

1

What Is International Law?

A. THE DEFINITION OF “INTERNATIONAL LAW”

We first want you to focus on the different kinds of law that an international lawyer must deal with, and on how public international law fits into the picture. You are already familiar with torts, contracts, and possibly some U.S. constitutional law. We assume, however, that you have not been exposed to much international law. Indeed, you may think of it as something entirely different from other kinds of law. You may have some notion that it exists on a higher plane, or you may have heard that international law only concerns governments. You may also be instinctively skeptical as to whether something called “international law” really exists. In this chapter, we will first introduce you to the definition of international law and present a problem showing how international law could be applied. Section B consists of materials that sketch the history of international law, which you should read as background for the course. Section C then confronts the skepticism sometimes expressed about international law and raises the following questions:

- (a) Is international law really “law”?
- (b) Why is international law binding?
- (c) What leads states to comply with international law?
- (d) What is the function of international law in the world today?
- (e) What should international law be, and what are the most compelling critiques of contemporary international law?

Section D considers some of the modern theoretical and methodological approaches to international law. Section E presents a case study of the terrorist attacks of September 11, 2001, and the U.S. and world response to them. The case study illustrates international law in action.

Western scholars have often divided the legal universe into two parts or levels — international law and domestic law. International law prescribed rules governing the relations of nation-states (or “states,” as they are called in the vocabulary of international law). It encompassed both public and private international law. Domestic law, on the other hand, prescribed rules governing everything else, mostly the conduct

or status of individuals, corporations, domestic governmental units, and other entities within each state.

“Public” international law was distinguished from “private” international law. Public international law primarily governed the activities of governments in relation to other governments. Private international law dealt with the activities of individuals, corporations, and other private entities when they crossed national borders. A large body of private international law consisted of choice-of-law rules (determining which state’s domestic law would apply to transactions between nationals of two states, such as an international sales contract, or to controversies that had some significant connection with more than one state). Private international law also included substantive terms and conditions that had become customary in certain international practice, such as shipping terms and letters of credit. Recently the scope of private international law has expanded to encompass treaties on many subjects that were traditionally domestic law, such as the U.N. Convention on Contracts for the International Sale of Goods and the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption.

Moreover, norms of public international law have increasingly regulated or affected private conduct. For example, states frequently conclude treaties granting rights of trade or investment to nationals of other states, proclaiming individual human rights that are required to be protected, or establishing environmental standards to be followed by industrial plants. Those treaties, which create legally binding obligations under public international law, may also be “incorporated” into domestic law and thereby become domestic legal obligations. The lines between international law and domestic law, as well as between public law and private law, have thus become somewhat artificial. Indeed, to some commentators, the intellectual basis for the traditional conceptual structure of the old legal universe seems suspect.

One of the classic treatises, J.L. Brierly, *The Law of Nations* (6th ed. 1963), defined international law as

the body of rules and principles of action which are binding upon civilized states in their relations with one another.

The 1987 revision of the American Law Institute’s Restatement of Foreign Relations Law (hereinafter referred to as the Restatement) takes a limited step toward recognizing the potential importance of international law for activity traditionally within the domestic or private spheres:

Restatement Section 101

“International law,” as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical.

These two definitions focus on the norm or rule of law. Those norms or rules may be created by or found in different instruments or sources.

A. The Definition of “International Law”

3

Article 38 of the Statute of the International Court of Justice, a treaty ratified by the United States and by all other members of the United Nations, contains a traditional statement of those sources. The Restatement offers an alternative exposition of basically the same idea.

Statute of the International Court of Justice***Article 38***

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Restatement Section 102

(1) A rule of international law is one that has been accepted as such by the international community of states

- (a) in the form of customary law;
- (b) by international agreement; or
- (c) by derivation from general principles common to the major legal systems of the world.

(2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.

(3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.

(4) General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreements, may be invoked as supplementary rules of international law where appropriate.

Notes and Questions

Problem. As an initial exercise, consider whether the norms or rules established by the legal instruments described below would qualify as international law under either of the two definitions above. You should focus on the norm or rule established by each of the instruments rather than on the instrument itself. (You may assume that a treaty is an agreement between states that is reached by the executive branches of the governments, often with legislative branch support.)

(a) A treaty among several countries prohibiting the use of force except in self-defense.

(b) A treaty between Mexico and the United States establishing the boundary between the two countries.

(c) A treaty between the United States and Japan under which each agrees to permit nationals of the other country to invest freely in its economy and not to expropriate property without payment of just compensation.

(d) An oil concession agreement between the government of Mexico and Texaco, under which Mexico agrees not to tax Texaco on its income from the concession for ten years. What if the concession agreement contains a clause saying that “this instrument shall have the force of law and shall be interpreted in accordance with generally recognized principles of international law”? Would it make any difference whether the concession agreement provided that disputes would be settled by international arbitration? Or if it provided that disputes would be settled exclusively in Mexican courts?

(e) A provision in the U.S. Constitution that property may not be taken except for public use and on payment of just compensation.

(f) A U.S. statute imposing licensing fees on foreign corporations.

(g) A common law rule announced by the California judiciary imposing strict liability without regard to negligence for damage caused by defective products (including those manufactured by foreign corporations).

(h) A custom long observed by all the countries of the world not to imprison properly accredited diplomats.

1. In the examples above, how was the legal norm formed? Who and/or what institutions were required for its formation?

2. Where would disputes about the validity or meaning of the norm be settled? In connection with this question, see Notes 5 and 6 below.

3. What law would govern the dispute? What difference does it make?

4. What sanctions could be imposed for violation, and who would impose them? It is important to think about sanctions other than retaliation (the normal international law sanction), and to think about why government officials comply with law, considering how factors such as judicial rebuke, adverse publicity, habitually following rules and procedures (the usual way a large bureaucracy functions), and fear of administrative sanctions or adverse effects on career development lead to compliance with international law. A relevant example occurred when two U.S. Border Patrol agents were removed from field duty because they “breached Mexico’s sovereignty” by crossing the border in pursuit of two suspects. In a similar incident on the U.S.-Canadian border, the United States protested the Canadian arrest of a person 200 yards inside the United States and demanded to know what steps Canada was taking with respect to the arrested American and with respect to the arresting officer. Canada released the defendant and sought extradition under the extradition treaty between the two countries.

5. Much skepticism about international law is based on the absence of a judicial system with compulsory jurisdiction to settle disputes and the absence of a central executive authority to coerce compliance. Nevertheless, as we show in Section C, almost all rules of international law are in fact regularly complied with. Furthermore, as explored in Chapter 4, there is an International Court of Justice (ICJ),

A. The Definition of “International Law”

5

which handles a few cases, and active regional and specialized international courts. Moreover, there are several means other than court adjudication by which disputes can be settled. For now, you should know that they include negotiation, mediation, and arbitration pursuant to a general or an ad hoc agreement. Most disputes are settled through negotiation. Consider the description of J. G. Merrills, *International Dispute Settlement* 2, 8 (3d ed. 1998):

In fact in practice, negotiation is employed more frequently than all the other methods put together. Often, indeed, negotiation is the only means employed, not just because it is always the first to be tried and is often successful, but also because states may believe its advantages to be so great as to rule out the use of other methods, even in situations where the chances of a negotiated settlement are slight. . . . [The process of negotiation is] a striking reminder of the fact that states are not entities, like individuals, but complex groupings of institutions and interests [such as the various U.S. cabinet departments, like the Departments of Defense, Commerce, Labor and Agriculture, the legislative branch of the government, and regulatory and law enforcement agencies]. . . . Negotiations between states are usually conducted through “normal diplomatic channels,” that is by the respective foreign offices [i.e., the Department of State in the case of the United States], or by diplomatic representatives, who in the case of complex negotiations may lead delegations including representatives of several interested departments of the governments concerned. As an alternative, if the subject matter is appropriate, negotiations may be carried out . . . by representatives of the particular ministry or department responsible for the matter in question — between trade departments in the case of a commercial agreement, for example, or defense ministries in negotiations concerning weapons’ procurement.

6. Sometimes U.S. courts will look to international law and apply it, either by finding it incorporated into U.S. law or by construing statutes to avoid a violation of it. This is especially so when a treaty or other international agreement is involved to which the United States is a party. Article VI of the U.S. Constitution (the so-called Supremacy Clause) expressly makes treaties part of the “supreme Law of the Land.” There are, however, questions under U.S. law about whether a treaty is self-executing or whether it needs implementing U.S. legislation. A court might also apply what is called customary international law — that is, the law that results from a general and consistent practice of states that they follow from a sense of legal obligation. One famous example of this is the decision by a U.S. court of appeals in *Filartiga v. Pena-Irala* (1980). There, the court determined that there was a customary international law norm against official torture, and the court held that an alien could bring suit in a U.S. court for a violation of this norm, pursuant to a U.S. statute that grants the federal courts jurisdiction to hear suits, brought by aliens, for torts “committed in violation of the law of nations. . . .” (These issues, and the *Filartiga* case, are discussed in Chapter 3.)

Litigating lawyers in the United States usually prefer to rely on constitutional and statutory arguments, rather than on international law. Does this preference reflect ignorance about international law? Parochialism? Skepticism about the perceived legitimacy of international law? Why would some people consider international law to be less legitimate than domestic law? Which of the following kinds of law would probably seem more legitimate to, or more worthy of respect by, (a) a judge, (b) a member of Congress, (c) a U.S. diplomat, and (d) an informed and

concerned member of the public: the constitutional protections of free speech and privacy, a statutory protection of privacy, a treaty guaranteeing free speech and privacy that has been approved by the President and two-thirds of the Senate, a U.N. General Assembly resolution providing for rights to free speech and privacy that has been endorsed by diplomats from all countries of the world, including the United States? What contributes to respect for a legal norm?

Problem. Assume that in 1910 the United States and Mexico concluded a boundary treaty, which, in the case of the United States, was ratified by the President after receiving the advice and consent of the Senate, in accordance with Article II of the Constitution. The treaty provided that the boundary between Texas and Chihuahua would “follow the center of the normal flow channel” of the Rio Grande River “in accordance with international law.” Your client is a wealthy Texas rancher who owns land on the northern bank of the river. Across the river, the land is owned by the Provincial Government of Chihuahua; this land is vacant, but the Provincial Government has plans to develop it into a bird refuge, which will stimulate local ecotourism. Assume that last spring, after an unusual spring flood, the entire river shifted 500 yards to the north, so that land formerly under water now is part of the Provincial Government’s land. Moreover, the main channel of the river (which has shifted 500 yards to the north toward Texas) now covers what was formerly your client’s land, and part of what he claims was his land now forms an island on the south side of the main channel. Assume that the Provincial Government has dispatched a work crew that is building a nature center on the island (this part of the river is a major migratory route for birds). Your client wants to stop the Mexican “occupation” of his land and has asked you to advise him as to (1) what the law is, (2) what remedies—judicial and non-judicial—are available, and (3) what the best strategy is for him to get “his land” back.

Your research has revealed that the treaty-established boundary has been discussed many times within the U.S.-Mexican Boundary Commission because of disputes and even fights over fishing rights in the middle of the river. The Commission and its staff are technicians and engineers who have always mediated a settlement of the problems, usually by getting the disputants to share their catches with each other, to fish on alternate days, or the like. The Commission does not have authority under the treaty to issue legal opinions. Indeed, there is no provision in the 1910 boundary treaty that specifies any judicial or other determination as to the interpretation or application of the treaty.

In 1995, the U.S. Supreme Court adjudicated a similar dispute between Louisiana and Mississippi. In such disputes between states, the Court has regularly stated that it applies general rules of international law. In *Louisiana v. Mississippi*, 516 U.S. 22, 24-25 (1995), the Court held:

The controlling legal principles are not in dispute. In all four of the prior cases that have involved the Mississippi River boundary between Louisiana and Mississippi, we have applied the rule of the thalweg. Though there are exceptions, the rule is that the river boundary between States lies along the main downstream navigational channel, or thalweg, and moves as the channel changes with the gradual processes of erosion and accretion. There exists an island exception to the general rule, which provides that if there is a divided river flow around an island, a boundary once established on one side of the island remains there, even though the main downstream navigation

B. History of Public International Law and Alternative Perspectives

7

channel shifts to the island's other side. The island exception serves to avoid disturbing a State's sovereignty over an island if there are changes in the main navigation channel.

The Special Master found that the disputed area derived from an island, known as Stack Island, that had been within Mississippi's boundary before the river's main navigational channel shifted to the east of the island. The Special Master found that, through erosion on its east bank and accretion on its west bank, Stack Island changed from its original location, next to the Mississippi bank of the river, to its current location, abutting the Louisiana bank. Pursuant to the island exception, then, the Special Master placed the boundary on the west side of the disputed area, confirming Mississippi's sovereignty over it.

[The Court adopted the Special Master's decision.]

In thinking about the advice you will give your client, consider the applicability of Texas state real property law and Article VI of the U.S. Constitution (treaties "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding"), the availability of a remedy in U.S. or Mexican courts, non-judicial remedies, international institutions, and so on. If you would like to pursue a negotiated settlement, with whom would you negotiate? If you would like to get the United States to negotiate with Mexico, or if you decide you would prefer to keep the U.S. government out of the picture, what strategy would you pursue to accomplish your objectives? How can you influence the U.S. Department of State? Can you be sure it will support your client? Should your client find it acceptable if the State Department proposes international arbitration of the dispute with Mexico?

**B. HISTORY OF PUBLIC INTERNATIONAL LAW AND
ALTERNATIVE PERSPECTIVES****1. Introduction**

In the preceding section you learned that public international law deals with the activities of nation-states. The contemporary system of international relations is built on the assumption that the nation-state is the primary actor. Nevertheless, the modern nation-state is a relatively recent product of political development in Western Europe. Generally, this is traced to the Renaissance and Reformation, the expansion of trade in the fifteenth and sixteenth centuries, and the European discoveries of the New World. Intellectually, the doctrine of sovereignty and the idea of the secular, territorial state are intimately associated with the creation of the modern system.

Of course, there had been well-organized political units in Europe before this period. And there were great empires for millennia in China, Japan, India, Africa, Southeast Asia, and the Middle East. Those empires had relations with other peoples, and hence there have been many systems of law that can be seen as predecessors to modern international law. However, even though most states today are non-European, the contemporary system of international law is based on the European model developed over the past four centuries. Some commentators have objected

to what they see as a continuation of colonialism and imperialism and have urged abandonment or at least recasting the old Western system.

Throughout this course you should consider the extent to which you believe these objections are justified. As you learn the substantive rules of international law, consider what policies and interests these rules favor (and at whose expense); whether a small developing country would be likely to approve or oppose the rule (and who and what interests within that state would be likely to do so); and whether the legitimation of state authority favors Western or capitalist interests over others. In the following excerpts we introduce you to the basic history of modern international law (Starke, Shaw, and Barton and Carter). Then we present the story of contemporary international law from the perspective of developing countries (Shaw and Anand).

I. A. Shearer, *Starke's International Law*

7-12 (11th ed. 1994)

The modern system of international law is a product, roughly speaking, of only the last four hundred years. It grew to some extent out of the usages and practices of modern European states in their intercourse and communications, while it still bears witness to the influence of writers and jurists of the sixteenth, seventeenth, and eighteenth centuries, who first formulated some of its most fundamental tenets. Moreover, it remains tinged with concepts such as national and territorial sovereignty, and the perfect quality and independence of states, that owe their force to political theories underlying the modern European state system, although, curiously enough, some of these concepts have commanded the support of newly emerged non-European states.

