common than resort to an organization's plenary or executive organs.[171] Thus, both UNESCO and WHO secretariat officials have been active in settling disputes concerning the interpretation of rules promulgated under their organization's respective auspices.[172] The WHO's Health Regulations establish a detailed procedure whereby disputes between members can, at the request of one of the parties, be formally considered by the WHO Communicable Diseases Committee, an expert body charged with issuing nonbinding findings and recommendations, and, ultimately, by the ICJ.[173] This formal procedure was used only once between 1951 and 1973.[174] Instead, that organization has resorted to the WHO Secretariat's exercise of "good offices" to resolve hundreds of interpretative questions and disputes. Leive reports that while members are not obliged to resort to this unwritten procedure and are not bound by the result, "it has been regularly employed, undoubtedly because of its very informality, flexibility and nonbindingness."[175] Notwithstanding their informality, the unwritten rules for such procedures—as to standing to raise complaints, the nature of evidence required, and the types of actions or recommendations that the WHO Secretariat can be expected to make—are reportedly clear to insiders as a result of longstanding institutional practice.[176] Significant interpretations arising from the WHO Secretariat's attempts to apply the Health Regulations or in response to members' disputes are potentially authoritative since these are included in the Director-General's report to the WHO Committee on Communicable Diseases, an expert body, and if these interpretations are approved by that body, they are included in the report to the WHO's plenary body. As noted in Chapter 4, once approved by the Health Assembly (as is usual), such interpretations are included as a footnote to the next edition of the Health Regulations.[177] Knowledgeable observers report that the footnotes have had a comparable impact to the regulations themselves, and that many involve significant financial consequences for members.[178]

[170] *Id.*, at 480.

[171] *See*, *e.g.*, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, November 14, 1970, article 17(5), 10 *ILM* 289 (1971). *See also* Universal Postal Union General Regulations and Final Protocol, 611 UNTS 41 (entered into force January 1, 1996), article 113(2) (authorizing the UPU Secretariat to give opinions even on questions in dispute at the request of the parties involved).

[172] Kirgis, *supra* note 32 at 479.

[173] David M. Leive, *International Regulatory Regimes*, Vol. II at 578 (Lexington, MA: Lexington Books, 1976). International Health Regulations, article 106(1), 21 UST 3003, 764 UNTS 3.

[174] Leive, *supra* note 173, at 578.

[175] Leive, *supra* note 173, at 577. Leive attributes the success of this process and the disinclination of WHO experts to transform it to a more formal, intergovernmental and adversarial process, to the inclination of the experts involved to keep "their" organization within their control and influence. *Id.*

[176] *Id.*, at 577.

[177] *Id.*, at 572; Kirgis, *supra* note 32, at 431.

[178] Leive, *supra* note 173, at 572.

This approach has not, however, proven acceptable in other IOs. Thus, even though the International Labor Office of the ILO has issued numerous and influential interpretative opinions that have been published in the ILO's Official Bulletin, that office has refrained from attempting an interpretation in situations where there is a clear dispute among members as to a provision or involves passing judgment on the conformity of domestic legislation.[179] This reticence cannot be explained by the respective texts of these organizations' constitutions; both the ILO's and the WHO's constitutions have comparable provisions anticipating that questions or disputes relating to interpretation should be submitted to the ICJ.[180] As a formal matter, the difference appears to lie at least partly in the WHO's Health Regulations' explicit authorization to this effect as opposed to the absence of any comparable authority within the ILO.

But the difference between the ILO's and the WHO's respective secretariats' approach to dispute settlement can also be explained by the alternatives available for dispute settlement in each of these organizations. Whereas the WHO does not, as an organization, contain general dispute settlement bodies, the ILO has a variety of such fora. Indeed, the ILO is a significant precursor to the proliferating body of institutionalized human rights adjudicators in both regional organizations and in the UN.[181] Some of the entities within the ILO charged with investigating or considering complaints or representations concerning violation of labor rights involve dispute settlers with little claim to political independence, judicial or otherwise. Indeed, some of these ILO bodies for monitoring, compliance, and dispute settlement, composed of the tripartite set of interests that characterize that organization generally (governments, workers, and employers), are made up of individuals with presumptive agendas, at least with respect to the labor issues under consideration. Such ILO bodies are not composed of "impartial" third parties knowledgeable about international labor laws and are more accurately described as within the set of political dispute settlers discussed in this chapter.

"Representations" that an ILO member has failed to secure the effective observance of any labor convention to which it is a party, filed by associations or employers, are heard by an ILO Committee under articles 24 and 25 of the ILO's constitution, which provides for such complaints. These Committees are appointed by the ILO's Governing Body and replicate that political body's tripartite membership: that is, they consist of a government member, an employer member, and a worker member.[182] The representation procedure has been used more often than the complaint procedure under articles 26 to 33 of the ILO Constitution, which involves more judicialized Commissions of Inquiry

[179] *See, e.g.*, J.F. McMahon, "The Legislative Techniques of the International Labour Organization," 1965–6 *Br. Yrbk Int'l L.* 1, at 90, 98.

[180] WHO Constitution,14 UNTS 185 (entered into force April 7, 1948)(current text available at http://wholibdoc.who.int/hist/official_records/constitution.pdf), article 75; ILO Constitution, 15 UNTS 35 (as amended)(current text at www.ilo.org/public/english/aboutiloconst.htm), article 37.

[181] *See* PICT Chart at p. 404.

[182] *See* articles 7, 24, ILO Constitution, *supra* note 180. *See* Kirgis, *supra* note 32, at 408–9.

(discussed in Chapter 8).[183] While Special Committees set up under articles 24 or 25 do not have the power to issue binding judgments as to the representations received, they are empowered to ask for additional information to substantiate representations made and may invite governments to respond. Such reports may find a government's response to be "unsatisfactory" for purposes of article 25 of the ILO Constitution and may, in accordance with that provision, recommend to the Governing Body that it publish the representation and the statement made in reply if that Body, after continued discussions with the government, also deems the government's response to be unsatisfactory.[184] Under article 26 of the ILO's Constitution, the Governing Body has the discretion thereafter to appoint a Commission of Inquiry to consider the representation. These procedures combine political and more judicialized modes of dispute settlement in tandem to consider the same disputes.

While ILO committee reports under articles 24 and 25 do not contain explicit conclusions of law or fact, their assessment of a government's response in light of the requirements of an ILO convention inevitably interprets the convention at issue, with potential wider normative ripples for all parties to such conventions. Thus, in 1977, an article 24 committee considered a complaint by the International Confederation of Trade Unions (ICFTU) that Czechoslovakia had violated ILO Convention No. 111 (requiring non-discrimination in employment on account of, among other things, the expression of political opinion) by firing individuals from their state-controlled jobs after they participated in issuing a Manifesto critical of the government's human rights policies. The Czech government's general and vague response in that case—indicating that the individuals involved had engaged in "activities aimed at the violation of public order, at the hampering of the international position of the Czechosolvak Socialist Republic and at the achievement of a change of the socialist social order through unconstitutional methods"[185]—was, according to the Committee, not an "adequate" response to the specific allegations raised in the representation and was not sufficient to trigger the exception in article 4 of Convention No. 111 for measures taken to protect national security.[186] The Committee suggested that it was up to the Czech government to rebut the allegations that the workers were discharged because they had signed or adhered to the political Manifesto and to prove that the action taken had been reviewed by a competent body.[187] Even more significantly, it concluded that adhering to a

[183] For a discussion of these more quasi-judicial Commissions of Inquiry, which tend to be composed of independent experts albeit also appointed by the ILO's Governing Body, see Chapter 8.

[184] *See*, *e.g.*, Report of the Committee Set Up Under Article 24 To Consider the Representation Alleging Non-Observance of the Discrimination Convention by Czechoslovakia, May 29, 1978, 61 ILO Official Bulletin, Series A, No. 3, at 1.

[185] Report, *supra* note 184, at para. 20.

[186] Article 4, Convention No. 111, 1362 UNTS 31 (entered into force June 15, 1960) (stating that measures affecting individuals who are "justifiably suspected of, or engaged in, activities prejudicial to the security of the State" do not constitute improper "discrimination," provided that individuals affected have the right to appeal to a "competent body established in accordance with national practice"). *See* Report, *supra* note 184, at paras. 16 and 21.

[187] Report, *supra* note 184, at para. 21.

political manifesto could not, in and of itself, constitute "an activity against the security of the State."[188]

That Committee report made implicit findings of both fact and law that served to guide future complaints and government responses under Convention No. 111. The Committee's suggestion that political advocacy of the type expressed in the Manifesto at issue does not threaten national security is a particularly striking example of an attempt to resolve an oft-noted tension that has bedeviled many states, including Western democracies. Implicit in that finding are two controversial and distinct legal conclusions. First, the Committee is suggesting that the exception for "national security" in Convention No. 111, common to many treaties and not just those that involve labor or human rights, is subject to objective, not self-judging third party scrutiny. The Committee is saying in effect that it is not ultimately up to the Czech Republic to determine where its national security interests lie or how these are threatened but that this is a legal determination, like all others, subject to impartial determination. While this conclusion is in accord with the judgment of various tribunals that have considered comparable questions, the principle has been contested in the past (as by the U.S. in the *Nicaragua case* before the ICJ).[189] The Committee's implicit finding that such questions are justiciable, despite the Czech government's claims, also resonate with determinations by other tribunals, particularly the ICJ, rejecting objections to jurisdiction because the legal issues are intertwined with "political" questions.[190] Secondly, the ILO Committee in this case resolved the merits by suggesting that the mere advocacy of ideas did not threaten a state's national security. This is, once again, a conclusion that, while

[188] *See* Report, *supra* note 184, at para. 21: "It does not emerge from the information available that the signing or adhering to such a document could in itself be considered, in relation to the principal protection envisaged by the Convention on matters of political opinion . . ., as an activity against the security of the State or incompatible with the requirements of their forms of employment."

[189] *See*, *e.g., Nicaragua case*, (Judgment on the merits), 1986 ICJ Rep. 14, paras. 222–4 (interpreting the "security" clause in the U.S.-Nicaragua FCN Treaty); *United Communist Party of Turkey* v. *Turkey*, European Court of Human Rights, 1998-I, Eur. Ct. H.R. 1, 26 E.H.R.R. 121 (1998) (interpreting article 11(2) and article 17 of the European Convention on Human Rights). Note, however, that, as is suggested in the *Nicaragua case*, *supra*, the precise wording of the "national security" exception may suggest non-reviewability. *See*, *e.g., Nicaragua case*, para. 222 (contrasting the wording in the FCN treaty at issue with the seemingly self-judging wording of the GATT, namely, permitting actions which "a party considers to be" in its national security interests). Whether the GATT's (now WTO's) national security exception ought to be seen as an entirely self-judging matter, not subject to third party scrutiny as by a GATT panel or the Appellate Body, remains a controversial issue. *See generally* Antonio F. Perez, "WTO *and* U.N. Law: Institutional Comity in National Security," 23 *Yale J. Int'l L.* 301 (1998). The ICJ has also repeatedly rejected more general arguments that it has no jurisdiction because the underlying case presents "political" questions, alongside legal ones. *See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, supra* note 64, at para. 41.

[190] *See*, *e.g., United States Diplomatic and Consular Staff in Tehran*, Judgment 1980 ICJ Rep. 3, at 19–20 (refusing to decline jurisdiction despite Iran's claims that the issues raised were a "marginal and secondary aspect" of a larger political problem). *See also* Merrills, *supra* note 4, at 155–9. *Compare Dusko Tadic*, Case No. IT-94-I-T, Aug. 10, 1995, paras. 24 and 28 (Trial Chamber's dismissal of defendant's jurisdictional claims, including on the basis that some challenges to the establishment of the tribunal raised non-justiciable "political questions") *with* Dusko Tadic (Appellate Chamber) *supra* note 14 (implicitly overruling political question dismissal by trial chamber).

consistent with the holdings of judicial human rights bodies, is, nonetheless, a daring, even brave, decision, given the practice of many governments, even in the West.[191]

As the discussion of articles 24 to 26 of the ILO's Constitution suggests, another political body within the ILO, namely, the Governing Body itself, has an active role in dispute settlement. In addition to its role in handling representations under articles 24 to 26, the Governing Body has long asserted itself as the defender of the "core" rights to freedom of association enshrined not only in two widely ratified ILO Conventions but in the ILO's Constitution.[192] In 1950, the Governing Body established a nine-member expert body chosen on the basis of high standing, competence and impartiality, the Fact-Finding and Conciliation Commission (FFCC), to address complaints of violations of freedom of association by ILO members that were not parties to at least one of the relevant ILO Conventions (but were subject to the underlying "principle" as a result of adhering to the ILO's Constitution itself). Despite establishment of that quasi-judicial body, it is a tripartite sub-committee of members of the Governing Body, established in 1951 as the Governing Body Committee on Freedom of Association (GBFA),[193] that is actually the entity most actively engaged in considering such complaints since the jurisdiction of the more quasi-judicial FFCC requires the prior consent of the state accused of a violation.

The GBFA has heard hundreds of cases involving both ILO members that have adhered to the ILO's freedom of association conventions and those that have not. Despite its political composition, the GBFA has developed consistent procedures for handling the high volume of cases that it receives and has developed a quasi-judicial manner for their disposition. These procedures involve securing substantiating information from both sides and sometimes holding oral hearings. While the GBFA can go forward with a case even without a response from the government involved, it often secures the cooperation of the government, including its consent to

[191] *See*, *e.g., Dennis* v. *United States*, 341 U.S. 494 (1951)(upholding conviction of leaders of Communist Party for planning to seize power by violent means); Gregory H. Fox and Georg Nolte, "Intolerant Democracies," 36 *Harv. Int'l L. J.* 1 (1995)(discussing various countries where statutory or other law suggests that it is permissible to ban political parties whose goals conflict with the existing constitutional order even where the parties advocate peaceful means for transition).

[192] *See* ILO Constitution, *supra* note 180, preamble (recognizing "the principle of freedom of association"); Convention Concerning Freedom of Association and Protection of the Right to Organize, 1948 (Convention No. 87) 68 UNTS 17 (entered into force July 4, 1950), and Convention Concerning the Application of the Principles of The Right to Organize and to Bargain Collectively, 1949 (Convention No. 98) 96 UNTS 257 (entered into force July 18, 1951). *See also* the more recent Convention Concerning the Promotion of Collective Bargaining, 1981 (Convention No. 154) 1331 UNTS 267 (entered into force August 11, 1983). The 2004 Report of the ILO Governing Body to the Conference, for example, reports that complaints against Belarus for non-observance of Convention Nos. 87 and 98 have led the Governing Body to establish a Commisssion of Inquiry to examine the allegations. Report of the Chairperson of the Governing Body to the Conference, 92nd Session, Provisional Record, at 3/10 (2004)(hereinafter "Governing Body Report").

[193] This Committee consists of three government, three employer, and three worker members, meets in Geneva three times a year and reports to the full Governing Body.

a "direct contact" whereby an ILO representative is sent to the country to ascertain facts. GBFA reports, issued after fact-finding ends and published in the ILO's Official Bulletin, follow a predictable format: after a summary of the allegations and the government's response, the GBFA's own consideration of the merits follows, including conclusions and recommendations. Neither the GBFA nor the Governing Body itself is empowered to make these findings binding. The ILO Constitution, which says nothing about the possibility of such complaints, provides nothing by way of "enforcing" compliance with respect to such issues. GBFA "recommendations" and "findings" appear intended, as is true of the conclusions reached by many of the dispute settlers discussed in this chapter and the next, to mobilize shame against violators of freedom of association.

GBFA reports are, in general, likely to include explicit findings of fact and law, including unapologetic conclusions that domestic laws are in violation of the principle of freedom of association.[194] Its reports, particularly those dealing with ILO members that have not ratified the freedom of association conventions, are part of the institutional framework that lends credence to the proposition that the rights of freedom of association and collective bargaining are binding rules of custom, at least for the nearly universal membership of the ILO and perhaps more generally.[195] GBFA reports also suggest the difficulty of drawing rigid lines among international legal regimes. Many of the reports confirm that, at least according to the GBFA, the labor rights at issue cannot be separated from related international human rights, including the right to life, free expression, and due process in criminal proceedings, and at least some GBFA reports have not been reticent about affirming the viability of these other internationally recognized human rights and citing the findings of human rights bodies.[196] These reports have helped to establish that labor rights are part of a universal, indivisible, and interdependent set of general human rights to which all individuals are entitled vis-à-vis their governments.

[194] *See, e.g.*, Complaint Against the Government of China Presented by the International Confederation of Free Trade Unions, ILO Committee on Freedom of Association Case No. 1500 (1990), 73 ILO Official Bulletin, Series B, No. 1; Complaint Against the Government of Canada Presented by the Canadian Labour Congress and the Postal, Telegraph and Telephone International, ILO Committee on Freedom of Association Case No. 1451 (1989), 72 ILO Offical Bulletin, Series B, No. 3. *See also* Governing Body Report, *supra* note 192, at 3, 9 (discussing observance of the Forced Labor Convention (No. 29) by Myanmar).

[195] Since the GBFA's conclusions apply only to ILO members bound to the principle of freedom of association because they have ratified the ILO's Constitution, it might be said that the GBFA's conclusions constitute a form of specialized custom—or specialized institutional practice binding on ILO members as a matter of treaty law—that would presumably not bind states that either withdraw from the ILO or were never members. On the other hand, the wide adherence to the ILO Constitution alone provides some evidence that its principles may indeed reflect general customary international law. *See*, *e.g.*, *Restatement (Third), of the Foreign Relations Law of the United States*, sec. 102, comment i (1986)(discussing interplay of treaty and custom).

[196] *See*, *e.g.*, Complaint Against the Government of China, *supra* note 194, at para. 330 (criticizing the "extreme rapidity" of criminal judgments handed down by Chinese courts against three workers, who were ultimately sentenced to death, and suggesting that these workers were entitled to the "usual judicial guarantees").

The foregoing are only some examples of non-judicial international organs involved in dispute settlement of various types. Regional entities not addressed here, including the Organization for Security and Cooperation in Europe (OSCE, formerly the CSCE)[197] and other bodies within UN specialized agencies, including the Codex Commission, established jointly by the FAO and the WHO for the elaboration of food standards and discussed in Chapter 4,[198] have also turned to non-judicial organs to resolve disputes.

[197] Thus, claims by one or more member states of the OSCE that another member state is not living up its "human dimension" commitments, including human rights commitments, are handled initially by a diplomatic exchange between the states concerned. If that stage yields no resolution, the matter may be raised before the full OSCE and may result in mediation or fact-finding by OSCE expert or rapporteur missions. *See* Thomas Buergenthal, *International Human Rights* at 169 (St. Paul, MN: West Publishing, 2nd edn., 1995). *See* also Thomas Buergenthal, "CSCE Human Dimension: The Birth of a System," I Collected Courses of the Academy of European Law, No. 2 (1992).

[198] *See*, *e.g.*, Leive, *supra* note 173.

8

Dispute Settlement by "Quasi-judicial" and "Judicial" Bodies

8.1 Introduction

The Chart produced by the Project on International Courts and Tribunals (PICT) (reproduced at p. 404) identifies a substantial number of international judicial bodies in operation through 2004. As the note by Cesare P. R. Romano produced alongside this Chart indicates, the PICT identified its forty-three existing, extinct, dormant, or nascent international "judicial" bodies by applying five distinct criteria: (1) a requirement that they be permanent institutions; (2) be composed of independent judges; (3) adjudicate disputes between two or more entities at least one of which is either a state or an IO; (4) work on the basis of predetermined rules of procedure; and (5) render legally binding decisions.[1] Dispute settlers that satisfy Romano's five criteria constitute only a small portion of institutionalized dispute settlement mechanisms. As is suggested by the dates of establishment indicated on that Chart, many dispute settlers, such as international courts in Africa and the International Tribunal for the Law of the Sea, have emerged only over the past few years and have not yet produced many judgments to permit a fair assessment of their normative impact. Others, such as the newly revamped European Court of Human Rights, have been extensively reformed in recent years. The PICT Chart documents the rise of the "international judiciary," spanning an impressive range of jurisdictional mandates and structural characteristics, that has emerged over the past few years. This chapter addresses select examples from some of the more established of these entities.

[1] For further background on these factors and how they were applied, see Cesare P.R. Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle," 31 *NYU J. Int'l L. & Pol.* 709, at 711–23 (1999). At that time, Romano concluded that thirteen of the bodies listed in the PICT Chart (at p. 404) would probably qualify as international judicial bodies. *Id.*, at 715–16 (listing the ICJ, the International Tribunal for the Law of the Sea, the European Court of Human Rights, the Inter-American Court of Human Rights, the Court of Justice of the European Communities (together with its Court of First Instance), the Central American Court of Justice, the Court of Justice of the Andean Community, the Court of Justice of the European Free Trade Association, the Court of Justice of the Benelux Economic Union, the Court of Justice of the Common Market for Eastern and Southern Africa, the common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa, the Court of Justice of the Arab Maghreb Union, and the Judicial Board of the Organization of Arab Petroleum Exporting Countries).

Most international lawyers would define all the mechanisms listed on the PICT Chart, and not only those identified at the top, as "international judicial bodies," as at least "quasi-judicial," even though these others would fall short on one or more of the PICT's five criteria. These other quasi-judicial dispute settlers are generally distinguishable from those discussed in Chapter 7 because they are all characterized by some serious attempt, primarily through rules for the type of expertise required of the dispute settlers, their method of selection, or their tenure in office (or all three), to recognize the "independent" status of the third party decision-maker from the governments involved in their creation.[2] For fully "judicialized" bodies, this is traditionally done by requiring the selection, preferably for a lengthy tenure in office, of, in the words of the Statute of the International Court of Justice, "independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law."[3] For other quasi-judicialized dispute settlers, such as the WTO's Appellate Body or ad hoc Commissions of Inquiry under the ILO, relative adjudicative independence or impartiality is accomplished by selecting arbitrators who are specialists in the law implicated by the disputes at issue, such as their knowledge of trade or labor law respectively, and not because they are accredited government representatives before the relevant IO. The dispute settlers discussed here are "relatively independent" of the governments that establish them or of the political organs of the IOs in which most are embedded or associated; this is a comparative judgment that is not intended to suggest that quasi-judicial or judicial dispute settlers are immune from political considerations or that all such indicators are equally independent.[4]

International lawyers have long recognized that decisions reached in the course of international adjudication, particularly when resulting in reasoned opinions that approximate the style of those promulgated by domestic courts, have had an

[2] In some instances, however, the requirement of independence or impartial selection may apply in reality to only some of the dispute settlers selected. In the United States-Iran Claims Tribunal, for example, some might question the "independent" status of all arbitrators appointed by either Iran or the U.S. This Tribunal is nonetheless discussed in this chapter because its decisions were rendered by panels of three judges (requiring the concurrence of the crucial third arbitrator elected by the two party-appointed arbitrators and not by either alone) or by the full tribunal of nine (including the three non-party-appointed arbitrators).

[3] Statute of the Court, article 3.

[4] Keohane, Moravscik, and Slaughter, for example, attempt to calculate the degree of "independence" on a range from high to low of many of these bodies based on various factors, including method of selection and tenure. They situate the ECJ and the European Court of Human Rights (since 1999) at the high end; assign the European Court of Human Rights (pre-1999) and the Inter-American Court of Human Rights a moderate to high rating, accord a "moderate" ranking to WTO/former GATT panels and the ICJ, and give a "low" ranking to the UN Security Council. Robert O. Keohane, Andrew Moravscik and Anne-Marie Slaughter, "Legalized Dispute Resolution: Interstate and Transnational," 54 *Int'l. Org.* 458, at 469 (Summer 2000). They do the same with respect to "access"(defined to mean "the range of social and political actors who have legal standing to submit a dispute to be resolved"), *id.*, at 462 and 469; and "embeddedness" (intended to measure the "degree of control exercised by individual governments over the legal promulgation and implementation of judgments"), *id.*, at 466 and 469.

impact on legal discourse and on the law. Both the adjudicators themselves and the wider "college of international lawyers" play a role in ensuring that many forms of "dispute settlement" result in law creation. Although many of these dispute settlers routinely disclaim a role in making law and it is not rare for many of them to suggest only that they "discover" the rules that apply but do not "make" them,[5] nearly all or most of them nonetheless cite their own or other international tribunals' prior decisions in support of their judgments. Neither the absence of a hierarchy among these international dispute settlers nor resistance to adopting a clear doctrine of *stare decisis* has prevented what is a routine characteristic of common law decision-making: reliance on prior "caselaw" or attempts to distinguish prior opinions as if they were precedents requiring differentiation to the extent not followed.[6] Although the degree to which these dispute settlers rely on and cite either their own prior opinions or those of other dispute settlers varies, and is often a function of whether the dispute settler gives discursive or succinct reasoned opinions, dispute settlers, scholars, and states make regular resort to these opinions as general evidence of what the law is and not merely as proof of the result in a particular case.

Explanations for the development of and reliance upon adjudicative "precedents" among international dispute settlers vary. For some, international "caselaw" inevitably develops because of international law's reliance on unwritten rules and principles or because of its need for unifying elements amidst "centrifugal" forces.[7] The search for a unifying, if formally missing hierarchy of dispute settlers, may explain why so many of these dispute settlers regularly cite to, and find persuasive, ICJ opinions (or why, on the contrary, the ICJ rarely, if ever, cites to opinions of others not its own). A less functionalist explanation, more dependent on positivist black letter doctrine, explains the phenomenon in terms of article 38 of the Statute of the ICJ. Article 38(d)'s reference to "judicial decisions" (along with the views of highly qualified publicists) as a "subsidiary means for the determination of rules of law" serves notice that decisions rendered in the course of adjudication can be cited as evidence of what a treaty means, what custom demands, or what general principles of law are recognized by states.[8] Whatever the explanation, neither the positivist's need to ground international obligation in the "consent" of states nor the "judicial" limitation in article 38 (never successfully defined) has prevented resort to the decisions rendered by a broad array of quasi-judicial and judicialized entities. The international lawyers' perennial, sometimes desperate, search for written legal conclusions regarding contested or unresolved points of

[5] For examples, see *infra* Chapter 9, at notes 36–8 (examples of courts denying that they are engaged in law-making).

[6] *See generally* Mohamed Shahabuddeen, *Precedent in the World Court* at 107–76 (Cambridge, U.K., and New York: Cambridge University Press, 1996)(discussing the Court's use of its own precedents despite the inapplicability of a formal doctrine of *stare decisis*, including its tendency to distinguish *ratio decidendi* from *obiter dicta*) and 213–15 (noting the use of precedent by advocates before the Court). State digests of practice, as well as documents with a semi-official status, such as restatements of the law, are replete with citations to international precedents as well.

[7] *See, e.g.*, Shahabudeen, *supra* note 6, at 8–9.

[8] *See* article 38 (a)–(c).

law, especially when rendered by a body with a claim to "impartial" legitimacy, have made many of the opinions issued by these institutionalized adjudicators at least as much a part of international legal discourse as other evidence of international norms, including state digests of practice and the opinions of the "most highly qualified publicists." Indeed, given the difficulty of finding the actual practice of states, as well as the inevitable selectivity of those state practices that are readily accessible, the opinions of international dispute settlers, increasingly available through the Internet, and, for members of the relevant IOs, in hard copy, may now be cited more often than this more traditional form of evidence of international law.

As would be expected, given the "judicial" qualification in article 38 and for the reasons suggested by commentators like Mann (discussed in Chapter 7), lawyers have been more reluctant to draw normative conclusions from results reached in the course of "political" dispute settlement. While lawyers are conflicted about the law-making qualities of dispute settlement when it is undertaken by the Security Council, the Secretary-General, the GA, or perhaps hybrids like the UNCC, they are less hesitant with respect to, for example, the opinions issued by the ICJ or the WTO Appellate Body. When pressed, many international lawyers agree, with Martin Shapiro and most students of courts in common law and civil law systems, "that all courts engage in at least supplementary and interstitial law making, filling the details of the statutory or customary law."[9] Subject to important exceptions, such as the *nullen crimen* principle in criminal cases, many international lawyers would add that this is legitimate, and not merely a necessity. They have readily absorbed the lesson that the ILC learned when it tried to abide by the GA's injunction that it clearly distinguish its work on "progressive development" from "codification."[10] As the ILC discovered, even seemingly routine efforts to codify existing law, as in its efforts with respect to the Vienna Convention on the Law of Treaties, invariably involved some creative gap-filling. As is suggested by Chapter 2's discussion of "constitutional interpretation," serious disputes concerning the meaning of a treaty cannot be resolved through the routine, mechanical application of rule to undisputed fact. Disputes that can be resolved in this fashion are most likely to be resolved by the parties themselves, as through the diplomatic consultations that are frequently required prior to resort to the more judicial processes discussed in this chapter, or through some of the less formal processes discussed in Chapter 7 (including requests to secretariats for informal legal opinions). Resort

[9] Martin Shapiro, *Courts: A Comparative and Political Analysis* at 28 (Chicago: University of Chicago Press, 1981). *See, e.g.*, Hersch Lauterpacht, ed., *The Development of International Law by the International Court*, at 155 (Cambridge, U.K.: Cambridge University Press Grotius Public Reprint Series, 1982)("Judicial law-making is a permanent feature of administration of justice in every society.") While recognition of this fact is often attributed to common law observers, the conduct of civil law judges within the ECJ suggests that the phenomenon is not restricted to the common law. *See, e.g.*, J. H. H. Weiler, "The Transformation of Europe," 100 *Yale L. J.* 2403, at 2425–8 (1991). *See also* C. Neal Tate and Torbjörn Vallinder, eds., *The Global Expansion of Judicial Power* (New York: NYU Press, 1995).

[10] *See* GA Res. 174 (II) (November 21, 1947), articles 15–24 (distinguishing between the procedures to be followed for "progressive development" as opposed to "codification").

to the more elaborate, time-consuming and expensive processes in this chapter typically require more complex determinations, such as interpreting the meaning to be given to imprecise treaty language or construing lacunae in a treaty regime given manipulable canons of interpretation, the presumed or original intent of treaty drafters, or the efficacy of a regime. Many legal commentators have long recognized that in all but the most routine of cases, the adjudicative "application" of law to a given set of facts involves complex, interactive reasoning that cannot be reduced to merely "discovering" empirical fact or the mechanical application of rules of logical deduction. Adjudicative process applied to distinct fact patterns over time, as Lon Fuller famously argued, inevitably develops the law, even if only by clarifying *which* facts are relevant to resolving the legal issues under dispute.[11]

Joel Trachtman has argued that the WTO's adjudicative processes, among the most developed in public international law, determine the applicable law through all or some of the following steps: (1) determining which law or set of rules is applicable to the facts alleged; (2) determining the meaning to be given to these rules; (3) determining how to construe rules whose terms do not precisely apply but whose "intent" may; (4) determining whether or how to fill lacunae where no rules appear to apply; (5) deciding, when rules conflict, whether both or only one applies; and/or (6) deciding, when rules conflict, whether they are of "equal" stature and, if so, how to accommodate both.[12] Depending on the circumstances and the context of the dispute, each of these steps may accord the adjudicator considerable discretion. The level of judicial discretion is all the greater within the context of the rudimentary international legal system as even its most sophisticated and evolved treaty regimes, such as the WTO's covered agreements, are replete with substantive and procedural lacunae that adjudicators need to fill, at least if they wish to avoid findings of non-justiciability or *non-liquet*.[13]

[11] *See* Lon L. Fuller, "The Forms and Limits of Adjudication," 92 *Harv. L. Rev*. 353, at 380–1 (1978) (describing adjudicative reasoning as involving the tracing out and articulation of "shared purposes" in a way that resembles but is not identical to logical deduction since the "end result is not a mere demonstration of what follows from a given purpose but a reorganization and clarification of the purposes that constituted the starting point of inquiry"). S*ee also* Joel Trachtman, "The Domain of WTO Dispute Resolution," 40 *Harv. Int'l L. J*. 333, at 338–41 (1999).

[12] Trachtman, *supra* note 11, at 337 (noting that where the applicable legal provision is clear, self-executing, fully specified in advance, and not in need of interpretation or construction the dispute settler has little left to do except to determine the facts but that this is rarely the case).

[13] *See, e.g.*, *id*., at 338 (describing "procedural" lacunae as involving gaps in the jurisdiction of a particular international dispute settler such that, for example, tribunals with less than "general" jurisdiction are given no clear direction as to how to integrate rules from other treaty regimes). Trachtman identifies at least one case by the WTO Appellate Body where that body declined to provide a remedy. *Id*., at 338, n. 21 (noting the WTO Appellate Body Report for Brazil—Measures Affecting Desiccated Coconut of February 21, 1997). For another example suggestive of a finding of *non liquet*, see *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 ICJ. Rep. 66, at 105. *But see* Prosper Weil, " 'The Court Cannot Conclude Definitely . . . ' Non Liquet Revisited," 36 *Colum. J. Transnat'l L*. 109, at 110 (1997)("the view prevailing among writers is that there is no room for non liquet in international adjudication because there are no lacunae in international law"); Ernst-Ulrich Petersmann, "How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System." 1 *J. Int'l. Econ. L*. 25,

The relative impact of any particular adjudicative attempt to fill these gaps depends on a number of factors, including the pedigree of the adjudicator within the broader institutional context, the point of law at issue, and the reaction of the parties to the underlying dispute. It is not always clear, even with respect to established international courts like the ICJ, whether a judgment, when rendered, will prove to have "normative legs." Some decisions, even if issued by prominent international judicial bodies, have had little or no immediate normative impact, even with respect to the parties to the dispute, much less with respect to the law as a whole.[14] This has even been obviously true of some prominent "advisory" opinions of the ICJ, such as its opinion in the *Certain Expenses case* discussed in Chapter 3, whose legal impact has only become clear over time. But even formally binding decisions issued by the ICJ or by the WTO's Appellate Body have sometimes taken a very long time to be accepted or to be implemented by the parties to the decision.[15] The legal impact of a decision on the disputants and, even more, on the international community, may not become evident for a considerable period of time in part because of the absence of a direct reference to the decision or any acknowledgment that it is being complied with by the parties to the decision or by others. In addition, as even domestic lawyers operating within a common law system ostensibly based on *stare decisis* acknowledge, the status of any judicial decision—its "precedential" value—ebbs and flows over time depending on other developments, including whether litigants in other cases cite to the decision.

Much of the literature concerning the most prominent international courts or tribunals, namely the ICJ, the GATT's and now the WTO's dispute settlement system, the ECJ, the European Court of Human Rights, the Inter-American Court of Human Rights, and the ICTY and ICTR, critically explores these entities' attempts to contribute to the law. Indeed the vast (perhaps inordinate) attention

at 32–3 (1998)("no court may refrain from giving judgment on the grounds that the law is silent or obscure"). Presumptively, general principles of law and of equity, and perhaps the *Lotus* principle deferring to national sovereignty, are always available to fill in gaps. *See* Trachtman, *supra* note 11, at 341. For an example of the efforts some dispute settlers undertake to avoid a finding of *non liquet* or the equivalent, see José E. Alvarez, "Nuremberg Revisited: The Tadic Case," 7 *EJIL* 24 (1996) (discussing the jurisdictional findings of the ICTY in its first case).

[14] In addition, there are numerous and difficult methodological and conceptual problems in determining whether any international norm, whether issued by a court or not, result in "compliance" or otherwise has an impact on the real world practice of states. *See* Chapter 4, *supra*. This is distinct from determining whether adjudicative decisions have a consequential impact on legal discourse—as measured, for example, by whether these decisions, once issued, are cited by lawyers elsewhere, including in other adjudicative fora.

[15] As is well known, states as different as the U.S. and Iran have failed to participate in ICJ proceedings and have ignored that Court's binding judgments (as in the *Nicaragua* and *Iran Hostages* cases respectively). There have been notorious difficulties in implementing certain controversial WTO decisions, as in the context of *Bananas* (against the European Union). Moreover, not even the much vaunted compliance records of European courts is untarnished. *See, e.g.*, Martin Walker, "Turkey Defies Europe over Compensation for Cyprus Seizure," *Guardian* (London), August 27, 1998, at 12. *See also* Karen J. Alter, "The European Union's Legal System and Domestic Policy: Spillover or Backlash?," 54 *Int'l Org.* 489 (2000) (noting uneven equality of compliance among national courts with rulings issued by ECJ).

paid to the relatively few quasi-judicial and judicial opinions rendered on the international plane by legal scholars and lawyers in foreign ministries is a testament to the shared assumption, at least among the invisible college of international lawyers, that such decisions do more than settle a particular dispute. The work of prominent commentators such as Rosenne, Fitzmaurice, Guillaume, Bowett, Thirlway, and others to distill the normative impact, both substantive and procedural, at particular moments in time, of decisions rendered by the PCIJ and later the ICJ,[16] has found modern-day emulators in a variety of contexts, by international trade lawyers (examining the contributions of GATT panels and the WTO Appellate Body), European Union lawyers (looking at the ECJ), European human rights lawyers (on the European Court of Human Rights), scholars on the Inter-American human rights system, and a veritable army of international criminal lawyers on both sides of the Atlantic (on the ICTY and ICTR).[17] Even tribunals with considerably narrower jurisdiction, such as the Iran-United States Claims Tribunal, have spawned comparable efforts to parse and distill the relevant "caselaw."[18]

As a survey of this vast literature suggests, virtually no subject within international law is now immune from at least potential adjudicative law-creation. The quasi-judicial and judicial bodies now operating impact, on a regular basis, one or more of the following four categories of law: (1) substantive obligations of the treaty

[16] *See, e.g.*, Shabtai Rosenne, *The Law and Practice of the International Court, 1920–1996* (The Hague and Boston: M. Nijhoff, 3rd edn., 1997); D.W. Bowett et al., *The International Court of Justice: Process, Practice and Procedure* (London: B.I.I.C.L., 1997); Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge, U.K.: Grotius, 1986)(2 vols.); Nagendra Singh, *The Role and Record of the International Court of Justice* (Boston: M. Nijhoff, 1989); J.H.W. Verzijl, *The Jurisprudence of the World Court: A Case By Case Commentary* (Leyden: I.W. Sijthoff, 1965)(2 vols.); Eduardo Jiménez De Aréchaga, "The Work and the Jurisprudence of the International Court of Justice 1947–1986," 58 *Br. Yrbk Int'l L.* 1 (1987). For a thorough analysis of the legal precedents set by the ICJ over a nearly 30 year period, see the thirteen part analysis by Hugh Thirlway of "The Law and Procedure of the International Court of Justice, 1960–1989" starting with Part One at 60 *Br. Yrbk Int'l L.* 1 (1989).

[17] *See, e.g.*, Thomas Buergenthal, *International Human Rights* (St. Paul, MN: West, 1995); Scott Davidson, *The Inter-American Human Rights System* (Aldershot, U.K. and Brookfield, VT: Ashgate Publishing Company, 1997); John H. Jackson, William J. Davey and Alan O. Sykes, *Legal Problems of International Economic Relations* (St. Paul, Minn.: West, 2002); George A. Bermann et al., *Cases and Materials on European Union Law* (St. Paul, Minn.: West, 2002); Paul Craig and Grainne de Burca; *European Union Law: Text, Cases and Materials* (Oxford, U.K.: Oxford University Press, 3rd edn., 2002); Jordan J. Paust, *International Criminal Law: Cases and Materials* (Durham, NC: Carolina Academic Press, 2nd edn., 2000). Indeed, the work of the ICTY/ICTR has drawn such academic attention that it has helped to spawn a new academic journal that devotes substantial attention to these tribunals' caselaw. *See Journal of International Criminal Justice*.

[18] *See, e.g.*, Louis B. Sohn, "The Iran-United States Claims Tribunal: Jurisprudential Contributions to the Development of International Law Claims" in Richard B. Lillich, ed., *Iran-United States Tribunal 1981–1983* [Seventh Sokel Colloquium] at 92–103 (Charlottesville: University Press of Virginia, 1984); Ignaz Seidl-Hohenveldern, "The Iran-United States Claims Tribunal: Controversies, Cases and Contribution," 34 *German Yrbk. Int'l L.* (1994); G.H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal—An Analysis of the Decisions of the Tribunal* (Oxford, U.K.: Clarendon Press, 1996).

regime in which the adjudicator is embedded; (2) "general" public international law (including treaties not embedded in the IO of which the adjudicator is a part, customary international law, and general principles of law, and the many forms of international institutional law discussed in Chapters 2 and 3); (3) other sources of potential international obligation, hard and soft, not clearly included in the traditional article 38 categories (including the many products of IOs discussed in Section 4.3); and (4) national law relevant to resolving the dispute presented to the international forum. While the lines distinguishing these four categories of law blur and a single decision may simultaneously affect all of them, it is useful to examine illustrative examples of each of these modes of adjudicative law-creation in turn.

8.2 Regime-specific Law

There is a substantial literature, by lawyers and political scientists, concerning judicial law-making within the European Union. The ECJ is the most prominent international dispute settler engaged in regime-specific law-making. The story of how the judges on the ECJ have been instrumental in turning an inter-state compact binding on sovereign states into a "vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private," within the sphere of application of Community law[19] or, if one prefers, in shifting from a legal order governed by international law to one based on a "constitutional charter governed by a form of constitutional law"[20] is by now a familiar tale that needs no repetition here.[21] Today, no one questions the central role of the ECJ in this transformation, particularly through its landmark decisions establishing and developing the doctrines of direct effect and supremacy for Community legislation.[22] Particularly in its twin decisions in 1963 and 1964,

[19] *See* J.H.H. Weiler and Joel P. Trachtman, "European Constitutionalism and its Discontents," 17 *Nw. J. Int'l L. & Bus.* 354, at 356 (1996–1997)(quoting Alec Stone). [20] *Id.*

[21] *See, e.g., id.*; Eric Stein, "Lawyers, Judges and the Making of a Transnational Constitution." 75 *AJIL* 1 (1981); Weiler, *supra* note 9. Indeed, Stein's focus on the central role of the ECJ (and the conversation between it and the Commission, member governments, and advocates general) in this transformation is suggested by his famous opening sentence: "Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe." Stein, *supra*, at 1. Weiler's description of the fashioning of the European constitutional order considers the interaction between the ECJ and a broader set of actors, including national courts and other statal actors. Weiler, *supra* note 9. For a version of the same story from the perspective of political science, see, e.g., Alec Stone Sweet and Thomas L. Brunell, "Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community," 92 *Am. Pol. Sci. Rev.* 63 (March 1998).

[22] But some commentators still dispute the legitimacy of the ECJ's efforts at "judicial legislation." *See, e.g.*, Trevor C. Hartley, "The European Court, Judicial Objectivity and the Constitution of the European Union," 112 *The Law Quarterly Rev.* 95 (1996)(enumerating instances of judicial rulings that are "contrary to the natural meaning of the words used" in the European treaties).

in *Van Gend en Loos* and *Costa* v. *ENEL*, the ECJ rendered the relationship between Community law and Member State law, for most practical purposes, "indistinguishable from analogous legal relationships in constitutional federal states."[23]

The ECJ developed the presumption that clear, precise, and self-sufficient legal norms created by Community organs must be regarded as the "law of the land" within Member States. Its notion of direct effect meant, as a rule of construction, that the European Treaty and its secondary legislation creates enforceable obligations not merely between Member States and individuals, but also among individuals inter se; that these norms can be invoked by individuals before their national courts and that these courts must provide adequate legal remedies as if these had been enacted by national legislatures.[24] In *Van Gend en Loos*, the Court famously posited that the EEC Treaty was "more than an agreement which merely creates mutual obligations between the contracting states." Rather, the Community "constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals."[25] While commentators debate whether the Court's implicit view of the limitations of traditional public international law were accurate even in 1963,[26] there is little doubt about what the Court set out to do, successfully, in *Van Gend en Loos*: its proclamation of a "new legal order" sought to distance the Community order from the perceived ineffectiveness of public international and its (usual) interstate remedies. Subsequently there would be little doubt that what the ECJ was engaging in was developing specialized law within a particular treaty framework, and not the interpretation or application of general public international law (which that Court rarely, if ever, cited again).

As Joseph Weiler has argued, the full impact of direct effect was realized by the Court's development of the principle of "precedence of Community law," beginning with its decision in *Costa* v. *ENEL* in 1964.[27] By affirming, in the absence of a clause in the EEC Treaty on point, an "uncompromising version of supremacy" such that where Community law applies, any Community norm, from treaty norms to administrative regulations, " 'trumps' conflicting national law whether enacted before or after the Community norm," the ECJ went beyond even those quasi-monist systems like the U.S., which accept the possibility of "self-executing" treaties

[23] Weiler, *supra* note 9, at 2413. [24] *Id.*

[25] Case 26/62, *Van Gend en Loos* v. *Nederlandse Adminstratie der Belastingen* [1963] ECR 1, at 12.

[26] *Compare* Weiler, *supra* note 9, at 2413–14 (arguing that "[p]ublic international law typically allowed the internal constitutional order of state to determine the method and extent to which international obligations may, if at all, produce effects for individuals within the legal order of a state" and that remedies for its breach are typically interstate "unless international constitutional or statutory law, to which public international law is indifferent" provides for remedies via domestic courts) with Ole Spiermann, "The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order," 10 *EJIL* 763, at 767–70 (arguing that the ECJ's view of public international law was ahistorical since it ignored precedents, as by military tribunals established in the wake of World War II and by the ICJ, where public international law was held to have direct effect).

[27] Weiler, *supra* note 9, at 2414. *See* Case 6/64, *Costa* v. *ENEL* [1964] ECR 585, at 594.

but subject these to the later in time rule such that treaty norms must give way to the subsequent will of the legislature.[28]

For most Community observers, a key element in the evolution of the Community legal order, and the ECJ's role in interpreting the diverse policy questions implicated by the Community "four freedoms,"[29] as well as other subjects of Community law (including environmental policy, consumer protection, workplace standards, and transport policy), has been article 177 of the EEC Treaty which provides, among other things, that when a question concerning the interpretation of the Treaty is raised before a national court, the court may suspend the national proceedings and request a preliminary ruling from the ECJ on the correct interpretation.[30] Once the ECJ issues its ruling, the case returns to the national court which renders the final judgment, applying the ECJ judgment and specifying the remedy. As Weiler has argued, this method, combined with judicially created doctrines such as direct effect and supremacy[31] turned national courts, as well as individuals, into decentralized agents for monitoring compliance, thereby nationalizing Community norms and creating a habit of obedience that so far has not been achieved by any other international regime.[32]

It would be wrong, however, to conclude from the ECJ example that international law-making by dispute settlers requires all of the unique elements that, in combination, characterize the European system. While EEC commentators may be right that no other international treaty regime to date has relied to such an extent on judicial legal development, other international dispute settlers have had a significant impact on the treaty regime in which they are embedded and, as might be expected, such adjudicative law-making occurs most often with respect to the substantive law that the dispute settler is charged with interpreting. Indeed,

[28] Weiler, *supra* note 9, at 2414–15. *But see* Spiermann, *supra* note 26, at 772–5 (arguing that the *lex posterior derogat priori* rule is not a rule of international law at least insofar as applied to the relative status of international versus domestic law but that, on the contrary, as is clear from article 27 of the Vienna Convention on the Law of Treaties, municipal law cannot be invoked to justify a treaty breach).

[29] That is, the free movement of goods, people, capital, or services.

[30] *See, e.g.*, Anne-Marie Burley and Walter Mattli, "Europe Before the Court: A Political Theory of Legal Integration," 47 *Int'l Org.* 41(1993)(arguing that the self-interests of private litigants, national judges, and the ECJ align to encourage the expansion and penetration of Community law); Sweet and Brunell, *supra* note 21 (positing, based on the Community experience, that transnational trade combined with third party dispute resolution leads to the expansion of legal rules and the construction of supranational governance); Keohane, Moravcsik, and Slaughter, *supra* note 4 (discussing the ECJ as a "transnational dispute resolution system" that is "inherently more expansionary" than traditional "interstate" approaches open only to states as parties). For one critique of much of this literature, see Alter, *supra* note 15.

[31] *See* Weiler, *supra* note 9, at 2415–19 (discussing the ECJ's resort to the doctrine of implied powers and limitations premised on human rights as two additional tools for constitutionalization).

[32] *See, e.g.*, Weiler, *supra* note 9, at 2420–2 (noting that the combination of constitutionalization and the evolution of EEC remedies makes the Community legal order something "new": a "truly self-contained legal regime with no recourse to the mechanism of state responsibility, at least as traditionally understood, and therefore to reciprocity and countermeasures, even in the face of actual or potential failure"). *See also* Alter, *supra* note 15, at 490–1 (noting that the EU is the most "legalized" international institution in existence on three dimensions: degree and level of obligation, precision of those obligations, and scope of delegation accorded to Community institutions).

the European example is now most often cited by international lawyers not by way of contrasting public international law regimes but by way of suggesting the probable or desired trajectory of some of the more judicialized international regimes.[33]

Decisions by GATT panels and by the WTO's Appellate Body (collectively, the "dispute settlement body" or DSB)[34] are a prominent example of adjudicative lawmaking within the context of a particular treaty regime that aspires, unlike the European Community, to universal participation. Dispute settlers in the trade regime have made enormous contributions to international trade law despite the absence of any comparable doctrines to direct effect or supremacy (and, of course, without any explicit notion of *stare decisis* either within the pre-1994 GATT or in the WTO's post-1994 Dispute Settlement Understanding (DSU)).[35] WTO adjudicators are regarded as having established significant principles of trade law, including: the possibility of making claims based on mere "nullification and impairment" of trade rights whether based on a violation of the GATT or not;[36] the viability of claims of GATT violation based on measures taken by private actors under the shadow of government involvement;[37] the meaning to be given to ambiguous terms of art within trade law such as "like product"[38] and

[33] *See, e.g.*, Alec Stone Sweet, "Judicialization and the Construction of Governance," 32 *Comp. Pol. Stud.* 147 (1999); Ernst-Ulrich Petersmann, "Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?," 31 *NYU J. Int'l L. & Pol.* 753 (1999); Lawrence R. Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication," 107 *Yale L. J.* 273 (1997).

[34] Under the WTO's Dispute Settlement Understanding (DSU), the DSB, made up of all the contracting states to the WTO and acting on the basis of consensus, is empowered to establish panels, adopt panel and Appellate Body reports, oversee the implementation of panel recommendations adopted by the DSB, and authorize retaliation. The DSU reverses the presumption that operated under the old GATT. Under the DSU, a panel will be formed, a panel or Appellate Body report will be adopted, and retaliation will be authorized unless there is a consensus against doing any of these, that is, unless *all* parties to the DSB agree to do so. If only one state representative on the DSB, for example, refuses to join consensus to reject a panel report, the panel report must be adopted. If a DSB decision involves a particular "plurilateral" agreement, only those members of that agreement may participate in such decisions. Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, article 3(2), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 *ILM* 1144 (1994)(hereinafter "DSU"). Because the DSB formally adopts panel and Appellate Body decisions, it is common for observers to consider the collective actions of these bodies to be subsumed as "actions taken by the DSB." *See Uruguay Round Trade Agreement*, Statement of Administrative Action, Understanding on Rules and Procedures Governing the Settlement of Disputes, H.R. Doc. No. 316, 103d Cong., 2d Sess., Vol. 1, 1008–22 (September 27, 1994).

[35] *See, e.g.*, DSU, *supra* note 34, article 3(2) ("recommendations and rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreements").

[36] For discussion of the broad invitation to judicial construction implied by the concept of a "non-violation nullification or impairment" claim, see Trachtman, *supra* note 11, at 370–3 (but noting how the GATT panel report in the *Kodak-Fuji case* narrows the scope of this type of claim).

[37] *See, e.g.*, Japan—Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R, Panel Report adopted by the DSB on April 22, 1998 (rejecting U.S. claim but accepting the possibility that non-binding actions taken by a government that incentivize private actors to take particular actions could present a viable non-violation complaint)(also known as the *Kodak-Fuji case*).

[38] This question arises regularly in connection with the WTO's provisions requiring non-discriminatory treatment, that is, requiring WTO dispute settlers to determine whether the foreign product that is being treated differently is in a sufficiently competitive relationship with a domestic

"sanitary measures" (as for purposes of the SPS Agreement);[39] the inclusion of rights and duties that, at the time of decision, were not explicitly mentioned in the GATT agreements (such as "trade related investment measures");[40] the scope of permissible exceptions to the GATT's liberal trade regime;[41] and the nature of remedies permitted for violation of trade rights.[42] GATT panel and Appellate Body rulings have similarly developed an expansive procedural "common law" of the GATT, establishing "black letter" rules concerning standing, ripeness and mootness, exhaustion of domestic remedies, sufficiency of a complaint, participation of private counsel, principles of judicial economy, burden of proof, fact-finding, submissions from NGOs, and the use of prior GATT panel reports that are not clearly articulated by the covered agreements.[43] While the WTO DSB and prior GATT panels have deviated from prior GATT caselaw, their express reliance on prior rulings is readily apparent.[44]

The degree of adjudicative gap-filling that occurs within the WTO is so considerable that it has even been noticed by outspoken critics within international civil society, such as the U.S.-based NGO, Public Citizen. The creativity of the WTO DSU is suggested by the Appellate Body's decision in *Shrimp/Turtle*. In that case, the Appellate Body decided that the United States' prohibition on the importation of certain shrimp and shrimp products harvested with commercial technology that may adversely affect sea turtles violated the GATT and was not justified as an exception intended to protect animal life or as an exhaustible natural resource. That decision, as well as the prior GATT ruling on the same question, required making several of Trachtman's six-fold determinations: i.e., it required the

product that it ought to be considered a "like" product. *See, e.g.*, European Committee Measures Affecting Asbestos and Asbestos-Containing Products, (WT/DS135/R (September 18, 2000) and WT/DS135/AB/R (March 12, 2001)).

[39] *See, e.g.*, *EC—Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS26/AB/R, January 16, 1998.

[40] *See* Canada—Administration of the Foreign Investment Review Act, GATT Panel, L/5504, February 7, 1984.

[41] *See, e.g.*, *US—Importation of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R (December 23, 1999) and WT/DS138/AB/R (May 10, 2000).

[42] *See, e.g.*, Friedl Weiss, "The WTO and the Progressive Development of International Trade Law," XXIX *Netherlands Yrbk Int'l L.* 71 (1998); Petros C. Mavroidis, "Remedies in the WTO Legal System: Between a Rock and a Hard Place," 11 *EJIL* 763 (2000). For a survey of the WTO's caselaw for 2001 and its substantive contributions, see Henrik Horn and Petros C. Mavroidis, eds., *The WTO Case Law of 2001* (Cambridge, MA: American Law Institute, 2003).

[43] *See, e.g.*, Raj Bhala, *International Trade Law: Theory and Practice* at 230–40 (New York: Lexis Publications, 2nd edn., 2001).

[44] For documentation on the formal use of precedent within the trade regime, see, e.g., Raj Bhala, "The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)," 14 *Am. U. Int'l L. Rev.* 845 (1999); Raj Bhala, "The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)," 9 *Fla. St. U. J. Transnat'l L. & Pol'y* 1 (1999); Raj Bhala, "The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)", 33 *Geo. Wash. Int'l L. Rev.* 873 (2001). Bhala argues that scholars and GATT panelists need to end the hypocritical stance suggesting that there is no *stare decisis* within the WTO; he recommends a formal amendment to the covered agreements and DSU to include precedent as a formal source of law.

Appellate Body to determine (1) whether the U.S. measures were subject to article III of the GATT (requiring national treatment); (2) whether, if subject to article III, they were removed from the strict scrutiny of article XI (banning embargoes); and (3) if still subject to article XI, whether they were nonetheless GATT legal under any of the exceptions provided in article XX.[45] Unlike the original GATT panel which decided the issue, the Appellate Body decided that the U.S. had met its burden of showing that it was within the parameters of article XX(g). The Appellate Body decided that the U.S. measures did "relate to" the goal of preserving an "exhaustible natural resource," and that the U.S. measures were "made effective in conjunction" with restrictions on domestic production.[46] Nonetheless, it ruled the U.S. measures GATT-illegal because they constituted "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade" under the chapeau of article XX.[47] As is suggested by the sharp differences between the Appellate Body's approach to the relevant issues and the interpretations offered by prior GATT panels that had addressed the meaning and application of article XX,[48] that case presented numerous opportunities for the exercise of judicial discretion.

The Appellate Body subtly changed the direction of trade law through this decision, in a direction that evinced considerably more sensitivity to environmental policy concerns than prior GATT law. It did not, unlike the prior GATT panel, determine that the U.S. measures were "discriminatory" because they distinguished between countries where "the same conditions prevail" and that this discrimination was "unjustifiable" because it frustrated the broad purpose of the WTO Agreement, which was to "promote economic development through trade."[49] As Trachtman has noted, this earlier decision seemed to predetermine that measures having an environmental object and purpose would invariably fall short of satisfying the trade regime's "broad" purposes.[50] Instead, the Appellate

[45] *See* Trachtman, *supra* note 11, at 346 and see *supra* text accompanying note 12.

[46] WTO Appellate Body Report: *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998–4, WT/DS58/AB/R (98–3899) (October 12, 1998)(hereinafter *Shrimp/Turtle* Appellate Body Report), Section VI(B)(1)–(3)(citing CITES at para.132). The relevant language of article XX of the GATT states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures…(b) necessary to protect human, animal or plant life or health;…(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption…

[47] *See* text of article XX, *supra* note 46.

[48] *See WTO Panel Report: United States—Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998–4, WT/DS58/AB/R (98–1710)(May 15, 1998) (hereinafter *Shrimp/Turtle* Panel Report). Other unadopted panel reports, from 1991 and 1994, had considered the issue as well. *See, e.g., WTO Panel Report: United States—Restrictions on Imports of Tuna*, GATT BISD (39th Supp.) at 155, 204, para. 6.3 (1993), reprinted in 30 *ILM* 1594 (1991); *WTO Panel Report: United States—Restrictions on Imports of Tuna*, DS29/R (1994), reprinted in 33 *ILM* 839 (1994).

[49] *Shrimp/Turtle* Panel Report, *supra* note 48, at paras. 7.33–7.34, 7.40, and 7.42.

[50] Trachtman, *supra* note 11, at 358–9.

Body suggested that the WTO Agreement did not have a single overarching "object and purpose" that must be read into every provision, including those that, like article XX(g), evinced concerns other than the liberalization of trade flows. It suggested that interests outside the four corners of the WTO Agreement may be relevant to its interpretation and found the inclusion of sea turtles as a species threatened with extinction in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) to be relevant to its ultimate determination that these creatures were indeed "exhaustible natural resources" for purposes of article XX.[51] Further, unlike the prior GATT panel in the case, the Appellate Body refused to rule on whether there is a territorial or jurisdictional limitation to permissible article XX measures; it did not say that the "extraterritorial" nature of the U.S. measure would alone have rendered it GATT-illegal.[52]

At the same time, the Appellate Body's interpretation of the chapeau of article XX in that case has enhanced its own powers, as adjudicative gap-filling so often does.[53] As a result of that decision, the Appellate Body gave itself discretionary power to determine whether measures falling within article XX are applied "reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned."[54] As Trachtman points out, the Appellate Body's judicially created "balancing test" to determine whether a challenged article XX measure is the "least restrictive," presumes that it is up to the WTO's dispute settlers to make this judgment. As a result, WTO panels and its Appellate Body are now authorized to engage in a policy-oriented means–ends analysis that requires them to consider, among other things, whether measures justified under article XX are too broad or stringent, whether the country asserting an article XX exception to undertake unilateral measures has previously attempted serious international negotiations directed at a multilateral solution, and whether the particular exception taken is unjustifiable because it is insufficiently responsive to differing conditions prevailing in foreign countries or insufficiently transparent in operation.[55] Whether or not all or some of these determinations appropriates too much or too little power to the WTO's judicial branch,[56] it is clear, as both critics and admirers of this decision acknowledge, that this decision has singular importance to the future resolution of

[51] *Shrimp/Turtle* Appellate Body Report, *supra* note 46, at para. 132. [52] *Id.*, at para. 133.

[53] For a particular example of adjudicative gap-filling used to enhance an international court's own powers, see *Le Grande case (Germany* v. *United States*), Judgment of June 27, 2001, 2001 ICJ Rep. (forthcoming)(text at http://www.icj-cij.org/icjwww/idecisions.htm)(finding that ICJ provisional measures orders are legally binding). *See also Shrimp/Turtle* Appellate Body Report, *supra* note 46.

[54] *Id.*, at para. 151.

[55] Trachtman, *supra* note 11, at 362–4 (praising the Appellate Body in this case for its "measured, analytical approach to teleological interpretation," for rejecting a strict "original intent" interpretation of article XX(g) in favor of a more dynamic interpretation, and for "aggregating substantial power to itself" in order to "modernize" the interpretation of article XX).

[56] For a critique of the Appellate Body's aggregation of power to determine whether the country asserting an article XX exception has previously undertaken "serious, across the board" multilateral negotiations, see John O. McGinnis and Mark L. Movsesian, "The World Trade Constitution," 114 *Harv. L. Rev.* 512, at 592–4 (2000).

many disputes concerning the line between permissible environmental regulation and national rules that will be struck down as impermissibly trade protectionist in effect or intent. Neither the WTO's admirers nor its detractors within the environmental community deny that the *Shrimp/Turtle* Appellate Body Report has given a whole new layer of meaning to the bare text of article XX of the GATT.

Trade commentators have suggested various rationales for the law-making prowess of the WTO's dispute settlement system. Defenders contend that the WTO's dispute settlers have not assumed power that they did not already have but that they have been delegated this gap-filling function as much as national legislatures have delegated authority to administrative agencies. Thus, Trachtman, inspired by the work of Hadfield on domestic statutes, argues that the drafters of the GATT Agreement originally had, like all treaty-makers, the choice of whether to specify a particular solution in the treaty, leave the question to dispute resolution, or narrow the DSB's discretion by, for example, identifying a different standard of review.[57] They chose to spend the considerable transaction costs of constructing an elaborate DSU that could resolve questions that would otherwise have required costly ex ante bargaining to resolve. In addition, since the DSB is only empowered to decide what governments bring before these bodies, members can, once treaty provisions are in place, still prevent adjudicative law-making simply be refusing to bring particular complaints.[58] Further, once a dispute is submitted to WTO dispute resolution the treaty-makers retain some discretion to reassert their "legislative" authority if they are displeased by the result; that is, they can modify the treaty,[59] seek an authoritative interpretation through political decision-making among the GATT parties,[60] or block by consensus the adoption of a panel report.[61] Since the hurdles of disturbing the adjudicative result through any of these more political actions are high, these provisions demonstrate that the GATT's treaty-makers have effectively authorized the DSB to complete their "incomplete contract."[62]

A second, not inconsistent, way of describing what the GATT treaty-makers have done relies on familiar distinctions between rules and standards. Treaty-makers opt for less precise standards that only give general guidance (e.g., calling for application of "due process" or banning "takings"), either to avoid the ex ante costs of specifying more precise rules more amenable to routine application, or as a result of a more explicitly political decision to "agree to disagree," or to "cloak the

[57] Trachtman, *supra* note 11, at 344 (noting the greater scope for members' auto-interpretation specifically indicated in connection with the Anti-Dumping Agreement).

[58] This may explain why certain disputes, including the EU's challenge to the legality of the U.S. sanctions on Cuba and third parties that do business in Cuba (under its Helms-Burton law), have not yet resulted in a panel or Appellate Body decision.

[59] *See* WTO Agreement, article X.

[60] *See* WTO Agreement, article 9(2); DSU, *supra* note 34, article 3(9)(indicating that the DSU is without prejudice to the rights of members to seek authoritative interpretations through decision-making under the WTO Agreement).

[61] DSU, *supra* note 34, article 16(4). Of course, prior to the strengthening of GATT dispute settlement in 1994, GATT parties retained even more discretion since losers to a dispute had the power to block the adoption of any decision adopted by a GATT panel.

[62] Trachtman, *supra* note 11, at 346–50.

hard decisions in the false inevitability of judicial interpretation."[63] Rules are made by legislators, or, in this case, the treaty drafters. Standards, however, because they rely on adjudicators to apply them, implicitly leave decisions to them.[64] The choice of whether to leave a contract to be "completed" by dispute settlement or to rely on standards instead of rules is subject to a cost/benefit analysis; their decision to opt for legal development in the course of dispute settlement reflects the treaty-makers' decision that it is not always economically efficient to resolve all issues ex ante via rules drafted by the "legislature."[65] To this extent, reliance on judicialized dispute settlement is merely a variation on those treaties or regimes, discussed in Chapter 4, that opt to progressively develop the extent of states' obligations through implementation decisions as these arise.

These analytical frameworks suggest the differing costs borne by "legislative," as opposed to adjudicative law-making. To be sure, not all or even most designers of international dispute settlement systems consciously regard international adjudicators as duly designated agents to "complete" their contracts or to apply ambiguous standards. As commentators on the respective histories of the European Court of Justice and the Strasbourg Court have contended, the degree of judicial law-making (and certainly its forms) in either institution was not fully foreseen by those who drafted the underlying treaties and who were sometimes surprised by the judicial law-making that resulted. It is common for treaty-makers to believe—as do some national legislators—that the rules they legislate are sufficiently detailed that they require only routine judicial application or to fail to foresee circumstances that will demand the exercise of adjudicative creativity.

McGinnis and Movsesian have suggested a third rationale to justify the WTO's reliance on the DSB. They argue that the WTO regime's primary value lies in reducing the power of protectionist interest groups that are likely to derail members' efforts to advance trade liberalization for the good of all.[66] The WTO works well, they argue, when it invalidates covert protectionism without supplanting national policy judgments on labor, the environment, or health and safety. The WTO wisely delegates to the DSB the application of its non-discrimination rules because "a tribunal operates under more constraints on its decisionmaking process and more barriers to interest group influence."[67] Paradoxically, they argue that it is the DSB's very isolation from "democratic" (protectionist) pressures that makes it a more effective agent for advancing the real democratic will of national polities—untainted by the normally effective organized power of special interests seeking protectionist legislation.[68]

[63] Trachtman, *supra* note 11, at 351.

[64] *Id.,* at 353.

[65] *Id.*, at 354 (noting various reasons why a cost-benefit analysis may not always favor a legislative solution).

[66] McGinnis and Movsesian, *supra* note 56.

[67] McGinnis and Movsesian, *supra* note 56, at 567.

[68] McGinnis and Movsesian, *supra* note 56, at 569–71 (contending that complaints against the "undemocratic" nature of WTO dispute settlement loses sight of the need to evaluate whether the WTO scheme as a whole "reinforces democracy" and arguing against opening the WTO's dispute settlement process to allow NGOs direct access).

While not all of these rationales are adaptable to the other dispute settlers discussed in this chapter, it seems clear that other quasi-judicial and judicial bodies that have been operating for some time have also had a significant normative impact on the treaty regimes of which they are a part. The work of the European Commission of Human Rights (through its demise in 1998) and of both the old and new European Court of Human Rights (ECHR) have helped to transform that regional human rights regime and have added considerable concreteness to the abstract human rights enumerated in the European Convention on Human Rights and its subsequent protocols. While, as Merrills indicates, the most dramatic impact of the work of these bodies has been in the changes in domestic law wrought by its decisions, their impact is felt at the international level as well, since the Strasbourg Court, and everyone in Europe, treats that Court's decisions as authoritative precedent on European human rights law.[69] As Merrills notes:

> each ruling is not an isolated episode; it is also a contribution to the jurisprudence of the European Convention. In each decision the Court is not just spelling out the obligations of the State which happens to be involved in the particular case. It is interpreting the Convention for all . . . States which are parties to it . . . every party to the Convention must stay abreast of developments. The common law, advancing from precedent has a counterpart, then, in the developing law of the European Convention.[70]

Like other tribunals discussed here, while the EHCR has at times departed from its own caselaw, it tends to rely on it no less than the WTO's dispute settlement bodies. This is not because it is required to do so through a formal doctrine of *stare decisis* but because its prior opinions

> are a repository of legal experience to which it is convenient to adhere; because they embody what the Court has considered in the past to be good law; because respect for decisions given in the past makes for certainty and stability, which are of the essence of the orderly administration of justice; and . . . because judges are naturally reluctant, in the absence of compelling reasons to the contrary, to admit that they were previously in the wrong.[71]

These are some of the reasons, one suspects, why other quasi-judicial and judicialized dispute settlers also rely on prior adjudicative decisions, albeit without a formal doctrine of *stare decisis*.

The ECHR's contributions to the European human rights regime, both substantive and procedural, have relied on principles that are familiar to us from Chapter 2's discussion of "constitutional interpretation." As Merrills indicates, for example, the Strasbourg Court has long invoked the "principle of effectiveness" (as to promote the effective protection of individual rights "over jurisdictional and procedural objections reflecting the traditional attitudes of governments")[72] and

[69] J.G. Merrills, *The Development of International Law by the European Court of Human Rights* at 12 (Manchester, U.K. and New York: Manchester University Press, 1988).

[70] Merrills, *supra* note 69, at 12.

[71] Merrills, *supra* note 69, at 13 (quoting Hersch Lauterpacht).