But any historical account of the system must begin with earliest times, for even in the period of antiquity rules of conduct to regulate the relations between independent communities were felt necessary and emerged from the usages observed by these communities in their mutual relations. Treaties, the immunities of ambassadors, and certain laws and usages of war are to be found many centuries before the dawn of Christianity, for example in ancient Egypt and India, while there were historical cases of recourse to arbitration and mediation in ancient China and in the early Islamic world, although it would be wrong to regard these early instances as representing any serious contribution towards the evolution of the modern system of international law.

We find, for example, in the period of the Greek City States, small but independent of one another, evidence of an embryonic, although regionally limited, form of international law which one authority — Professor Vinogradoff — aptly described as “intermunicipal.” This “intermunicipal” law was composed of customary rules which had crystallised into law from long-standing usages followed by these cities such as, for instance, the rules as to the inviolability of heralds in battle, the need for a prior declaration of war, and the enslavement of prisoners of war. These rules were applied not only in the relations inter se of these sovereign Greek cities, but as between them and neighbouring states. Underlying the rules there were, however, deep religious influences, characteristic of an era in which the distinctions between law, morality, justice and religion were not sharply drawn.

In the period of Rome's dominance of the ancient world, there also emerged rules governing the relations between Rome and the various nations or peoples with

B. History of Public International Law and Alternative Perspectives

9

which it had contact. One significant aspect of these rules was their legal character, thus contrasting with the religious nature of the customary rules observed by the Greek City States. But Rome's main contribution to the development of international law was less through these rules than through the indirect influence of Roman law generally, inasmuch as when the study of Roman law was revived at a later stage in Europe, it provided analogies and principles capable of ready adaptation to the regulation of relations between modern states.

Actually, the total direct contribution of the Greeks and Romans to the development of international law was relatively meagre. Conditions favourable to the growth of a modern law of nations did not really come into being until the fifteenth century, when in Europe there began to evolve a number of independent civilised states. Before that time Europe had passed through various stages in which either conditions were so chaotic as to make impossible any ordered rules of conduct between nations, or the political circumstances were such that there was no necessity for a code of international law. Thus in the later period of Roman history with the authority of the Roman Empire extending over the whole civilised world, there were no independent states in any sense, and therefore a law of nations was not called for. During the early medieval era, there were two matters particularly which militated against the evolution of a system of international law:

- a. the temporal and spiritual unity of the greater part of Europe under the Holy Roman Empire, although to some extent this unity was notional and belied by numerous instances of conflict and disharmony; and
- b. the feudal structure of Western Europe, hinging on a hierarchy of authority which not only clogged the emergence of independent states but also prevented the Powers of the time from acquiring the unitary character and authority of modern sovereign states.

Profound alterations occurred in the fifteenth and sixteenth centuries. The discovery of the New World, the Renaissance of learning, and the Reformation as a religious revolution disrupted the façade of the political and spiritual unity of Europe, and shook the foundations of medieval Christendom. Theories were evolved to meet the new conditions; intellectually, the secular conceptions of a modern sovereign state and of a modern independent Sovereign found expression in the works of Bodin (1530-1596), a Frenchman, Machiavelli (1469-1527), an Italian, and later in the seventeenth century, Hobbes (1588-1679), an Englishman.

With the growth of a number of independent states there was initiated, as in early Greece, the process of formation of customary rules of international law from the usages and practices followed by such states in their mutual relations. So in Italy with its multitude of small independent states, maintaining diplomatic relations with each other and with the outside world, there developed a number of customary rules relating to diplomatic envoys, for example, their appointment, reception and inviolability.¹

An important fact also was that by the fifteenth and sixteenth centuries jurists had begun to take into account the evolution of a community of independent

1. Cf. also the influence of the early codes of mercantile and maritime usage, e.g., the Rhodian Laws formulated between the seventh and the ninth centuries, the Laws or Rolls of Oleron collected in France during the twelfth century, and the *Consolato del Mare* as to the customs of the sea followed by Mediterranean countries and apparently collected in Spain in the fourteenth century.

sovereign states and to think and write about different problems of the law of nations, realising the necessity for some body of rules to regulate certain aspects of the relations between such states. Where there were no established customary rules, these jurists were obliged to devise and fashion working principles by reasoning or analogy. Not only did they draw on the principles of Roman law which had become the subject of revived study in Europe from the end of the eleventh century onwards, but they had recourse also to the precedents of ancient history, to theology, to the canon law, and to the semi-theological concept of the "law of nature," a concept which for centuries exercised a profound influence on the development of international law. Among the early writers who made important contributions to the infant science of the law of nations were . . . Belli (1502-1575), an Italian, Brunus (1491-1563), a German, . . . Ayala (1548-1584), a jurist of Spanish extraction, Suarez (1548-1617), a great Spanish Jesuit, and Gentilis (1552-1608), an Italian who became Professor of Civil Law at Oxford, and who is frequently regarded as the founder of a systematic law of nations. The writings of these early jurists reveal significantly that one major preoccupation of sixteenth century international law was the law of warfare between states, and in this connection it may be noted that by the fifteenth century the European Powers had begun to maintain standing armies, a practice which naturally caused uniform usages and practices of war to evolve.

By general acknowledgment the greatest of the early writers on international law was the Dutch scholar, jurist, and diplomat, Grotius (1583-1645), whose systematic treatise on the subject *De Jure Belli ac Pacis* (The Law of War and Peace) first appeared in 1625. On account of this treatise, Grotius has sometimes been described as the "father of the law of nations," although it is maintained by some that such a description is incorrect on the grounds that his debt to the writings of Gentilis is all too evident and that in point of time he followed writers such as Belli, Ayala and others mentioned above. Indeed both Gentilis and Grotius owed much to their precursors.

Nor is it exact to affirm that in *De Jure Belli ac Pacis* will be found all the international law that existed in 1625. It cannot, for example, be maintained that Grotius dealt fully with the law and practice of his day as to treaties, or that his coverage of the rules and usages of warfare was entirely comprehensive. Besides, *De Jure Belli ac Pacis* was not primarily or exclusively a treatise on international law, as it embraced numerous topics of legal science, and touched on problems of theological or philosophic interest. Grotius's historical pre-eminence rests rather on his continued inspirational appeal as the creator of the first adequate comprehensive framework of the modern science of international law.

In his book, as befitted a diplomat of practical experience, and a lawyer who had practised, Grotius dealt repeatedly with the actual customs followed by the states of his day. At the same time Grotius was a theorist who espoused certain doctrines. One central doctrine in his treatise was the acceptance of the "law of nature" as an independent source of rules of the law of nations, apart from custom and treaties. The Grotian "law of nature" was to some extent a secularised version, being founded primarily on the dictates of reason, on the rational nature of men as social human beings, and in that form it was to become a potent source of inspiration to later jurists.

Grotius has had an abiding influence upon international law and international lawyers, although the extent of this influence has fluctuated at different periods. . . . While it would be wrong to say that his views were always treated as being of

B. History of Public International Law and Alternative Perspectives

11

compelling authority — frequently they were the object of criticism — nevertheless his principal work, *De Jure Belli ac Pacis*, was continually relied upon as a work of reference and authority in the decisions of courts, and in the textbooks of later writers of standing. Also several Grotian doctrines have left their mark on, and are implicit in the character of modern international law, namely, the distinction between just and unjust war, the recognition of the rights and freedoms of the individual, the doctrine of qualified neutrality, the idea of peace, and the value of periodic conferences between the rulers of states. Nor should it be forgotten that for over three centuries Grotius was regarded as the historic standard-bearer of the doctrine of the freedom of the seas by reason of his authorship of the work, *Mare Liberum*, published in 1609.

The history of the law of nations during the two centuries after Grotius was marked by the final evolution of the modern state-system in Europe, a process greatly influenced by the Treaty of Westphalia of 1648 marking . . . the end of the Thirty Years' War, and by the development from usage and practice of a substantial body of new customary rules. Even relations and intercourse by treaty or otherwise between European and Asian governments or communities contributed to the formation of these rules. Moreover the science of international law was further enriched by the writings and studies of a number of great jurists. Side by side there proceeded naturally a kind of action and reaction between the customary rules and the works of these great writers; not only did their systematic treatment of the subject provide the best evidence of the rules, but they suggested new rules or principles where none had yet emerged from the practice of states. The influence of these great jurists on the development of international law was considerable, as can be seen from their frequent citation by national courts during the nineteenth century and even up to the present time.

. . . In the eighteenth century, there was a growing tendency among jurists to seek the rules of international law mainly in custom and treaties, and to relegate to a minor position the “law of nature,” or reason, as a source of principles. . . . There were, however, jurists who at the same time clung to the traditions of the law of nature, either almost wholly, or coupled with a lesser degree of emphasis upon custom and treaties as components of international law. As contrasted with these adherents to the law of nature, writers such as Bynkershoek who attached primary or major weight to customary and treaty rules were known as “positivists.”

In the nineteenth century international law further expanded. This was due to a number of factors which fall more properly within the scope of historical studies, for instance, the further rise of powerful new states both within and outside Europe, the expansion of European civilisation overseas, the modernisation of world transport, the greater destructiveness of modern warfare, and the influence of new inventions. All these made it urgent for the international society of states to acquire a system of rules which would regulate in an ordered manner the conduct of international affairs. There was a remarkable development during the century in the law of war and neutrality, and the great increase in adjudications by international arbitral tribunals following the *Alabama Claims Award* of 1872 provided an important new source of rules and principles. Besides, states commenced to acquire the habit of negotiating general treaties in order to regulate affairs of mutual concern. Nor was the nineteenth century without its great writers on international law. . . . The general tendency of these writers was to concentrate on existing practice, and to discard the concept of the “law of nature,” although not abandoning recourse to reason and

justice where, in the absence of custom or treaty rules, they were called upon to speculate as to what should be the law.

Other important developments have taken place in the twentieth century. The Permanent Court of Arbitration was established by the Hague Conferences of 1899 and 1907. The Permanent Court of International Justice was set up in 1921 as an authoritative international judicial tribunal, and was succeeded in 1946 by the present International Court of Justice. Then there has been the creation of permanent international organisations whose functions are . . . in the interests of peace and human welfare, such as the League of Nations and its present successor — the United Nations, the International Labour Organisation, the International Civil Aviation Organisation. . . . And perhaps most remarkable of all has been the widening scope of international law to cover by multilateral treaty or convention not only every kind of economic or social interest affecting states (e.g., patents and copyright), but also the fundamental rights and freedoms of individual human beings.

Malcolm N. Shaw, International Law

26-27 (4th ed. 1997)

The First World War marked the close of a dynamic and optimistic century. European empires ruled the world and European ideologies reigned supreme, but the 1914-18 Great War undermined the foundations of European civilisation. Self-confidence faded, if slowly, the edifice weakened and the universally accepted assumptions of progress were increasingly doubted. Self-questioning was the order of the day and law as well as art reflected this.

The most important legacy of the 1919 Peace Treaty from the point of view of international relations was the creation of the League of Nations. The old anarchic system had failed and it was felt that new institutions to preserve and secure peace were necessary. The League consisted of an Assembly and an executive Council, but was crippled from the start by the absence of the United States and the Soviet Union for most of its life and remained a basically European organisation.

While it did have certain minor successes with regard to the maintenance of international order, it failed when confronted with determined aggressors. Japan invaded China in 1931 and two years later withdrew from the League. Italy attacked Ethiopia and Germany embarked unhindered upon a series of internal and external aggressions. The Soviet Union, in a final forlorn gesture, was expelled from the organisation in 1939 following its invasion of Finland.

Nevertheless much useful groundwork was achieved by the League in its short existence and this helped to consolidate the United Nations later on.

The Permanent Court of International Justice was set up in 1921 at The Hague to be succeeded in 1946 by the International Court of Justice, the International Labour Organisation was established soon after the end of the First World War and it still exists today, and many other international institutions were inaugurated or increased their work during this period.

Other ideas of international law that first appeared between the wars included the system of mandates, by which colonies of the defeated powers were administered by the Allies for the benefit of their inhabitants rather than being annexed outright, and the attempt made to provide a form of minority protection guaranteed by the

B. History of Public International Law and Alternative Perspectives

13

League. This latter creation was not a great success but it paved the way for later concern to secure human rights.

After the trauma of the Second World War the League was succeeded in 1946 by the United Nations Organisation, which tried to remedy many of the defects of its predecessor. It established its site at New York, reflecting the realities of the shift of power away from Europe, and determined to become a truly universal institution. The advent of decolonisation fulfilled this expectation and the General Assembly of the United Nations today has [about 190] member-states.

Many of the trends which first came into prominence in the nineteenth century have continued to this day. The vast increase in the number of international agreements and customs, the strengthening of the system of arbitration and the development of international organisations have established the essence of international law as it exists today.

Post-World War II developments are described by Professors John Barton and Barry Carter:

John H. Barton & Barry E. Carter, International Law and Institutions for a New Age

81 Geo. L.J. 535, 535-549 (1993) [and updated by Prof. Carter through January 2003]

The years immediately after World War II witnessed tremendous creativity and accomplishment in establishing new international institutions that would play a role in the international system, in addition to the nation-state. The United Nations was created, primarily to prevent military conflict among its members and to settle international disputes. It was also intended to help spawn and oversee more specialized agencies — the International Civil Aviation Organization and the World Health Organization. It was supplemented by the International Court of Justice (I.C.J. or World Court), which was designed as the formal judicial body to resolve legal disputes among nations.

A different group of institutions, the Bretton Woods institutions, were designed to face economic issues. The International Monetary Fund (IMF) was established to promote monetary cooperation among nations and stability in foreign exchange. The International Bank for Reconstruction and Development (or World Bank) was created to help provide funds for the reconstruction of then war-ravaged nations and to promote economic development. An International Trade Organization (ITO) was envisioned as a structure to monitor and enforce rules that would regularize and encourage international trade. Opposition to the ITO, especially in the U.S. Congress, caused it to be a stillbirth. However, a subsidiary trade agreement, the GATT, was allowed to metamorphose into a skeletal institutional arrangement.

These institutions continue to exist today though they have had varied success in realizing their envisaged potential. The security-oriented entities were a disappointment. Confronted with rivalries among its veto-wielding major powers, the United Nations shifted from collective security to a new peacekeeping pattern based on the consent of the nations involved. Even so, the United Nations proved less successful at preventing war and settling disputes than its creators had hoped. Only with

the end of the Cold War and the disintegration of the Soviet Union has use of the veto power in the Security Council dramatically decreased, allowing the organization to fulfill some of the dreams of its founders. . . . Additionally, the I.C.J. has been much less active and successful than was envisioned.

The institutional evolutions on the economic side have been much more far-reaching. With the admission of many new member states from the developing world in the 1960s and 1970s, developing countries increasingly dominated the U.N. General Assembly, and the United Nations itself took on a strongly economic orientation. It created, for example, the United Nations Conference for Trade and Development (UNCTAD), a group dedicated to development perspectives. In the 1970s, the IMF saw the United States go off the gold standard and the major industrial countries of the world switch to flexible exchange rates. The IMF could no longer play its original role of supporting fixed exchange rates and has instead carved out a role in assisting and supervising countries that face unreasonable debt burdens [or currency instability]. The World Bank has switched its focus from reconstructing the war-torn economies of Europe to encouraging the development of countries in Latin America, Africa, Asia, and Eastern Europe.