[72] Merrills, *supra* note 69, at 44 (discussing the implications of the Court's first case, *Lawless*, in which the Court, then operating under a rule that limited access to states and the Commission,

has used as its interpretative framework the Vienna rules for treaty interpretation, including its emphasis on text.[73] As would be suggested by Chapter 2 on constitutional interpretation, the ECHR has also interpreted the Convention as a "living instrument" subject to dynamic interpretation over time,[74] found both "implied rights" and "implied limitations,"[75] taken predictably inconsistent positions with respect to the relevance of the Convention's *travaux preparatoires*, [76] and resorted to "general principles of law" such as waiver and estoppel.[77] Some of the underlying examples of judicial law-making by the ECHR are clearly analogous to those seen within the WTO. In both regimes, for example, adjudicators have expanded the scope of state responsibility to encompass a greater number of state agents or those deemed to be acting under "delegated" state power than would be evident from the text of the respective treaties that these bodies are charged with interpreting.[78]

But the ECHR has made its own unique contributions to regime-specific law, most famously, through its elaboration of a "margin of appreciation." That judicially created doctrine was established to facilitate the Court's delicate task of balancing the "sovereign rights" of state parties to the European Convention with the rights of individuals. Used "to incorporate some discretion in the text or where difficult issues of economic and social policy or technology are involved, or where the justifiability of an act of discrimination is at stake, or simply where the Court thinks the national judge is in a better position than the international judge to make a decision,"[79] the pragmatic margin of appreciation is, at best, implicit in the text of the European Convention.[80] That doctrine explains some of the peculiarities of

nonetheless decided to alert the applicant as to the proceedings and permitted the applicant to submit his views to the Court). *See also, id.*, at 89–111 (discussing the principle's application to particular rights in the Convention and to the questions of imputing state responsibility but also noting the principle's limits).

[73] *Id.*, at 63–72 (discussing the role of text, context, and object and purpose in the Court's caselaw).

[74] *Id.*, at 72–3 (discussing the *Tyrer case* involving the question of whether birching of a juvenile in the Isle of Man violated the prohibition on torture or inhuman or degrading treatment).

[75] *Id.*, at 76–81 (discussing the *Golder case* finding of an implied right of access to the courts despite the silence of the Convention but indicating that such a right was not unlimited).

[76] *Id.*, at 81–8 (discussing the prominent use of *travaux* in some cases and its omission in other cases, as where reliance would not support the conclusion that the Court reached).

[77] *Id.*, at 161–81 (discussing the Court's resort to such general principles notwithstanding the absence of any provision referring to these comparable to those in the Statute of the ICJ's article 38(1)(c)).

[78] *See, e.g.*, *id.*, at 100–3.

[79] R.St.J. MacDonald, "The Margin of Appreciation," in R.St.J. MacDonald et al., eds., *The European System for the Protection of Human Rights* at 83 (Dordrecht, Boston: M. Nijhoff, 1993).

[80] As discussed in *Handyside* v. *United Kingdom*, 1976, 24 Eur. Ct.H.R. (Series A), 1 E.H.R.R. 737, the margin of appreciation was found to be implicit to the specific requirements of article 10(2) of the original European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, ETS No. 5 (entered into force November 1, 1998) (hereinafter "European Convention of Human Rights") (requiring freedom of expression to be subject to formalities, conditions, restrictions or penalties that are, among other things, "necessary in a democratic society"). In subsequent cases, the Court has applied the doctrine in a variety of contexts and has "never set out a universal and

European human rights law (as with respect to limitations found in the exercise of free speech).[81] It has become one of the Court's primary tools for interpreting substantive rights in light of changing legal developments within Europe. The doctrine has permitted the Court to set its "standards quite openly by reference to the law in the great majority of European states,"[82] but also to increase the pressure on those states that are lagging behind an emerging consensus within European practice.[83] The margin of appreciation doctrine is Janus-faced: while evincing deference to the local, it also preserves the power of international judges to change their minds about what the European Convention for the Protection of Human Rights requires over time. The margin of appreciation is not entirely what it first appears to be: a judicially created doctrine of self-imposed restraint. Like the WTO's ruling in *Shrimp/Turtle*, the margin of appreciation doctrine, at least in part, enhances the discretionary power of the judges who invented it and apply it.

The law-making powers of the ECHR and Commission can be analyzed, as have the comparable powers of the WTO's dispute settlers, in terms of either completing the treaty-makers' incomplete contracts or adding precision to imprecise standards. The interplay between treaty "legislator" willing to have its "contracts" completed by the regime's adjudicator that Trachtman describes in the trade context is readily adaptable to the "deepening" cooperation evinced by the European system for the protection of human rights, ever since the right of individual petition came into force (for only six states) on July 5, 1955.

A number of commentators have sought to explain the remarkable transformation of a regime which initially left it to individual states to decide whether to accept the right of individual petition, established initially only a non-judicial organ (the Commission) charged with only recommendatory action, and left a number of significant rights outside of the treaty framework.[84] Moravscik has

general formula" to identify which of the many rights enumerated in the Convention are subject to its application. *See, e.g.*, MacDonald, *supra* note 79. The Court's doctrine has sometimes been combined with an inquiry as to whether there exists a "consensus" among the European parties to the Convention concerning a particular issue. This inquiry, a judicial invention nowhere mentioned in the text of the Convention, has been defended as a way for the judges to link their decisions to the "pace of change of domestic law" that acknowledges "the political sovereignty of respondent states while legitimizing its own decisions against them." Helfer and Slaughter, *supra* note 33, at 316–17.

[81] *See, e.g., Handyside case*, *supra* note 80. *See also Lehideux and Isorni* v. *France*, 1998–VII Eur. Ct H.R. 2864 (1998)(finding France liable of violating freedom of expression for punishing individuals who had extolled a Vichy collaborator but suggesting that denials of the Holocaust could still be banned).

[82] David Harris, "Regional Protection," quoted in Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals—Text and Materials* at 876 (Oxford, U.K.: Clarendon Press, 1996).

[83] *See, e.g.*, Helfer and Slaughter, *supra* note 33, at 316–17 (explaining how the margin of appreciation doctrine along with the consensus inquiry permits the Court to narrow the margin of discretion allotted to national governments in an incremental fashion and imposes a heavier burden of persuasion on those European states that are lagging behind trends in European domestic law).

[84] *See, e.g.*, Henry G. Schermers, "Acceptance of International Supervision of Human Rights," 12 *LJIL* 821 (1999); Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," 54 *Int'l Org.* 253 (2000).

argued that a willingness to accept the right of individual petition and of direct access by individual petitioners before the Court and Commission occurred first among the more "fragile" democracies of the continent (Italy, rather than, for example, Britain) and can be attributed to the perceived need of government elites in those states to use the European human rights system to secure the hold of democracy, and therefore protect their own elected status.[85] Schermers and other legal commentators attribute the evolution of the European human rights system, by contrast, at least in part, to the carefully incremental actions of the Commission and later the Court to establish their legitimacy in the eyes of the treaty-makers, including the Commission's initial restraint in declaring individual applications admissible and the Court's early recognition of a "margin of appreciation." According to Schermers, the care taken by Commission and Court in developing their caselaw, including the expansion of the definition of substantive rights only by measured, incremental steps, explains how they earned the confidence of governments and helped to convince more of them that "the infringement of their sovereignty was not excessive."[86] On this view, the growing power of these international courts can be explained by the work of the dispute settlers themselves through their careful, incremental forms of judicial law-making over time.

But whether conceived as a bottom-up process inspired by interest groups politics or as legitimation that owes something to the top-down efforts by the international dispute settlers themselves, neither of these is inconsistent with Trachtman's account of an ever-changing dynamic between treaty-maker and adjudicator premised on a cost-benefit analysis of the relative virtues of ex ante or ex post regulation. Indeed, the eleven protocols that followed the initial negotiation of the European Convention, and the new European Court of Human Rights established in 1999, are, from this perspective, roughly analogous to the various GATT rounds, which added various new disciplines to the trade regime (such as intellectual property, services, and government procurement) and, in 1994, led to the establishment of the WTO and its formal DSU. Like the various trade rounds that added new disciplines to the WTO regime and subjected these new issues to harder forms of dispute settlement, the protocols added a number of new substantive rights (including the right to property, education, free elections, prohibition on imprisonment for debt, freedom of movement within national territory, prohibition of collective or individual expulsion of nations, abolition of the death penalty, right of appeal in criminal matters, compensation for wrongful conviction, right not to be tried twice for the same offence, equality between spouses), as well as stabilized the state parties' commitment to international dispute settlement (such that, for example, new entrants into the European system must accept the Court's jurisdiction, its right to issue binding judgments, and the right of individual petition).[87]

[85] Moravcsik, *supra* note 84. [86] Schermers, *supra* note 84, at 824.

[87] Protocol 12, adopted on November 4, 2000 in Rome (not yet in force), Council of Europe Treaty Series, No. 177, continues this process. It recognizes a general prohibition on discrimination on the basis of sex, race, color, language, religion, political, or other opinion, national or social origin,

In both the European human rights regime and the trade regime, government treaty-makers became more comfortable, over time, in delegating law-making (along with dispute settling) authority to their respective adjudicative bodies. They increasingly delegated more power to their dispute settlers to "complete their contracts" with respect to a greater number of subjects, along with greater prospects for finality. In both cases, they evinced their increased comfort or acquiescence by making it increasingly difficult to disturb judicial pronouncements by "legislative" means, by refusing to disturb, for the most part, particularly controversial decisions rendered by the dispute settlement bodies (despite their ability to do so by, for example, amending the treaty), by adding incrementally to the subjects or topics to be addressed by those bodies, and by making the decisions rendered by those bodies more easily enforceable.[88]

As with respect to the trade regime, the law-making capacity of the Strasbourg Court today can also be explained in terms of the generality of many of the standards it is responsible for applying. The ECHR is charged with interpreting rights and prohibitions, along with limitations on these, no more precisely defined than in most of the constitutional orders within Europe and no more precise in content than, for example, the general obligation not to discriminate against imports in the WTO's covered agreements. Like constitutional courts in Europe as well as in the U.S., the Strasbourg Court has considerable room to maneuver in deciding, for example, what it means for the right to life to be "protected by law;" what constitutes "torture" or "inhuman or degrading treatment or punishment;" what constitutes state-sanctioned "disrespect" for "private and family life," or what limitations on these rights are "in accordance with the law," "necessary in a democratic society," in the interests of "national security," "public safety," the "economic well-being of the country," for the "prevention of disorder or crime," to protect "health or morals," or for the protection of the "rights and freedoms of others."[89] Neither these standards, nor their exceptions, are self-defining. The ECHR has considerable latitude in defining their scope over time. Further, the charge to apply such standards to particular facts and, as would be expected of any standing court, to do so in a reasoned, principled, and coherent way over time anticipates that the Court will be undertaking policy-making over a range of issues that are much

association with a national minority, property, birth, or other status. Protocol, article 1, para. 1 (text available at www.echr.coe.int/convention/webConvenEng.pdf).

[88] Within the trade regime, the binding nature of third party dispute settlement was considerably enhanced by the adoption of a formal DSU which clarified a number of issues concerning the scope and enforceability of panel decisions, establishing an Appellate Body, and, most significantly, considering decisions rendered by that Body or by GATT panels "adopted" in the absence of a political consensus to the contrary by all WTO members. In the European human rights system, this was achieved by eliminating the Commission (and its non-binding opinions), making the Court's jurisdiction mandatory, establishing an appeals process within the Court, and, in many but not all, European states, incorporating the European Convention into domestic law, thereby making the Court's judgments generally "self-executing." *See, e.g.,* the 1998 UK Human Rights Act, available at http://www.hmso.gov.uk/acts/acts1998/19980042.htm.

[89] *See* European Convention on Human Rights, *supra* note 80, articles 2–3 and 8.

broader in scope than McGinnis and Movesesian endorse for the WTO's dispute settlers.

As this suggests, the ECHR differs from the WTO system in a few respects that are relevant to its law-making abilities. Subject matter matters. The cases raised before the Strasbourg Court usually secure more public attention than most decisions rendered by the WTO, and its judgments intrude more obviously into the *domaine réservé* than do most issues raised in the trade context. Whatever the Strasbourg Court does is bound to be scrutinized in public fora far more than all but a few of the more "technical" or obtuse rulings issued by the WTO's DSB. The topics raised before the ECHR are also more comparable to those raised before domestic courts under local law. This assists the Court's law-making role—at least to the extent it is comparable to what local courts are already doing—but could, in particular instances, undermine it, if, for example, the Court's judgment puts it at odds with local courts, general public sentiments in the community affected, or powerful interest groups at either the national or international levels.

Volume matters as well. As with respect to the WTO, the ECHR's law-making capacity is considerably enhanced by the volume of cases that it is expected to handle. That volume has exploded in recent years and today vastly exceeds anything that the WTO's dispute settlers have ever attempted to handle.[90] While the sheer number of cases threatens to overwhelm the ECHR's capacity, it thrusts that court into deciding a greater body of issues that intrude deeply into erstwhile sovereign concerns. In addition, the Strasbourg Court's decisions, whether or not treated as self-executing by the respective governments, are, to the extent contrary to local law, generally expected to result in conforming changes to such laws and not merely to result in compensation to any aggrieved parties to the action.[91] This is not generally the case for the WTO where the precise remedy is usually left to governments to decide, where trade retaliation at the international level, and not necessarily changes to domestic law, is the anticipated remedy, and where most governments have not made WTO rules self-executing or part of domestic law such that private parties can invoke the "direct effect" of WTO law in domestic courts.[92] For all these reasons, WTO adjudicators' law-making powers pose a more attenuated threat to its treaty legislators or, from the "incomplete contract" perspective, accord governments greater political space to disagree with any attempt by their adjudicators to complete their contract in a disagreeable way.

[90] *See generally* Kara Leitner and Simon Lester, "WTO Dispute Settlement 1995–2003: A Statistical Analysis," 7 *J. Int'l Econ. L.* 169 (2004) (showing, for example, that the number of WTO complaints filed from 1995 to 2003 ranged from a low of 23 one year to a high of 50, while the number of Appellate Body reports issued over those years ranged from a low of zero to a high of 10).

[91] While domestic implementation of ECHR rulings is generally considered to be good, there are gaps in our knowledge. *See, e.g.*, Mark W. Janis, "The Efficacy of Strasbourg Law," 15 *Conn. J. Int'l L.* 39 (2000). For anticipation of difficulties with respect to domestic implementation in the United Kingdom, see K.D. Ewing, "The Human Rights Act and Parliamentary Democracy," 62 *Modern L. Rev.* 79 (1999).

[92] *See* John H. Jackson and Alan Sykes, eds., *Implementing the Uruguay Round* (New York: Clarendon Press, 1997).

But a final difference may be the most significant. The ECHR, along with the ECJ, constitutes "transnational," and not merely "international," dispute settlement. Since it provides direct access to individuals and not merely governments as litigants, the cases that come before the Strasbourg Court are not screened for political or other forms of acceptability. Governments that wish to collude cannot prevent, as they still can under the WTO, the international dispute settler from hearing any particular case, no matter how politically sensitive or potentially intrusive on the treaty-makers' political agenda. The ECHR's openness and reliance on individual petition enhances not only that Court's relative independence from the governments that it serves, but also its law-making powers.[93]

While the Inter-American system has struggled with far more serious human rights violations, a recalcitrant Human Rights Commission that, at least in its early years, appeared unwilling or unable to offend OAS members, a Court with a more meager number of cases than the ECHR, and states that have not always abided by the decisions rendered by either the Inter-American Commission or the Inter-American Court, the system as a whole also has made formidable strides in affirming human rights norms not always clearly articulated in the relevant human rights conventions. Among the many creative Commission and/or Court precedents regarding the substantive rights protected by Inter-American human rights instruments are rulings that, for example, U.S. abortion laws are legal but not its "patchwork scheme of legislation" applying, on a state-by-state basis, different rules on the juvenile death penalty; that government-sponsored disappearances of individuals violate rights to arbitrary detention, physical integrity and personal liberty; that a state's failure to prevent or investigate disappearances caused by others constitutes an independent violation of the duty to "ensure" these rights; that numerous common practices in the hemisphere, such as beatings, rape, mock burials and executions, threats of physical violence, denials of medical treatment, deprivation of food and water, interrogation under truth drugs, hooding, and simulation of early release, all constitute illegal torture or cruel, inhuman, or degrading punishment or treatment; that some forms of prison labor violate the ban on forced or compulsory labor; that the detention of an accused's family members "for their protection" at their home constitutes an illegal deprivation of physical liberty; that the expulsion of Jehovah's Witnesses from state schools for refusing to salute the flag violates freedom of conscience; that interfering with the transmission and power to a radio station critical of the government violates freedom of expression; and that refusal of citizenship and an order of expulsion does the same.[94] At the

[93] For a view that "transnational" dispute settlement, because it insulates dispute resolution from the day-to-day political demands of states, is a key element in legalization and in making its constraints real on governments, see Moravscik, Slaughter, and Keohane, *supra* note 4. According to these authors, the WTO's DSU, because of the active participation of industry groups behind the scenes, is an "intermediate" form of dispute settlement between the classical "interstate" model represented by the ICJ and the "transnational" model represented by the ECJ and the ECHR. *Id.*, at 486.

[94] *See* Davidson, *supra* note 17, at 263, 269–70, 275, 277–8, 283, 284, and 320–1.

same time, these bodies have found not so obvious limitations with respect to some of these rights.[95]

Generalizable principles are routinely drawn from the Inter-American Commission's reports as well as the Inter-American Court's decisions. While, as will be discussed *infra*, the attempt is sometimes made to apply these principles more widely—to incorporate a European precedent into the Inter-American system where the rights at issue are defined in similar terms, for example—the Strasbourg's and Inter-American Court's reliance on their respective prior decisions has not proven controversial. The decisions of both the European and Inter-American Courts are considered the best predictor of what these rights are within their respective treaty regimes, as well as what these courts are likely to hold in future cases.

As compared to the judicial rulings issued by the Inter-American Court, reports issued by the Inter-American Commission have had a lesser impact because these are not legally binding under the applicable conventions and are subject to review by the Court.[96] Nonetheless, it is important to point out that the Inter-American Commission has not always seen itself as has the (now defunct) European Commission: that is, as merely the first phase of a quasi-judicial dispute settlement process. For much of its history, the Inter-American Commission acted more like an international organ with a political task to perform, not unlike that of the UN Human Rights Commission. Accordingly, the Inter-American Commission has attempted to investigate, document, and opine about systematic, gross violations within a state, even at the expense at times of adjudicating individual cases. To this end, much of its work, including visits to countries leading to the adoption of country reports as well as annual reports to the OAS political organs, has been of a different nature than European Commission rulings were on particular instances of violation. These country and annual reports, however, have themselves had a normative impact—as with respect to the scope and interpretation of the American Convention's guarantees of the rights to public participation, including to vote and to be elected in genuine periodic elections.[97]

[95] *See, e.g.*, Commission Cases 9777 and 9718 (finding that laws requiring registration with the Bar Association do not violate the freedom of association), *but see* Advisory Opinion OC-5/85 of November 13, 1985, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (articles 13 and 29 American Convention on Human Rights), Series A, No. 5 (1986) 25 *ILM* 123 (1986) (finding that compulsory membership in the Colegio de Periodistas for journalists violates this right).

[96] *See, e.g.*, Merrills, *supra* note 69, at 14–15 (discussing the lesser precedential impact of the European Commission's rulings). The European Commission was, however, eliminated through establishment of a single court in November 1998. *See* European Conventions of Human Rights, *supra* note 80 (now incorporating Protocol 11). Note that there may be additional reasons for lesser normative impact, including greater timidity on the part of Commission members to engage in lawmaking.

[97] *See, e.g.*, Final Report on Cases 9768, 9780 and 9828 of Mexico, *Annual Report of the Inter-American Commission on Human Rights* 1989–90 (1998)(discussing the types of obligations imposed under the Convention on the Mexican government with respect to providing domestic remedies to

The Inter-American Court also provides evidence that the absence of a treaty provision making an international dispute settler's ruling "legally binding," need not, of itself, preclude judicial law-making. Some of that Court's most far-reaching opinions have come through its advisory jurisdiction. The Inter-American Court has expansive advisory jurisdiction, permitting any OAS organ, any OAS member state, as well as any party to the American Convention on Human Rights, to ask the Court for its opinion concerning the interpretation of not only the American Convention but "other treaties concerning the protection of human rights in the American states."[98] OAS members may also ask the Court to give its views "regarding the compatibility of any of its domestic laws" with the American Convention.[99] Although the Inter-American Court has only rendered eighteen Advisory Opinions through late 2004, many of these have made "important contributions to the evolution of the law of the Convention."[100] Thus, the Court has opined that the concept of reciprocity is not applicable to human rights treaties such as the American Convention, suggesting that a ratifying state to that Convention need not wait until its reservation is accepted by other contracting parties before it could be considered a party to the Convention.[101] In another opinion, the Court examined the legality of a state's purported reservation to one of the Convention's "non-derogable" rights in terms of the Vienna Convention's test of "compatibility" with a treaty's "object and purpose."[102] In other opinions, the Court has affirmed that the writ of habeas corpus and related remedies cannot be suspended in emergency situations,[103] and opined that a law requiring journalists to belong to a professional association violates the freedom of expression.[104]

The "incomplete contracts" and "standards/rules" frameworks for understanding adjudicative law-making works reasonably well in explaining judicial gap-filling in the Inter-American human rights regime. This is a system that, to an even greater extent than the European human right system, has struggled to find the right balance between law-making via treaty and law-making through dispute settlement. The Inter-American Commission, as originally established in 1959, was given, after all, only the vaguest mandate, with many assuming that it was only permitted

protect election rights); *Report on the Situation of Human Rights in Mexico, Inter-American Commission on Human Rights*, 1998, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, September 24, 1998 (identifying flaws in local laws relating to, for example, offenses for electoral fraud, campaign financing, and access to all political candidates to communications media). *See also* Christina M. Cerna, "Universal Democracy: An International Legal Right or the Pipe Dream of the West?," *NYU J. Int'l L. & Pol.* 289 (1995)(discussing the OAS's role generally in promulgating the right to democratic governance in the hemisphere).

[98] American Convention on Human Rights, OAS Treaty Series, No. 36, 1144 UNTS 123 (entered into force July 18, 1978), article 64(1). These opinions are not legally binding. *See* Advisory Opinion OC-3/83, I-A Court H.R., Series A: Judgments and Opinions, no. 3 (1983) (text at www.umn.edu/humanrts/iachr/seriesa.html).

[99] American Convention on Human Rights, *supra* note 98, article 64(2).

[100] Buergenthal, *supra* note 17, at 221.

[101] Advisory Opinion OC-2/82, I.-A. Court H.R., Series A: Judgments and Opinions, No. 2, paras. 29 and 40 (1982).

[102] Advisory Opinion OC-3/83, I.-A. Court H.R., Series A: Judgments and Opinions, No. 3 (1983).

[103] Advisory Opinion OC-8/87, I.-A. Court H.R., Series A: Judgments and Opinions, No. 8 (1987).

[104] Advisory Opinion OC-5/85, I.-A. Court H.R., Series A: Judgments and Opinions, No. 5 (1985).

to undertake "abstract investigations."[105] That body only incrementally acquired the power to take cognizance of individual complaints and indeed, even after adoption of the American Convention, which formally vested in the Commission (and Court) the power to handle individual complaints and to initiate individual cases on its own motion, still struggled with a history in which the power to make effective law was seemingly lodged elsewhere. Today, the Inter-American Court still has to deal with governments that, notwithstanding their formal acceptance of the American Convention, may not be quite ready to have an impartial court complete their "contracts"on many politically sensitive human rights issues.[106]

The American Convention on Human Rights is, however, as filled with vague standards that call out for a judicial interpreter as is the European Human Rights Convention. Indeed, the other instrument that the Inter-American Commission is charged with interpreting (with respect to states like the U.S. that have not ratified the American Convention), the American Declaration of the Rights and Duties of Man, has an even more intriguingly vague set of standards within it. That Declaration, which actually preceded the Universal Declaration of Human Rights of which it is reminiscent, imposes "duties" on individuals, including duties to conduct oneself with respect to others such that all "may fully form and develop" their personality, to aid, support, educate, and protect one's minor children (and for children in turn to honor their parents and support them when needed), to acquire at least an elementary education, to vote in popular elections, to obey the law and other legitimate commands of governmental authorities, to render civil and military service, to hold public office if elected, to cooperate with the state and community with respect to social security and welfare, to pay taxes, to work, and, if an alien, to refrain from taking part in political activities reserved to nationals of a state.[107]

Other long-standing quasi-judicial bodies, such as the Commissions of Inquiry established in the ILO to hear complaints lodged by member states, delegates to the International Labor Conference, or the ILO Governing Body,[108] have also had an impact on the law within their respective treaty regimes. For example, the Commission of Inquiry, established in 1984 to investigate complaints by workers' delegates to the ILO that Poland was not respecting the rights to freedom of association for trade unions was instrumental not merely in pressuring that government but in establishing the scope of these rights in a context where martial law had been declared and serious violations of basic civil and political rights, not

[105] *See, e.g.*, Cecilia Medina, "The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture," 12 *Hum. Rts. Q.* 439 (1990).

[106] For examples of the emerging backlash problems, see Lawrence R. Helfer, "Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes," 102 *Colum. L. Rev.* 1832 (2002).

[107] American Declaration of the Rights and Duties of Man, OAS Res. XXX (1948), OEA/Ser.L/V/I.4 Rev. (1965), articles XXIX–XXXVIII.

[108] ILO Constitution, 15 UNTS 35 (adopted October 9, 1946) (for a current version, see www.ilo.org/public/english/about/iloconst.htm), articles 26–33.

directly encompassed by ILO law, were also at issue.[109] The Report issued by that ad hoc expert Commission began with the sparse text of article 3 of ILO Convention No. 87, which provides that public authorities shall not impede the lawful exercise of the rights of workers to elect their representatives and to organize.[110] Applying that text to the situation in Poland following the proclamation of martial law in 1981 forced the Commissioners to decide whether a plea of emergency can justify restrictions on labor rights. It concluded that such pleas can be advanced "only in circumstances of extreme gravity constituting a case of *force majeure* and provided that any [such] measures . . . are limited in scope and in duration to what is strictly necessary to deal with the situation in question."[111] The Commission rejected Poland's contention that suspension and dissolution of Solidarity's rights were necessary to avert a civil war, restore law and order, or save the economy from collapse, concluded that the suspension violated the Convention's right to organize and an (implied) right to strike, and went on to consider the conformity of other actions taken by the government, including the internment and conviction of leaders of Solidarity.[112] In a striking passage that could have been written by either the European or Inter-American Courts, the Commission noted that guarantees granted trade union representatives "can be effectively ensured only if a number of basic civil liberties are respected." Referring to human rights instruments that had been ratified by Poland in support, the Commission condemned the internment of union leaders, citing, not only their right to strike, but their rights to free expression and due process, and even the violation of the UN General Assembly's Standard Minimum Rules for the Treatment of Prisoners.[113] As would a human rights court, the Commission demanded that Poland amend its domestic law to permit the effective application of freedom of association, follow its suspension of martial law with the release and amnesty of all imprisoned workers, and restore all rights to freedom of expression and assembly in conformity with the demands of the Final Act of the Conference on Security and Cooperation in Europe.[114]

As with some of the other dispute settlers examined here, one of the law-making tools used by the Commission of Inquiry for Poland involved allocating the burden of proof. The Commissioners acknowledged that the mere arrest or conviction of

[109] "Report of the Commission Instituted Under Article 26 to Examine the Complaint on the Observance by Poland of the Freedom of Association and Right to Organize," 67 *ILO Official Bulletin*, Series b, Special Supp. (1984). [110] *See* Report, *supra* note 109, at para. 1.

[111] Report, *supra* note 109, at para. 479. [112] Report, *supra* note 109, at paras. 483–517.

[113] Report, *supra* note 109, paras. 403–512. The Standard Minimum Rules for the Protection of Prisoners were adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and were approved by ECOSOC in (non-binding) resolutions in 1957 and 1977.

[114] Report, *supra* note 109, paras. 587–90. *See* Final Act—Helsinki Summit, Conference on Security and Cooperation in Europe, adopted by the Conference on Security and Cooperation in Europe (CSCE), August 1, 1975, available at http://www.osce.org/docs/english/1990–1999/summits/helfa75e.htm. *See* particularly Chapter 1(a) (Declaration on Principles Guiding Relations Between Participating States) article VII (Respect for Human Rights and Fundamental Freedoms, Including the Freedom of Thought, Conscience, Religion, or Belief).

trade unionists would not, of itself, constitute a violation of Convention No. 87.[115] What was needed, they said, was proof that these measures were directed against their trade union activities; further, it found that "since the persons concerned are entitled to a presumption of innocence, it is incumbent on the government to show that the measures taken by it were not occasioned by the trade union activities of these persons."[116] As in the Inter-American Court's decision in *Velasquez-Rodriguez*, the dispute settler imposed on one of the parties the burden of proving a negative, and not surprisingly, found that difficult burden unmet.[117] Other dispute settlers discussed here have also used another of the Commissioners' devices—resort to sources of obligation outside the four corners of the treaties directly at issue. In the case involving Poland discussed above, for example, the Commission of Inquiry turned to the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, the Standard Minimum Rules for the Protection of Prisoners, and the Helsinki Accords adopted under the auspices of the then-CSCE to assist its interpretation of ILO Convention No. 87. As this example suggests, many of these dispute settlers are using sources of authority other than the treaties they are charged with interpreting but that are as much a product of the age of IOs as they are.

8.3 General Public International Law

The ICJ's contribution to public international law is hardly surprising. We expect that a Court charged with general competence to consider any and all sources of international legal obligation, as was the charge for the PCIJ and continues to be for the ICJ, will develop that law no less than the other dispute settlers discussed here. And, despite the relative paucity of PCIJ and ICJ judgments issued, both these courts have, in fact, made substantial and well-known contributions to public international law.[118] A voluminous literature exists concerning the contribution of both to public international law, from the rules governing treaty interpretation to those defining the elements and sources of evidence of customary international law, from elaboration of the remedies attendant to special treaty regimes governing the protection of diplomats or the protection of foreign investment to remedies attendant on any violation of the rules of state responsibility, from the rules applicable to territorial, boundary, or maritime disputes to those applicable to new international legal persons such as international organizations. Despite the injunction of article 59 of the Court's statute, ostensibly restricting

[115] Report, *supra* note 109, para. 514. [116] *Id.*

[117] *See id.*, para. 515 (dismissing Poland's general assertions that the arrests were made because these individuals' political activities endangered the security of the state on the basis of the large number of trade unionists arrested).

[118] For examples of ICJ's "ripple" effects, in terms of explicit cross-citations by other international tribunals, see Sean D. Murphy, "Amplifying the World Court's Jurisdiction Through Counter-Claims and Third-Party Intervention," 33 *Geo. Wash. Int'l L. Rev.* 5, at 29 (2000).

the binding force of an ICJ judgment to the disputing parties, every ICJ judgment, whether controversial or more pedestrian, is subject to minute examination by ICJ judges in other cases, as well as by others, for legal and factual determinations likely to be useful as precedent.[119] Thus, the Court's decision on the merits in the *Nicaragua case* has been subjected to close scrutiny to determine what the Court said with respect to, for example, the genesis and maintenance of customary international law (as distinct from the law of the UN Charter), the use of force and the inherent right of self-defense, the meanings to be attributed to the concept of no-intervention, or the limits to collective counter-measures in response to conduct that does not amount to an "armed attack."[120]

The Court's contribution to international law is substantial, even with respect to highly fact-dependent territorial and boundary disputes, the richest source of its contentious case jurisdiction. As commentators have repeatedly recognized, the Court's resolution of such disputes has both settled specific inter-state disputes and developed the law. Opinions produced in the course of such disputes have tackled predictable questions of treaty interpretation (involving applications of the principle of effectiveness, judicial elaboration of such issues as the relevancy of *travaux preparatoires* and the meaning to be given to the "subsequent practice"of the treaty parties) and jurisdiction (such as application of the *non ultra petita* rule), as well as more specialized norms such as, most prominently, the meaning, effectiveness, and interplay between the principles of *uti possidetis*[121] and self-determination, as well as the application of the distinct but interrelated notions of estoppel, acquiescence, and preclusion.[122] The Court's interpretation of *uti possidetis* to defend the boundaries of newly independent states, even at the expense of claims of indigenous peoples,[123] has done much to propagate the notion that a central role of international legal norms generally (and of international dispute settlement) is to promote stability and predictability.[124]

As was suggested in Chapter 2, the contribution of the ICJ to international institutional law, largely attributable to its advisory jurisdiction which is, after all,

[119] As Jonathan Charney has noted, "Judgments of the Court continue to be the most analyzed and the most frequently referenced of all the decisions by tribunals that address international law questions. This is unlikely to change in the foreseeable future." Jonathan F. Charney, "The Impact on the International Legal System of the Growth of International Courts and Tribunals," 31 *NYU J. Int'l L. & Pol.* 697, at 705 (1999).

[120] *See, e.g.*, Keith Highet, "Evidence, The Court, and the Nicaragua Case," 81 *AJIL* 1(1987).

[121] For a description of the origins of this principle, see John B. Moore, "Memorandum on Uti Possidetis: Costa Rica-Panama Arbitration", at 6 (1913), reprinted in 3 *The Collected Papers of John Bassett Moore* 328, at 329 (New Haven: Yale University Press, 1944).

[122] *See* J.G. Merrills, "The International Court of Justice and the Adjudication of Territorial and Boundary Disputes," 13 *Leiden J. Int'l L.* 873 (2000).

[123] *See, e.g.*, W. Michael Reisman, "Protecting Indigenous Rights in International Adjudication," 89 *AJIL* 350 (1995).

[124] *See, e.g.*, Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment February 3, 1994, where the Court defended the viability of a boundary arrangement even if the treaty establishing it was no longer valid: 1994 ICJ Rep. 6, at 37, para. 73. *See also Case Concerning the Frontier Dispute* (*Burkina-Faso* v. *Mali*), 1986 ICJ Rep. 554 (December 22), paras. 20–5 (discussing with approval the general principle of *uti possidetis*).

intended to provide legal advice to IOs and organs within them, is considerable.[125] Through its advisory opinions in *Reparation for Injuries, Admissions, Competence of the General Assembly, Expenses, Namibia*, and *Mazilu*, the Court established many of the significant legal principles that form the backbone of international institutional law, including the applicability of the concept of legal personality to IOs, constitutional principles of treaty interpretation (including the principle of effectiveness, the significance of institutional practice, and the concept of implied powers), the scope of privileges and immunities, and a member's duty to pay. [126] Though grounded in the interpretation of the UN Charter, many aspects of these decisions have been deemed applicable to other IOs with comparable provisions in their constitutive instruments and even, in some cases, to institutions with no equivalent language on which to draw in their own charters.[127] At least some of the principles enunciated by the Court—such as functional effectiveness as the linch-pin for organizational privileges and immunities and as the basis for functional protection of an organization's agents, the power of interpretation imputable to each organ in the first instance, inherent powers and their limits, and the presumption of inherent but functionally limited treaty-making powers—would appear, given their use by other international bodies as well as national courts, worthy to be denominated "general principles of international institutional law," whether or not this source of international obligation is recognized in article 38 of the Statute of the ICJ. Other institutionally significant decisions of the ICJ, including its repeated rejections of pleas by states that a dispute should be deemed inadmissible or non-justiciable because it encompasses political issues not susceptible to judicial determination,[128]

[125] In a relatively small number of instances, IOs have been able to secure binding opinions from an international dispute settler. This is possible for the UN, for example, where a particular treaty provides that advisory opinions issued by the Court concerning the interpretation of the treaty shall be binding. *See, e.g.*, General Convention on the Privileges and Immunities of the United Nations, 1 UNTS 16, article VIII, section 21(b).

[126] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 ICJ Rep. 174; *Conditions of Admission of a State to Membership in the United Nations*, Advisory Opinion, 1948 ICJ Rep. 57; *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 1950 ICJ Rep. 4; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, 1971 ICJ Rep. 16; *Certain Expenses of the United Nations,* Advisory Opinion, 1962 ICJ Rep. 149; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (the Mazilu case)*, Advisory Opinion, 1989 ICJ Rep. 177. *See generally* Chapters 2 and 3.

[127] *See generally* Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity Within Diversity* at 26–7 (The Hague and Boston: M. Nijhoff, 4th edn., 2003). Other tribunals, most especially administrative tribunals, have developed a consistent body of law relevant to the operation of the international civil service. *See, e.g.*, C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* at 323–67 (Cambridge, U.K. and New York: Cambridge University Press, 1996). Although the ICJ exercised for a time, review power over the UN Administrative Tribunal, its impact on this body of law has been relatively modest.

[128] *See, e.g.*, the Court's rejection of jurisdictional and admissibility arguments raised by the United States in *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua* v. *United States of America*), *Jurisdiction and Admissibility*, Judgment November 26, 1984, 1984 ICJ Rep. 392, and by Iran in *United States Diplomatic and Consular Staff in Tehran* (*U.S.* v. *Iran*), 1980 ICJ Rep. 3.

while most pertinent to that Court's docket and to its relations with UN political organs,[129] have also influenced other tribunals.[130] In principle, other tribunals that permit access to IOs to ask advisory opinions would also be expected to play a role in the development of international institutional law (but, for the most part, such requests have not been deployed with the frequency of the ICJ's advisory jurisdiction).[131]

International dispute settlers are also regularly required to demarcate the outer limits of the treaty regimes that they are charged with interpreting and doing so requires indicating which, if any, rules outside the regime in which the adjudicators operate are applicable, or at least subject to their interpretation. The ICJ, in its response to the WHO's request for an Advisory Opinion Concerning the Legality of Nuclear Weapons, for example, did more than merely interpret the scope of its advisory opinion jurisdiction under Article 96 of the UN Charter.[132] While the Court's refusal to answer the WHO's question turned on its determination that the question posed to it was not a legal question "arising within the scope of [the WHO's] activities," as required by Article 96, the Court was effectively suggesting limits to the WHO's sphere of legitimate activities. The Court's reliance, in that case, on the "principle of speciality" suggests that IOs, or at least UN specialized agencies, preside over separate and distinct (though not necessarily self-contained) regimes whose outer limits may be at least partly circumscribed by the interests and capacities of other organizations (in this instance, the UN's General Assembly).[133] Other ICJ opinions, such as many of its opinions on territorial

[129] *See, e.g.*, Merrills, *supra* note 69, at 233–8.

[130] Thus, while a trial chamber of the ICTY seemed favorably disposed to applying some version of the "political question" doctrine at the jurisdictional phase of the *Tadic case*, the Appellate Chamber seemed to reject the premise that some issues could not be addressed because they were too political. *See* discussion *infra* at notes 187–95.

[131] For example, the GA or the Council of the International Sea Bed Authority can request advisory opinions from ITLOS; the Council and the Commission of the European Communities can request advisory opinions from the ECJ; and several OAS organs can request advisory opinions from the Inter-American Court of Human Rights. *See* Romano, *supra* note 1, at 740. In some cases, as with respect to the International Sea Bed Authority and ITLOS, Community organs before the ECJ, and certain organs of regional organizations before their regional trade bodies, IOs can also appear in contentious cases. *Id.*, at 741–2. Administrative Tribunals charged with handling staff complaints, as within the World Bank, the IMF, the ILO, and the UN, are also prominently involved in delineating the law applicable to the international civil service. *See, e.g.*, C.F. Amerasinghe, *The Law of the International Civil Service* (*As Applied by International Administrative Tribunals*) (2 vols.) (Oxford, U.K.: Clarendon Press, 2nd edn., 1994).

[132] *See Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 ICJ Rep. at 66 (hereinafter "WHO Opinion"). The ICJ's attempt to demarcate the limits of the WHO's regime is only the latest attempt by the foremost judicial body to define an IO's sphere of operation. *See, e.g.*, Advisory Opinion No. 3, PCIJ (1922)(examining the competence of the ILO).

[133] WHO Opinion, *supra* note 132, at 78–89, para. 25. *See generally* Laurence Boisson de Chazournes and Philippe Sands, eds., *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge, U.K. and New York: Cambridge University Press, 1999)(chapters by Gavan Griffith and Christopher Staker, Pierre Klein, Michael Bothe, and Virginia Leary); Dapo Akande, "The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice," 9 *EJIL* 437 (1998).

disputes mentioned above, demarcate "boundaries" in more ways than one. The Court's refusal in such cases to read contemporary human or indigenous peoples' rights into its doctrine of *uti possidetis*, for example, is a subtle, controversial attempt at line-drawing, a refusal to import norms from one area of international law into another, predicated on the Court's view of procedural and substantive law. As Professor Reisman has suggested, the Court's blinkered view of *uti possidetis* is as much a response to the rules of standing under which it operates (limited to states and the legal arguments these states present) as an affirmation of the state-centered values that such rules protect.[134]

By comparison, the WTO's Appellate Body has, in its interpretation of the scope of article XX exceptions, suggested a willingness to view the trade regime as not entirely "self-contained," but subject to, for example, evolving conceptions of customary international law not explicitly addressed in the covered agreements.[135] Such attempts to contain or expand applicable regimes have potentially broad ripples. On-going debates concerning, for example, whether the trade regime should be expanded to include environmental, labor, or more general human rights concerns, often begin with discussions of the WTO's definition of what is already included within the trade regime in order to discuss the propriety of "linking" other issues, either through treaty amendment or adjudicative interpretation.[136]

The ECJ has also defined its sphere of influence relative to other IOs, but with far less obvious impact on public international law. As noted, that Court suggested, early on, that the EEC was a "new legal order" in contradistinction to public international law.[137] Indeed, in cases after *Van Gend en Loos*, the ECJ has rarely referred to international law at all, nor to its sources, its methods of interpretation (e.g., the Vienna Convention on the Law of Treaties), or to ICJ opinions. While, as Weiler and Trachtman have argued, international law remains the "original operating system" of the Community upon which the EEC's version of constitutionalism was constructed,[138] international norms and remedies rarely make an appearance

[134] *See* Reisman, *supra* note 123, at 359–62. The Court has accepted submissions from non-governmental organizations rarely and only under its advisory jurisdiction; it has apparently refused to accept the equivalent of *amicus* from individuals even in such instances. *See id.*, at 362, n. 59.

[135] *See generally* Joost H.B. Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?," 95 *AJIL* 535 (2001)(discussing the relationship between WTO rules and other rules of international law).

[136] *See, e.g.*, "Symposium: The Boundaries of the WTO," 96 *AJIL* 1 (2002); Robert Howse and Makau Mutua, "Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization," Policy Paper Rights and Democracy, International Centre for Human Rights and Democratic Development (2000)(using existing WTO precedents as a building block to suggest the propriety of incorporating human rights concerns more explicitly in the WTO's caselaw).

[137] *See* prior discussion in text accompanying note 26. For an argument that the ECJ's decision in *Costa* v. *ENEL* reflects an underlying assumption that the Community's legal order is different from public international law because it is part of the various European national legal orders, see Spiermann, *supra* note 26, at 774–5.

[138] As was suggested, most provocatively, by the German Constitutional Court's *Maastricht decision*, which by reasserting that Court's ultimate right to define the scope of the Community legal order was reaffirming, perhaps wrongly, the "implicit underpinning of the community legal order in international law." Weiler and Trachtman, *supra* note 19, at 377.

within the ECJ's modern opinions. The Community's and the ECJ's principal effects on public international law have been less direct: namely, to provide models for other international regimes, not only to the extent that the Community's processes for judicial review have been emulated elsewhere (as within some of the regional courts listed in the PICT Chart at p. 404) but in terms of increasing the acceptability of "constitutional" references within such regimes.[139]

Apart from the ECJ, many international adjudicators have relied on sources of public international law other than the treaties in which the dispute settler is embedded. This has occurred whether or not the dispute settlers have been explicitly authorized to have recourse to such sources, and generally in the absence of a textually explicit license to apply all sources, of public international law comparable to article 38 of the ICJ's Statute. While it is too early to say whether these specialized bodies will make the contribution to public international law that the ICJ has made to date, many of these bodies seem destined to become developers as well as consumers of public international law.

There is a growing recognition that the WTO's dispute settlement system, while it relies primarily on the texts of WTO agreements and prior reports, is not an entirely "self-contained" regime if the phrase is intended to suggest a hermetically sealed-off institution that relies exclusively on its own covered agreements as sources of law.[140] While the DSU specifies that WTO dispute settlement seeks to examine only the relevant provisions in the covered trade agreements that are cited by the disputing parties,[141] it also provides that its purpose is to clarify these agreements "in accordance with customary rules of interpretation of public international law."[142] This latter provision has repeatedly led GATT panels and the Appellate Body to articles 31 and 32 of the Vienna Convention on the Law of Treaties,[143]

[139] *See id*., at 354–6 (noting how the vocabulary of constitutionalism is increasingly employed in other IOs, most notably the WTO, and is contributing to an evolving methodology of "comparative transnational constitutionalism"). For attempts to read developments within the WTO in terms of constitutionalism and the promotion of the "international rule of law," see, e.g., Petersmann, *supra* note 13. For an attempt to expand the ECJ's and the WTO's "constitutionalism" to the UN, see Ernst-Ulrich Petersmann, "Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?," 31 *NYU J. Int'l L. & Pol.* 753 (1999).

[140] As the WTO Appellate Body indicated in 1996, the trade regime does not exist "in clinical isolation from public international law." *United States—Standards for Reformulated and Conventional Gasoline*, AB-1996-1, WT/DS2/AB/R (April 29, 1966), at 17. *See also* David Palmeter and Petros C. Mavroidis, "The WTO Legal System: Sources of Law," 92 *AJIL* 398, at 413 (1998); Javier Fernandez Pons, "Self-Help and the World Trade Organization," in Paolo Mengozzi, edn. *International Trade Law on the 50th Anniversary of the Multilateral Trade System* at 55 (Milano: Dott. A. Giuffre Editore, 1999). *Cf.* Bruno Simma, "Self-Contained Regimes," 16 *Netherlands Yrbk. Int'l L.* 111 (1985).

[141] *See* article 7 of the DSU indicating that panels are "to examine, in the light of the relevant provisions in [the covered agreements cited by the parties of the dispute] the matter referred to the DSB" and to "address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." Palmeter and Mavroidis suggest that this provision substitutes, in the WTO, for the ICJ's article 38. Palmeter and Mavroidis, *supra* note 140, at 399.

[142] Article 3.2, DSU, *supra* note 34.

[143] *See, e.g.*, *US—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (March 20, 1996), at 17; Palmeter and Mavroidis, *supra* note 140, at 406.

including its injunction to consider, together with a treaty's "context," "any relevant rules of international law applicable in the relations between the parties."[144] This provision, along with the incorporation of other non-GATT treaties or other multilateral arrangements, either by explicit reference within the WTO "covered" agreements[145] or by ad hoc agreement of the GATT Contracting Parties,[146] as well as terms that invite the use of non-WTO sources of law, as do many terms in article XX ("exhaustible natural resources," determining what is "necessary" for "essential security"), enables, and in some cases may require, the WTO's dispute settlers to consider a broad range of sources of international obligation.

As David Palmeter and Petros Mavroidis have demonstrated, GATT panels and the Appellate Body have had occasion to consider the same three types of general sources of public international law as are considered by the ICJ, namely, international agreements apart from "covered" trade agreements, customary international law (especially, but not exclusively, customary rules of treaty interpretation and underlying canons of interpretation such as the principle of effectiveness), general principles of law (including principles of estoppel and proportionality and canons of interpretation), as well as subsidiary sources such as "judicial opinions" (especially but not exclusively reports of prior panels and the Appellate Body) and the "teachings of the most highly qualified publicists."[147] While the WTO's dispute settlers are not given the same wide open license as is the ICJ to consider any and all disputes under these sources of law, the opportunity (perhaps the duty) to

[144] Article 31(3)(c), Vienna Convention on the Law of Treaties. For a survey of the invocation of articles 31 and 32 of the Vienna Convention, see Thomas Skouteris, "Customary Rules of Interpretation of Public International Law and Interpretative Practices in the WTO Dispute Settlement System," in Mengozzi, *supra* note 140, at 113.

[145] WTO agreements refer to international intellectual property conventions such as the Paris Convention of 1967 and the Berne Convention of 1971 as well as "softer"agreements such as the WHO/FAO Codex Alimentarius and the OECD's Arrangement on Guidelines for Officially Supported Export Credits. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, in Final Act, 33 *ILM* 1144 (1994), article I.3 (hereinafter TRIPS); Agreement on Subsidies and Countervailing Measures (SCM), *id.*, Annex I(k), Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), and the Agreement on Technical Barriers to Trade (TBT). The SPS agreement refers to standards reached in three specific "sister institutions," the Codex Alimentarius Commission, the International Office of Epizootics, and the International Plant Protection Convention. *See* SPS, article 3.1 and Annex A., para. 3. The TBT refers to international standards developed by any "[b]ody or system whose membership is open to the relevant bodies of at least all (WTO) Members." TBT, article 2.4 and Annex 1, para. 4. In some instances, as in the TRIPS Agreement, the incorporated rules are legally binding. *See, e.g.*, *US—Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted July 27, 2000 (discussing the Berne Convention). In other cases, members who rely on the non-WTO rules will be presumed to be in conformity with the WTO covered agreements. *See, e.g.*, SPS, articles 3.1 and 3.2. *See also* Pauwelyn, *supra* note 135, at 540–50.

[146] *See, e.g.*, WTO Appellate Body Report: *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, AB-1997-3, WT/DS27/AB/R (November 17, 1997), adopted by Dispute Settlement Body, at para. 164 (acknowledging the Contracting Parties' temporary waiver of article I duties for the European Community "to the extent necessary" for the Community to grant preferential treatment to certain products as required by the Fourth Lome Convention).

[147] Resort to such sources has been most prominent within the WTO's Appellate Body. *See* Palmeter and Mavroidis, *supra* note 140.

"complete" the contracting parties' trade contracts through recourse to such sources, and the many ambiguities and arguable gaps in the "covered" agreements directly at issue, have made such references necessary in order to give reasoned opinions and to avoid determinations of *non-liquet*. Creative forms of judicial law-making remains essential to resolving contentious issues, consistent with giving effect to the trade regime's primary purpose and respecting its outer boundaries. Whether general principles of treaty law, such as *lex posterior*, apply within the trade context and can be applied by the WTO's DSB are central to resolving issues of possible conflict between the trade regime and international environmental and labor norms, for example.

Trade commentators have canvassed the many instances in which the WTO's dispute settlers have had to consider what is encompassed or excluded by the DSU's injunction to apply the "customary rules of treaty interpretation." Apart from repeated attempts to resolve the many familiar ambiguities encompassed by articles 31 and 32 of the Vienna Convention on the Law of Treaties,[148] particular WTO panels and Appellate Body reports have used this authority to authorize reference to a number of canons of interpretation used by other international tribunals (including the ICJ), such as the principle that if the meaning of a term is ambiguous the preferred meaning ought to be the one that is less onerous on the party assuming the obligation[149] and the injunction against interpretations that render particular provisions or words in the treaty text redundant. The Appellate Body has inferred burdens of proof based on a rule, allegedly applied by the ICJ, that this burden rests upon the party claiming the affirmative of a particular claim or defense.[150] It has found and applied "fundamental" rules of due process as well as the requisites of "good faith."[151] GATT and WTO reports have applied other rules contained in the Vienna Convention on the Law of Treaties and arguably within "customary rules of treaty interpretation," including norms regarding the application of "successive" or "later" treaties,[152] retroactive application, "error" in treaty formation, the inadmissibility of internal law as an excuse for failure to perform a treaty, and treaty termination. The Appellate Body has also dealt with, but so far refused to resolve, general questions as to the evolution of customary

[148] *See generally* Chapter 2. Thus, the WTO's dispute settlers, and trade commentators, have, like the ICJ, wrestled with the relevance of drafters' intent, the meaning of "context," the meaning to be given to "subsequent practice,"the propriety of a purely "textual" as opposed to more "evolutionary" approach to treaty interpretation, as well as the meaning to be given to "relevant rules of international law applicable in the relations between the parties." *See generally* Pauwelyn, *supra* note 145.

[149] *See generally* Pauwelyn, *supra* note 135, at 573 n. 242 (discussing the ruling in *US—Gasoline*).

[150] *See, e.g.*, *Turkey—Textiles*, WT/DS34/R (May 31, 1999), at paras. 9.57, 9.58 and Appellate Body Report, WT/DS34/AB/R (November 19, 1999), at para. 59 (invoking the rule to require a party seeking to establish that the customs union exception of article XXIV applies to bear the affirmative burden of proving it).

[151] Pauwelyn, *supra* note 135, at 575, nn. 257, 259 (discussing reports in *EC—Computer Equipment* and *EC—Hormones*).

[152] *See*, e.g., *id.*, at 540–52.

international law.[153] It has referred to *lex mercatoria*.[154] Trade commentators have increasingly needed to address other public international law questions, including the applicability of other rules within the Vienna Convention on the Law of Treaties (including the interplay between treaties and *jus cogens*), the hierarchy of treaty versus customary norms, and the applicability of the concept of "self-contained" regimes raised by the ICJ in the *Hostages case*.[155] The WTO's dispute settlers have also had to rely on a number of general adjudicatory principles borrowed from other international (and domestic) tribunals, including the notion of *compétence de la compétence* and principles relating to standing and mootness.[156] They have also borrowed principles of "judicial economy"as well as a number of evidentiary rules.[157]

Further, while trade commentators accept the proposition that the WTO's DSU constitutes a commitment by all WTO members to submit their differences to WTO panels and to undertake unilateral remedies (or countermeasures) only to the extent that these are authorized by the WTO, the DSU provisions on remedies contain a number of ambiguities.[158] Article 19 of the DSU merely states that where a measure is inconsistent with a covered agreement, trade panels and the Appellate Body "shall recommend that the member concerned bring the measure

[153] *See, e.g.*, *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R and WT/DS26/AB/R (February 13, 1998) (hereinafter "*EC—Hormones*"), at para. 147 (noting that "the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation"); *US—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (October 12, 1998), at para. 129 (noting that non-WTO rules that reflect "the contemporary concerns of the community of nations" have an impact on WTO rules). *See also* Pauwelyn, *supra* note 135, at 569–71 (discussing the WTO's treatment of customary international law).

[154] *See id.*, at 575, n. 258 (discussing the *EC—Poultry* report's discussion of the meaning of "c.i.f. import price").

[155] Among the other Vienna Convention provisions that have been discussed in this context are articles 53 and 64 (*jus cogens*), 36–7 (rights of third parties), and 39–41 (amendments). *See generally* Pauwelyn, *supra* note 135; Palmeter and Mavroidis, *supra* note 140; and Mavroidis, *supra* note 42.

[156] *See, e.g.*, *US—Anti-Dumping Act of 1916*, WT/DS136/AB/R (September 26, 2000) at para. 54 n. 30 (applying *compétence de la compétence* although that principle is nowhere stated within the DSU) and *EC—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (September 9, 1997), at para. 133 (stating that there was no "general rule that in all international litigation, a complaining party must have a 'legal interest' in order to bring a case"). Pauwelyn, *supra* note 135, at 563 (identifying the following rules of "general international law": standing, representation by private counsel, *la compétence de la compétence*, burden of proof, the treatment of municipal law, the acceptability of *amicus curiae* briefs, authority to draw adverse inferences, and judicial economy; as well as rules from the law of treaties (such as the principle of non-retroactivity, and error in treaty formation) and from state responsibility (such as counter-measures and attribution)).

[157] Thus, in *US—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (May 23, 1997) at 19, the Appellate Body affirmed that "a panel need only address those claims which must be addressed in order to resolve the matter in issue." *See* Pauwelyn, *supra* note 135, 556 and n. 141; *see also* Joost Pauwelyn, "Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears the Burden?," 1 *J. Int'l Econ. L.* 227 (1998).

[158] *See generally* Mavroidis, *supra* note 42, at 764; Pons, *supra* note 140. As Pons points out, regardless of the impact the traditional regime with respect to counter-measures has on the DSB, that regime also influences what states do either in anticipation of the DSB's action or in its wake, as while waiting for the DSB's implementation proceedings to conclude. *Id.*, at 63–90 (noting the role of countermeasures as part of the structural backdrop to the DSU and its operation).

into conformity with that agreement," and may also "suggest ways in which the Member concerned could implement the recommendations."[159] As Mavroidis has argued, this provision leaves a number of questions unresolved for compliance panels—including whether their authorized recommendations or suggestions are legally binding or otherwise create legal effects of any kind; whether they are limited to remedies requested by the complaining party; whether the types of remedies can include, in addition to a determination of GATT inconsistency, a requirement to repeal the offending measure (either prospectively from the time of determination of inconsistency or retroactively as if it were a nullity from the time it was imposed) or to accord the injured party damages to restore the *status quo ante* (including actual damages suffered, as well as lost profits, interest, and punitive damages); and whether (or when) an aggrieved party can undertake additional countermeasures to re-establish the *status quo ante*.[160]

The answers to these questions, only now starting to emerge, are likely to be informed by and, in turn, develop general principles of state responsibility, as well as other principles of public international law. Thus, Mavroidis argues that the DSB's notion of what it can "recommend" or "suggest" by way of remedies in violation cases ought to be governed by the *non ultra petita* principle applicable in other international tribunals, according to which an adjudicating body cannot decide more than it has been asked to do by one of the parties.[161] He suggests that *pacta sunt servanda* and the principle of good faith interpretation of treaty texts should lead to a conclusion that recommended remedies should be treated as binding by their addressees and, that panel suggestions, when made, should create an irrefutable presumption of compliance when followed.[162] He contends that general rules authorizing *restitutio in integrum* and "effective remedies" would suggest that legal remedies available to trade panels would, in principle, include a declaration of illegality, an obligation to cease the illegal act that could apply retroactively, and, even in some cases, the awarding of *damnum emergens* (actual damages), *lucrum cessans* (lost profits), and interest, but not punitive damages. The canon of interpretation requiring giving effect to all treaty provisions and avoiding suggestions of redundancy, requires, in his view, a prior finding that a member's measures taken in compliance with its ruling are inadequate before additional countermeasures can be authorized. Finally, Mavroidis argues that article 60 of the Vienna Convention permitting collective responses to material breach of a multilateral treaty ought to be interpreted in the trade context as requiring a preliminary determination that such a material breach has occurred; he further contends that tabling such proposals would entitle the affected party to request consultations and a panel procedure on the "dispute" that has arisen between the membership and itself. Mavroidis also applies a similar analysis, grounded in public international law principles, to describe the

[159] DSU, *supra* note 34, article 19(1).
[160] Mavroidis, *supra* note 42, at 778–809.
[161] Mavroidis, *supra* note 42, at 768 and 803.
[162] Mavroidis, *supra* note 42, at 778–88.

permissible range of countermeasures that ought to be authorized by WTO dispute settlement.[163]

One need not accept all of Mavroidis's conclusions to accept the plausibility of his central premise: that the DSB is likely to develop the ill-defined trade remedies at its disposal in light of the most likely set of legal rules available to interpret the DSU's provisions, namely, general principles of public international law and most specifically its rules governing state responsibility and permissible countermeasures. The Appellate Body caselaw based on many of the same principles that Mavroidis relies upon, is, by now, simply too abundant for that Body to ignore when it seeks guidance on vexed topics of remedies.[164] With respect to many issues left open by the DSU, the WTO Appellate Body is now in the position of having to justify why general principles from public international law are *not* applicable.[165] Reasons must be given, preferably drawn from specific language in the covered agreements or the DSU itself, to indicate why one provision in the Vienna Convention is not applicable when another is. Moreover, the tendency to rely on all public international law rules as a necessary backstop for interpreting the covered agreements is not limited to the Appellate Body. At least one panel ruling has suggested that all customary international law, and not just its rules regarding treaty interpretation, applies in WTO dispute resolution since:

> Customary international law applies generally to the economic relations between the WTO members. Such international law applies to the extent that the WTO agreements do not "contract out" from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.[166]

While some trade commentators have suggested that this statement is too broad if it intends to include "substantive" customary rules (such as the precautionary principle in Stockholm's Principle 21), as well as more "procedural" rules (such as those concerning permissible countermeasures),[167] these disagreements about

[163] Mavroidis, *supra* note 42, at 789–809.

[164] Thus, in the *EC—Bananas case*, the arbitrators invoked the "general international law principle of proportionality of counter-measures," and in *Brazil—Aircraft*, they discussed the appropriateness of the "countermeasures" permitted under the SCM Agreement. *See* Pauwelyn, *supra* note 145, at 563, n. 191.

[165] At a minimum, WTO panelists and commentators may be forced to explain why the rule pronounced by a chamber of the ICJ in the *ELSI case* is not applicable in the trade regime. In that case, the ICJ opined that it was "unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so." Elettronica Sicula S.p.A. (*ELSI*), 1989 ICJ Rep. 15. *Cf.* Paolo Mengozzi, "The World Trade Organization Law: An Analysis of its First Practice," in Mengozzi, ed., *supra* note 140, at 18.

[166] *Korea—Measures Affecting Government Procurement*, WT/DS163/R (June 19, 2000), at para. 7.96; quoted in Pauwelyn, *supra* note 145, at 543 and n. 57.

[167] *Cf.* Pauwelyn, *supra* note 145, at 543–4 (arguing that only general (not local or regional) customary norms are implicitly incorporated within the WTO covered agreements).

what non-trade rules the WTO's dispute settlement system is authorized to apply do not mean that, depending on how they are resolved, the operation of trade regime might not have a normative impact on public international law. *However* these disagreements are resolved by the WTO's dispute settlers, the implications on contentious questions within public international law—including on the meaning and viability of "self-contained" regimes in general—will be hard to ignore. While much of what the DSB does will continue to be seen as *lex specialis* (that is, applicable only to the trade regime), particularly to the extent its panels and Appellate Body reach for public international law principles, those principles themselves will be developed by what it does. WTO dispute settlers' interpretations of the *non ultra petita* principle, *compétence de la compétence*, fundamental evidentiary rules demanded by equality of arms or other principles of fairness, other rules contained in the Vienna Convention on the Law of Treaties, canons of interpretation derivable from the rules of treaty interpretation or the principle of effectiveness, and the requirements of state responsibility (including principles of proportionality and *restitutio in integrum*) will have an impact on these "non-trade" rules. The impact on public international law would, of course, be all the greater to the extent WTO adjudicators interpret the DSU as delegating to them the power to resolve substantive conflicts between the WTO and more substantive "non-trade" rules such as the precautionary principle or "core" labor rights.[168]

Other quasi-judicial and judicial dispute settlers rely on and, in turn, develop public international law in even more obvious ways than do WTO panels or its Appellate Body. The most prominent example occurs among human rights dispute settlers. The notion that these regional and UN bodies are developing a common set of international norms that, in turn, may reflect or affect customary human rights norms is common to the scholarly literature. Moreover, this is sometimes suggested by the dispute settlers themselves. Given the substantive similarity of many definitions of human rights in both regional and international instruments, it is not surprising that those engaged in adjudicating such disputes, at either the international or local levels and within specialized UN treaty bodies or regional courts, sometimes engage in "horizontal" and "vertical" forms of trans-judicial communication.[169] This process is encouraged by the involvement of non-governmental organizations active before many of these entities, at both the UN and regional levels.[170] While the Strasbourg Court has stressed that it is only

[168] *Compare* Howse and Mutua, *supra* note 136 (arguing that WTO panels and its Appellate Body should, for example, interpret language in preamble to the covered agreements such as "sustainable development" as a license to incorporate rights included in the International Covenant on Economic, Social and Cultural Rights as well as the precautionary principle) with Pauwelyn, *supra* note 145, at 573 (arguing that the DSU cannot be read as directing the WTO judiciary to add new obligations).

[169] *See, e.g.*, Helfer and Slaughter, *supra* note 33, at 370–3.

[170] *See, e.g.*, Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca and London: Cornell University Press, 1998); Ellen L. Lutz and Kathryn Sikkink, "International Human Rights Law and Practice in Latin America," 54 *Int'l Org.* 633 (2000).

engaged in interpreting the cases before it under the terms of the European Convention, and that it is not engaged in constructing a code of rights for the world, the sheer number of its rulings as well as their scope has ensured plentiful citation to its interpretations elsewhere, as within the Inter-American system and before some UN human rights "expert" bodies.[171] On the other hand, the regional human rights systems in the Americas and in Europe have sometimes also encouraged suggestions that multilateral human rights treaties as such have unique attributes and require special rules, as with respect to rules regarding treaty reservations, teleological or dynamic forms of treaty interpretation, and construction in a "rights-protective"—not "sovereignty-protective"—manner.[172]

Another common (if unsurprising) example concerns public international rules regarding adjudication itself. Questions common to formalized methods of dispute settlement wherever it occurs—legal issues concerning jurisdiction over the subject or the person (including the scope of the principles of *compétence de la compétence* and *ne ultra petita*),[173] admissibility (such as the meaning of a rule to "exhaust" local remedies), standing and mootness, and procedure and evidence, involve particularly abundant cross-citation among international dispute settlers—despite evident differences in their jurisdictional mandates, choice of law or rules for judicial access. With respect to these procedural and evidentiary decisions, the line between inter-state dispute settlement and commercial arbitrations between private parties is becoming less distinct. Thus, ICJ interpretations of *kompetenz-kompetenz* and the *ne ultra petita* rule are as likely to be cited in the course of a commercial arbitration between private parties as by other international tribunals.[174]

[171] *See* Merrills *supra* note 69, at 16–18.

[172] *See generally* Rudolf Bernhardt, "Thoughts on the Interpretation of Human Rights Treaties," in Franz Matscher and Herbert Petzold, eds., *Protecting Human Rights: The European Dimension, Studies in Honour of Gérald J. Wiarda* at 65 (Köln: Carl Heymanns Verlag, 1988); Helfer and Slaughter, *supra* note 80, at 378–86; Ryan Goodman, "Human Rights Treaties, Invalid Reservations, and State Consent," 96 *AJIL* 531 (2002). Thus the Inter-American Court's Advisory Opinions discussed in Sec. 8.2, have helped to cast doubt on the applicability of traditional treaty rules for treaty reservations insofar as human rights treaties are concerned. *Compare* UN Human Rights Committee, General Comment No. 24, UN Doc. CCPR/C/21/Rev.1/Add. 6 (1994) *with* Report of the International Law Commission on the Work of its Forty-ninth Session, UN GAOR, 52nd Sess., Supp. No. 10, at 107, UN Doc. A/52/10 (1997).

[173] *Compétence de la compétence* is the general rule that tribunals have the power to determine for themselves whether they have jurisdiction or competence. *See* discussion *infra* at text and accompanying note 156. *Ne ultra petita*, generally considered to derive from the "consent" principle that international tribunals only have jurisdiction to deal with disputes that have been submitted to it by the parties, is the rule that "an international tribunal will not decide more than it is asked to decide" and will not "award by way of compensation or other remedy more than it is asked to award." *See* Hugh Thirlway, "The Law and Procedure of the International Court of Justice 1960–1989," Part Ten, 70 *Br. Yrbk Int'l L.* 1, at 22 (1999) (quoting Fitzmaurice).

[174] *See, e.g.*, *Arbitral Award of 31 July 1989 (Guinea Bissau* v. *Senegal)*, 1991 ICJ Rep. 53. The ICJ's reluctance in that case to serve as a court of appeal from an arbitral decision or to determine that an *exces de pouvoir* had been committed may have implications for analogous debates now arising within commercial arbitration. *Compare* Thirlway, *supra* note 16, at 63–72 and Thirlway, *supra* note 173, at 25–9 *with* Eric A. Posner et al., "Should International Arbitration Awards Be Reviewable?," *ASIL Proceedings of the 94th Annual Meeting*, April 5–8, 2000, at 126–34. The ICJ's

International dispute settlers also resort to gap-filling "general principles among international tribunals" that are drawn from a small set of common sources (usually ICJ opinions), such as estoppel/acquiescence, unclean hands, and the duty to mitigate damages. Resort to such principles is as likely to arise within regional human rights bodies as they are within, for example, the WTO. As would be expected of entities that are established by and are usually required to interpret treaties, questions of treaty interpretation, the meaning of other rules in the Vienna Convention on the Law of Treaties, and issues arising from treaty breach, including broader questions of state responsibility, commonly arise within these bodies as much as within the WTO.[175] Many of these decisions—such as the Inter-American Court's advisory opinions concerning the application of the Vienna rules on treaty reservations[176]—have wider implications both for the viability of the rules contained in the Vienna Convention on the Law of Treaties as well as their applicability to arguably "*sui generis*" regimes (such as those involving human rights).[177] In some instances, sharp differences have emerged with respect to basic treaty interpretation questions, particularly between human rights dispute settlers and others. Thus, the *Lotus*-inspired principle sometimes mentioned in WTO adjudication, preferring interpretations that are least restrictive on state sovereignty, seems diametrically opposed to the maxim, occasionally cited by the European Court of Human Rights, that individual liberties need a broad interpretation and restrictions on these rights, in favor of state sovereignty, are not favored.[178]

Like the ECHR, the Inter-American Court has added considerably to the body of law concerning legal remedies for human rights violations. Both Courts have necessarily had to address unresolved questions concerning, for example, who is entitled to seek redress as well as the nature of "compensation" properly due.[179] Like the WTO's DSB, both courts have resolved disputes by shifting the burden of proof—as with respect to findings that local remedies have been "exhausted"

ruling in *Arbitral Award* also has implications for those drafting arbitration contracts in any setting. *See, e.g.*, Catharine A. Hartzenbusch, "Case Comment," 86 *AJIL* 553, at 558 (1992).