[Although the GATT continued to develop through the 1980s and early 1990s, it remained severely limited by the absence of an institutional structure, by its coverage of only goods and not other important matters such as services and intellectual property, and by its dispute-settlement process that was often complied with, but that lacked effective enforcement in difficult cases. Recognizing that the GATT was becoming increasingly inadequate as international trade and investment steadily grew, most of the world's nations during the so-called Uruguay Round of trade negotiations agreed to create a successor entity, the World Trade Organization (WTO). Starting in 1995, the WTO has an institutional structure, though it still is based on a one-country, one-vote system that requires unanimity on important matters. Reflecting the approximately 2,000 pages of related agreements, the WTO's scope is considerable — the agreements not only include more detailed provisions regarding trade in goods, but also cover trade in services and intellectual property, and there is the start toward regulating trade-related investment. The new WTO dispute resolution system is possibly the most influential international dispute-settlement arrangement in the world — the decisions of a WTO panel or, if appealed, of the Appellate Body, are binding on the disputing parties, except in the highly unlikely situation that all the WTO members (including the winning state in the decision) vote not to accept the report of the panel or the Appellate Body. If a country does not then bring its laws or regulations into consistency with the WTO rules as specified in the report, the complaining country may be allowed to retaliate up to the equivalent amount that it has been injured.]

While these initial institutions were growing and evolving, a wide range of other institutions developed. To deal with new, often specialized issues, entities such as the International Atomic Energy Agency in 1957, and the U.N. Environment Programme (UNEP) in 1972 were created. Countries with similar interests have combined in quasi-formal combinations, such as the Group of [Eight] (the United States, Japan, Germany, France, United Kingdom, Italy, . . . Canada [and Russia]). The finance ministers of these countries regularly discuss exchange rates among themselves and take steps that frequently have more impact on these rates than does the IMF.

At least as dramatic has been the emergence of regional entities. The European Community (EC) has achieved a high level of economic integration [and it has also

B. History of Public International Law and Alternative Perspectives

15

expanded not only to 15 member states, but also to include several more responsibilities under the broader umbrella of the European Union (EU). Among other results are the euro, a common currency for 12 of the member states, and growing cooperation on noneconomic foreign policy issues.] Regional development banks, which substantially supplement the work of the World Bank, exist for Latin America, Asia, Africa, and now Eastern Europe. . . .

On the judicial front, the European Community's Court of Justice and the separate European Court of Human Rights are both active and effective. The . . . Law of the Sea Convention establishe[d] a new international court as well as two arbitral mechanisms.

Beyond such international and regional entities are a vast array of new bilateral and multilateral agreements that require, or at least encourage, cooperation across a nation's borders on a host of issues — from protecting the ozone layer, to combating terrorism, safeguarding diplomatic personnel, and enforcing arbitral awards.

II. THE CHANGES IN INTERNATIONAL LAW

Paralleling this impressive change in the international institutional order have been equally important, though often less visible, changes in international law. Most notably, (1) the international system is no longer confined to relations among nations, and the individual person has emerged as an independent and recognized actor; and (2) national and international tribunals are offering new, and much more effective, means for enforcing international law.

A. The Emergence of the Person

The traditional concept of international law was one of law between nations. As late as 1963, a very respected English treatise defined public international law as “the body of rules and principles of action which are binding upon civilized states in their relations with one another.”

Reciprocity was the critical element in ensuring that international rules and norms were observed. Formal rules about the treatment of ambassadors or about respect for a state's territorial sea, for example, were usually followed because the potential offender was also a potential victim. For reasons discussed below, only rarely would states resort to the International Court of Justice (or its predecessor, the Permanent Court of International Justice) or to formal arbitration.

In the immediate post-war era, the scope of international law expanded from nation states to the new international and regional institutions. For example, U.N. organs and agencies were allowed to seek advisory opinions from the I.C.J., which was otherwise restricted to disputes among states.

Moreover, the person (whether an individual or corporation) has become increasingly accepted as an independent actor, subject to and benefiting from international law. This has been an inevitable result of the increasing global interactions and shared interests of persons across frontiers.

Among the early steps toward the emergence of the person in international law were efforts by foreign investors and businesses to protect themselves from expropriation or other mistreatment by a host country. Under traditional international

law, the investor would rely on its home country to protect its interests through diplomatic arguments and pressure. The investor, however, also wanted independent protection. Moreover, host countries wished to attract investment and all parties sought to resolve disputes quickly and reasonably. As a result, a trend developed toward arbitration between the investor and the host government by a panel that applied international principles.

This was part of a much larger phenomenon in which the traditional barriers between so-called “public” and “private” international law have come tumbling down. In contrast to the public international law of rules between states, there has long been private international law dealing with the activities of individuals, corporations, and other private entities when their activities crossed national borders. This was particularly important in the laws of admiralty, governing the maritime sector, and in choice-of-law rules, determining which country’s domestic law would apply to transnational transactions between the nationals of different countries.

The distinctions between public and private international law have become increasingly artificial as many states and their instrumentalities have entered the marketplace in a major way — either as traders themselves or as guardians of industrial policy — and as commerce and foreign policy have become increasingly intertwined. For example, the Iraqi invasion of Kuwait and the resulting U.N. economic sanctions involved traditional issues of public international law; yet the implementation of the sanctions very much affected U.S. and European banks with Iraqi or Kuwaiti deposits. At much less dramatic levels, the same kinds of mixed public-private issues are posed daily by satellites broadcasting across national boundaries, by fishers in international waters, and by investors trading on foreign stock exchanges. Courts, national governments, and international organizations struggle with such issues. Thus, when the European Community developed its judicial system, it realized that it must allow individuals to appeal to, or against, Community action just as much as governments.

The independent role of individuals has probably advanced furthest in the human rights area. The tragic experience of Nazi Germany caused many to believe that citizens of a state should have some form of international protection against even their own state, a view reinforced by the recent tragic plights of the Iraqi Kurds and of the residents of [Kosovo]. There is no question that international law now defines a number of human rights, such as the right to be free from official torture. Many conventions go much further in defining rights of the individual. As discussed below, these rights can sometimes be enforced in a nation’s domestic courts. In Europe, they also can be enforced before the European Court of Human Rights. . . .

B. Enforcing International Law

Paralleling this transformation in the role of the individual in international law is an equally dramatic change in the mechanisms available to enforce international law.

The traditional, and still important, international enforcement mechanism is reciprocity. After invading Panama in December 1989, what basically kept the United States from storming the Vatican nunciature to capture General Manuel Noriega was the possibility that this would create a precedent that would endanger U.S. embassies everywhere. It would also have been a clear violation of the Vienna Convention on Diplomatic Relations of 1961, to which the United States, Panama,

B. History of Public International Law and Alternative Perspectives

17

the Vatican, and over [175] other states are now parties. That Convention strengthens reciprocity by providing a reasonably clear definition of the rights of ambassadors and embassies.

For traditional international law, the best-known adjudicatory body was, and probably still is, the I.C.J. The Court will probably remain the principal forum for resolving certain forms of legal issues between states, especially boundary disputes. The Court has been hampered, however, by a perceived lack of bite. Under the U.N. Charter, a member “undertakes to comply with the decision” of the Court if “it is a party” to the case, and the U.N. Security Council may “decide upon measures to be taken to give effect to the [Court’s] judgment.” Although states have complied with the Court’s judgments in many of the cases in which the judgment required an action, recalcitrant states have on occasion refused to comply. . . .

For instance, . . . [in] 1980, Iran refused to comply with the Court’s judgment to release the U.S. hostages. [More] recently, the United States continued its support of the Nicaraguan Contras in spite of the Court’s 1986 decision that the extensive U.S. involvement with the Contras violated international law. [And, as discussed in Chapter 4, U.S. states have executed foreign nations in recent years despite preliminary orders by the Court requesting that the United States take all measures at its disposal to stay the executions.]

This uncertain enforceability of I.C.J. judgments is one of several reasons why the Court has not emerged as an important institution for resolving international legal disputes. . . .

The Court’s formal procedures have also discouraged its use. Its procedures do not yet recognize the emergence of the person in international law; only states can be parties in contentious cases, although U.N. entities can also seek advisory opinions. Moreover, a state that wants a dispute resolved promptly finds I.C.J. procedures uninviting: they are not well-adapted for fact-finding, and a long time usually passes before the Court renders a decision, even with its light caseload. Although there has been a recent surge in the number of cases brought to the Court, [the Court’s 125] cases in [over 55] years average out to less than [three] new cases per year — hardly a heavy caseload. . . .

The Court has recently shown a willingness to reform itself. It adopted revised rules in 1978 to enable a state to bring cases before three- or five-judge panels, in which each country would have one of its nationals as a judge and a voice regarding the other judges. The Court’s decision in 1984 to take jurisdiction in Nicaragua’s case against the United States could also be seen as reflecting a new aggressiveness toward finding jurisdiction.

But these changes in the I.C.J. are minor compared with the wide variety of attractive alternative arrangements that have emerged elsewhere for formal enforcement of international rules and norms. These alternatives include international arbitration, regional and specialized courts, and transnational use of domestic courts. They amount to a revolution in international law.

1. Arbitration

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (N.Y. Convention) has been ratified by over [130] countries, including the United States and all the other major industrialized countries. According to this treaty, subject to very narrow exceptions, a decision by an international arbitral

panel sitting in a contracting state will be enforced by the domestic courts of any other contracting country as if the decision were by that domestic court. As a result, a winning party in an international arbitration can usually be assured of collecting against a recalcitrant losing party if the loser has assets — bank accounts, real estate, goods — in any one of the N.Y. Convention countries. It is only necessary to take the arbitral award to the local court for authority to have the assets seized and sold off under local law.

Libya's Colonel Qaddafi learned first-hand of this Convention in the 1970s. After his coup, Qaddafi nationalized valuable interests of foreign oil companies operating in Libya. These oil companies had entered into long-term agreements with the prior Libyan government, under which the companies were entitled to submit any dispute to arbitration and the principles of international law. Qaddafi claimed that the nationalization decree invalidated these contract provisions and that the companies had to seek redress in Libya's domestic courts. The oil companies disagreed and sought arbitration. Sole arbitrators were appointed in three separate cases. Each decided that he had jurisdiction and each ultimately entered awards against Libya. Qaddafi apparently refused initially to pay, but eventually settled for tens of millions of dollars. Had Libya not paid, the successful companies could have moved to enforce their arbitral awards against Libya in, say, Italy, Germany, Switzerland, or any of the other N.Y. Convention countries by moving to attach Libyan oil, bank accounts, airplanes, or other assets.

The N.Y. Convention gave a powerful boost to arbitration, but it is not the only reason why arbitration has grown. Arbitration already had the advantages of flexibility. Parties can choose the place of arbitration and the number, specialization, and even identity of arbitrators; they can select the procedural rules (including those governing confidentiality and the amount of discovery allowed); and they can specify the substantive rules (e.g., general principles of international law, an individual country's laws, or even specially-drafted provisions). This flexibility makes arbitration particularly useful in disputes between nations and investors or between holders of economic interests in different nations. Arbitration has also been strongly supported in a variety of U.S. Supreme Court decisions.

As a result, arbitration has been a growth industry in the last [fifty] years. For example, [566] new requests for arbitration were filed in [2001] with the International Chamber of Commerce (ICC). Although the ICC is designed to handle commercial disputes, about a fifth of its cases have involved governmental or parastatal entities, such as government-owned utilities or airlines. Similarly, the American Arbitration Association (AAA) now has over [500] cases per year involving international disputes.

The World Bank created the International Centre for the Settlement of Investment Disputes (ICSID) to resolve disputes between foreign investors and the host country through conciliation and arbitration. ICSID's own multilateral convention has enforcement provisions similar to those in the N.Y. Convention. [After getting off to a slow start, ICSID has experienced a growing number of cases, with over 45 pending as of January 2003.]

The Iran-U.S. Claims Tribunal . . . has been a pace-setting institution. It was created in 1981 as part of the arrangement for freeing the U.S. hostages and resolving a number of outstanding claims between the two countries. In spite of initial delays and wrangling, [as of January 2003, the Tribunal had nearly completed resolution of all the private claims of U.S. nationals against Iran. Its remaining focus was the arbitration of claims between the two governments. The Tribunal has rendered

B. History of Public International Law and Alternative Perspectives

19

a total of 599 awards, the majority of which were in favor of U.S. claimants. The value of these awards to successful U.S. claimants totaled over \$2.5 billion.] The awards for U.S. claimants have been paid out of an escrow account set up with Iranian funds transferred from those frozen by the U.S. government in 1979-1981 and supplemented by funds derived from Iranian oil sales. Iranians can count on directly collecting on awards in their favor because of the availability of the N.Y. Convention.

Another example of the preference for arbitration is the choice by the United States[, Canada,] and Mexico to provide in the North American Free Trade Agreement (NAFTA) for arbitration as the binding method for dispute resolution of many trade disputes between any two of those countries. Since NAFTA's inception in 1994, there have been over 80 binational arbitration panels established.]

2. Regional and Specialized Courts

The new regional courts of Europe — whose decisions are as effective as those of any domestic court — are among the most dramatic examples of the new mechanisms of international law. The European Community's Court of Justice [for the European Community] had [over 500] new cases brought to it in [2001]; a new court of first instance, or trial court, had to be organized in September 1989 to meet the rest of the Court of Justice's business. [The European Court of Human Rights, partly as a result of its expanding membership and institutional reforms, is now entering several hundred judgments a year.]

The Court of Justice handles a variety of appeals from [European] Community measures, and it can also be called on to interpret Community law for the benefit of national courts. It is open to individuals as well as national governments. Among its decisions are landmark opinions holding that Community law has precedence over national law — opinions very similar to the federalism decisions of the U.S. Supreme Court.

The European Court of Human Rights enforces an international bill of rights . . . — the European Convention for the Protection of Human Rights and Fundamental Freedoms. All of the [44] European states that have submitted to the compulsory jurisdiction of the court have agreed to abide by its decisions, which have normally been accepted and implemented. Such decisions have covered areas as sensitive as freedom of the press, wiretapping, and the regulation of homosexuality. In addition, some of the member states, like France and Italy, have incorporated the European Convention's bill of rights into domestic law. . . .

The success of these European courts is in large part a result of Europe's overall political moves toward integration. The European Community is obviously of vital interest to its member states. The European Court of Human Rights and the related Council of Europe enjoy widespread popular support and prestige in Europe. The courts have a focused jurisdiction and relatively easy access, unlike the I.C.J. Perhaps most important, it is very difficult to build the type of federalism being sought in Europe without a judicial institution to draw the lines between central and local authority. Judicial review, an American invention, has largely taken over in Europe, even in France, which had historically looked to a popularly-elected legislature as a defense against aristocratic judges.

A sign of the recent times is the dispute resolution system in the . . . 1982 Convention on the Law of the Sea. This Convention, drafted under U.N. auspices, [came into force in 1994 and now has over 140 parties, though the United States has not

ratified this treaty. This Convention established a detailed regime for the oceans (as is discussed in Chapter 9).] Disputes under this Convention may be referred not only to the I.C.J., but also to a new International Tribunal for the Law of the Sea and two different arbitration arrangements. The choices reflect the developing countries' unhappiness with I.C.J. judgments at the time of drafting the Convention, and the drafters' hope of achieving enforceability under the N.Y. Convention. The arrangement also reflects efforts to rely more on specialized courts or on arbitration. Each country is to select the dispute resolution institution it prefers when it ratifies the Convention. If the two or more parties which are later involved in a dispute had not agreed on the institutions in their ratification documents, then the Convention directs the parties to use arbitration. Arbitration is implicitly the preferred lowest common denominator.

3. *Domestic Courts*

As international trade, finance, investment, and travel have mushroomed, the domestic courts of most countries have naturally found themselves considering more and more cases that have an international impact. These courts have sometimes declined to hear such cases because of concerns about the extraterritorial impact of their decisions, and they have developed a variety of doctrines for that purpose.

The overall trend, however, is to hear more such cases and effectively to develop what amounts to an international common law that lies in between traditional domestic and traditional international law. This common law draws from a country's domestic statutes and court decisions that affect international matters, as well as international treaties and the other international legal rules generally called customary international law. These international common law doctrines are often developed further by international and regional courts and by international arbitrations. Tribunals and scholars in different nations often look to one another's work to develop the harmony needed to make the system work.

This international flow of legal ideas is especially important in human rights issues, in international economic issues, and in resolving jurisdictional conflicts. Thus, domestic courts will often entertain claims that foreign corporate conduct violated domestic . . . law, that a foreign government violated the rights of a domestic business that had contracted with it, or that a corporation should be liable for work hazards affecting foreign workers. The courts will develop rules as to when and how a foreign subsidiary is bound by the employment discrimination law or banking law of the parent corporation's home nation.

This developing role of domestic courts is evident in the human rights area. For example, U.S. federal courts allowed a suit by a Paraguayan citizen against a former Paraguayan police official who was accused of torturing and murdering the citizen in Paraguay. The U.S. courts decided the case on the basis of a U.S. law that allows tort suits by an alien for a violation of "the law of nations or a treaty of the United States." . . .

The domestic courts also have an influence beyond their specific judgments — their decisions are often cited in other national courts and in the regional courts discussed above. Thus, there is the further development of an international common law, although, discouragingly, U.S. courts tend to consider foreign decisions much less than foreign courts consider U.S. decisions.

2. *Developing Countries' Perspective*

Malcolm N. Shaw, International Law

33-35 (4th ed. 1997)

In the evolution of international affairs since the Second World War one of the most decisive events has been the disintegration of the colonial empires and the birth of scores of new states in the so-called Third World. This has thrust onto the scene states which carry with them a legacy of bitterness over their past status as well as a host of problems relating to their social, economic and political development. In such circumstances it was only natural that the structure and doctrines of international law would come under attack. The nineteenth century development of the law of nations founded upon Eurocentrism and imbued with the values of Christian, urbanised and expanding Europe did not, understandably enough, reflect the needs and interests of the newly independent states of the mid and late twentieth century. It was felt that such rules had encouraged and then reflected their subjugation, and that changes were required.

It is basically those ideas of international law that came to fruition in the last century that have been so clearly rejected, that is, those principles that enshrined the power and domination of the west. The underlying concepts of international law have not been discarded. On the contrary, the new nations have eagerly embraced the ideas of the sovereignty and equality of states and the principles of non-aggression and non-intervention, in their search for security within the bounds of a commonly accepted legal framework.

While this new internationalisation of international law that has occurred in the last twenty years has destroyed its European-based homogeneity, it has emphasised its universalist scope. The composition of, for example, both the International Court of Justice and the Security Council of the United Nations mirror such developments. Article 9 of the Statute of the International Court of Justice points out that the main forms of civilisation and the principal legal systems of the world must be represented within the Court, and there is an arrangement that of the ten non-permanent seats in the Security Council five should go to Afro-Asian states and two to Latin American states (the others going to Europe and other states). The composition of the International Law Commission has also recently been increased and structured upon geographic lines.

The influence of the new states has been felt most of all within the General Assembly, where they constitute a majority of the [191] member-states [in January 2003]. The content and scope of the various resolutions and declarations emanating from the Assembly are proof of their impact and contain a record of their fears, hopes and concerns.

The Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960, for example, enshrined the right of colonies to obtain their sovereignty with the least possible delay and called for the recognition of the principle of self-determination. This principle . . . is regarded by most authorities as a settled rule of international law although with undetermined borders. Nevertheless, it symbolises the rise of the post-colonial states and the effect they are having upon the development of international law.

Their concern for the recognition of the sovereignty of states is complemented by their support of the United Nations and its Charter and supplemented by their desire for “economic self-determination” or the right of permanent sovereignty over natural resources. This expansion of international law into the field of economics is a major development of this century and is evidenced in myriad ways, for example, by the creation of the General Agreement on Tariffs and Trade, the United Nations Conferences on Trade and Development, and the establishment of the International Monetary Fund and World Bank.

The interests of the new states of the non-Western, non-communist Third World are often in conflict with those of the industrialised nations, witness disputes over nationalisations. But it has to be emphasised that, contrary to many fears expressed in the early years of the decolonisation saga, international law has not been discarded nor altered beyond recognition. Its framework has been retained as the new states, too, wish to obtain the benefits of rules such as those governing diplomatic relations and the controlled use of force, while campaigning against rules which run counter to their perceived interests.

While the new countries share a common history of foreign dominance and underdevelopment, compounded by an awakening of national identity, it has to be recognised that they are not a homogenous group. Widely differing cultural, social and economic attitudes and stages of development characterise them and the rubric of the “Third World” masks diverse political affiliations. On many issues the interests of the new states conflict with each other and this is reflected in the different positions adopted. The states possessing oil and other valuable natural resources are separated from those with few or none and the states bordering on oceans are to be distinguished from land-locked states. The list of diversity is endless and variety governs the make-up of the southern hemisphere to a far greater degree than in the north.

It is possible that in legal terms tangible differences in approach may emerge in the future as the passions of decolonisation die down and the western supremacy over international law is further eroded. This trend will also permit a greater understanding of, and greater recourse to, historical traditions and conceptions that pre-date colonisation and an increasing awareness of their validity for the future development of international law.

Ram Prakash Anand, International Law and the Developing Countries

17-19, 34-36, 44-45 (1987)

INDUSTRIAL REVOLUTION AND THE AGE OF IMPERIALISM

... With Napoleon defeated and Continental system in disarray, with no rival left in the contest for overseas dominion, and with a virtual monopoly of naval power, the British embarked on a century of world dominance.

Europe came out of the wars shaken, but not ruined. Moreover, Europe was carried on the wave of an expanding economy. The economic growth and enrichment that had resulted from the commercial expansion was so pronounced and spectacular that it is commonly called Commercial Revolution. The riches of Asia and American trade flowing to Europe, followed by numerous scientific inventions

B. History of Public International Law and Alternative Perspectives

23

like steam engine, improved transportation facilities, railroads, steamship, harnessing of electricity and internal combustion engine, led to what is called Industrial Revolution. The industrial revolution got under way first in England. After the first quarter of the nineteenth century it started spreading gradually to the continent of Europe, and even to non-European portions of the globe. But it was not until 1870 that Britain faced any competition. The British had a virtual monopoly in textiles and machine tools. The British capitalists were accumulating surplus capital and were on the look out for investment opportunities on the continent and beyond. London became the world's clearing house and financial centre.

The needs and demands of the industrial revolution were largely responsible for the creation of huge European colonial empires in Asia and Africa. With the rapid industrialization, several European countries had developed substantial industries. The close relationship between the new imperialism and industrial revolution may be seen in the growing need and desire to obtain colonies which might serve as markets for the rising volume of manufactured goods. The several European and overseas Europeanized countries, like the United States, Canada and Australia, which had become industrialized in the nineteenth century, were soon competing with each other for markets. In the process they raised their tariffs to keep out each other's products. The only alternative was to sell their products to Asia and Africa and have colonies to provide "sheltered markets" for each industrialized country.

The industrial revolution also produced surplus capital which could not be invested in Europe and led European countries to seek colonies as investment outlets. It also created a demand for raw materials to feed the machines. Many of these materials—jute, rubber, petroleum, and various metals—could be obtained from Asia and Africa. In most cases, heavy capital outlays were needed to secure adequate production of these commodities.

There were, of course, several other factors—need for more additional manpower, influence of missionaries, and desire to strengthen national security by establishing strategic naval bases—which were responsible for the spread of imperialism which is defined as "the government of one people by another." Moreover, practically all of the Asian political systems, weakened by internal dissensions and outside pressures, were crumbling. There arose by this time an enormous difference in wealth and power between the decaying Asian empires and growing European states, enriched through commercial revolution, and bubbling with new strength provided by the industrial revolution in the form of iron and steel ships, heavier naval guns, and more accurate rifles. . . .

The net result of all these economic, political and psychological factors was the greatest land-grab in the history of the world. . . .

. . . The world as it emerged from the Second World War was a different world altogether. If a divided Asia could not withstand the pressure of an aggressive Europe, a divided and warring Europe could not continue to dominate Asia and Africa. The European Powers, which had dominated the world scene for nearly three hundred years, had been pushed aside and were no longer at the centre of the world stage. Out of the ruins of the world holocaust of 1939-1945, the United States and the Soviet Union had emerged with enough strength to dominate the international scene and seriously challenge each other. . . .

There was another significant change: With the weakening of Europe, colonialism collapsed and there emerged numerous independent countries of Asia and

Africa which for a long time had no status and no role in the formulation of international law and, as we have seen, were considered as no more than its objects. For one thing, the erstwhile “backward” China came to be recognized as a Great Power. Although in 1945, of the 51 original members of the United Nations, there were only 13 Asian-African states, their number sharply increased after 1955. Under a strong current of the principle of self-determination and aided by the unusual conditions of the cold war, most of the Asian-African and Pacific countries acquired independence and became full-fledged members of the international society. So that today Europe forms a small minority of this group and a vast majority of the UN membership consists of the thus far neglected and dominated countries of Asia, Africa, and other parts of the world. . . .

Having achieved their political independence, the “new states” of Asia and Africa naturally wanted to improve their lot and increase their political influence. The existence of an international forum, such as the United Nations, where they could make their voices heard, and where they had scope for concerted action, enhanced their power and helped them in pursuing their purposes. They were further helped by the rivalry between the big Powers. As the work of the Security Council got frozen in the chilling atmosphere of the cold war, and with the persistent use and abuse of veto its authority as well as prestige declined, the power and influence of the General Assembly began to rise. . . . With the increase in the powers of the General Assembly, the United Nations Organization changed from an instrument of the Great Powers to a forum for the smaller states to press their claims. This is a phenomenon of tremendous significance in international law. Enjoying formal legal equality with the big Powers in the new “Parliament of Mankind,” and of course numerical superiority, the “new” Asian and African states, along with the equally disgruntled Latin American states — the so-called Third World as they came to be called — acquired a new influence in the post-war divided world society. . . . They could make their voices heard in the world forums and hardly lost an opportunity to air their views. Non-aligned to any of the power group as most of these countries were, they aligned themselves to take concerted action and play an important role in the international legal structure in pursuance of their interests. It was only to be expected that the new majority should try to mould the law according to their own views and for the protection of their interests. Not only colonialism, which came to be called a “form of permanent aggression,” but several parts of international law of the colonial period came to be challenged. Some of the enlightened European writers themselves conceded that:

In all positive law is hidden the element of power and the element of interest. Law is not the same as power, nor is it the same as interest, but it gives expression to former power-relation. Law has the inclination to serve primarily the interests of the powerful. “European” international law, the traditional law of nations, makes no exception to this rule. It served the interests of the powerful nations.

. . . [I]t came to be questioned if this law could be preserved “even now that the world no longer consists of European states only, does not express the unconscious desire, through rules of law, to maintain a status which can no longer be ensured by power.”

Although the international society could not start with a clean slate, and indeed the “new” states did not mean to reject wholesale the existing system of international

C. Is International Law Really Law?

25

law, it was reminded afresh that law in order to remain effective must change with the changing society. Law could not be allowed to stagnate. . . .

C. IS INTERNATIONAL LAW REALLY LAW?

At the beginning of this chapter we anticipated a certain skepticism about the effectiveness of international law. Some believe that international law is a charade: governments comply with it only if convenient to do so and disregard it whenever a contrary interest appears. That view seems to be based on an image of global anarchy in which independent “sovereign” states selfishly contend for unilateral advantage. Some of the traditional skepticism about international law may be attributable to the extensive attention given to the highly indeterminate and often unobserved norms against the use of force, a relatively small part of international law. In addition, the most prominent institutions in this century dedicated to advancing the rule of law among states have not lived up to the expectations of their proponents. The League of Nations failed to prevent war, and the United Nations has often proved unable to take decisive action. Some people may also suspect that international law cannot really be law because there is no effective world court or international police force.

In fact, however, the image of global anarchy is not very accurate, as the abundance of international travel, economic interdependence, and transnational cooperation amply demonstrates. And the emphasis on courts and a police force is misleading. Law derives its force from sources other than those two institutions, even in industrialized societies. For example, people often comply with legal norms because of expectations of reciprocal behavior by other members of the society, or simply out of a belief that the law is legitimate and therefore ought to be obeyed. Moreover, there can be effective sanctions for breaches of international law, even without centralized adjudication and enforcement agencies, such as through arbitration or unilateral “self-help” retaliatory measures.

Professor Henkin describes the role of law in the world:

Louis Henkin, How Nations Behave

13-27 (2d ed. 1979)

As for international law, much misunderstanding is due to a failure to recognize law where it exists. That failure may be due to a narrow conception of law generally. The layman tends to think of domestic law in terms of the traffic policeman, or judicial trials for the thief or murderer. But law is much more and quite different. . . . [I]n domestic society law includes the scheme and structure of government, and the institutions, forms, and procedures whereby a society carries on its daily activities; the concepts that underlie relations between government and individual and between individuals; the status, rights, responsibilities, and obligations of individuals and incorporated and non-incorporated associations and other groups, the relations into which they enter and the consequences of these relations. Men establish families, employ one another, acquire possessions and trade them, make arrangements, join

in groups for ill or good, help or hurt each other, with little thought to law and little awareness that there is law that is relevant. By law, society formalizes these relationships, creates new ones, legitimates some and forbids others, determines the content and consequences of relationships. The individual remains hardly or hazily aware that he is enmeshed and governed by “law”— laws of property, tort, contract, crimes, laws of marriage, divorce, family, inheritance, laws of employment, commerce, association; and that there are procedures and institutions and formalities which are ever there and maintain an order in society, although they may assert themselves only at critical points, when relations are established, or change, or break down.

In relations between nations, too, one tends to think of law as consisting of a few prohibitory rules (for instance, that a government may not arrest another’s diplomats) or the law of the U.N. Charter prohibiting war. . . . But international law, too, is much more and quite different. Although there is no international “government,” there is an international “society”; law includes the structure of that society, its institutions, forms, and procedures for daily activity, the assumptions on which the society is founded and the concepts which permeate it, the status, rights, responsibilities, obligations of the nations which comprise that society, the various relations between them, and the effects of those relations. Through what we call foreign policy, nations establish, maintain, change, or terminate myriads of relations; law — more or less primitive, more or less sophisticated — has developed to formalize these relationships, to regulate them, to determine their consequences. A major purpose of foreign policy for most nations at most times is to maintain international order so that they can pursue their national interests, foreign and domestic. That order depends on an “infrastructure” of agreed assumptions, practices, commitments, expectations, reliances. These too are international law, and they are reflected in all that governments do.