[175] *See generally* Dinah Shelton, *Remedies in International Human Rights Law* (Oxford, U.K. and New York: Oxford University Press, 1999).

[176] *See* prior discussion at notes 101–2.

[177] Consider, for example, lively on-going debates concerning the applicability of the usual Vienna rules concerning treaty reservations, based on notions of reciprocity, to human rights treaties. *See generally* Bernhardt, *supra* note 172; Ryan Goodman, "Human Rights Treaties, Invalid Reservations, and State Consent," 96 *AJIL* 531 (2002).

[178] *See* Bernhardt, *supra* note 172, at 70.

[179] *See generally* Shelton, *supra* note 175 (noting how the proliferation of fora for adjudicating human rights claims has required considerable efforts to fill gaps in the international law of remedies, particularly by drawing on analogies from other bodies of law, including domestic law). Shelton surveys developments among human rights bodies concerning procedural issues such as who has standing, as well as legal precedents established on the availability of declaratory judgments, various forms of compensation (*e.g.*, pecuniary and non-pecuniary damages, interest), punitive or exemplary damages, non-monetary remedies, and payments for attorney costs or other fees. *Id.*

once the applicant makes an initial showing that such remedies were attempted and by presuming that a breach of the relevant conventions has occurred if remedies are denied.[180] With respect to the substantive law of remedies, the Inter-American Court of Human Rights, in particular, has shown considerable creativity in interpreting the vague provisions in the American Convention on point.[181] That Court's precedents on remedies establishes rights to recover, for victims or, in case of death, their successors, not merely actual damages but indirect damages, lost earnings, and "moral" damages (as to compensate for suffering).[182] While that Court has also recently begun allowing victims to recover for the costs of litigating their cases, it has, for a long time, taken an expansive view of its powers to provide for provisional measures. It has, for example, issued orders in the midst of hearing a case, directing a state to investigate and prosecute those guilty of intimidating or killing witnesses to the on-going proceedings before the court.[183] It is likely that such determinations will have an impact on attempts to define the scope of state responsibility, as well as the scope of judicial powers elsewhere.

The normative impact of judicial law-making on substantive rules of public international law may be considerable and substantive—even when "only" procedural issues appear to be at stake. Consider, for example, the seemingly innocuous general principle, applied by the bodies discussed here, if only implicitly: the notion that all dispute settlers have the competence to decide their own competence unless this is explicitly denied (*compétence de la compétence* or *kompetenz-kompetenz*).[184] The significance of that principle was made manifest for EEC scholars

[180] *See, e.g., Kurt* v. *Turkey*, European Ct of Human Rights, May 25, 1998, 1998-III Eur. Ct. H.R. 1152, 27 E.H.R.R 91; *Velásquez-Rodríguez case*, Inter-American Court of Human Rights, 1988, (Series C) No. 4, 9 *Hum. Rts. L. J.* 212 (1988). *See also* Helfer and Slaughter, *supra* note 33, at 350 (describing the Human Rights Committee's "default judgment jurisprudence under which the author's plausible and substantiated allegations form the basis for its findings of fact and legal conclusion that the Covenant has been violated").

[181] Article 63 of the American Convention permits the Court to "rule that the injured party be ensured the enjoyment of the right or freedom that was violated" and to adopt "provisional measures" in cases of extreme gravity and urgency. It also permits the Court to rule "if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid." American Convention on Human Rights, November 22, 1969, O.A.S. Treaty Series No. 36, at 1, OEA/Ser.L./V/11.23 doc. rev. 2 (entered into force July 18, 1978).

[182] *See, e.g. Aloboetoe et al., case (Reparations)*, Inter-American Court of Human Rights, 1993, 15 Inter-Am. Ct. H.R. (Series C). In that case, the Court took judicial notice that the beatings and other acts inflicted on victims caused "moral suffering" and stated that no evidence was required to prove these. *Id.*, at para. 52. In granting the right of compensation for both actual and moral damages to the victims' successors, the Court again assumed that the victims' deaths caused their heirs to suffer such damages and imposed on the government the burden of showing that "such damages do not exist." *Id.*, at para. 54.

[183] *See, e.g., Velásquez-Rodríguez case, supra* note 180.

[184] *See, e.g.*, article 36(6) of the Statute of the ICJ ("In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court"). Although not all international dispute settlers include an express statement of *kompetenz-kompetenz* within their constituent instrument, such a power is inherent to a grant of jurisdiction. *See, e.g., Dusko Tadic*, Case No. IT-94-1-AR72, October 2, 1995, paras. 11–12, 14, and 18 (hereinafter "Appellate Chamber") (applying the principle to the ICTY). It is not clear whether especially in the absence of such an express statement, a state may attempt to deny a tribunal's *compétence de la compétence*.

by the test of wills, still on-going, between various European constitutional courts and the ECJ over who, ultimately, has *kompetenz-kompetenz* over Community norms. The consistent position of the ECJ that it alone has the power to determine with binding, direct effect the jurisdictional limits of the Community since these are a matter of interpretation of the EEC Treaty has been challenged, as, for example, by the German Constitutional Court.[185] The German Court has asserted its *kompetenz-kompetenz* over such questions as a matter of German constitutional law, thereby rejecting, as Weiler and Trachtman contend, "at least one of the cardinal principles of direct effect and supremacy."[186] The seemingly innocuous principle of *kompetenz-kompetenz*, if actually exercised by one or more of the European constitutional courts, could prompt a constitutional crisis within the EEC.

In public international law, the same concerns are suggested by the ICTY's holdings in response to the first challenge presented to that body's jurisdiction. The first defendant before that tribunal, Dusko Tadic, argued that the ICTY had no jurisdiction to try him for violations of international humanitarian law because the tribunal was illegally constituted.[187] Specifically, Tadic argued that the UN Charter does not authorize the Security Council to establish such a judicial body and that even if it did, this would require action by the GA. In answering this challenge, the Appellate Chamber of the ICTY took an expansive view of its inherent *compétence de la compétence* and found, unlike the trial chamber, that examining the propriety of the Council's action in establishing the tribunal was not an unreviewable "political question" but was within its "inherent" judicial powers.[188] The court found that it could examine the bona fides of the Council's action thanks to *kompetenz-kompetenz*, a principle not explicitly mentioned in the ICTY's constituent instrument. The ICTY refused to limit its inherent power under this "well-entrenched principle of general international law" and suggested that to do otherwise would undermine the tribunal's judicial character and the Council's intention of creating an independent body.[189] The ICTY thus used *compétence de la compétence* as a license to review the legality of the Council's acts since this was "incidental" to the determination of its jurisdiction. While the tribunal rejected, on the merits the defendant's jurisdictional challenge, *kompetenz-kompetenz* became the linch-pin to an extraordinary series of suggested implied limitations

See Hugh Thirlway, "The Law and Procedure of the International Court of Justice, 1960–1989," Part Ten, 70 *Br. Yrbk Int'l L.* 1, at 6, n. 18 (1999) (noting the possibility that a state may attempt, through a reservation to its declaration under article 287 of the Convention on the Law of the Sea, to exclude that tribunal's power to determine its own jurisdiction).

[185] *See Solange II* (1988), 25 *Common Mkt. L. Rep.* 201; *Granital Spa* v. *Administrazione della Firanze* (1984), translated in 21 *Common Mkt. L. Rev.* 756.

[186] Weiler and Trachtman, *supra* note 19, at 390.

[187] *See, e.g., Dusko Tadic*, Case No. IT-94-I-T, August 10, 1995, para. 2 (hereinafter "Trial Chamber") (text at www.un.org/icty/cases/indictindex-e.htm).

[188] *Dusko Tadic*, Appellate Chamber, *supra* note 184, para. 24.

[189] Appellate Chamber, *supra* note 184, paras. 16 and 19 (citing the ICJ's *Effect of Awards case*). *See* Effect of Awards of Compensation made by the United States Administrative Tribunal, Advisory Opinion, 1954 ICJ Rep. 47.

on the Council's powers in that case—limitations that, so far, not even the ICJ has dared to suggest.[190]

Thus, appellate judges of the ICTY concluded that: the Council's powers are wide but not unlimited; that there is a varying political content to possible determinations under Article 39 of the Charter and while a finding of a "threat to the peace" is more political than a determination of "aggression," even the former is limited by the Charter's Principles and Purposes; that internal armed conflicts may constitute a "threat to the peace;" that Article 39 channels and limits the Council's powers to the means provided in Articles 41 and 42; and that the establishment of the ICTY was a measure "not involving the use of force" under Article 41, does not constitute either an improper delegation nor a usurpation of judicial powers, lies within the discretion of the Council's chosen means, and should not be tested by the likelihood of achieving the Council's enunciated goals.[191] *Kompetenz-kompetenz* was also instrumental in permitting the ICTY's judges to interpret the meaning of human rights norms requiring that criminal cases be heard by tribunals "established by law," to answer questions of standing nowhere clearly spelled out in the Court's statute, and to apply general principles of law such as *jus de non evocando*.[192] Whether or not one agrees with the ICTY's disposition of these issues, it is clear that the principle that a tribunal has the right to determine its jurisdiction was, in this case, transformed into a general vehicle for opining on some of the most contentious issues facing the international community. Along the way to affirming its jurisdiction over the case, the ICTY suggested that the Security Council can properly act "indirectly" on individuals,[193] implied that the Council could deprive national courts of jurisdiction,[194] and readily dismissed contentions that the Council could ever "improperly delegate" its functions.[195] The ICTY's jurisdictional ruling in *Tadic* is a singular manifestation of the absence of an adjudicatory hierarchy in international law. If this tribunal, jurisdictionally limited to hearing cases under a select number of international crimes and within a geographically constrained region, has inherent competence over foundational constitutional issues central to the UN Charter order, then all tribunals would appear to have comparable powers should the occasion arise, and none are required to defer such issues to the UN's principal judicial organ—at least under *kompetenz-kompetenz*.

Nor is this the only example of the contribution made to public international law by the ad hoc war crime tribunals. The decisions rendered by both the ICTY and the ICTR have also done much to develop the substance of international humanitarian law. Thanks in part to the work of these tribunals, international humanitarian law "has developed faster since the beginning of the atrocities in the

[190] *Cf. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (*Libya* v. *UK*, *Libya* v. *U.S.*), Provisional Measures, 1992 ICJ Rep. 3, 114.

[191] Appellate Chamber, *supra* note 184, paras. 28–39.

[192] *Id.*, at paras. 39–45 (discussing, for example, article 14 of the International Covenant on Civil and Political Rights).

[193] Trial Chamber, *supra* note 187, para. 36.

[194] Appellate Chamber, *supra* note 184, paras. 61–2 (rejecting pleas of *jus de non evocando*).

[195] Appellate Chamber, *supra* note 184, para. 38.

Former Yugoslavia than in the four-and-a-half decades since the Nuremberg Tribunals and the adoption of Geneva Conventions."[196] Examples of the tribunals' normative impact are legion. They include, for example, the ICTY's Appeals Chamber's recognition that individual criminal responsibility exists under international customary law for certain crimes committed in internal armed conflicts[197] as well as for many of the provisions of Protocol II of the Geneva Conventions.[198]

The normative impact of the ICTR is suggested by, for example, its judgment against the bourgmestre of the Taba commune in the Prefecture of Gitarama in Rwanda, Jean-Paul Akayesu.[199] The trial judges' conviction of Akayesu on various charges of genocide and crimes against humanity applied the concept of targeted "ethnic group" for purposes of genocide in a context where the group was not defined by a difference in appearance, language, or culture; determined that "incitement" to genocide can be found even in the absence of "direct" incitement but in a case where the perpetrator "plays skillfully on mob psychology," and that this crime can be punished even when not successful; determined that genocide (in the form of "measures to prevent births within the group") can include deliberate impregnation by a man of another ethnic group where there is intent to have the victim give birth to a child that will be ostracized due to its mixed parentage; affirmed that sexual violence can constitute genocidal "steps in the process of destruction" of the targeted ethnic group as well as a crime against humanity (if committed as part of a widespread or systematic attack on a civilian population); found that mass rape can constitute a crime against humanity; and determined that rape, when inflicted by or at the instigation of a public official, constitutes torture.[200] All of these findings are novel interpretations of existing international crimes rendered in the course of applying them to individual criminal defendants.[201]

8.4 Other Sources of International "Obligation"

The ICTY's jurisdictional holding in *Tadic* discussed above also raises, less directly, questions as to the sources of law that international dispute settlers generally apply.

[196] Theodor Meron, *War Crimes Law Comes of Age: Essays* at 297 (Oxford, U.K.: Clarendon Press, 1998).

[197] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT Doc. IT-94-1-AR72, October 2, 1995, at 48 and 71 (finding that while grave breaches of the 1949 Geneva Conventions apply only to international armed conflicts, common article 3 offences extend to both internal and international armed conflicts).

[198] *Id.*, at 63. On the tribunals' role in evolving notions of applicable customary law, see Theodor Meron, "The Continuing Role of Custom in the Formation of International Humanitarian Law," 90 *AJIL* 238 (1996).

[199] *See Prosecutor* v. *Jean-Paul Akayesu*, ICTR-96-4-T, September 2, 1998 available at http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm#7_5.

[200] *See Akayesu, supra* note 199.

[201] For an enumeration of concerns raised as a result with respect to the fair treatment of defendants, including with respect to the *nullum crimen sine lege* principle, see, e.g., José E. Alvarez, "Rush to Closure: Lessons of the Tadic Judgment," 96 *Mich. L. Rev.* 1031 at 2061–8 (1998).

The ICTY is charged with applying international criminal law as defined in its statute. It is not given the ICJ's general license to apply any and all public international law norms nor even the explicit permission, contained in the WTO's DSU, to apply customary international rules as to the interpretation of treaties. Yet, the ICTY turned to *compétence de la compétence*, seemingly as part of a "brooding omnipresence"[202] of general principles applicable within international tribunals—without indicating precisely where this rule is found. It did not clearly indicate whether *compétence de la compétence* is a general principle of law applicable, at least initially, among domestic courts, an implied term in the ICTY's constituent instrument, a rule of custom that applies among international tribunals, or something else. As is suggested by the WTO's and regional human rights courts' reach for comparable "general principles" (including *compétence de la compétence* itself) or the ILO's Commission of Inquiry for Poland's reliance on other sources of "soft law," a tendency to resort to norms whose status among the traditional sources of international law is not precisely defined is not unique to the ICTY. Even these judicial bodies, the most legalistic entities within IOs, sometimes rely on norms whose legal pedigree is dubious.

Section 4.3 discussed the role IOs have played, and continue to play, with respect to promoting various forms of international soft law. The categories of soft law discussed in that chapter have different relationships to the traditional sources of (hard) international law.[203] Soft law may guide the interpretation, elaboration, or application of hard law; constitute norms that aspire to harden; serve as evidence of hard law; exist in parallel with hard law obligations and act as a fall-back; or serve as a source of obligation through acquiescence or estoppel.[204] The opinions issued by the entities in this chapter are filled with references to rules that, on their face, fit into these types of international soft law. Thus, when the ICTY came to address the merits of the case against Dusko Tadic, the trial judges resorted to a variety of non-binding materials to define the offences at issue or to consider questions of jurisdiction, including the Report of the Secretary-General, the Report of the ad hoc committee on the Permanent International Criminal Court, and the ILC Draft Code of Crimes against Peace and Security of Mankind.[205] Many of these entities, including the ICJ, regularly resort to GA resolutions without clearly indicating whether they are using such resolutions as mere evidence of rules that fit the traditional categories of international law, as building blocks of custom, as part of a treaty's "context" or its "subsequent practice," or, most controversially, as a *sui generis* source of legal obligation that can substitute for one of the traditional sources of international law if certain, often unspecified, conditions are

[202] *See* W. Michael Reisman, "The Constitutional Crisis in the United Nations," 87 *AJIL* 83, at 91, n. 33 (1993)(criticizing this idea).

[203] *See* Chapter 4 at text and note 221 (enumerating Chinkin's six categories of soft law).

[204] Christine Chinkin, "Normative Development in the International Legal System," in Dinah Shelton, ed., *Commitment and Compliance* at 21, 30–1 (Oxford, U.K. and New York: Oxford University Press, 2000).

[205] *Prosecutor* v. *Dusko Tadic*, IT-94-1-IT, May 7, 1997, 36 *ILM* 908; see Chinkin, *supra* note 204, at 36.

satisfied. Such unexplained reliance has led to perennial complaints among commentators.[206]

Yet there is something more that needs to be said about soft law and international dispute settlers other than the evident fact that these international actors are just as careless about citing to these sources as other international actors sometimes are. There is a complex interaction between quasi-judicial and judicial dispute settlement bodies and soft law. Adjudicative entities do more than apply these norms. In some cases, they are the principal vehicle by which soft law hardens. Thus, when some WTO agreements authorize its dispute settlers to apply certain types of soft law in the course of binding dispute settlement, those norms are turned into hard law in the course of application. The WTO's covered agreements do not by themselves turn these soft law rules into binding treaty law. The references in trade agreements to the Codex Alimentarius or to the OECD's Arrangements for Export Credits do not turn these instruments into fully binding obligations on all GATT parties; these references, together with the standard provisions in the WTO's DSU, turn only those provisions of these soft law instruments applied in particular cases into fully binding GATT law. If the Codex Alimentarius or the OECD's Arrangements for Export Credits come to have greater binding authority within the trade regime as a whole, it is as a result of the action of the DSB—through the informal precedential effect of GATT rulings on non-parties.[207] Absent further action by the contracting parties or the wholesale adoption of the Codex or the Export Credit Arrangement as fully binding on all GATT parties, the hardening of such rules within the WTO relies on the effects of the WTO's dispute settlement scheme.

Reliance on soft norms does not alleviate concerns about judicial law-making. On the contrary, the resort to soft law may aggravate legitimacy concerns. Norms that are "soft" because they lack the requisite pedigree lack the legitimacy of traditional sources of international law. They have neither been consented to by individual sovereigns (as are treaties) nor are they the product of general international consensus (as is ostensibly custom). In some cases, these standards are not even the work product of intergovernmental organizations through which sovereign states express their will, as are GA resolutions or other "recommendations" issued by other IOs. In some instances, such soft law may not even be rules primarily intended to be used by or to apply to international legal persons. They may be instead rules intended for the use of private parties. A prime example is the voluntary series "14000" standards, intended to be of use to private industry and issued by the International Organization for Standardization (ISO), an organization not created by treaty and consisting of both governmental entities and representatives of private industry. Yet, as noted in Chapter 4, the WTO's Agreement on Technical

[206] For one attempt to explain the ICJ's reliance on such resolutions, especially when not accompanied by evidence of conforming state practice, see Frederic L. Kirgis, Jr., "Custom on a Sliding Scale," 81 *AJIL* 146 (1987).

[207] On the impact of GATT "caselaw" generally, see Bhala, *supra* notes 43, 44.

Barriers to Trade (TBT) expressly refers to voluntary standards adopted by an "international standardizing body," presumably including the ISO's. Under the TBT, governmental regulations that adhere to these standards are presumptively legitimate and do not constitute barriers to trade. Application of this rule in the TBT is left to the WTO's dispute settlers, and the results have been criticized by environmentalists. In this fashion, rules adopted by non-governmental organization are transformed, in the words of David Wirth, into a ceiling for public regulation to protect health and environment, even in a state, such as the U.S., whose participation in the ISO is limited to private industry.[208]

The hardening of soft law that may take place in such cases occurs through yet another type of "soft law": the rulings of GATT panels and the Appellate Body. Indeed, from one perspective, the primary product of all of the dispute settlement bodies discussed here is the generation of a substantial body, perhaps the largest body outside of the UN's General Assembly, of "international soft law."[209] Note how many of Chinkin's six characteristics of "soft law,"[210] previously discussed in Chapter 4, arguably apply to the opinions, reports, or rulings issued by international dispute settlers.

First, none of these opinions qualify as general Article 38 sources of law. Although some of these rulings may become authoritative if so indicated by a treaty, in these cases they are "binding" as a matter of treaty law only for parties to the dispute at issue. No treaty regime explicitly authorizes its dispute settler to make general law binding even with respect to treaty parties, much less non-parties. In other instances, as with respect to the Inter-American Commission and the ILO Commissions of Inquiry, opinions issued have no binding effect even with respect to parties to the dispute.

Secondly, these rulings contain, as noted, many vague and imprecise terms. Opinions applied to particular fact patterns do not typically attempt to resolve all ambiguities in a standard, but only those necessary to a decision. The standard, once judicially interpreted, may be only marginally more precise than it was before the case was adopted. Its fundamental imprecision may be left unchanged. Further, as is suggested by the European Court of Human Right's "margin of discretion," some of these judgments create new, highly ambiguous standards.

Thirdly, these opinions are issued by bodies that lack law-making authority. Indeed, as noted, many policy makers and commentators deny that international dispute settlers, in the WTO or elsewhere else, "make law" at all.[211]

Fourthly, some judicial opinions, such as criminal cases brought to the ICTY, are "directed" at non-state actors. In other cases, as when GATT panels apply ISO

[208] David B. Wirth, "Compliance with Non-Binding Norms of Trade and Finance," in Shelton, *supra* note 204, 330, at 339–40.

[209] For a suggestion that such reports and rulings are part of an abundant "secondary soft law," that purports to apply the primary "soft law" contained in many human rights instruments, see Dinah Shelton, "Commentary and Conclusions," in Shelton, *supra* note 204, at 449, 451.

[210] *See* Chapter 4, at text and note 221.

[211] *See generally* Pauwelyn, *supra* note 135.

standards, they may be applying law designed for private actors. Nor is it always clear to whom judicial or quasi-judicial decisions are "directed." When international dispute settlers communicate "horizontally" with one another to develop their *compétence de la compétence*, they appear to be directing their message at least in part to other dispute settlers. But international brethren, however judicial, are not international legal persons capable of constituting customary international law. (This raises some troubling questions with respect to some of the rules these adjudicators apply. Notwithstanding the claims of many of these tribunals, is there really such a thing as a "general principle of law *among international tribunals*"?)

Fifthly and sixthly, the ambiguities that often surround the enforcement of the decisions issued by international dispute settlers—including by the ICJ and the WTO DSU—do not lead to clear notions of what is the "responsibility" of a state that refuses to comply with the rulings of these dispute settlers. Notwithstanding Mavroidis's valiant attempts to clarify the WTO DSU's permissible remedies in light of general public international law, it is not yet clear what collective or individual remedies are legally available in case of breach of WTO obligations or precisely what procedures apply to such determinations. The same ambiguities exist with respect to the ICJ, especially given the sparse attempts to enforce ICJ rulings except through voluntary action by states. Although the Court has recently clarified the binding status of its provisional measures orders, no one is quite sure whether a state has a continuing obligation to comply with an ICJ decision if the Security Council considers and rejects a plea to enforce such a decision or, if the state does have such a continuing obligation, what this means in terms of the ability of other states to enforce this obligation either on an individual or collective basis. Further, even if we relegate ICJ decisions in contentious cases and WTO rulings to the clearly "binding" category, other rulings that are discussed here, such as advisory opinions issued by the ICJ or by the Inter-American Court of Human Rights, Inter-American Commission reports, or reports of the ILO's Commission of Inquiry, are presumably intended to be "soft" in terms of enforcement, despite occasional attempts to "harden" them.[212]

It is also worth noting that in at least some instances—for example, the work of various dispute settlers within then CSCE,[213] the World Bank's Inspection Panel—the international dispute settler is charged with applying *only* soft law. Indeed, as Dinah Shelton notes, when the OAS established the Inter-American

[212] Thus, the Human Rights Committee charged with expressing presumably non-binding views under the Optional Protocol to the International Covenant on Civil and Political Rights, see Protocol, article 5(4), has suggested that states have a duty to "adopt appropriate measures to give legal effect to the views of the Committee." *See Bradshaw* v. *Barbados*, No. 489/1992, UN GAOR, Hum. Rts. Comm., 49th Sess., Supp. No. 40, Annex X, 305, at 309. Similarly, the Inter-American Court declared that parties to the American Convention "have the obligation to carry out their best efforts to enforce the recommendations" of the Inter-American Commission. *Loayza Tamayo* v. *Peru* (1997) 40 Inter-Am. Ct. H.R. (Series A), para. 80.

[213] *See* Thomas Buergenthal, "The CSCE Rights System," 25 *Geo. Wash. J. Int'l L. & Econ.* 333 (1993).

Commission on Human Rights by Assembly resolution and conferred upon it the power to make recommendations to member states that had adhered to the non-legally binding American Declaration of Rights and Duties of Man, an institution established by soft law received a mandate to apply (primary) soft law to create (secondary) soft law.[214] In other instances, questions of state responsibility that may arise as a result of the issuance of an opinion by these dispute settlers are made difficult not merely because of the unclear effect of these opinions—as under the Inter-American human rights system where the Commission can only issue "recommendations"—but because of the unclear legal status of the norms that the dispute settler is charged with applying. For OAS members such as the U.S. that are not parties to the American Convention, the Inter-American Commission may only apply the American Declaration of the Rights and Duties of Man, for example, a document whose legal status remains doubtful (at least in the eyes of the U.S.). The argument that the Declaration became part of binding OAS treaty law when the OAS Charter was amended in 1970, first made by a prominent scholar,[215] was adopted by the Inter-American Court in an advisory opinion in 1989 and accepted by most OAS members once the Court issued its opinion.[216] As this suggests, to the extent the Declaration's legal status is no longer doubtful among most states in the Western Hemisphere, this is due to the Court's "non-binding" opinion. For OAS members other than the U.S., soft law has served to harden other soft law. As this example suggests, soft law sources applied by international dispute settlers capable of issuing only "soft" opinions may yet produce hard obligations.

The complex interaction between quasi-judicial and judicial interpretation and what are initially soft norms needs to be incorporated into accounts of how some of these regimes evolve and harden over time.[217] As noted, some observers of the trade regime contend that DSB rulings are so influential as de facto binding law that for all extensive purposes, that regime can be said to operate under a rule of *stare decisis*.[218] If this is correct, many of these bodies are, at least by routinely relying on their own prior rulings, constructing hard law predominantly on the basis of soft law. It may be possible to explain this hardening of soft law through traditional sources of international law. Perhaps, for example, what the Inter-American Court's Advisory Opinion on the status of the American Declaration accomplished

[214] Shelton, *supra* note 209, at 451.

[215] Thomas Buergenthal, "The Revised OAS Charter and the Protection of Human Rights," 69 *AJIL* 828, at 828–35 (1975).

[216] Adv. Op. OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Annual Report of the Inter-American Court of Human Rights, 1989 (1990), 119–22, paras. 37–48. As of 1996, the US Department of State continued to maintain that the Declaration "has not acquired binding legal force." *Andrews* v. *U.S.*, Commission Case No. 11.139, Report 57/96 of December 6, 1996, Annual Report of the Inter-American Court of Human Rights 1997 (1998), 570, 583 para. 59.

[217] *See, e.g.*, Douglass Cassel, "Inter-American Human Rights Law, Soft and Hard," in Shelton, *supra* note 175, at 393 (describing how the Inter-American system "hardened" and its impact on states).

[218] See generally, *supra* note 44.

was to put OAS members on notice, and when all or most failed to protest the Court's pronouncement, the Declaration's binding status became "accepted" by a familiar process of acquiescence and estoppel. Perhaps the acceptance (or "hardening") of pre-WTO GATT panel reports can be explained along similar lines. But even if such positivistic explanations are convincing, focusing on the "softness" of the norms to be interpreted helps to explain features of a dispute settlement scheme. The inability to foresee what may occur when soft law is interpreted by a "soft" method may help to explain why dispute resolution often takes unforeseeable turns from the perspective of those who create such mechanisms.

It may also help to explain why states accede to such regimes in the first place. The prospect that a merely advisory opinion by the Inter-American Court could have such effects on a soft "Declaration" was surely not foreseeable to all, or most OAS members, when they gave that Court the power to issue non-binding opinions. It may help to explain as well why, before the end of the Cold War, the Soviet Union and Eastern European states committed themselves to the then CSCE's soft implementation scheme for equally soft human rights norms.[219] Other attributes of dispute settlement regimes may also become easier to explain in such terms. Reliance on soft norms that can only be interpreted through a mechanism that produces only soft recommendations may encourage states to permit non-state parties to have some forms of access to such mechanisms. It is doubtful whether the World Bank's Inspection Panel, for example, would have been opened to individuals had Panels been charged with interpreting hard treaty law or permitted to issue legally binding (hard) opinions.

Those who have examined why states resort to soft law generally have suggested a number of rationales: (1) to forego or lessen domestic constitutional or legislative barriers to treaty-making; (2) to shorten the negotiating time needed to reach agreement at the international level; (3) to retain ultimate national control over the level of commitment; (4) to permit needed flexibility given differing conditions among the nations involved; (5) to permit non-international legal persons to participate in negotiation or enforcement; and (6) to permit evolution of standards as circumstances change.[220] All or most of these rationales may help to explain the softness of the norms that some of these dispute settlers are explicitly charged with interpreting (for example, under the WTO's TBT) or the softness of some of the standards that some of these dispute settlers adopt in the course of judging disputes before them. These six factors may also help explain the softness in many international dispute settlement regimes, including their soft enforcement provisions. These rationales may also help to explain why so many of the international dispute settlement regimes discussed here began as they did. The treaty-makers

[219] *See, e.g.*, Erika B. Schlager, "A Hard Look at Compliance with 'Soft' Law: The Case of the OSCE," in Shelton, *supra* note 209, at 346 (describing the evolution and impact of the CSCE's (now OSCE's) human rights regime).

[220] *See, e.g.*, Alexandre Kiss, "Commentary and Conclusions," in Shelton, *supra* note 209, 223, 237–8; Hartmut Hillgenberg, "A Fresh Look at Soft Law," 10 *EJIL* 499, at 501 (1999).

engaged in establishing the original (weakly enforced) pre-1994 GATT dispute settlement, the initial forms of the Inter-American and European human rights regimes, or the ILO's Commissions of Inquiry, for example, created in all three instances essentially soft dispute settlement schemes in all likelihood, for all or most of the six reasons identified.

Yet, as a dispute settlement scheme hardens (as did the GATT scheme when it evolved into the WTO), this may have effects along the six factors identified. While the effects are not interchangeable with those caused by changing a soft declaration into a binding treaty, for example, they may be comparable. Consider the WTO TPT's reliance on ISO standards. From a governmental perspective, incorporating such soft standards within the TPT can be attractive as a way to avoid legislative scrutiny of such standards, to hasten conclusion of the TPT (since the standards themselves do not need to be negotiated at the interstate level), to tacitly include business involvement, and to provide a less burdensome process of adaptation as circumstances change (since the ISO, and not the WTO's contracting parties, can modify these as circumstances dictate). Further, since governments retain considerable control over which disputes to bring to the WTO DSB, reliance on such standards still manages to preserve some national control over the level of commitment. But the absence of direct legislative involvement in the evolution of the ISO's standards and the shortening of ex ante international negotiations produced by deferring to such standards may not be seen as virtue by the state adversely affected by a DSB ruling that applies an ISO standard. From a governmental perspective, some or all of the alleged benefits of soft law are lost once these are embedded in relatively hard dispute settlement.[221] This is certainly the message conveyed by, for example, developing countries who now complain that the ISO standards are insufficiently flexible to accommodate the differing needs of both rich and poor nations. On the other hand, some of the obvious detriments of soft law disappear when a credible dispute settler is available to make sure that these norms cannot be ignored.

8.5 National Law

International dispute settlers' contributions to national law is most obvious in the case of the ECJ. The doctrines of direct effect, supremacy, and the operation of judicial review within the EEC make Community norms largely interchangeable with law produced by domestic processes. As noted, one of the Community's singular contributions has been to give credibility to the general notion that public international law and municipal law are all part of the same seamless web.[222]

[221] *Cf.* Hillgenberg, *supra* note 220, at 506 (noting that those who rely on soft law assume that this excludes the legal consequences resulting from treaties, namely "compensation and the possibility of enforcement through dispute settlement procedures and reprisals").

[222] Weiler and Trachtman, *supra* note 19.

When domestic actors can draw upon ECJ interpretations of Community law that are favorable to their interests, present such arguments in national court, have national courts refer such relevant questions to the ECJ for preliminary rulings, and have these ECJ rulings applied to provide them with a domestic remedy, the distinction between international and domestic law appears largely irrelevant.[223] Still, as one political scientist has noted, even within the EEC and despite the doctrines of direct effect and supremacy, a ruling by the ECJ does not always ensure change in Community-inconsistent legislation. Some European governments have been known to simply compensate the litigant while leaving the legislation in effect or administrative policy unchanged; others have changed the letter of the law but not its enforcement; others have delayed complying while still others have ignored an adverse ruling, particularly in instances where the plaintiff was not likely to have the resources to return to court to ensure compliance.[224] Although the levels of compliance with Community rulings are the envy of international lawyers, it is important to remember that these levels of compliance vary among EU countries.

The enforcement problems are far more dramatic within other international regimes operating without benefit of direct effect, supremacy or comparably developed systems of international judicial review from unfavorable rulings by domestic institutions. As might be expected, instances in which international dispute settlers purport to rule a national law or an act of a national court illegal often serve as tests of states' real commitment to these regimes, despite the dispute settlers' inadequately developed enforcement tools. To this extent, it is indeed surprising not only how often such international dispute settlers confront questions of national law but how often an international ruling that such laws are illegal meets with compliance instead of defiance. Virtually all the international adjudicators discussed here have confronted questions involving the compatibility of national law with international law. Thus, the ICJ has passed on the compatibility of Italian bankruptcy procedures with a bilateral treaty,[225] the European Court of Human Rights has ruled many national laws, from those criminalizing homosexual conduct to those permitting the dissolution of certain political parties, illegal;[226] GATT panels have ruled GATT-inconsistent laws permitting discrimination against imports even before these have gone into effect or were not being enforced[227]—to mention but just a few examples. In some instances, such as

[223] But not wholly irrelevant. For enumeration of why these four steps are not always taken even within the Community or how even when they are national laws may not change even in the face of an ECJ ruling that suggests that law is not compatible with Community norms, see Alter, *supra* note 15.

[224] *See* Alter, *supra* note 15, at 507–11. For enumeration of the emerging challenges to the EEC legal order, and to the ECJ's authority, and its underlying causes, see Weiler and Trachtman, *supra* note 19.

[225] *See* case concerning *Elettronica Sicula S.p.A. (ELSI)* (*United States* v. *Italy*), 1989 ICJ Rep. 15.

[226] *See, e.g.*, *Norris* v. *Ireland,* European Court of Human Rights, 1989, Series A, No. 142, 13 EHRR 186; *United Communist Party of Turkey* v. *Turkey*, European Court of Human Rights, 1998, Series A, 26 EHRR 121.

[227] *See US—Taxes on Petroleum and Certain Imported Substances* (*US—Superfund)*, BISD 34S/136 (June 17, 1987), at paras. 5.21 and 5.22 (tax legislation found to violate GATT obligations even

where the ILO Commission of Inquiry on Poland (previously discussed) suggested the incompatibilities of Polish criminal processes with international labor law and probably international human rights, there has been the more predictable resistance, amidst threats by the government that it would choose to withdraw from the organization.[228] Such threats have also been heard on occasion in response to rulings by the European Court of Human Rights and that Court, despite its successes, has not had a perfect record of compliance with its decisions, at least as measured by conforming changes to domestic law brought about immediately after that Court's rulings.[229] That Court's rulings are most likely to have effects on domestic law comparable to those produced by the EEC's "direct effect" when member states have incorporated the European Convention of Human Rights directly into domestic law. In such cases, however, the legal effects of the Strasbourg Court's rulings within national systems are determined by, and subject to, the terms of the domestic law that incorporates the treaty and not the treaty itself.[230]

But some international dispute settlers have reached for many of the characteristics of the ECJ's doctrine of "direct effect" without adopting such a doctrine as such, and in the face of the refusal of states to incorporate the underlying treaty norms into domestic law or make these self-executing. As noted, the ECJ's notion of direct effect is characterized by the following features: (1) it forces states to renounce the most typical international law remedies, namely, reciprocal tit-for-tat countermeasures or other measures permitted under the Vienna Convention on the Law of Treaties for material breach; (2) it denies states a choice of means by which it will comply with treaty norms since that question is no longer a question of domestic law; (3) it leaves the choice of means of compliance to the international dispute settler; and (4) given the relatively open access to the ECJ, it permits individuals, and not just treaty bodies, to bring questions of the compatibility of national and international rules before the international dispute settler. No one claims that WTO's agreements have "direct effect" in the EEC sense and, as noted, most WTO members, including the U.S., have refused to adopt implementing legislation that would make the WTO's covered agreements directly enforceable in their domestic courts. Yet, despite this, many of the features that characterize the operation of direct effect in the European Community are suggested by the results achieved by the WTO's dispute settlers.

Consider, for example, the WTO panel decision on the compatibility of sections 301–10 of the United States' Trade Act of 1974 with the WTO covered

though not yet entered into effect); *US—Measures Affecting Alcoholic and Malt Beverages* (*US—Malt Beverages*), BISD 39S/206 (June 19, 1992), at paras. 5.39, 5.57, 5.60 (where discriminatory tax was not being enforced by the authorities).

[228] *See* David A. Wirth, "Trade Union Rights in the Worker's State: Poland and the ILO," 13 *Den. J. Int'l L. & Pol'y* 269 (1984). *See also* text *supra* at note 109.

[229] *See, e.g.*, Janis, *supra* note 91. For an overview of the much more uneven compliance record of the Inter-American Commission and Court, see Cassel, *supra* note 217.

[230] *See, e.g.*, Ewing, *supra* note 91 (discussing the inadequacies and ambiguities of the UK's Incorporation Act).

agreements, including its DSU.[231] Faced with a U.S. statute that, at least on its face, permits the U.S. Trade Representative to make a unilateral determination of GATT inconsistency even prior to exhausting DSU proceedings, that panel took it upon itself to affirm the "exclusive" nature of DSU remedies, the concomitant renunciation of unilateral remedies, and the requirement to "abide by" the rules and procedures set out in the DSU.[232] The panel found the U.S. threat of unilateral action contained in sections 301–10 of its Trade Act to be a prima facie violation of the DSU because it constituted an "ongoing threat" likely to produce a "chilling effect" not only on other WTO parties but on individual importers and traders.[233] The panel ruled that the promise made by WTO member states, in article 23 of the DSU, not to make determinations of inconsistency before the adoption of findings in specific disputes, entails, under the duty to abide by treaty obligations in good faith, an undertaking to refrain from adopting national laws which threaten prohibited conduct.[234] Further, the panel affirmed GATT prima facie illegality even where the local statute constitutes a mere threat without any actual GATT-inconsistent action due to the particular importance of the WTO dispute settlement system and the need to affirm the "integrity" of that system and avoid "overall systematic damage."[235] Since producing market conditions where individual economic activity can flourish is part of the GATT's object and purpose, the indirect chilling effects on individual traders is a relevant concern, said the panel, even though the WTO's legal order does not produce "direct effect" on individuals.[236] Finally, when it came to determine the legality of the U.S. statute, the panel found in favor of the United States only because it determined that the United States' executive branch had "carved out WTO covered situations from the general application of the Trade Act," thereby committing itself to the exhaustion of DSU proceedings and remedies despite the unrestricted language of the statute itself.[237]

Through these findings, the GATT panel in the *301 case* came as close as it could to affirming the four basic elements of the Community doctrine of direct effect in the WTO context. Although the panel ultimately found in favor of the U.S., it did so only by affirming its ultimate power over the WTO's most powerful member in a (soft) manner that would have made the U.S. Supreme Court in *Marbury* v. *Madison* proud. The panel essentially found that the U.S. had indeed renounced the usual remedies arising from the material breach of a multilateral treaty and the operation of the doctrine of state responsibility; told the U.S. that it

[231] *See United States—Sections 301–310 of the Trade Act of 1974*, WT/DS152/R, December 22, 1999 (hereinafter "301 Case").

[232] 301 Case, *supra* note 231, at para. 7.43.

[233] *Id.*, at paras. 7.88–7.90.

[234] *Id.*, at para. 7.68.

[235] *Id.*, at paras. 7.93–7.94 (noting that the assurances given by contracting states under the DSU may be of even greater importance than those provided under substantive WTO provisions).

[236] *Id.*, paras. 7.72–7.84. For an argument that this panel finding bodes increasing recognition within the trade regime of individual economic actors as "stakeholders," see Steve Charnovitz, "The WTO and the Rights of the Individual," *Intereconomics*, 98, at 103–4 (March/April 2001).

[237] 301 Case, *supra* note 231, para. 7.109.

had given up its ability to determine for itself how to comply with the WTO DSU; affirmed that only the WTO DSB could determine by which means a member could be punished for violating the covered agreements; and interpreted the covered agreements in light of the interests of individuals who are engaged in trade and directly receive its benefits—all while merely confirming the "self-imposed" limits of U.S. domestic law. While the GATT panel did not open the DSU to individual complainants, did not suggest that the covered agreements were "self-executing" in defiance of U.S. law to the contrary, and did not find that the "direct effect" of the DSU is to preclude passage of a statute like sections 301–10 of the U.S. Trade Act, the effect of its ruling was to tie the hands of the U.S. Trade Representative such that U.S. unilateral trade retaliation is barred pending WTO action, at least vis-à-vis other WTO members.

In that case, as in a number of others, the WTO's dispute settlers tethered the most powerful member of the organization without benefit of direct effect or self-execution. Whether or not the arguments raised in this case will be affirmed by the Appellate Body in comparable cases (the *301 case* itself was not appealed), that ruling illustrates how some international dispute settlers seize upon their *kompetenz-kompetenz* to find implicit authority to rule upon the compatibility of national laws.[238] It also illustrates, however, the circumspect approach at least some international dispute settlers take to the politically difficult matter of striking down illegal local law. In the end, as is suggested by both parties' refusal to appeal the decision to the Appellate Body, both the complainant, the EU, and the U.S. appeared at least publicly content with the GATT panel's ruling and unwilling to disturb the result. After all, both sides could present the holding as a victory to their respective domestic constituencies. The EU could claim that it had "defanged" 301 unilateralism, while the U.S. could affirm that its Trade Act remains an important tool to "pry open foreign markets" and fully a part of U.S. law.

As is further suggested by the U.S. official reaction to the WTO's Appellate Body's controversial ruling against the GATT legality of U.S. import restrictions on shrimp and shrimp products intended to protect sea turtles, such circumspection by an international dispute settler may be politically important and facilitates the soft managerial approach to enforcement that even a relatively "hard" dispute settler like the WTO is compelled to follow given the limits of international legal remedies. In that instance the U.S. interpreted the WTO's ruling as not requiring modification of U.S. domestic law but only a change in how that law would be implemented.[239] Accordingly, the U.S. announced that hereinafter it would

[238] The Inter-American Court of Human Rights' interpretation of members' duties to "ensure" the free and full exercise of the rights recognized in the American Convention of Human Rights, see Convention, article 1(1), provides another illustration. *See, e.g.*, *Velásquez-Rodríguez*, *supra* note 180, (ruling that the duty to ensure "implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights").

[239] *See* Sean Murphy, "U.S. Implementation of WTO Turtle/Shrimp Decision," 94 *AJIL* 361 (2000).

implement existing U.S. laws "consistent not only with U.S. WTO obligations, but also with the firm commitment of the United States to the protection of threatened and endangered species, including sea turtles."[240] The U.S. government contended that the "WTO did not undermine the goal of sea turtle protection in this case" but that "many aspects of the WTO decision have strengthened efforts to achieve this goal."[241] While these reactions have not fully placated environmentalists and others worried about the encroachment on "sovereignty" brought about by the WTO, their complaints would have been even more vociferous had the WTO ruling in that case purported to "strike down" the U.S. law. At the same time, the WTO's ruling, as interpreted by the U.S., permitted that country's executive branch to cede to the WTO's demands quietly, without triggering undue domestic backlash.

One way to measure the impact of the rulings and opinions of international dispute settlers on domestic law is to consider whether these are cited by domestic judges in their judgments. Many scholars have engaged in such attempts with mixed results.[242] While empirically attractive as a measure of domestic impact, the numbers of such citations by themselves are misleading. Citation does not prove the influence of international courts on others and its absence does not indicate the opposite. Domestic courts that refer to an opinion of the ICJ only as evidence of propositions of public international law, only when consistent with their own government's position in a case, or while refusing to accept the decision as preclusive on the issue of liability, show awareness of that Court but hardly suggest consequent effects on national law stemming from judgments of international courts.[243] On the other hand, the absence of explicit citation may not indicate that international rulings are not having some effect on domestic law, but merely national judges' natural reticence to acknowledge this.[244] Such effects may

[240] *See id.*, at 361, see also *id.*, at 363 (announcing changes that would not require the U.S. to repeal or amend U.S. law but would implement it "in a more transparent, flexible and even-handed manner, to seek to negotiate relevant multilateral agreements with the affected nations and to provide technical assistance to those nations when asked").

[241] *Id.*, at 363.

[242] *See, e.g.*, Jordan J. Paust, *International Law as Law of the United States* (Durham, NC: Carolina Academic Press, 1996); David M. Reilly and Sarita Ordóñez, "Effect of the Jurisprudence of the International Court of Justice on National Courts," 28 *NYU J. Int'l L. & Pol.* 435 (1995–6); William A. Schabas, *International Human Rights Law and the Canadian Charter* (Toronto: Carswell, 2nd edn., 1996). For one attempt to explain the significance of such cross-citations, see Anne-Marie Slaughter, "A Typology of Transjudicial Communication," 29 *U. Rich. L. Rev.* 99 (1995)(suggesting that judges in "liberal" democratic nations may share some common characteristics and that transjudicial communication among both national and international courts may be a potent tool for harmonization of laws).

[243] *See, e.g.*, Reilly and Ordóñez, *supra* note 242 (suggesting that all of these are characteristics of the way ICJ opinions are used by domestic courts). *See also* C. Wilfred Jenks, "The Authority in English Courts of Decisions of the Permanent Court of International Justice," 20 *Brit. Y.B. Int'l L.* 1 (1939).

[244] *See, e.g.*, Eyal Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts," 4 *EJIL* 159 (1993); D. Michael Kirby, "The Role of the Judge in Advancing Human Rights with Reference to International Human Rights Norms," 62 *Australian L. J.* 514 (1988).

occur through a principle calling for interpretation of domestic laws that, whenever possible, is consistent with international law.[245] Domestic judges have many reasons to resist direct reliance on international rulings or international law generally while nonetheless taking account of these *sub silentio*.[246] One should also be cautious about attributing the cross-references to the judgments of other international bodies that do occur to the supposedly "common" attributes among judges in liberal rule of law states.[247] Abundant citations in one area of international law—such as human rights—may reflect domestic statutes that license such references, such as the Canadian Charter of Rights and Freedoms,[248] implementing legislation for the European Convention of Human Rights,[249] or the U.S. Alien Tort Claims Act,[250] rather than a general tendency by judges to respect such rulings. More general references may suggest the inclinations of constitutional drafters, such as those who drafted the 1996 South African Constitution, to specifically accord constitutional status to international law,[251] rather than the judiciary, and even such a constitutional license may not always be used by domestic judges.[252]

To date the impact of international dispute settlers on domestic law has been, outside of the EEC, most explicit or notorious in those instances in which international dispute settlement is both open to and explicitly intended to affect individuals—as is the case within regional human rights regimes in the Americas and in Europe. In addition, virtually all the newer international dispute settlers associated with regional systems for economic integration grant standing to individuals to some degree.[253] To the extent political scientists are correct in contending

[245] *See, e.g.*, Hugh M. Kindred et al., *International Law Chiefly as Interpreted and Applied in Canada* at 188–95 (Toronto: Edmond Montgomery, 5th edn., 1993); *Restatement (Third) of the Foreign Relations Law of the United States*, Sec. 114 (1987).

[246] *See* José E. Alvarez, "Do Liberal States Behave Better?: A Critique of Slaughter's Liberal Theory," 12 *EJIL* 183–246 (2001). S*ee also* Benvenisti, *supra* note 244.

[247] *Cf.* Slaughter, *supra* note 242, at 135.

[248] *See, e.g.*, Schabas, *supra* note 242, at 12 (attributing the increase in citations to international human rights in Canadian courts to the adoption of the Canadian Charter).

[249] *See, generally*, J.P. Gardner, ed., *Aspects of Incorporation of the European Convention of Human Rights into Domestic Law* (London: British Institute of International and Comparative Law, 1993).

[250] *See* Alien Tort Claims Act (ATCA), 28 USC § 1350.

[251] Constitution of the Republic of South Africa (Act 108 of 1996), articles 39(1)(requiring consideration of international law in interpreting the bill of rights); 232 (recognizing international customary rules as law unless inconsistent with the Constitution or an act of parliament), and 233 (requiring courts to "prefer any reasonable interpretation" of law that is "consistent with international law over any alternative interpretation that is inconsistent with international law"). Available at http://www.gov.za/constiution/1996/96cons2.htm#39.

[252] *Cf. AZAPO* v. *President of South Africa*, 1996 BCLR 1015, July 25, 1996 (finding that South Africa's international obligations to prosecute war crimes do not bar the truth and reconciliation approach and amnesty provided under South African law despite a Constitutional obligation to have regard for public international law).

[253] Romano identifies the following existing entities as open to individual petition: the ECJ, the European Court of Human Rights, the Court of Justice for the European Free Trade Association (EFTA), the post-1994 Central American Court of Justice, the Court of Justice for the Andean Community (TJAC), the Court of Justice of the Common Market for Eastern and Southern Africa (COMESA), and the Common Court of Justice and Arbitration of the Organization for the

that such forms of "transnational" dispute resolution offer "greater potential for the widening and deepening of dispute resolution over time, for unintended consequences, and for progressive restrictions on the behavior of national governments,"[254] it would appear that we are likely to see a greater number of international adjudicative rulings relating to domestic law quite apart from those arising from human rights regimes. But, as is suggested by the discussion of the WTO DSU, other dispute settlement mechanisms can have effects on domestic law as well, even without granting access to non-state actors as litigants. As the WTO indicates, even treaty rights defined to be only for the benefit of states, which can only be litigated by states, and that do not enjoy the benefits of "direct effect," can result in changes to national laws or to their implementation.

8.6 Emerging Problems

There are ways to describe the law-making contributions of quasi-judicial and judicial dispute settlers other than through the four categories of law enumerated above. Their normative contribution might be cast differently, as by enumerating the many ways international adjudicators (1) have refined the legal duties of states under specific treaty regimes (e.g., by defining what it means to "ensure" human rights in the Inter-American system or to provide "national treatment" in the trade regime); (2) expanded or contracted the substantive rights of those owed benefits under treaty regimes (e.g., by giving a narrow interpretation to "like product" to the disappointment of certain exporters in the trade regime or through an expansive interpretation of the right not to be tortured for the benefit of individuals in regional human rights systems); (3) defined the scope of dispute settlement itself (e.g., through creative interpretations of *kompetenz-kompetenz* or by "discovering" and applying shifting burdens of proof); or (4) elaborated on the scope of treaty regimes (e.g., by accepting or rejecting references to rules arising under rival treaty regimes or under general international law). However their normative contribution is parsed, it is apparent that quasi-judicial and judicial dispute settlers' contribution to the law is considerable and often involves law-making on subjects not clearly included in the treaty regime in which the dispute settler is based.

Harmonization of Corporate Law in Africa (OHADA). Romano, *supra* note 1, at 743–4. In addition, individuals have some access to the Judicial Board of the Organization of Arab Petroleum Exporting Countries and to the International Tribunal for the Law of the Sea (ITLOS)(but only with respect to the interpretation and implementation of contractual obligations or acts or omissions of a party to a contract relating to activities in a defined "area"). *Id.*, at 744–5. Of course, individual "access" to the international criminal tribunals, the ICTY and ICTR, is limited to their role as defendants.

[254] Keohane, Moravscik, and Slaughter, *supra* note 4, at 487 (also contending that judges in transnational dispute resolution systems are likely to "exploit the potential for independence, access, and embeddedness to centralize political authority in international institutions, particularly dispute-resolution bodies themselves").

The sheer diversity in jurisdictional mandates, underlying organizational context, and internal structure of the wide gamut of institutionalized dispute settlers indicated on the PICT Chart (at p. 404) raise a number of problems. The most obvious is the potential threat to the unity and coherence of public international law posed by the prospect of conflicting adjudicative interpretations, especially if all or some are regarded as having broader normative effects beyond the dispute that is decided. The problem is posed of course because there is no mechanism by which the diverse international dispute settlers can seek ultimate appellate recourse to one judicial body, such as the ICJ, and indeed that body's jurisdiction (based on inter-state agreement and limited to states as parties, at least for contentious cases) severely restricts the possibility that that Court could serve such a unifying purpose.

The most extensive systemic survey of the legal opinions of a variety of international tribunals by Jonathan Charney, in 1999, found this threat to be overstated.[255] For the most part, Charney found a general conformity of doctrine with respect to such matters as sources of law, the law of treaties, and state responsibility.[256] Nonetheless, even when Charney was writing, there are some differences emerging as between different dispute settlers, and the potential for conflicting or inconsistent opinions has only increased with the numbers of quasi-judicial and judicial dispute settlers added to the PICT Chart since 1999. The conflicts that have emerged indicate the potential dimensions of the problem. The Inter-American Court of Human Rights and the ICTY appear to expect states to assume greater responsibility for taking affirmative measures of protection in defense of human rights than, for example, does the ICJ.[257] The European Court of Human Rights has rejected territorial limitations on a state's acceptance of its jurisdiction that appears to be acceptable within the context of the ICJ.[258] Teleological or dynamic interpretations of underlying treaty norms, less likely to presume that states are permitted to do what they are not explicitly precluded from doing, appear to be more common in regional human rights courts than in other tribunals.[259] The ICTY and the ICJ have openly differed concerning the requisite test to apply to determine that a state has engaged, through surrogates, in the extraterritorial use of force.[260] And a number of potential conflicts appear to be near at hand—as with respect to the status and meaning of the "precautionary principle" in international customary law as this may be determined by the

[255] Similarly, Merrills acknowledges the risk of fragmentation but is inclined to trust the judges to reach compatible resolutions. Merrills, *supra* note 69, at 310.

[256] Charney, *supra* note 119. *See also* Merrills, *supra* note 69, at 142–4, 309 (suggesting that the risks of conflicting decisions by the ICJ itself, raised when that Court encouraged the greater use of chambers, have been overstated).

[257] *See* Benedict Kingsbury, "Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?," 31 *NYU J. Int'l L & Pol.* 679, at 681 (1999).

[258] *Id.*

[259] *Id.*

[260] *See Prosecution* v. *Dusko Tadic*, Appeals Chamber, Case No. IT-94-1-A, Judgment, July 15, 1999, paras. 115–45 (finding "unpersuasive" the ICJ's test as applied in the *Nicaragua case*).

various international bodies that have or are likely to consider the question, including the WTO's dispute settlement bodies, the ICJ, and the Law of the Sea Tribunal;[261] the meaning of "genocide" as this may be determined by the ICJ, the ICTY, the ICTR, the ICC, or even national courts;[262] or the binding force of orders for provisional measures as between the various tribunals capable of issuing these.[263] As is suggested by the differing reactions by the ICJ in *Lockerbie* and the ICTY in responding to the defendant's jurisdictional challenge in the *Tadic case*, even the question of whether the Security Council actions are judicially reviewable or subject to legal limits might arise in different fora, not all of which may be as deferential to the Council.[264] As the example relating to the Security Council suggests, the potential for conflict exists not only among more judicialized dispute settlers, but also as between entities discussed in Chapter 7.

A related but distinct concern arises from the potential for forum shopping amidst tribunals with overlapping jurisdictions but no established procedures for coordination of efforts or requirement of exhaustion of international remedies.[265] Will it be possible for the international community to establish priorities when more than one dispute settlement mechanism (international or national) applies, or will certain international issues present "races to the courthouse" whereby, for example, environmentally concerned claimants will favor one tribunal while those seeking liberalization of trade another? Distinct regimes have taken very different approaches with respect to permitting disputants a choice of dispute settlement means. At one extreme is the Law of the Sea Convention's "cafeteria" approach to

[261] *Compare EC—Hormones*, *supra* note 153 (casting doubt on precautionary principle as a matter of customary international law) and *Southern Bluefin Tuna* (*N.Z.* v. *Japan*, *Austl.* v. *Japan*), Provisional Measures Order, ITLOS Case Nos. 3 and 4 (August 27, 1999), reprinted in 38 *ILM* 1624 (1999), para. 45 (suggesting precautionary principle was a viable rule of custom)(revoked by *Southern Bluefin Tuna* (*Austl. & N.Z.* v. *Japan*), Jurisdiction and Admissibility, Award (UN Law of the Sea Arb. Trib., August 4, 2000). *See also* Pierre-Marie Dupuy, "The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice," 31 *NYU J. Int'l L. & Pol.* 791, at 807 (1999).

[262] *See* Kingsbury, *supra* note 257, at 683, n. 10. The possibility of conflicts among international dispute settlers with respect to the interpretation of such international crimes is particularly ironic since a principal rationale for establishing international criminal tribunals has been the need to avoid conflicting interpretations of such crimes by national courts. *See generally* José E. Alvarez, "Crimes of States/Crimes of Hate: Lessons from Rwanda," 24 *Yale J. Int'l L.* 365–483 (1999)

[263] *See* Kingsbury, *supra* note 257, at 684–5.

[264] *See* discussion *supra* at notes 187–95.

[265] For one attempt to wrestle with such questions in the context of the trilateral Convention for the Conservation of Southern Bluefin Tuna and the Law of the Sea Convention, see *Southern Bluefin Tuna* (August 4, 2000) *supra* note 161. For attempts to address overlapping cases and topics among the ECJ, the WTO, and NAFTA's dispute settlement fora, see J.H.H. Weiler, ed., *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade?* (Oxford, U.K. and New York: Oxford University Press, 2000). For the problems posed by the allocation of "primary" jurisdiction to ICTR over national courts, see Madeline H. Morris, "The Trials of Concurrent Jurisdiction: The Case of Rwanda," 7 *Duke J. Comp. & Int'l L.* 349 (1997). For concerns about the jurisdictional allocations premised on "complimentarity," between the prospective ICC and national courts, see Alvarez, *supra* note 262, at 476–80; Lawyers' Committee for Human Rights, *Establishing An International Criminal Court: Major Unresolved Issues in the Draft Statute* at 13–14 (1996). For consideration of some of the problems raised by forum shopping, see Laurence Helfer, "Forum Shopping for Human Rights," 14 *U. Pa. L. Rev.* 285 (1999).

compulsory settlement, permitting states a range choice of distinct dispute settlement options. At the other end lies the WTO's DSU, which, while permitting a range of dispute settlement measures short of binding arbitration, restricts binding adjudication to a "vertical" system that includes relatively short time constraints, the possibility of appellate review, and subsequent compliance proceedings.[266] Somewhere in between are the two distinct schemes seen within international criminal tribunals: one, evident with respect to the ICTY and ICTR, favoring the international venue by according priority to these over national prosecutions, and a second, under the ICC's complementarity, which favors national courts provided such prosecutions are comparable and in good faith.[267] The European Convention for the Protection of Human Rights is one of the few regimes that extends the standard exhaustion of domestic remedies principle, found in customary international law with respect to the right of states to espouse claims on behalf of their nationals, to international courts. It provides that the Strasbourg Court may find a claim inadmissible if it is, among other things, "substantially the same as a matter that . . . has already been submitted to another procedure of international investigation or settlement and contains no relevant new information."[268] These variations reflect differences not only in the types of disputes at issue,[269] but with respect to the goals that distinct dispute resolution mechanisms attempt to fulfill.

At the global level, we have ended up generally with a "cafeteria" approach since resort to more than one tribunal and even simultaneous filings before various dispute settlement mechanisms remains possible.[270] Although international dispute settlers may defer to each other's jurisdiction through application of general principles of litispendence, such filings may undermine confidence in particular dispute settlement mechanisms or present fairness questions. Indeed, petitions by the same individual addressed by both the Human Rights Committee and the Inter-American Commission of Human Rights reportedly helped to precipitate denunciations of relevant treaties by Jamaica, Trinidad and Tobago, and Guyana.[271] There are also concerns about the ability of governments, particularly in poorer states, to sustain all these international mechanisms over time, to manage responses to identical or similar cases in fora as diverse as the WTO, the Law of the Sea Tribunal, the ICJ, and the ILO, or to coordinate consistent positions in these bodies when distinct ministries within a single government may be involved.

[266] *See* Merrills, *supra* note 69, at 195, 286–7.

[267] *See*, *e.g.*, article 9, Statute of the ICTY (requiring primary over material courts); article 17(1), Statute of the ICC (requiring the ICC to assume jurisdiction only where the state with jurisdiction is unwilling or unable to exercise it).

[268] European Convention for Human Rights, *supra* note 80, article 35(2)(b).

[269] *See* Merrills, *supra* note 69, at 287 (suggesting that greater expedition in the handling of trade disputes may be justified by the capacity for unresolved trade disputes to inflict damage quickly and that such disputes, less diverse than maritime disputes, may be more amenable to uniform procedures).

[270] Nothing precludes, for example, a request for an advisory opinion from the ICJ directly related to a dispute pending under the WTO, for example. But see the European Convention for the Protection of Human Rights, *supra* at text and note 268.

[271] *See* Kingsbury, *supra* note 257, at 683.

It is possible that, faced with conflicts of jurisprudence or other challenges to their jurisdiction, international dispute settlers might respond with increasingly narrow holdings based on the specific facts of a case. Some suggest that this is what has occurred in the ICJ in the wake of the *Nicaragua case*.[272] For specialized tribunals, this may take the form in addition of withdrawing to the relatively safer confines of their own treaty regimes and issuing opinions that expound only regime-specific law. Such attempts may limit or delay normative law development, but are not likely to end it. Further, to the extent such attempts occur, they may only encourage what Dupuy calls the "illusion of completely autonomous subsystems" of international law, each relatively self-contained and incapable of entering into a dialogue or sharing knowledge from one to the other.[273] In one way or another, adjudicative law-making of all types is likely to continue. But a multiple dialogue among diverse regimes, leading to occasionally untidy, iterative development of the law through adjudication, is what we now appear to have.[274]

[272] *See, e.g.*, Dupuy, *supra* note 261, at 803–4 (discussing the ICJ).
[273] *Id.*, at 796.
[274] *See, e.g.*, Charney, *supra* note 119, at 700 (defending the multiplicity of tribunals on the grounds that it permits experimentation and exploration).

9

The Nature of International Adjudication

9.1 What Makes for a Legitimate Court?

Adjudication is often said to involve (1) independent judges applying (2) relatively precise and pre-existing legal norms handed down by some other body after (3) adversary proceedings in order to achieve (4) a dichotomous decision in which one of the parties clearly "wins."[1] Although Martin Shapiro and other political scientists have contended that this ideal type accurately describes almost no actual domestic court in existence—if only because judges rarely are able to restrict themselves to genuinely "pre-existing" norms but, in his view, invariably create law in the course of applying it[2]—the prototype still represents what most international lawyers would consider to be the ideal form of international adjudication.[3]

As noted in Chapter 8 and as identified on the PICT Chart (see p. 404), there are presently nearly twenty permanent independent international courts or tribunals that presumptively fit the four-fold ideal type.[4] Another large group of administrative tribunals and inspection panels, along with the claims and compensation bodies, permanent arbitral tribunals or conciliation commissions, and internationalized criminal courts and tribunals, all on the PICT Chart would also satisfy these criteria, although many of these have very narrowly defined

[1] *See, e.g.*, Martin Shapiro, *Courts: A Comparative and Political Analysis* at 1 (Chicago: University of Chicago Press, 1981) (criticizing this four-fold description). *Cf.* J.G. Merrills, *International Dispute Settlement*, at 293–6 (Cambridge, U.K. and New York: Cambridge University Press, 3rd edn., 1998) (noting that adjudication is characterized by dispositive decisions, impartial judges, and characteristic forms of conservative reasoning relying on precedent).

[2] Shapiro, *supra* note 1, at 1.

[3] The international legal literature has been most attentive to forms of "international judicial settlement"—here addressed as a sub-part of entities considered in Chapter 8. *See, e.g.*, Ian Brownlie, *Principles of Public International Law* at 671 (New York and Oxford, U.K.: Oxford University Press, 6th edn., 2003); Cesare P. R. Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle," 31 *NYU J. Int'l L. & Pol.* 709 (1999).

[4] *See* PICT Chart (at p. 404); Romano, *supra* note 3, at 723–8. Few would question the status of the following entities under the four-fold criteria: the ICJ, regional human rights tribunals for the Inter-American and European systems, the WTO dispute settlement system, the International Tribunal for the Law of the Sea, the ad hoc war crimes tribunals for Rwanda and the Former Yugoslavia, the International Criminal Court and Court for the African Charter of Human Rights, the ECJ, and administrative tribunals to handle disputes concerning IO staff (such as the UN, ILO, IMF, and World Bank Administrative Tribunals).

jurisdiction. The twenty diverse human rights and humanitarian law bodies on that Chart, however, as well as the non-compliance and implementation monitoring bodies within environmental accords identified, are harder to fit within the prototype (and not only because of doubts about whether some of these bodies are limited to the application of pre-existing law).[5]

The most numerous entities examining compliance with human rights norms are not "courts" composed of formally independent judges but creatures of specialized treaty regimes such as the ICCPR's Human Rights Committee, and the Committees on Economic, Social, and Cultural Rights, on the Elimination of Racial Discrimination, on the Elimination of Discrimination against Women, against Torture, on the Rights of the Child, and on the Protection of the Rights of All Migrant Workers and Members of the Their Families, as well as a number of specialized committees or commissions within the ILO. These bodies, usually made up of experts in designated fields, but not elected or appointed "judges," operate in settings that can only loosely be said to be "adversarial."[6] These compliance or monitoring entities are not empowered to issue a final, binding judgment proclaiming "winners" and "losers," as is suggested by the four-fold prototype for courts.

Difficulties arise as well when one considers the diverse ways that many other international disputes are resolved through the intervention of a third party that do not involve judges, courts, or commissions, explicit resort to law (pre-existing or otherwise), adversarial processes subject to defined rules, or any kind of dichotomous decision. The four-fold ideal type does not readily describe the "political" fora enumerated in Chapter 7, nor indeed most of the less formal forms of international dispute settlement foreseen in Article 33 of the UN Charter (negotiation, mediation, fact-finding, and conciliation). The IMF's directors, no less than the members of the Security Council, are in no sense independent judges, for example, and neither body has restricted itself to applying pre-existing legal norms or employed adversarial proceedings when resolving disputes. While we are free to define all or most of such processes as "non-adjudicative," we risk losing sight of how a great many disputes are settled internationally if we restrict our sights to entities that fulfill the four-fold ideal type of a court. It seems particularly perverse to dismiss on this ground entities such as the UN Compensation Commission when, despite the mixed political/expert pedigree of its Governing Council and Commissioners, the uncertain status of its choice of law, and the absence of adversarial proceedings, that entity is on its way to rendering judgments on the largest group of disputes ever considered by any international dispute settler in history.

[5] *See also* Romano, *supra* note 3, at 723–8.

[6] In addition, many of these bodies are charged not only with examining individual complaints of human rights abuse but with examining state parties' periodic reports of compliance. This activity, typically regarded as part of the "enforcement" efforts of IOs, is difficult to categorize in terms of the four-fold ideal type or in terms of "dispute settlement."

Moreover, upon closer inspection, not even the leading exemplars of international courts or tribunals identified on the PICT Chart (at p. 404) fulfill the four-fold ideal type, at least without significant qualification. The *intended*, as well as the actual, political "independence" of most international judges remains open to question, even on the ICJ, quite apart from the openly political process by which such judges are elected or re-elected.[7] After all, the ICJ's statute, as well as the geographic quotas applied in fact with respect to the election of ICJ judges, indicates that nationality is very much a criterion for judicial selection for both permanent and ad hoc judges.[8] Others have challenged the "independence" of GATT/WTO panelists and even of judges on the ICTY and ICTR, as well as the idea that those who establish such tribunals are genuinely attempting to secure courts characterized by "judicial independence."[9] The second criterion within the ideal type also gives rise to some doubts when transported to the international realm. Whatever doubts one may have as to the existence of "pre-existing" law within reasonably developed domestic legal systems, such concerns multiply when one moves to the rudimentary international legal system where gaps in existing law are manifest on virtually every topic, and where a primary task of international judges, as discussed in Chapter 8, is often to interpret vague or contradictory general principles or standards. In other cases, the notion that international judges are charged only with applying pre-existing law seems laughable, given the lack of precision as to relevant choice of law rules.[10] As discussed in Chapter 8, international judicial

[7] The political process by which ICJ judges are elected and re-elected, involving the participation of the Security Council, the GA, and "national groups" within member states, including the de facto assurance of representation on the court to all permanent members of the Security Council, has been the subject of criticism. For these reasons, some have distinguished the "impartiality" that characterizes international dispute settlers from that seen among domestic courts; in international adjudication, "impartiality is more a function of the composition and balance of the tribunal as a whole than of the neutrality of every single arbitrator or judge." Richard B. Bilder, "International Dispute Settlement and the Role of International Adjudication," in Lori Damrosch, ed., *The International Court of Justice at a Crossroads* at 55, 161 (Dobbs Ferry, NY: Transnational Publishers, 1987). For one preliminary attempt to dispel concerns with the ICJ's "independence" through an analysis of that Court's substantive decisions relative to expected political alignments among its judges, see Edith Brown Weiss, "Judicial Independence and Impartiality: A Preliminary Inquiry," in *id.*, at 123.

[8] *See* article 9 of Statute of the Court (requiring consideration of representation of the "main forms of civilization" and of "the principal legal systems"); article 10(3) (restricting election to only one national of a particular state), and article 31 (permitting a party to choose an ad hoc judge whenever the Court includes a national of another party).

[9] For a critique of WTO dispute settlement system for not being "judicial" enough, see John A. Ragosta, "Unmasking the WTO—Access to the DSB System: Can the WTO DSB Live Up to the Moniker 'World Trade Court'?," 31 *L. & Pol'y Int'l Bus.* 739 (2000). Steve Charnovitz argues, on the contrary, that WTO members, and perhaps others, do not want WTO dispute settlers to be too independent of the political process. Steve Charnovitz, "Judicial Independence in the World Trade Organization," in Cesare Romano, Laurence Boisson de Chazzournes, and Ruth Mackenzie, eds., *International Organizations and International Dispute Settlement: Trends and Prospects* at 219 (Ardsley, N.Y.: Transnational Publishers, 2002). For a critique of the much touted "independence" of ICTY and ICTR, see José E. Alvarez, "Rush to Closure: Lessons of the Tadic Judgment," 96 *Mich. L. Rev.* 2031 (1998).

[10] Consider, in this regard, the ambiguous choice of law clause in the Algiers Accords, intended to be applied by the Iran-United States Claims Tribunal (*see* Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the

law-making results from, at least in part, the relative absence of precision in applicable law and from treaty-makers' tendency to use their dispute settlers to "complete" their treaty contracts.

There are other telling anomalies even with respect to the international system's foremost court, the ICJ. What are we to make of the power of the ICJ to decide a case *ex aequo et bono* when so authorized by the parties? That this provision has never been officially deployed by parties to the Court does not diminish that it exists as an authorized option of the Court and that it seems to play a role, *sub silentio*, in at least some of that Court's "equitable" decisions, particularly in maritime demarcations.[11] Empowering a *court* to decide a case without necessary regard to law at the option of litigants is not a common occurrence among domestic courts. Whether or not exercised, the fact that this authority exists suggests that even the foremost international court was not necessarily conceived to serve exactly the same functions as national courts.[12]

The third criterion—the existence of adversarial proceedings—is problematic not only with respect to the "political" dispute settlers of Chapter 7 but even with respect to the more judicialized dispute settlers of Chapter 8. "Adversarial" proceedings seem an odd way to describe the vast bulk of contentious cases brought to the ICJ, most of which are based on ad hoc agreements by both parties to submit their disputes to that Court. International tribunals whose jurisdiction is premised on party consent are not "adversarial" in the same sense as a criminal

Government of the United States and the Government of the Islamic Republic of Iran, January 19, 1981). Article V of that Declaration provides that "the Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances." (*See* text available at http://www.parstimes.com/history/algiers_accords.pdf.) Compare the Security Council's charge to the UNCC that it apply principles of financial liability, including for environmental harms, that had not, at least in 1991 when the UNCC was established, yet been given precise content at the international level. *See* para. 16 of SC Res. 687 (April 8, 1991) providing that: "Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August, 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals, and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait").

[11] For a critique of the "free-range" use of equity in such cases, see, e.g., *Case Concerning the Delimitation of the Maritime Areas Between Canada and France*, Dissenting Opinion of Prosper Weil, 31 *ILM* 1149, at 1197, 1207–8, paras. 1 and 28 (1992). *But see* Robert Jennings, "Equity and Equitable Principles," 42 *Annuaire Suisse de droit international* 27, at 29–30 (1986), (attempting to distinguish the use of equity according to law from a decision *ex aequo et bono*); Barbara Kwiatkowska, "Equitable Maritime Boundary Delimitation," in Vaughan Lowe and Malgosia Fitzmaurice, eds., *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* 264 (New York: Cambridge University Press, 1996)(arguing that the Court's 1993 decision in *Denmark* v. *Norway* stabilized the law by accommodating the operation of equity to the now crystallized principles and rules of the new law of the sea).

[12] *Cf.* Brownlie, *supra* note 3, at 690 (noting that exercise of the power to decide *ex aequo et bono* "may not be easy to reconcile with the judicial character of the tribunal"). Whether the ICJ has in effect acted as a court of equity in, for example, cases of maritime demarcations such as the *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine* (Judgment of October 12, 1984), 1984 ICJ Rep. 246, is subject to debate.

prosecution in a national court or civil lawsuit that compels one party to respond. Unilateral submissions to the ICJ, based on ad hoc or special agreements between the parties, are undertaken at least partly because this *avoids* making one party the equivalent of the "plaintiff" and the other the unwilling "defendant."[13] ICJ advisory opinions are also hard to classify as adversarial. Although such opinions may relate directly to a discrete dispute among two or more states, as was the case in the ICJ's recent opinion concerning the legal consequences arising from the wall being built by Israel on occupied territory, even such cases also serve other functions, including to control the legality of decisions by the organization, to maintain administrative jurisdiction over staff members, or to promote uniform interpretation of rules intended to be applied by other bodies, including national courts.[14] The broad public purpose of an ICJ Advisory opinion that, for example, purports to give the GA requested advice on the legality of nuclear weapons,[15] is much more clearly manifest than in the typical garden-variety lawsuit in national court.

Finally, with respect to the fourth criterion, if branding "winners" and "losers" is intended to suggest notions of finality or closure, there are multiple doubts on this score as well. The enforceability or binding force of ICJ decisions—obviously not intended in the advisory context, only recently settled by the Court with respect to its provisional measures, and severely constrained, at least in the case of judgments rendered against Permanent Members given the strictures of the UN Charter—leaves much to be desired, and not merely as a result of political realities.[16] As is suggested by the number of instances in which states have failed to participate in ICJ proceedings, even after a finding upholding the Court's jurisdiction, or to immediately comply with the Court's decision even in a contentious case resulting in a formally binding judgment, the "closure" achieved by the Court may require passage of a considerable amount of time and a number of intervening events after a supposedly "final" court decision is rendered. As Thomas Franck implies, in cases where one of the parties resists the ICJ's jurisdiction or considers the matter to raise critical national interests, closure may not emerge at all.[17] The same may be said of

[13] Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. 2, at 505–6 (Cambridge, UK: Grotius, 1986).

[14] *See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ, at paras. 59–62 (discussing the purposes of advisory opinions). *See also* Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity Within Diversity* at 427 (The Hague, Boston: M. Nijhoff, 4th edn., 2003) (acknowledging different functions but contending that international judicial organs are "primarily created to settle disputes between states").

[15] *See Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep. 226.

[16] Article 94(2) provides that the Security Council, presumably subject to the Permanent Members' veto, may make recommendations or take decisions to give effect to the Court's judgments. For an enumeration of the inadequacies with respect to enforcement of ICJ decisions, see, e.g., Attila Tanzi, "Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations," 6 *EJIL* 539 (1995).

[17] Thomas Franck, *Fairness in International Law and Institutions* at 318 (New York: Clarendon Press, 1995). Certainly many in the U.S. would still, despite the end of the Cold War (or because the Cold War ended with an apparent Western victory), strongly dispute the Court's findings in both the jurisdictional and merits phases of the *Nicaragua case*.

WTO rulings with respect to particularly contentious disputes—as on bananas and hormones—or numerous decisions of the Inter-American Court that have encountered formidable opposition at the national level, or even some decisions of the Strasbourg Court or the European Court of Justice. Even those international proceedings that are most comparable on this score with national courts—international criminal prosecutions in the ICTY and ICTR—differ in significant respects from national criminal prosecutions, since even these ad hoc war crimes tribunals are not assured that their orders for witnesses or evidence will be executed, or by whom. As would be expected of a system lacking centralized judicial or legislative authority and that, with the exception of European courts, usually lacks specific and reliable enforcement mechanisms at the national level, achieving effective finality remains a challenge for even those international courts authorized to issue binding judgments. Even the most judicialized forms of international dispute settlement are characterized by considerable ambiguity as to the binding power of the judgments they render, as well as some doubt about what is required for good faith compliance with such judgments. Such ambiguous forms of enforcement do not engender confidence as to closure.[18] It also seems fallacious to categorize all of the ICJ's advisory opinions or its contentious decisions as dichotomous rulings in favor of one side or another, especially when many of these appear intended to mediate a dispute and to avoid any perception of "winners" and "losers" at all.[19] Nor is this characteristic unique to the ICJ. Other international dispute settlers, notably the WTO's, facilitate friendly (presumably "non-adversarial") settlements among parties both before formal proceedings and sometimes in the way formal judgments are rendered, or in the ways the adjudicators strive to avoid branding winners and losers.

But if the four-fold ideal type fails to provide a satisfactory rubric for describing the many forms of international dispute settlers surveyed in Chapters 7 and 8, are alternative generalizations possible? What precisely makes for a legitimate international dispute settler? V.S. Mani has attempted to distill the essential procedural standards that he believes characterize legitimate dispute settlement. He argues that the communicative process—between litigant and adjudicator and vice versa—"is the most important constitutive aspect of international adjudication."[20] He contends that the smooth flow of the communicative process requires respect for two fundamental principles: *audi alteram partem* (the right of each

[18] For arguments that "closure" is a deeply flawed notion to apply with respect to international tribunals intended to enforce international criminal law, see Alvarez, *supra* note 9.

[19] *See, e.g.*, Cornelius F. Murphy, "The World Court and the Peaceful Settlement of Disputes," 7 *Ga. J. Int'l & Comp. L.* 551(1977)(discussing the Court's role as "quasi-conciliator").

[20] V.S. Mani, *International Adjudication: Procedural Aspects* at 5 (The Hague, Boston: M. Nijhoff, 1980). Mani argues that these principles serve the following objectives: (1) to help the tribunal instil confidence in the minds of litigants on its efficacy and impartiality; (2) to serve sovereign sensibilities; (3) to facilitate the effective conduct of adjudication and enable the tribunal to gather adequate information; (4) to ensure effective participation by the disputant parties; and (5) to guarantee that neither party derives any special and material procedural advantage. *Id.,* at 15.

party to be heard) and the equality of the parties. Mani distills from these two principles five fundamental procedural rights that need to be respected for effective and final adjudication: the right to be heard, the right to due deliberation by a duly constituted tribunal, the right to a reasoned judgment, the right to a tribunal free from corruption, the right to proceedings free from fraud, and the right to composition of the tribunal.[21]

Mani immediately encounters difficulties, however, when trying to apply his general principles to the ICJ. He notes that disputants' traditional right to the composition of the tribunal has been interpreted, at least in the context of the ICJ, to permit parties who have no national on the Court to appoint ad hoc judges. For Mani, this right seems to betray the general principle, inherent to his procedural fundamentals, that "no man can be a judge of his own cause."[22] Mani reluctantly concludes that this natural law principle can be imported into the international system "only with a pinch of salt" since it would be "inconvenient" to sovereign states.[23] Similarly, while Mani contends that the "right to be heard" constitutes the "king pin of the international adversary procedure,"[24] he concedes, after examining the practice of the ICJ in a number of advisory proceedings involving an organization and its staff members, that the ICJ routinely denies both the *audi alteram partem* and equality of parties principles—at least when advisory proceedings directly involve private interests.[25]

Virtually all of the dispute settlers canvassed in Chapter 7 run afoul of Mani's two fundamental principles and at least some of his five derivative procedural rights. Certainly the Security Council's actions with respect to post-Gulf War Iraq, including its establishment of the UNCC and that body's subsequent operation, would appear to violate Mani's two fundamental principles since Iraq's right to be heard before financial liability was imposed upon it was severely compromised and Iraq has not enjoyed "equality of parties or arms" before the UNCC. Indeed, the UNCC was established, along with the categories of claims over which it was accorded jurisdiction, on the premise that Iraq would not be able to contest the Council's basic finding of financial liability. The same could be said of the Council's handling of the boundary question between Iraq and Kuwait. Other dispute settlers surveyed in Chapter 7, including the GA, the

[21] Mani, *supra* note 20, at 25. Other commentators, such as Lon Fuller, relate the disputants' rights to participation to the structural requisites for impartiality noted above. Lon L. Fuller, "The Forms and Limits of Adjudication," 92 *Harv. L. Rev.* 353, at 363–4 (1978)(contending that the distinguishing characteristic of adjudication is that it confers on the affected party a peculiar form of participation in the decision, namely, that of presenting proofs and reasoned arguments, and that destruction of participation destroys the integrity of adjudication itself). Fuller argues that once an affected party is accorded the right to present proofs and reasoned arguments, the requirement of an impartial judge or arbitrator follows as a "necessary implication." Fuller, *supra*, at 365.

[22] Mani, *supra* note 20, at 25–30. [23] *Id.*, at 29. [24] *Id.*, at 30.

[25] *Id.*, at 42–8 (discussing advisory proceedings in *Effect of Awards* and in judgments of the Administrative Tribunal of the ILO) and *311* (noting that enabling the private interests to present written observations through the secretariat of the organ asking for the advisory opinion aggravates the problem instead of mitigating it).

UN Secretary-General, the IMF's Executive Directors, ICAO's Council, and secretariat officials from other IOs, routinely violate Mani's two principles or his basic procedural rights (with the exception, one hopes, of those regarding fraud and corruption). One possible implication, of course, is that such forms of non-judicial dispute settlement are not capable of settling disputes legitimately, and presumably are not likely to affect the general law through any substantive or procedural precedents attempted to be set.

But the problems with Mani's generalizations, as with the four-fold ideal type with which this Chapter began, run deeper. As Mani's concerns relating to the ICJ suggest, his fundamentals do not apply very well even with respect to the entities canvassed in Chapter 8. Neither the ICJ nor the WTO respect the right of private parties to be heard or their equality of arms, especially when the underlying disputes, albeit presented by two states, directly implicate non-state actors' rights.[26] Certainly, if, as Mani suggests with respect to the ICJ, the right to be heard and equality of arms applies not only at the inter-state level but, where a dispute involves private interests, to these private disputants as well, only a subset of international tribunals—namely those granting full access to individuals—fulfill Mani's two fundamental principles.[27]

A fair application of Mani's standards of fundamental fairness would de-legitimate many, if not most, of the other judicial and quasi-judicial bodies identified in the PICT Chart, along with their efforts at law creation.[28] If what we are looking for are generalizations applicable to all or most of the dispute settlers canvassed in Chapter 8, it seems that Mani's distillation of the requisites of the "communicative process," while perhaps useful as an ideal to which to aspire, does not fully reflect empirical realities.

An alternative conception of the nature of adjudication is Martin Shapiro's far simpler definition of conflict resolution. Shapiro contends that the root concept involved in adjudication is a triad: when two persons come into conflict that they cannot themselves solve, they call upon a third, a stranger to both, for assistance in achieving resolution.[29] Shapiro's triad is intended to be capable of explaining the social logic, and therefore the political legitimacy, of all dispute settlers, regardless of setting. Shapiro contends that the fundamental legitimacy of all courts is rooted in perceptions concerning the third party's role. Challenges to a court's legitimacy

[26] For a harsh critique of WTO dispute settlement for such failings, see, e.g., Ragosta, *supra* note 9.

[27] Note that while the number of such entities appears large, the number of institutionalized dispute settlers that have successfully functioned for a period and have dealt with significant numbers of non-state initiated disputes at the international level is considerably smaller. Putting aside mechanisms within Europe and the NAFTA or those involving individuals as criminal defendants, few of the regional courts, apart from human rights bodies, that are officially open to individuals and identified in the PICT Chart have had a significant caseload.

[28] Some have argued that a binding adjudicatory system that operates without essential procedural protections is "neither beast nor fowl," and is unworthy to be called a "court." Ragosta, *supra* note 9, at 739–43. Ragosta adds that a "court" worthy of the appellation also requires "democratic controls on what the law is," that is, some political mechanism for "correcting" the law-making efforts of unaccountable judges. *Id.*, at 743–6.

[29] Shapiro, *supra* note 1.

emerge from a basic instability or dialectic: the moment that the third party decides in favor of one of the two disputants, that party potentially perceives the outcome as an illegitimate "two against one." For Shapiro, successful dispute resolution involves a variety of methods to deflect this perception and avoid the predictable breakdown of the process over time. This may involve attempts to cast a decision in ways that defuse the perception that any one party has lost. This would explain why some judicial compromises, even in national courts, appear closer to attempts to negotiate or mediate than to "adjudicate" on the basis of established law. In other instances, efforts to take away the sting for the losing party involve attempts to make the result less than wholly obligatory. Ambiguous enforcement, far from being anomalous, is, for this reason, ubiquitous among a range of dispute settlement systems.

From the perspective of Shapiro's triad, courts are at one end of a spectrum that extends to far less formalized efforts in conflict resolution. Dispute settlement may involve only the third party as "go-between," charged only with carrying messages between the disputants and perhaps mediating, but not imposing, a "two against one" binding solution. With respect to modern domestic courts, we rely on notions of consent to lessen perceptions of "two against one:" the loser "is told that he should obey the third man because he has consented in advance to obey," that is, he has chosen the norm of decision, the decider, and has agreed to obey the decision.[30] Even then, according to Shapiro, problematic tensions exist between the different uses to which domestic courts are put, namely, as conflict resolvers, social controllers, and law-makers.[31] For Shapiro, courts engaged in social control, such as criminal courts engaged in enforcing the will of the community against the defendant, must contend with the inherent tension between their fundamental claim to legitimacy and what they are being asked to do. In criminal cases, the dispute is formally between one party (the defendant) and the community, and the instability arises with respect to the court's maintaining its appearance of "thirdness" in a context where, at least in most Western societies, the third party adjudicator is there to enforce the will of the community and is in fact an officer of the government or of the people. In these cases, argues Shapiro, the triadic position of courts is impaired and needs to be tended to through "various rituals of independence and impartiality," including through concepts such as the presumption of innocence. The triadic nature of courts is also put under strain in the usual case—when judges are called upon to engage in law-making to resolve disputes before them. Interstitial and other forms of judicial law-making, endemic to the task of judging, threaten to reveal the judges as not entirely "neutral" third parties but as unelected (or at least unauthorized) makers of public policy engaged in the implementation of their own (or their community's preferences). This explains strained efforts by judges and others to ground their decisions in terms of "pre-existing" law.

[30] *Id.*, at 2. [31] *Id.*, at 37.

Although Shapiro's initial conclusions were derived from a comparative analysis among national courts, his approach seems readily adaptable to international dispute settlement.[32] Some international adjudicative decisions, cast as responding to the demands of "equitable" principles, may approximate forms of mediation, designed to give something to both sides in order to avoid perceptions that any one of the disputants lost. Other forms of international dispute settlement rely on ambiguity as to the enforceability of the final judgment reached to avoid perceptions of "two against one." At one end, the UN Secretary-General's "good offices" function corresponds to Shapiro's "go-between." At the other end of the scale, compulsory and binding international adjudication relies on formal consent, as do domestic courts. Parties to the ICJ's article 36(1) or (2) jurisdiction can be told to abide by that Court's decisions in contentious cases because they agreed to the Court's rules and procedures, including the Court's ability to decide whether it has jurisdiction, as well as to the UN Charter provisions that recognize those decisions as binding. The same holds true, unless the WTO members decide otherwise, with respect to binding reports issued by the WTO's dispute settlers.

The forms of dispute resolution canvassed in prior chapters fall along a spectrum that mediates perceptions of "two against one" through various devices. This may be done by attempts to avoid perceptions that the third party is charged with imposing a dichotomous solution. This explains the turn to mediators charged with issuing only hortatory recommendations, pre-WTO (GATT) panels whose reports could still be refused adoption by the Contracting Parties, and adaptations of the triad that give dispute settlers more ambiguous mandates, as within human rights bodies, composed of politicians or experts charged only with examining individual "communications" and issuing "views." In such instances there is a studied and conscious ambiguity about two critical issues: namely, whether there is a "dispute" between two or more parties at all and whether, even if there is a dispute, any third party is really being asked to finally "settle" it.

As compared to Mani's proceduralist criteria, Shapiro's model seems to provide a better framework for understanding the nature of international institutionalized dispute settlement and, of particular concern here, its impact on the law.[33] It is readily understandable why the international system, in the absence of a central government, more readily turns to systems of adjudication that "mediate consent" by avoiding a clearly binding judicial judgment, by manifesting considerable uncertainties concerning the enforcement of even those binding judgments that are authorized, or by fashioning settlements that avoid a declaration of a clear winner. Shapiro's triad explains the ambiguous nature of the enforcement options for those international dispute settlers authorized to issue dichotomous, imposed solutions.

[32] Indeed, in a recent co-edited book, Shapiro's triad is examined in the context of the ECJ and other transnational contexts. *See* Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002).

[33] For one attempt to apply Shapiro's triad to GATT/WTO dispute settlement and to systems of governance more generally, see Alec Stone Sweet, "Judicialization and the Construction of Governance," 32 *Comp. Pol. Studies* 147 (April 1999).

Article 94(2) of the UN Charter, making the enforcement of ICJ judgments subject to the political whims of the Security Council, usually described as a regrettable concession to *realpolitik*, becomes, from the perspective of Shapiro's triad, a subtle tool to *mediate* consent in a context where *mandating* consent would have been unworkable. The same might be said of the WTO DSU's ultimate reliance on trade retaliation as an admittedly imperfect enforcement tool. At the same time, the triadic model emphasizes how difficult it is for the third party to overcome de-legitimating perceptions of "two against one." It helps explain why many multilateral treaties and IOs lack formal procedures for dispute settlement.[34]

The dynamic that Shapiro describes works on a number of levels and helps to explain significant features of adjudicative law-making. Shapiro's framework provides one explanation for the numerous ambiguities, enumerated above, concerning permissible remedies under WTO dispute settlement. While WTO panels and the Appellate Body may someday assume the *komptenz-komptenz* to order a party to dismantle any domestic legal scheme that it finds to be GATT-inconsistent and not just issue a declaratory judgment of illegality, for example, Shapiro's framework suggests that wise WTO panelists will fill such enforcement gaps only when they are confident that doing so will not create backlash perceptions of "two against one." Similarly, it might someday prove viable for the ICJ to rule that Article 27(3) of the UN Charter's admonition to abstain from decisions under Chapter VI includes, as some have suggested, a requirement that a Permanent Member of the Security Council abstain from any Council decision relating to the enforcement of an ICJ decision rendered against its interests.[35] That Court might also attempt to fill other enforcement gaps and conclude that it can, where a contentious case necessarily requires it, pass on the bona fides of a Security Council decision with binding effect; suggest that a UN member engaged in attempting to enforce the Court's judgment is authorized to seek the assistance of others (or their courts) notwithstanding the absence of a Security Council resolution authorizing such enforcement; or opine that an advisory opinion might be subject to some kind of enforcement action by the Council.[36] But filling these legal gaps would require confidence on the part of the Court that it can engage in such law-making without undermining its legitimacy as well as the commitment of states generally to it as a legitimate third party dispute settler.

Shapiro's triad also provides a ready explanation for international dispute settlers' typical aversion to acknowledging that they may be engaged in making law. One would never know, based on the text of most decisions issued by these bodies or the charge given to these bodies, the extent of law-making resulting

[34] *Cf.* Merrills, *supra* note 1, at 272–6 (enumerating the hurdles regional organizations face with respect to serving as effective dispute settlers, including their restrictive geographic or subject matter reach, the divisions of loyalty and conflicts of interest even within a region, and resource constraints).

[35] *See, e.g.*, Tanzi, *supra* note 16, at 552–61 (favoring a duty to abstain but noting that Article 27(3) refers to disputes under Chapter VI whereas Article 94 is in the Charter's Chapter XIV).

[36] For discussion of some of these enforcement options, see Tanzi, *supra* note 16.

from adjudicative decisions.[37] Candid acknowledgment of judicial law-making, on either procedural or more substantive questions, is a rarity in international decisions.[38] It is not that most international adjudicators are unaware that they are filling legal gaps. Denials of law-making power often occur in contexts where it is difficult to deny that such law-making has occurred elsewhere in the same opinion.[39] Yet the triad makes such denials as understandable as they are predictable: the legitimacy of the third party's resolution of the dispute turns on convincing the parties (and other audiences) that the decision is based on the application of neutral legal principles readily discoverable (even if not evident to anyone before the decision was rendered).[40] Such denials are all the more necessary when, as in the context of international criminal trials in the ICTY and ICTR, the triad is under the most strain, and observers need to be convinced that the third party adjudicator, who is in that context essentially the international community's enforcer of social norms, is engaged in applying only pre-existing crimes.

Shapiro argues that adjudicative law-making is

logically required wherever law is substituted for consent in the triadic resolution of conflict. For if the third person must resolve the conflict, and if he must do so by preexisting law,

[37] After all, even the foremost international court is authorized only to "apply," not "create," sources of international law. Article 38(1), Statute of the ICJ.

[38] As Judge Jennings once wrote of the ICJ: "perhaps the most important requirement of the judicial function [is] to be seen to be applying existing, recognized rules, or principles of law," even when it "creates law in the sense of developing, adapting, modifying, filling gaps, interpreting, or even branching out in a new direction . . ." Mohammed Shahabuddeen, *Precedent in the World Court* at 232 (Cambridge, UK and New York: Cambridge University Press, 1996) (quoting Jennings). For instances in which ICJ or PCIJ judges have, in accordance with Jennings' injunction, denied law-making power, see, e.g., Shahabuddeen, *supra* at 75 (citing Judges Fitzmaurice and Pasha), 83 (citing Judge Weiss (PCIJ)), 84–5 (citing Judges Read and Krylov). As Shahabuddeen indicates, the Court has "been careful never to assert a power to make law." *Id.*, at 86; *see also id.*, at 90. For rare examples of iconoclastic individual opinions to the contrary, see *id.*, at 84 (Judge Armand-Ugon) and 222 (Judge Alvarez); for more hedged acknowledgments of some law-making effects, see *id.*, at 84–5 (Judges Tanaka and Winiarski). The same holds true for the WTO's Appellate Body. *See, e.g.*, Ernst-Ulrich Petersmann, "How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System," 1 *J. Int'l Econ. L.* 25, at 46 (1998) (noting the WTO's Appellate Body's claim to be a mere dispute settler). Others, including scholars, have been less evasive. *See, e.g.*, *Ireland* v. *United Kingdom* 1978, Eur. Court HR, Series A, Vol. 25, at 62 (indicating that the Court's role was "not only to decide those cases brought . . . but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention"); GA Res. 3232, UN Doc. A/9631 (1974)(urging the ICJ to consciously develop international law through its decision-making); Manfred Lachs, "Some Reflections on the Contribution of the International Court of Justice to the Development of International Law," 10 *Syr. J. Int'l L. & Com.* 239, at 240 (1983)("each judgment is either a step forward or a step backward in the development of law . . . judges cannot avoid being a vital force in the life of the law"); Shahabuddeen, *supra*, at 89–96 (surveying the "divided" views of scholars with respect to the ICJ's law-making powers but concluding that for all practical purposes what the Court decides in a case "is international law").

[39] Compare the views of Judges Alvarez (at p. 190) and Krylov (at p. 219) in *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 ICJ Rep. 174. *See also* Shahabuddeen, *supra* note 38, at 209–13 (discussing the practical effects of the ICJ's decisions).

[40] *See, e.g.*, Stone Sweet, *supra* note 33, at 155 ("the dispute settler seeks to secure legitimacy by defending her behavior normatively, as meaningfully enabled and constrained by rules embedded in normative structure").

then he must "discover" the preexisting law. Because no human society has ever sought to set down an absolutely complete and particularized body of preexisting law designed exactly to meet every potential conflict, judicial "discovery" must often of necessity be judicial law making.[41]

From this perspective, it is not necessary to resort, as we have in Chapter 8, to notions of "incomplete contracts" or "standards vs. rules," to explain judicial law-making. The application of any general rule to particular facts, and the attempt to justify such application—which occurs in every kind of dispute settlement that results in a reasoned decision—necessarily involves law-making.[42] Shapiro's analysis is, nonetheless, consistent with the standards vs. rules and incomplete contracts frameworks discussed in Chapter 8. Shapiro acknowledges that judicial law-making is often implicitly authorized by legislative action—as where statutes incorporate common law terms of art that invite inquiry into the past and result in adjudicative law-making, as does the U.S. Sherman Antitrust Act's condemnation of conspiracies in "restraint of trade."[43] Such common law terms of art are no different, in terms of implicit authorization of judicial law-making, than the many international law standards discussed in Chapter 8. Shapiro also contends that legislators are sometimes aware that they are assigning judges law-making tasks; judicial law-making, in Shapiro's view, may result from efficiency demands, including the need to assign tasks to existing bodies rather than create new ones. He notes that even in the context of systems committed to strong separation of powers, courts will be given many law-making and administrative tasks "simply because they are there."[44]

For international lawyers, accustomed to the scarce resources normally allocated to international problems and the absence of clearly defined notions of separation of powers (even within reasonably developed institutions such as the United Nations), these arguments have particular relevancy. In numerous regimes discussed above, including the WTO and the European Union, adjudicatory bodies have taken up the legislative slack simply because there was no place else to turn. In some of these cases, the international judiciary's authorization to "complete the legislators' contracts" is not merely a post hoc rationalization for judicial power but an apt description of what the treaty negotiators (or at least some of them) must have intended. In such contexts, adjudicative law-making effectively consolidates the parties' treaty negotiations.[45] Submitting a dispute to

[41] Shapiro, *supra* note 1, at 29.

[42] *See also* Stone Sweet, *supra* note 33, at 156–7 (arguing that rule-making occurs through the application to concrete, particular, and retrospective facts as well as through the dispute settlers' attempts to justify their decisions through recourse to abstract, general, and prospective standards). Sweet also explains precedent in the same fashion: "Precedent helps to legitimize [triadic dispute settlement] by simultaneously acknowledging rule-making behavior, while constraining that same behavior with a rule: that like cases shall be settled likewise." *Id.*, at 157.

[43] Shapiro, *supra* note 1, at 29. [44] *Id.*, at 31.

[45] *See* Laurence Boisson De Chazournes and Sarah Heathcote, "The Role of the New International Adjudicator," *ASIL Proceedings of the 95th Annual Meeting* (April 4–7, 2001) at 129.

adjudicative processes continues treaty negotiations in another forum subject to different rules.[46]

Shapiro's approach emphasizes the inherent tension in the multiple roles demanded of adjudicators. Under Shapiro's triad, judges are regarded as legitimate to the extent they are "neutral rule appliers," yet their need to solve concrete disputes inevitably embroils them in the formulation of policy—which tests their legitimacy.[47] Nor does Shapiro deny that political observers of the process may, by either accepting or rejecting the judicial usurpation of power necessarily required of dispute settlers, affect the law-making process. Shapiro contends that political actors may react to judicial law-making attempts in any of four ways: (1) by yielding, thereby extending some policy-making roles to adjudicators, (2) systematically withdrawing all matters of political interest from the adjudicator, (3) intervening to pull particular cases out of the courts and into the political realm, or (4) attempting to ensure that judges will be able to resolve disputes between private parties but prove amenable to the interests of the regime on all legal matters touching on the government's interests.[48] International lawyers can readily see these patterns in the course of particular regimes over time. Indeed, they seem inherent to many of the patterns of "exit and voice" that commentators have described in such regimes as the European Union and the WTO.[49] This means that adjudicative law-making is directly related to more "political" forms of regime change encompassed within an organization. As trade commentators point out, for example, there is a "delicate interplay" between the WTO's dispute settlers' law-making abilities and the powers of WTO members to enact changes or modifications to the regime's rules through new trade rounds, formal amendments, waivers, and formal interpretations.[50] Even when legal change is rendered

[46] *But see* Alain Pellet, "Responding to New Needs through Codification and Progressive Development," in Vera Gowland-Debbas, ed., *Multilateral Treaty-Making* at 13 (The Hague: Martinus Nijhoff Publishers, 2000). Pellet argues that the task of codifiers such as the International Law Commission is "lawyers' law" not "politicians' law" in that they "only try to understand the logic of existing rules" and develop them "in the framework of this logic, not to change the underlying logic" as a politician is free to do. *Id.,* at 16. Presumably Pellet would argue that judges, unlike legislators, should be limited to making "lawyers' law."

[47] Merrills describes comparable tensions arising from adjudicators' need to reach for prior precedents. As he indicates, such reliance on general principles and prior practice, inherent to reasoned adjudicative opinions, may deter states from submitting disputes to adjudicative processes to the extent they do not wish to prejudice their position in comparable cases, to the extent existing law is unsettled or inadequate, to the extent the parties do not agree that the dispute is capable of legal resolution, or to the extent the dispute involves the interests of absent third parties. *See* Merrills, *supra* note 1, at 295–8. *See also* Bilder, *supra* note 7, at 162–72 (identifying salient advantages and disadvantages to adjudication and noting how several of these are "two-sided"); 173–5 (identifying comparable advantages and disadvantages of a permanent court suggestive of inherent tensions).

[48] Shapiro, *supra* note 1, at 32.

[49] *See generally* J.H.H. Weiler, "The Transformation of Europe," 100 *Yale L. J.* 2403 (1991); Eyal Benvenisti, "Exit and Voice in the Age of Globalization," 98 *Mich. L. Rev.* 1 (1999). For a recent attempt to apply exit/voice to WTO dispute settlement, see Richard H. Steinberg, "Judicial Lawmaking at the WTO: Discoursive, Constitutional, and Political," 98 *AJIL* 247 (2004).

[50] *See, e.g.*, John H. Jackson, "Dispute Settlement and the WTO," *J. Int'l Econ. L.* 329, at 345 (1998); Ragosta, *supra* note 9, at 743–6.

difficult by alternative political processes, change via the judicial process may not necessarily be welcomed. While in some instances the political reaction to judicial law-making has been favorable and has led to a deepening commitment to international dispute settlement—see, for example, the evolution of cooperation suggested in the eleven protocols to the European Convention on Human Rights or the role of the ECJ in establishing the law of the European Union[51]—in other instances, as is suggested by Peru's attempt to withdraw from the Inter-American Court of Human Rights or the United States' withdrawal from the ICJ's article 36(2) jurisdiction in the wake of the *Nicaragua case*, the political reaction has been less favorable. Adverse political reaction is often expressed in terms that are readily understandable under Shapiro's triad. Thus, when the U.S. withdrew from the ICJ's compulsory jurisdiction, its justification was essentially that the dispute resolution had broken down, in that instance, to "two against one"—that is because the Court had gone, in the view of the U.S., beyond established law in assuming jurisdiction over Nicaragua's claims, and had shown its partiality in denying El Salvador's right to intervene.[52]

Owen Fiss's challenge to the Shapiro triad provides an instructive counterpoint that further illuminates the nature of international dispute settlement. Fiss has argued against the triadic dispute settlement model on the basis of how the U.S. judiciary behaves. According to Fiss, courts, at least in the U.S., are used not only to resolve disputes but also to give meaning to public values.[53] He argues that in cases such as *Brown* v. *Board of Education*,[54] what is crucial is not whether the particular successful disputant is accepted at the door of the white school, but rather how the court addresses "a social condition that threatens important constitutional values and the organizational dynamic that creates and perpetrates that condition."[55] Harold Koh, addressing the significance and impact of human rights cases litigated before U.S. courts, has made similar points concerning the impact of "transnational public litigation."[56] From this perspective, cases such as *Filartiga* v. *Pena-Irala*,[57] and presumably ICJ Advisory opinions such as those dealing with nuclear weapons and the Israeli Wall, are essentially not instances of dispute settlement; nor are they aptly described as modest judicial attempts to fill those small gaps in the law absolutely necessary to settle a dispute. Adjudication is, on this perspective, a much grander enterprise. To paraphrase Fiss, what judges do is at least on the same level, and certainly on the same moral plane, as legislative and executive action.[58]

[51] *See* Stone Sweet, *supra* note 33 (describing the "virtuous circle" between effective dispute settlement, adjudicative law-making, and reinforcement of the parties' commitment to both the rules of a regime and the dispute settlement process).

[52] *See* Statement Concerning U.S. Withdrawal from the Nicaragua Case, January 18, 1985, Annex E, in Damrosch ed., *supra* note 7, at 472–5.

[53] Owen M. Fiss, "Foreword: The Forms of Justice," 93 *Harv. L. Rev.* 1 (1979).

[54] 347 n 5483 (1954).

[55] Fiss, *supra* note 53, at 18.

[56] Harold H. Koh, "Why do Nations Obey International Law?," 106 *Yale L. J.* 2599 (1997).

[57] 630 F.2d. 876 (2d Cir. 1980).

[58] Fiss, *supra* note 53, at 40.

From Fiss's perspective, adjudication is necessarily polycentric, and judges necessarily consider (or ought to consider) the impact on parties not directly represented in the case. This view contrasts sharply both with the traditional conception that regards dispute settlement as inherently handicapped with respect to the interests of third parties[59] and with positivistic denials of judicial law-making power. This view of the nature of adjudication takes Shapiro's assumptions about the inherent necessity of judicial law-making to a different level; according to Fiss, judges are used not merely to complete contracts or to make vague standards more precise, but to set public policy. Applied to the adjudicators of Chapter 8, Fiss's conception means that the judges involved in international dispute settlement are super-legislators engaged in resolving tensions between community values that other international actors and sources of international law dare not touch.

However plausible this conception may be with respect to the U.S. Supreme Court, it appears, at least at first glance, wildly out of sync with respect to most, if not all, of the dispute settlers canvassed here. While it may be true that some of those who were instrumental in getting the GA to ask the ICJ for its views regarding the legality of nuclear weapons were intending that that Court would perform the kind of functions that Fiss describes, such grandiose goals surely cannot be said to characterize the usual boundary demarcation case presented to that Court, most trade disputes heard by the WTO, much less the average interpretative issue addressed by ILO compliance bodies. It is also not evident that international dispute settlers that might attempt to resolve significant international public values can successfully do so. While it will take time for the international community to absorb the lessons of the ICJ's *Nuclear Weapons* opinion, the prospect that the Court's closely divided views in that instance will affect the stance of the nuclear powers, or of those who might be able to secure or develop such weapons in the future, seems dubious—and not merely because the Court issued only a nearly evenly divided non-binding opinion.

Fiss's arguments rely on a vision of the role of the judge and of judicial powers that can easily be derided as U.S.-centric. The activist judge who, in Fiss's model of "structural" litigation, reaches out to all others likely to be affected to construct an appropriate class of litigants, invites third parties such as interested organizations or agencies to participate in the proceedings, relies on special masters to correct representational or factual inadequacies, and designs an on-going remedy that continues judicial supervision even after a final judgment is announced—in short the judge in the mold of grand dismantler of a system of de facto apartheid in the wake of *Brown* v. *Board of Education*—is a real rarity at the international level.[60]

It certainly does not appear to describe the usual role of ICJ judges. Most ICJ judges are more aptly described as the passive "umpires" or "observers" between

[59] *See, e.g.*, Fuller, *supra* note 21, at 394–404 (discussing the difficulties of adjudicative handling of "polycentric tasks").

[60] *But see, e.g.*, Judge Weeramantry, Dissenting, in *Kasikili/Sedudu Island case* (*Botswana* v. *Namibia*), 1999 ICJ Rep. 1194–5, at paras. 114–16 (noting that he would have required the parties to negotiate a joint regulatory regime as a means of environmental protection).

litigants "relying on all their initiatives for the presentation of the facts of the law and the articulation of the possible remedies" that Fiss rallies against. The role of ICJ judges appears closer to Shapiro's "stranger" between two disputants than to Fiss's intrusive guardians of public virtue reaching out to the concerns of all others not present in their courtroom.[61] The extended and intrusive supervisory role between court and other institutions, initiated by the U.S. Supreme Court's ruling in *Brown* v. *Board of Education*, is not typical of international litigation. Even complex cases involving on-going conflict, such as the *Nicaragua case* in the ICJ, are delimited by judicial action to manageable proportions. As is suggested by the merits stage of the *Nicaragua case*, the judges acted in that case in precisely the opposite fashion than would be suggested by Fiss. The judges were clearly intent on *not* establishing a long, continuous relationship with the remaining litigant in that case through a series of interventions or cycles of supplemental relief. The Court saw its task precisely in the terms that Fiss denies: "to declare who is right or who is wrong," "to calculate the amount of damages,"and "to formulate a decree designed to stop the discrete act."[62] None of this would necessarily surprise Fiss who, after all, contrasts the role of the U.S. judge, described as a "public officer . . . empowered by the political agencies to enforce and create society-wide norms and perhaps even to restructure institutions," with arbitrators who are paid for, and chosen by, the parties, and who are enjoined by practices that may make them reluctant to write opinions, generate precedents and that "localize or privatize" their decisions.[63] While many of the adjudicators described here do not share the characteristics that Fiss ascribes to arbitrators generally, it is not plausible to describe international judges on the ICJ or elsewhere as public officials implicitly empowered by a social contract to restructure international society or its institutions. The "incomplete" contract framework discussed in Chapter 8 cannot be stretched so far.

For every case submitted to an international dispute settler that arguably expresses an intent to pronounce significant public values, there are probably hundreds that are primarily intended, as Shapiro would argue, simply to settle a matter between the litigants.[64] After all, the vast number of international disputes do not reach the formal mechanisms that are the subject of Chapter 8; most international disputes, even in the WTO regime, when they are settled peacefully, are settled privately and quietly.[65] Shapiro's emphasis on judges as primarily settlers of

[61] *Cf.* Fiss, *supra* note 53, at 29. [62] *Cf. id.*, at 24–7. [63] *Id.*, at 30–1.

[64] The WTO's DSU makes this goal explicit: "The aim of the dispute settlement mechanism is to secure a positive solution to a dispute." Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, article 3(7), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 *ILM* 1144 (1994) (hereinafter "DSU").

[65] Indeed, commentators, in trade and other contexts, routinely describe such mechanisms, particularly when authorized to issue binding opinions, as "catalysts" for settlement since they serve as a deterrent against conflict and as promoters of agreement. *See, e.g.*, Elisa Baroncini, "The WTO Dispute Settlement Understanding As A Promoter of Transparent, Rule-Oriented, Mutually Agreed Solutions—A Study on the Value of DSU Consultations and Their Positive Conclusion," in Paolo Mengozzi, ed., *International Trade Law on the 50th Anniversary of the Multilateral Trade System* at 55, 298 (Milano: Dott. A. Giuffre Editore, 1999).

disputes would appear to more accurately capture the nature of international adjudication because of the structural features of the international system. Unlike the U.S. litigants that Fiss is writing about, disputing parties at the international level enjoy no assurance that their disputes will be settled at all, much less through regularized processes on the basis of law. Resort to any kind of peaceful dispute settlement, despite the proliferation of available dispute settlers, remains a relative rarity at the international level. Under the circumstances, it should scarcely surprise that formal international agreements to adjudicate, such as the WTO DSU, endorse a variety of less formal ways to facilitate mutually satisfactory solutions to disputes—including provisions for notification, meaningful consultations, alternative methods of non-institutionalized arbitration, and friendly settlement short of adjudication.[66] Such provisions, which one commentator suggests define the WTO dispute settlement scheme as "a kind of hybrid between conciliation and a sort of arbitration,"[67] serve much the same functions as the principle requiring exhaustion of local remedies does for human rights courts or other dispute settlers' insistence that prior negotiations between the parties have been tried and failed before formal proceedings are permitted to begin. The insistence on prior steps to settle reflects not merely the reluctance of international actors, especially states, to formally submit their disputes to Shapiro's third party. It also suggests that the primary purpose of most, if not all, forms of international adjudication is to secure a solution to an actual dispute and not to elucidate community values. It would be fundamentally misleading to describe the *primary* task of most international dispute settlers in the way that Fiss has for the U.S. judiciary. The community of states is a long way from accepting that its ad hoc collection of adjudicators, the "international judiciary," is licensed to promulgate public values for them.

But Fiss's views, while not readily transferable to the international level, are not wholly irrelevant. The purposes that international dispute settlers are intended to fulfill vary. Some dispute resolution mechanisms are vehicles for compliance control (as in some human rights regimes). Others, such as inspection panels in international financial institutions, are primarily intended to enhance institutional good governance and democratic participation.[68] The ad hoc war crimes tribunals and the ICC reflect a multitude of primary goals, including effecting deterrence,

[66] *See, e.g.*, article 3(6), DSU, *supra* note 64 (authorizing "mutually agreed solutions" as to matters formally raised); article 4, DSU (authorizing "consultations" between the parties); article 5, DSU (permitting good offices, conciliation and mediation if the the parties agree); article 25, DSU (providing for "expeditious arbitration" as an alternative). *See also* Baroncini, *supra* note 65, at 153.

[67] Baroncini, *supra* note 65, at 167.

[68] Christine Chinkin, "Alternative Dispute Resolution under International Law," in Malcolm D. Evans, ed., *Remedies in International Law: The Institutional Dilemma* at 123 (Evanston, IL: Northwestern University Press, 1998). *See also* G.J.H. van Hoof and K. de Vey Mestdagh, "Mechanisms of International Supervision," in P. Van Dijk, ed., *Supervisory Mechanisms in International Economic Organisations* at 1, 11–14 (The Hague: Kluwer Law International, 1984) (describing the creative (or quasi-legislative), review (or quasi-judicial), and correction (or enforcement) functions of dispute settlement organs).

preserving a historical account of atrocity, and providing some kind of recompense to victims.[69] Yet in all of these instances the resolution of disputes and the filling of legal gaps as needed are, in addition, at some level vehicles for enforcement or institutional legitimation. Most, if not all, of these dispute settlers are, as are IOs more broadly, perceived as community representatives either generally or in particular cases.[70] Judgments issued by the ICTY and ICTR, by regional human rights courts, by the ICJ (as in the *Nicaragua case* or *Iran Hostages*), have affirmed vital values for the international community.

Shapiro's highly individualistic approach, focusing exclusively on the conflict between discrete, identifiable, and self-selected disputants and its resolution by an impartial third party, assumes that the underlying structure of adjudication remains unchanged despite the differing purposes to which such mechanisms are put. The tensions that Shapiro sees as inherent in triadic dispute resolution are built on this premise. But international dispute settlers have evinced considerable evolution over time; none have stood still and states and IOs continue to build new dispute settlers using different models to fulfill new purposes. In most cases, the primary purposes of a regime's dispute settlers have evolved, along with the regime or the international organization of which they are a part. The institutionalized dispute settlers canvassed in Chapter 8 have changed considerably, even though nearly all were established in the second half of the 20th century (and, in most cases, since the end of the Cold War). The Security Council that engaged in dispute settlement in the wake of the Gulf War is radically different from the paralyzed body during the Cold War. The UN Commission of Human Rights, though much maligned, has not stood still and has developed 1235 and 1503 procedures not foreseen at its establishment.[71] Today's Inter-American Commission operates very differently from the timid organ of two decades ago.[72] The Strasbourg Court has now taken over the duties formerly undertaken by its Commission.[73] The Human Rights Committee of the ICCPR has attempted to "bring its communications closer to a typical system of adjudication."[74] The WTO's dispute settlers, more "judicialized" than the GATT's, are a bit more

[69] For a description of these, see, e.g., Alvarez, *supra* note 9. Indeed, international criminal prosecutions present special problems and are less susceptible to analysis as forms of triadic dispute resolution.

[70] *See* Kenneth W. Abbott and Duncan Snidal, "Why States Act Through Formal International Organizations," 42 *J. Conflict Res.* 3, at 24–6 (1998).

[71] *See, e.g.*, Philip Alston, "The Commission on Human Rights," in Philip Alston, ed., *The United Nations and Human Rights: A Critical Appraisal* at 126, 144–81 (New York and Oxford: Oxford University Press, 1992).

[72] *See, e.g.*, Cecilia Medina-Quiroga, *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System* (Boston: M. Nijhoff, 1988).

[73] *See* Protocol No. 11 to the European Convention on Human Rights, ETS 155 (entered into force November 1, 1998).

[74] *See, e.g.*, Henry J. Steiner, "Individual Claims in a World of Massive Violations: What Role for Human Rights Committee?", in Philip Alston and James Crawford, *The Future of UN Human Rights Treaty Monitoring* at 15, 30 (Cambridge: Cambridge University Press, 2nd edn., 2000).

receptive to non-state interests, to the distress of some of the WTO's members.[75] Even the conservative ICJ has encouraged parties' recourse to chambers of fewer judges and has adopted other procedural innovations intended to give its proceedings the whiff of ad hoc arbitration.[76] While not all of these changes reflect a fundamental change in their respective orientations, some of these entities, most notably the Inter-American Court of Human Rights and the Strasbourg Court, appear to be moving in directions that hint at Fiss's alternative conception of the nature of adjudication. Henry Steiner, for example, contends that these regional human rights courts are today issuing opinions that, like those of constitutional courts elsewhere, do more than merely settle the dispute before them: "they inform and stimulate an ongoing legal, political, and moral debate on human rights issues. They become part of a rich and varied dialogue. They educate."[77]

While Shapiro might be right about the unchanging structural tensions buried within all triadic dispute settlement, the changing social purposes that dispute settlers serve affect the lessons drawn from them, as well as prescriptions for reform. As Helfer and Slaughter point out, we cannot judge the effectiveness of particular international dispute settlers unless we ask and answer the question, "effective for what purpose?"[78] Such purpose-driven inquiries suggest the relevancy of Fiss's alternative conception of the role of dispute settlers in particular instances. If the primary purpose of ad hoc criminal tribunals is to "send a message" to would-be perpetrators of human rights atrocities or to inspire domestic courts to begin prosecuting such people, the number of actual cases resolved by such tribunals, the number of actual "disputes" settled by such bodies (in Shapiro's terms) becomes less significant. If the point of such tribunals is primarily to inspire local courts to begin prosecutions for genocide, crimes against humanity, and war crimes, whether the international judges themselves do a good job of mediating perceptions of "two against one" such that others are encouraged to submit more disputes to them becomes less important. (Indeed, in a perverse way, the more illegitimate international tribunals appear to be, the greater may be the incentive on states to engage their own courts.) With respect to human rights bodies, their success might be measured not by whether international adjudicators successfully ameliorate the "two against one" syndrome in a particular dispute so that the result proves acceptable to the parties before them, but by whether, for example, the threat of international dispute settlement reduces the incidence of human rights violations generally or increases the number of domestic civil and criminal remedies for such violations. In the case of some disputes brought to the ICJ, such as the GA's inquiry concerning the legality of nuclear weapons, success might be measured not by whether the Court settled the debate about prominent public values but by whether it opened a new avenue for a fruitful dialogue about such

[75] *See* Robert O. Keohane, Andrew Moravcsik, and Anne-Marie Slaughter, "Legalized Dispute Settlement: Interstate and Transnational," 54 *Int. Org.* 457 (Summer 2000).

[76] *See, e.g.*, Franck, *supra* note 17, at 326–7.

[77] Steiner, *supra* note 74, at 41.

[78] Laurence R. Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication," 107 *Yale L. J.* 273, at 282 (1997).

values and established (or re-established) *legal* discourse as a legitimate basis for discussing them. Similarly, establishing a comparable dialogue between international public servants and the local communities affected by their policies is what some contend is the point of the World Bank's Inspection Panels. Making judgments as to the effectiveness of international forms of dispute settlement requires examining something other than whether decisions are successfully enforced against losing parties. Moreover, even where the primary purpose of a dispute settlement mechanism is to resolve dichotomous disputes, that scheme's success may not be accurately reflected in the numbers of disputes formally adjudicated, but in the numbers of conflicts deflected or settled under the shadow of formal dispute settlement or because of its provisions for notification.[79] Some international dispute settlers might be deemed successful purveyors of the norm requiring peaceful settlement of disputes to the extent they inspire such friendly settlements, even at the expense of clarifications of the law.[80] Fiss's views might also provide a better account of when international adjudicators fail. If the Security Council's efforts to settle disputes fail, perhaps this might be best explained in terms of its inadequacy as an acceptable community representative. In many instances, the insights of both Shapiro and Fiss might be valuable. If the value of the WTO DSU lies not only in settling particular disputes but in instilling within the trade regime the public value of submitting to the "rule of law," both of their perspectives seem instructive.

As this suggests, Shapiro's and Fiss's alternative conceptions need to be kept in mind when we turn to reform agendas. For many commentators, including Steiner and Helfer/Slaughter, the dispute settlement mechanisms of the European Community and the Strasbourg Court suggest lessons for the UN Human Rights Committee (and other dispute settlers with a global reach). The differences between Shapiro and Fiss suggest why international lawyers should not rush to assume that European models for adjudication should be emulated everywhere.

For some, the lesson suggested by the relative success of the ECJ and the ECHR is that a community of law can be built, as Shapiro's triad would suggest, by gradually progressing towards court-like mechanisms able to settle a greater and greater number of disputes and, most importantly, able to secure compliance with

[79] Mengozzi, for example, notes that in the trade regime, "negotiators' awareness that the matter will be decided by a third independent entity if an amicable settlement is not achieved changes the diplomats' negotiating technique;" the focus changes from the potential retaliation or actions by one or more parties to the dispute to the parties' respective predictions as to the outcome of the independent entity's decision. Paolo Mengozzi, "The World Trade Organization Law: an Analysis of its First Practice," in Mengozzi, *supra* note 65, at 3, 10 (citing John H. Jackson).

[80] Fear has been expressed that friendly settlements in the trade regime, for example, may placate the disputants at the expense of the law or its clarification. Such concerns are reflected in the WTO DSU (see *supra* note 64), which provides that solutions raised under the consultation provisions of the DSU should be consistent with the covered agreements (article 3(5)) and provides for notification of mutually agreed solutions should any member raise "any point relating thereto" (article 3(6)). *See also* General Agreement on Tariffs and Trade, October 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, art. X(2) (1994) (requiring notification of governmental acts affecting trade rights). On the positive and negative aspects of mutually agreed solutions between WTO parties, see Baroncini, *supra* note 65.

its judgments.[81] For Helfer and Slaughter, for example, the ECJ and ECHR models of successful triadic dispute settlement are built on ever increasing interactions among a network of subnational and supranational actors (lawyers, judges, legal scholars), brought about by a set of incentives to encourage these actors to interact and to maximize the impact of supranational decisions, and built upon a set of norms that "distinguish law from politics in ways that promote an autonomous realm of law protected from direct political interference."[82] What this implies is that the UN Human Rights Committee should continue its evolution from a non-judicial body to a quasi-judicial one by increasing its judicial dialogue with the ECHR: it should "harmonize its decisions with the [ECHR's] case law" to promote a convergence with European jurisprudence.[83] The UN Committee would have the burden of justifying and explaining any departure from established European interpretations and would need to show, for example, where the object and purpose of the respective treaties differ, or that the ECHR's holdings "rely primarily on European law reforms that have no analogue elsewhere on the planet."[84] The goal would be to generate, for the Committee, the set of incentives for claimants that the ECHR and ECJ have successfully generated and to build on a "genuinely transnational or supranational body of law" that is "textually and culturally differentiated as necessary but acknowledg[es] the promise of universality."[85] For Helfer and Slaughter, the UN Committee must change from a "more diplomatic style of dispute resolution emphasizing compromise and avoidance of conflict to a more legal mode of consistent application of general principles" by improving the quality of its legal reasoning, airing a wider range of competing arguments, being more willing to challenge states in high-profile cases, and increasing its dialogue with individuals, national courts, and other supranational tribunals.[86] The aim is to replicate, at the global level, the "virtuous circle" managed within Europe: namely, ever higher number of transnational exchanges, triadic dispute settlement, and adjudicative rule making, replicating more of the same, and leading towards ever higher levels of legal integration.[87]

[81] Helfer and Slaughter define "effectiveness" as the third party dispute settler's power to compel a party to a dispute to defend against a plaintiff's complaint and to comply with the resulting judgment; for them, this is the power that distinguishes courts from other dispute resolvers such as go-betweens, mediators, and arbitrators, and it is the power that determines a court's "significance as a political actor." Helfer and Slaughter, *supra* note 78, at 283. For Helfer and Slaughter, this power stems from the "coercive power of the state," as supplemented by the court's ability to command acceptance through its own judicial legitimacy. *Id.*, at 284 (identifying the sources of legitimacy to encompass structural and procedural components, including impartiality, principled decision-making, continuity of court composition, and provision of a meaningful opportunity for litigants to be heard).

[82] Helfer and Slaughter, *supra* note 78, at 389. *See also* Alec Stone Sweet and Thomas L. Brunell, "Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community," 92 *Am. Pol. Sci. Rev.* 63 (March 1998)(describing European legal integration as the product of transnational exchange, triadic dispute settlement, and the production of legal norms).

[83] Helfer and Slaughter, *supra* note 78, at 373–4. [84] *Id.*, at 378–84.

[85] *Id.*, at 373. [86] *Id.*, at 388.

[87] *See also infra* at text accompanying note 93, and see generally Stone Sweet and Brunell, *supra* note 82.

While Henry Steiner shares a comparable goal of promoting judicial "dialogue" through improved legal reasoning, his reform agenda for the Human Rights Committee points away from Shapiro's triad but would also not require Committee members to don the activist garb that Fiss attributes to U.S. activist judges. For Steiner, the gap between the numbers of potential annual complainants and the numbers of possible Committee views, the Committee's inability to rely on the findings and conclusions of another international organ or, in the typical case, a domestic court, and the Committee's inability to find or verify facts, suggest that this UN body cannot realistically be expected to do justice in the individual case or serve to deter rights violations.[88] It cannot be an effective court that harnesses the coercive power of the state or of judicial legitimacy to settle an ever-increasing number of disputes in the model of the ECJ or the ECHR. The UN Human Rights Committee, in short, cannot, and should not, attempt to resolve all or most of the human rights disputes within its jurisdiction. It cannot become, in that sense, more "court-like." For Steiner, what that body can do is to learn from the style of effective opinion writing seen in other contexts. It can expound the Covenant on Civil and Political Rights through selective but closely reasoned opinions that, by confronting and attempting to resolve that instrument's ambiguities and indeterminacies, open a dialogue about that instrument's interpretation and values with relevant political actors in the way that some constitutional courts have done with respect to national constitutions. To this end, Steiner proposes reforms in the style of Committee opinions that would, for example, streamline the Committee's existing tendency to fully air all competing arguments, regardless of relevance.[89] Most prominently, he would recommend discretionary, rather than mandatory, jurisdiction.[90] Steiner's reform agenda would, in short, attempt to replicate the ECHR's achievement in terms of enunciating values, without trying to replicate the incentive structure between claimants, national courts, and supranational judges that characterizes the Strasbourg or the Luxembourg courts.

Much of what Steiner says about the UN Human Rights Committee applies with equal force to other dispute settlers canvassed here. The backlog of cases that Steiner finds in the Human Rights Committee context now appears elsewhere, including within the Strasbourg Court. In contexts as different as the WTO and human rights, commentators increasingly worry about the increased burdens

[88] Steiner argues, for example, that the gap between complaints and the UN Human Rights Committee's resources is simply too wide for the Committee to settle all but a minuscule portion of disputes within its jurisdiction. He notes that the Committee can probably realistically issue about thirty views a year, despite the millions of brutal and systematic human rights violations committed against the Committee's one billion potential "clients" annually, and that this number is not likely to increase significantly no matter what procedural changes are adopted. Under the circumstances, the Committee can offer "slender support for the rule of law." Steiner, *supra* note 74, at 32–3.

[89] For similar complaints about WTO opinion writing, see, e.g., Ragosta, *supra* note 9, at 765–7; Robert E. Hudec, "The Judicialization of GATT Dispute Settlement," in Michael M. Hart and Debra P. Steger, eds., *In Whose Interest? Due Process and Transparency in International Trade*, at 9, 13 (Ottawa: Centre for Trade Policy and Law, 1992).

[90] Steiner, *supra* note 74, at 42–8.

brought about by these mechanisms' very success.[91] In varied contexts observers suggest that dispute settlement mechanisms have worked as well as they have so far because all those eligible to bring disputes have not resorted to dispute settlement. Even the relatively sparse caseload of the ICJ has grown in recent years, along with the diversity of its clientele, and knowledgeable observers contend that absent an unlikely and substantial increase in resources devoted to that Court, the prospect of noticeable greater efficiencies in the Court's operation or in the number of cases handled per year is unlikely.[92] Moreover, Steiner's other concerns with the respect to the Human Rights Committee apply with equal force to many other dispute settlers, such as the WTO's Appellate Body or the ICJ, neither of which can be expected to serve fact-finding and investigatory functions, given their personnel, available remedies, or resources.[93]

As this suggests, Shapiro's and Fiss's alternative conceptions of the nature of adjudication inspire distinct types of reform agendas for international dispute settlers. Helfer and Slaughter's adaptation of the triadic constituency-building model of dispute settlement leads them to propose assimilating global mechanisms to those that they perceive to be more successful at the European (and national) levels. They advocate assimilation on the premise that the legal communities involved, at both the global and regional levels, and, most prominently, the third party adjudicators, will come to see themselves as engaged in fundamentally the same task and will find common ground in their conception of rights.[94] Steiner's emphasis on using dispute settlers to propound common community values leads him away from assimilating these entities in terms of goals, procedures, or substance. For him, the UN Human Rights Committee cannot, and should not, become "more like a court" on the model of domestic courts, the ECHR or the ECJ: it need not be open to all comers and need not build incentives among constituencies to encourage the bringing of ever higher numbers of claims at the international level. Steiner does not base his reform agenda on the need for legal common ground, nor does he assume that it is necessary. Paradoxically, Helfer and Slaughter's reform agenda, though premised on Shapiro's seemingly "value-free" triad, implies that, at least with respect to human rights, but possibly with respect to other regimes

[91] *See, e.g.,* Jeffrey L. Dunoff, "The Death of the Trade Regime," 10 *EJIL* 733 (1999)(discussing risks posed by "trade and" disputes).

[92] *See generally* D.W. Bowett, J. Crawford, and I. Sinclair, "The International Court of Justice Efficiency of Procedures and Working Methods," Report of the Study Group Established by the British Institute of International and Comparative Law, Supplement to 45 *Int'l Comp. L.Q.* 51 (1996).

[93] To the extent "effective adjudication" means the ability to compel a party's participation in proceedings and compliance with the court's judgments and orders (see, e.g., Helfer and Slaughter, *supra* note 78, at 283), most if not all international tribunals face exceptional hurdles in this respect, despite their legitimacy. *See, e.g.*, Susan Lamb, "The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia," LXX *Br. Yrbk Int'l L.* 165 (1999)(discussing the problems the ICTY has faced in issuing and securing compliance with its orders).

[94] They express a "renewed millennial faith in the ability of courts to hold states to their international obligations." Helfer and Slaughter, *supra* note 78, at 387. For a comparable reform agenda for the WTO, see Ragosta, *supra* note 9.

as well, effective dispute settlement requires a common vision of values as well as a common mode of "adversarial" litigation. Steiner's vision, though seemingly closer to Fiss's portrayal of courts as guardians of community virtue, ends up endorsing a more value-neutral reform agenda amenable to adjudicative law-making by diverse means, including through non-adversarial advisory opinions.[95] In this instance, it is the Fiss model that appears most adaptable to a wide diversity of dispute settlement methods and outcomes.

9.2 When Do Courts "Make Law"?

While Chapters 7 and 8 emphasized the normative impact of the international dispute settlement process, whether involving judges or others, they also noted the considerable resistance to attributing general law-making powers to institutionalized dispute settlers, and not exclusively with respect to political dispute settlers. What accounts for this resistance and when does resistance give way?

Resistance might stem from fundamental disagreement with the proposition that adjudicators must inevitably fill legal gaps when norm meets fact. As an empirical matter, such skepticism seems untenable. The instances of gap-filling canvassed in Chapters 7 and 8 and in a vast literature dealing with these dispute settlers are simply too numerous to ignore. Skepticism as a normative matter—the argument that legal gaps *ought not* to be filled but that adjudicators should confine themselves to terse judgments resolving the dispute at hand and, if necessary, resort to findings of *non liquet*—is more rarely encountered. Most international lawyers agree that an adjudicator should issue a reasoned opinion that "weighs and refines legal principles and seeks consistency that connects past, present, and future."[96] Most commentators and judges have also suggested that findings of *non liquet* are not appropriate, even with respect to advisory opinions before the ICJ.[97] More common are objections to particular rulings or to individual judicial opinions that have not adhered to (imprecisely defined) judicial limits but are perceived to have gone "too far" in the direction of teleological law-creation. Some would also claim that particular dispute resolution procedures—for example, ad hoc

[95] For an argument that the ICJ's advisory jurisdiction facilitates law-making because it is not adversarial, see Lachs, *supra* note 38, at 250–62.

[96] *See, e.g.*, Franck, *supra* note 17, at 335 (suggesting that these are the attributes of reasoned adjudicative decision-making).

[97] *Compare* Gaven Griffith and Christopher Staker, "The Jurisdiction and Merits Phases Distinguished," in Laurence Boisson de Chazournes and Philippe Sands, eds., *International Law, the International Court of Justice, and Nuclear Weapons* at 59, 76 (Cambridge, U.K. and New York: Cambridge University Press, 1999)(noting that declarations of *non-liquet* are not considered appropriate in contentious cases) *with* Declaration of Judge Vereshchetin, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion, 1996 ICJ Rep. 226 (hereinafter "*Nuclear Weapons case*")) (referring to writers who do not see a complete prohibition on a declaration of *non-liquet*). For the view that a declaration of *non liquet* may be inappropriate even in advisory opinions, see, e.g., Dissenting Opinion, Judge Schwebel, Advisory Opinion, *Nuclear Weapons case*, *supra*.

private forms of commercial arbitration established by private parties or even the specialized bilateral Iran-U.S. Claims Tribunal—are not suited for general law-making purposes. Most of the resistance to adjudicative law-creation seems to fall within these narrower grounds. It does not reject out of hand the possibility that international norms might be nudged in new directions by the process of adjudication; it is just selective about when that process should be recognized or accepted. If so, what are the necessary preconditions for legitimate law-making by institutionalized dispute settlers?

The criteria to distinguish legitimate from illegitimate adjudication canvassed in Section 9.1 are useful starting points for determining the legitimacy of adjudicative law-making as well.[98] Adjudicative law-making seems most acceptable with respect to all or most of the entities canvassed in Chapter 8 because these bodies comport themselves more in accordance with the "ideal of law."[99] A crucial element of this ideal appears to be that legitimate adjudicative law-making necessarily relies on independent third parties, preferably lawyers, whose expertise in the law helps secure their impartiality. Commentators attribute the transformation of the trade regime from one based on "diplomacy" to one governed by the rule of law at least in part to the change in the composition of panels and the installation of the Appellate Body, for example.[100] But the ideal of law has other elements. It is not only that the relatively politically independent and impartial adjudicators in Chapter 8 better approximate the composition of domestic courts, it is that quasi-judicial and judicial bodies tend to have limited discretion in terms of their jurisdiction, such that cases come to them through the action of others and not through the control of the adjudicators themselves.[101] What makes the Security Council or the GA's attempts to engage in adjudicative law-making illegitimate, it is argued, is not only that the entities are composed of self-dealing politicians, but that these organs reach out to determine for themselves which disputes to address.

Professor Thomas Franck has enumerated other aspects of the ideal of law and legitimacy. He has argued that procedures for "structural impartiality" seen in, for example, the ICJ, such as the relatively depoliticized selection of judges, lengthy judicial tenure, possibility for disqualification on the basis of bias, empirical record of impartiality over time, and even the unusual provision for ad hoc judges and party-selected chambers, promote perceptions of fairness.[102] Steiner's vision of the ideal of law stresses differences in terms of available remedies. He suggests that more judicialized dispute settlers are limited to "indirect" legal remedies in

[98] But neither Steiner nor Mani apply their criteria to delineate the parameters of legitimate adjudicative law-making. Their respective approaches provide an interesting heuristic with which to examine the question.

[99] Steiner, *supra* note 74, at 49.

[100] *See, e.g.*, Rambod Behboodi, "Legal Reasoning and the International Law of Trade: The First Steps of the Appellate Body of the WTO," in Mengozzi, *supra* note 66, at 303, 310–13 (noting the impact of increased numbers of lawyers as adjudicators).

[101] *Cf.* Steiner, *supra* note 74, at 49.