To move from the abstract, consider some of the “givens” of international relations. First, they are relations between nations (states). The nation is the principal unit. All the forms of intercourse, all the institutions, all the terms even, depend on the existence of “nations.” . . . That political society is based on the nation is not commonly seen as involving either policy or law; ordinarily, nationhood is the unspoken assumption of political life. But the nation (“state”) is not only a political conception; it is also a fundamental legal construct with important consequences. Statehood — who is and shall be a state — has been one of the major political issues of our day. The legal concept of statehood is crucial, of course, when the character of an entity as a state is itself in issue. . . . It was raised when Palestine was partitioned and Israel created and underlies the recent claims of Palestinians to a state of their own. It was entangled in the question of Chinese representation in the United Nations and still bedevils the future of Taiwan. The “nation” has been in issue in differences over recognition of divided countries and their membership in international organizations — China, Korea, Vietnam, Germany. The legal concept and consequences of nationhood underlie the explosion of “self-determination” which ended Western colonialism and transformed the map of the world, and have troubled even the new nations. . . . It still deeply troubles Cyprus, and also Kashmir. It has given new significance to the problem of the “micro-state” or “mini-state.”

Relations between nations generally begin with “housekeeping arrangements,” including recognition and establishment of diplomatic relations. That these involve law (e.g., in regard to recognition, sovereign and diplomatic immunities) is

C. Is International Law Really Law?

27

commonly known, but the importance of this law for foreign policy is commonly depreciated. In fact, this law is basic and indispensable, and taken for granted because it rarely breaks down. The newest of nations promptly adopts it and the most radical scrupulously observes it. The occasional exception confirms the obvious, that there would be no relations with a nation that regularly violated embassies and abused diplomats.

The relations of one nation with another, as soon as they begin, are permeated by basic legal concepts: nationality, national territory, property, torts, contracts, the rights and duties and responsibilities of states. These do not commonly figure in major policy doctrines, nor do they commonly occupy the attentions of diplomats. They too are taken for granted because they are rarely in issue. The concept of territory and territorial sovereignty is not prominent in foreign policy; but every foreign policy assumes the integrity and inviolability of the national territory, and any intentional violation would probably lead to major crisis.

Related to territoriality is the concept of internal sovereignty. Except as limited by international law or treaty, a nation is master in its own territory. That principle is fundamental, and commonly observed. Yet it is in issue whenever there is a claim that internal action violates international law. It figures in disputes about nationalization of alien properties and about violations of human rights. . . .

The concepts of property lie deep in international relations. Property rights are taken for granted in all international trade and finance. When a vessel plies the seas, the assumption is that others will observe the international law prohibiting interference with free navigation, recognizing rights of ownership in property, forbidding torts against persons and property. The United States went to war in 1917, in part because it thought this law was being violated to its detriment.

Contemporary international relations have seen recurrent issues as to the law of the responsibility of states, particularly in regard to the treatment of aliens and their property. But even in times when nationalizations are not everyday occurrences, even when there are no accusations that governments are denying "justice" to aliens, the law on the treatment of foreign nationals pervades relations between nations. Because there is this law (and because it is largely observed), there is tourism and foreign investment; and consular activity and "diplomatic protection" are a common, friendly, continuous part of international intercourse. . . .

Law is also essential to foreign policy and to diplomacy in that it provides mechanisms, forms, and procedures by which nations maintain their relations, carry on trade and other forms of intercourse, resolve differences and disputes. There is international law in the establishment and operation of missions and in communications between governments, in the writing of contracts and other commercial paper, in oil concessions, in tariffs and customs practices, in the registry of vessels, the shipment of goods, the forms of payment, in all the intricacies of international trade and finance. There is law in and about the variety of international conferences. International organization — from the United Nations to the Universal Postal Union — involves legal concepts, and different organizations have contributed substantial law. For settling disputes, the law provides diplomats with claims commissions, arbitration bodies, mediators and conciliators, even courts.

For foreign policy, perhaps the most important legal mechanism is the international agreement, and the most important principle of international law is *pacta sunt servanda*: agreements shall be observed. This principle makes international relations

possible. The mass of a nation's foreign relations involve innumerable agreements of different degrees of formality. The diplomat promotes, develops, negotiates, implements various understandings for various ends, from establishing diplomatic relations to trade, aid, allocation of resources, cultural exchange, common standards of weights and measures, to formal alliances affecting national security, cease-fire and disengagement, arms control, and a regime for outer space. The diplomat hardly thinks of these arrangements and understandings as involving law. He does assume that, if agreement is reached, it will probably be observed; if he did not, he would not bother to seek agreement. No doubt, he thinks that nations generally observe their undertakings because that is "done" in international society and because it is generally in the interest of nations to do so. That is law, the lawyer would say. . . .

. . . Even nations that wish to escape from such arrangements are usually compelled to invoke legal principles of escape — whether by reinterpreting the agreement, by attacking its original validity, or by invoking some principle of law to claim that it permits escape or is no longer valid or binding.

In our times, there flourishes a type of international agreement that has added new dimensions to foreign policy and international law. Much of contemporary international law consists of new arrangements, often among large numbers of nations, to promote cooperation for some common aim. In this category one might place the various intergovernmental organizations and institutions, universal or regional — the United Nations, the World Bank and the Monetary Fund, the FAO, UPU, ITU and the IAEA, OECD, [WTO], the International Coffee Agreement and UNCTAD, NATO and the European Economic Community, the OAS and OAU . . . — as well as bilateral aid agreements. One might include, too, arrangements, not exclusively governmental, like the International Telecommunications Satellite Consortium (INTELSAT) or oil concessions. . . .

Law reflected in the assumptions, concepts, institutions, and procedures of international society is not the kind of international law one commonly thinks about because it does not, on its face, direct governments how to behave. But, in fact, all law is intimately related to national behavior. Even that "submerged" law molds the policies of governments. The concept of the nation determines that the United States has relations with Canada, not with Quebec. The concept of territoriality means that the United States can do largely as it likes within the United States, but is sharply restricted in what it can do outside. There are clear prohibitions in the basic legal concepts, in the rights and duties they imply: territoriality, property, tort imply that the United States cannot, at will, invade or violate the territory or seize the property of another nation. Freedom of the seas means that one nation cannot prevent the vessels of others from going their way. Contracts and agreements are not to be broken. Even organizations for cooperative welfare, though commonly distinguished from traditional law of "abstention," impose obligations on members which they must "abstain" from violating; they may not interfere with the international mails; they must pay budget assessments to the FAO. These organizations have also promoted common procedures and minimum standards of national behavior, e.g., in regard to labor, or the treatment of refugees, or basic human rights even for a nation's own citizens.

There is also the law which aims directly at controlling behavior. Governments may not arrest accredited diplomats or deny basic justice to foreign nationals. . . .

C. Is International Law Really Law?**29**

The student of foreign affairs may grant, if the lawyer insists, that the law implied in international society gives some direction to national policies and places some limitations on how nations behave. But he remains skeptical of the influence of law as it is commonly and more narrowly conceived, of that law which seeks to control the conduct of nations within the framework of the society of nations. In particular, he questions whether nations really observe the important prohibitory norms of international law or really keep their important agreements. Governments may sometimes act consistently with norms or obligations, but, he insists, only when it is in their interest to do so; and it is their interest, not the law, which governs their behavior. Such skepticism in the diplomat and the policy-maker is sometimes reflected in the foreign policies they promulgate and carry out.

The tendency to dismiss international law reflects impressions sometimes summed up in the conclusion that it is not really law because international society is not really a society: the world of nations is a collection of sovereign states, not an effective body politic which can support effective law. In this judgment are subsumed a number of alleged weaknesses and inadequacies.

The society of nations has no effective law-making body or process. General law depends on consensus: in principle, new law, at least, cannot be imposed on any state; even old law cannot survive if enough states, or a few powerful and influential ones, reject it. New universal law, then, can come about only through long, gradual, uncertain "accretion" by practice and acquiescence, or through multilateral treaties difficult to negotiate and more difficult to get accepted. Law is also slow and difficult to clarify, or amend, or repeal. The law is therefore haphazard and static. As concerns customary law in particular, there is often uncertainty and little confidence as to what it is. The law is also inadequate, for many important actions and relations remain unregulated. There are important disorders — for example, the arms race or the oil embargo — which are not subject to law. In the absence of special undertakings, nations may engage in economic warfare, may boycott, even starve each other. And law has not achieved a welfare society: there is no law requiring social and economic assistance by the very rich to the very poor, or providing community relief even to the starving.

Also lacking is an effective judiciary to clarify and develop the law, to resolve disputes impartially, and to impel nations to observe the law. The International Court of Justice does not satisfy these needs. Its jurisdiction and procedures are starkly insufficient: jurisdiction requires the consent of the parties, and few consent to it; only a minority of nations have accepted the Court's compulsory jurisdiction, some of these with important reservations. . . . The Court's justice is slow, expensive, uncertain: even nations which can invoke the Court's compulsory jurisdiction are reluctant to do so. Nations still prefer the flexibility of diplomacy to the risks of third-party judgment. In the result, few issues of substantial significance to international order ever get to the Court. No one would claim that the Court has a major influence in international affairs.

The greatest deficiency, as many see it, is that international society lacks an executive authority with power to enforce the law. There is no police system whose pervasive presence might deter violation. The society does not consider violations to be crimes or violators criminals, and attaches no stigma which might itself discourage violation. Since nations cannot be made to observe rules and keep promises, they will not do so when they deem it in their interest not to do so. . . .

In sum, to many an observer, governments seem largely free to decide whether to agree to new law, whether to accept another nation's view of existing law, whether to comply with agreed law. International law, then, is voluntary and only hortatory. It must always yield to national interest. Surely, no nation will submit to law any questions involving its security or independence, even its power, prestige, influence. Inevitably, a diplomat holding these views will be reluctant to build policy on law he deems ineffective. He will think it unrealistic and dangerous to enact laws which will not be observed, to build institutions which will not be used, to base his government's policy on the expectation that other governments will observe law or agreement. Since other nations do not attend to law except when it is in their interest, the diplomat might not see why his government should do so at the sacrifice of important interests. He might be impatient with his lawyers who tell him that the government may not do what he would like to see done.

These depreciations of international law challenge much of what the international lawyer does. Indeed, some lawyers seem to despair for international law until there is world government or at least effective international organization. But most international lawyers are not dismayed. Unable to deny the limitations of international law, they insist that these are not critical, and they deny many of the alleged implications of these limitations. If they must admit that the cup of law is half-empty, they stress that it is half-full. They point to similar deficiencies in many domestic legal systems. They reject definitions (commonly associated with the legal philosopher John Austin) that deny the title of law to any but the command of a sovereign, enforceable and enforced as such. They insist that despite inadequacies in legislative method, international law has grown and developed and changed. If international law is difficult to make, yet it is made; if its growth is slow, yet it grows. If there is no judiciary as effective as in some developed national systems, there is an International Court of Justice whose judgments and opinions, while few, are respected. The inadequacies of the judicial system are in some measure supplied by other bodies: international disputes are resolved and law is developed through a network of arbitrations by continuing or ad hoc tribunals. National courts help importantly to determine, clarify, develop international law. Political bodies like the Security Council and the General Assembly of the United Nations also apply law, their actions and resolutions interpret and develop the law, their judgments help to deter violations in some measure. If there is no international executive to enforce international law, the United Nations has some enforcement powers and there is "horizontal enforcement" in the reactions of other nations. The gaps in substantive law are real and many and require continuing effort to fill them, but they do not vitiate the force and effect of the law that exists, in the international society that is.

Above all, the lawyer will insist, critics of international law ask and answer the wrong questions. What matters is not whether the international system has legislative, judicial, or executive branches, corresponding to those we have become accustomed to seek in a domestic society; what matters is whether international law is reflected in the policies of nations and in relations between nations. The question is not whether there is an effective legislature; it is whether there is law that responds and corresponds to the changing needs of a changing society. The question is not whether there is an effective judiciary, but whether disputes are resolved in an orderly fashion in accordance with international law. Most important, the question is not whether law is enforceable or even effectively enforced; rather, whether law is

C. Is International Law Really Law?**31**

observed, whether it governs or influences behavior, whether international behavior reflects stability and order. The fact is, lawyers insist, that nations have accepted important limitations on their sovereignty, that they have observed these norms and undertakings, that the result has been substantial order in international relations.

In the end, the issues do not turn on theoretical answers to theoretical questions, or on unexamined impressions or assertions about the fate and influence of law in the chancelleries of nations. We must examine as well as we can the role that law, in fact, plays in daily diplomacy, the extent to which law, in fact, affects the behavior of nations, the contribution which law, in fact, makes to order and welfare.

Questions

1. Summarize Henkin's main points. Has he convinced you that international law is "law"? That it has a significant effect on national behavior?

2. Is it accurate to describe compliance with international law as "voluntary"? Why is there compliance with law in domestic systems? Are the reasons for compliance in the international system different? What sanctions can be imposed for violations of international law?

3. What differences are there between the legal institutions in the international community and those in domestic systems, such as in the United States? What are the similarities? Is a centralized legislature necessary in order for there to be law? How about a court with general, compulsory jurisdiction? An executive agency with enforcement powers?

4. It is easy to think of examples, of course, in which nations have acted in violation of international law. Does this show that international law is not really "law"? Is it easy to think of examples of violations of domestic law?

5. Would it be accurate to say that international law is law because nations regard it as law? In what ways do nations treat international law as law? Do you think that law as such influences government decision-makers? Or just fear of sanctions? Or self-interest? Or beliefs about what is morally right? Can you separate these factors?

6. Doesn't much of international law (as described by Henkin) confer reciprocal rights on nations and therefore naturally lend itself to acceptance by government decision-makers? If so, does this disprove that international law is law? Can you think of situations in which a nation might be tempted to violate a reciprocal international legal norm — governing, for example, protection of diplomats, rights over the sea, or nonuse of force? Are there examples of international law rules that do not confer reciprocal rights?

7. Assume that you have agreed to represent an individual on death row in Texas. You find out that this individual is a citizen of Mexico who was convicted of murder several years ago in a Texas state court and sentenced to death. You do some research and discover that there is a treaty called the Vienna Convention on Consular Relations, and that both Mexico and the United States (along with many other countries) are parties to this treaty. The treaty provides that if a member country arrests and detains a citizen of another member country, the arrested person shall be informed "without delay" that they have the right to contact their country's consulate and request assistance. The treaty does not specify, however, what if any remedy is available if a nation fails to comply with this requirement. You find out that

Texas authorities never informed your client of this right and that he has not in fact communicated with the Mexican consulate.

What remedies might you seek for the apparent violation of this treaty provision? Where would you go to seek these remedies? What role, if any, will the Mexican government need to play? In terms of enforceability, how does the treaty right here compare with U.S. constitutional rights, such as the implied right under the Fifth Amendment to a *Miranda* warning? In representing your client, what additional legal or factual information would you like to have? As discussed in Chapter 4, Mexico recently brought an action against the United States in the International Court of Justice on behalf of a group of Mexican citizens on death row in various U.S. states, alleging that these citizens had not been given consular notice as required by the Vienna Convention.

Most international law is found either in international agreements or in rules based on custom. That much is not controversial. The questions that have haunted international law advocates, and that have fueled the skepticism of critics, are whether international law is properly called “law,” and why it is binding on “sovereign” states. This debate has often been couched in terms of the legal theories (summarized below) known as “positivism” and “natural law.”

Of course, if “sovereign state” is defined as one that is not subject to law, the definition answers the question. Some commentators (the positivists) have tried to accept that definition but then to create a theory of why sovereign states are still bound by international law based on the proposition that such states *consent* to be bound by international law. Restatement section 102, quoted above, seems to follow this path. The theory is obviously incomplete, to say the least, because it does not explain why consent is binding or why it cannot be revoked.