[102] Franck, *supra* note 17, at 316–47. *See also* Thomas Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990).

the same way that most domestic courts are. They manifest the ideal of law because they can express views or issue judgments but have limited abilities to exert direct political pressures on states to comply. They cannot, for example, compel the infliction of economic sanctions (as compared to the UN Security Council). As Steiner notes in comparing the Human Rights Committee with the UN Human Rights Commission, the former "holds itself aloof from the political and power relations and strategies within the UN, whereas the Commission fully engages in that process."[103] The same might be said of several of the non-judicial entities discussed in Chapter 7. The Security Council, its UNCC, the GA, and IMF Executive Directors are all fully engaged in power politics and its characteristic enforcement tools. Despite the diversity of views, the suggested components of the ideal of law have this much in common: adjudicative law-making at the international level is most acceptable when it emerges from structures analogous to those found among domestic courts.[104]

Mani's detailed criteria for discriminating legitimate adjudicative fora, discussed in Section 9.1, grounded in concerns for deliberative regularity, add a procedural dimension.[105] Even if the Security Council has undoubted power to apply legally binding enforcement measures whenever it finds a threat or breach of the peace, many international lawyers are reluctant to accept the proposition that the Security Council has the power to make legally binding general determinations "along the way" to enforcement action precisely because that body fails to incorporate the deliberative process, and to respect the procedural guarantees, found in courts. Objections to drawing general legal conclusions from the Council's determinations on Kuwait's boundaries or concerning Iraq's financial liabilities after the Gulf War, canvassed in earlier chapters, reflect concerns about the denial of Iraq's right to be heard and equality of arms.[106] Critics point to the Council's failure to engage in legal deliberations after open hearings devoted to hearing from the parties' legal counsels, failure to issue a reasoned judgment, and unwillingness to respect Iraq's right to have a say in the composition of an arbitral body that would sit in judgment of its alleged misdeeds. The suggestions that the UNCC's commissioners are, for various reasons, incapable of exercising "independent judgment" and cannot, in any case, engage in a fully deliberative and transparent process, given their workload and need for expedition, reflect similar concerns

[103] Steiner, *supra* note 74, at 49*; see also* Petersmann, *supra* note 38, at 26 (contending that the international rule of law requires legal systems that meet certain minimum standards of substantial and procedural justice, such as transparency, legal consistency, and "completeness" of the rules ("no no-law situations, prohibition of *non liquet*"), democratic legitimacy and enforceability of the rules).

[104] *See, e.g.*, Ragosta, *supra* note 9 (critiquing WTO dispute settlement for failing to replicate the standards of domestic courts).

[105] *See also* Franck, *supra* note 17, at 316–47 (discussing the requisites of "procedural fairness" in the ICJ, including that Court's rejection of the notion of inadmissible "political questions," ability to grant provisional relief, rules of evidence, and handling of third parties).

[106] *See* Erika de Wet, *The Chapter VII Powers of the United Nations Security Council*, at 357–67 (Oxford: Hart Publishing, 2004). This is all the more the case when the Security Council's quasi-adjudicative role is being exercised with respect to individuals. *See id.*, at 338–57. *See also* Chapter 4.

and help to explain the resistance to recognizing the UNCC's law-making abilities. The same might be said of the GA's sporadic dispute settlement efforts, as with respect to the Middle East and southern Africa, discussed in Chapter 7. Objections to accepting an adjudicative role for the GA in these contexts stem in large part from the GA's reluctance or inability to engage in deliberations that fully respect (1) the rights of the respective parties to air their respective legal arguments, and (2) their equality of arms. As the World Court pointed out in the *Effect of Awards case* to justify the GA's establishment of an administrative tribunal to handle the UN's employee disputes, the problem is that a large political body like the Assembly cannot deliberate like a court.[107]

Mann's critique of the authoritativeness of IMF Fund decisions also invokes, implicitly, Mani's criteria.[108] Similar concerns are suggested by the distinctions drawn by Lon Fuller between negotiations, governed by no overreaching principle except what the parties' reciprocal interests will bear, and adjudication, emerging from and constrained by the deliberative process.[109] Fuller's distinctions would suggest that lawyers refuse to accept the legitimacy of the Security Council's legal gap-filling in the wake of the Gulf War because they see it as the continuation of political negotiations unconstrained by law.

The criteria suggested by the "ideal of law" and the needs of the deliberative process presume the value of a standing adjudicative body. Permanency makes it easier to establish the security of tenure and other structural components of the ideal of law; it also enables dispute settlers to issue reasoned opinions built on their own prior judgments. Both sets of requisites also presume flexible application. As Steiner recognizes, dispute settlers are more or less "court-like." They are more or less "independent" in composition, more or less limited in their discretion over their dockets, more or less able to exert direct political pressure on states. Fulfillment of Mani's procedural fundamentals, even assuming uniform agreement on interpretation, varies along a spectrum as well. Some dispute settlers in Chapter 7, as, for example, the UNCC, might respect enough of the rights of the respective parties that at least some observers would concede law-making possibilities with respect to some of that bodies' decisions. It is assumed, nonetheless, that the application of these criteria would yield clear answers in some instances. Few would suggest, for example, that the Security Council in the Iraq/Kuwait border dispute acted in a court-like manner or with sufficient respect to Mani's fundamentals. Similarly, the limited normative impact of the UN Secretary-General's efforts at dispute settlement can be explained by that official's inability, in the normal case, to satisfy either the ideal of law or procedural fundamentals. In the

[107] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 1954 ICJ Rep. 47, at 56 ("the Court is of the opinion that the GA itself, in view of its composition and functions, could hardly act as a judicial organ—considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them—all the more so as one party to the disputes is the United Nations Organization itself").

[108] *See supra* at text to note 21 and Section 7.2.2.

[109] *See* Fuller, *supra* note 21.

typical case, the Secretary-General's need for secrecy precludes a demonstration that he has respected both sides' right to be heard or their equality of arms; his reliance on the UN's political organs suggests dependence on political tools for enforcement. The absence of a clear institutional mandate to engage in fact-finding or to determine rights in accordance with the law encourages a perception that the UN Secretary-General tends to split the difference between the parties in an equitable fashion, without respect to their legal rights or prior legal precedents (as it has been suggested he did even in the course of "binding mediation" in the *Rainbow Warrior case*). It should scarcely surprise us then if the Secretary-General's numerous successful dispute settlement efforts are rarely cited as examples of adjudicative law-making even when the result, as in the *Rainbow Warrior case*, is a written document that, as a judicial judgment does, records for public consumption the terms of settlement.

As these examples suggest, a dispute settler's degree of adherence to the ideal of law and respect for the deliberative process go a long way towards explaining attitudes towards the legitimacy of adjudicative forms of law-making. But there is considerable nuance lost in exclusive reliance on such criteria. As is suggested by Chapter 7, even those dispute settlers that are least likely to comport with the ideal of law or with procedural fundamentals, such as the Security Council, appear to be having *some* impact on the law in the course of settling disputes. Further, the flexible application of these structural and procedural requisites conceals rather than highlights significant differences among dispute settlers, and in particular among the "judicial" dispute settlers that are most likely to reflect the ideal of law and to respect the disputants' procedural rights.

The enumerated structural and procedural criteria fall short of describing the complexities of adjudicative law-making in seven respects.

They do not fully explain, first, dispute settlers' impact on institutional law, both with respect to the organization in which the dispute settler is embedded and more generally. As is suggested in Chapter 7, it is hard to deny non-judicial dispute settlers' impact on this part of public international law, irrespective of the structural and procedural deficiencies of most of these bodies. The Security Council's efforts to engage in dispute settlement have, at a minimum, affected the interpretation of the Council's powers under Chapter VI, and expanded that body's implied powers to delegate certain powers, including to the Secretary-General. The GA's termination of South Africa's mandate over Namibia expanded that body's implied powers, while the Secretary-General's numerous efforts at dispute settlement have considerably expanded that official's implied powers vis-à-vis the UN's political organs. Opinions by the UN Legal Counsel rendered in response to particular disputes involving the day-to-day interpretation of substantive Charter provisions, legal personality and its consequences, the privileges and immunities of the organization and its agents, membership, and participation, and the duty and remedies implicated by the duty to pay UN voluntary and compulsory financial assessments, have shaped at least those issues of institutional

law canvassed in Chapters 2 to 4. OAS dispute settlement efforts with respect to Cuba have affected that body's membership norms and possibly those of other regional organizations that are now regarded as capable of defining their own criteria for membership, while efforts of both the OAS and UN Secretaries-General in the Contadora process expanded both officials' implied powers. The ICAO Council's formal rules for the settlement of differences are no less binding as a matter of institutional law for being adopted by that political body in the course of dispute settlement and so on . . .

The failure to satisfy Franck's requisites for "structural impartiality" or Mani's procedural rights has not prevented this type of adjudicative law-creation. Nor is it clear that the gradations of difference with respect to meeting these criteria among the judicial dispute settlers of Chapter 8 matter to their impact on institutional law. The role and impact of first GATT panels and thereafter the WTO's DSB on that organization's internal rules, as with respect to what constitutes a cognizable type of dispute, are not discernibly different—nor is the normative impact of pre- or post-WTO dispute settlement in this respect discernibly different from other judicial bodies that, more in accord with Mani's requisites, are open to private parties to a dispute. Just why institutionalized dispute settlers should have such an impact on institutional law is not altogether clear but part of the explanation must be that these bodies, no less than other institutional organs, are presumed to have the power to decide, at least as a matter of first instance, matters falling within their own competence, including interpretative questions as to their powers relative to other institutional organs.[110] This explanation for adjudicative law-making relies on dispute settlers' embeddedness within an international organization, and on a central principle of international institutional law—and not the quality of justice they accord disputants or whether in other respects they look or act like courts.

Secondly, the suggested criteria tell us nothing about the dynamic between various actors that assist or prevent adjudicative law-creation. The GA's attempts to resolve the disputes in the Middle East and in southern Africa, briefly discussed in Chapter 7, appear to have had different normative effects because of subsequent events and the actions of other actors, including the Security Council and UN member states. The GA's normative impact with respect to the Middle East appears to have floundered thanks to the resistance of relevant actors. Its legal determinations in Resolutions 2145 and 2248, however, have had arguable "constitutive effects" (as on the statehood of Namibia) because some of these (such as the Assembly's termination of South Africa's mandate) were legally confirmed by the ICJ, while others eventually gained the support of other states, the Council, and, ultimately, South Africa itself. As with respect to a states' attempts to nudge customary law in new directions, the acquiescence or resistance of other relevant actors is important in assessing the normative impact of law-making

[110] *See generally* Chapter 2.

attempts rendered in the course of dispute settlement, even when the dispute settlers (or the actors reacting to them) do not fulfill anyone's ideal of law or fail to respect procedural niceties.

With respect to the dispute settlers surveyed in Chapter 8, the reaction of other organs within the organization in which these are embedded is an important part of the adjudicative law-making story: how the institution and its members handle, over time, the rulings, reports or opinions issued by its dispute settlers matters. A regime that, like the WTO, routinely relies on such rulings as "institutional precedents" and does not disturb these via interpretative statements by the WTO members, makes it difficult to distinguish such rulings from the institutional practice of an organization that, under the Vienna Convention on the Law of Treaties, may legitimately be the basis of subsequent treaty interpretation.[111] This may occur, as with respect to the WTO, even in the face of a treaty provision that denies dispute settlement rulings such general law-making effects or despite adjudicative statements that refuse to equate DSB rulings with the parties' subsequent practice.[112] Further, as the WTO example suggests, the reaction of other actors is relevant to successful adjudicative law-creation, even with respect to those bodies that function more like courts and respect most or all of Mani's fundamentals. One suspects that the ICJ's *Reparation for Injuries* opinion would not be read today as a basic statement of the legal personality of international organizations or of their "necessary" implied powers if that opinion had been rejected by the GA, had not been codified as permissible practice through the joint action of the Secretary-General and the GA, and had not formed the basis of claim settlements between the UN and states in that and subsequent cases.[113]

Thirdly, the ideal of law/procedural regularity criteria does not distinguish between types of law-making tasks or distinct IOs with different modes of engaging in law-making more generally. The implication is that an adjudicator is or is not legitimate for all law-making purposes. Yet, as Chapters 7 and 8 suggest, distinct dispute settlers have a comparative advantage with respect to discrete subject areas within public international law. Further, as Chapter 4 indicates, IOs evince different levels of tolerance for expert-driven law in different contexts. As the discussion in Chapter 7 on the UNCC suggests, it is quite possible, even likely, that some of the substantive legal decisions rendered by that body—for example, legal decisions based on the Commissioner's reading of public international law and not the dictates of the Security Council in its Resolution 687—will be accepted and have an impact on the law, even if that dispute settler does not fulfill

[111] *See* Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 31(3)(b), 1155 U.N.T.S. 331, 340. *See also* article 2(1)(g), Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (defining the "rules of the organization" to include the "established practice of the organization"). *But see* Chapter 2 (Spender's views). *But see* Ragosta, *supra* note 9, at 743–6 (arguing that the difficulty of a "legislative check" on WTO judicial law-making is likely to pose grave problems for the legitimacy of WTO dispute settlement).

[112] *See* DSU, *supra* note 64.

[113] *See supra* Chapter 3.

the ideal of law or the requisite procedural regularity. The unprecedented and sheer number of claims before that body, along with the high-profile nature of their resolution, makes it likely that UNCC rulings will influence aspects of state responsibility and its cognizable remedies. In addition, if the UNCC were to issue, for example, a fully reasoned, articulate decision explaining why the general duty to mitigate damages requires a certain result, its subsequent impact on international legal discourse will not necessarily be dissipated by that body's inadequacies with respect to many of the structural or procedural criteria enumerated above.

With respect to dispute settlers grounded in technical expertise, such as ICAO's Council, legal determinations rendered in the course of settling disputes that relate specifically to international aviation law are probably more credible and influential than comparable rulings issued by a non-expert but more "court-like" body. The Council's adoption of its own internal investigative report on the United States' warnings to Iran Air Flight 655, concluding that these warnings failed to act in conformity with ICAO's rules,[114] for example, is more likely to establish a binding interpretation as to the requisites of these rules than would a contrary ruling issued by a state's domestic court, even if the latter adhered to and respected the parties' right to be heard and equality of arms in ways not possible before the ICAO Council.[115] This certainly would be the case with respect to other ICAO members and the ICAO secretariat itself in their day-to-day interpretation of that organization's rules and this is the community, after all, which determines what is international aviation law. If the ICAO Council successfully engages in effective international aviation law-creation in the course of settling disputes, it is not because it functions "like a court" but because it is embedded in a regime whose legitimacy is based, partly, on technocratic expertise and that type of legitimacy rubs off on the Council. To the extent the ICAO Council were to express views on matters outside of its recognized expertise—were it to conclude that because the United States' failure to issue proper warnings, it owes Iran financial compensation as a matter of state responsibility, for example—its views would in all likelihood not be taken as seriously (although this claim may contribute to state practice if accepted). The legitimacy conferred by specialized expertise may also help to explain why specialized agencies such as the IMO, ICAO, or the WHO have generally refrained from resorting to the one institution that most plausibly embraces the "ideal of law" as well as most of Mani's fundamentals, namely, the ICJ—despite constitutional provisions permitting such recourse. Such institutions (along with their members and the relevant epistemic communities involved) may simply care more about competence in the relevant expert field than about satisfying either the "ideal of law" or procedural niceties.

Regime-specific adjudicative law-creation, as discussed in Chapter 8, is not confined to regimes requiring specialized technical or scientific expertise, such as

[114] *See* discussion in Section 7.2.3. [115] *Id.*

meteorology, civil aviation, or health. The proliferation of other international dispute settlers across all subjects suggests that increasingly, when adjudicative law-making occurs, it will often be regime-specific.[116] While the proliferation of international dispute settlement bodies raises concerns that they could, at least without the highly unlikely imposition of an "appellate" jurisdiction leading to resolution by one supreme body, detract from the uniformity of interpretation, or even lead to the unraveling of public international law into discrete and insular specialized regimes, no one has suggested a viable alternative.[117] With the possible exception of the ICJ, there is little inclination among international organizations to share mechanisms for dispute resolution. As Schermers and Blokker note, whenever members of a particular regime seek the benefits of dispute settlement, there is a tendency to create another mechanism rather than to borrow an existing judicial or other organ.[118] The growing numbers of entities with potential for overlapping jurisdiction, including the ICJ and the Law of the Sea Tribunal and human rights specialized bodies and courts, is a testament to this phenomenon. This tendency suggests that those creating dispute settlement bodies may value substantive familiarity with a legal regime over structural or procedural prerequisites of fairness. GATT and now WTO members have historically relied on the judgment of trade experts rendered in the course of dispute settlement because, one suspects, those experts come from a close-knit epistemic community who can be trusted to complete the members' trade compact or give precision to its standards. Such trust, grounded in expertise, is not as easy to replicate in other bodies, even those, like the ICJ, which proceed through demonstrably fair and court-like procedures.[119]

[116] "Regime-specific" is merely intended to describe the sources of law to which dispute settlers turn and not where these sources fit into public international law. Regime-specific law, as used here, is not intended to suggest that these regimes are "self-contained regimes." *Cf.* P.J. Kuyper, "The Law of GATT as a Field of International Law," XXV *Netherlands Yrbk Int'l L.* 227 (1994). Even general dispute settlers, such as the ICJ, develop specialized expertise thereby enhancing their credibility with respect to certain types of disputes. This may explain why an increasing number of states, including unlikely converts to international dispute settlement such as Libya, have turned to that Court to resolve boundary or territorial disputes fraught with political implications.

[117] *See generally* Jonathan I. Charney, "Is International Law Threatened by Multiple International Tribunals?," 271 *Recueil Des Cours* 101 (1998)(arguing that, to date, the risks of conflicting interpretations by international tribunals appear overstated). In addition, the proliferation of international dispute settlers has been accompanied by the consolidation of existing ones. Both the European human rights system and the WTO have consolidated pre-existing institutions. *See* Protocol 11, *supra* note 73 (eliminating the European Commission on Human Rights and consolidating its former role within a single Court); WTO DSU, *supra* note 64 (eliminating forum shopping among the pre-existing dispute settlement bodies under various GATT codes and consolidating these in the DSU).

[118] Schermers and Blokker, *supra* note 14, at 486–9.

[119] For discussion of the "remarkable" avoidance of international economic disputes before the ICJ and the clear preference for submitting such disputes to specialized fora, see Ernst-Ulrich Petersmann, "Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?," 31 *NYU J. Int'l L. & Pol.* 753, at 771–4 (1999). For an argument that not even the ICJ is immune from reliance on a close-knit "epistemic community" that encourages its legitimacy, see Franck, *supra* note 17, at 320.

Fourthly, the structural and procedural criteria enumerated above include, as merely one factor, a dispute settler's need to issue a "reasoned opinion." For Mani, the right to a reasoned opinion, like other procedural rights, derives from disputants' rights to be heard and to the equality of arms; its importance is due to what it contributes to perceptions of fair treatment. This does not do justice to the importance of reasoned opinions. The issuance of a reasoned opinion is capable of generating considerable confidence in a dispute settler and should not be seen as a mere appendage of the rights of the disputants. Dispute settlers' impact on law is, to some extent, a product of their own efforts to provide such opinions and the credibility of the underlying reasoning may overcome other flaws. As James Boyd White has noted in the context of domestic courts, if adjudicators merely issued terse "yea" or "nay" results without explanation, they would settle disputes before them at the expense of what we have come to regard as an essential aspect of law, namely, learning from the past through reliance on prior precedents.[120] As White argues, if judges did not explain themselves, law would simply be whatever they did in the particular case, not what they said. Lawyers "would find it difficult to reason from such precedents with confidence, for we would not know how the judges perceived the cases they decided or why they decided them as they did. We would not know which of the arguments made in a prior case worked and which ones did not. We would not know what the cases meant."[121] As is suggested by the examples in both Chapters 7 and 8, terse or enigmatic adjudicative decisions or opinions that simply give a result without fully reasoned analysis, in whatever setting, are less likely to result in adjudicative law-making. As Merrills indicates, "it is not the fact of obtaining judgment which vindicates a claim, so much as the reasoning by which the decision is supported."[122]

Reasoned adjudicative opinions are not essential for a system of law but they are certainly anticipated in a system predicated on article 38(c) of the Statute of the ICJ, that is, which includes such decisions as part of the evidentiary sources of international obligation. If, as article 38 suggests, we are entitled to accord some authority to "judicial decisions," what we are deferring to, as White suggests, is not the case's result simpliciter but the result *as it is characterized by the adjudicator*.[123] Systems of law that rely on adjudicative precedents do so because and to the extent that adjudicators themselves invoke legal authority for what they do by connecting the case before them to prior cases, particular facts to more general concerns, and the experiences of the parties before them to the general language of the law.[124] The reasoning required of such decision-makers imposes constraints upon them. Reasoned opinions arise within and, in turn, help to constitute institutions that simultaneously explain and limit themselves over time. Adjudicative

[120] James Boyd White, "What's an Opinion For?," 62 *U. Chi. Legal F.* 1363 (1995). *See also* Franck, *supra* note 17, at 335.

[121] White, *supra* note 120, at 1364.

[122] Merrills, *supra* note 1, at 295 (noting that judgments based on principles "cannot avoid having an impact as precedents").

[123] White, *supra* note 120, at 1366.

[124] *Id.*

reasoning is constitutive of a regime not merely through the results in particular cases but because it shapes the whole method of discourse; adjudicative reasoning shapes what counts as a proper argument and invites its participants to think and speak in the same way.[125]

As this suggests, the likelihood of adjudicative law-making is greatly enhanced by embedding dispute settlers in an institution or otherwise affording them a degree of permanency.[126] Continuity of existence facilitates what many consider to be the principal engine of adjudicative law-creation: the systematic and reasoned invocation of the past as precedent.[127] According such central importance to the need for adjudicative reasoning helps to explain, for example, what most trade commentators readily acknowledge: namely, that the legal regime governing trade would be radically different without institutionalized dispute settlement. It is not just that WTO panels facilitate the successful implementation of trade rules or that the rationales offered by such panels placate the losers by reassuring them that resolution is fair. Reliance on adjudicative discourse has been constitutive of what "law" means in the trade regime.

The contents of decisions may matter more than the number of decisions issued. As White contends, "the opinion is not merely an epiphenomenon to the law, a slight adjunct to the real business of deciding cases and predicting what officials will do, but is central to the activities of mind and character of the law as we know and value it."[128] Not all attempts to justify a result matter equally to the development of public international law. As Steiner's critique of the Human Rights Committee's opinion writing suggests, the style, as well as substance, of the reasoned opinion matters. An opinion's persuasive authority may differ because of the strength of what it argues in terms of analytical rigor or ability to marshal prior authority, and not just because its content reflects respect for the disputants'

[125] *Id. See also* Fuller, *supra* note 21, at 366–7 (arguing that adjudication gives "formal and institutional expression to the influence of reasoned argument in human affairs;" "assumes a burden of rationality not borne by any other form of social ordering," and is a form of "social ordering" distinct from the results of contract or of voting precisely because "it must be prepared itself to meet the test of reason"). But note that Fuller does not contend that adjudication requires reasoned judgments, only that its fairness and effectiveness would be impaired without them. *Id.*, at 388–9.

[126] *See, e.g.*, Merrills, *supra* note 1, at 169 (identifying the other advantages of standing tribunals as relieving states of the expense and inconvenience of establishing ad hoc mechanisms as the need arises and as serving to remind states of the availability of peaceful dispute resolution).

[127] *But note* Patrick Norton, in "A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation," 85 *AJIL* 474 (1991)(arguing, in the context of consistent precedents concerning standards for expropriation, that ad hoc arbitrators engage in a comparable search for coherence and consistency even without benefit of institutional embeddedness because legal argument is characterized by a conservative search for stability and predictability); Durward V. Sandifer, *Evidence Before International Tribunals* at 457 (Charlottesville: University Press of Virginia, rev. edn., 1975)(noting common patterns with respect to the treatment of evidence even among ad hoc international tribunals). My argument is that reliance on precedents established by prior international tribunals is greatly facilitated by institutional permanency, not that institutional embeddedness is a *sine qua non* for such behavior on the part of international adjudicators.

[128] White, *supra* note 120, at 1368. *See also* Shahabuddeen, *supra* note 38, at 235 (noting that while the output of the ICJ affects the speed and extent to which its decisions influence the general development of law, the comparative infrequency of its decisions serve to enhance their value).

procedural rights.[129] As Steiner persuasively argues, the Human Rights Committee's formulaic recitation of all of the arguments and assertions of the parties, whether or not ultimately relevant to the holding and set forth in more or less chronological order of the pleadings, do not serve to elucidate the law or the issues that are at stake.[130] They get in the way of a clearly articulated rationale for the Committee's conclusions and its ability to engage in adjudicative law-making. For these reasons, as noted, Steiner argues that the Committee should instead organize the relevant information and selectively incorporate those aspects of the parties' arguments that identify the relevant issues and expound the law.[131] Interestingly, those aspects of the Committee's standard views that give Steiner greatest pause are precisely those that contain the clearest evidence that the Committee respects, as Mani demands, the parties' respective rights to be heard and equality of arms. If Steiner is right, the strength of adjudicative opinion writing lies not merely or necessarily in evincing respect for the parties but in educating readers. (In fact Steiner's suggested reforms for the Human Rights Committee would enhance its educative dimension at the expense of dealing with all potential disputants (as well as all their contentions) since, as noted, Steiner argues for a more selective and discretionary jurisdiction for the Committee and a more selective distillation of legal arguments.)[132]

Perhaps most obviously, the substance of an opinion matters. Opinions issued even in fora that generally adhere to fair deliberative procedures but that do not purport to pass on any general principles of international law will not elucidate those principles. The many reasoned decisions issued by administrative tribunals dealing with the international civil service, in the UN, the ILO, and elsewhere, are not usually examined for their contributions to public international law because most of these decisions do not purport to express views on public international law sources, and there is in fact some debate about the status of the "employment law" with which they are typically concerned.[133] Similarly, the opinions of the World Bank's Inspection Panels, while relevant to public international law in several respects, do not contribute to public international law to the extent they do not engage its principles but are narrowly cast as merely ensuring the Bank's

[129] For a thoughtful, if dated, enumeration of how the Strasbourg Court's judgments, including the presence of separate opinions, have contributed to its successful development of the law, see J.G. Merrills, *The Development of International Law by the European Court of Human Rights* at 21, 39 (Manchester, U.K. and New York: Manchester University Press, 1988).

[130] *See* Steiner *supra* note 74, at 39. [131] *Id.*, at 39–40. [132] *Id.*, at 46.

[133] For the view that the law of employment relations or "international administrative law" applied in these tribunals is a part of public international law and a brief survey of views to the contrary, see C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* at 326–35 (Cambridge, U.K. and New York: Cambridge University Press, 1996). Even Amerasinghe concedes, however, that the sources of law applied by these tribunals include the staff regulations, rules, and procedures of particular IOs as well as contracts of employment, scarcely the usual list sources of public international law. *See id.*, at 323–67. To the extent that these tribunals rely on these sources and not on, for example, interpretation of the treaty establishing the organization or on general principles of law, their contributions to public international law (as generally understood) would appear to be minimal.

compliance with its own operational policies and practices.[134] The Inspection Panel procedure, after all, is not intended to accord an opportunity for an external impartial assessment of a project's conformity with international law. It is essentially an adjudicated procedure for an organization to review its own projects.

More controversially, it might be suggested that the power of adjudicative discourse—reasoned opinions—might even be felt in settings that do not accord the disputants a fair or equal opportunity to present their respective arguments. An opinion that fully engages relevant sources of public international law and builds an argument based on the need for consistency and coherency across related fact patterns may have an impact on the law even if rendered in clearly non-judicial settings. This may explain, for example, the normative impact of opinions by the UN Legal Counsel (or of the legal office of other organizations) that have nudged the law in new directions in the course of responding to members' complaints through analytically persuasive memoranda—even though such opinions or interpretations have been issued without benefit of judicial or deliberative processes. This may also explain the normative impact of other dispute settlers, such as the UNCC or ICAO's Council, to the extent these bodies produce persuasive decisions based on analysis of the applicable law.[135]

Perhaps even quintessential political bodies, such as the Security Council, could make a contribution to the law while in dispute settlement mode if that body or, as is more likely, its individual members or its President, were to undertake conscientious efforts to justify the Council's legal conclusions in an analytically rigorous way. From this perspective, what is wrong with the Council's conclusion in Resolution 687 finding Iraq liable for any and all financial damage is the lack of legal justification—and not just that the Council did not deliberate or otherwise act as would a court. Had the Council (or even perhaps the President) done what most courts would have done prior to reaching such a conclusion—reach for arguable precedents, acknowledge the need for consistency across time and with respect to factually similar cases, and articulate a generalizable rule that made sense of arguably conflicting instances—the legitimacy of its application of these rules to Iraq and its probable impact on the law for others might have been different.

On the other hand, as is suggested by the UN Secretary-General's terse ruling in *Rainbow Warrior*, an impartial adjudicator who, after due deliberation with full and equal participation from both sides, issues a judgment that fails to justify the result reached in terms of general principles or prior practice, may settle the particular dispute at hand, and his amicable solution may contribute to the law as state practice

[134] *But see* Benedict Kingsbury, "Operational Policies of International Institutions as Part of the Law-Making Progress: The World Bank and Indigenous Peoples," in Guy S. Goodwin-Gill and Stefan Talman, eds., *The Reality of International Law* at 325 (Oxford: Oxford University Press, 1999) (discussing the more general normative impacts of certain World Bank policies).

[135] For implicit criticisms of the ICAO's Council failure to respect the procedural rights of the disputants, see Frederic L. Kirgis, Jr., *International Organizations in Their Legal Setting* at 454–5 and 474–5 (St. Paul, MN: West Publishing Co., 2nd edn., 1993).

but do little more to develop the law.[136] At the same time, judicial attempts to extract a legal question from a fundamentally political situation will not always settle the dispute between the parties—even if it contributes in some way to the development of the law. Thus, commentators have noted that the ICJ's "abstract" legal opinions in the *Conditions of Admission of a State to Membership in the UN* and in *Competence of the General Assembly for the Admission of a State to the UN*, while worthy (and ultimately successful) efforts to develop relevant institutional law, did not resolve the political question of how to admit new UN members during the Cold War.[137]

Fifthly, the structural and procedural requisites enumerated above tend to assume that the domestic court model from which these derive is equally suited to all international organizations, regardless of composition, purpose or subject matter. They rely on an "impartial" third party arbitrator modeled on the domestic court judge. Lon Fuller, for example, warns of the "mixed" form of adjudication consisting of an impartial arbitrator flanked by two selected by the respective parties. For Fuller, the problem lies in the party-selected arbitrators who can be "neither wholly advocates nor wholly judges" and the attendant risk that the process will degenerate into a "mere continuation of bargaining."[138] Mani, discussing the ICJ's provisions for ad hoc judges, echoes the same concerns.[139] Yet, as noted, many of the dispute settlers canvassed here, such as the ICAO's Council, contain aspects that suggest Fuller's "mixed" form and many judicialized dispute settlers engage in results-oriented decisions that are hard to distinguish from forms of bargaining or negotiation. The world of institutionalized international dispute settlers suggests the truth of Shapiro's observations concerning domestic courts, namely, that "no rigid prototype of court is applicable to the real world," that many contain elements of negotiation and mediation, and that "most triadic conflict resolvers are deeply embedded in the general political machinery of their regimes."[140] Moreover, other aspects of international dispute settlement, for example, the ability of some of these to offer "advisory" opinions, have long been regarded as "unusual" from the standpoint of most domestic courts.[141]

[136] This may occur with respect to particular topics or areas of the law even when these are repeatedly addressed by impartial judges in otherwise carefully reasoned opinions. *See, e.g.*, Christine D. Gray, *Judicial Remedies in International Law* at 59–108 (Oxford: Clarendon Press, 1990)(noting the perfunctory treatment of the subject of remedies in the ICJ and the consequential adverse effects on the development of satisfactory law).

[137] *See* Shabtai Rosenne, "The Cold War and the International Court of Justice: A Review Essay of Stephen M. Schwebel's Justice in International Law," 35 *Va. J. Int'l L.* 669, at 673 (1995).

[138] Fuller, *supra* note 21, at 396.

[139] *See supra* at text and note 22. But note that Franck, on the contrary, embraces the ICJ's provisions for appointment of ad hoc judges as part of that institution's contribution to perceptions of structural fairness. *See supra* note 102. Party-appointed judges, such as ad hoc judges on the ICJ, might also be defended as a mechanism to enhance the likelihood that the third party adjudicator will produce a more nuanced or analytically rigorous opinion that is more thoroughly responsive to all the arguments raised by both disputants.

[140] Shapiro, *supra* note 1, at 37.

[141] *See, e.g.*, Lachs, *supra* note 38, at 246–7 (noting that it is unusual for a court to give advice and noting that some opposed the ICJ's advisory jurisdiction on the basis that it was incompatible with the judicial function or the traditional role of courts). Lachs goes on to defend advisory opinions and argues that they offer the Court much greater potential to develop the law than contentious cases that limit the judges to the facts. *Id.,* at 249–50.

The ILO's various modes of dispute settlement, for example, suggest the unique impact of that organization's tripartite membership. The ILO's alternative conception of general law-making (see Chapter 7), grounded in its tripartite composition, extends to some forms of ILO adjudicative law-making. To the extent the ILO's tripartite committees for dispute settlement discussed in Chapter 7 successfully develop international labor law, such adjudicative law-making occurs in a context that differs in a number of ways from domestic courts' "ideal of law." Committees appointed under articles 24 and 25 of the ILO's constitution, as discussed, replicate the tripartite membership of the organization as a whole and presumably the biases of (respectively) government, labor, and employer representatives. These are not the "independent" or "impartial" adjudicators of the rule of law model. Moreover, such Committee reports are ultimately under the jurisdiction of the ILO's Governing Body, another tripartite and political organ that can scarcely be regarded as "impartial" under any traditional criteria. Further, considering that "representations" to this process are filed by associations of employers or employees, it is not precisely accurate to suggest that the "docket" before these Committees is wholly independent of its membership. While Committee members may not have brought the representation at issue, most of the adjudicators are associated with groups that have articulated views (or related interests) concerning the matter at hand. Further, the Governing Body ultimately responsible for handling such representations does not hold itself aloof from the political and power relations within the ILO. Indeed, that Body has the power, under the ILO constitution to recommend to the General Conference of the ILO such action as "it may deem wise and expedient to secure compliance."[142] This is dispute settlement that on its face does not hold itself out as limited to "indirect" legal remedies, such as the issuance of a declaratory judgment. It is dispute settlement undertaken by the same arguably self-interested groups as compose the organization as a whole and that is not clearly distinct from the more politicized tasks undertaken by that organization.[143] While, as noted in Chapter 8, the ILO also employs a form of dispute settlement that is closer to the "ideal of law," namely, Commissions of Inquiry composed of labor law experts, the differences between the adjudicative law-making engaged in by these two forms of dispute settlement are not clearly demonstrable in ILO practice. Both Committees under the article 24 and 25 procedure and Commissions of Inquiry have issued reasoned opinions that attempt to develop international labor law. While the ILO's constitutional provision permitting the Governing Body to appoint a Commission of Inquiry as the culmination of an article 24 and 25 procedure appears to anticipate that the more apolitical "expert" body could serve as a form of appeal, this rarely

[142] ILO Constitution, 15 UNTS 35 (adopted October 9, 1946)(as amended), article 33.

[143] *See generally* Victor-Yves Ghebali, *The International Labour Organisation: A Case Study on the Evolution of U.N. Specialised Agencies* (Boston: M. Nijhoff, 1989); James A. R. Nafziger, "The International Labor Organization and Social Change: The Fact-Finding and Conciliation Commission on Freedom of Association," 2 *NYU J. Int'l L. & Pol.* 1 (1969). *See also* Section 7.2.4 (discussing interplay between ILO adjudicative processes and the organization's role in treaty-making).

occurs. Moreover, even assuming that Commissions of Inquiry have a relatively freer hand in filling legal gaps and might issue opinions likely to be regarded as more influential, this does not lessen the law-making aspects of the Committees involved in the article 24 and 25 dispute settlement process.

To the extent all ILO dispute settlement bodies successfully develop ILO law, they do so through a process that is hard to distinguish from "legislative" or "implementation" processes within the ILO. As noted, the ILO's treaty-making is characterized by periodic reports both leading to, and subsequent to, ratification of ILO Conventions. The organization's implementation efforts with respect to such ILO legislation rely on periodic reports of compliance. A Committee report responding to an article 24/25 complaint that leads the ILO Governing Body to publish the representation (along with the government's response) and brands the response as "unsatisfactory" is hard to distinguish from, for example, a comparable response made by the ILO's Governing Body to a member's inadequate annual report of compliance with ILO conventions generally or with comparable implementation schemes in other regimes (such as the Human Rights Committee's scrutiny of human rights reports under the Covenant on Civil and Political Rights).

While ILO dispute resolution is probably not "judicial" in the traditional sense, we need to be cautious about automatically assuming that such processes do not (or cannot properly) lead to the development of law. To the extent the ILO's dispute settlement processes develop that regime's law, the process works for the same reason (and possibly to the same extent) as do the ILO's legislative and implementation efforts: because the organization's tripartite membership reflects the competing interests at stake with respect to labor issues, and the political balance achieved by such representation confers the legitimacy that "impartiality" confers in other contexts. If this is the case, we should also expect that many of Mani's procedural requisites become less significant in this context. To the extent a disputant in the ILO believes that its interests are represented among the tripartite adjudicators, a formal right to be heard and to equality of arms with respect to procedures, along with auxiliary rights, such as the right to compose the tribunal, may be less significant.[144] Others have suggested the importance of contextual factors unique to other institutional settings.[145]

[144] In any case, as is suggested by both ILO dispute settlement and the approach adopted by ICAO's Council for resolving disputes, see *supra* at text and notes 113–14, we should not readily assume that non-judicial entities, even those having governmental representatives, cannot adopt formal rules that respect the respective parties' rights to be heard. Further, as both the ILO and ICAO examples demonstrate, non-judicial dispute settlers can also engage in fact-finding as well as the application of law to fact.

[145] Thus, Bernhardt has enumerated reasons why human rights regimes, and the European system in particular, require more dynamic or teleological forms of treaty interpretation peculiarly amenable to adjudicative law-making. *See* Rudolf Bernhardt, "Thoughts on the Interpretation of Human Rights Treaties," in Franz Matscher and Herbert Petzold, eds., *Protecting Human Rights: The European Dimension, Studies in Honour of Gérald J. Wiarda* (Köln: Carl Heymanns Verlag, 1988). Karen Alter has identified the many factors, unique to the European Union, that facilitate adjudicative law-creation in that regime as well as generate peculiar forms of resistance. Karen J. Alter, "The European Union's Legal System and Domestic Policy: Spillover or Backlash?," 54 *Int'l Org.* 489 (2000).

Sixthly, the structural and procedural requisites ignore a point that would be obvious to positivists: adjudicative law-making may be barred or limited in some respect by the sources of law that are available or authorized to the dispute settler. Provisions on choice of law may limit what adjudicators feel that they have discretion to do, thereby precluding or limiting the dispute settler's adjudicative law-making (and perhaps their dispute settling) role. This is certainly suggested by the result at the provisional measures stage of the *Lockerbie case* where the ICJ, faced with a Council decision under Chapter VII ordering Libya to "provide a full and effective response" to the request made by France, the UK, and the United States, declined to order the provisional relief sought by Libya. The text of that decision suggests that the majority of the judges believed that article 25's duty on all UN members to abide by any binding decisions reached by the Council prevented the Court from indicating provisional measures of relief.[146] When considering Libya's claims on the merits, the Court upheld its jurisdiction but, one suspects that its judgment on the merits, had the case not been settled by the parties, nonetheless would have been constrained by the narrow basis on which the Court found jurisdiction: namely, to determine whether Libya's rights under the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation were violated.[147]

By the same token, the text of article 25 and the expansive Chapter VII powers given to the Security Council have considerably enhanced that body's dispute settlement and adjudicative law-making powers. As with respect to decisions reached in the course of dispute settlement by the IMF's Executive Directors, a political body's adjudicative decisions are regarded as having legitimate and discernible law-making impacts, in part because a binding treaty makes their underlying decisions authoritative. Council determinations with respect to Iraq's financial liability or its borders may have broad normative impacts simply because these decisions are binding on Iraq and all UN members under the Charter. Similarly, the IMF's interpretative decisions are rendered at least presumptively legitimate because all IMF members have bound themselves to abide by them. Security Council decisions rendered in the course of dispute settlement, just like Council decisions rendered in the course of enforcement action, merit scrutiny in terms of their likely broader impact because, unlike many "decisions" taken by international bodies, these are formally legally binding and, at least in the cases of the Council and the IMF, may be subject to tangible forms of enforcement. To date,

[146] *See Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, (*Libya* v. *United Kingdom* and *Libya* v. *United States*), Request for the Indication of Provisional Measures, 1992 ICJ Rep. 114. *See, e.g.*, Krztysztof Skubiszewski, "The International Court of Justice and the Security Council," in Lowe and Fitzmaurice, eds., *supra* note 11, 606, at 615–22 (arguing that SC Res. 748 left the Court with "practically . . . no choice other than inaction").

[147] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, Preliminary Objections, 1998 ICJ Rep. 9 (U.K.), 115 (U.S.).

the ICJ itself seems inclined to regard the Council's interpretation of its powers vis-à-vis the multilateral extradition treaty cited by Libya in the *Lockerbie case* as conclusive, at least for purposes of considering provisional measures.

The implications of the ICJ's *Lockerbie* decisions are, to date, unclear, but are suggestive of the relevancy of textual arguments. The majority decision in favour of denying Libya's request for provisional measures implies that there is a high, perhaps insurmountable, burden on a party attempting to argue that the Security Council's allocation of legal rights is wrong. Its view of article 25 makes it harder to contend, for example, that even though the Security Council found Iraq conclusively liable for environmental harm under such authority, such harm is not cognizable under international law in other comparable instances. On the other hand, the positivist who wishes to deny the Council any such general law-making powers is not without textual arguments. As the abundant literature on litispendence recognizes, the UN Charter suggests that the ICJ, not the Council, has jurisdiction over legal disputes, and that the Council's role in dispute settlement is limited to the making of recommendations.[148] On this view, the legal conclusions reached in Resolution 687 with respect to Iraq's financial liability, for example, even if not *ultra vires* and illegal with respect to Iraq, carry no weight as a norm of general international law since the Council is not authorized by the Charter to engage in either dispute settlement or adjudicative law-making. While the cynic would argue that the competing Charter provisions leave the question unresolved, textual arguments have carried the day in other instances and have, for example, been cited to prevent the Council itself from undertaking an adjudicative and possibly law-making role.[149] Comparable debates with respect to the binding impact of IMF determinations discussed in Chapter 7, as between Mann and other Fund commentators, are based not only on competing visions of what constitutes "proper adjudication" but also on competing interpretations of specific provisions in the IMF's general articles.

Substantive treaty provisions establishing the quasi-judicial and judicial entities of Chapter 8 may also affect those bodies' law-making capabilities. Those with the explicit power to issue legally binding decisions—e.g., the ICJ in contentious cases, the WTO's DSB, regional human rights courts, and the ECJ—enjoy advantages in terms of recognition as adjudicative law-makers over those that do not, such as, for example, UN human rights bodies under specialized treaty arrangements. All else being equal, a judgment that requires, at a minimum, that the disputants respect the verdict rendered is likely to draw more exacting scrutiny than one that does not. All else being equal, such a judgment may also elicit more

[148] *See* Article 36(1) UN Charter (Council may "recommend" appropriate procedures or methods of settlement), Article 36(3) UN Charter ("legal disputes" should be referred by the parties to the ICJ). *See, e.g.*, John W. Halderman, *The United Nations and the Rule of Law: Charter Developments Through the Handling of International Disputes and Situations* at 65–89 (Dobbs Ferry, NY: Oceana Publications, 1966).

[149] *See, e.g.*, Halderman, *supra* note 148, at 73 n. 18 (citing an instance in which the U.S. successfully resisted a Soviet attempt to get the Council to make a legal determination concerning the Soviet shooting-down of a U.S. plane over the Barents Sea).

care from the adjudicators and therefore reinforce other factors that we have associated positively with adjudicative law-making (such as analytically rigorous opinions). But other provisions, such as article 59 of the ICJ Statute, providing that decisions of the Court have "no binding force except between the parties and in respect of that particular case," or article 3(2) of the WTO DSU, providing that the DSB's rulings cannot "add to or diminish the rights and obligations provided in the covered agreements," suggest that not everything is equal. Both articles 59 and 3(2) have provided considerable fuel to positivistic contentions against the legitimacy of adjudicative law-making within these respective regimes and among international adjudicators generally.

The meaning and import of articles 59 of the ICJ's Statute and 3(2) of the WTO DSU remain unclear. From a common law perspective, it is not self-evident whether the drafters meant that the ICJ was barred from adopting the doctrine of *stare decisis*[150] or, as may be more likely, whether the drafters only meant that only parties to a decision were bound by the Court's determination as a matter of *res judicata*.[151] Moreover, as with respect to most textual contentions regarding international organizations, such provisions must also be measured against institutional practice. Whatever was the original intent of article 59, or of article 3(2) of the WTO DSU, it is clear that ICJ judges, like WTO dispute settlers, accord considerable deference to their own prior judgments and, when they seek to depart from prior caselaw, attempt to "distinguish" the prior case in a way that is scarcely different from that which would be undertaken by a common law court. The hold that its prior cases have on the ICJ is scarcely surprising, given article 38's direction to that Court to consider prior judicial decisions (national and international) as subsidiary evidence of sources of law. Comparable reliance on prior "precedents" occurs with respect to virtually all the quasi-judicial and judicial dispute settlers canvassed in Chapter 8. Indeed some have suggested that at least some of these bodies adhere to a more rigid, if de facto, notion of *stare decisis* than any seen in most common law jurisdictions.[152] Nonetheless, the potential

[150] Article 59 of the ICJ Statute has routinely been read as indicating the inapplicability of the doctrine of *stare decisis* to all international tribunals governed by international law. *See, e.g.*, *Trendtex Trading Corporation* v. *Central Bank of Nigeria* [1977] QB 529, at 554 (Lord Denning) ("International law knows of no rule of *stare decisis*"). But the ICJ itself has apparently never invoked article 59 as a license to overturn or ignore a prior decision, and even if one accepts the premise that international law has no rule requiring adjudicators to be legally bound by prior precedent, this would not prohibit adjudicators from basing their decisions voluntarily upon their own or others' prior decisions. *See* Shahabuddeen, *supra* note 38, at 67–109 (concluding that *stare decisis* does not apply within the ICJ but that this does not prevent the Court from developing the law through precedent).

[151] Nor are these the only interpretative possibilities. In at least one instance, the ICJ has suggested that article 59 is intended to protect the rights of third parties who otherwise might be disadvantaged by, for example, a territorial or boundary ruling. *See, e.g.*, *Case Concerning the Frontier Dispute (Burkino Faso/Mali)*, 1986 ICJ Rep. 554, at 577, para. 46 (noting that the rights of Niger, not a party to the dispute at issue, were "safeguarded by the operation of article 59").

[152] For an argument that the WTO forego its hypocritical rejection of *stare decisis* and embrace it, see Raj Bhala, "The Myth about *Stare Decisis* and International Trade Law (Part One of a Trilogy)," 14 *Am. U. Int'l L. Rev.* 845 (1999).

limiting role of textual provisions like article 59 of the ICJ's Statute or article 3(2) of the WTO's DSU—both of which have been read to bar or severely constrict adjudicative law-making, albeit in different ways—cannot be ignored. Such provisions, along with specific limitations on a dispute settler's remedial powers, have a constraining impact on law-making independent from structural or procedural concerns.[153]

Seventhly, exclusive reliance on structural and procedural requisites for the legitimacy of adjudicative law-making fails to acknowledge the implicit tensions between the roles of dispute settler and law-giver inherent in the Shapiro triad.[154] Adjudicators may refuse to answer a party's legal contentions for fear of prompting Shapiro's "two against one" perception and the possible breakdown of the dispute settlement process. Adjudicative law-making sometimes fails to occur—no matter how structurally or procedurally legitimate the dispute settler may be—due to the dispute settlers' concerns that their law-making efforts, even if limited to interstitial gap-filling, may prove unacceptable to the disputants or to the IO membership more generally. To a much greater extent than domestic courts, all international dispute settlers, even the most securely established, operate in a context where the third party adjudicators realize that their actions could serve to marginalize them in subsequent disputes. Such fears may be all the greater where, as in the WTO, "legislative" efforts to correct dispute settlers' mistakes by the contracting parties are difficult or improbable. Such fears may induce caution, particularly if the dispute settlers operate on the basis of an informal "consensus" model where the lowest common denominator results in narrow holdings.

Refusing to decide a case on the basis of justiciability, admissibility, mootness or for failure to state a cognizable claim may be, as Antonio Perez has suggested, ways for international dispute settlers to defend their institutional legitimacy through the exercise of the "passive virtues."[155] In the *Lockerbie case*, the ICJ's reluctance to tread on the Council's discretion, at least for purposes of granting provisional

[153] *Compare* J.G. Merrills, "The International Court of Justice and the Adjudication of Territorial and Boundary Disputes," 13 *Leiden J. Int'l L.* 873, at 884–5 (2000) (defending the ICJ's unwillingness to consider the rights of indigenous peoples in territorial disputes on the grounds that the "Court's function is to apply the law not make it") *with* W. Michael Reisman, "Protecting Indigenous Rights in International Adjudication," 89 *AJIL* 350 (1995) (criticizing the Court for failing to consider such issues). Interestingly, although Reisman argues for "actualization" as a mode of interpretation, by which he means the reading of "contemporary values" into older principles such as *uti possidetis*, see Reisman, *supra* at 360, he also suggests that consideration of indigenous claims would be consistent with original conceptions of *uti possidetis* since that Praetorian edict defended the rights of those who openly and peacefully possessed property. *Id.*, at 252, n.8. This implicitly acknowledges the power of the myth, perpetuated by article 59 of the Court's statute, that ICJ judges can only "discover," not make the law. Remedial limitations on other dispute settlers, such as the WTO's Appellate Body's apparent inability to remand a dispute to a GATT panel for further fact-finding, also impose limits on adjudicative law-making. *See* David Palmeter, "The WTO Appellate Body Needs Remand Authority," 32 *J. World Trade* 41 (1998).

[154] *See* Section 9.2, *supra*.

[155] *See* Antonio F. Perez, "The Passive Virtues and the World Court: Pro-Dialogic Abstentation by the International Court of Justice," 18 *Mich. J. Int'l L.* 399 (1997). For a more general argument against judicial law-making in the WTO, see J. Patrick Kelly, "Judicial Activism at the World Trade Organization: Developing Principles of Self Restraint," 22 *Nw. J. Int'l L. & Bus.* 353 (2002).

relief, is, if anything, overly determined. The majority of the judges probably seized on a broad interpretation of article 25 to avoid prompting a constitutional crisis that would likely have left the Court diminished as an effective dispute settler.[156] Adjudicators disinclined to engage in law-making in particularly unsettled areas of the law may exercise the passive virtues not by dismissing a case but by limiting their decision to the facts or refusing to permit a third party to intervene.[157] Such might have been the case with respect to some of the ICJ's decisions in response to maritime demarcation claims before the law in this area was settled in the Law of the Sea Convention, for example, and it has been suggested that this may explain narrow ICJ decisions with respect to Nauri or East Timor.[158] It is also the explanation offered, for example, by the late Ted Stein for the Iran-United States Claims Tribunal's refusal to disregard choice of law clauses contained in private contracts that agreed to submit disputes to Iranian courts, in the face of U.S. claims that such clauses should not be regarded as valid.[159] Adjudicative law-making may be curtailed or limited precisely because, and to the extent, these institutionalized dispute settlers aspire to permanency or seek to maintain their on-going viability as part of an on-going regime.[160] In yet other instances, the disputants may decline to

[156] For an argument the ICJ's power to "judicially review" the Security Council is most likely to proceed through small incremental steps, rather than by one bold act of judicial activitism, see José E. Alvarez, "Judging the Security Council," 90 *AJIL* 1 (1996).

[157] *See generally* Shahabuddeen, *supra* note 38, at 215–33 (discussing examples of judicial restraint by ICJ judges and its causes). The tension between acting as dispute settler as opposed to law-giver has been addressed quite often in discussing the ICJ's decisions to permit a third party to intervene under articles 62 and 63 of that Court's statute. In some instances, the Court's restrictive approach to intervention has been explained in terms of protecting the Court's jurisdictional base since states might be reluctant to submit their disputes to the Court if third parties could readily intervene. *See, e.g.*, J.G. Merrills, *International Dispute Settlement* at 121 (Cambridge, U.K.: Grotius, 2nd edn., 1991). S*ee also* Lori Damrosch, "Multilateral Disputes," in Damrosch, ed., *supra* note 7, at 283 (noting that a restrictive approach to third party intervention facilitates ad hoc submissions to the Court); Franck, *supra* note 17, at 344–5 (noting prudential reasons for a restrictive view including to facilitate case management, to expedite proceedings or to facilitate settlement). On the other hand, denying a third party's right to intervene, as in the case of El Salvador in the *Nicaragua case*, may reduce the Court's opportunities to clarify the law.

[158] *See generally* Gavan Griffith, "Commentary," *ASIL Proceedings of the 95th Annual Meeting*, (April 4–7, 2001), at 35; Barbara Kwiatkowska, "Case Note," 95 *AJIL* 162 (2001). For another controversial example of dispute settlers who were arguably overly cautious, see, e.g., *Southern Bluefin Tuna* (*Australia and New Zealand* v. *Japan*), Jurisdiction and Admissibility, Arbitral Tribunal, August 4, 2000 (denial of jurisdiction under the Law of the Sea Convention). Note that even cases like *Bluefin Tuna*, however, engage in law-making, albeit with respect to significant procedural issues such as litispendence between distinct dispute settlement treaty regimes. *See* Kwiatkowska, *supra*. But note that some believe that a judicial decision that applies only for a particular case is "inadmissible." *See* Judge Armand-Ugon, *Barcelona Traction, Light and Power Company*, 1964 ICJ Rep. 165; Shahabuddeen, *supra* note 38, at 235–6.

[159] Ted Stein contended that the Tribunal prudently rejected U.S. arguments that post-revolutionary Iranian courts could no longer be trusted to deal with claims involving U.S. claimants. *See* Ted Stein, "Jurisprudence and Jurist's Prudence: The Iranian-Forum Clause Decisions of the Iran-United States Claims Tribunal," 78 *AJIL* 1 (1984).

[160] For explanations of the emergence of the ECHR's "margin of appreciation" on such grounds, see, e.g., R.St.J. Macdonald, "The Margin of Appreciation," in R.St.J. Macdonald et al., eds., *The European System for the Protection of Human Rights* at 83 (Dordrecht, Boston: M. Nijhoff, 1993).

give the dispute to the third party because of similar concerns. This may explain, for example, why the WTO's DSB was not ultimately pressed into resolving the European Union's complaints concerning the GATT-consistency of the U.S. Helms-Burton legislation, and why the parameters of the national security exception within the WTO remain notoriously ill-defined.[161]

* * *

There is no scarcity of explanations for the growth of international dispute settlement mechanisms and for their differing design and evolution. Political scientists especially have found the proliferation of international dispute resolution mechanisms to be something of a mystery. They have sought some explanation for why nation states, traditionally jealous of their sovereignty, should spend vast amounts of energy and resources to establish mechanisms that, in the end, are intended to constrain their sovereign prerogatives. As James McCall Smith asks, what accounts for the "puzzling delegations of authority by sovereign states to supranational judiciaries" that, as in regional trade pacts, constrain political leaders' abilities to manage the unforeseen costs of adjustment to free trade policies by making it more costly to provide relief to specific groups injured, limit their general policy autonomy across a range of domestic regulation, and hamper their resort to pursue bilateral trade policies that offer distinct political advantage?[162] Smith, like others, has tried to provide rationales for why such mechanisms appear in some regimes but not others and to explain why, when they do exist, they differ so markedly, along a spectrum from more "diplomatic" to more "legalistic" procedures.[163]

At the most general level, functionalists like Derek Bowett have responded that the trend from ad hoc to institutionalized forms of dispute settlement simply reflects "attempts to make an undertaking to arbitrate effective by ensuring that a tribunal, capable of adjudicating upon the dispute, shall exist."[164] This assumes

[161] For the view that pressing that case could have undermined political support for the WTO in the U.S., see, e.g., John A. Spanogle, "Can Helms-Burton Be Challenged Under WTO?," XXVII *Stetson L. Rev.* 1313, at 1336 (1998). *See also* Michael J. Hahn, "Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception," 12 *Mich. J. Int'l L.* 558 (1991) and Antonio F. Perez, "WTO and UN Law: Institutional Comity in National Security," 23 *Yale J. Int'l L.* 301 (1998) (discussing the contours of the WTO's "national security" exception and the meagre caselaw).

[162] James McCall Smith, "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts," 54 *Int. Org.* 137, at 138, 145 (2000).

[163] For Smith, the legalism of a regime's dispute settlement mechanism is defined by (1) whether it contains an explicit right to third party review of complaints regarding treaty application and interpretation or only, for example, mediation or conciliation; (2) the legal status accorded to any rulings issued by the third party and whether these are subject to approval by member governments (as in the pre-WTO trade regime); (3) the number, term, method of appointment, and credentials of the third party adjudicators; (4) which entities (member governments only, regime organs such as the secretariat, or individuals) have *locus standi* to file complaints; and (5) the types of remedies (if any), accorded in cases of treaty violation (from retaliatory sanctions to direct effect in local law). Smith, *supra* note 162, at 139–43.

[164] Derek W. Bowett, *The Law of International Institutions* at 258 (London: Stevens, 4th edn., 1982).

that states that enter into treaties intend to abide by them, and that provisions for international dispute settlement are merely attempts to make sure that others will as well.[165] International dispute resolution, on this view, is essentially a means to assure reciprocal enforcement of rules that states believe further their interests. Such an account of the creation of these mechanisms implicitly relies on a rational actor model: effective dispute resolution emerges when it maximizes the interests of the unitary state actors that establish and sustain them. Schermers and Blokker invoke the same rationale. They contend that international judicial organs are "primarily created to settle disputes between states," and suggest that the prevalence of dispute settlement mechanisms among IOs responds primarily to the need states have for controlling the legality of an organization's decisions. They argue that the need for judicial control is strongest in IOs empowered to take binding decisions by majority vote (as with respect to the ECJ), and that effective dispute settlement is less likely to emerge when IOs cannot take externally binding decisions, or when every state feels itself sufficiently protected by a right to veto any such decisions.[166] More sophisticated, game-theoretic versions of the rational actor model explain mandatory dispute settlement mechanisms as attempts to resolve prisoners' dilemmas. From this perspective, binding dispute settlement mechanisms are more likely when the need to secure compliance with a regime's norms outweighs the reputational or other costs that must be borne in the event of breach.[167]

Functionalist arguments have also appeared to explain design differences among dispute settlers. Thus, some have suggested that when states are committed to deep integration across a number of regulatory fields, as in, most prominently, the European Union, highly legalistic mechanisms are required given the technical complexity of the anticipated level of cooperation. Highly ambitious treaty commitments, necessitating the compatibility of, for example, health, safety, and competition policies, or anticipating the broadening of trade liberalization to cover new areas such as services, intellectual property or investments, require, in this view, equally ambitious dispute settlers capable of crafting applicable rules.[168] Evidence for this functionalist explanation is found not merely in the ECJ but in the NAFTA's five mechanisms for dispute resolution

[165] *Cf.* Andrew T. Guzman, "The Cost of Credibility: Explaining Resistance to Interstate Dispute Settlement Mechanisms," 31 *J. Leg. Stud.* 303 (2002) (suggesting that this is a common, if mistaken, view among international lawyers).

[166] Schermers and Blokker, *supra* note 14, at 427–8. *See also* Romano, *supra* note 3, at 729–38 (accounting for the proliferation of international judicial bodies on the grounds that they are the "precipitate of the accrued normative density of the international legal system" but also attributing their growth to the end of bipolarism, the abandonment of Marxist-Leninist interpretations of international relations, and the rise of capitalist, market-based economies).

[167] *See, e.g.*, Guzman, *supra* note 165 (arguing that dispute resolution clauses are most likely when rates of compliance are expected to be high, with respect to smaller stakes commitments where the marginal impact of adjudicative decisions is small, and when the adjudicator is constrained to examining norms that the parties are equally likely to violate).

[168] *See* Smith, *supra* note 162, at 172.

(for general disputes, Chapter 20; unfair trade laws, Chapter 19; investment, Chapter 11; and under the side agreements on labor and the environment).

Liberal theorists, anxious to break free of the unitary rational actor mindset, have looked for explanations within states: that is, within the interest groups that comprise them.[169] They argue that the key to the differing dynamics of "inter-state dispute resolution" (characterized by the ICJ) and "transnational" dispute resolution (characterized by the ECJ) is access. Transnational dispute settlers that grant *locus standi* to individual claimants provide incentives for domestic actors to mobilize, to increase the legitimacy of their claims, and enables adjudicative law-making expansion. Ready access to a transnational tribunal can create a "virtuous circle: a steady stream of cases results in a stream of decisions that serve to raise the profile of the court and hence to attract more cases."[170] The "private attorneys-general" of transnational dispute settlement are seen as the engines of adjudicative law-making. Thus, the European legal order has been memorably portrayed as built on the dynamic between national courts, individual litigants, and the ECJ.[171] WTO dispute settlement, whose inter-state cases often reflect private business concerns, is seen as at an "intermediate" stage between the inter-state and transnational dispute resolution ideal types.[172]

Other political scientists, within the more realist tradition, have been more skeptical of the significance of international dispute settlers—at least on the real world practice of states. This is certainly implied by those who contend that international organizations, and presumably their dispute settlement mechanisms, merely reflect or ratify the existing distribution of power among states.[173] For them, as presumably for some critical legal theorists, such mechanisms merely mask policy preferences in legal guise.[174]

Smith pursues an interesting hybrid of "neoliberal institutionalist logic and structural realist indicators of relative economic power."[175] His empirical survey of more than sixty regional trade agreements highlights the political factors that in his view help explain why in some but not all of these pacts, the contracting parties opted for highly legalistic forms of dispute settlement. Smith stresses two central explanatory variables: the degree of "symmetry" between the contracting

[169] For an introduction to liberal theory, see Chapter 1.

[170] Keohane, Moravcsik, and Slaughter, *supra* note 75, at 482–3.

[171] *See, e.g.*, Stone and Brunell, *supra* note 82; Anne-Marie Slaughter and Walter Mattli, "Europe Before the Court: A Political Theory of Legal Integration," 47 *Int'l. Org.* 41 (1993).

[172] Keohane, Moravcsik, and Slaughter, *supra* note 73, at 485–7. *See also* Frederick M. Abbott, "NAFTA and the Legalization of World Politics: A Case Study," 54 *Int'l Org.* 519, at 536–7 (Summer 2000) (describing the NAFTA's two distinct mechanisms for antidumping/counterveiling duties and investment disputes respectively as more in the nature of "transnational" dispute settlement due to the involvement of private parties).

[173] *See, e.g.*, John J. Mearsheimer, "A Realist Reply," 20 *Int'l Security* 82 (1995); Geoffrey Garrett, "International Cooperation and Institutional Choice: The EC's Internal Market," 46 *Int'l Org.* 533 (1992).

[174] *See generally* Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki, Finland: Lakimiesliiton Kustannus, 1989).

[175] Smith, *supra* note 162, at 173.

state parties to these pacts (with high symmetry defined to mean trading partners whose relative economic size and bargaining leverage are approximately equal to one another) and degree of integration sought.[176] Smith argues that legalistic dispute settlement is unlikely where asymmetry is high or integration is shallow.[177] He contends that trade pacts among highly asymmetrical partners—where, for example, a single member country is much larger than its partners and might be regarded as the regional hegemon—are less likely to resort to highly legalistic forms of dispute settlement, such as a standing tribunal whose rulings have direct effect. For Smith, this is because such hegemons are likely to get their way in regional trade negotiations and they (and private traders within them) have less incentive to trade off policy discretion in favor of the enhanced treaty compliance that is likely to emerge with legalized dispute settlement. Such regional hegemons are less likely to be dependent on trade and more likely to be willing and able to resort to pragmatic self-help remedies when they need to assert the rights of their businesses abroad. Domestic political concerns, in short, help explain the resistance of regional powers to legalized dispute settlement. But Smith argues that the degree of integration remains an important variable as well, both because deeper forms of integration may functionally require a more judicialized process and because they promise to generate more positive gains to overcome the disadvantages of dispute settlement. (Nonetheless, Smith contends that this factor is not determinative, since his sixty trade pact set includes six anomalous cases of deep integration evincing little or no resort to legalistic dispute settlement.)[178]

9.3 Interim Conclusions

The conclusions suggested in this chapter with respect to the nature of international dispute settlement as well as the likelihood of adjudicative law-making will prove undoubtedly frustrating to those interested in parsimonious accounts susceptible to wide application. The generalizations suggested in Section 9.1, based on Shapiro's triad and Fiss's more normative perspective, rely on too many variables, and are not readily adaptable to modeling or easy empirical verification. More frustrating still, the generalizations offered contradict more than they complement one another. Section 9.1 suggests that institutionalized dispute settlers may be regarded as both triadic conflict resolvers as well as guardians of public values, a description that seems to contradict both Shapiro's and Fiss's respective approaches, at least to the extent these are intended to be alternative conceptions.

The thick description suggested by Section 9.2 is no less amenable to easy categorization. Section 9.2 seems to suggest that all else being equal, a dispute

[176] *Id.*, at 147–50. [177] *Id.*, at 173. [178] *Id.*, at 172.

settler that shares the characteristics described by Steiner, Franck and Mani—one who looks like and quacks like a domestic court—is more likely to attempt (and to be successful at) adjudicative law-creation. Yet the seven caveats appended to this conclusion complicate matters greatly as they suggest that these familiar structural and procedural requisites are neither necessary nor sufficient conditions to explain the adjudicative law-making phenomenon or the impact that particular dispute settlers have on distinct topics of international law, including institutional law and regime-specific rules. Section 9.2 argues that adjudicative law-making requires examining the dynamic interplay between dispute settlers and other actors, including political actors' reactions and adjudicators' self-imposed limits on their discretion. It suggests that even dispute settlers that appear non-judicial in composition or non-judicious in structure and procedures, such as IO legal secretariats and the ILO's tripartite bodies, may have an impact on areas of the law through the issuance of reasoned opinions that appeal to and resonate with traditional forms of legal discourse. Further, even though all of the seven caveats enumerated in Section 9.2 relate to or emerge from these dispute settlers' aspirations for permanency or their embeddedness in an international organization, that section resists enumerating the "essential" characteristics of such permanent bodies—as opposed to, for example, ad hoc arbitration. Section 9.2 concludes that while *institutionalized* dispute settlers share certain characteristics that help to explain their individual impact on the law, it is foolhardy to suggest that they adhere to common procedures or that their impact on the law can be reduced to a single causal model.

The generalizations offered in Sections 9.1 and 9.2 above are unmistakably a lawyer's account. They highlight the significance of features of dispute settlement that lawyers would care about, including the impact of structure, procedure, institutional embeddedness, and style of reasoning. They focus on the internal dynamics of dispute settlement, including the strategic incentives and actual behavior of judges, much more than on the political factors addressed by Smith or liberal theorists.

This legalistic perspective casts doubt on some explanations for the rise and evolution of international dispute settlers. Given the differing levels of effectiveness even among the judicialized dispute settlers of Chapter 8, Bowett's unadorned functionalist explanation for the proliferation of these mechanisms seems unsatisfactory. There are simply too many instances in which states have created mechanisms that are only ostensibly charged with the resolution of disputes, but which are simultaneously denied the ability either to settle such disputes with finality or to engage in law-making while doing so. Whatever else it was intended to achieve, the establishment of the UN Human Rights Commission, for example, cannot be described as an attempt to make dispute settlement more "effective" through institutionalization. A permanent existence, even an affiliation to an established IO, without more, tells us little about the likelihood of effective adjudication. Schermers and Blokker's conclusions also seem descriptively

deficient. Europe aside, there are too few credible examples of organizations explicitly charged with binding legislative authority and too many examples of institutionalized dispute settlers whose principal roles have little to do with preserving the legality of an IO's acts, including, if the *Lockerbie case* is a guide to the future, the ICJ itself. Their account seems to have little relevance in explaining the origins of the large number of dispute settlers canvassed in Chapters 7 and 8 or the differences between these in terms of normative impact. Moreover, with respect to Europe, a functionalist account of the rise of the ECJ, if intended to suggest that that Court merely gives effect to the revealed preferences of member states or the most powerful among them, misses the degree to which the ECJ has itself been an independent actor engaged in "audacious acts of agency" that do not always reflect the preferences of government actors before it.[179]

The survey of international dispute settlers undertaken here prompts skepticism concerning some of Smith's conclusions as well. While his suggestion that regional hegemons like the U.S. and the European Union may stand in the way of legalized dispute settlement is a welcome respite from the usual celebration of these "liberal democracies'" singular contribution to effective international law,[180] Smith's finding on the inverse role of "asymmetry" needs severe qualification. The United States' and Europe's commitment to legalized dispute settlement has varied greatly, depending on the subject matter and the parties involved.[181] While in a number of instances these hegemons have favored the "less legalized" forms of dispute settlement canvassed here, this should not be interpreted as necessarily suggesting resistance to complying with the underlying treaty norms.[182]

Some of Smith's premises are questionable. His assumption that greater compliance automatically follows greater "legalism" seems flawed on a number of levels. There is, for example, a familiar endogeneity or selection bias problem. As Guzman contends, legalistic forms of dispute settlement are often more likely

[179] *See* Stone Sweet and Brunell, *supra* note 82.

[180] *Compare* Petersmann, *supra* note 38, at 30; Anne-Marie Slaughter, "Government Networks: The Heart of the Liberal Democratic Order," in Gregory H. Fox and Brad R. Roth, eds., *Democratic Governance and International Law*, at 199 (Cambridge, U.K. and New York: Cambridge University Press, 2000); and Anne-Marie Slaughter, "International Law in a World of Liberal States," 6 *EJIL* 503 (1995) (all suggesting that liberal democracies may be more likely to participate in international regimes and comply better with them) *with* José E. Alvarez, "Do Liberal States Behave Better?: A Critique of Slaughter's Liberal Theory," 12 *EJIL* 183 (2001)(expressing skepticism of liberal theory to this extent).

[181] The U.S., for example, has entered into binding investor-state dispute settlement in Chapter 11 of the NAFTA and in a number of bilateral investment treaties. *See* Alvarez, *supra* note 180. S*ee also* Miles Kahler, "Legalization as Strategy: The Asia-Pacific Case," 54 *Int'l Org.* 549, at 666 (2000). Kahler argues as well that the unwillingness of some regional powers to negotiate legalized forms of dispute settlement reflects asymmetries that Smith ignores, namely disparity in legal resources. *Id.*

[182] For an argument that acceptance of "soft" dispute settlement mechanisms may actually serve to enhance compliance in certain cases, see, e.g., Kal Raustiala, "Compliance & Effectiveness in International Regulatory Cooperation," 32 *Case W. Res. J. Int'l L.* 387, at 423–7 (2000). *See also* Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," 54 *Int'l Org.* 421 (2000).

from the outset if the parties assume that there will be routine compliance.[183] Legalistic dispute settlement mechanisms and relatively good compliance may indeed be positively correlated but this does not mean that the former caused the latter. Assuming otherwise would be as erroneous as implying defective compliance from the *absence* of highly legalistic remedies.

In addition, Smith assumes that a number of features of dispute resolution mechanisms, such as provisions empowering the third party adjudicator to prescribe sanctions directly or permitting their rulings to have direct effect as domestic law, are associated with "more legalism" and therefore better compliance. Such domestic law analogies have been resisted here since they ignore, as Steiner has suggested with respect to the UN Human Rights Committee, the constraints such tribunals and their adjudicators face, as well as the differing institutional contexts in which these are embedded. Contrary to what Smith suggests, involving judicial dispute settlers in the direct imposition of sanctions does not invariably depoliticize such remedies; it may instead politicize the judges. Smith's assumptions concerning direct effect suggest the over-eagerness of some to draw generalizable lessons from the European Union.[184] As Joseph Weiler and Karen Alter have argued, the European experience should not be viewed as a simple story of the empowerment of an international judiciary.[185] The ECJ's process of legalization has subtly blended direct effect with the initiative of, and implementation by, national authorities. Other regimes, including the WTO, have appeared (at least to date)

[183] *See also* George W. Downs, David M. Rocke, and Peter N. Barsoom, "Is the Good News About Compliance Good News About Cooperation?," 50 *Int'l Org.* 379 (1996)(arguing that studies that demonstrate high levels of compliance with high levels of legalization may suffer from selection bias since governments will only negotiate such agreements when they fully intend to comply).

[184] As Karen Alter has suggested, a variety of factors may account for the ECJ's relative success. *See, e.g.*, Alter, *supra* note 145, at 490–512 and Table 3 therein (discussing the unique combination of legal texts, access to dispute settlement, ability to marshal national courts' support, and enforceable remedies against violators that made the ECJ's success possible). We have no way of knowing whether these factors are replicable with respect to other regimes. *See, e.g.*, Alter, *supra*, at 516–18 (noting differences among regimes in invocable legal texts, degree of individual access to dispute settlement, the ability to solicit national judicial support, and available tools for enforcement). We also do not know whether the ECJ's relatively short-lived normative drive will continue. *See* Alter, *supra* at 512–15 (noting the possibility of "negative feedback loops" and not just a "virtuous circle" where successful litigation produces ever higher levels of international integration); Kahler, *supra* note 181, at 680–2 (noting possibility of "retrenchment" due to unanticipated domestic political consequences to legalization); J.H.H. Weiler and Joel P. Trachtman, "European Constitutionalism and its Discontents," 17 *Nw. J. Int'l L. & Bus.* 354, at 366–72 (1996–7) (enumerating recent challenges to the notions of "constitutionalization" which the ECJ's actions have helped to inspire). For a comparably over-eager suggestion from the other side of the Atlantic divide, suggesting that the evolution of the GATT/WTO's dispute settlement regime suggests its "Americanization" and that this is a general trend among dispute settlers, see Bhala, *supra* note 152, at 847–9.

[185] Weiler, *supra* note 49; Alter, *supra* note 145; Kahler, *supra* note 181, at 676. *See also* Weiler and Trachtman, *supra* note 184, at 354 (warning of the well-known dangers of "borrowing" from one legal system to another and noting that "law, like any other human institution, always has a history"). *See also* Merrills, *supra* note 1, at 288 (discussing the importance of "social" traditions, interests and attitudes in determining methods of dispute settlement and noting Europe's unique qualities: a high degree of political and economic integration, a readiness to lay aside historic animosity, a high level of economic prosperity, and the absence of a dominant state).

to turn the *absence* of direct effect to their advantage.[186] Further, Smith's contentions imply a preference for heavily litigious strategies for effecting compliance. But, as is suggested by Chapters 7 and 8, soft or non-legalized dispute settlement, along with soft law and soft enforcement, has proven effective in some contexts both in settling disputes and in making law.[187] Dispute settlement that is not obligatory, that applies relatively imprecise standards, and that operates without the benefit of any enforceable delegation of powers to the supranational level—that, for all these reasons, is not fully judicialized—remains, after all, the most commonly found form of international dispute settlement.[188]

Game-theoretic accounts of the rise and function of some of these regimes are troublesome on two distinct grounds. First, there is the complication that the games which these dispute settlers are playing are more diverse than mere iterations of the basic prisoner's dilemma. Much of what these dispute settlers do, as with respect to *some* aspects of the ICAO regime, might more usefully be described as coordination games. This may help explain the effectiveness of soft remedies, for example. We also need to take into account a wider gamut of players than the traditional two-state models permit. Game-theoretic explanations are more difficult where, as with respect to a growing number of regional economic tribunals or regional human rights courts, all identified in the PICT Chart, we must take account of the needs, intentions and actions of private claimants and not merely unitary state actors.[189]

But the second difficulty with game-theoretic accounts is more fundamental: to the extent they are based on the causes and effects of the pursuit of self-interest by individual rational actors, this is hard to reconcile with the constructivist insight that the actors themselves, as well as their interests, are being transformed by the game being played. Game-theoretical explanations do not take us very far in explaining the evolution of these mechanisms over time, their impact on the disputants or states, or their effects on the law. The trajectory of, for example, the Strasbourg Court cannot be reduced to a single constitutive decision or a series of them in which states (and only states) decided that the reputational costs of

[186] For suggestions as to why, see John H. Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis," 86 *AJIL* 310 (1992).

[187] For arguments that less legalized administrative and market-based strategies may lead to greater compliance with treaty norms in some cases than formal dispute settlement, see, e.g., Kahler, *supra* note 181, at 676; Ronald B. Mitchell, "Regime Design Matters: International Oil Pollution and Treaty Compliance," 48 *Int'l Org.* 425, at 451 (1994) (discussing the relative ineffectiveness of the sanctions regime to regulate the discharge of oil pollution). For the reasons that states might have to opt for "the softer forms of legalization," see, e.g., Abbott and Snidal, *supra* note 182, and see generally Charles Lipson, "Why are Some International Agreements Informal?," 45 *Int'l Org.* 495 (1991).

[188] *Cf.* Kenneth W. Abbott, Robert O. Keohane, Andrew Moravscik, Anne-Marie Slaughter, and Duncan Snidal, "The Concept of Legalization," 54 *Int'l Org.* 401 (2000)(discussing the extent of legalization along the dimensions of extent of obligation, the precision of norms, and degree of delegation to third parties).

[189] Thus, Guzman's conclusions, see *supra* note 165, appear singularly inapplicable with respect to, for example, the ECHR, the ECJ, or the Inter-American Court of Human Rights.

adhering to this regime were less than the costs of compliance.[190] Missing from such accounts is a sense of how the third party dispute settlers themselves change the rules of the game and help to transform the individual and collective identities of the participants, through, for example, closely reasoned and persuasive opinions.[191]

Game theorists may be correct when they suggest that binding international dispute settlement is resorted to on occasion in order to solve prisoners' dilemmas between states when these states conclude that the benefits of increased compliance resulting from such mechanisms outweigh the reputational and other costs that they must bear in the event of breach.[192] They may be correct even when they conclude, counter-intuitively, that "dispute resolution clauses are most likely when rates of compliance are expected to be high even without such clauses" and when there is a relatively low likelihood of an erroneous conclusion by the dispute settler.[193] But we cannot presume that those creating such mechanisms can correctly anticipate the likely costs of such mechanisms, including the risks of unpredictable decisions by the third party dispute settler. Nor should we presume that successful forms of binding dispute settlement ordinarily consist of dispute settlers engaged in the mechanistic and foreseeable application of precise rules. When disputants resort to the forms of international dispute settlement considered in Chapter 8 it is frequently as a last resort, when negotiations or unilateral alternatives fail or prove unsatisfactory. When states engage in high-profile international litigation—still a relatively rare phenomenon despite the proliferation of tribunals—there is a strong likelihood that the dispute involves a "hard" case. Many of the hard cases surveyed here—consider Tadic's jurisdictional challenge to the ICTY or certain environmental disputes before the WTO's Appellate Body—lead to law-making that goes in unanticipated directions. Game theorists do not clearly tell us why states remain engaged in international dispute settlement in such cases, even when their expectations for only "routine" or mechanical application of the law prove unwarranted.

But the generalizations offered here may complement other accounts, including those offered by other political scientists. Consider liberal accounts of transnational dispute resolution, including the ECJ-centered account of the rise of the European Community. Moravscik has offered, in the context of the ECHR, a liberal explanation as to why states establish international dispute resolution mechanisms, including those that combine binding dispute settlement with access to non-state parties. He has examined the negotiating positions of European states over the 1949–53 period, when the European human rights system was established, with respect to: (1) whether the system would have an independent international court with mandatory jurisdiction, and (2) whether it would grant

[190] *Cf.* Guzman, *supra* note 165.

[191] *See, e.g.*, Stone Sweet, *supra* note 33, at 163 (noting that game theorists have difficulty modeling triadic dispute settlement because the evolution of rule structures is endogenized).

[192] *See, e.g.*, Guzman, *supra* note 165. [193] *Id.*

private individuals and groups standing to file cases before such a body.[194] He finds general opposition to both among the "established democracies" of Europe (defined as those that had continuous democratic rule since before 1920 and remained so thereafter) as well as "semidemocracies and dictatorships," and general support among the more fragile "new democracies" (namely those that established democratic rule only between 1920 and 1950).[195] Moravscik concludes that this pattern is consistent with "liberal" and not realist or ideational explanations. He finds that the states that spearheaded an effective international human rights dispute settlement system were not the established democracies who, as a realist might argue, threatened or cajoled others to participate, but the new democracies which sought to stabilize democratization (and their own hold on power) through the internationalization/judicialization of rights.[196] His account explains the origins of the ECHR in terms of the self-interested efforts of domestic groups within certain European states, as opposed to the "altruistic" efforts of human rights NGOs or other "socialization" processes favored by other theorists, or the actions of regional hegemons suggested by realists.[197]

Moravcsik's explanation of how European states came to establish the Strasbourg Court does not tell us how and why these states came to deepen their commitment through the adoption of eleven protocols to the European Convention on Human Rights. His account of the origins of the Strasbourg Court does not take us through the period of 1953 to the present. He does not tell us how a system that at the outset only bound its participants to recognizing interstate complaints before a body (the Commission), capable of rendering only nonbinding views, transformed itself into a mechanism that binds all its participants to compulsory judicial jurisdiction open to individual complaints. Moravcsik himself expresses considerable ambivalence on whether his liberal explanation applies with equal force to the post-1953 period. On the one hand, Moravcsik argues that his liberal explanation of the ECHR's origins implies "that the tendency of states to enhance the credibility of domestic policies by binding themselves to international institutions may help explain the origins *and evolution* of human rights enforcement regimes more generally."[198] He counsels caution against "uncritical acceptance of certain ideational explanations for the emergence of international norms" and argues that we need to "establish methodologically

[194] Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," 54 *Int'l Org.* 217, at 231 (2000) (noting that both mandatory binding jurisdiction and individual petition "are required to render a system of international human rights adjudication effective").

[195] Under Moravcsik's coding, Belgium, Denmark, Luxembourg, Netherlands, Norway, Sweden, and the UK were classified as established democracies; Austria, France, Italy, Iceland, Ireland, and West Germany were "new democracies;" and Greece and Turkey were semi- or non-democratic. *Id.*, at 231–2. Moravcsik finds that all six new democracies, ultimately joined by Belgium late in the negotiations, supported binding human rights guarantees. *Id.*, at 232.

[196] *Id.*, at 235–43.

[197] *Id.*, at 243–6. For a brief introduction to "liberal" theories of international relations, see Chapter 1.

[198] Moravcsik, *supra* note 194, at 244 (emphasis added).

the existence of altruistic motivations and socialization processes."[199] On the other hand, Moravcsik acknowledges that the evolution of human rights regimes "are unlikely to be identical to the determinants of their founding and are therefore unlikely to be explained entirely by republican liberal theory."[200] He suggests that a "social process intervenes between original intent and ultimate evolution—a process . . . of which governments were quite aware in 1950."[201]

Sections 9.1 and 9.2, discussing the nature of international dispute settlement and how these come to have an impact on law, presume that what dispute settlers do matters—at least to the same extent as other legislative or regulatory efforts by IOs do. This and prior chapters also suggest, more generally, that the trajectory of legal development prompted by international dispute settlement is often neither predictable nor foreseeable by those who established such systems, and hence cannot be wholly explained by the interests of domestic interest groups who establish such mechanisms. As would be expected, the lawyers' account of international dispute settlement offered here attributes some degree of independent agency to dispute settlers, particularly those in Chapter 8, and implies that the level of agency once exercised matters in the real world. Lawyers find implausible an account of the evolution of the European human rights regime that would suggest that, for example, that system would have deepened even if the judges in Strasbourg had written terse judgments in the model of the Secretary-General's decision in *Rainbow Warrior* or if the judges had not fashioned their "margin of appreciation." For lawyers, Moravcsik's account is implausible to the extent it goes beyond the origins of the Strasbourg Court to suggest a general and mono-causal explanation for the *evolution* of dispute settlement mechanisms in that case or generally. Such an explanation would treat the dispute settlement institutions involved as sites of, but not agents of, cooperation.[202] Lawyers predictably resist an account that suggests that the European Commissioners and judges of the Court did not play a role in deepening that system and extending its reach both procedurally and substantively. From a legal perspective, Moravscik's account "falls short of a true appreciation of the subtle, multilevel dynamics of representation and discourse" of which the Strasbourg Court was a part.[203]

[199] *Id.*, at 248–9 (noting that alternatives to liberal theories must do more than "cite public professions of idealism, document the actions of moral entrepreneurs, or invoke the desirability of the ultimate end. Talk and even mobilization are often cheap and often redundant or futile accordingly, such evidence is often misleading . . . What seems at first to be a conversion to moral altruism is in fact an instrumental calculation of how best to lock in democratic governance against future opponents").

[200] *Id.*, at 246.

[201] *Id.*, at 246. For a view that British officials were not conscious of the ultimate evolution of the Strasbourg system when they adhered to it as Moravcsik implies, see A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001).

[202] *Cf.* Abbott and Snidal, *supra* note 70, at 7 (suggesting that Moravcsik does the same with respect to European Community institutions).

[203] *Cf.* Weiler and Trachtman, *supra* note 184, at 364 (discussing the problems with Moravcsik's comparable liberal account of the rise of European integration).

The generalizations offered in Sections 9.1 and 9.2 above suggest, on the contrary, as do the accounts of other lawyers such as Henry Schermers, that the deepening legal evolution in human rights within Europe is at least partly attributable to the "careful and reticent way Commission and Court operated during the initial years."[204] This chapter contends, but does not attempt to empirically demonstrate, that the deepening of European cooperation with respect to human rights has a great deal to do with the inherent triadic tensions of dispute settlement and how these have been resolved through reasoned legal discourse.

But the legalistic generalizations offered here need not be regarded as inconsistent with a liberal account. One suspects that Moravcsik is not fundamentally hostile to such perspectives; it is just that tracing the effects of, for example, the normative impact of ideas and judicialized rule-making is difficult to incorporate in a parsimonious causal model. Elsewhere, Moravcsik has suggested that his liberal account is entitled to theoretical primacy on the basis that even if the factors enumerated above had an impact, they did so by affecting the actions and perspectives of the domestic groups that liberal theory examines.[205] This assumes that the interests of these groups are pre-formed and are not themselves shaped by legal discourse. Yet even if we accept Moravcsik's point, this concedes that ideas and particular types of adjudicative machinations to give them effect may matter (albeit indirectly). To the extent Moravcsik is only arguing that the actions of liberal interest groups are a necessary, but not necessarily a sufficient precondition for the deepening evolution of the Strasbourg system (or other dispute settlement systems), the more legalistic explanation is not inconsistent with, and may supplement, his liberal account.

But what is too legalistic for some may be insufficiently so for others. Some international lawyers will take issue with the account offered in this chapter. The rise of judicial international dispute settlement has been associated with the triumph of the rule of law over "power politics" or "diplomacy."[206] Some have even associated the rise of binding dispute settlement, as in the WTO, with a loss of "sovereignty."[207] International lawyers have a common interest in presenting political approaches to dispute settlement, in particular negotiation or "power-oriented diplomacy," at the bottom of a normative hierarchy with judicial settlement at the top—even though, in terms of actual numbers of disputes,

[204] Henry G. Schermers, "Acceptance of International Supervision of Human Rights," 12 *Leiden J. Int'l L.* 821, at 830 (1999).

[205] *See* Moravcsik, *supra* note 194, at 540 (suggesting that the interests of domestic groups may be the only factors that matter and that the suggested significance of other factors, such as the rise in international communications or the impact of ideas, may be spurious or may matter only when these are congruent with domestic values and institutions).

[206] *See, e.g.*, John H. Jackson, *Legal Problems of International Economic Relations: Cases, Materials, and Text on the National and International Regulation of Transnational Economic Relations*, at 327 (St. Paul, MN: West Publishing, 3rd edn., 1995); Petersmann, *supra* note 38. *See also* Ragosta, *supra* note 9.

[207] *See, e.g.*, Paul Demaret, "The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization," 34 *Colum. J. Trans'l L.* 123, at 170 (1995).

perhaps ninety-nine percent of international disputes are settled by the political methods we like to disparage.[208] For most international lawyers, quasi-judicial and judicial dispute settlers is of interest because they are seen as the primary engines for legalization—not only because judges make law but because their availability casts a shadow on all disputes subject to their jurisdiction and makes settlement of such disputes *in accordance with law* more likely.[209] Further, as is suggested by those who would consider dispute settlers more legitimate to the extent that these remain aloof from the familiar tools of power politics, advances in international dispute settlement are regarded as advances in the "international rule of law" precisely because, and to the extent that, they decrease resort to political enforcement, including reciprocity-based tit-for-tat retaliation.[210] Those who would delineate sharp lines between "political" and "legal" phenomena will not be pleased by suggestions that political and judicial dispute settlers share common characteristics and may sometimes engage in similar tasks.

This chapter, by examining both political and more judicial dispute settlers together, attempts to be more faithful to a world in which all these forms of settling disputes are intermingled, often within the same institution, and must, by necessity, deal with some of the same types of disputes. Whether lawyers like it or not, international actors have sometimes regarded even relatively judicialized dispute settlers, including the ICJ and the WTO's Appellate Body, as extensions of diplomacy.[211] The uses to which even the most judicial of these bodies have been put, both before the Cold War and in its wake, are not always distinguishable from the ways political bodies have been used. Nicaragua's use of the ICJ in 1986, like the U.S. use of that Court over the 1979 taking of hostages by Iran, Iran's suit against the U.S. for the destruction of oil platforms, Libya's suits against the United Kingdom and the U.S. arising from Lockerbie, and Bosnia's suit against Yugoslavia alleging the promotion of genocide, all suggest use of the foremost international court as part of high stakes political negotiations.[212] They also suggest use of that Court to proclaim, in ways Fiss would presumably defend, community values.

Other dispute settlers have blurred the lines between adjudication and legislation. As noted, dispute settlers within the IMF and the ILO operate in ways that are hard to distinguish from the ways norms are "legislated" either in the monetary or

[208] J.G. Collier, "The International Court and the Peaceful Settlement of Disputes," in Lowe and Fitzmaurice, eds., *supra* note 11, at 364, 365–6.

[209] *See, e.g.*, Jonathan F. Charney, "The Impact on the International Legal System of the Growth of International Courts and Tribunals," 31 *NYU J. Int'l L. & Pol.* 697, at 704 (1999); Petersmann, *supra* note 38, at 48.

[210] *See generally* Petersmann, *supra* note 38.

[211] For the view that this is how the European Union, for example, viewed the WTO's DSB when it initially sought consideration by that body of the U.S. Helms-Burton legislation, see Spanogle, *supra* note 161, at 1338. Political scientists are far more apt to reject rigid dichotomies between "legalization" and "world politics." *See, e.g.*, Abbott, Keohane et al., *supra* note 188, at 419; Stone Sweet, *supra* note 33.

[212] *See, e.g.*, Keohane, Moravcsik, and Slaughter, *supra* note 75, at 481.

labor regimes. Others, such as the WHO's mechanisms for resolving disputes under its Health Regulations, combine more judicial mechanisms (expert bodies) with more political ones (the Health Assembly). In other instances, even the most political of bodies, such as the Security Council, and those with clearly "mixed" composition, such as the ILO's Governing Body Committee on Freedom of Association (GBFA), have been deployed to "judicial" ends. Further, to the extent political organs are given the *discretion* to enforce decisions reached by judicial bodies, as appears to be the case from the wording of Article 94(2) of the UN Charter indicating that the Security Council "may, if it deems necessary" give effect to the ICJ's judgments, it appears that governmental representatives have been accorded the power (de facto if not de jure) to "review" decisions reached by the judiciary.[213]

On the other hand, even non-judicial and ostensibly "political" bodies, as within the ILO, have been known to deliberate, to respect the rights of the disputants, and to issue reasoned opinions. Drawing lines in the sand between political and judicial dispute settlers—and their respective "immutable" characteristics—ignores the political and policy-making aspects of judicial bodies as well as the dispute settlement and law-making tasks of some political organs. This chapter calls attention to both.

It identifies current strains in the dispute settlement and adjudicative law-making roles on the assumption that understanding these provide the best guide for the future of institutionalized dispute settlement. It is skeptical of recommendations to import the forms and procedures of domestic courts but it is equally skeptical of attempts to graft elements from one successful international dispute settler onto another. The "impartiality" that some would suggest is required of successful international dispute settlement, for example, often turns out to be distinct from the "neutrality" expected of domestic judges. It also seems that the significance of the much touted impartiality among international dispute settlers varies. Impartiality may be more important to some of the functions of international dispute settlers (i.e., the successful settling of particular disputes) than to others (i.e., developing the law).[214]

With respect to institutionalized international dispute settlers, one size does not fit all. The diversity of international dispute settlers suggests caution about

[213] *See, e.g.*, Tanzi, *supra* note 16, at 542–50 (also discussing the possibility of GA involvement but urging that self-restraint by these political organs is the only realistic way of preserving the authority of the Court). As Merrills acknowledges, the post-adjudication phase of even the most judicialized processes consists of a series of "political" decisions. Merrills, *supra* note 153, at 898–900 (discussing the Security Council's implementation of the ICJ's award of the Aouzou Strip to Chad).

[214] The Secretary-General's success in settling the dispute between the parties in *Rainbow Warrior* was surely due, in large part, to that official's perceived impartiality as between the parties. *See, e.g.*, Thomas Franck and Georg Nolte, "The Good Offices Function of the UN Secretary-General" in Adam Roberts and Benedict Kingsbury, eds., *United Nations, Divided World: The U.N.'s Roles in International Relations* at 166 (Oxford, U.K.: Clarendon, 1993). At the same time, the terse opinion he issued lessened the potential impact on the development of the law.

describing general trends and recommending common reforms. The global "judicialization" of law that some purport to see adheres neither to a "European" or "American" model. Those who would recommend, for example, opening dispute settlement mechanism processes to individuals as the sole or best route to adjudicative law-making need to pay greater heed to the diverse models for dispute settlement now operating, as well as the diverse purposes these serve. As is indicated by the inadequacies of attempting to describe the legitimacy of adjudicative law-making through the prism of one conception of the "ideal of law," we are witnessing less the "judicialization" of law, if this is intended to suggest a singular progression towards a domestic court model of adjudication, and more the propagation of distinct models of dispute resolution attentive to institutional context.[215] Some might contend that WTO dispute resolution has been as successful as it has been to date because, despite the discretion accorded to amicus and the access given to private counsel, it has been open only to state claimants.[216] The Strasbourg Court has been an effective law-maker, by contrast, precisely because its agenda has been determined by individual petitioners. The relative success of the Inter-American Court has been due both to procedures open only to states and international organizations (advisory opinions) as well as to proceedings available to individuals (contentious cases). Other entities, such as the ILO's tripartite Committees, operate under yet another stakeholder model in which dispute settlers are part and parcel of that regime's unique tripartite approach to treaty-making and enforcement.

The relatively brief history of institutionalized dispute settlement, shorter still than the history of many IOs, may delude us about its future trajectory. Established dispute settlement mechanisms are now facing serious challenges to their legitimacy and some of these suggest *common* concerns about their structural fairness or lack of procedural regularity. While agreement on one hierarchically superior international court (the ICJ or some other) as an appellate body from all other international tribunals remains as distant a prospect as the concept of a global legislature, a more unified consensus may yet emerge on what we are entitled to expect from legitimate international dispute settlement and legitimate

[215] *Cf.* Petersmann, *supra* note 38, at 33, 47 (discussing the characteristics of the "judicialization" of international trade law and proposing it as a general model for the " 'judicialization' of international relations for the benefit of domestic citizens").

[216] *See United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (October 12, 1998), paras. 89–91 (permitting the submission of amicus briefs by non-state actors); *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS38/AB/R (May 10, 2000)(permitting governments to be represented by private counsel). *See generally* Jeffrey L. Dunoff, "The Misguided Debate Over NGOs Participation at the WTO," 1 *J. Int'l Econ. L.* 433 (1998)(discussing the levels of non-state participation in WTO dispute settlement); S. Bruce Wilson, "Can the WTO Dispute Settlement Body be A Judicial Tribunal Rather Than a Diplomatic Club?," 31 *L. & Pol. Int'l Bus.* 779 (2000). *But see* Dunoff, *supra*, at 451 (arguing that the actual level of private business involvement in WTO dispute settlement suggests that it is "better understood as sophisticated, multi-track political and economic battles between economic competitors . . . over specific markets than as international legal disputes between sovereign nations").

adjudicative law-making. UN members' patience with expansive Security Council adjudicative law-making of the kind seen in the Iraq case may wear thin, especially if such decisions are regarded as being dictated by one "hyper-power" and more judicious alternatives exist. The Council may become more reticent about engaging in comparable attempts in the future, as appears to have occurred with respect to creating more ad hoc war crimes courts. The WTO's DSB may not be able to ignore the demands for transparency and participation by non-state parties that prompted the World Bank to establish its Inspection Panels, and these pressures may gradually make trade dispute resolution more accessible to non-state interests.[217] Increasing demands for examination of the credentials of WTO panelists by members of international civil society suggest worries about structural impartiality; reliance on a familiar epistemic community of free traders within the WTO whose opinions WTO parties can trust is becoming, in some circles, a cause for complaint rather than celebration. Similar complaints about transparency, access, and fairness, are being raised concerning dispute settlement processes under the NAFTA.[218] Even venerable institutions like the ICJ and the ECJ may not be immune to the winds of change. Some observers are beginning to criticize the incestuous nature of the close-knit community of lawyers who argue cases before the ICJ and the close government ties of many of the ICJ judges that cast doubt on judicial impartiality,[219] while others are raising "democratic deficit" concerns against the ECJ.[220]

The levels of non-state party access, judicial impartiality, and openness evident in the ECJ, the ECHR and some emerging regional economic tribunals may raise

[217] Further pressures on the WTO's dispute settlement system may arise due to invidious comparisons with the level of private actor participation under the NAFTA. Under Chapter 11 of the NAFTA, private investors may bring claims directly against governments, and to date, at least some of those proceedings have been amenable to the intervention of *amicus*. *See, e.g.*, *Methanex Corp. and United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae," In the Matter of an Arbitration under Chapter 11 of NAFTA and the UNCITRAL Arbitration Rules (January 15, 2001), available at http://www.naftaclaims.com/disputes_us/disputes_us_6.htm.

For an argument that all effective international dispute settlement mechanisms, including the WTO's, derive "democratic legitimacy" from the respect that they accord to the rights of the individual, see Petersmann, *supra* note 119.

[218] For concerns about the NAFTA's Chapter 19 (concerning anti-dumping and countervailing duty assessments), see, e.g., Barbara Bucholtz, "Sawing Off the Third Branch: Precluding Judicial Review of Anti-Dumping and Countervailing Duty Assessments Under Free Trade Agreements," 19 *Md. J. Int'l L. & Trade* 175 (1995). For concerns about the NAFTA's Chapter 11 mechanisms (for investment disputes), see, e.g., Samrat Ganguly, "The Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health," 38 *Colum. J. Transnat'l L.* 113 (1999); "NAFTA's Birthday Bombshell," Public Citizen News Release, November 24, 1998.

[219] *See, e.g.*, Alain Pellet, "The Role of the International Lawyer in International Litigation," January 15, 1998, British Institute of International and Comparative Law (criticizing the "ICJ mafia"); Merrills, *supra* note 1, at 138 (noting that the "increasing tendency to elect legal advisers, members of the International Law Commission, and career diplomats" to the ICJ has posed difficulties with respect to the application of rules disqualifying judges with a prior connection to the case at hand).

[220] For a survey of these concerns, see Weiler and Trachtman, *supra* note 184. For a synthesis of "democratic deficit" concerns, including discussion of the ECJ's "excessively narrow" interpretation of citizens' direct access rights, see Eric Stein, "International Integration and Democracy: No Love at First Sight," 95 *AJIL* 489, at 520 (2001).

the bar even for forms of international dispute settlement that remain, for now, accessible only to state parties and that are relatively non-transparent. Expanding notions of human rights may spur reforms within other dispute settlers. International tribunals that purport to deprive individuals of their right to property, for example, whether in trade, human rights, or ILO settings, may find it more difficult to do so without respecting more of Mani's proceduralist criteria or responding to Franck's concerns for structural impartiality—if only because a continuing disregard of domestic judicial analogies in such cases may itself come to be regarded as a human rights violation.[221] It may no longer be tenable to deny private actors access to WTO dispute settlement, at least in those rare instances where what is directly at issue is the financial liability of private actors.[222] Even the highly state-centric ICJ may feel the pressure to go beyond the submissions of the state parties before it to consider the justice of some indigenous claims to servitudes or other territorial rights in the context of boundary disputes, for example.[223] And tribunals designed to have a direct impact on individuals—such as international criminal courts—may need to undergo continuous scrutiny to give effect to expanding or changing notions of the individual rights (to victims as well as defendants) at stake. This is certainly suggested by the evolution of the ad hoc war crimes tribunals since these were established, as well as the innovations undertaken with respect to the Rome Statute for the International Criminal Court to make its proceedings more responsive to the rights of victims and the demands of gender equality.[224]

[221] For more expansive arguments that WTO dispute settlement, and the trade regime as a whole, needs to be opened to international civil society because this is required by human rights concerns, see Robert Howse and Makau Mutua, "Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization," Policy Paper Rights and Democracy, International Centre for Human Rights and Democratic Development (2000). For an attempt to couple the adjudication of transnational commercial transactions with the transnational adjudication of human rights, see, e.g., Petersmann, *supra* note 38.

[222] *See, e.g.*, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse to article 21.5 of the DSU by the United States*, Report of the Panel, January 21, 2000, WT/DS126/RW, para. 6.48 (compliance proceeding finding that Australia had failed to comply with the SCM Agreement and requiring that a private party pay back to the government the prohibited export subsidy). The panel acknowledged that its conclusion interfered with private rights. *Id.*, at para. 6.23, but did not offer the private party an opportunity to appear and present a defense. *See* Steve Charnovitz, "The WTO and the Rights of the Individual," *Intereconomics* 98, at 103–4, 107 (March/April 2001) (criticizing the absence of recognition of procedural rights in cases of "WTO-required confiscation"). Such cases are likely to provoke adverse comparisons with, for example, Chapter 11 proceedings under the NAFTA, which grant private investors direct access to binding arbitration for violations of their treaty-granted rights, including in instances of alleged expropriation. *See generally* Ganguly, *supra* note 218 (enumerating Chapter 11 challenges).

[223] *See* W. Michael Reisman, "Protecting Indigenous Rights in International Adjudication," 89 *AJIL* 350, at 358–62 (1995) (urging this be done without change to the Court's rules limiting *locus standi* in contentious cases to state parties).

[224] For a discussion of the victim-related provisions incorporated into the Rome Statute for the ICC, along with criticisms of these, see Sam Garkawe, "The Victim-Related Provisions of the Statute

At the same time, when increasing demands for international dispute settlement encounter the inevitable resource constraints, the result may not be change in the direction of making such mechanisms more closely analogous to one another or to domestic courts. The Strasbourg Court, even after its recent streamlining under Protocol 11, may find it difficult to cope with an onrush of disputes (including many very serious human rights complaints from within the former Eastern Bloc), and it may need to adopt reforms closer in kind to those that Steiner recommends for the UN Human Rights Committee.[225] Another layer of complexity is added by the prospect that, particularly after the *Pinochet case* and in the wake of establishment of an ICC with complementary jurisdiction, some international dispute settlers may be "competing" with national courts more willing to take on international cases, as with respect to adjudicating war crimes. The prospect of comparable cases being brought within national and international dispute settlers may invite invidious comparisons between the two types of venues.[226] Whether such comparisons will result in increased differentiation or the harmonization of procedures and substantive law remains to be seen.

It is premature to suggest that the increasing numbers of international dispute settlers has revolutionized how most international disputes are handled or has permanently "judicialized" the making of international law. Some of the reform efforts to legitimate international dispute settlers may actually deter the bringing of international claims or make international mechanisms more unwieldy or expensive.[227] The proliferation of international fora may spur the bringing of international disputes in domestic courts or prompt equitable settlements that make little or no reference to law at all. International dispute settlement is in a state of flux and its future, despite the proliferation of fora in most (but not all)

of the International Criminal Court: A Victimological Analysis," 8 *Int'l Rev. of Victimology* 269 (2001). The urge to expand those participating in transnational justice projects has also prompted concern about the limitations of the court-centered approaches promoted by international criminal lawyers. For a thoughtful consideration of other more community-centered approaches, extending from truth commissions to rituals of community mourning, see Laurel E. Fletcher and Harvey M. Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation," 24 *Hum. Rts. Q.* 573 (2002).

[225] This would be particularly ironic given the views of, for example, Helfer and Slaughter, see *supra* note 78.

[226] *See, e.g.*, Alvarez, *supra* note 9. To the extent national courts present viable alternatives to international dispute settlement, this invites comparisons as to whether the "laundering" aspects of international fora are worth the resulting costs and constraints on unilateral action. *Cf.* Abbott and Snidal, *supra* note 70, at 18–19 (discussing the "laundering" aspects of international financial institutions and UN peacekeeping) and *see* Chapter 1.

[227] For an enumeration of the challenges likely to be faced by the ICC, in part spurred by its increased sensitivity to rights of victims of mass atrocity, see José E. Alvarez, "Post-ICC Challenges," Australia/New Zealand Society of International Law, *Proceedings of the Annual Meeting* (2000).

regions of the world, remains cloudy.[228] What we know for sure is that such mechanisms will continue to evolve and that their evolution will affect their capacity to engage in law-making.

[228] *See* Kahler, *supra* note 181 (describing why the Asia-Pacific region has remained generally resistant to judicialized forms of international dispute settlement but has embraced it when instrumentally or strategically useful); Judith Goldstein and Lisa L. Martin, "Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note," 54 *Int'l Org.* 603 (2000)(discussing the patterns of complaints filed under the GATT and the WTO and concluding that these do not suggest reduced opportunism, and casting doubt on the effects of legalization on trade compliance).

10

Conclusion: The Promise and Perils of International Organizations

In Mary Shelley's gothic novel of 1818, concerned with modern dilemmas arising from mankind's attempt to improve on nature, a young idealistic student builds a monster from corpses and imbues it with life by galvanism.[1] Frankenstein's monster became as shunned as his maker, especially when local citizens became convinced that the creature could not be controlled by its master and was dangerous. *Frankenstein* was intended to be an admonitory parable for those who dare to assume the prerogatives best left to God; Shelley condemns the pursuit of solitary individual idealism in defiance of collective humanitarianism.[2] Yet her novel also serves today as a cautionary tale for those who extol collective humanitarianism, including the idealistic advocates of post-World War II IOs, since it suggests that agents may not always heed their principals and that the deeds, real or imagined, of agents can wreak havoc on both master and servant.[3]

For many public international lawyers, the prospects for multilateral cooperation lie in the promise that IOs have become international legal persons to some extent independent of the states that have established them and that IO processes will encourage the consideration of "community" interests and not merely the interests of self-interested states. By contrast, as noted in Chapter 1, strict realists regard the notion of quasi-independent non-state actors such as IOs as naive myth. For them, international outcomes remain the product of state power and state interests alone, even in the age of IOs. A powerful inter-governmental organization, if it exists at all, is only a tool of, as Hans Morgenthau put it, "its most influential member."[4] For those who see legally significant IOs as merely

[1] Mary Shelley, *Frankenstein* (1818).

[2] *See, e.g.*, Paul Johnson, *The Birth of the Modern*, at 430 (New York: Harper Collins, 1991).

[3] Thus, Jan Klabbers begins his book on international institutional law with the one quotation from *Frankenstein* most likely to send chills down the spine of international lawyers and their state clients, namely the monster's command to Dr. Frankenstein: "You are my creator, but I am your master; obey!" Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge, UK: Cambridge University Press, 2002)(quoting Chapter 20 of *Frankenstein*). In context, the command is not merely an obvious reminder that IOs can constrain sovereigns. In the relevant passage, the monster is demanding a female companion for himself. For critics of IOs, this is an apt reminder that organizations breed more organizations—that bureaucracies tend to expand and acquire more power.

[4] Hans J. Morgenthau and George A. Lipsky, eds., *Political Limitations of the United Nations, in Law and Politics in the World Community* 143, at 150 (Berkeley, U.S.: University of California Press, 1953).

purveyors of hegemonic international law, this view retains considerable appeal. Morgenthau's description, as is suggested in Chapters 3 and 4, describes aspects of actions taken by the post-Cold War UN Security Council. And yet, as is also suggested by those chapters, neither the standard-setting practice of UN political organs nor that of other IOs surveyed in this book is wholly captured by such realist descriptions. The views of Morgenthau do not do justice to the many ways IOs are having an impact on: the classic sources of international legal obligation, the complex processes by which states are now governed, the new kinds of law-making actors, the content of international law, and the ways these rules are being enforced. This concluding chapter surveys these changes and begins to consider the consequential impact on the Westphalian system.

It also describes why, to those attuned to these changes in how international law is being made, the concept of "global governance" is not some fantastical notion more appropriate to the romantic movement of which Mary Shelley was a part, but very much a reality, especially to the vast majority of states and peoples of the world who have as much of a prospect of controlling IOs as the townspeople in Shelley's novel had of controlling the monster. Most of the states of the world cannot, on their own or even with the aid of their closest allies, expect to control the standard-setting practices of the IOs described in this book, from the Security Council to the IMF. And while powerful states like the U.S. have a much better chance of making these organizations do their bidding, even the U.S. cannot totally escape some of the legal constraints emerging from the modern turn to IOs. It is too simple to dismiss IOs as either irrelevant to what states do or as mere tools of the powerful. At the same time, the degree of independence that IOs enjoy—and the attendant transformations in conceptions of sovereignty—is not an unalloyed good. The fact that IOs take on a life of their own once created and evince certain pathologies means that at least some of them might indeed become, or at least be perceived as, global Frankenstein monsters bent on "terrorizing the international countryside."[5]

As is noted in the Preface, this book contends that international lawyers have not examined their institutional creations closely enough. The literature on IOs and their impact on law is replete with half-truths, some derived from the continuing hold of legal positivism and others inspired by international lawyers' idealistic aspirations for multilateral institutions. A primary goal of this book has been to scrutinize these half truths with respect to IOs' impact on international institutional law, on treaty-making, and on dispute settlement.

Part I, on international institutional law, criticizes the following positivist nostrums: (1) that the interpretation of IO charters is subject to closely delimited

[5] *See* Michael N. Barnett and Martha Finnemore, "The Politics, Power, and Pathologies of International Organizations," 53 *Int'l Org.* 699 (1999). *See also* Daniel L. Nielson and Michael J. Tierney, "Delegation to International Organizations: Agency Theory and World Bank Environmental Reform," 57 *Int'l Org.* 241, at 244 n. 15 (2003)(describing Barnett and Finnemore's views in these terms).

standard rules of treaty interpretation equally applicable to all treaties; (2) that all the law-making powers of IOs are derived from explicit and enumerated treaty provisions and that these clearly differentiate between powers to make "internal" rules, applicable on the organizational plane, and "external" rules applicable to members; (3) that multilateral mechanisms for making global law, binding on the international community as a whole, do not exist; and (4) that neither the relevant actors (states) nor the relevant sources of international legal obligation (treaties, custom, and general principles) have changed.

Part II, on multilateral treaty-making, re-examines the same four half-truths, illustrating the many ways that IOs have changed that fundamental traditional source of law, from the initiation of negotiations to attempts to enforce. That Part also dispels two contrasting contentions on the impact of IOs on treaty-making: first, that the contemporary multilateral treaties that are the product of IOs, replete with deliberate ambiguities and ineffective enforcement mechanisms, have displaced both the more precise treaties of yore as well as customary law with nothing more than "feel-good" or face-saving public relations efforts, or secondly, that IOs, as effective tools for centralization and independence, have increased the number of treaties, the prospects for enforcement, and their democratic legitimacy. This book argues instead that while IOs have made the prospects for the initiation of treaty negotiations more likely, they have, far from displacing custom as a source of legal obligation, revived it in new forms, especially through entangled treaty/custom. Chapter 6's assessment of the qualitative impact of IOs on treaty-making is far more equivocal than either of these contrasting positions. In contrast to the suggestions made by either the critics of IO treaty-makers or their staunch defenders, it contends that there is no substitute for judging the quality of the resulting treaty products of IOs in context, one treaty at a time.

Part III considers the role of institutionalization in the legitimation of international dispute settlers and in enabling them to engage in law-making. This Part tackles many of the half-truths associated with international dispute settlement, whether propounded by positivists (e.g., judges do not make law), functionalist lawyers (e.g., only courts that respect the "ideal of law" are capable of producing legitimate opinions that influence the law), or neo-realists (e.g., the only effective dispute settlers are those embedded in regimes favored by powerful states, such as the WTO, and the law-making impact of these are limited to regime-specific law favored by the powerful). It explains why international dispute settlers have an interest in denying that they are engaged in law-making (even though this is what most of them do), contends that even non-judicial forms of dispute settlement that least resemble national courts may nonetheless influence the law, and identifies examples of general law-making by more specialized and quasi-judicial dispute settlers (such as in the WTO).

The forms of law-making occurring in these three settings reveal that the inter-governmental institutions aspiring to universal participation that are the subject of this book are neither the clear alternative to unilateral assertions of

power portrayed by idealistic international lawyers nor the mere tools for hegemonic power of more realist accounts. For the reasons summarized in Sections 10.1 to 10.3 below, the creatures fashioned by international lawyers—inter-governmental organizations that attempt a global reach—are changing public international law. As is suggested by the interim conclusions contained at the end of Chapters 3, 6, and 9, IOs have changed and are continuing to change the international sources of law, their substantive content, and the actors that make them, including states themselves. As is summarized in Section 10.4 below, IOs are also changing the ways states are compelling, persuading, or otherwise enticing relevant actors (no longer just fellow nation states) to comply with international standards. These changes cumulatively suggest both the promise and the perils that IOs pose. This means that IOs are not merely the "handmaidens"[6] of either states or their lawyers and that globalization is not simply an (ill-defined) exogenous mover of all of them. The organizations that are the subjects of this book respond to, and in turn provide, the structure upon which globalization is built, no less than, for example, the gold standard or the relative absence of comparable international institutions helps to explain the structure of 19th-century inter-state relations. The resulting challenges are addressed in Section 10.5 below.

10.1 IOs and the Traditional Sources of Law

The first source of law indicated in article 38 of the International Court of Justice's statute is the international agreement. No one doubts that the number of such agreements, both bilateral and multilateral, vastly increased in the second half of the 20th century, coincident with the rise of IOs. The usual explanation for the waves of multilateral treaties that characterize the modern age is a functional one: the needs of globalization. States, we are told, are driven to enter ever more agreements by ever increasing needs to handle problems that each cannot revolve by itself; the proliferation of international agreements results from the ever rising flows of goods, people, capital, and ideas across borders. While this account explains much, it is impossible to know for sure whether the supply of multilateral treaties would have kept up with the demand in the absence of inter-governmental institutions. What we do know is that, as is suggested by Chapters 5 and 6, in many ways IOs have made it easier to conclude the multilateral treaties that states need and that it is not farfetched to assume that there would be fewer such treaties had IOs not been around to facilitate their conclusion.

Political scientists and economists have told us why IOs have become what many of these organizations, such as the ILO, were explicitly intended to be: effective treaty machines. Even those organizations not explicitly designed to

[6] *Cf.* Philip Alston, "The Myopia of the Handmaidens: International Lawyers and Globalization," 8 *EJIL* 435 (1997).

become venues for treaty-making, such as ICAO, have become useful venues for multilateral treaty negotiations. In the case of ICAO, which has become a repeated venue for the negotiation of counter-terrorism conventions, this has happened largely in part because what makes that organization a legitimate purveyor of generally "soft" aviation Standards and Recommended Practices (SARPs) also makes it a credible venue for certain types of treaty-making. More generally, IOs are effective treaty-makers for the same reasons many of them are effective sites for other forms of standard-setting: because they encourage iterated cooperation; promote pooling of information, expertise, and resources; reduce transaction costs, uncertainty, and free riders; and facilitate path dependencies.[7]

Constructivists would also suggest a more radical notion: the existence of IOs has itself helped to change the felt needs of states and has helped to convince states that they need some treaties. The argument, difficult to prove empirically but plausible, is that at least some modern multilateral treaties are not the product of pre-determined state interests but result, at least in part, from the actions of relevant epistemic communities—from the promotional and information gathering efforts of groups such as international civil servants and transnational networks of government regulators—whose very existence and tactics are inextricably linked to IOs. Leading candidates of treaties evincing this characteristic include the Rome Statute for the International Criminal Court—a treaty that probably would not exist but for the Security Council's establishment of ad hoc war crimes tribunals, many years of efforts by the ILC, as well as the peculiarities of established procedures within UN negotiating conferences; the Landmines Convention, which some observers suggest would never have been concluded but for the involvement of NGOs, the efforts of the UN Secretariat, including the lobbying efforts of the UN Secretary-General, as well as established IO procedures for treaty-making; and the WHO's Tobacco Control Convention, an agreement whose origins lie within epistemic communities nurtured within an organization whose *raison d'etre* is the promotion of better global standards of health.

Whether or not IOs are given whole or partial credit for these or other treaties, there is no doubt that IOs have changed how multilateral treaties are concluded. As described in Chapter 5, they have prompted three central innovations in the structures for multilateral treaty-making:

(1) UN-styled treaty-making conferences with divisions between plenary and specialized discussions (formal and informal), reliance on consensus decision-making and elaborate procedural rules for the conduct of negotiations among (usually pre-established) groups of states that facilitate the nesting of issues.

(2) Reliance on forms of treaty-making by experts where at least initial drafts are delegated to experts such as the public international lawyers of the ILC,

[7] *See generally* Kenneth W. Abbott and Duncan Snidal, "Why States Act through Formal International Organizations," 42 *J. Conflict Res.* 3 (1998).

aviation experts in ICAO, labor law specialists in the ILO, or commercial lawyers in UNCITRAL, and whose work is supplemented by a different kind of "expert" group, namely, the expertise of IO secretariats relied upon to draft, for example, compromise formulations or "final" clauses governing such matters as when the treaty enters into force and the permissibility of reservations.

(3) Managerial forms of treaty-making—as in trade, human rights, the environment, and tobacco control—dependent on regularized meetings, delegation of standard-setting (as through the updating of protocols), and opt in/opt out procedures, all of which permit a virtually continuous legislative process at odds with the one-off law-making efforts of the pre-UN era.

These innovations have radically transformed all the stages of treaty-making: the initiation of negotiations, the formulation of first drafts, the modes for negotiation and applicable procedures, the finalization of the text, ratification procedures and registry of parties, and post-ratification follow-up procedures (including methods for amendment or other modes of updating, and implementation, and enforcement). The initiation of treaty-making today may stem from a consensus reached among experts gathered together under IO auspices (as has been the case for many environmental and human rights agreements). The anticipated form for such agreements (e.g., bilateral, regional, or multilateral and the relevant epistemic community involved) typically reflects the IO forum in which treaty negotiations are initiated. The first steps toward actual negotiations usually follow established organizational precedents and take advantage of organizational sunk costs by, for example, resorting to "usual" procedures asking states to report their views, directing IO secretariat officials to prepare reports based on these replies, or requesting an expert body (often already in existence) to prepare a detailed study or first draft. When a decision is taken to initiate treaty-making, the negotiating venue and the timetable for concluding the agreement may adhere to organizational conferences already planned or involve a decision by a plenary body to convene a special session for this purpose (such as the GA's decision to convene a five-week negotiating session in Rome to negotiate a Statute for the ICC). The formulation of preliminary draft texts, in advance of such a session among states, may be delegated to expert bodies (such as the ILC in the case of the Rome Statute for the ICC). Numerous issues relating to the conduct of negotiations—rules of access for NGOs, the circulation of texts, the type of negotiating record authorized to be kept, the respective roles of formal versus informal sessions, the tasks to be completed by the "drafting committee"—are typically resolved by pre-established organizational rules, subject to modification by members of the IO secretariat to which many such procedural issues are delegated. The finalization of any text may take advantage of organizational precedents, as with respect to "standard" final clauses or submission to the IO's

plenary body for final approval. Ratification procedures also usually adhere to the prior practices within the organizational setting, as with respect to "standard" reporting obligations, periodic supervision by IO organs or designated subsidiary bodies, and rules governing the depository of ratifications and reservations. Finally, post-ratification procedures usually take advantage of prior institutional precedents and may include follow-up by established IO compliance bodies or technical assistance for ratifying states.

As discussed in Chapter 6, however, the institutionalization of treaty-making has sometimes precluded the successful conclusion of treaties and the involvement of IOs does not guarantee the desired number of ratifications by states with diverse interests. Indeed, the fact that IOs that aspire to global membership generally aspire to treaties with a comparable reach necessarily complicates treaty-making since the more states and NGOs involved, the more difficult it may be to attain compromise formulations equally acceptable to so many states. Package deals bridging the diverse interests of all those concerned may be difficult to craft in diplomatic settings characterized by "transparency" and access to multiple NGOs. The involvement of global IOs may render treaty-making less efficient and more time-consuming, especially if IO staff lack the entrepreneurial leadership or competence needed, the experts chosen to propose draft language are not in tune with political realities, or the organizational venue ultimately selected lacks the legitimacy needed to win support within the groups (from national parliaments to NGOs) needed to secure ultimate ratification. The proliferation of different types of IOs may also complicate the decision to initiate treaty-making to the extent this leads states to weigh the benefits of conducting negotiations in distinct organizational venues (regional, technocratic, or other) or requires attention to "forum shifting" efforts by groups of states, each intending to delegate treaty-making to an IO deemed more favorable to their interests. But while it is, as discussed in Chapter 6, difficult to say with certainty that the involvement of IOs has improved either the processes for multilateral treaty-making or the final product, there is little doubt that their involvement has changed how multilateral treaties are made.

IOs have also transformed the second source of law in article 38, customary international law.[8] As discussed in Chapter 4, traditional descriptions of the requisites of custom—the need for the passage of a considerable period of time and the accumulation of evidence of the diplomatic practices between sets of states reacting to one another's acts—appear increasingly passé.[9] Invocations of custom by states or judges now rarely involve the historical surveys of the practice and reaction of bilateral sets of states across decades that, for example, characterized the determination of the customary rules of prize by the U.S. Supreme Court in

[8] This is even accepted by some prominent self-proclaimed positivists. *See*, *e.g.*, Bruno Simma and Andreas L. Paulus, "The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View," 93 *AJIL* 302 (1999).

[9] *See supra* Section 4.4.

the *Paquete Habana case* circa 1900.[10] Neither judges nor diplomats appear to have the patience to comb through laborious diplomatic exchanges to discover whether custom exists. IOs provide shortcuts to finding custom. Although these shortcuts may trouble traditionalists (and legal historians), it is important to keep in mind that pre-IO forms for finding evidence of custom tended to privilege those few interested states with the global interests and the institutional resources needed to make clear their practice (as through promptly produced and readily accessible digests). While traditional customary law required general acceptance throughout the world and evidence of truly general state practice, the truth was that such rules, at least under pre-IO modes for discovering custom, also involved shortcuts (albeit of a different kind). Traditional custom was usually in fact made by a handful of interested (and generally powerful) states able and willing to made their practice visible to all.[11] The modern resort to IO-generated forms of evidence for custom might be seen, therefore, as a relatively more egalitarian approach to finding this source of law, even if it comes, as critics charge is the case with respect to GA resolutions for example, at the expense of sometimes elevating the rhetoric of states over their deeds.

But whether or not resort to IO-generated forms of custom is regarded as praiseworthy, no one would deny that relevant actors today increasingly rely on IO-generated legislative treaties to suggest custom binding even on non-parties to such agreements, resolutions adopted by organizational plenary bodies (most notably the UN General Assembly but including, for example, WTO members as in their Doha Declaration), the practice of IO organs or their secretariats (especially with respect to "international institutional law"), and even the occasional principle proclaimed at a gathering not authorized to generate law at all (such as the precautionary principle proclaimed at the Rio conference).[12] Public international lawyers are also finding custom and general principles of law (as well as new, sometimes unexpected, interpretations of treaty law) in another product of institutions: in the judgments issued by the proliferating number of international dispute settlers canvassed in Chapters 7 and 8, even though none of these judicialized or non-judicialized fora are authorized to make law. Yet, for the reasons canvassed in Chapter 9, institutionalized adjudicators are as much promulgators of law, both treaty-based and customary, as they are settlers of disputes.

As with respect to treaties, it is plausibly argued that much modern customary law would not exist but for the opportunities provided by IOs. This is obviously true to the extent the new custom is increasingly the product of intertwined forms of treaty and custom emerging from, for example, the rising number of law-making multilateral treaties generated by IOs, such as the Vienna Convention on the Law of Treaties. It is also true even with respect to customary rules not

[10] *The Paquete Habana*, 175 U.S. 677 (1900).
[11] *See* Jonathan I. Charney, "Universal International Law," 87 *AJIL* 529, at 538 (1993).
[12] *See generally id.*

based on such legislative treaties, such as certain GA resolutions that come to be cited by states or international dispute settlers as ready shorthand for otherwise laborious searches into state practice or demonstrations of *opinio juris*. As Cassese argues, the "unique opportunity afforded by the UN for practically all members of the world community to get together and exchange their views cannot fail to have had a strong impact on the emergence or reshaping of customary rules."[13] From the annual sessions of the GA to the commentaries provided by the ILC that accompany its efforts (such as the commentaries to its Articles of State Responsibility), IO venues ensure that a host of pronouncements are collected in widely available written texts. IO venues make possible what would otherwise be increasingly difficult in a world of nearly 200 nation states: finding concrete, preferably written, evidence that virtually all states accept a rule as one of custom. In addition, as is described in Sections 3.2 and 3.3, the sustained interaction between institutional organs (GA/SC/Secretariat) and other actors (states/NGOs), has produced dramatic changes in customary rules on such significant topics as the rights and duties of states and other international legal persons, human rights and their application, and the (ever-diminishing) concept of "domestic jurisdiction." The very existence of global venues open to diverse membership—such as the plenary bodies of global IOs—provides ready-made environments for concretizing the generalized acceptance or rejection that is the essence of custom.

Venues such as the UN General Assembly, where particular legal issues are often raised on a periodic, even annual basis, also make it plausible for scholars and international judges to argue that the absence of a state's adverse reaction—even if evinced merely by the failure to object to a finding based on consensus—shows its acquiescence on a matter of custom, or at least the absence of evidence that the state in question regarded itself as a persistent objector with respect to the practice. At the very least, repeated affirmations of an ostensible principle of law through some actions by the GA, just like path-dependent recourse to certain principles by the World Bank in its operational principles or the IMF in conditions it imposes under its structural adjustment loans, by the UN Secretary-General in instructions to UN peacekeepers, or by UN specialized agencies (from the IAEA to the WHO) in the course of their normative or operational efforts, place the burden of proof on any state attempting to deny the legal status of such rules. The very existence of IO-generated texts purporting to state rules of custom—whether in the form of legal opinions issued by IO lawyers or opinions issued by institutionalized dispute settlers, others charged with overseeing compliance, or technical experts (such as accident investigators in ICAO)—virtually ensures that such products will be referenced by those with a need to determine the relevant law and indeed, despite disputes about their value, that such IO-generated texts will more likely be given normative weight than any piece of evidence purporting

[13] Antonio Cassese, *International Law in a Divided World* at 193 (Oxford U.K.: Clarendon Press, 1986).

to reflect the views of any single state. As with respect to treaty-making efforts in which states are expected to take a position, IO opportunities for reaction also prompt the development of new customary rules since they solicit and sometimes compel states to take positions or to develop their views on a range of legal issues on which they might otherwise have been silent.[14] Specific IO venues, as well as the density of institutionalized fora for the elaboration, implementation, and enforcement of hard and soft norms, encourage states to agree, at least rhetorically, on rules, even on subjects where international practice does not exist, or is fragmentary, or contradictory.[15]

As discussed in Chapter 4, the resort to IO-generated forms of evidence of custom has subtly changed this source of law. Apart from the more egalitarian and transparent nature of this form of evidence (at least as compared to reliance on those privileged states that can and do produce digests of their practice), reliance on IOs tends to make the resulting rules the product of a *consciously* deliberative process that approximates the intentional processes involved in treaty-making.[16] Rules of custom discussed by the GA; in proposed commentaries of the ILC, or in the legal memoranda circulated by the UN Legal Counsel, for example, are circulated in written form—as would draft texts of a treaty—and all states (and NGOs involved) are on notice if they wish to respond. Unlike rules of law that have to be gleaned from the practices or reactions of states in specific factual contexts, such IO texts, cast in "sufficient expression in legal form," are ready-made to form viable rules of custom.[17] IO-proposed rules of custom are far more easily discoverable and accessible than implicit norms buried in state digests. What constitutes "repetition of state practice across time" has been changed as well; it is more likely to include rhetorical repetition (as through repeated GA resolutions) or the repeated practices of IO organs. To the extent it was once difficult to secure widespread state agreement with respect to pre-IO rules of custom because states were reluctant to accede to a new obligation unless they had evidence that other states were also prepared to accept the same, centralized IO processes for action and reaction obviate the difficulties of finding a first mover, thereby rendering agreement with customary law, even relatively new rules, more likely than in the past.

As with respect to their impact on treaties, IOs' impact on customary law has good and bad aspects. Charney praised IO-generated forms of custom precisely because these were more truly universal, at least in terms of participation, than traditional custom and because in his view, the new forms of customary law lessened some of the vagaries attendant to traditional modes of generating custom,

[14] *Id.*

[15] *Id.*, at 184 (discussing the development of rules of custom at the margins of diplomatic conferences set up to codify and progressively develop the law).

[16] *See, e.g.*, Charney, *supra* note 11, at 547. *See also* H. Meijers, "How is International Law Made?," 9 *Netherlands Yrbk. Int'l L.* 3 (1998).

[17] *See* Meijers, *supra* note 16, at 14.

precisely because they were the product of a deliberative and deliberate process.[18] Charney might have been contemplating, for example, the plight of the U.S. Supreme Court judges, back in 1900, who had some understandable difficulties culling from relevant state practice the customary law of prize. Some of the U.S. judges in *the Paquete Habana* argued that all that the evidence of the practice of states showed was that some states refused to seize the commercial vessels of their opponents in war merely out of a sense of polite comity but not from a demonstrable conviction that they were obligated not to seize these vessels because of binding custom.[19] Such dilemmas, inherent to pre-IO forms of customary law, are obviated by IO-generated written texts that deal clearly with *opinio juris* and unambiguously advance claims that a certain rule of custom exists. But, as suggested in Chapter 3's synthesis of the debates concerning the value of GA resolutions, not all would agree with Charney that IO-generated forms of custom obviate such problems, are "less open to abuse and miscommunication than classical customary lawmaking," or that, because legitimated by greater numbers of states, they are more likely to elicit compliance than old rules of custom.[20]

As with respect to treaty-making, what can be said with greater certainty is that whether or not IOs have made rules of custom or the ways these rules are found better or worse, there is little doubt that it has changed this second source of law. And the same can be said for the third source of law identified in article 38, general principles of law. As is suggested by the recourse to such general principles by institutionalized dispute settlers (see Chapter 8), this residual source has secured a new hold on life thanks to the need for judges and others to find ways to fill in relevant gaps in the law and avoid findings of *non liquet*, as by, for example, developing the general principle of "*compétence de la compétence*." It is also obvious that the age of IOs has vastly increased the potential significance of article 38's reference to "judicial decisions" as potential evidence of one of the three international sources of law, if only by increasing the numbers of international dispute settlers.

But the greatest single challenge to article 38 sources of law is that much of the standard-setting in which IOs engage does not readily fit into any of the three

[18] Charney, *supra* note 11. *See also* Onuma Yasunaki, "The ICJ: An Emperor Without Clothes? International Conflict Resolution, Article 38 of the ICJ Statute and the Sources of International Law," in N. Ando et al., eds., *Liber Amicorum Judge Shigeru Oda* 191, at 211 (The Netherlands: Kluwer Law International, 2002) (arguing that multilateral conventions of a universal character such as the UN Charter or GA resolutions adopted unanimously or by consensus "can provide more convincing evidence of sufficiently general and wide coverage of States" than the traditional components of customary law, and that the legitimacy of traditional customary law "in terms of global participation of States in the creation of global norms, transparency and identification of the sovereign will of nations is far inferior to that of the general international law-creating process based on multilateral treaties of a universal nature or the UN declarations").

[19] Compare, for example, the majority opinion penned by Mr. Justice Gray in *the Paquete Habana* (finding the rules of prize to constitute rules of custom) from the views of dissenting Chief Justice Fuller (joined by Justices Harlan and McKenna)(finding the relevant rules to be only rules of comity). *The Paquete Habana*, *supra* note 10.

[20] Charney, *supra* note 11.

established sources of law. As discussed throughout this book and particularly in Chapters 3 and 4, most of the standards or rules that these organizations produce are *not* authorized by express charter provision. This was why, for example, the survey of organizational charters undertaken in Section 3.1 proved such an unreliable guide to whether or how particular IOs engage in law-making.[21] It is also why those chapters describe IO-generated standard-setting as "law-making by subterfuge."

Law-making by subterfuge is, by definition, hard to justify as a matter of positivist treaty interpretation grounded in plain meaning. As discussed in Chapters 3 and 4, the making of "internal" international institutional law, even if implicitly authorized by these organizations' constitutive instruments, proves hard to disentangle from external law-making—with direct consequences on states' ever shrinking *domaine réservé*. In addition, many IO-generated texts are, intentionally or not, ambiguous in terms of legal effect and difficult to categorize as part of a binding article 38 international obligation for this reason alone. The categories of treaty, custom, and general principle do not provide satisfactory rubrics for describing such phenomena as ICAO's SARPs, the World Bank's Guidelines, or IMF-imposed conditions. Such norms, as much as those UN General Assembly resolutions deemed to be expressions of the "general will," are "global law" unique to the age of international organization.[22]

It is difficult to avoid the conclusion that IOs produce considerable quantities of post-modern or at least post-positivist norms, outside the three traditional sources of international law. If, to the horror of scholars like Prosper Weil, international law now includes a wide variety of "soft" norms falling along a spectrum of binding force, IOs must be given the requisite credit or blame.[23] As discussed in Sections 4.2 and 4.3, IOs generate codes of conduct relating to food products intended to obligate both governmental and non-governmental actors, aviation standards, and recommended practices that formally require only notification, labor recommendations that appear to add precision to treaty obligations, originally hortatory standards for transporting nuclear materials now backed by formally binding Security Council decisions, guidelines for the conduct of future inter-state trade negotiations that presumably include binding interim obligations, operational guidelines that bind only World Bank employees but that provide non-state actors with a means to enforce them, and intrusive structural adjustment conditions assumed by states through unique forms of treaty contracts. Some of these organizational products "harden" (if not in pedigree at least in effect) as a result of other organizational processes. Some institutional soft

[21] *See supra* Section 4.4.

[22] *See*, *e.g.*, Oscar Schachter, "The Crisis of Legitimation in the United Nations," in 50 *Nordisk Tidsskrift for International Ret* 3, at 18 (1981). *See also supra* Section 4.4.

[23] *Compare* Prosper Weil, "Towards Relative Normativity in International Law," 77 *AJIL* 413 (1983)(objecting to relative normativity) *with* Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," 52 *Int'l Org.* 887 (1998)(describing the impact and proliferation of soft norms).

law, produced either by inter-governmental bodies or expert groups of mixed state/non-state composition, such as codes for marketing foodstuffs or packaging goods or the World Bank's Guidelines, are more effectively enforced than are some "hard" treaties—as in hands of WTO panelists, the World Bank's Inspection Panel, or merely as a result of the actions of private market actors. But some organizational products appear fated to remain in a netherworld between *lex lata* and *lex ferenda*, to the regret of positivists.

IOs have produced new standards that are hard to fit within article 38's familiar sources of law because many of the new rules involve the participation of, or purport to affect, the conduct of non-state actors, fail to evince traditional expressions of state consent to be bound, or lack the precision often associated with rules of law. Some, like ICAO's SARPs, appear intended to be "enforced" in ways not anticipated by the traditional rules of state responsibility, while others, like the World Bank's Guidelines and the IMF's structural adjustment loan conditions, appear to be *sui generis* regimes that owe their origin, but possibly not much else, to traditional pedigreed sources of public international law. Other products of institutionalization, such as the opinions rendered by myriad dispute settlers, are rendered soft by the absence of a hierarchy among international courts and of a formal doctrine of *stare decisis*. IOs have also "softened" some of the "hard" sources of law in article 38. As discussed in Chapter 6, many of the treaties generated in the age of IOs contain "soft" general principles (some of which are contradictory or that can be paired off in opposites) or are replete with vague "standards." This includes organizational charters, such as the UN Charter, which includes such vague injunctions as an obligation to settle disputes by peaceful means and the duty to refrain from assisting a state against which the UN is taking preventive or enforcement action. The Charter also simultaneously affirms the conflicting (and vague) goals of non-interference in domestic jurisdiction, while according respect for human rights; it affirms the sovereign equality of states, but also proclaims the self-determination of peoples; it prohibits the use of force, while recognizing an "inherent" and undefined carve-out for self defense. It also includes a number of inherently vague standards: "good faith," "peace-loving," "with due regard to equitable geographical distribution."[24] Vague or soft provisions also characterize other treaty products of IOs, such as the ILO's Equal Remuneration Convention (discussed in Chapter 6). Such developments are often seen as the result of inevitable political compromises unlikely to produce much law or, as Simma suggested was the case with the Equal Remuneration Convention, regrettable lapses from hard definable obligations because of a need to placate the lowest common denominator in settings with too many states and too much pressure to produce results.

The relative imprecision of many modern treaties appears to be linked to the turn to institutions. General principles, such as those in Article 2 of the UN

[24] *See*, *e.g.*, Oscar Schachter, "The Relation of Law, Politics and Action in the United Nations," *Recueil des Cours* 169, at 193 (1963).