Other commentators have sought to base the validity of international law on some fundamental principle, like earlier natural law scholastics who appealed to the commands of God, or those who rested their arguments on right, reason, and a secular law of nature. Professor Brierly summarizes the traditional debate:

J.L. Brierly, *The Law of Nations*

49-56 (6th ed., Humphrey Waldock ed., 1963)

Traditionally there are two rival doctrines which attempt to answer the question why states should be bound to observe the rules of international law.

The doctrine of “fundamental rights” is a corollary of the doctrine of the “state of nature,” in which men are supposed to have lived before they formed themselves into political communities or states; for states, not having formed themselves into a super-state, are still supposed by the adherents of this doctrine to be living in such a condition. It teaches that the principles of international law, or the primary principles upon which the others rest, can be deduced from the essential nature of the state. Every state, by the very fact that it is a state, is endowed with certain fundamental, or inherent, or natural, rights. Writers differ in enumerating what these rights are, but generally five rights are claimed, namely self-preservation, independence, equality, respect, and intercourse. It is obvious that the doctrine of fundamental rights is merely the old doctrine of the natural rights of man transferred to states. . . .

C. Is International Law Really Law?

33

[Brierly then criticizes the idea of “natural” rights on the grounds that rights can only exist as part of a legal system. Moreover, the natural rights doctrine emphasizes individual rights at the expense of equally important social bonds.]

. . . [I]n the society of states the need is not for greater liberty for the individual states, but for a strengthening of the social bond between them, not for the clamant assertion of their rights, but for a more insistent reminder of their obligations towards one another. Finally, the doctrine is really a denial of the possibility of development in international relations; when it asserts that such qualities as independence and equality are inherent in the very nature of states, it overlooks the fact that their attribution to states is merely a stage in an historical process; we know that until modern times states were not regarded either as independent or equal, and we have no right to assume that the process of development has stopped. On the contrary it is not improbable, and it is certainly desirable, that there should be a movement towards the closer interdependence of states, and therefore away from the state of things which this doctrine would stabilize as though it were part of the fixed order of nature.

The doctrine of positivism, on the other hand, teaches that international law is the sum of the rules by which states have *consented* to be bound, and that nothing can be law to which they have not consented. This consent may be given expressly, as in a treaty, or it may be implied by a state acquiescing in a customary rule. But the assumption that international law consists of nothing save what states have consented to is an inadequate account of the system as it can be seen in actual operation, and even if it were a complete account of the contents of the law, it would fail to explain why the law is binding. . . . [A] customary rule is observed, not because it has been consented to, but because it is believed to be binding, and whatever may be the explanation or the justification for that belief, its binding force does not depend, and is not felt by those who follow it to depend, on the approval of the individual or the state to which it is addressed. Further, in the practical administration of international law, states are continually treated as bound by principles which they cannot, except by the most strained construction of the facts, be said to have consented to, and it is unreasonable, when we are seeking the true nature of international rules, to force the facts into a preconceived theory instead of finding a theory which will explain the facts as we have them. For example, a state which has newly come into existence does not in any intelligible sense *consent* to accept international law; it does not regard itself, and it is not regarded by others, as having any option in the matter. The truth is that states do not regard their international legal relations as resulting from consent, except when the consent is express, and that the theory of implied consent is a fiction invented by the theorist; . . . even if the theory did not involve a distortion of the facts, it would fail as an explanation. For consent cannot of itself create an obligation; it can do so only within a system of law which declares that consent duly given, as in a treaty or a contract, shall be binding on the party consenting. To say that the rule *pacta servanda sunt* is itself founded on consent is to argue in a circle. A consistently consensual theory again would have to admit that if consent is withdrawn, the obligation created by it comes to an end. . . .

There need be no mystery about the source of the obligation to obey international law. The same problem arises in any system of law and it can never be solved by a merely *juridical* explanation. The answer must be sought outside the law, and it is for legal philosophy to provide it. The notion that the validity of international law raises some peculiar problem arises from the confusion which the doctrine of sov-

ereignty has introduced into international legal theory. Even when we do not believe in the absoluteness of state sovereignty we have allowed ourselves to be persuaded that the fact of their sovereignty makes it necessary to look for some specific quality, not to be found in other kinds of law, in the law to which states are subject. We have accepted a false idea of the state as a personality with a life and a will of its own, still living in a "state of nature," and we contrast this with the "political" state in which individual men have come to live. But this assumed condition of states is the very negation of law, and no ingenuity can explain how the two can exist together. It is a notion as false analytically as it admittedly is historically. The truth is that states are not persons, however convenient it may often be to personify them; they are merely *institutions*, that is to say, organizations which men establish among themselves for securing certain objects, of which the most fundamental is a system of order within which the activities of their common life can be carried on. They have no wills except the wills of the individual human beings who direct their affairs; and they exist not in a political vacuum but in continuous political relations with one another. Their subjection to law is as yet imperfect, though it is real as far as it goes; the problem of extending it is one of great practical difficulty, but it is not one of intrinsic impossibility. There are important differences between international law and the law under which individuals live in a state, but those differences do not lie in metaphysics or in any mystical qualities of the entity called state sovereignty.

The international lawyer then is under no special obligation to explain why the law with which he is concerned should be binding upon its subjects. If it were true that the essence of all law is a command, and that what makes the law of the state binding is that for some reason, for which no satisfactory explanation can ever be given, the will of the person issuing a command is superior to that of the person receiving it, then indeed it would be necessary to look for some special explanation of the binding force of international law. But that view of the nature of law has been long discredited. If we are to explain why any kind of law is binding, we cannot avoid some such assumption as that which the Middle Ages made, and which Greece and Rome had made before them, when they spoke of natural law. The ultimate explanation of the binding force of all law is that man, whether he is a single individual or whether he is associated with other men in a state, is constrained, in so far as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live.

In thinking about the distinction between the natural law and positivist approaches, consider the following two decisions from early in U.S. history addressing the legality under international law of the slave trade:

United States v. La Jeune Eugenie

26 F. Cas. 832 (D. Mass. 1822)

STORY, Circuit Justice. . . .

Now the law of nations may be deduced, first, from the general principles of right and justice, applied to the concerns of individuals, and thence to the relations and duties of nations; or, secondly, in things indifferent or questionable, from the customary observances and recognitions of civilized nations; or, lastly, from the

C. Is International Law Really Law?

35

conventional or positive law, that regulates the intercourse between states. What, therefore, the law of nations is, does not rest upon mere theory, but may be considered as modified by practice, or ascertained by the treaties of nations at different periods. It does not follow, therefore, that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations. Nor is it to be admitted, that no principle belongs to the law of nations, which is not universally recognised, as such, by all civilized communities, or even by those constituting, what may be called, the Christian states of Europe. Some doctrines, which we, as well as Great Britain, admit to belong to the law of nations, are of but recent origin and application, and have not, as yet, received any public or general sanction in other nations; and yet they are founded in such a just view of the duties and rights of nations, belligerent and neutral, that we have not hesitated to enforce them by the penalty of confiscation. There are other doctrines, again, which have met the decided hostility of some of the European states, enlightened as well as powerful, such as the right of search, and the rule, that free ships do not make free goods, which, nevertheless, both Great Britain and the United States maintain, and in my judgment with unanswerable arguments, as settled rules in the law of prize, and scruple not to apply them to the ships of all other nations. And yet, if the general custom of nations in modern times, or even in the present age, recognized an opposite doctrine, it could not, perhaps, be affirmed, that that practice did not constitute a part, or, at least, a modification, of the law of nations. But I think it may be unequivocally affirmed, that every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations; and unless it be relaxed or waived by the consent of nations, which may be evidenced by their general practice and customs, it may be enforced by a court of justice, whenever it arises in judgment. And I may go farther and say, that no practice whatsoever can obliterate the fundamental distinction between right and wrong, and that every nation is at liberty to apply to another the correct principle, whenever both nations by their public acts recede from such practice, and admits the injustice or cruelty of it.

Now in respect to the African slave trade, such as it has been described to be, and in fact is, in its origin, progress, and consummation, it cannot admit of serious question, that it is founded in a violation of some of the first principles, which ought to govern nations. It is repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice. When any trade can be truly said to have these ingredients, it is impossible, that it can be consistent with any system of law, that purports to rest on the authority of reason or revelation. And it is sufficient to stamp any trade as interdicted by public law, when it can be justly affirmed, that it is repugnant to the general principles of justice and humanity. Now there is scarcely a single maritime nation of Europe, that has not in the most significant terms, in the most deliberate and solemn conferences, acts, or treaties, acknowledged the injustice and inhumanity of this trade; and pledged itself to promote its abolition. I need scarcely advert to the conferences at Vienna, at Aix-la-Chapelle, and at London, on this interesting subject, as they have been cited at the argument of this cause, and authenticated by our own government, to show what may be emphatically called the sense of Europe upon this point. France, in particular, at the conferences at Vienna, in 1815, engaged to use "all the means at her disposal, and to act in the employment of these

means with all the zeal and perseverance due to so great and noble a cause” (the abolition of the slave trade). And accordingly, in the treaty of peace between her and Great Britain, France, expressing her concurrence without reserve in the sentiments of his Britannic majesty with respect to this traffic, admits it to be “repugnant to the principles of natural justice, and of the enlightened age, in which we live”; and, at a short period afterwards, the government of France informed the British government, that it had “issued directions in order, that on the part of France the traffic in slaves may cease from the present time everywhere and forever.” The conduct and opinions of Great Britain, honorably and zealously, and I may add, honestly, as she has been engaged in promoting the universal abolition of the trade, are too notorious, to require a pointed enumeration. She has through her parliament expressed her abhorrence of the trade in the most marked terms, as repugnant to justice and humanity; she has punished it as a felony, when carried on by her subjects; and she has recognized through her judicial tribunals the doctrine, that it is repugnant to the law of nations. Our own country, too, has firmly and earnestly pressed forward in the same career. The trade has been reprobated and punished, as far as our authority extended, from a very early period of the government; and by a very recent statute, to mark at once its infamy and repugnance to the law of nations, it has been raised in the catalogue of public crimes to the bad eminence of piracy. I think, therefore, that I am justified in saying, that at the present moment the traffic is vindicated by no nation, and is admitted by almost all commercial nations as incurably unjust and inhuman. It appears to me, therefore, that in an American court of judicature, I am bound to consider the trade an offence against the universal law of society and in all cases, where it is not protected by a foreign government, to deal with it as an offence carrying with it the penalty of confiscation. And I cannot but think, notwithstanding the assertion at the bar to the contrary, that this doctrine is neither novel nor alarming. That it stands on principles of sound sense and general policy, and, above all, of moral justice. And I confess, that I should be somewhat startled, if any nation, sincerely anxious for the abolition, and earnest in its duty, should interpose its influence to arrest its universal adoption.

The Antelope

23 U.S. (10 Wheat.) 66 (1825)

Mr. Chief Justice MARSHALL. . . .

The question, whether the slave trade is prohibited by the law of nations has been seriously propounded, and both the affirmative and negative of the proposition have been maintained with equal earnestness.

That it is contrary to the law of nature will scarcely be denied. That every man has a natural right to the fruits of his own labour, is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission. But from the earliest times war has existed, and war confers rights in which all have acquiesced. Among the most enlightened nations of antiquity, one of these was, that the victor might enslave the vanquished. This, which was the usage of all, could not be pronounced repugnant to the law of nations, which is certainly to be tried by the test of general usage. That which has received the assent of all, must be the law of all.

C. Is International Law Really Law?

37

Slavery, then, has its origin in force; but as the world has agreed that it is a legitimate result of force, the state of things which is thus produced by general consent, cannot be pronounced unlawful.

Throughout Christendom, this harsh rule has been exploded, and war is no longer considered as giving a right to enslave captives. But this triumph of humanity has not been universal. The parties to the modern law of nations do not propagate their principles by force; and Africa has not yet adopted them. Throughout the whole extent of that immense continent, so far as we know its history, it is still the law of nations that prisoners are slaves. Can those who have themselves renounced this law, be permitted to participate in its effects by purchasing the beings who are its victims?

Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself as a part, and to whose law the appeal is made. If we resort to this standard as the test of international law, the question, as has already been observed, is decided in favour of the legality of the trade. Both Europe and America embarked in it; and for nearly two centuries, it was carried on without opposition, and without censure. A jurist could not say, that a practice thus supported was illegal, and that those engaged in it might be punished, either personally, or by deprivation of property.

Notes and Questions

1. How does Story's view of international law in *La Jeune Eugenie* compare with Marshall's view of international law in *The Antelope*? Who is right? Should some rules of international law bind nations regardless of whether they consent to the rules? Or should international law be purely like contract law, only binding if nations agree?

2. Why is domestic law binding? What are the sources of domestic criminal law, contract law, and constitutional law? Why are those bodies of law generally followed and considered binding? Doesn't the validity of any legal norm ultimately rest on some form of myth or partial myth — for example, that a legislature reflects the will of the people or that a court applies neutral principles of law or legislative intent? Is international law any different? Is the role of sanctions significantly different in the case of international law?

3. Isn't consent an appealing myth to explain the binding nature of international law? It is used to explain the value of personal choice and the basis of contract and is not limited to Western civilization. What are the problems with maintaining that the consent of a state binds it and its people?

4. Why is international law binding under a natural law approach? If the basis of authority is religion or "reason" or "nature," does it follow that international law is based on Western cultural values and is therefore illegitimate with respect to the rest of the world?

5. Consider the following argument by the late Professor Jonathan Charney:

The international community of the late-twentieth century faces an expanding need to develop universal norms to address global concerns. Perhaps one of most salient of these concerns is to protect the earth's environment. While many environmentally

harmful activities result only in local damage, others have an impact far beyond the boundaries of the states in which they take place and may cause damage to the earth's environment as a whole. For example, the discharge of some substances into the atmosphere may adversely affect the global climate or the ozone layer. Discharges that pollute the common spaces of the oceans may also have a global impact and thus raise similar concerns. Current threats to the environment highlight the importance of establishing norms to control activities that endanger all nations and peoples, regardless of where the activities take place. Acts of international terrorism, the commission of international crimes (such as genocide and war crimes), and the use of nuclear weapons pose similar global problems and have been on the international agenda for some time.

To resolve such problems, it may be necessary to establish new rules that are binding on all subjects of international law regardless of the attitude of any particular state. For unless all states are bound, an exempted recalcitrant state could act as a spoiler for the entire international community. Thus, states that are not bound by international laws designed to combat universal environmental threats could become havens for the harmful activities concerned. Such states might have an economic advantage over states that are bound because they would not have to bear the costs of the requisite environmental protection. They would be free riders on the system and would benefit from the environmentally protective measures introduced by others at some cost. Furthermore, the example of such free riders might undermine the system by encouraging other states not to participate, and could thus derail the entire effort. Similarly, in the case of international terrorism, one state that serves as a safe haven for terrorists can threaten all. War crimes, apartheid, or genocide committed in one state might threaten international peace and security worldwide. Consequently, for certain circumstances it may be incumbent on the international community to establish international law that is binding on all states regardless of any one state's disposition.

Jonathan I. Charney, *Universal International Law*, 87 *Am. J. Int'l L.* 529 (1993). Do you agree with Professor Charney's assessment? How can the international community go about creating this sort of universal international law? How would this law be enforced? When such law is invoked against them, will nations regard it as legitimate?