Charter, are intended to lay down parameters—for the ICJ in deciding legal disputes and for the political bodies in the exercise of their discretionary powers.[25] Despite their contradictory and vague nature, these principles remain useful guides to what states do precisely because permanent institutions are established alongside them. It is the very "softness" of the Charter—the "give" at its joints—that encouraged both Schachter and Rosalyn Higgins to take a closer look at the decisions produced by UN political bodies. They found, as discussed in Chapter 3, legal patterns and cognizable principles of institutional law emerging from the practice of the UN's political organs and they drew several general lessons from this fact. As Schachter indicated, UN Charter provisions, vague or contradictory as they are, should not "be approached as a set of autonomous norms which dictate decisions but as a process through which States and peoples pursue their interests and undertake joint action in accordance with felt necessities and values."[26] Although such provisions undoubtedly reflect political tensions evident at the time of the Charter's drafting, they also reflect the reality that these provisions would be subject to the day-to-day interpretation of authorized permanent bodies, operating within a constitutional framework subject to a common vocabulary and shared values expressed in the Charter's principles and purposes. Treaties like the UN Charter contained, he argued, a normative hierarchy among values, reflected in, for example, the deference given to its Article 2 Principles, and these principles, however vague and contradictory, contained certain "core meanings" capable of structuring debates as particular situations arise.[27] Schachter also noted that such instruments, embedded in an institutionalized framework, would inevitably be subject to "less restrictive" forms of interpretation distinct from those appropriate to traditional treaties (where the contracting parties acted in terms of precise interests on the basis of reciprocity).[28] It was wrong, he argued, to see such treaties as a "litany of prohibitions and permissions," since one of the basic functions of such treaties was to mobilize a community into action when appropriate, by, for example, using an independent and impartial international staff to channel information, transfer knowledge and skills, or link governmental sub-units with one another and with UN staff.[29]

Implicit in Schachter's description of the different functions of an institutional charter is the idea that treaties that can be legitimately characterized as representing the collective interest can more plausibly be made subject to a teleological form of interpretation or even to more dynamic, evolutionary forms of interpretation. This is certainly the argument that is often heard with respect to IO charters as well as to many of the treaty products produced by IOs with a global reach, such as human rights treaties.[30]

[25] *See*, *e.g.*, Alan Boyle, "Some Reflections on the Relationship of Treaties and Soft Law," in Vera Gowland-Debbas, ed., *Multilateral Treaty-making* 25, at 32 (The Hague: Martinus Nijhoff, 2000).

[26] Schachter, *supra* note 24, at 169. [27] *Id.*, at 191–2. [28] *Id.*, at 196.

[29] *Id.*, at 233–45.

[30] *See*, *e.g.*, Bruno Simma, "How Distinctive Are Treaties Representing the Collective Interest? The Case of Human Rights Treaties," in Gowland-Debbas, *supra* note 25, 83, at 84; Vera Gowland-Debbas, "Introductory Remarks," in *id.*, at 1, 7.

These views are hard to reconcile with traditional positivist conceptions of this source of law—under which all treaties are subject to the same kind of interpretation based on respect for the plain meaning of its text, and in which all obligations contained in a treaty are equally binding. But they are perfectly in accord with recent insights into the centralization and independence functions of international organization.[31] As this suggests, the establishment of IOs has subtly changed the conception of "treaty." The UN Charter itself, no less than other IO constitutions and treaties embedded in a broader institutional framework for elaboration such as the Equal Remuneration Convention, are more accurately seen as species of managerial regimes that, from the outset, anticipate a continuous legislative enterprise by the political organs charged with interpretation. Such treaties, no less than environmental framework agreements, institutionalize change rather than reify stability.[32]

As is suggested by the "softness" of some modern treaty provisions and the use of some forms of institutional soft law to harden treaty obligations (as the ILO recommendation on Equal Remuneration does with respect to the Equal Remuneration Convention),[33] the turn to IOs has blurred the distinctions between the sources of international law. The distinction between hard treaty and soft law obligations is no longer as clear cut as it was, and it is no longer as easy to tell whether states are complying because of a treaty or customary law obligation, or merely because they are dutifully following organizational expectations.[34] This means as well that it is sometimes difficult to tell whether certain institutional legal products—whether "core" ILO Conventions or opinions issued by the ILO Labor Office—impose obligations only for those who have ratified particular treaties and are therefore a species of contractual obligation, or are general obligations on all and therefore a new phenomenon, namely, a species of international legislation.[35]

As many examples in this book illustrate, soft law is no longer just a precursor to a hard rule (whether established by treaty or custom), it is sometimes regarded as a preferable alternative to law-making by treaty or as its complement. Institutionalized soft law—whether in the form of GA resolution, an ILO recommendation, or a ruling by the WTO Appellate Body—can provide an authoritative interpretation of a treaty, amplify its terms, provide detailed rules and technical standards needed for its implementation, or operate in conjunction

[31] *See* Abbott and Snidal, *supra* note 7.

[32] *See generally* Catherine Redgwell, "Multilateral Environmental Treaty-Making," in Gowlland-Debbas, *supra* note 25, 89. It may be that, like many institutional developments, the rise of such continuous legislative enterprises is as much a product of technological innovations (especially the ability to engage in much more simultaneous communications), as the product of IOs, but it is difficult to disentangle cause and effect on such matters.

[33] *See supra* Section 6.3.

[34] *See generally* Boyle, *supra* note 25, at 26.

[35] *See generally* Francis Maupain, "The ILO's Standard-Setting Action: International Legislation or Treaty Law?" in Gowlland-Debbas, *supra* note 25, 129. For discussion of similar issues in the WTO, see Joost Pauwelyn, "A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?," 14 *EJIL* 907 (2003).

with a treaty to suggest that the underlying rules ought to be seen as rules of custom or at least organizational norms binding on members.[36]

As is suggested in particular in Chapter 9, IOs have also blurred the distinctions between making law, interpreting it, and adjudicating it. This is most evidently true to the extent many IOs rely on adjudicative fora (as in the WTO) to clarify and amplify the treaty obligations of members, and not merely settle discrete disputes. And as is most clearly the case with respect to the post-Cold War Security Council in the course of enforcement action, some IO political organs have also blurred distinctions between enforcement, law-making, and dispute settlement, and are capable of engaging in all three functions, sometimes simultaneously. Even relatively low-level World Bank or IMF officials, while engaged in attaching particular conditions to loan commitments may be, incidentally and unconsciously, simultaneously expanding the mandate of the international financial institutions for whom they work, while also serving as an enforcement tool for soft norms produced in other IOs. Similarly, Interpretations of the WHO's Health Regulations, issued by its expert committees and approved by its plenary body, perform both a regulatory/legislative function and a dispute settlement one.

To the extent general rules of law are produced through such methods—by the actions of bureaucrats, dispute settlers, or political organs—this necessarily implies a shift of power to those making these decisions and a shift away from positivist state consent as the basis for all international obligations. The rise of such organizational forms of law-making explains why, to commentators, "[t]he image of a sovereign state exercising freedom of choice in its participation in the international community no longer seems valid, or even desirable, except perhaps for the most powerful of nation-states."[37] By contrast to IO-generated forms of custom discussed above, it also suggests something of a shift to *less* consciously created sources of international legal obligation—at least to the extent the legally significant aspects of institutional decisions emerge only gradually or unexpectedly, or result from the incremental reliance on institutional "precedents." At least some IO-generated law is best described as law on automatic pilot, produced in routinized fashion by path-dependent institutions.

To the extent article 38 is regarded not as a definitive code of sources of law but as a choice of law clause for a particular dispute settler specially intended for use in the course of adjudication,[38] the developments described here might be regarded as the inevitable result of the proliferation of institutionalized settings that make use of, and promulgate, international legal standards. As the number of actors

[36] *See generally* Boyle, *supra* note 25, at 29–31. *See also supra* Section 4.4.

[37] John W. Head, "Supranational Law: How the Move Toward Multilateral Solutions is Changing the Character of 'International' Law," 42 *U. Kan. L. Rev.* 605, at 622 (1994). Head argues that new players and new rules, such as the IMF, have made "obsolete the concept of an 'international law' concerned solely or primarily with nation-states abiding by rules emanating from their own free will." *Id.*, at 635.

[38] *See generally* Yasuaki, *supra* note 18.

using international law has expanded with the rise of IOs, needs for new "sources" of international law have emerged.

10.2 IOs and the Changing Content of International Law

IOs have also helped to transform the substantive content of international law. Some of these changes are obvious. The sheer diversity of subject matter that characterizes IOs is reflected in the diversity of institutional forms of law. It is not altogether clear which of these phenomena came first or whether they can be always disentangled from one another in terms of cause and effect. Some organizations, such as the WTO, are appendages to a substantive set of inter-state obligations and can scarcely be distinguished from the legal regime over which they preside.[39] IOs generally, and institutionalized dispute settlers in particular, have transformed the content of international law by reducing its gaps and serving as permanent fora for reacting to the actions of states. The sheer growth in the amount of international regulation—and especially in human rights—has increasingly served to challenge the residual notion (from the *Lotus case*) that states remain free to do whatever is not explicitly prohibited.[40] Even if the *Lotus* presumption still holds true, there are fewer and fewer legal matters on which states are not regulated and in which they retain absolute discretion. Quite apart from the specific developments canvassed in Chapter 3 and their impact on UN Charter Article 2(7), the activity of IOs generally has helped to de-legitimate the proposition that there remains a "domestic" area of state regulation that cannot be the subject of international scrutiny. The on-going legislative enterprises that IOs make possible deepen international cooperation and make international law more responsive both to rapid technological change and to the demands of non-state actors. International rules are now more up to date than before IOs were created.

But it is not just that IOs have reduced the gaps in international law. IOs have created rules that would have been unimaginable without them. As Louis Henkin has noted, some international rules are "uniquely the child of organization."[41] Obvious examples include legal regimes governing the privileges and immunities of IOs themselves or representatives to them but more subtle and general examples of the phenomenon include the wide number of international duties that presuppose an institutional reaction, such as duties to report, to warn, to

[39] *See* Louis Henkin, "International Organization and the Rule of Law," 23 *Int'l Org.* 656, at 658 (1969).

[40] *The S.S. Lotus (France* v. *Turkey*), PCIJ Ser. A, No. 10 (1927). *See*, *e.g.*, Bruno Simma and Andreas L. Paulus, "The 'International Community': Facing the Challenge of Globalization," 9 *EJIL* 266 (1998)(claiming that the *Lotus* principle "is giving way to a more communitarian, more highly institutionalized international law, in which states 'channel' the pursuit of most of their individual interests through multilateral institutions"). *See also* discussion at *infra* Section 10.3.

[41] Henkin, *supra* note 39, at 661.

negotiate multilaterally prior to taking unilateral action; or to negotiate in good faith.

Since, as was suggested in Section 10.1 above, IOs have changed the form in which many international standards are expressed, a substantial number of IO-generated legal principles remain, despite the growth in treaties, not codified in formal instruments or included in express provision in IO charters. Some of the new kinds of legal duties are more akin to rules of habit or the informal rules of etiquette followed by members of a club.

For many public international lawyers, the law of the UN Charter as well as the rules within many modern treaty regimes accords fundamental importance to the duty of states to respect the sovereign equality of others by not unilaterally imposing their will on others nor by substituting "diktat for concerted action."[42] For an increasing number of international lawyers, the legal obligation to cooperate, part of the "law of coexistence" brought about by the UN system, is the "basis for the whole post-war international legal order" and requires states to "choose the path of compromise and negotiated settlement."[43] This principle is assumed to be generally applicable and not limited to UN matters. To the extent government officials share this view, the rise of IOs has changed what states expect from each other. The rise of universal fora for negotiation has led to contentions by diplomats and their lawyers that, for example, the U.S. had a duty to continue to negotiate at Kyoto; it has also prompted rulings by the WTO Appellate Body that the U.S. had a duty to negotiate multilaterally and not to discriminate prior to undertaking certain unilateral measures.[44] It is increasingly suggested that states, including the U.S., no longer have the freedom to contract if what they are seeking would undermine a "global agreement" produced under IO auspices. Such arguments are made, for example, by those who oppose U.S. efforts to

[42] Pierre-Marie Dupuy, "The Place and Role of Unilateralism in Contemporary International Law," 11 *EJIL* 19, at 23 (2000). *See also* Vera Gowland-Debbas, "The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN peace Maintenance," 11 *EJIL* 361 (2000); Philippe Sands, " 'Unilateralism,' Values, and International Law," 11 *EJIL* 291 (2000).

[43] Dupuy, *supra* note 42, at 22 and 25. As Dupuy puts it, the *Lotus* presumption is dead: a state's right to act alone is "residual and conditioned." *Id.*, at 23–4 (citing as examples of the principle, specific international rules such as those banning reprisals and barring unilateral denunciations of treaties). International law requires states, according to Dupuy:

> to seek in good faith to find through dialogue a solution compatible with the interests of all states concerned. It obliges them . . . where cooperation and negotiation structures have been opened to them through treaties and the creation of international institutions, to have recourse to these norms and these institutions, on pain of incurring, if they are ignored, international liability vis-à-vis the states concerned.

Id., at 24. *See also* Bruno Simma, "From Bilateralism to Community Interest in International Law," 250 *Recueil des Cours* (1994-VI); Simma and Paulus, *supra* note 40.

[44] *See generally* Dupuy, *supra* note 42. Cassese argues that the duty to cooperate emerges naturally from the universal participation of states in modern law-making settings since it makes negotiations among diverse and often conflicting groups of states possible; such rules of conduct were not necessary in 19th century treaty-making fora "based on unequal relationships between hegemonic and minor States." Cassese, *supra* note 13, at 185.

negotiate bilateral agreements seeking to guarantee that U.S. nationals would not be subject to the jurisdiction of the ICC. Others would suggest that "common but differentiated responsibilities," imposing stricter obligations on states that can more readily afford them, are yet another example of an emerging general phenomonon, if not yet a general principle, common to the age of global institutions.[45]

IOs represent, and perhaps supply, the "international community" that lead to such ostensible communal responsibilities premised on a hierarchy of values. It is not accidental that the notion of *jus cogens* and *erga omnes* obligations came to fruition only in the post-World War II age of institutions. Both of these concepts are premised on a hierarchy of values suggested by the UN Charter itself. As those familiar with the history of the Vienna Convention on the Law of Treaties suggest, the concept of *jus cogens* in that Convention can be attributed to the diverse interests represented in UN fora since the concept, initially resisted by some Western states, was the product of demands made by "Third World" and socialist states.[46]

As this last example suggests, many of the substantive changes in contemporary international law are attributable to the increasingly diverse participation of states and non-state actors that modern IO venues make possible. Such venues make more likely and encourage the conclusion of legislative treaties intended to codify, but that also progressively develop, the fundamental constitutive rules of the international system—such as the rules governing treaties, the way states ought to conduct their diplomatic relations, or those governing the global commons. Such legislative treaties, as noted, are more readily capable of being seen as influencing general customary rules, whether or not this was the original intent of those who drafted them.

But the universal nature of IO negotiating venues have other effects on the content of treaties. Consider again the paradigmatic example of the Vienna Convention on the Law of Treaties. Cassese notes the contrast between the old rules with respect to the law of treaties with the new ones contained in that Convention, which was drafted under UN auspices and with the considerable assistance of the ILC. The old rules, he explains, "played into the hands of stronger states" because: economic, political or military coercion did not invalidate treaties; reservations had to be accepted by all parties to a treaty; no substantive restrictions existed with respect to the content of treaties; no binding rules on treaty interpretation existed with the possible exception of a canon of

[45] For arguments concerning whether common but differentiated responsibilities are appropriate in different circumstances, see Christopher D. Stone, "Common But Differentiated Responsibilities in International Law," 98 *AJIL* 276 (2004).

[46] *See generally* Cassese, *supra* note 13, at 176–7; Edward McWhinney, *United Nations Law Making* at 73–6 (New York: Holmes and Meir Publishing, 1984). For a suggestion that such developments suggest that international law has "entered into a process of constitutionalization," see Jost Delbruck, "Prospects for a 'World (Internal) Law?'," 9 *Ind. J. Global Legal Stud.* 401, at 430 (2002).

interpretation, *in dubio mitius* (limitations of sovereignty were to be strictly construed), that favored the freedom of states; and rules regarding the termination of treaties were notoriously unclear.[47] Under strong pressure from socialist and Third World states, the Vienna Convention on the Law of Treaties did far more than merely "codify" the existing law: it generally introduced a number of restrictions on the absolute discretion of states that had heretofore generally favored the powerful. That Convention made a treaty null and void if brought about by threat or use of military force or if it violates *jus cogens*; rendered reservations invalid only if inconsistent with a treaty or its object and purpose; adopted concrete guidance on rules of interpretation and implicitly eliminated reliance on *in dubio mitius* as a legitimate canon of interpretation; and clarified the rules governing termination.[48] While developing states did not achieve everything that they had sought (and had to be content with a declaration calling on states to refrain from economic or political coercion in making treaties, for example), the results, as Cassese indicates, stabilized treaty relations to the benefit of states as a whole, thereby reflecting the greater "democratic participation of international relations" that gave rise to that Convention and that now prevails with respect to most multilateral treaty-making efforts.[49] Other unique features of modern treaty regimes—such as differentiated responsibilities as between developed and developing states in environmental regimes and the WTO—would also appear to be the predictable outcome of treaty-making venues conducted under the procedures and arrangements discussed in Chapter 5.

The impact of IO procedures and venues on multilateral treaty-making has been, as is suggested in Chapter 6, a mixed blessing. Consider a second quintessential treaty product of the age of IOs: the Genocide Convention produced through UN efforts and endorsed by the GA in 1948. It would be misleading to view that Convention as principally designed as a multilateral (and exceptionally narrow) extradition treaty that merely obligates its parties contractually to transfer requested persons for trial upon request. Although it would not be inaccurate to describe the concrete obligations that states accept in such terms, that treaty was an effort by the international community, as represented by the GA, to react to the horrors that had prompted, among other things, the establishment of the UN itself. That treaty, as do many UN treaties and soft law products dealing with human rights, sought to reflect and to shape human and societal values believed to be reflected in the UN Charter and, perhaps equally significantly, to restate these values, in *legally binding* form. To this extent the Genocide Convention reflected, for good and bad, the communal forum in which its terms were forged. That

[47] Cassese, *supra* note 13, at 187–8. [48] *Id.*, at 189–91.

[49] *Id.*, at 189 (noting that the new rules required treaties to respect a central core of international values from which no country, no matter how powerful could deviate, permitted wider and greater participation of all states in treaties, and stressed the need to enhance the object and purpose of a treaty, and not state sovereignty, in terms of interpretation).

treaty was intended to be an expression of values no less than the UN Charter itself. Though its drafters undoubtedly hoped that genocidal murderers would, in accordance with its terms, be brought to justice, they surely hoped as well that criminal trials would not be necessary and that the Convention would help prevent further genocides. Yet, as with respect to so many UN treaty products, the efforts to compromise among competing diverse interests in a global forum led to inescapable substantive gaps—such as the failure to include the killing of political opponents or forms of cultural genocide—and a rather large and obvious enforcement gap—a failure to establish any international mechanism to compel states to convict those guilty of genocide, apart from dispute settlement by the ICJ, which of course could not itself try individuals. It also led to a highly ambiguous, perhaps intentionally non-operational, Article 1 ostensibly proclaiming a "duty to prevent" genocide but saying nothing about the content of this duty and certainly not suggesting that ratifying states would thereby be obligated to use unilateral force to intervene in states where on-going genocide was taking place.

Given these flaws, many, such as government officials in the U.K. who resisted ratifying the "useless" Convention until 1970, argued that the Genocide Convention was a feel-good series of "pretend-rules" intended to appeal to the public conscience that substituted for real action, the progeny of international bureaucrats seeking to justify their continued employment and cynical states willing to engage in a free, and empty, public relations gesture.[50] Yet Britain itself ultimately ratified the Convention without reservation despite its qualms, as have most states, perhaps (as is discussed in Section 10.4 below) precisely because this Convention was a UN product and was regarded as part and parcel of all UN members' unavoidable obligations.

Today, despite its evident operational flaws, the Genocide Convention is regarded, at least by its defenders, as one of the constitutive instruments of modern international law. Together with other transformative legal developments events in the immediate wake of World War II, especially the Nuremberg Trials and the GA's passage of the Universal Declaration of Human Rights, the Genocide Convention marked a transition to using public international law to address questions other than inter-state problems or derivations from these (such as the treatment of aliens within each state's territory under espousal practice). The Genocide Convention indicated that protecting the dignity and life of the individual (whether or not an alien) was now within the domain of public international law, that individuals could be held criminally accountable for violations of this law, that certain crimes could be subject to universal

[50] *See generally* A.W. Brian Simpson, "Britain and the Genocide Convention," 73 *Br. Yrbk Int'l L.* 5 (2002). *See also* Thomas W. Wälde, "Non-Conventional Views on 'Effectiveness': The Holy Grail of Modern International Lawyers: The New Paradigm? Or a Brave New World in the Global Economy?," 4 *Austrian Rev. Int'l & Eur. L.* 164 (1999)(describing the characteristics of many modern treaties).

jurisdiction and subject to the jurisdiction of an internationalized court, and that it would not be a defense to such crimes to point to national law.[51] In doing so, it established (or at least encouraged) the use of legal discourse as a legitimate basis for addressing problems that heretofore had been seen only from a political or moral perspective. All of these had practical implications. As is suggested by Simpson's account, the Genocide Convention forced these issues onto the agenda of lawyers within discrete government departments. Like many subsequent human rights instruments produced under UN auspices, the Genocide Convention's expressive (as opposed to operational) values have proven, over time, to be enduring. Its inability to prevent the horrors that it addresses has not undermined its legitimacy or made the treaty irrelevant to the real world practice of states or organizations.

That treaty's normative ripples are far and wide. In recent times the Genocide Convention has been invoked by the Secretary-General and ultimately the Security Council in establishing the ICTY and ICTR, as well as by the drafters of the Rome Statute for the ICC. The prohibition on genocide is regarded as an indisputable part of *jus cogens* and there are on-going efforts to operationalize its ineffectual "duty to prevent" as part of a broader "principle to protect."[52] Few question today, at least in the wake of the débâcle of Rwanda, that at least the Security Council has the right to act, if not the duty to do so, in cases of on-going genocide. No state in the world is likely to contend that an act of genocide whether within its borders or outside it is not an international crime. Most states have criminalized such acts under their domestic law, at least with respect to their own nationals; and some national courts, including in the U.S., have prosecuted acts of genocide or at least provided some of its victims with a civil cause of action.[53] All relevant actors—NGOs, government bureaucrats, IO secretariat officials, and even multinational corporations—are aware that genocide is one of the acts for which individuals can be held accountable by the international community. It would be wrong to deny the impact—at least on law and societal values—of this widely ratified UN treaty. The Genocide Convention is an example of a prototypical treaty of and for the age of IOs, expressive of

[51] While there were hints of all of these possibilities prior to the end of World War II, neither earlier minority rights treaties nor prior efforts to establish international criminal liability can be credited with establishing either of the two flourishing legal regimes that emerged in the wake of World War II institutions: international human rights and international criminal law.

[52] Gareth Evans and Mohamed Sahnoun, "The Responsibility to Protect," 81 *Foreign Affairs* 99 (November/December 2002)(describing the International Commission on Intervention and State Sovereignty's report, *The Responsibility to Protect*, published in December 2001 and available at www.iciss-ciise.gc.ca). Indeed, despite the absence of clear legal basis for a duty on third parties to use force to prevent genocide, it is striking how often government officials attempt to avoid use of the term "genocide" in describing atrocities being committed, perhaps to avoid contemporary expectations that once the term is invoked, there will be increased public pressure to intervene forcefully. *See generally* Samantha Power, *A Problem from Hell* (New York: Harper Collins, 2002).

[53] *See*, *e.g.*, *Kadic* v. *Karadzic*, 70 F.3d 232 (2nd Cir. 1995)(upholding private cause of action for, among other things, genocide).

community values and likely to be judged on the basis of a different calculus of costs and benefits. The vagueness of its terms is, as is the case with many IO-generated treaties, a Janus-faced phenomenon.[54]

IOs' impact on the content of public international law extends beyond treaties. The rules—and attendant uncertainties—that we have with respect to many critical questions governed by customary international law or general principles can best be explained in terms of the organizational processes that produced them. The continuous iteration of the practices of IO organs, both the Trusteeship Council and the GA, has, for example, given greater precision to vague principles such as "self determination" and "sovereign equality." We now know that at a minimum self-determination means the right not to be a colony and to exercise some control over one's natural resources but the uncertainties as to the remaining aspects of self-determination—the extent to which it applies to other peoples or what it means when it does—can be explained as well by the relatively narrow focus of those UN organs that have been the most prominent interpreters of the term.

Thanks to IO organs, we know that "sovereign equality" means at least the equal right to participate in international negotiations and, in the context of particular IOs, may entitle states to many more procedural rights. At the same time, the unequal standing of states formally accepted in terms of the governance structures of the IMF and the World Bank, not to mention the authorized privileges of the Permanent Members of the Security Council, are an apt reminder that this sovereign right may not have much greater substantive content. Chapter 2's description of the rules of treaty interpretation that have been applied to the UN Charter suggests yet another example. The World Court's interpretations of the UN Charter, especially in advisory opinions such as *Certain Expenses* and *Reparation for Injuries*, have inspired teleological canons of treaty interpretation more generally and helped to legitimate expansive canons of interpretation not clearly stated in the Vienna Convention on the Law of Treaties, such as the "principle of effectiveness."

The sheer diversity of IO standards suggests a considerable expansion in what we now expect international law to accomplish. As suggested above, treaties in the age of IOs are no longer restricted to sets of bilateral and reciprocal obligations among their state parties: they can and do have provisions intended to be promotional, hortatory, or educative, or designed to mobilize support (as by permitting access to NGOs for certain purposes). Since many modern treaties are the products of processes that are more open to non-state actors, we should not be surprised that some anticipate rights or even responsibilities for non-state parties. (Just as customary rules in the age of IOs are, as noted, no longer restricted to bilateral reactions between states across time but encompass the practices of institutional organs that are intended to affect the actions of those organs or other institutional players.) As is suggested by the diverse uses to which some

[54] *See also supra* Section 6.4.

GA resolutions are put, customary rules also have declaratory or expressive, interpretative, condemnatory, and other uses.[55] General principles are no longer restricted to those found within the national law of nation states but may also include, for example, principles generally applicable as between, and for the use of, international dispute settlers.[56]

10.3 IOs and the Changing Law-makers

IOs are the first type of "international legal person" apart from states ever recognized. As discussed in Chapter 3, this came about in large part at the initiative of IO organs themselves—specifically the actions of the Secretary-General, the GA, and the ICJ in the course of the *Reparation for Injuries case*. This is not the only example in which the actions of IOs have helped to fashion a new actor capable of influencing the development or enforcement of international law. Far from it. IOs have helped to generate a "participant revolution" in the making of international law. Institutionalized human rights compliance bodies have empowered individuals not only by providing them with access to an international forum but by permitting them indirectly to affect the subsequent developments in international law through the judicial precedents established. Some IO organs, such as the WTO's dispute settlement body, indirectly empower multinational corporations since they are its primary beneficiaries and are therefore the principal bodies with an incentive to pressure government officials to bring WTO claims on their behalf. Private industry's power to influence international law is also considerably enhanced by IOs' reliance on expert bodies open to their participation, as in the Codex Alimentarius.

IOs have re-shaped all the relevant international law-making actors and in some cases created new kinds of actors. Sociological institutionalists have long suggested that social institutions shape the identities and interests of actors, as well as are shaped by the actions of such actors.[57] The causal arrows go in both directions. Like states, IOs are social structures that construct individual and collective actors—including new categories of persons such as "international civil servants" and diplomats charged with being representatives to IOs and not ambassadors to a foreign country—by providing them with models, identities, or roles.[58] Just as the Treaty of Westphalia constructed states and helped to define some of the roles of a "head of state," IOs have transformed some non-state actors, including individuals, into relevant international actors by constructing new

[55] *See supra* Section 4.4. [56] *See supra* Chapter 8.

[57] *See generally* Alexander Wendt, "Anarchy is What States Make of It," 46 *Int'l Org.* 391 (1992). For a discussion of the impact of globalization and IOs on the law-making actors, see Saskia Sassen, "Symposium: Globalization and Governance: The Prospects for Democracy," 10 *Ind. J. Global Leg. Stud.* 5 (2003).

[58] Walter Mattli and Tim Büthe, "Setting International Standards", 56 *World Pol.* 1, at 12 (2003).

identities for them unique to the age of IOs—from "Secretaries-General" to "international civil servant" to UN-authorized "expert" to "peacekeeper."

International civil servants have been influential in establishing both "internal" and "external" rules—from the scope of the duty to pay UN dues to the responsibilities of UN peacekeepers and the interpretation of their mandates, from the meaning of the WHO's health regulations to the meaning of "consensus" in the course of treaty negotiation. Much of the work of IO secretariat officials and staff that has a normative impact is done behind the scenes. In the course of their day-to-day activities, IO staff, including lawyers in the legal office, are the first to apply the rules of constitutional interpretation discussed in Chapter 2, usually in ways that are not subjected to external forms of scrutiny (as by the ICJ). In the usual case, their interpretation that a matter falls within the scope of legitimate implied powers, for example, carries the day. Their work facilitates the standard-setting in which UN political organs and UN specialized agencies engage (as canvassed in Chapters 3 and 4). They fill a vital auxiliary role in supporting the various institutionalized forms of treaty-making discussed in Chapter 5 and are, of course, the persons responsible for the non-judicial forms of dispute settlement canvassed in Chapter 7.

Perhaps least recognized is how the work of IO secretariats shape and, depending on the judicial forum, influence the judicial opinions emerging from the more judicialized dispute settlers of Chapter 9. WTO legal staff reportedly assist in the drafting of many of the opinions emerging from WTO dispute settlers. And even with respect to the ICJ, some of the opinions issued by that body are heavily influenced by the work of the UN secretariat. A recent example is that Court's Advisory Opinion addressing the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. As the Court's opinion acknowledged, the greater part of the facts presented to the Court were contained in voluminous dossiers submitted to the Court by the Secretary-General or otherwise prepared by other UN bodies. Those dossiers contained not only detailed information on the route of the wall—crucial for many of the Court's findings of illegality—but also details as to the humanitarian and socio-economic impact of the wall on the Palestinian population, based on on-site visits by special rapporteurs and competent organs of the UN.[59] These UN dossiers were equally crucial to the Court's numerous findings that the wall violated international humanitarian law as well as human rights norms. It was due to this volume of ostensibly impartial information that the Court was able to find that it had sufficient information and evidence to enable it to give the requested Advisory Opinion, despite Israel's refusal to provide the Court with information relating to the merits of the case.[60]

[59] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ Rep. 136 para. 57 (hereinafter "*Legal Consequences of the Wall*").

[60] *Legal Consequences of the Wall*, *supra* note 59, at para. 58.

At the same time, as is suggested by Judge Buergenthal's separate opinion in that case, it is not clear that the Court was provided with all the "relevant facts bearing directly on issues of Israel's legitimate right of self-defence, military necessity and security needs." It appears that the Secretary-General, like the Court, was content with merely attaching the summary of the legal position of the Government of Israel as an annex to its report without a thorough consideration or amplification of these issues.[61] As this suggests, particularly in cases involving requests for advisory opinions where state parties are not obligated to participate or to supply the Court with information, the Court is dependent on the UN Secretariat or the work of other IOs for much of what it considers and opines upon. Yet, like the older advisory opinions discussed in Chapter 3, the Court's opinion on the wall, ostensibly designed to assist UN political organs' handling of the issue, goes far beyond questions of "internal" institutional law to address vital questions of interest to the entire international community, particularly given current threats posed by international terrorism, such as the interplay between international humanitarian law and human rights, the use of force and self-defense, and the extraterritorial scope of states' human rights treaty commitments. The Court's Advisory Opinion on the wall, no less than its opinions in *Certain Expenses* and *Reparation for Injuries*, has the potential to affect customary and treaty rules far removed from the narrow question presented to the Court in that case.

Another aspect of international institutional law that has not been the subject of much attention is the symbiotic relationship between IOs and NGOs. Although IOs and NGOs are today often seen as potential adversaries or competitors, a bit of historical perspective makes clear that IOs have been the conduit for these members of "international civil society," and indeed have given NGOs the participation rights which make it possible for many of them to credibly claim to represent "international civil society."[62] As Steve Charnovitz has indicated, the starting point for NGOs' participation in modern forms of law-making came in the Paris Peace Conference in 1919, which established not only the terms of the peace following World War I but also the League of Nations. At that Conference at least four non-state groups played a role—labor unions, Jewish and Zionist organizations, women's groups, and the American Red Cross. While private groups had held side events alongside the Hague Peace Conferences of 1899, the Paris Conference marked the first time that individuals from NGOs were accorded an opportunity to participate in a major law-making conference.[63] Charnovitz argues that state practice "matured" at that Conference such that, after

[61] *See* Judge Buergenthal, Declaration, *Legal Consequences of the Wall*, *supra* note 59, paras. 3–8.

[62] For a history of the symbiotic relationship between NGOs and IOs, see Steve Charnovitz, "Two Centuries of Participation: NGOs and International Governance," 18 *Mich. J. Int'l L.* 183 (1997).

[63] Steve Charnovitz, "The Emergence of Democratic Participation in Global Governance (Paris, 1919)," 10 *Ind. J. Global Legal Stud.* 45, at 71 (2003).

1919, "the developing norm (or at least best practice) was that governments would recognize the legitimacy of the NGO activities alongside international conferences, and would give consideration to requests by NGOs to make presentations on topics of NGO expertise."[64] The Peace Conference of 1919 "empowered NGOs," making them "feel like a regular part of the constitutive process."[65] Whether or not Charnovitz is right to call that Conference a "global constitutional moment" that galvanized the continuation of NGO participation to give global governance a "more democratic morrow,"[66] it is true that the subsequent League of Nations began the tradition of granting NGOs observer and participant status—a tradition that continues, in various forms, in most IOs today.

The literature on the impact of NGOs on international law is extensive and requires no summary here.[67] Although the impact of NGOs on legal development ebbs and flows, no one questions today the fact that international law—both its content and its impact—has been forever changed by the empowerment of NGOs. The degree to which IOs have empowered NGOs has varied over time and with the particular IO. NGOs' involvement in UN treaty-making conferences—a development that, in the modern era, stemmed from initiatives by ECOSOC and the UN General Assembly—is an obvious concrete example of NGO empowerment. Of course, IOs' enabling roles with respect to NGOs have not been limited to including these organizations in ad hoc conferences but have taken the form of more or less permanent on-going associations through consultative or observer status, subject to varying degrees of permitted access and participation. In UN system organizations other than the ILO, accepted NGO representatives generally have access to documents and on occasion are permitted to submit comments but they are usually barred from voting and access may be restricted with respect to many organs. In some cases, as with respect to the ILO's acceptance of labor unions and industry representatives as delegates to that organization's plenary or dispute settlement bodies, NGO or other non-state interests secure a status within IOs comparable to that of governments for some purposes. Global administrative processes, discussed in Chapter 4, have often empowered NGOs and other non-state actors, including multinational corporations or associations of business interests. Non-state access to international dispute settlement varies. Some judicialized dispute settlers, such as the ICJ and in the WTO, have discretion to grant some access to NGOs. Individuals and NGO representatives acting on their behalf are increasingly permitted to submit

[64] *Id.* [65] *Id.*, at 72.

[66] *Id.*, at 72 and 74. Charnovitz also notes that the "constitutional moment of 1919" received a confirming international judicial endorsement when the PCIJ, in the first case to come before it, agreed to hear from two international labor unions, in the course of deciding an advisory opinion on the method used by The Netherlands in selecting its worker delegate to the ILO. *Id.*, at 75–6.

[67] For one example of the impact of NGOs on human rights regimes, see Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998).

petitions in human rights bodies, while private investors have access to some forms of institutionalized international dispute settlement (as under the World Bank's ICSID).

Quite apart from their role in adjudicative forms of law-making, NGOs have had an impact on IO-generated forms of law by giving voice to the views of persons not otherwise represented within IOs or governments. NGOs engage in law-making indirectly, by providing technical expertise needed by IOs and governments, facilitating negotiations on treaty-making and other forms of standard-setting (as by generating ideas and compromise formulations outside normal bureaucratic channels), providing feedback on government and IO proposals, assisting governments in the ratification of treaties or the implementation of other standards, or enhancing the monitoring of compliance with international standards (as through "shadow reports" provided to UN human rights treaty bodies).[68]

The legitimacy of NGOs and IOs are often intertwined. NGOs have arguably enhanced the political legitimacy of some IOs by providing forms of accountability not otherwise available, but NGOs' IO participation has also benefited some NGOs by enhancing their own international stature or legitimacy.[69] In some instances IOs have specifically asked or even required NGOs to take specific action. The UN Security Council, for example, has requested international humanitarian organizations to assist refugees and in 1991 appeared to require International Red Cross societies to take charge of Kuwaiti and other third-country nationals that had been detained by Iraq.[70] Other IOs, such as UNESCO in the course of its anti-apartheid campaign, called on NGOs to conform with its mandates and that organization even suspended relations with some forty-two NGOs that did not comply.[71] As this suggests, IOs have on occasion treated NGOs as international legal persons subject to the constraints of, and entitled to some of the benefits of, international law.

The IO-generated participant revolution includes, of course, the proliferation of IOs. IOs have tended to reproduce themselves, or at least have produced a multitude of subsidiary bodies.[72] They have also empowered existing IOs—as the Security Council did when it enhanced the power and the stature of the IAEA by relying on it for inspections in Iraq.[73] The multitude of quasi-autonomous bodies produced in the age of IOs, as with respect to those charged with monitoring arms control regimes, has been fully documented elsewhere.[74] Apart from the import

[68] *See*, *e.g.*, Charnovitz, *supra* note 62, at 274.

[69] *See*, *e.g., id.*, at 274–5.

[70] *See* SC Res. 686, March 2, 1991, S/RES/686.

[71] Charnovitz, *supra* note 62, at 259–60.

[72] *See*, *e.g.*, Eric Stein, "International Integration and Democracy: No Love at First Sight," 95 *AJIL* 489, at 489 and n. 2 (2001) (noting estimates that IOs have increased in number from 123 in 1951 to 251 in 1999 and that a "huge portion" of new IOs were created by other IOs and not by governments, citing statistics in the 1999/2000 Yearbook of International Organizations).

[73] *See*, *e.g.*, SC Res. 687, April 3, 1991, S/RES/687.

[74] *See* Paul Szasz, "The Complexification of the United Nations System," *Max Planck UN Yrbk* 3 (1999).

these bodies have on the production of international standards or efforts to enforce them—it stands to reason that more IOs produce more law—another significant consequence of the proliferation of organizations is that public international lawyers are no longer as certain as they once were that the ability to act on the international law requires actors to be formally accepted as "international legal persons." Although the ICJ suggested as much in *Reparation for Injuries*, it is not so clear that the Court would be so emphatic if the question arose today. We now have so many plausible "international legal persons" that we are no longer sure what that term implies.[75] MOPs or "meeting of the parties" under various environmental framework conventions talk and act like IOs: they conclude treaties and seem to enjoy "implied powers" even though they were never formally established as IOs or as international legal persons.[76] Other groups, such as transnational networks of government regulators, such as the Basel Committee on Banking Supervision, which often operate in the shadow of IOs or in conjunction with them, are also empowered by their associations with IOs (and vice versa). Such groups also act on the international plane and their actions have transnational legal effects without benefit of formal personhood.[77] And even when states choose to avoid the expense and bureaucratic headaches of establishing a full-fledged inter-governmental organization, they often cannot help borrowing elements from IOs—such as privileges and immunities based on international institutional law, the secretariats of established IOs, or institutionalized dispute settlement.[78] In such cases, persons purporting to represent certain collective interests are acting on the international plane—even settling international disputes—without aid of the international legal personhood once seen as an essential prerequisite. Of course, to the extent the conduct of such collectivities have an impact on international law, this is also hard to reconcile with the formal state-centric sources of international law.

Perhaps most significantly, IOs are transforming the principal law-making actors that are recognized by article 38 sources of law, namely the states themselves. This is so not only because the majority of states today would not exist but for the decolonization efforts of the UN, but also because, as noted in

[75] This has long been the case, even before most formal IOs were established. Thus, in the 1930s, an Italian Court found that the Sovereign Order of Malta as an "international collective unit" had a limited capacity of acting internationally and having juridical personality because of the "universal character of its aims and ideals." Charnovitz, *supra* note 62, at 278 (discussing *Nanni and Others* v. *Pace and the Sovereign Order of Malta* which upheld the validity of a property title despite lack of permission from the Italian government).

[76] *See*, *e.g.*, Robin R. Churchill and Geir Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon In International Law," 94 *AJIL* 623 (2000).

[77] *See generally* Anne-Marie Slaughter, *A New World Order* (Princeton, New Jersey: Princeton University Press, 2004).

[78] Thus, many of the over 2,000 bilateral investment treaties that form the backbone of an emerging global regime for foreign investment rely on the dispute settlement facilities of the World Bank, namely, ICSID.

Chapter 3, IOs have transformed how we recognize when states exist. IO membership has always been significant to those for whom recognition as a state is not a foregone conclusion, from the component parts of the former Yugoslavia to today's advocates for a Palestinian state.

But even for those not insecure in their statehood, IOs are changing what it means to be modern sovereign. Implicit to article 38 sources of law, and indeed essential to the Westphalian system on which it was based, was the proposition that states were the supreme or final decision-making authority over their territory. Sovereignty, on this view, coincided with absolute power and embraced the power, reflected in Article 2(7) of the UN Charter, to be left alone: to determine one's own domestic jurisdiction without external interference. By definition, there was no power superior to those of states, no vertical power over them. The international system was premised on horizontal relations between states, each enjoying absolute privileges. The anarchy prevailing outside of states, in their foreign relations, was subject to isolated islands of stable relations created by willing states. Article 38 sources of law recognized only states as law-makers for themselves and for the international community. The international obligations that this provision recognized were premised on the consent freely given of those states. Consent was the basis for all constraints on sovereigns because it was assumed that "inter-national" law by definition could only consist of such rules, and it was assumed that those rules would address only those issues dealing with inter-state interaction (such as diplomatic relations, war, transboundary trade) having nothing to do with the sacrosanct "domestic jurisdiction" (that is, dealing with how a government treated its own people or ruled over its territory).[79]

On this view, any re-allocations of power by a state, as through delegations to an IO, required a forfeiting of sovereignty. Indeed, it was once argued that certain attempts to re-allocate sovereign powers, never to be presumed, were perhaps illegal, as where states attempted to enter international agreements with respect to matters not dealing with "foreign relations," narrowly understood. Thus, it was plausibly argued within the U.S. for some time that the Executive Branch's treaty-making power was inherently limited to subjects that could be the subject of "foreign relations" and for that reason alone, did not pose a serious challenge to the legislative branch's virtually unlimited power to make the laws. Not surprisingly, the combination of the operation of the principle of non-intervention, which excluded a great deal from diplomatic discourse, and the assumption that only states could exercise supreme authority over their subjects and territory, led scholars like John Austin to the logical conclusion that international law was simply not law.[80]

[79] *See*, *e.g.*, David P. Fidler, "Global Challenges to Public Health: SARS: Political Pathology of the first Post-Westphalian Pathogen," 31 *J. L. Med. & Ethics* 485, at 487 (2003). *See also* Kal Raustiala, "Rethinking the Sovereignty Debate in International Economic Law," 6 *J. Int'l Econ. L.* 841 (2003).

[80] John Austin, *The Province of Jurisprudence Determined*, at 133 and 201 (Berlin: Hampshire and Wollheim, edn. 1954; originally published in 1832)(arguing that law obtaining between nations is not "positive law" since positive law consists of commands issued by sovereigns to their subjects whereas duties among nations are enforced by "moral sanctions"). *See supra* Section 1.4.

IO-generated forms of law have been instrumental in undermining all of these premises. As this book repeatedly demonstrates, in the modern world, thanks at least in part to the actions of IOs, states can no longer be said to hold "absolute" power over their own peoples or territory, even with respect to matters that were once seen as "domestic" having nothing to do with inter-state relations. International law now embraces the full spectrum of matters that national law covers, from family relations to the labeling of food products. States' right to be left alone, if it exists as a general residual right at all, is increasingly contingent and conditioned, even with respect to how a state governs itself and treats its own citizens. It is no longer clear that international obligations are subject to *in dibio mitus* as a legitimate canon of construction or that, as found in *Lotus*, states remain free to do all that they have not specifically barred themselves from doing. As demonstrated in Chapter 3, UN political organs have steadily undermined the scope of "domestic jurisdiction" while enhancing the UN's ability to intervene. As discussed in Chapter 4, other IOs have developed ways to make law involving quite attenuated forms of sovereign "consent." Even those international obligations most clearly evincing consent—international agreements—are subject to procedures and processes, surveyed in Chapter 5, that put pressures on the "free will" of states to negotiate, ratify, and implement such agreements. As discussed in Chapters 7 to 9, non-judicial and judicial dispute settlers' settlement of disputes generate rulings whose normative ripples can be felt by states that are not parties to such disputes. For all these reasons, states are no longer the sole actors capable of making international law.

While the international system remains anarchic, at least relative to nation states subject to the rule of law, the "islands" of stable inter-state relations are increasingly dense and no longer as isolated from one another. The density of IOs and IO-generated forms of law increasingly requires attention to inter-island (inter-IO) relations, the interaction of national and international legal standards, and the interaction between national and international regulators and adjudicators.[81] Within some IOs, most prominently in the Security Council, horizontal and voluntary agreements have given way to vertical and coercive commands by organs purporting to represent the collective interest.[82] The sanctions available to some international organs, international bureaucrats, and dispute settlers—including UN sanctions committees, IMF loan officers, and WTO dispute settlement—are no longer as easy to distinguish from Austinian sovereign commands.

Formally, the Westphalian conception of sovereignty has not changed. It remains possible, though increasingly artificial, to find evidence of state consent to justify all the forms of IO-generated law surveyed in this book. If one sees states' WTO agreements as reflecting their pre-commitment to tie their own protectionist hands, for example, whatever the WTO DSB does with this consent, even though it alters real world outcomes, reflects the intentions of those who retain the

[81] *See supra* Section 4.4. [82] *See supra* Section 4.2.

real power to make law, namely states. Realists would also contend, with considerable justice as is suggested by Section 4.2 discussing the Security Council's enforcement actions, that the more coercive forms of IO-generated forms of compliance constitute laundered forms of hegemonic self-help. On this view, the fact that the WTO Appellate Body authorizes some states to do what they could have done on their own, that is suspend trade concessions, should not be regarded as a species of Austinian sovereign command, at least not from the WTO "sovereign." Further, as Kal Raustiala points out, if the "absolute" sovereign power envisioned by the Westphalian system means only power that cannot be *irrevocably* allocated to others, that is, if all "sovereignty" requires is that states are able to exit from IOs at will, the existence of IOs has not radically altered sovereignty, since only rarely does an international institution rest on formally irrevocable delegations of power. Even with respect to those organizations that arguably do not permit a state to withdraw, such as the UN, there is in practice little that the organization could do to prevent exit. But if one takes into account the political realities faced by most (if not all states), the Westphalian conception of sovereignty has indeed been radically altered by, among other things, IOs and managerialists' alternative descriptions of the independent agency of IOs holds considerable appeal.

As the Chayes have pointed out, the single greatest determinant of sovereignty today is probably not what remains of "internal" or "domestic" jurisdiction but the *status* of states, as determined by the degree to which they participate in IOs and are able to take advantage of their privileges.[83] Most states today find that it is impossible to fulfill the modern expectations of their populations without the tangible assistance of UN system organizations or of international financial institutions such as the IMF. And even powerful states like the U.S. and China find that they cannot fulfill all the expectations of their populations, from physical security to economic welfare, without the assistance of IOs. Though the possibility of exit usually exists, it is notoriously difficult to disengage from modern IOs and when exit occurs it is usually not permanent.

Although, as discussed below, tensions persist between competing views of sovereignty, scholars and policy-makers increasingly take the view that sovereign power is not a "zero-sum game" in which delegations of power to IOs necessarily lessen a state's own power.[84] Participation within IOs is increasingly portrayed by diplomats and scholars as "sovereignty-strengthening" since it enhances a state's ability to engage in the standard-setting activities, and secure other benefits, needed to fulfill the regulatory needs generated by a globalizing world. The exercise of sovereignty as traditionally understood today requires, as the Chayes indicate, participation in IOs. IOs, along with other international legal regimes, are the "primary means by which states may prosper and achieve social

[83] *See* Abram and Antonia Handler Chayes, *The New Sovereignty* at 27 (Cambridge, Mass.: Harvard University Press, 1995).

[84] *See*, *e.g.*, Raustiala, *supra* note 79, at 853.

objectives;" they are the "primary means by which states may reassert or express their sovereignty."[85] As Kal Raustiala argues and as discussed in Chapter 4, the nature of sovereignty has to this extent been transformed. The Chayes' redefinition of sovereignty as "status" is a relational concept that stresses the importance of what the community thinks of a state as well as what collective institutions enable a state to do for itself; it requires re-defining a state as an organizational (and community) member and not as autonomous and unfettered actor.[86]

Public choice theorists have also helped to re-define sovereignty in a more IO-friendly fashion. They argue that IO participation should be seen as enhancing the power of government officials to respond to the desires of their constituencies by permitting them to recapture some degree of control over important policy decisions that would otherwise, given exogenous and de-stabilizing changes in the international system, escape their grasp.[87] Participation in the Security Council's counter-terrorism efforts permits states, for example, to regain some degree of control over financial resources that fund terrorism within their territory; cooperation with the World Bank or the IMF permits states to have access to financial resources and encourage the entry of foreign investors. Like the Chayes' redefinition, this reconceptualization of sovereignty views IOs as beneficial agents for governments that enable all branches of a government to achieve what they otherwise could not. IOs permit legislatures and government regulators—such as those attempting to regulate securities fraud—to achieve their purposes at a time when global capital markets challenge their ability to do this on their own. International tribunals, such as ICSID tribunals that supervise states' treatment of foreign investors, are said to achieve what national courts cannot as easily provide: supply a less partial forum for resolving disputes. Even those IO activities that appear to "second-guess" the discretion of national regulators—such as the power of WTO dispute settlers or human rights adjudicators to rule national laws as contrary to international law or the power of the WHO to issue health warnings despite local officials' reluctance to do so—can be reconceptualized, under public choice theory, as welfare-enhancing "corrections" responding to flaws in national structures intended to reflect the preferences of a majority of national constituents.

[85] *Id.*, at 860.

[86] *Id.*, at 861. *See supra* Section 4.4. *See also* Slaughter, *supra* note 77, at 267–8 (arguing that "sovereignty-as-autonomy" makes no sense if the background conditions for the international system are "connection rather than separation, interaction rather than isolation, and institutions rather than free space" and that the "measure of a state's capacity to act as an independent unit within the international system—the condition that "sovereignty" purports to grant and describe—depends on the breadth and depth of its links to other states"); Ben Chigara, *Legitimacy Deficit in Custom* at 83 (Dartmouth: Ashgate, 2001) (noting that evidence that IOs now have the capacity to exercise some of the benefits and duties previously reserved to states provide evidence that the "conception of the idea of sovereignty has shifted from the traditional one of centralised absolute power, to that which favours sharing out of constitutional and administrative authority between State organs and international institutions of their choice") and 89 ("a powerful State appears not to be one which seeks to vanquish others, but one that acts in concert with other States to achieve communitarian goals").

[87] *Id.*, at 864–5.

Thus, participation in the WTO is argued to be "sovereignty-enhancing" since it prevents rent-seeking private actors from securing protectionist legislation that would diminish the general welfare.[88] International scrutiny of human rights protections, the complementary regime of the ICC, or issuance of SARS warnings by the WHO, to cite just three other examples, might also be justified through comparable arguments that focus on the flaws of the national rule of law that prevent welfare-enhancing actions desired by the majority of a nation's citizenry, or that fail to protect an insular minority from the tyranny of the majority.[89]

An alternative justification offered for some of these international regulatory or adjudicatory efforts does not re-define sovereignty as much as displace it. For some the justification for such international regulatory efforts is reminiscent of those offered by advocates of natural law: it is simply that the international community has now decided that some values need to prevail over "sovereignty," or, as Secretary-General Kofi Annan has suggested, that sovereignty should no longer be a shield for states that abuse the rights and liberties of individuals.[90]

IOs have also got *inside* the state, transforming the way governments organize themselves and what they think lies in their national interest. A formal organization like the WTO is a conduit for trade ministers to talk to one other and support each other's interstate initiatives.[91] The association of relatively like-minded trade specialists that the WTO makes possible is also well positioned to advance the cause of liberalization within governments, by drawing the support of like-minded supporters abroad. When such a like-minded epistemic community does not yet exist as a unit of government, IOs have sometimes helped fashion them, along with governmental structures to service their needs. IOs have convinced states that they need independent labor unions to conform to the ILO's expectations of tripartite membership, modern ministries of health and education compatible with the expectations of the WHO and UNESCO, civil aviation authorities that can comply with ICAO Standards and Recommended Practices, regulatory enforcement capabilities consistent with the demands of UN Sanctions Committees, and domestic courts capable of protecting rights like those in the

[88] For a detailed justification of the WTO along these lines, see John McGuinnis and Mark Movesian, "The World Trade Constitution," 114 *Harv. L. Rev.* 511 (2000). *See also* Raustiala, *supra* note 79, at 865–7.

[89] For a detailed description of the WHO's actions in the case of SARS and a description of how that action demonstrates a fundamental shift from Westphalian conceptions of state autonomy, see Fidler, *supra* note 79. But note that some public choice theorists would distinguish certain IO regimes from others on the basis that only some international legal regimes correct for rent-seeking flaws within domestic legal processes. For a response to some of these views, see, e.g., Andrew Moravcsik, "Conservative Idealism and International Institutions," 1 *Chi. J. Int'l L.* 291 (2000)(suggesting that such defenses of U.S. sovereignty mask a partisan or ideological agenda).

[90] *See* Kofi Annan, "Two Concepts of Sovereignty," *The Economist* (September 18, 1999). *See also* Raustiala, *supra* note 79, at 876. As discussed above, to this extent this view relies on a hierarchy of superior values ostensibly shared by the "international community," this idea is also at least partly a product of the age of IOs.

[91] For comparable arguments among transnational networks of government regulators whether or not associated within a formal IO, see Slaughter, *supra* note 77.

TRIPs Agreement.[92] In some cases, states have been able to build such internal institutions only after technical assistance provided by IOs.[93]

The existence of rival or complementary institutional structures at the global level has also changed how states' internal government branches and agencies behave or interact. The existence of international courts, for example, has altered the content of national judicial conversations and led to "trans-judicial communications," and not only within Europe.[94] For a time it appeared that actions of certain international judicial bodies, namely the ad hoc war crimes tribunals, were inspiring national legislatures and national courts to take universal jurisdiction for international crimes more seriously.[95] IOs have affected the nature of federal/state relations throughout Europe and even, to some extent, within the U.S. It also has been suggested that establishment of IOs, and the attendant shift towards greater forms of international regulation that are, in the usual case, controlled by the executive branches of government, have contributed to a "de-parliamentization" of political processes.[96] But while IOs are often associated with a relative increase in the power of the executive branches of governments (and a consequential disempowerment of the legislative branch), some IOs have constrained the powers of all branches of national government. Given what WTO dispute settlers have said about section 301 of the U.S. Trade Act, for example, both the U.S. executive branch and its Congress face some constraints on the use of unilateral trade sanctions.[97]

IOs also enhance the prospect that parts of states (or parts of government) now can communicate and cooperate with one other, leading to what Anne-Marie Slaughter has called the "disaggregation" of the state.[98] IOs have contributed to the perception that governments do not behave, in their foreign relations, as monolithic units. They do not always speak with one voice across IOs or even, on some occasions, within different units of the same IO. Governments are increasingly acting at the minister-to-minister or agency-to-agency level and engage in continuous interactions at these levels thanks to the existence of informal

[92] *See*, *e.g.*, Martha Finnemore, *National Interests in International Society*, at 34–66 (Ithaca, N.Y.: Cornell University Press, 1996) (discussing UNESCO's impact on the preferences, identities, internal organization, and interests of states on science policy); Martha Finnemore, "International organizations as teachers of norms: the United Nations Educational, Scientific, and Cultural Organization and Science Policy," 47 *Int'l Org.* 565 (1993).

[93] *Id.,* For an early description of such efforts, see Schachter, *supra* note 24, at 238–43.

[94] *See*, *e.g.*, Anne-Marie Slaughter, "Judicial Globalization," 40 *Va. J. Int'l L.* 1103 (2000). *See also supra* Chapter 9.

[95] *See*, *e.g.*, Anthony Sammons, "The 'Under-Theorization' of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts," 21 *Berkeley J. Int'l L.* 111 (2003)(discussing and critiquing Belgian courts' efforts to become prosecuting agents for the international community).

[96] *See*, *e.g.*, Stein, *supra* note 72, at 493. *See also infra* Section 10.5.

[97] *See* the WTO panel decision in *United States—Sections 301–310 of the Trade Act of 1974*, WT/DS152/R, December 22, 1999, discussed in Chapter 8.

[98] *See* Slaughter, *supra* note 77, at 6 (noting that it is possible to "disaggregate" international organizations as well as states, to see "vertical networks" between national regulators and judges and their supranational counterparts). *See also supra* Section 4.3.

transnational networks of government regulators and specialized IOs or specialized sub-organs within IOs. Both transnational networks and formal IOs may empower particular government units within states—such as the health ministers instrumental in concluding the WHO's Tobacco Control Convention—as much as they do other non-state actors to whom they grant access or to whom they accord benefits. Ironically, as much of the literature on transnational networks has noted, the enhanced communication among sub-state actors that IOs have encouraged has also enabled many of these regulators to by-pass some of the cumbersome procedures of formal IOs. The existence of such networks adds yet another set of potential fora to the choices states face when selecting regulatory or law-making venues.

10.4 IOs and Changing Conceptions of Compliance

Although, as discussed in Chapter 6 with respect to treaty-making, no one knows whether IOs have increased the quality (and not just the quantity) of law and the jury is still out on whether, to paraphrase Louis Henkin, in the age of IOs more states are complying with more international rules more of the time, we do know that IOs have helped to transform *how* states comply. As discussed in Chapter 4, the rise of IOs has resulted in a multitude of creative enforcement mechanisms that help to make up for the absence of a global police force or a single court with compulsory jurisdiction in the international legal system.[99]

Although no one claims that states always comply with the standards, hard or soft, that IOs promulgate, when states do comply, IOs help to explain why. The models of compliance that we now have—apart from old-fashioned positivist consent—are all heavily influenced by IOs: the managerial model of Chayes and Chayes, the harder-edged enforcement approaches of neo-realists like George Downs, Thomas Franck's legitimacy, Slaughter and Moravscik's liberal theory, or Harold Koh's transnational legal process.[100] IOs help explain why the modern state behaves under all of these approaches. They supply the needed forms of transparency and information exchange, dispute settlement, or capacity building vital to managerial regimes.[101] They sometimes authorize the hard sanctions sought by those with more realist inclinations, providing multilateral alternatives to the unilateral recourses by the poweful. Although the most familiar examples of coercive measures are Security Council-authorized actions,[102] IOs have developed other enforcement measures at the hard end of the spectrum, such as WTO-licensed

[99] *See supra* Section 4.3.

[100] For a description of compliance theories, see Kal Raustiala and Anne-Marie Slaughter, "International Law, International Relations and Compliance," in Walter Calnaes, Thomas Risse, and Beth Simmons, eds., *Handbook of International Relations*, at 538 (Thousand Oaks, CA, London: Sage Publications Ltd., 2002). *See also supra* Sections 4.3, 1.3 and 1.4.

[101] *See*, *e.g.*, Chayes and Chayes, *supra* note 83.

[102] *See supra* Sections 4.1 and 4.2.

trade retaliation, IMF conditionality, and even regulatory codes that anticipate and encourage enforcement by market actors.[103]

For those who believe the nature of legal discourse itself helps to explain why states behave, IOs provide the pedigreed multilateral legitimacy that makes Franck's "compliance pull" possible.[104] IO dispute settlement bodies and even IO bureaucrats charged with rendering legal opinions may provide the necessary determinacy, symbolic validation, and coherence needed to turn vague principle or standard into legitimate rule. The legitimacy of bodies with universal membership or impartial expertise explains the power of, for example, fact-finding bodies within political or technocratic organizations, and helps to account for the pressure to comply both with coercive IO sanctions and with such "soft" products as general comments issued by human rights treaty bodies or factual findings issued by ICAO's accident investigators.

To those with a more political bent, IOs are effective instruments to the extent they enable national interest groups to achieve what they want from their own government. To liberal theorists, IOs are the target, as well as the product, of interest group politics within states.[105] The stakeholder-driven agenda of the WTO's Committee on Trade and Environment, for example, is said to explain that regime's particular approach to issues at the "joints" of the trade and environmental regimes, as well as the support for the WTO's liberal trade policies among some national constituencies.[106] And the disaggregating perspective encouraged by liberal theory can be applied to IOs themselves, to reveal the relevant sub-actors within them that help to explain what law gets made or how it is sought to be enforced. It is argued, for example, that the deepening levels of cooperation evident in some institutionalized human rights regimes is driven by the shared agenda of international judges serving on regional human rights courts, working together with national government officials and NGOs intent on preserving fragile democracies.[107]

Alternatively, the effectiveness of some international rules can be explained because IOs help to convince states that these rules are in their self-interest and states therefore "internalize" international norms. Scholars who address the internalization of norms brought about by the "transnational legal process"

[103] *See*, *e.g.*, George W. Downs, Kyle W. Danish, and Peter Barsoom, "Transformational Model of International Regime Design: Triumph of Hope or Experience?," 38 *Colum. J. Transnat'l L.* 465 (2000); George Downs, David Rocke, and Peter Barsoom, "Is the Good News about Compliance Good News about Cooperation?," 50 *Int'l Org.* 379 (1996).

[104] Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford, U.K. and New York: Oxford University Press, 1990); Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995).

[105] *See* Andrew Moravcsik, "The Origins of International Human Rights Regimes: Democratic Delegation in Postwar Europe," 54 *Int'l Org.* 217 (2000).

[106] For a description of the politics of the WTO's Committee on Trade and the Environment, see Gregory C. Shaffer, "The World Trade Organization Under Challenge: Democracy and The Law and Politics of the WTO's Treatment of Trade and Environment Matters," 25 *Harv. Envt'l L. Rev.* 1 (2001).

[107] Moravcsik, *supra* note 105. *See also* Section 9.3.

include, as a prominent feature of their model, the output of institutionalized dispute settlers—from international criminal courts to human rights treaty bodies charged with compliance. For theorists like Harold Koh, these are among the forums for discourse, along with national courts, in which human rights norms emerge and are internalized as domestic law.[108]

To the extent these varying accounts of why states behave can be simplified into two primary mechanisms—techniques for *coercing* states to comply favored by rationalists versus techniques for *persuading* states to comply preferred by constructivists—IOs play prominent roles in both. The rise of IOs has vastly increased the size of the toolbox containing both coercive and persuasive techniques. As Abbott and Snidal would argue, IOs offer the familiar benefits of centralization and independence to compliance efforts.[109] For those favoring coercion, the benefits of centralized IO measures are obvious. Organs like the Security Council enable states to get together as a group to enforce multilateral (and therefore more likely to be comprehensive) economic sanctions on rogue states; they also permit multilateral, and not merely unilateral, military action against a state that breaches the peace. Either of these types of enforcement actions is more likely to be regarded as legitimate because they are issued by a relatively less self-interested enforcement arm acting on behalf of the international community. For those favoring persuasion, IOs offer a multitude of fora where diverse suggestions for solution, presented by state and non-state actors, can be centrally gathered and where governments can collectively attempt to convince recalcitrant states, through reasoned arguments or other enticements, to comply with the law.[110] They also have on hand numerous independent officials, from the UN Secretary-General to impartial experts, to serve as mediators and message carriers and, where the parties are so inclined, independent judges to settle, with finality, their disputes.

But IOs have done more than give international lawyers more enforcement tools. IOs are changing how we think about compliance. Modern IOs are complex, multi-faceted institutions and they are forcing us to think about compliance in complex, multi-faceted ways. As discussed in Chapter 4, compliance, in the age of IOs, is no longer amenable to the dichotomous descriptions suggested by "coercive" versus "persuasive" theories of compliance or indeed any single model of compliance.[111] Few IOs rely on any one set of enforcement tools to convince states on either end of the coercive-persuasive spectrum. They rely instead on a range of techniques. Moreover, IOs change over time and learn from one another such that institutions that once relied on relatively coercive techniques may come to adapt "softer" techniques that include facilitation and

[108] *See* Harold Hongju Koh, "Why Do Nations Obey International Law?," 106 *Yale L. J.* 2599 (1997); Harold Hongju Koh, "Frankel Lecture: Bringing International Law Home," 35 *Hous. L. Rev.* 623 (1998).

[109] Abbott and Snidal, *supra* note 7.

[110] *See, e.g.*, Jeffrey T. Checkel, "Why Comply? Social Learning and European Identity Change," 55 *Int'l Org.* 553 (2001).

[111] *See supra* Section 4.3.

discursive techniques (such as reporting obligations combined with a supervisory mechanism).

Brett Frishmann's description of the WTO and Ozone regimes, for example, is a useful reminder that both of these evolving regimes rely on both coercive and persuasive techniques for compliance. Frishmann shows how the WTO regime, though associated with hard-edged enforcement, "increasingly relies on nonadversarial, management-oriented institutions to encourage cooperation in pursuit of trade liberalization."[112] He notes that environmental regimes, on the other hand, though usually associated with "soft" managerial techniques, "increasingly include enforcement oriented institutions, ranging from legalistic adjudication to compliance panels with authority to impose sanctions of various types."[113] Frishmann draws lessons from the comparison that can usefully be generalized to all IOs. He argues that IOs cannot be reduced to an iterated multi-player prisoners' dilemma or similar games. States that create IOs and remain as members, he contends, enter into a dynamic process that is not limited to detecting defection and altering the payoffs of states in the event of detection, as would be predicted by traditional game theory.[114] States design institutions that can and do evolve to maintain cooperation in the face of dynamic change that no one can predict. As this suggests, the complexity and permanency of IOs leads to a multitude of compliance strategies, even within a single institution—not unlike the complexity of techniques and rationales that explain why individuals comply with national law.

Once the issue of compliance emerges in the context of permanent institutions, it is no longer susceptible to being accurately measured as of one moment in time but requires the study of interactional processes and forms of dynamic learning across time—as noted in Chapter 9's discussion of the evolution of international dispute settlers. There is evidence that states embedded in institutional processes for treaty-making, regulatory rule-making, and adjudication acquire new interests and preferences through interactions within the broader institutional context of norms and discursive processes and engage in "social learning."[115] The very identities of states (and their IOs) can be affected by institutional processes that combine coercive elements, cost-benefit calculations, and the discourse processes of dialogue, communication, and argumentation.[116]

[112] Brett Frischmann, "A Dynamic Institutional Theory of International Law," 51 *Buffalo L. Rev.* 679, at 697 (2003)(discussing that regime's use of the Trade Policy Review Mechanism, which periodically evaluates domestic implementation and compliance with WTO rules and provides capacity-building, financial, and technical assistance).

[113] *Id.*, at 698. *See also* Jutta Brunnée, "The Kyoto Protocol: Testing Ground for Compliance Theories?," 63 *ZaörV* 255 (2003)(discussing the Kyoto Protocol's combination of "facilitative," "normative-discursive," and "enforcement-oriented" techniques to compliance).

[114] Frischmann, *supra* note 112, at 722. *See also supra* Section 9.3.

[115] *See generally* Jeffrey T. Checkel, "The Constructivist Turn in International Relations Theory," 50 *World Pol.* 324 (1998).

[116] *See* Alexander Wendt, "Constructing International Politics," 20 *International Security* 71 (1995); Thomas Risse and Kathryn Sikkink, *The Power of Principles: The Socialization of Human Rights Norms in Domestic Practice* (New York: Cambridge University Press, 1999); Thomas Risse et al., *The*

Further, as is suggested by the Genocide Convention example discussed above, to the extent IOs have changed what we hope to accomplish via international rules, this changes perceptions of what "compliance" or "effectiveness" means. If what we hope to accomplish through such a treaty is, at least in part, to secure a permanent dialogue among states and international civil society about values and to put on the table a range of legal or policy options on how to prevent mass atrocity, including unilateral and collective uses of force, as well as how to deal with accountability in the wake of mass atrocity, from international criminal courts to truth and reconciliation commissions, the Genocide Convention would appear to have accomplished at least that much. For decades, permanent UN bodies, most prominently the ILC, kept alive the possibility of a permanent international criminal court and it took nearly four decades from the drafting of the Genocide Convention for states to finally fulfill that treaty's invitation to establish such a court. As this suggests, institutionalization has expanded the time horizon over which compliance or effectiveness can be judged as well as the criteria used to judge success.

As is also suggested by the fate of the Genocide Convention in Britain, the rise of IOs has created a third mechanism for inducing compliance distinct from both coercion and persuasion: socialization or acculturation. Derek Jinks and Ryan Goodman, among others, have offered this explanation in connection with the rise of human rights regimes. They contend that states become parties to and on the whole remain in human rights regimes not because they are compelled to obey by force or persuaded by reasoned arguments that compliance is in their best interests but because of mimicry, identification, or status-maximization.[117] Their views appear to be borne out by Brian Simpson's review of recently released archives relating to internal British government deliberations with respect to the Genocide Convention from the time that treaty was released by the GA in 1948 through Britain's long-delayed decision to ratify in 1970. In the case of Britain and the Genocide Convention, British officials decided not to vote against the Genocide Convention in the GA in 1948, despite serious qualms about certain of its provisions, because the U.K. was isolated in opposition and would likely be the only dissenting vote cast in that body; they decided reluctantly in 1970 to ratify the Convention because British opposition by that time had become increasingly untenable. By 1970 British officials voiced concerns about continued criticism at the UN and elsewhere should Britain remain outside a regime that, by 1970, included only a handful of states, most notably apartheid-era South Africa; about

Power of Human Rights: International Norms and Domestic Change (New York, N.Y.: Cambridge University Press, 1999); Jutta Brunnee and Stephen J. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law," 39 *Colum. J. Transnat'l L.* 19 (2000).

[117] Derek Jinks and Ryan Goodman, "How to Influence States: Socialization and International Human Rights Law," 54 *Duke L. J.* (forthcoming 2005). Jinks and Goodman's work revives an older tradition of socialization studies in international organization. *See, e.g.*, Finnemore and Sikkink, *supra* note 23, at 902–4 (discussing work by, among others, Claude, Waltz, Katzenstein, Axelrod, and Elster).

continued exposure to charges of anti-Semitism or being insensitive to the Holocaust; and about the continued harm to that country's "international prestige" should it refuse to ratify.[118] This account of Britain and the Genocide Convention suggests the varying degrees of cognitive and social pressures, real and imagined, that states face, including to conform to community expectations and avoid the embarrassment of being left out of certain regimes.[119]

Much of what Jinks and Goodman describe in terms of socialization can be attributed to the social pressures that naturally emerge from a surrounding organizational culture. Their socialization or acculturation approach to compliance extends beyond institutionalized human rights regimes. Indeed, much of their account of socialization discusses that phenomenon in terms of the sanctions and rewards made possible by IOs, such as techniques for "shaming, back-patting, and other means of identification and belonging."[120] States conform in their model "not because of some second-order calculation of the costs and benefits of cooperation but rather because 'conforming' and 'belonging' themselves confer substantial affective returns ('cognitive comfort')."[121] This is conforming behavior that is presented not on rational cost/benefit analysis but because of "isomorphism"—the desire for states to behave like other states and even to replicate each others' standards, including with respect to rules of law. Jinks and Goodman's account of "norm diffusion" and the "contagion effects" of cross-country influences relies on the considerable information and constant inter-state contact that IOs provide. Their argument that states tend to follow certain "global scripts" relies on the universal authority and legitimacy that IOs are best able to confer. To the extent they are correct that states tend to follow certain global scripts even when these are sometimes dysfunctional given local realities, this is an explanation that relies, as they indicate, on "embedding target actors in social settings organized around highly institutionalized, broadly shared principles."[122] In such cases, they argue, "states will likely value their status in the group" and respond to the cultural forces shared by and promoted by the group. Not surprisingly, when Jinks and Goodman turn to a detailed evaluation of socialization techniques, their most detailed example relates to an enforcement tool that is unique to the age of IOs: membership decisions.

Jinks and Goodman analyze membership decisions—whether to have an inclusive rule permitting all states to join or insist on compliance with human rights norms prior to membership—from the perspective of coercive, persuasive, and socialization theories of compliance. They offer a multitude of reasons, for and against, inclusive or exclusive approaches to membership. They argue, not surprisingly, that their favored approach of socialization alone shows the high potential value of membership decisions as a tool for compliance and conclude that, while excluding states that fail to comply with human rights norms inflicts a

[118] Simpson, *supra* note 50, at 13, 16, 33–4, and 48.
[119] *See id*.
[120] Jinks and Goodman, *supra* note 117.
[121] *Id*.
[122] *Id*., at 20.

tangible penalty on those targeted, and may increase the solidarity of those remaining in the regime, on the whole acculturation favors a rule that includes the widest number of members and does not insist that members comply with human rights norms prior to joining.[123] Whether or not one agrees with Jinks and Goodman's prescriptions, their socialization theory suggests how institutionalization is changing the behavior of states or, at least, the options available for those attempting to entice states to comply with their international obligations.

More generally, the three-fold division of compliance approaches suggested by the Jinks and Goodman account—coercive, persuasive, and socialization—corresponds to the way Joseph Nye describes the three dimensions of national power: military, economic, and soft.[124] The military might of nations obviously corresponds to their coercive potential on others; their economic hold over other states turns on their own and others' calculation of relative costs and benefits, that is persuasion. And Nye's description of the U.S. "soft power"—the ability of the U.S. to "set the political agenda that shapes the preferences of others"[125]—bears a strong resemblance to what Jinks and Goodman call socialization. Nye argues that the soft power of the U.S. arises "in large part from our values,"[126] as expressed in U.S. culture and the policies the U.S. follows internally and with respect to others. Soft power, in his view, influences others by inspiring their dreams and desires. The considerable soft power of the U.S.—its ability to inspire others to emulate it—turns on the appeal of its values; Nye identifies these as democracy, personal freedom, upward mobility, and openness.[127] Nye includes, in his list of U.S. sources of "soft power," those "liberal" international regimes, most of which were created through instrumental U.S. leadership at the end of World War II.

A central thesis of this book is that these liberal international regimes—the IOs that are the subject of this book—have their own soft power. As Schachter and Higgins once reminded us, IOs aspiring to global reach have, in abundance, values. Indeed, it would not be entirely unfair to suggest that UN system organizations have, like the Genocide Convention, a surfeit of values, in excess of their operational capabilities. If Nye, and Jinks and Goodman are correct, however, the values these organizations proclaim or pursue, and are widely believed to represent (albeit not always consistently)—such as sovereign equality, respect for human dignity, the peaceful settlement of disputes and avoidance of war, equal economic opportunity for all—help to explain their continuing appeal to, and impact on, states. They help to explain the legitimacy such organizations enjoy and why states are sometimes induced to comply with their edicts, even without a credible threat of coercive sanction or even, on occasion, in ways contrary to their own perceived self interest. Like the Pope, whose historical influence on states has obviously

[123] *Id.*

[124] Joseph Nye, *The Paradox of American Power* at 8–12 (Oxford U.K.: Oxford University Press, 2002).

[125] *Id.*, at 9.

[126] *Id.*

[127] *Id.*, at 11.

exceeded the Vatican's military or economic capabilities, IOs' impact on international law-making actors results from, in substantial part, the moral suasion they exert and not from the law-making powers explicitly.

10.5 New Challenges to the Legitimacy of International Law

All of the changes brought in the wake of the rise of IOs, surveyed in Sections 10.1 to 10.4 above, have a darker edge. What IOs have done to the positivist sources of law, its content, its actors, or to recipes for compliance pose risks and considerable challenges.

The uncertainties attendant to "soft" law, canvassed by defenders of the positivist sources of law such as Prosper Weil, though they cannot all be laid at the feet of IOs, can be partly attributed to IO processes that encourage treaties with vague provisions or that reflect a false "consensus" among states, rhetorical statements of the law disguised as existing law (such as GA resolutions), reliance on the practice of organs instead of the actual practices of states, and attempts at law-making by persons (IO bureaucrats, experts, international dispute settlers) having no readily demonstrable authority to legislate on behalf of states. Even those who criticize the state-centricity of the current list of international sources of law recognize that states need some list, or at least a reliable checklist of factors, that distinguish law from non-law, political aspiration from firm obligation. When everything—from "guidelines" to commitments made in loan agreements—can be regarded as legally significant, even if not equally legally binding, there is understandable fear that law and lawyers will lose their value to the policymaker, that if everything is "law," nothing, in the end, will be.

Not everyone appreciates the IO-generated changes to the content of international law. The content of treaties like the Genocide Convention, if attributable in part to the IO processes that gave rise to it, is a source of shame, not pride, to those who sought a legal instrument that would actually criminalize and effectively prevent a horrific crime. To them, the explanation that this treaty "promotes values" is hypocritical sophistry. Was it really the case that states regarded genocide as *not* a crime before the Genocide Convertion? Sometimes "soft" treaties are exactly that: soft, ineffectual public relations efforts.[128]

Not everyone believes that to the extent IOs have empowered actors other than states to become involved in international law-making, the results enhance either the legitimacy or the quality of international law. A legion of critics of NGOs, from both sides of the political spectrum and north and south, have emerged contending that adding unrepresentative, unaccountable, and typically

[128] *See generally* Oona Hathaway, "Do Human Rights Treaties Make a Difference?," 111 *Yale L. J.* 1935 (2002).

single-issue NGOs, overly representative of the interests of rich developed states, is hardly the best way to "democratize" international law-making or to add truly diverse voices to international discourse.[129] Others would defend the state-centricity of old-fashioned forms of law-making, arguing that keeping states in control of both international law and international institutions may still provide the best defense of certain values.[130] And to the extent the new actors being added to international law-making processes are members of the international civil service or IO-based experts, these groups have their critics as well. Fears of meddling international bureaucrats or of experts pursuing their own agendas at odds with the desires of those governments trying to faithfully represent the desires of their peoples, are not limited to "fringe" right-wing groups in the U.S.[131] As discussed in Chapter 4, empowering these non-state actors as law-making agents is not regarded as a good thing if one fears rule by technocracy—at either the national or international levels.[132]

The proliferation of another new law-making actor, institutionalized dispute settlers, is also not an unalloyed good. To the extent some international judges believe that they, like Owen Fiss's public-minded adjudicators, are entitled to propound grand values for the international community and not merely settle the narrow disputes before them, this is likely to provoke, sooner or later, at least as much concern as comparable presumptions have generated with respect to national judges.[133] If international judges presume a license to issue interpretations at odds with the original intent of treaty drafters, even pursuant to the "principle of effectiveness," this may undermine even further the consensual basis for such obligations and provoke the political backlash now evident with respect to some international legal regimes. And even if dispute settlers do not overreach, they may still provide opportunities for overly narrow epistemic communities to "capture" some forms of standard-setting, as some suggest is the case with respect to free traders and the WTO. In addition, the multitude of dispute settlers may eventually fracture the harmonious development of universal rules or unleash the

[129] *See supra* Section 4.3. For a defense of NGOs' involvement in the WTO regime on the basis that this will promote more intellectual "competition" in that organization, see, e.g., Steve Charnovitz, "Opening the WTO to Nongovernmental Interests", 24 *Fordham Int'l L. J.* 173 (2000).

[130] *See, e.g.*, Benedict Kingsbury, "Sovereignty and Inequality," 9 *EJIL* 599 (1998)(arguing that discarding sovereignty would intensify inequality, weaken restraints on coercive intervention, diminish critical roles of the state as the locus of identity and an autonomous zone of politics, and re-divide the world into zones, as between "liberal" and "non-liberal" states).

[131] Paul Stephan, for example, points to studies indicating that administrators in command-and-control organizations like IOs tend to encourage policies that permit them to dispose of larger amounts of assets. To this end, they lobby their members for larger contributions, seek to insulate expenditure decisions from oversight, tie expenditure choices to popular programs that members find hard to resist, increase overhead and administration expenses, or seek to control or influence other expenditures by governments. Paul Stephan, "Accountability and International Lawmaking: Rules, Rents, and Legitimacy," 17 *Nw. J. Int'l L. & Bus.* 681 at 706 (1996–7). He also suggests that some IO structures (e.g., Organization of Petroleum Exporting Countries (OPEC)) may permit greater opportunities for rent-seeking by interest groups, at odds with the global welfare. *Id.*, at 694.

[132] *See supra* Section 4.3.

[133] *See generally supra* Section 9.1.

destructive potential of international forum-shopping among litigants, to the detriment of states, stable expectations, or the general welfare.[134]

The changes allegedly wrought with respect to compliance should, on reflection, trouble both sides: those who want greater compliance with international rules and those who fear it. Those who seek greater compliance with international law are entitled to remain skeptical that IOs can truly force recalcitrant states, at least those with power, to comply. It remains doubtful whether the rare coercive forms of enforcement action authorized by IOs (as by the Security Council) can really be attributed to "the international community"—as opposed to old-fashioned hegemonic power in multilateral guise. It remains to be seen whether "socialization" works as an effective enforcement tool, at least when international rules are believed to clash with important state interests. If it takes socialization over twenty years to work its magic on Britain—a law-abiding state that nonetheless had to be dragged, unwillingly, to ratify the Genocide Convention—it may simply take too long to work elsewhere, especially with respect to states that are more resistant to complying with international rules. If so, IOs may be squandering valuable resources and engendering false hopes with respect to compliance.

On the other hand, for those who are skeptical of the political legitimacy of international rules, especially when these are produced by unaccountable, unauthorized institutional processes, it is hardly comforting to learn that perhaps some states—especially weaker states that especially need the status and other benefits of these organizations—may be conforming with international rules not because their leaders are truly persuaded that these will enhance the welfare of their populations but because they are coerced into doing so or because of unthinking conformity with the behavior of others. For those who want their governments to adopt well-considered policies sensitive to local circumstances, the prospect that some international rules might be followed because some government officials are "socialized" into accepting them, like unthinking teenagers opting for the latest international fad, is not a positive development.

As these debates suggest, IOs have brought one more change. The rise of IOs—and the accompanying rising density of international regulation—is transforming international lawyers and policymakers. The complexities of international institutionalization are forcing those addressing "foreign policy" issues to ask questions that once arose only in connection with national law. As greater international regulatory and adjudicatory efforts emerge, more diplomats, along with their lawyers, are asking critical questions about the proper level of regulation (the market?, the state?, the region?, the world?), the appropriate venue (court or

[134] For discussion of forum-shopping among human rights claimants, see Laurence R. Helfer, "Forum Shopping for Human Rights," 148 *U. Pa. L. Rev.* 285 (1999). *But see* Jonathan I. Charney, "Is International Law Threatened by Multiple International Tribunals?," 271 *Recueil Des Cours* 101 (1998)(suggesting that fears of inconsistent judicial opinions among international dispute settlers are overstated).

regulatory process? specialized technocratic forum or politicized, but possibly more legitimate, plenary body? international, regional, domestic, or "hybrid" court containing elements of international dispute settlers and national law and courts?), and the nature and forms of accountability (forms of judicial review, including with respect to applying doctrines of "improper delegation"? international notice and comment procedures? monitoring mechanisms to enhance transparency or access to non-state actors?). As the generation "present at the creation" passes from the scene, a second generation confronts complaints of looming "democratic deficits" and concerns that IO-generated law only replicates, but does not displace, power. These risks and challenges, the subject of an increasingly vast literature, require but brief mention here.[135]

10.5.1 Vertical and Horizontal Challenges

As suggested by Chapter 2, criticisms that IO-generated forms of law-making are "undemocratic" address the lack of connections at the vertical level, between national and international forms of law-making. These critiques take one of three forms.[136] The most familiar view of "democracy" interprets it as rule by the people (or a "demos") characterized by a sovereign authority that is responsive and accountable, either directly through popular assemblies or indirectly through representatives chosen by means of periodic elections.[137] IOs have a deficit of this kind of formal democracy to the extent they engage in law-making without benefit of law-makers representative of the demos these rules purport to affect.[138] The positivistic consent given by nations to the treaties that give rise to IOs is deemed insufficient to satisfy the demands of formal democracy. The treaties that give rise to IOs, typically the product of the initiative of the executive branches of states are, at best, examined by the principal branch of government charged with making law, legislatures or parliaments, only at a single moment in time; the other legal standards produced by IO processes once IOs are established may not be subject to legislative or parliamentary consideration. For these reasons the standards set by IOs over time—such as interpretations of the WTO covered agreements issued by the WTO's dispute settlers—lack the

[135] For an introductory to "democratic deficit" concerns as applied to IOs, see, e.g., Stein, *supra* note 72. For one attempt to address ideological, economic, and hegemonic concerns, see Ugo Mattei, "Globalization and Empire: A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance," 10 *Ind. J. Global Legal Stud.* 383 (2003).

[136] *See supra* Section 2.4 (discussing three distinct visions of legitimacy: democratic legitimacy, formal legitimacy, and social legitimacy).

[137] *See* Robert A. Dahl, "Can International Organizations Be Democratic? A Skeptic's View," in Ian Shapiro and Casiano Hacker-Cordón, eds., *Democracy's Edges*, 19 at 20 (Cambridge: Cambridge University Press, 1999).

[138] Weiler characterizes these critiques as based on "formal legitimacy." J.H.H. Weiler, "The Transformation of Europe," 100 *Yale L. J.* 2403 at 2468–9 (1991).

legitimation of national law produced through democratic processes, which in the prototypical case involve full consideration by at least two branches of government. For some, full democratic legitimacy entails, in addition, respect for the "checks and balances" between governmental organs evident in some democratic systems of governance, such as the U.S., involving demarcated separation of powers (as between executive and legislature) and the possibility of judicial review by courts over the two other branches of government. These additional qualities, as discussed in earlier chapters, appear only in highly diluted form in most IOs.

The absence of these democratic qualities is regarded as a serious flaw, as Eric Stein has noted, at least to the extent the IO in question is seen as generating intrusive rules or standards intended to produce legal effects within a polity.[139] Accordingly, this democratic critique is more likely with respect to organizations like the WTO or the IMF, which are perceived to result in a significant transfer of national power, than, for example, with respect to the WHO, an organization that only rarely engages in treaty-making or in regulatory/adjudicatory forms of standard-setting.[140]

To the extent IOs are regarded as lacking in democracy because they have not found an adequate substitute for electoral democracy, the suggested palliatives are obvious: establish parliamentary mechanisms at the global level, such as a plenary body within the UN consisting of elected representatives from member states based on population, or build parliamentary participation into existing IO organs by, for example, having delegates from the legislative branch participate in IO plenary bodies or in other IO sub-bodies charged with standard-setting.[141] To the extent the absence of "checks and balances" is seen as the principal problem, proposed remedies have included such democracy-protecting devices as constitutional doctrines barring national decision-makers from delegating certain powers to IOs, judicial review over IO decisions by national courts, or making IO-generated forms of law (including decisions reached by international judges), not

[139] Stein, *supra* note 72.

[140] *Id.*, at 496–9 (noting that the WHO has only once become involved in promulgating a code of conduct, has only twice used its power to promulgate regulations, and has rarely invoked the formal processes for international dispute settlement anticipated in its constitution (including references to the ICJ)). For a brief discussion of WHO standard-setting, see *supra* Chapter 4.

[141] The idea of some form of global parliamentary assembly consisting of elected representatives from around the world and not one state/one vote has been a favorite of academics and certain NGOs for quite some time. In 1924 L.M. Lloyd and R. Schwimmer of the U.S. launched the idea of a Constituent Assembly of Peoples (with one delegate per million) to draft a world constitution, for example, and after World War II, some proposed combining elections for such an Assembly with national parliamentary elections. *See* Dieter Heinrich, "Creating a World Parliament—Proposal for a United Nations Parliamentary Assembly," (August 1989). For more contemporary proposals along these lines, see Louis B. Sohn, "The Need for the Democratization of the United Nations," *The Federalist* (January to February 1966); Richard Falk and Andrew Strauss, "Toward Global Parliament," 80 *Foreign Affairs* 212 (January/February 2001). For skeptical critiques, arguing that formal representation at the global level is impractical or politically not feasible, see chapters by Dahl, Tobin, and Kymlicka in Shapiro and Hacker-Cordón, *supra* note 137.

self-executing as a matter of national law.[142] To the extent an IO engages in standard-setting primarily through the actions of its dispute settlers, the proposed remedies are likely to be increased constraints on those dispute settlers' powers to do more than "settle" the disputes before them.[143]

A second definition of "democracy" sees it as based on rights and freedoms essential to popular control and the functioning of democratic institutions, such as freedom of speech and association. On this view, IOs' "democratic deficit" arises not because of the absence of formal parliamentary or legislative roles in standard-setting but the absence of participatory forms of democratic governance; that is, the inability for individuals, NGOs, and participants in the market to intervene and influence standard-setting.[144] Those making this critique accept that global processes for standard-setting cannot duplicate the representational forms of legitimacy produced by periodic elections of legislators at the national level; alternatively, they regard the attempt to replicate such procedures at the global level as inappropriate given the diversity of forms of governance at the national level. Instead they look to remedies that would open IO proceedings and would permit greater access by non-state actors to IO documents and fora for dispute settlement.[145] Those who lobby this critique stress the substantive and

[142] *See*, *e.g.*, Curtis A. Bradley, "International Delegations, the Structural Constitution, and Non-Self-Execution," 55 *Stan. L. Rev.* 1557 (2003); Michael J. Glennon and Allison R. Hayward, "Collective Security and the Constitution: Can the Commander in Chief Power Be Delegated to the United Nations?," 82 *Geo. L. J.* 1573 (1994).

[143] Remedies for judicial law-making are likely to include proceduralist doctrines that make it harder for judges to reach out for cases in order to make law, such as requirements that issues be "ripe" for adjudication or calling for the exercise of the familiar "passive virtues" that national judges deploy. *See* Antonio F. Perez, "The Passive Virtues and the World Court: Pro-Dialogic Abstentation by the International Court of Justice," 18 *Mich. J. Int'l L.* 399 (1997). Other remedies may be more substantive judicial doctrines, such as a requirement of deference to agency determinations or with respect to certain legal or factual matters. *See*, *e.g.*, Steven P. Croley and John H. Jackson, "WTO Dispute Procedures, Standard of Review, and Deference to National Governments," 90 *AJIL* 193 (1996); Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford: Oxford University Press, 1999).

[144] Weiler categorizes this as premised on a vision of "democratic legitimacy," *supra* note 138, at 2468–9. As is discussed below, some would contend that this definition of what democratic "participation" entails is heavily weighted in favor of Western conceptions of what is meant by the rights of free speech and association. *See* discussion at *infra* Section 10.5.2 (discussing Kingsbury views).

[145] *See*, *e.g.*, Stein, *supra* note 72, at 493; David A. Wirth, "Public Participation in International Processes: Environmental Case Studies at the National and International Levels," 7 *Colo. J. Int'l Envt'l L. & Pol'y* 1 (1996); Lewis Rosman, "Public Participation in International Pesticide Regulation: When the Codex Commission Decides, Who Will Listen?," 12 *Virg. Environmental L. J.* 329 (1993). For a description of a "stateholder model" of desirable governance for the WTO, see G. Richard Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization," 44 *Duke L. J.* 829 (1995). For a more general argument in favor of "cosmopolitics," by which is meant greater input from global actors such as NGOs apart from the influence of citizenry on their own governments, see Steve Charnovitz, "WTO Cosmopolitics," 34 *NYU J. Int'l L. & Pol.* 299 (2002)(arguing that greater access rights for NGOs will not only improve the "marketplace of ideas" available to the WTO but will improve the level of discourse among NGOs). For discussion of accountability mechanisms within international financial institutions, including establishment of forms of dispute settlement open to non-state claimants, see Daniel Bradlow, "International

legitimating benefits of discourse made possible by the free exchange of information among a sufficiently diverse set of actors. Steve Charnovitz, for example, argues for NGO access to WTO dispute settlement processes on the basis that NGOs would provide WTO adjudicators with a broader range of competing policy and legal considerations and would therefore improve the quality of the decisions reached, as well as improve their legitimacy, at least among members of international civil society.[146]

A third conception views "democracy" as based on a broader and more extensive body of rights than those that guarantee participation in law-making. Democracy, on this view, is more than the right to free discourse. The question is whether IOs respect the array of rights that tend to develop among democratic peoples, such as rights to due process and to property.[147] This critique chastises IOs for unfairness of result or actions that violate or undermine the basic rights of individuals.[148] These fundamental values are said to arise from the various references to human rights in the UN Charter and are said to apply to all IOs. This critique is reflected in criticisms, for example, of certain UN Security Council actions that allegedly violate the due process or other human rights of individuals.[149]

An alternative way of viewing some or all of three "democratic" deficits above is to consider IOs as presenting prototypical problems as between principals and their agents. Democratic deficits might be said to arise to the extent that IOs exhibit independence and are not simply the agents of their members. Daniel L. Nielson and Michael J. Tierney, for example, analyze instances in which IOs exhibit considerable degrees of autonomy from all or most of their members for great lengths of time and yet may suddenly be forced to respond to demands made by their most powerful members or by the united collective action of the entire membership.[150] They contend that such situations can be explained by the complex relationships that emerge when agents need to respond to "collective principals." In such cases, the agent faces numerous opportunities for autonomous action because members sometimes fail to solve collective action problems among themselves and cannot give clear orders, because IOs (as agents) may receive conflicting marching orders from organizationally distinct principals (such as distinct agencies or branches of governments), or because IOs act at the end of a long chain of delegation that complicates the transmission of demands

Organizations and Private Complainants: The World Bank Inspection Panel," 34 *Va. J. Int'l L.* 553 (1994); Daniel Bradlow, "Lessons From the NGO Campaign Against the Second Review of the Inspection Panel: A Participant's Perspective," 7 *ILSA J. Int'l & Comp. L.* 247 (2001); Daniel Bradlow, "Stuffing New Wine Into Old Bottles: The Troubling Case of the IMF," 3 *J. Int'l Banking Reg.* 9 (2001).

[146] Charnovitz, *supra* note 129; Charnovitz, *supra* note 145.

[147] *See, e.g.*, Dahl, *supra* note 137, at 20.

[148] Weiler characterizes this critique as premised on a vision of "social legitimacy." Weiler, *supra* note 138, at 2468–9.

[149] *See supra* Sections 4.1 and 4.2.

[150] Nielson and Tierney, *supra* note 5.

from their ultimate principals.[151] All of these enhance the normal delegation problems that all agent–principal relationships face—the prospect that agents can hide information or conceal their actions or because of problems arising from "Madison's dilemma" (the paradox that the need to delegate authority inherently creates opportunity for delegated powers to be used against the principal).[152] Madison's dilemma is evident, for example, to the extent states rely on an "independent civil service" or "impartial" dispute settlers who are specifically asked *not* to comply with any one state's demands or expectations. The fact that IOs are agents of collective principals enhances the likelihood—present in all agent/principal relationships—that the interests of principal and agent will diverge: that there will be "agency slippage" between what the principal wants and what the agent does.[153]

Nielson and Tierney's four tools designed to prevent agency slippage allegedly explain a number of the actions that states routinely take to enhance the "accountability" of IOs. As they indicate, agency slippage can be mitigated by (1) careful screening of potential agents by principals; (2) careful monitoring of agent actions; (3) contracting arrangements that punish or reward agents; and (4) the construction of checks and balances that require coordination between two or more agents.[154] Examples of all of these techniques exist in IOs, although critics could charge either that they are undertaken for reasons having nothing to do with principal/agent theory or that even if they respond to its problems, that none are undertaken to such an extent that "agency slippage" is eliminated. Defenders of IOs would argue that methods (1) through (3) are routinely applied, for example, in the selection, promotion, and discharge policies pursued with respect to the international civil service, the appointment or dismissal of experts, and even with respect to the election or re-election of Secretaries-General. Other oversight mechanisms, consistent with (2), exist through diverse mechanisms—from reporting obligations to the more formal ombudsman and inspection panel approaches undertaken in international financial institutions.[155] IO defenders would also suggest that many of the frustrating delays in achieving legal standards in IO settings reflect the numerous "checks and balances" built into IO processes by states intent on keeping their IO agents in line. Indeed, the balances struck between politics and law described by Rosalyn Higgins and Oscar Schachter through which UN political organs develop the general law and the law of the Charter (discussed in Chapter 3) or similar balances struck in the course of treaty-making (discussed in Chapters 5 and 6) might be seen as essential compromises between the needs for organizational autonomy and respect for the demands of principals. The Sixth Committee's "political" check on legal action recommended by the ILC in the course of treaty-making, for example, might be seen as one way state principals constrain

[151] *Id.*, at 242. [152] *Id.*, at 247. [153] *Id.*
[154] *Id.*, at 246. [155] *See* articles by Bradlow, *supra* note 145.

their organizational agents. Similarly, Oscar Schachter argues that the UN Secretariat's need to negotiate "status" agreements, providing for the rights of UN peacekeepers with host states consistent with the UN mandates for peacekeeping missions, constitutes a method by which the desires of the collective are "controlled" and "supervised" by member states.[156] Indeed, the legal doctrines developed in the formative period of the UN surveyed in this book—from approaches to constitutional interpretation discussed in Chapter 2 to the legal limits imposed on traditional peacekeeping discussed in Chapter 3—evince "self-limiting" qualities that can easily be seen as preserving both a degree of organizational autonomy and continued membership control.[157]

As is suggested by Chapter 9, however, at least one venue for institutionalized law-making—international modes of adjudication, including a proliferating number of international courts—is difficult to explain in simple principal/agent terms. As is suggested in Chapter 8, it is possible to see some international dispute settlers as duly designated agents for a collective principal, charged with completing the latter's contract and in which that principal (e.g., the WTO members) exerts control over its agent (e.g., the WTO's dispute settlers) through the terms of the delegation (e.g., the relative precision of the delegation contract), the agents selected (e.g., the types of persons chosen to be members of the WTO's Appellate Body or to be on the list of potential WTO panelists), the financial and other technical support offered to the dispute settler, or the exercise of power to recontract (e.g., the members' powers to interpret or amend the covered agreements, including the terms of the WTO's Dispute Settlement Understanding (DSU)). There are, to be sure, examples in which IOs have arguably attempted to rein in international dispute settlers in ways that appear consistent with principal/agent theory. The Security Council's "completion strategies" for its ad hoc war crimes tribunals might be seen as an example of the collective principal's reining in its agent through the exercise of, among other things, its budgetary authority.[158] The ICJ's decision to permit those filing cases before it to turn to ad hoc panels, chosen from among the judges' permanent judges, accomplishes more than adding a whiff of arbitration to its proceedings: that, along with the prospect of not re-electing a judge whose rulings are unacceptable, or the power to appoint ad hoc judges, permits states to re-assert some degree of control over a "runaway" Court. And in some instances, threats by the principal have arguably worked. Some would see the WTO's Appellate Body's apparent retreat (in fact if not *de jure*) from accepting unsolicited amicus briefs not supported by governments

[156] *See* Schachter, *supra* note 24, at 204–5.

[157] *See also id.*, at 212–13 (discussing the "self limiting" conceptions of traditional peacekeeping as between the UN and host state). For a particular application of the self-legitimating aspects of some IOs, see Michael P. Ryan, "Knowledge, Legitimacy, Efficiency and the Institutionalization of Dispute Settlement Procedures at the World Trade Organization and the World Property Organization," 22 *Nw. J. Int'l L. & Bus.* 389 (2002).

[158] *See*, *e.g.*, SC Res. 1524 (March 26, 2004).

as a response to many states' evident discontent with its earlier ruling permitting such briefs.[159]

Yet, as is suggested by Chapter 9, the diverse functions served by international adjudicators—from functioning as settlers of discrete disputes under Martin Shapiro's triad to serving as Owen Fiss's promoters of international public values—are too complex to be reduced to variations on a master/slave narrative. International dispute settlers are not defined merely in terms of a contract between principal and agent. As was originally suggested by Abbott and Snidal's enumeration of the many functions of IOs, some international courts act less like agents than as trustees.[160] When the ICJ is asked to take on the role of de facto constitutional court—as in cases like *Certain Expenses* or *Reparation for Injuries*—it is expected to act independently of UN members and not as the mere agent of the collective; and to the extent its opinions (or the views of other political or judicialized dispute settlers) are accepted as authoritative because of the Court's reasoning and its status, states are no longer (or certainly not the only) "masters of the treaty."[161] Other dispute settlers surveyed in Chapters 7 and 8—from non-judicial bodies in the ILO or ICAO to the more judicialized WTO Appellate Body—are expected to act on behalf of, and to a considerable extent are legitimated by, specialized epistemic communities (labor, aviation law, and trade law experts respectively), while yet others receive considerable input and legitimacy from non-state actors such as NGOs (such as human rights compliance bodies).[162] Whether they are acting to alleviate concerns of "two against one" pursuant to Shapiro's triad or to promote public values on behalf of a disembodied "international community," the actions of international dispute settlers are, to differing extents dependent on context, shaped by pressures, substantive goals, and modes of legal discourse not readily reducible to principal/agent modes of control. To the extent the opinions of international dispute settlers deviate from those outcomes that would be predicted from the exercise of state power, it seems misleading to attribute this to "agency slippage." Whether or not an international court is formally open to receiving amicus briefs from NGOs, many of them are difficult to control through the blunt principal/agent control tools suggested by Nielson and Tierney.[163] As is the case in the WTO, where achieving a reinterpretation or formal amendment of the WTO agreement is extremely difficult, principals may not have ready ways to re-formulate the contract that originally delegated

[159] *See, e.g.*, Decision by the Appellate Body Concerning Amicus Curiae Brief, Statement by Uruguay at the General Council on 22 November, 2000, WT/GC/38 (December 12, 2000)(expressing concerns that acceptance of amicus briefs from persons or institutions that are neither parties nor third parties in a particular dispute upsets the balance of the contract between the contracting parties and the dispute settlement body).

[160] Abbott and Snidal, *supra* note 7, at 20–1. *See also*, Karen J. Alter, "Agents or Trustees? International Courts in Their Political Context," (paper under submission)(critiquing Nielson and Tierney's principal/agent theory as applied to international courts and discussing the role of international courts as trustees).

[161] Alter, *supra* note 160.

[162] *Id.*

[163] *Id.*

authority to a regime's dispute settler. And, as is suggested in Chapter 8's description of general law-making by even specialized dispute settlers, the ostensible principals in one regime cannot control the impact of another regime's dispute settlers on their own regime, which may occur through transnational judicial conversations. But the point is not merely that institutionalized dispute settlers enjoy considerable degrees of relative autonomy from their ostensible principals. It is not just that "agency slippage" may be inevitable. It is that many, if not most, international dispute settlers are established at least in part precisely to exercise relative autonomy from the states that establish them. The collective principals, in short, want their agents to "slip"; indeed, although they do not often express the point or do so consistently, they do not want these dispute settlers to be seen as their "agents" at all. Even some political dispute settlers—such as the UN Secretary-General—are expected to be something other than agents for the majority and not to serve merely as channels for majority preferences.[164]

Another form of IO critique focuses on IOs' impact on the horizontal relations among states. Concerns, canvassed in Chapter 4, that the Security Council may be violating the sovereign equality of states or members' rights to non-interference with matters relating to their domestic jurisdiction, self defense, or territorial integrity evince these horizontal "sovereignty" concerns. These worries can easily slide into the vertical democratic critiques surveyed above, at least to the extent they are portrayed as intended to protect sovereign prerogatives that enable governments to respond to the needs and rights of their polities.[165] Remedies for the various democratic deficits and for remedying agency slippage, may also address these horizontal concerns. Proposals that would, for example, force the Security Council to provide independent judicial review of its decisions to list alleged terrorists for financial sanction could alleviate some vertical concerns (to the extent they protect the due process rights of individuals, for example), agency slippage concerns (to the extent they wrestle some control away from the Council), and horizontal concerns (to the extent they help to level the playing field between Permanent Members of the Council and other members).

But neither agency/principal nor horizontal concerns should be equated to democratic deficit concerns. Sometimes what states worry about has little to do with the rights of individuals within their polities as such, but simply the right to be treated equally on a par with other states or the right to exercise their own discretion as governments. This leads, of course, to familiar tensions between states and IOs when, for example, the latter are established, as are human rights regimes, precisely because the collective does not trust states to protect the rights of their own nationals. It also leads to familiar disputes when IOs and states disagree about the meaning, scope, or significance of particular human rights or

[164] This is certainly suggested by arguments in democratic theory that elected representatives, as well as courts in democratic societies, need to protect insular minorities from the tyranny of the majority and uphold the rule of law.

[165] *See, e.g.*, Kingsbury, *supra* note 130.

the degree of deference that ought to be accorded to local sensibilities or traditions within such regimes.

Not all horizontal concerns that states express vis-à-vis IOs are illegitimate. Some concerns with IOs that governments express cannot be remedied by enhancing democratic representation, transparency, or participation, or by giving fairer treatment to individuals. In some cases, governments need to be reassured that their organizational agent will do their bidding, is not being commanded by powerful states, or at the very least is not violating the expectations of his/her principal. IO remedies proposed to solve "democratic deficit" concerns may conflict with such goals. Independent judicial review over Council decisions that identify alleged terrorists for sanction, for example, like ICJ review over the Security Council, is not seen as an appropriate or desirable remedy if what states are worried about is protecting their own decisions about who constitutes a "terrorist." Consequently, neither a state like the U.S., protective of its Council prerogatives, nor certain Middle Eastern states, distrustful of "Western" views of what constitutes a terrorist act, may support this proposal for reform—which threatens to give their collective agent too much discretion.

Vertical and horizontal concerns with IOs are not restricted to academics. They emerged, for example, in the arguments made by the President of the United States to the U.S. Congress to convince that body to give its consent to the results reached during the historic WTO Uruguay Round. As the U.S. legislative history to that effort shows, the U.S. Executive argued that U.S. ratification of the WTO Agreement was consistent with "democracy" because (1) WTO organs would have no power to change U.S. law without Congressional action since the WTO agreements were not "self-executing"; (2) the U.S. could not be easily outvoted in WTO organs since action was usually to be taken on the basis of consensus and interpretations (which could not, in any case, constitute an amendment of the underlying agreements) which would require a vote by three-fourths and not a mere majority of the membership; (3) amendments to the treaty could not be imposed on the U.S. without its consent; (4) the WTO secretariat was an impartial body not beholden to any other government; (5) U.S. federalism concerns were protected by various mechanisms such as the promise that the states of the U.S. would be consulted on ways to conform state law with WTO obligations, U.S. states would play a role in WTO dispute settlement when their interests were implicated, and the U.S. federal government and not a WTO panel would ultimately decide when state laws needed to be changed; (6) WTO dispute settlement did not include a private right of action but would permit the U.S. government to screen the types of disputes that it would bring; (7) the relevant U.S. executive agency would regularly report to the U.S. Congress on votes taken within the WTO and the possibility of WTO challenges to U.S. law; (8) WTO dispute settlers had no authority to demand a change in U.S. law and were authorized only to interpret, not add to or diminish rights in the covered agreements; (9) unilateral U.S. action against states was still possible outside the WTO

context (as with respect to matters not covered by the WTO agreement or with respect to non-WTO members); and (10) the U.S. Federal Register would publish notices of all pending WTO disputes to enable interested private parties to provide their views to the U.S. executive agency charged with handling such disputes.[166] The U.S. Congress also considered, but ultimately did not pass, as part of its implementing legislation on the WTO Agreement, a proposal to establish a WTO Dispute Settlement Review Commission (also called the "Dole Commission" in honor of Senator Robert Dole, who proposed it), consisting of five federal appellate judges. That Commission would have reviewed all WTO cases that the U.S. lost to determine whether the panel or the WTO Appellate Body had exceeded its authority or acted outside the scope of the relevant trade agreement, added to U.S. obligations or diminished its rights, acted arbitrarily or capriciously, or engaged in misconduct. If the Commission found three "violations" in a five-year period, then any member of the U.S. House or Senate could introduce a joint resolution to disapprove of further U.S. participation in the WTO, and if that resolution were approved, the U.S. would commence withdrawal from the organization.[167]

Whether or not the arguments made by the U.S. Executive to its Congress accurately reflect the obligations contained in WTO covered agreements, they respond to the three types of "democratic deficit" canvassed above as well as to more horizontal concerns about protecting U.S. rights as both principal and "sovereign." Reactions to these arguments turn on evaluations of the IO in question, in this case the WTO. If one believes that the WTO protects governments from giving in to rent-seeking interests within their polity and that therefore the general welfare is advanced by giving the WTO autonomous power over national trade rules, many of the U.S. Executive's points (such as (1), (2), (3), (7), and (8)), which respond to concerns about affirming formal democracy and parliamentary supremacy, are illegitimate. But the U.S. Executive's arguments are far more persuasive if one believes that there is a serious risk the WTO, or WTO dispute settlers in particular, will engage in standard-setting at odds with the will of its member/principals or with the interests of affected non-state constituencies whose views may not be heard.

The arguments over the WTO also reflect distinct views of how IOs are made more accountable and, alternatively, how they achieve compliance. Points (5) and (10), designed to placate those concerned about participation rights, suggests an organization that operates on the level of discourse. Points (6) and (8), as well as the un-enacted Dole Commission, suggest a fundamental distrust of at least the WTO form of international dispute settlement and a preference for national adjudication. Point (9), most obviously directed at protecting U.S. horizontal "sovereign" concerns, suggests the limits of faith in multilateral fora

[166] Raj Bhala, *International Trade Law: Theory and Practice* at 201–28 (New York: Lexis Publishing, 2001) (containing excerpts from Uruguay Round Trade Agreement, Statement of Administrative Action). [167] *See* Bhala, *supra* note 166, at 243 (describing proposal of November 23, 1994).

and residual hopes for exacting compliance through old-fashioned hegemonic power.

Implicit in many of the U.S. Executive's contentions with respect to the WTO is a simple plea: states can always exit if their voice does not get heard.[168] This is a perennial response to the horizontal and vertical risks posed by IOs. As discussed in Chapter 9, international dispute settlers' awareness of their own tenuous jurisdiction and of the threat that states will fail to submit their disputes for peaceful settlement or even withdraw from participating in pending cases, exerts a constraining influence on adjudicative law-making.[169] The U.S., as well as some other states against which ICJ claims have been brought, has exercised the "exit" strategy, even in defiance of that Court's jurisdiction. In other cases, most notably with respect to the payment of UN dues and continued participation in the ILO and UNESCO, the U.S. has used the threat of withdrawal (actually exercised for a period in the cases of the ILO and UNESCO), to insist on institutional reforms.[170] States' ability to credibly threaten exit, or to engage in other modes of political control (such as threats to rewrite the underlying rules by which an IO is governed, threats to withhold modes of cooperation, or threats to the re-election possibilities of IO leaders), varies with their relative power; clearly, most states do not have the leverage over IOs that can be exercised by the United States or other powerful states.

10.5.2 The Challenge of Ideology and Power

A substantial literature documents how IOs embody and promote particular ideologies.[171] Although global in import and aspiration, IOs generally reflect the ideology of certain powerful states in the West. Ideological critiques of IOs target, for example, the Eurocentric approaches taken by IOs with respect to human rights. Scholars have documented, for example, the ways the UN and its various

[168] *See generally* Eyal Benvenisti, "Exit and Voice in the Age of Globalization," 98 *Mich. L. Rev.* 167 (1999).

[169] *See generally* Richard H. Steinberg, "Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints," 98 *AJIL* 247, at 263–7 (2004)(discussing the political constraints that alleviate concerns that WTO judicial law-making will undermine the sovereignty of states or create a serious democratic deficit but acknowledging that the threat of unilateral exit "has limited credibility because it would be too costly").

[170] For discussion of U.S. threats to withhold UN dues, see *supra* Section 3.2.

[171] This follows naturally from the premise that IOs are as much a product of Eurocentric premises as the rules of international law that established them. As Benedict Kingsbury notes, 19th-century divisions made by international lawyers between "civilized" and "uncivilized" eventually gave way to a "Western model of the state" as global reference point and Eurocentric minimum standards relating to the treatment of foreigners and their property, the law of the sea, and the recognition of governments. Kingsbury, *supra* note 130, at 605–9. Modern IOs were built on the same precepts. *See also* David Kennedy et al., "International Symposium on the International Legal Order," 16 *Leiden J. Int'l L.* 839 (2003); Makua Mutua, "Critical Race Theory and International Law: The View of an Insider-Outsider," 45 *Vill. L. Rev.* 841 (2000); Susan Marks, "Big Brother is Bleeping Us—With the Message that Ideology Doesn't Matter," 12 *EJIL* 109 (2001).

human rights bodies have sidelined questions of economic, social, and cultural rights, despite the widespread ratifications to the ICESCR, undoubtedly in response to how such rights are treated in the national law of powerful states, and especially in the U.S.[172] Others, like Benedict Kingsbury, have argued that the "global legal architecture" reflects views of freedoms of speech and association and appropriate forms of government participation that reflect the U.S.'s views of the First Amendment.[173] He argues that such ideological concepts subtly delimit from the outset the types of NGOs deemed eligible to participate within IOs, the forms of accountability deemed appropriate for NGOs, and generate a particular model of voluntaristic international civil society, structured by and for the market, to the disadvantage of certain groups, such as indigenous peoples' organizations, that do not adhere to such models.[174]

Kingsbury's critique of how IOs conceive of, and structure, "international civil society" connects to broader concerns that existing institutions for global and regional governance favor economic over social values. Although "soft" managerial forms of institutionalized enforcement are widely touted, it turns out that the harder, and some would contend more effective, forms of institutional compliance are reserved for issues of particular value to Western, rich states (such as protecting intellectual property rights under the WTO). IOs appear to devote more resources and time to protecting the rights of free traders and foreign investors than to the protection of ordinary people these private companies employ or adversely affect. Aside from regional human rights courts, the more coercive forms of institutionized remedies are restricted, for the most part, to defending the rights of private traders and investors. Although other non-state actors can bring complaints before the World Bank Inspection panel or ILO dispute settlement mechanisms, such claimants have no right to the enforceable monetary judgments that ICSID arbitrators can issue on behalf of foreign investors or the binding decisions authorizing trade retaliation approved by the WTO's DSB. For these reasons, it is argued that the world lacks a social architecture to rival the WTO's powerful tools for case-by-case law-making, the IMF's powerful economic inducements for regulatory uniformity, institutionalized arbitral mechanisms to protect foreign investors, or European-styled formal adjudicative models for enforcement through private rights of action.

[172] *See, e.g.*, J. Oloka-Onyango, "Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa," 18 *Am. U. Int'l L. Rev.* 851 (2003). Debates continue over whether these rights can be subject to institutional or judicial enforcement at either the regional or UN level, see, e.g., Robin R. Churchill and Urfan Khaliq, "The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?," 15 *EJIL* 417 (2004); Michael J. Dennis and David P. Stewart, "Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?," 98 *AJIL* 462 (2004).

[173] Benedict Kingsbury, "First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society," 3 *Chi. J. Int'l L.* 183, at 184 (2002).

[174] Kingsbury, *supra* note 173.

Others make an even broader counter-critique, suggesting that the proliferation of institutionalized dispute settlers is, in and of itself, a manifestation of Americans' penchant for adjudicative forms of public regulation over less adversarial alternatives.[175]

Quite apart from the alleged ideology of institutionalized dispute settlement, IOs are increasingly regarded as enablers of the "Washington Consensus." They are increasingly seen as supporters of the ideology of the free market, for deregulation and other U.S.-centric structural reforms, and the promotion of only those civil and political rights and forms of "democratic" governance associated with Western liberal states.[176] While some, like Thomas Friedman, praise the resulting "Golden Straitjacket" that such organizations help developing countries don (sometimes described as a "club model" of interstate cooperation to promote "embedded liberalism"), others take a dimmer view of the outcomes.[177] Although the resulting impact on global welfare is hotly disputed and lies outside the purview of this book, debaters on both sides agree that IOs have become, since the end of the Cold War, champions for the "victors" of that conflict. The current agenda of UNCTAD, for example, are regarded as symptomatic. That UN body, once associated with promoting a particular ideological conception of the primacy of development and equity and a chief supporter of UN efforts (including by the GA) to promote a "New International Economic Order," has increasingly become an agent for the free market.[178] Fears that the WTO is the agent of predatory economic globalization, and not merely an enemy of democratic forms of governance, have spurred vitriolic clashes concerning that organization's legal impact—including about the merits of concluding the Doha Round, about whether and when to admit amicus briefs, and about the domain of WTO dispute settlement.[179] Comparable North/South divisions arise with respect to the "mission creep" evident in the operations of the IMF or the World Bank and with respect to the continued marginalization of claims premised on promoting greater equity as between developed and developing states.[180] It might also be the case that powerful states use their ability to shift treaty negotiations, or other regulatory efforts, to certain IOs (or organs within them) as a way to bury

[175] *See*, *e.g.*, Mattei, *supra* note 135; Jane Jenson and Boaventura de Sousa Santos, eds., *Globalizing Institutions*: *Case Studies Social Regulation and Innovation* (Aldershot, U.K.: Ashgatt, 2000).

[176] *See*, *e.g.*, Mattei, *supra* note 135.

[177] *See*, *e.g.*, Thomas Friedman, *The Lexus and the Olive Tree* (New York: Farrar, Straus, and Giroux, 2000); John Gerald Ruggie, "International regimes, transactions, and change: embedded liberalism in the postwar economic order," 36 *Int'l Org.* 379 (1982).

[178] *See*, *e.g.*, Matthias Finger and Bérangère Magarinos-Ruchat, "The Case of UNCTAD", in Dennis Dijkzeul and Yves Beigbeder, eds., *Rethinking International Organizations* at 140 (New York: Berghamhn Books, 2003).

[179] *See e.g.*, Charnovitz, *supra* note 145.

[180] *See*, *e.g.*, Jessica Einhorn, "The World Bank's Mission Creep," *Foreign Affairs* 22 (September/October 2001). For a more positive assessment of the international financial institution's attempts to spread liberal economic policies and build national and international legal regimes in support of them, see Edith Brown Weiss et al., eds., *The World Bank, International Financial Institutions and the Development of International Law* (Washington, DC: ASIL, Studies in Transnational Legal Policy, No. 31, 1999).

issues on which they do not want to reach agreement—from codes of conduct governing the conduct of multilateral enterprises to definitions of aggression. It may be the case that some IO failures reflect conscious efforts to deflect critical energy onto weak institutions whose lack of competence or overly diverse membership constitute a kind of designated "safety value" for legal projects not favored by powerful states, while keeping more effective fora (such as the WTO) clear for more "important" business.[181]

Another ideological critique of IOs stems from these organizations' continuing inability to fulfill the promise of equal participation of men and women and complaints that they merely replicate, at the global level, the gendered practices of nation states. The gender inequities or blindspots within institutions like the international civil service, many of the expert groups charged with treaty-making or standard-setting, and arbitral or judicial institutions are seen as partly responsible for gender inequities in public international law, that is, the gendered gaps in international humanitarian law, the legal regulation of peacekeepers, the rules governing international assistance and refugees, along with the international processes for establishing all of these that make it difficult for vulnerable, weak groups (especially women) to assert their rights.[182] It is argued that IOs replicate the patriarchy evident in the organizational structures, and usually the composition of, member governments. IOs promulgate and give effect to "human" (but not always "women's") rights. IO law-making all too often falls into the same problematic public/private dichotomies evident in national law. At both the international and national levels states claim that they cannot or will not prevent horrors such as female infanticide, bride burning, genital mutilation, trafficking in women, or "private" violence against women. At both the international and national levels, sex discrimination claims face defenses based on "culture" more often than other claims for equal treatment. Despite progress made within some institutions—as through the persistent efforts of female judges and others within the ad hoc war crimes tribunals—there is concern that IO law-making continues to ignore the legitimate concerns of one half of the world's population.

There is, finally, fear that some IOs, especially those that can only act with the consent of the United States or those whose weighted voting schemes give the U.S. and other rich states considerable power, such as the IMF, are subject to capture by the hegemon or other powerful states. Lloyd Gruber argues that institutions for "voluntary cooperation" like the international financial institutions have "as much to do with power, co-optation and outright

[181] Hints of this possibility appear in the "forum-shifting" literature, see generally Kal Raustiala and David Victor, "The Regime Complex for Plant Genetic Resources," 58 *Int'l Org.* 277 (2004); Helfer, *supra* note 134.

[182] *See generally* Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law* at 171–200 (United Kingdom: Juris/Manchester University Press, 2000) and especially Chapter 6.

domination" as they do with bargaining and strategic interaction and that they might be more accurately seen as tools for "ruling" the world in the hands of a select number of powerful states that can control such institutions.[183] As is most clearly suggested by Chapter 4's examination of the power of the Security Council, the sidelining of that body during the invasion of Iraq in 2003 does not mean that it is absurd to worry about an "imperial" Security Council. As Chapter 4 shows, since September 11, 2001, the U.S. has successfully used the Security Council to pursue its war on terrorism through financial sanctions and other forms of criminalization,[184] to secure a license to use self-defense,[185] to recognize its powers as Iraq's occupier,[186] and to temporarily carve out an exception to the ICC's jurisdiction.[187] Despite persistent criticisms of the paralysis of the Council, particularly for its inability to respond to many humanitarian crises, it may yet emerge as the hegemon's best little helper or junior partner.

While most of what the Council is doing at the instigation of the U.S. may be necessary and even beneficial, the Council's actions, good and bad, fit within Detlev Vagt's description of hegemonic international law.[188] This is Council-generated "universal international law" very different from most international lawyers' original conception. This is *ostensibly* multilateral law that is unilateral in many of its effects. Aspects of these resolutions severely undervalue the formal equality of states, substitute diktat and blackmail for genuine dialogue and cooperation, devalue or ignore reciprocal obligations on the hegemon, regard hegemonic breach as seed for new custom or new treaty interpretation, and encourage the hegemon's projection of force or intervention in others' internal affairs. Several of the Council resolutions, as discussed in Chapter 4, are characterized by indeterminacy or vagueness that accrue to the benefit of the hegemon and its allies. Most avoid entangling the hegemon in other international obligations and, on the contrary, enhance its opportunities for self-judging interpretation within a forum that has few, if any, formal checks on its own freedom of action. And some of the Council's resolutions appear intended to displace what Bruno Simma once called the "vehicle par excellence of community interest," namely the multilateral treaty.[189]

At the same time, those who fear hegemonic international law need to bear in mind that some monsters are perceived as more fearsome than they really are, real monsters are few and far between, and a benevolent monster may be better than alternatives on hand. Even a hegemon that resorts to a multilateral forum to achieve its purposes may find itself ultimately constrained, to some extent, by its

[183] Lloyd Gruber, *Ruling the World* at 277 (Princeton: Princeton University Press, 2000).
[184] SC Res. 1373 (September 28, 2001); SC Res. 1390 (January 28, 2002).
[185] SC Res. 1368 (September 12, 2001); SC Res. 1373 (September 28, 2001).
[186] SC Res. 1483 (May 22, 2003). [187] SC Res. 1422 (July 12, 2002).
[188] Detlev Vagts, "Hegemonic International Law," 95 *AJIL* 843 (2001).
[189] Simma, *supra* note 43, at 323. *See* discussion of SC Res. 1373 and 1422 in *supra* Chapter 4.

own rhetoric and the habits of obedience, general values, and rules of law of the institution in question.[190] The need to secure the approval of others, even in the context of a veto-wielding state that needs to secure the approval of only eight others on the Council, exerts some constraint. The Security Council, while undoubtedly a tool of power, may be preferable to likely alternatives and IO fora for standard-setting may constitute significant progress—if the baseline is 19th-century sources of international law and 19th-century processes for making them.

10.6 Conclusion

The changes brought in the wake of institutionalization are tantalizing to international lawyers. That IOs are now making international law outside the constraints suggested by the traditional doctrine of sources—that IO organs need not find explicit delegations of power, are not confined to differentiated or closely circumscribed spheres of legal action, and are not limited to making "internal" institutional housekeeping rules—offers the promise of forms of governance and constitutional analogies. The prospect that states are no longer limited in their treaty-making to waiting for the "slowest boat," but can deviate from one state/one vote by relying on consensus or opting out procedures, that "sovereignty" is increasingly defined to mean cooperation and not autonomous action, that international rules are no longer confined by subject matter, that fora exist where rules are fashioned by impartial experts intent on solving real problems, that those parts of governments most expert with respect to a particular question have formal places to consult and to negotiate with their counterparts abroad and even with non-state groups most relevant to their work, and that international tools for compliance and adjudication are becoming as diverse and sophisticated as those employed to enforce and adjudicate national law—all of these are regarded as signposts designed by Hugo Grotius.

There is no mystery about why international lawyers have a tendency to don rose-tinted glasses when examining IOs and their impact. IOs are seen as primary vehicles for transforming international law from rudimentary frameworks for bilateral barter to systems of governance premised on multilateral cooperation.[191] IOs provide greater opportunities for all states, regardless of wealth or power, to participate in the formation of law. The making of international law in the age of IOs is now open to non-European states that would have been dismissed as

[190] Indeed, this is implicit to Rosalyn Higgins' analysis of the role of law in UN political organs, discussed in *supra* Section 3.3. For a description of the constraining influence of "legal culture" within the Security Council, see Martti Koskenniemi, "The Place of Law in Collective Security," 17 *Mich. J. Int'l L.* 455 (1996). For an interesting case study of the impact of norms on the Council, the United States, and Libya in the aftermath of the Lockerbie bombing, see Ian Hurd "The Strategic Use of Liberal Institutionalism: Libya and the UN Sanctions, 1999–2003," 59 *Int'l Org.* 3 (forthcoming 2005).

[191] *See generally* Simma, *supra* note 43.

"uncivilized" in the 19th century and to ever increasing number of non-state actors, from NGOs to multinational corporations (MNCs). Thanks largely to institutionalization, the late Jonathan Charney was able to proclaim that we now have something new: truly "universal" international law.[192] And he is right. IOs have produced *more* law, more democratically and transparently, and, given the diversity of adjudication and compliance efforts now in use, presumably, to more effect.

International lawyers are particularly entranced by what some have characterized as an enormous expansion and transformation in the international judiciary at the end of the 20th century (canvassed in this book's Part III). Some regard the proliferation of institutionalized dispute settlers as "the single most important development of the post-Cold War age."[193] The new "international judiciary," suggested by the PICT Chart of dispute settlers (at page 404) is the subject of excited academic attention. That a number of these dispute settlers now grant standing to non-state claimants portends a new "discipline" devoted to the study of international judicial law and organization, in place of the well-worn topic of the "peaceful settlement of disputes."[194] International judges offer the promise that the gaps in international law will be filled more readily, even without the benefit of a hierarchal system of binding *stare decisis*, through reliance on persuasive precedent.

International lawyers and some political scientists see institutionalized dispute settlers as yet another set of organizations that promote interstate cooperation—as other venues to advance the rule of law through reasoned discourse that take advantage of sunk costs, reduce transactions costs, extend the shadow of the future, facilitate signaling between states, or, at the very least, collect and disseminate information.[195] For some, the "judicialization" of international law promises eventual "constitutionalization," including through forms of judicial review within and perhaps even between IOs, or at least through the growing phenomenon of "transjudicial communication" not only between the various international courts, but between those tribunals and national courts.[196] The turn

[192] *See* Jonathan I. Charney, "Universal International Law," 87 *AJIL* 529 (1993).

[193] Cesare P.R. Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle," 31 *NYU J. Int'l L. & Pol.* 709, at 709 (1999).

[194] *Id.*, at 711. For a critique of such views, see José E. Alvarez, "The New Dispute Settlers: (Half) Truths and Consequences," 38 *Tex. Int'l L. J.* 405 (2003).

[195] *See generally* Abbott and Snidal, *supra* note 7; William J. Aceves, "Institutionalist Theory and International Legal Scholarship," 12 *Am. U. J. Int'l L. & Pol'y* 227 (1997).

[196] *See generally* "Symposium Issue: The Proliferation of International Tribunals: Piecing Together the Puzzle," 31 *NYU J. Int'l L. & Pol.* No. 4 (1999). European models generally provide hopes for such developments elsewhere, see, e.g., Alec Stone Sweet, "Judicialization and the Construction of Governance," 32 *Comp. Pol. Stud.* 147 (1999). For discussion of the communication among dispute settlers, see Anne-Marie Slaughter, "A Typology of Transjudicial Communication," 29 *U. Rich. L. Rev.* 99 (1994). For proposals to further "constitutionalize" particular institutional regimes, see, e.g., Ernst-Ulrich Petersmann, "Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?," 31 *NYU J. Int'l & Pol.* 753 (1999); Ernst-Ulrich Petersmann, "Constitutionalism and WTO Law: From a State-Centered Approach Towards a Human Rights Approach in International Economic Law," in Daniel L.M. Kennedy and James

to judicialized forms of dispute settlement in regimes as distinct as trade and international criminal law is regarded as a fundamental shift away from diplomatic solutions based on blatant assertions of power.[197] It is small wonder that some see developments like the creation of an ICC as a "constitutional" moment for the international system.[198]

This book has tried to present a more balanced, less sanguine view of the effects of IOs. It argues that something profound occurred with the move to international organization: that consciously or not, the institutionalization of international law brought in its wake significant changes in the nature and content of its positivist sources, provided the entrée for distinct law-making actors, changed the conception of the state and of "sovereignty," and expanded the range of tools for compliance. While it is difficult to say whether IOs have improved public international law and the jury is still out on whether they have made states more likely to behave in conformity with international rules, there is little doubt that the institutionalization of public international law has radically altered how state power, hard and soft, is exercised and has created competing sites for its exercise.

At the same time, this book acknowledges that IOs are not inevitably successful promoters of inter-state cooperation and that even when they succeed, their successes may be built on sand.[199] That IOs promote ambiguity and compromise may mean that they produce only open-ended, inoffensive standards that, as suggested by Paul Stephan, merely "reify the status quo."[200] The fact that organizations and their dispute settlers benefit from "independence" and "impartiality" means that they may not understand, or be able to respond to, local situations or be limited in their responsiveness. The functional differentiation among IOs is

D. Southwick, eds., *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* 32 (Cambridge, U.K. and New York: Cambridge University Press, 2002). For a skeptical view of the prospects for constitutionalization within the UN, see, e.g., Matthias J. Herdegen, "The 'Constitutionalization' of the UN Security System," 27 *Vand. J. Transnat'l L.* 135 (1994). *See also* Lawrence R. Helfer, "Constitutional Analogies in the International Legal System," 37 *Loy. L.A.L. Rev.* 193 (2003).

[197] *See generally* John H. Jackson, *The World Trading System*, at 85–8 (Cambridge, MA.: MIT Press, 1989)(comparing "power-oriented" diplomacy to "rule-oriented" diplomacy). For some commentators this reflects a more general phenomenon, namely, the declining power of states. S*ee* Kenichi Ohmae, *The End of the Nation-State: The Rise of Regional Economies* (New York: Free Press, 1995); Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (New York: Cambridge University Press, 1996); Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996).

[198] *See*, *e.g.*, L. N. Sadat and S. R. Carden, "The New International Criminal Court: An Uneasy Revolution," 38 *Geo. L.J.* 381, at 407 (2000).

[199] This book does not attempt to assess whether IO-generated law enhances global welfare. For a skeptical answer to that inquiry, see Gruber, *supra* note 183, (questioning the welfare implications of regional and multilateral institutions). For a more general critique of legalization at the global level, see Richard H. Pildes, "The Dark Side of Legalism," 44 *Va. J. Int'l L.* 145 (2003).

[200] Stephan, *supra* note 131 (arguing that processes controlled by the executive branches of government or by private legislators (experts) as in UNCITRAL are likely to produce such standards). *But see supra* Sections 6.3–6.4.

both a useful division of labor permitting specialization, and a needless complication that generates overly burdensome reporting requirements and impedes cross-cutting solutions. IOs' respect for sovereign prerogatives and sovereign equality means that they are likely to respond only to crises when these emerge—and be unable to prevent them.

Organizational venues can de-legitimate forms of treaty-making or other attempts at setting standards; IO secretariats may be inefficient, ineffective, or repressive, perhaps because they are not as accountable as some government agencies. IO expert groups, like other bureaucratic agents, may develop their own agendas or come to rely on ritualized practices that limit their field of vision. Reliance on path dependent solutions may "flatten diversity" or be "inattentive to contextual and particularistic concerns."[201]

The perils posed by IO law-making suggest that policymakers and lawyers need to approach their creations—as we do Frankenstein's monster—with our eyes open, attentive to the possibility that all forms of regulation—national and international—can be abused and may need some kind of check. Context-specific inquiries may reveal that even IOs with universal membership do not always further principles of sovereign equality or reciprocity; that gaps in IO regulation and enforcement may reflect ideological preferences and not merely practical difficulties; that there is a price to be paid for more efficient forms of universal "global law" that make it unnecessary to endure arduous treaty negotiations; that overly flexible interpretations of IO charters might be just as dangerous as rigid textualism; that reliance on institutional practice to progressively develop the law may not always constitute "progress" or be politically "progressive;" and that international lawyers need to worry about not only *whether* the hegemon goes to institutions like the UN, but about what it does when it gets there.

IO reform agendas, responsive to the manifold challenges and risks posed by IOs, need to go beyond familiar formulas for remedying the formal democratic deficit by establishing more representative global organs, such as a global parliament. Establishing such a parliament, even if feasible, is likely to remain a step too far for most governments. While proposals for increasing parliamentary participation in certain IO organs, including the UN General Assembly, and for increasing the participation rights of non-state actors, are more feasible, it must be kept in mind that greater goodwill for these organizations may not always result.

[201] *See* Barnett and Finnemore, *supra* note 5, at 721; Dijkzeul and Beigbeder, *supra* note 178. Dennis Dijkzeul and Leon Gordenker identify the following IO pathologies: limited funding and withholding to exert influence, antiquated personnel management, incomplete organizational adaptation to changing circumstances and ideologies, north/south antagonism and adverse impact on sustainable human development, uncritical application of program procedures that hamper local participation, fraud, nepotism, and corruption, overly narrow interpretation of human rights, implementation errors in connection with assistance to civilian police forces, and haphazard and ill-directed funding of civil society programs intended to promote democracy. Dennis Dijkzeul and Leon Gordenker, "Cures and Conclusions," in *id.*, 311 at 333. *See also supra* Section 6.2.

Familiarity can breed contempt. Greater contact with IO bureaucrats, IO-appointed experts, and IO representatives from other countries could generate greater, and more well informed, opposition to IOs—as more become familiar with their pathologies.

Responding to the challenges presented by IOs is becoming as complex an enterprise as the design of national regulatory and adjudicatory systems always has been. Many of the things that would remedy some of the democratic or sovereignty deficits of IOs would, as is suggested by the U.S. response to its Congress with respect to the WTO, aggravate the risks that an IO would either not be empowered to do anything at all or would become, effectively, the de facto agent of the state(s) that satisfactorily answers those concerns to its own satisfaction. Yet institutional reforms directed at ameliorating IOs' vertical and horizontal challenges are not a hopeless cause, particularly if IO reformers join forces with those who are trying to solve analogous concerns arising from the administrative state.

The rise of IOs and the emergence of complex administrative agencies within states are increasingly interrelated events that have coincided in time. Both phenomena respond to and help produce a new density of regulation at both the international and national levels. Both IO forms of standard-setting and those undertaken by national administrative agencies have tended to be been seen as limited to top-down, command-and-control modes of rule-making that lend themselves to democratic critiques, generate local resentment, and complicate compliance. This need not be.

As briefly noted in Section 4.3.11, both the builders of international regimes and administrative lawyers at the national level are turning to organizing principles that may serve to deflect such concerns. At both international and national levels, this model of governance stresses the increased participation of non-state actors, public/private collaborations, diversity and competition, decentralization and subsidiarity, greater integration of policy domains, and soft law techniques for standard-setting and enforcement.[202] The legal standards established—whether through treaties or forms of national regulation—are less like black/white prohibitions than managerial structures for dynamic interactions intended to encourage adaptability and iterative learning, including re-defining problems in the course of implementation and continued re-examination of rules over time.[203]

IOs have been experimenting with this set of policy tools—now getting increased attention from national administrative lawyers in the U.S. and Europe—for some time. They have had to, given the international system's paucity of coercive, hierarchal alternatives. IOs have long turned to forms of self-regulation (e.g., codes of conduct), soft techniques for establishing law (e.g., the UN General Assembly), and soft mechanisms for compliance and feedback

[202] *See* Orly Lobel, "The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought" 89 *Minn. L Rev.* 342 (December, 2000). *See also supra* Section 4.3.

[203] *See generally* Lobel, *supra* note 202.

(e.g., disclosure regimes, information gathering, and reporting). From the start IOs have lowered the barriers of entry to non-state actors seeking to influence the law, thereby helping to turn individuals, NGOs, and even multinational corporations, into norm-generating subjects. More recently, international lawyers, like administrative lawyers, are becoming more aware of the need to promote institutions and rules that are as responsive to local sentiments as they are to the disembodied and all too abstract "international community." The transition from Council-created ad hoc war crimes tribunals, premised on primacy over national courts, to the ICC, premised on complementarity, and now to "hybrid" courts that incorporate both national and international participants and rules, suggests this learning process. International lawyers realize that these alternatives to command-and-control or coercive forms of regulation and adjudication are not a panacea and create problems of their own. Nonetheless, the numerous innovations in international law's norms, content, actors, and forms of compliance brought about in the age of IOs may themselves provide the best hope for eventually generating efficient, politically legitimate, and democratic forms of standards—both within the administrative state and outside of it. That is the continued promise offered by the move to international institutions.

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