Professor Franck offers an explanation of the power of international law and its basis in legitimacy:

Thomas M. Franck, Legitimacy in the International System

82 *Am. J. Intl. L.* 705 (1988)

The surprising thing about international law is that nations ever obey its strictures or carry out its mandates. . . .

Why should rules, unsupported by an effective structure of coercion comparable to a national police force, nevertheless elicit so much compliance, even against perceived self-interest, on the part of sovereign states? Perhaps finding an answer to this question can help us to find a key to a better, yet realistic, world order. The answer, if there is one, may also incidentally prove useful in designing more widely obeyed, less coerced, laws for ordering the lives of our cities and states.

C. Is International Law Really Law?

39

A series of events connected with the role of the U.S. Navy in protecting U.S.-flagged vessels in the Persian Gulf serves to illustrate the paradoxical phenomenon of uncoerced compliance in a situation where the rule conflicts with perceived self-interest. Early in 1988, the Department of Defense became aware of a ship approaching the gulf with a load of Chinese-made Silkworm missiles en route to Iran. The Department believed the successful delivery of these potent weapons would increase materially the danger to both protected and protecting U.S. ships in the region. It therefore argued for permission to intercept the delivery. The Department of State countered that such a search and seizure on the high seas, under the universally recognized rules of war and neutrality, would constitute aggressive blockade, an act tantamount to a declaration of war against Iran. In the event, the delivery ship and its cargo of missiles were allowed to pass. Deference to systemic rules had won out over tactical advantage in the internal struggle for control of U.S. policy.*

Why should this have been so? In the absence of a world government and a global coercive power to enforce its laws, why did the U.S. Government, with its evident power to do as it wished, choose to “play by the rules” despite the considerable short-term strategic advantage to be gained by seizing the Silkworms before they could be delivered? Why did preeminent American power defer to the rules of the sanctionless system? At least part of the answer to this question, quietly given by the State Department to the Department of Defense, is that the international rules of neutrality have attained a high degree of recognized legitimacy and must not be violated lightly. Specifically, they are well understood, enjoy a long pedigree and are part of a consistent framework of rules—the *jus in bello*—governing and restraining the use of force in conflicts. To violate a set of rules of such widely recognized legitimacy, the State Department argued, would transform the U.S. posture in the gulf from that of a neutral to one of belligerency. That could end Washington’s role as an honest broker seeking to promote peace negotiations. It would also undermine the carefully crafted historic “rules of the game” applicable to wars, rules that are widely perceived to be in the interest of all states.

Such explanations for deferring to a rule in preference to taking a short-term advantage are the policymaker’s equivalent of the philosopher’s quest for a theory of legitimacy. Washington voluntarily chose to obey a rule in the Persian Gulf conflict. Yet it does not always obey all international rules. Some rules are harder to disobey—more persuasive in their pull to compliance—than others. This is known intuitively by the legions of Americans who deliberately underreport the dutiable price of goods purchased abroad, and by the aficionados who smuggle Cuban cigars into the country behind pocket handkerchiefs, but would not otherwise commit criminal fraud. That some rules *in themselves* seem to exert more pull to compliance than others is the starting point in the search for a theory of legitimacy. . . .

Most students of law, power and structure in society have sought to identify other characteristics [besides power] that conduce to the rule of law. . . .

*[A similar event occurred in December 2002 when U.S. and Spanish authorities stopped a North Korean freighter bound for Yemen and discovered that it was carrying Scud missiles (see Chapter 9). After a protest by Yemen’s president, the Bush Administration decided to release the vessel, noting that international law did not prohibit the delivery of the missiles to Yemen. Eds.]

Four elements — the indicators of rule legitimacy in the community of states — are identified and studied in this essay. They are *determinacy*, *symbolic validation*, *coherence* and *adherence* (to a normative hierarchy). To the extent rules exhibit these properties, they appear to exert a strong pull on states to comply with their commands. To the extent these elements are not present, rules seem to be easier to avoid by a state tempted to pursue its short-term self-interest. This is not to say that the legitimacy of a rule can be deduced solely by counting how often it is obeyed or disobeyed. While its legitimacy may exert a powerful pull on state conduct, yet other pulls may be stronger in a particular circumstance. The chance to take a quick, decisive advantage may overcome the counterpull of even a highly legitimate rule. In such circumstances, legitimacy is indicated not by obedience, but by the discomfort disobedience induces in the violator. (Student demonstrations sometimes are a sensitive indicator of such discomfort.) The variable to watch is not compliance but the strength of the compliance pull, whether or not the rule achieves actual compliance in any one case.

Each rule has an inherent pull power that is independent of the circumstances in which it is exerted, and that varies from rule to rule. This pull power is its index of legitimacy. For example, the rule that makes it improper for one state to infiltrate spies into another state in the guise of diplomats is formally acknowledged by almost every state, yet it enjoys so low a degree of legitimacy as to exert virtually no pull towards compliance. As Schachter observes, “some ‘laws,’ though enacted properly, have so low a degree of probable compliance that they are treated as ‘dead letters’ and . . . some treaties, while properly concluded, are considered ‘scraps of paper.’ ” By way of contrast, we have noted, the rules pertaining to belligerency and neutrality actually exerted a very high level of pull on Washington in connection with the Silkworm missile shipment in the Persian Gulf.

The study of legitimacy thus focuses on the inherent capacity of a rule to exert pressure on states to comply. This focus on the properties of rules, of course, is not a self-sufficient account of the socialization process. How rules are made, interpreted and applied is part of a dynamic, expansive and complex set of social phenomena. That complexity can be approached, however, by beginning with the rules themselves. . . .

Perhaps the most self-evident of all characteristics making for legitimacy is textual *determinacy*. What is meant by this is the ability of the text to convey a clear message, to appear transparent in the sense that one can see through the language to the meaning. Obviously, rules with a readily ascertainable meaning have a better chance than those that do not to regulate the conduct of those to whom the rule is addressed or exert a compliance pull on their policymaking process. Those addressed will know precisely what is expected of them, which is a necessary first step towards compliance. . . .

Indeterminacy . . . has costs. Indeterminate normative standards not only make it harder to know what conformity is expected, but also make it easier to justify noncompliance. Put conversely, the more determinate the standard, the more difficult it is to resist the pull of the rule to compliance and to justify noncompliance. Since few persons or states wish to be perceived as acting in obvious violation of a generally recognized rule of conduct, they may try to resolve the conflicts between the demands of a rule and their desire not to be fettered, by “interpreting” the rule

C. Is International Law Really Law?

41

permissively. A determinate rule is less elastic and thus less amenable to such evasive strategy than an indeterminate one. . . .

The degree of determinacy of a rule directly affects the degree of its perceived legitimacy. A rule that prohibits the doing of “bad things” lacks legitimacy because it fails to communicate what is expected, except within a very small constituency in which “bad” has achieved a high degree of culturally induced specificity. To be legitimate, a rule must communicate what conduct is permitted and what conduct is out of bounds. These bookends should be close enough together to inhibit incipient violators from offering self-serving exculpatory definitions of the rule. When almost everyone scoffs at such an exculpation, the outer boundary of the rule’s determinacy has been established.

There is another sense in which determinacy increases the legitimacy of a rule text. A rule of conduct that is highly transparent — its normative content exhibiting great clarity — actually *encourages* gratification deferral and rule compliance. States, in their relations with one another, frequently find themselves tempted to violate a rule of conduct in order to take advantage of a sudden opportunity. If they do not do so, but choose, instead, to obey the rule and forgo that gratification, it is likely to be because of their longer term interests in seeing a potentially useful rule reinforced. They can visualize future situations in which it will operate to their advantage. But they will only defer the attainable short-term gain if the rule is sufficiently specific to support reasonable expectations that benefit can be derived in a contingent future by strengthening the rule in the present instance. . . .

As determinacy is the linguistic or literary-structural component of legitimacy, so *symbolic validation*, *ritual* and *pedigree* provide its cultural and anthropological dimension. As with determinacy, so here, the legitimacy of the rule — its ability to exert pull to compliance and to command voluntary obedience — is to be examined in the light of its ability to communicate. In this instance, however, what is to be communicated is not so much content as *authority*: the authority of a rule, the authority of the originator of a validating communication and, at times, the authority bestowed on the recipient of the communication. The communication of authority, moreover, is symbolic rather than literal. We shall refer to these symbolically validating communications as cues.

These three concepts — symbolic validation, ritual and pedigree — are related, but not identical. The *symbolic validation* of a rule, or of a rule-making process or institution, occurs when a signal is used as a cue to elicit compliance with a command. The cue serves as a surrogate for enunciated reasons for such obedience. The singing of the national anthem, for example, is a vocal and (on public occasions) a visual signal symbolically reinforcing the citizen’s relationship to the state, a relationship of rights and duties. This compliance reinforcement need not be spelled out in the actual words of the anthem (as it is not in the commonly used stanza of the American one). The act of corporate singing itself is a sufficient cue to validate the fabric of regularized relationships that are implicated in good citizenship. We are not really singing about bombs bursting in the night air, but about free and secret elections, the marketplace of ideas, the rule of valid laws and impartial judges.

Ritual is a specialized form of symbolic validation marked by ceremonies, often — but not necessarily — mystical, that provide unenunciated reasons or cues for eliciting compliance with the commands of persons or institutions. The entry of

the mace into the British House of Commons is intended to call to mind the Commons's long and successful struggle to capture control of lawmaking power from the Crown. It functions as a much more direct, literal kind of symbolic validation than the "Star-Spangled Banner." Ritual is often presented as drama, to communicate to a community its unity, its values, its uniqueness in both the exclusive and the inclusive sense.

All ritual is a form of symbolic validation, but the converse is not necessarily true. *Pedigree* is a different subset of cues that seek to enhance the compliance pull of rules or rule-making institutions by emphasizing their historical origins, their cultural or anthropological deep-rootedness. An example is the practice of "recognition." When a government recognizes a new regime, or when the United Nations admits a new state to membership, this partly symbolic act has broad significance. It endows the new entity with a range of entitlements and duties, the concomitants of sovereignty. The capacity of states, and, nowadays, perhaps also of the United Nations, to confer sovereignty and its incidents in this fashion derives not from some treaty or other specific agreement but from the ancient practice of states and groupings of states, which legitimizes the exercise of this power. . . .

Symbolic validation, like determinacy, serves to legitimize rules. But like determinacy, symbolic validation is not quite as simple a notion as it may initially appear. For example, . . . a pedigree only confers actual rights and duties when the standards for pedigrees are applied *coherently*. When, on the contrary, symbols, ritual and pedigree are dispensed capriciously, the desired effect of legitimization may not accrue.

Both determinacy and symbolic validation are connected to a further variable: coherence. The effect of incoherence on symbolic validation can be illustrated by reference to diplomatic practices pertaining to the ritual validation of governments and states. The most important act of pedigrees in the international system is the deep-rooted, traditional act that endows a new government, or a new state, with symbolic status. When the endowing is done by individual governments, it is known as *recognition*. The symbolic conferral of status is also performed collectively through a global organization like the United Nations when the members vote to admit a new nation to membership, or when the General Assembly votes to accept the credentials of the delegates representing a new government. . . .

To recapitulate: an act of recognition, the symbolic validation of a state or regime, has the capacity to bestow, symbolically, rights and duties on the recognized entity when, *but only if*, it is done in accordance with the applicable principled rules and procedures. Such pedigreed recognition, and its corporate UN equivalent, is everywhere accorded great weight. On the other hand, when the rules and standards for validation are violated, or are themselves unprincipled and capricious, then symbolic validation fails in its objective of bestowing status. Moreover, when validation is seen to be capricious, a failure to validate will do more to undermine the legitimacy of the validating process than of the state or government thus deprived of symbolic validation. . . .

There is another aspect of coherence. It encompasses the further notion that a rule, standard or validating ritual gathers force if it is seen to be connected to a network of other rules by an underlying general principle. . . .

By focusing on the connections between specific rules and general underlying

C. Is International Law Really Law?

43

principles, we have emphasized the horizontal aspect of our central notion of a community of legitimate rules. However, there are vertical aspects of this community that have even more significant impact on the legitimacy of rules. . . .

According to Dworkin, a true community, as distinguished from a mere rabble, or even a system of random primary rules of obligation, is one in which the members

accept that they are governed by common principles, not just by rules hammered out in political compromise. . . . Members of a society of principle accept that their political rights and duties are not exhausted by the particular decisions their political institutions have reached, but depend, more generally, on the scheme of principles those decisions presuppose and endorse. So each member accepts that others have rights and that he has duties flowing from that scheme. . . .

Nor are these rights and duties “conditional on his wholehearted approval of that scheme; these obligations arise from the historical fact that his community has adopted that scheme, . . . not the assumption that he would have chosen it were the choice entirely his.”

Moreover, the community “commands that no one be left out, that we are all in politics together for better or worse.” And its legitimizing requirement of rule integrity “assumes that each person is as worthy as any other, that each must be treated with equal concern according to some coherent conception of what that means.”

Does that accurately describe the social condition of the nations of the world in their interactive mode? The description does not assume harmony or an absence of strife. According to Dworkin, an “association of principle is not automatically a just community; its conception of equal concern may be defective.” What a rule community, a community of principle, does is to validate behavior in accordance with rules and applications of rules that confirm principled coherence and adherence, rather than acknowledging only the power of power. A rule community operates in conformity not only with primary rules but also with secondary ones—rules about rules—which are generated by valid legislative and adjudicative institutions. Finally, a community accepts its ultimate secondary rules of recognition not consensually, but as an inherent concomitant of membership status.

In the world of nations, each of these described conditions of a sophisticated community is observable today, even though imperfectly. This does not mean that its rules will never be disobeyed. It does mean, however, that it is usually possible to distinguish rule compliance from rule violation, and a valid rule or ruling from an invalid one. It also means that it is not necessary to await the millennium of Austinian-type world government to proceed with constructing—perfecting—a system of rules and institutions that will exhibit a powerful pull to compliance and a self-enforcing degree of legitimacy.

Professor Koh discusses why states comply with international law (going beyond self-interest and the force of legitimacy) in the context of recent developments in international law.

Harold Hongju Koh, Why Do Nations Obey International Law?

106 Yale L.J. 2599 (1997)

By the 1970s and '80s, the legal landscape had altered significantly. The growth of international regimes and institutions, the proliferation of nonstate actors, and the increasing interpenetration of domestic and international systems inaugurated the era of "transnational relations," defined by one scholar as "regular interactions across national boundaries ari[sing] when at least one actor is a non-state agent or does not operate on behalf of a national government or an intergovernmental organization." Multinational enterprises, nongovernmental organizations, and private individuals reemerged as significant actors on the transnational stage. . . . Instead of focusing narrowly on nation-states as global actors, scholars began to look as well as transnational networks among nonstate actors, international institutions, and domestic political structures as important mediating forces in international society.

The post-Cold War era has seen international law, transnational actors, decisional fora, and modes of regulation mutate into fascinating hybrid forms. International law now comprises a complex blend of customary, positive, declarative, and "soft" law, which seeks not simply to ratify existing practice, but to elevate it. As sovereignty has declined in importance, global decisionmaking functions are now executed by a complex rugby scrum of nation-states, intergovernmental organizations, regional compacts, nongovernmental organizations, and informal regimes and networks. The system has become "neomonistic," with new channels opening for the interpenetration of international and domestic law through judicial decision, legislation and executive action. New forms of dispute resolution, executive action, administrative decisionmaking and enforcement, and legislation have emerged as part of a transnational legal process that influences national conduct, transforms national interests, and helps constitute and reconstitute national identities.

In the last five years, these developments have returned the compliance question to center stage in the journals of international theory.

The compliance literature has followed three distinct explanatory pathways. . . . The first, not surprisingly, is a rationalistic instrumentalist strand that views international rules as instruments whereby states seek to attain their interests in wealth, power, and the like [and employs] sophisticated techniques of rational choice theory to argue that nation-states obey international law when it serves their short or long term self-interest to do so. Under this rationalistic account, pitched at the level of the international system, nations employ cooperative strategies to pursue a complex, multifaceted long-run national interest, in which compliance with negotiated legal norms serves as a winning long-term strategy in a reiterated "prisoner's dilemma" game. . . . [T]he more sophisticated instrumentalists are willing to disaggregate the state into its component parts, to introduce international institutions and transnational actors, to incorporate notions of long-term self-interest, and to consider the issue within the context of massively iterated multiparty games.

A second explanatory pathway follows a Kantian, liberal vein. The Kantian thread divides into two identifiable strands: one based on Franck's notion of rule-legitimacy, and another that makes more expansive claims for the causal role of na-

C. Is International Law Really Law?

45

tional identity. . . . [T]he determinative factor for whether nations obey can be found, not at a systemic level, but at the level of domestic structure. Under this view, compliance depends significantly on whether or not the state can be characterized as “liberal” in identity, that is, having a form of representative government, guarantees of civil and political rights, and a judicial system dedicated to the rule of law. Flipping the now-familiar Kantian maxim that “democracies don’t fight one another,” these theorists posit that liberal democracies are more likely to “do law” with one another, while relations between liberal and illiberal states will more likely transpire in a zone of politics.

The third strand is a “constructivist” strand, based broadly on notions of both identity-formation and international society. Unlike interest theorists, who tend to treat state interests as given, “constructivists” have long argued that states and their interests are socially constructed by “commonly held philosophic principles, identities, norms of behavior, or shared terms of discourse.” Rather than arguing that state actors and interests create rules and norms, constructivists argue that “[r]ules and norms *constitute* the international game by determining who the actors are, what rules they must follow if they wish to ensure that particular consequences follow from specific acts, and how titles to possessions can be established and transferred.” Thus constructivists see norms as playing a critical role in the formation of national identities. . . .

[T]he norms, values, and social structure of international society . . . help . . . form the identity of actors who operate within it. Nations thus obey international rules not just because of sophisticated calculations about how compliance or non-compliance will affect their interests, but because a repeated habit of obedience re-makes their interests so that they come to value rule compliance. . . . [S]tates follow specific rules, even when inconvenient, because they have a longer-term interest in the maintenance of law-impregnated international community.

Each of these explanatory threads has significant persuasive power, and strongly complements the others. Yet . . . none of these approaches provides a sufficiently “thick” theory of the role of international law in promoting compliance with shared global norms. The short answer to the question, “Why do nations obey international law?” is not simply: “interest”; “identity”; “identity-formation”; and/or “international society.” A complete answer must also account for the importance of *interaction* within the transnational legal process, *interpretation* of international norms, and domestic *internalization* of those norms as determinants of why nations obey. What is missing, in brief, is a modern version of the fourth historical strand of compliance theory—the strand based on *transnational legal process*. . . .

[S]uch a process can be viewed as having three phases. One or more transnational actors provokes an *interaction* (or series of interactions) with another, which forces an *interpretation* or enunciation of the global norm applicable to the situation. By so doing, the moving party seeks not simply to coerce the other party, but to *internalize* the new interpretation of the international norm into the other party’s internal normative system. The aim is to “bind” that other party to obey the interpretation as part of its internal value set. Such a transnational legal process is normative, dynamic, and constitutive. The transaction generates a legal rule which will guide future transnational interactions between the parties; future transactions will further internalize those norms; and eventually, repeated participation in the pro-

cess will help to reconstitute the interests and even the identities of the participants in the process.

The Anti-Ballistic Missile Treaty Reinterpretation Debate represents one recent example of this phenomenon from United States foreign policy. To simplify a complex story, in 1972, the United States and the U.S.S.R. signed the bilateral Anti-Ballistic Missile Treaty (ABM Treaty), which expressly banned the development of space-based systems for the territorial defense of our country. Thirteen years later, in October 1985, the Reagan Administration proposed the Strategic Defense Initiative (SDI), popularly called "Star Wars," which amounted to a space-based antiballistic missile system for American territorial defense. To skirt the plain language of the ABM Treaty, the Reagan Administration proposed to "reinterpret" it to permit SDI, essentially amending the treaty without the consent of either the Senate or the Soviet Union. That decision triggered an eight-year battle in which numerous present and former government officials, including six former Secretaries of Defense and numerous key Senators (principally Sam Nunn, Chairman of the Senate Armed Services Committee), rallied in support of the original treaty interpretation. One key player in the fight against the ABM treaty reinterpretation was Gerard C. Smith, the chief American negotiator at SALT I and principal negotiator of the ABM Treaty, who chaired the boards of two influential nongovernmental organizations, the Arms Control Association and the National Committee to Save the ABM Treaty.

The ABM controversy raged in many fora: Senate hearings, debates over other arms control treaties, journal articles, and op-ed columns. In the end, Congress withheld appropriations from SDI tests that did not conform with the treaty; the Senate reported the ABM Treaty Interpretation Resolution, which reaffirmed its original understanding of the treaty; and in 1988 the Senate attached a condition to the Intermediate-Range Missile Treaty, which specified that the United States would interpret the treaty in accordance with the understanding shared by the President and the Senate at the time of advice and consent. In response, the Reagan and Bush Administrations maintained that their broad reinterpretation was "legally correct," but announced that they would comply with the original understanding as a matter of "policy." In 1993, the episode ended, when President Clinton repudiated the unilateral Reagan reinterpretation and announced that his administration would abide by the original ABM treaty interpretation.

None of this legal dispute reached any court. Indeed, had one stopped tracing the process of the dispute in 1987, one might have concluded that the United States had violated the treaty and gotten away with it. But in the end, the ABM Treaty Reinterpretation Debate demonstrates how the world's most powerful nation, the United States, returned to compliance with international law.

Standing alone, neither interest, identity, or international society provides sufficient explanation for why the United States government obeyed the original ABM Treaty interpretation. Presumably, the U.S. national interest in deploying SDI remained roughly the same under either legal interpretation, as did the liberal identity of the American polity. If the response of international society, in the form of allies' and treaty partners' resistance to the reinterpretation, was not enough to block the reinterpretation in 1985, it is unclear why that resistance should have become overwhelming by 1993.

In my view, a transnational legal process explanation provides the missing link.

D. International Law Theory and Methodology

47

Transnational actors such as a U.S. Senator (Sam Nunn), a private “norm entrepreneur” (Gerard Smith), and several nongovernmental organizations (the Arms Control Association and the National Committee to Save the ABM Treaty) formed an “epistemic community” to address the legal issue. That community mobilized elite and popular constituencies and provoked a series of interactions with the U.S. government in a variety of fora. They challenged the Administration’s broad reinterpretation of the treaty norm with the original narrow interpretation in both public and private settings, and succeeded in internalizing the narrow interpretation into several legislative products. In the end, the executive branch responded by internalizing that interpretation into its own official policy statement. Thus, the episode proved normative . . . and constitutive of U.S. national interests supporting the original ABM treaty interpretation. In this dynamic process, the episode established a precedent for the next debate over the antiballistic missile issue. . . .

This example reveals that the various theoretical explanations offered for compliance are complementary, not mutually exclusive. In his classic statement of neorealism, *Man, the State and War*, Kenneth Waltz posited three levels of analysis, or “images,” at which international relations could be explained: the international system (systemic); the state (domestic politics); and the individuals and groups who make up the state (psychological/bureaucratic). These images are not mutually exclusive, but sit atop one another like a layer cake; thus, interest and international society theorists seek to explain compliance primarily at the level of the international system, while identity theorists seek to explain it at the level of domestic political structure. Transnational legal process analysts, by contrast, seek to supplement these explanations with reasons for compliance that are found at a *transactional* level: *interaction*, *interpretation*, and *internalization* of international norms into domestic legal structures. While the interest, identity, and international society approaches all provide useful insights, none, jointly or severally, provides a sufficiently thick explanation of compliance with international obligations.

Questions

1. Do you agree with Professor Franck concerning the factors that make law legitimate? Based on the factors identified by Professor Franck, how can international law’s legitimacy be enhanced?
2. Do you agree with Professor Koh’s “transnational legal process” explanation for national compliance with international law? Can you think of recent examples of this process? Professor Koh uses the ABM reinterpretation debate as an example. In December 2001, the Bush Administration announced that it was withdrawing from the ABM treaty, effective in June 2002. (See Chapter 2, at page 120.)

D. INTERNATIONAL LAW THEORY AND METHODOLOGY

This section provides an overview of some of the modern theoretical and methodological approaches to international law. It is not expected that students will master

these approaches in the basic international law course, especially at the beginning of the course. Students may find it useful, however, to have a sense of different ways of thinking about international law before evaluating the substantive international law topics in subsequent chapters.

1. Overview

Excerpted below is a brief description of some of the modern approaches to international law, prepared for a 1999 symposium on “Method in International Law.” This excerpt is followed by more in-depth materials discussing some of the specific approaches.

Steven R. Ratner & Anne-Marie Slaughter, Appraising the Methods of International Law: A Prospectus for Readers

93 Am. J. Intl. L. 291 (1999)

Positivism. Positivism summarizes a range of theories that focus upon describing the law as it is, backed up by effective sanctions, with reference to formal criteria, independently of moral or ethical considerations. For positivists, international law is no more or less than the rules to which states have agreed through treaties, custom, and perhaps other forms of consent. In the absence of such evidence of the will of states, positivists will assume that states remain at liberty to undertake whatever actions they please. Positivism also tends to view states as the only subjects of international law, thereby discounting the role of nonstate actors. It remains the lingua franca of most international lawyers, especially in continental Europe.

New Haven School (policy-oriented jurisprudence). Established by Harold Lasswell and Myres McDougal of Yale Law School beginning in the mid-1940s, the New Haven School eschews positivism’s formal method of searching for rules as well as the concept of law as based on rules alone. It describes itself as a policy-oriented perspective, viewing international law as a process of decision making by which various actors in the world community clarify and implement their common interests in accordance with their expectations of appropriate processes and of effectiveness in controlling behavior. Perhaps the New Haven School’s greatest contribution has been its emphasis on both what actors say and what they do.

International legal process. International legal process (ILP) refers to the approach first developed by Abram Chayes, Thomas Ehrlich, and Andreas Lowenfeld at Harvard Law School in the 1960s. Building on the American legal process school, it has seen the key locus of inquiry of international law as the role of law in constraining decision makers and affecting the course of international affairs. Legal process theory has recently enjoyed a domestic revival, which seeks to underpin precepts about process with a set of normative values. Some ILP scholars are following suit.

Critical legal studies. Critical legal studies (CLS) scholars have sought to move beyond what constitutes law, or the relevance of law to policy, to focus on the contradictions, hypocrisies and failings of international legal discourse. The diverse group of scholars who often identify themselves as part of the “New Stream” have emphasized the importance of culture to legal development and offered a critical view of the progress of the law in its confrontations with state sovereignty. Like the

deconstruction movement, which is the intellectual font of many of its ideas, critical legal studies has focused on the importance of language.

International law and international relations. IR/IL is a purposefully interdisciplinary approach that seeks to incorporate into international law the insights of international relations theory regarding the behavior of international actors. The most recent round of IR/IL scholarship seeks to draw on contemporary developments and strands in international relations theory, which is itself a relatively young discipline. The results are diverse, ranging from studies of compliance, to analyses of the stability and effectiveness of international institutions, to the ways that models of state conduct affect the content and subject of international rules.

Feminist jurisprudence. Feminist scholars of international law seek to examine how both legal norms and processes reflect the domination of men, and to reexamine and reform these norms and processes so as to take account of women. Feminist jurisprudence has devoted particular attention to the shortcomings in the international protection of women's rights, but it has also asserted deeper structural challenges to international law, criticizing the way law is made and applied as insufficiently attentive to the role of women. Feminist jurisprudence has also taken an active advocacy role.

Law and economics. In its domestic incarnation, which has proved highly significant and enduring, law and economics has both a descriptive component that seeks to explain existing rules as reflecting the most economically efficient outcome, and a normative component that evaluates proposed changes in the law and urges adoption of those that maximize wealth. Game theory and public choice theory are often considered part of law and economics. In the international area, it has begun to address commercial and environmental issues.

2. *International Relations Theory*

Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*

93 Am. J. Intl. L. 361 (1999)

Over the last ten years, international relations (IR) theory, a branch of political science, has animated some of the most exciting scholarship in international law. If a true joint discipline has not yet emerged, scholars in both fields have clearly established the value of interdisciplinary cross-fertilization. . . .

[A]s a social science IR does not purport to be . . . a true "legal method" capable of answering doctrinal questions. . . . And like most social sciences, IR takes its "science" seriously (often too seriously), generally eschewing specific normative recommendations. An IR perspective can, however, enhance both kinds of scholarship. In general, by situating legal rules and institutions in their political context, IR helps to reduce the abstraction and self-contained character of doctrinal analysis and to channel normative idealism in effective directions. More concretely, the visions of international politics underlying theories of IR do suggest some (often implicit) preferences for particular sources of law and normative outcomes.

IR theory is most helpful in performing three different, though equally significant, intellectual tasks: *description*, *explanation* and *institutional design*. First, while lawyers *describe* rules and institutions all the time, we inevitably—and often

subconsciously — use some intellectual template (frequently a positivist one) to determine which elements of these complex phenomena to emphasize, which to omit. The carefully constructed models of social interaction underlying IR theory remind us to choose these templates carefully, in light of our purpose. More specifically, IR helps us describe legal institutions richly, incorporating the political factors that shape the law: the interests, power, and governance structures of states and other actors; the information, ideas and understandings on which they operate; the institutions within which they interact. IR scholars are primarily concerned with *explaining* political behavior — recently, at least, including law-related behavior. Especially within those schools that favor rationalist approaches, scholars seek to identify the actors relevant to an issue, the factors (material or subjective) that affect their behavior or otherwise influence events, and the “causal pathways” by which those factors have effect. These elements are typically incorporated in a model that singles out particular factors for study. In designing research, scholars look for ways to test explanatory hypotheses, using case studies or data analysis. . . .

A scholar applying IR theory might treat legal rules and institutions as phenomena to be explained (“dependent variables”). . . . Alternatively, IR might analyze legal rules and institutions — including the processes of legal decision making — as explanatory factors (“independent variables”). . . .

Why should a lawyer care about questions like these? Analyses treating law as a dependent variable are valuable in many settings, for they help us understand the functions, origin and meaning of rules and institutions. Analyses treating law as an independent variable are also valuable (though unfortunately less common): they help us assess the workings and effectiveness of legal arrangements in the real world. Both forms of explanation, then, are valuable in their own right. But explanation is at least as important for its forward-looking applications: predicting future developments and *designing institutions* capable of affecting behavior in desirable ways. It is here — constructing law-based options for the future, as the editors put it — that lawyers can play their greatest role and IR can make its most significant contribution. . . .

Four visions of international politics are prominent in IR scholarship today. . . .

Realist theory has dominated IR since before World War II. Realists treat states as the principal actors in international politics. States interact in an environment of anarchy, defined as the absence of any central government able to keep peace or enforce agreements. Security is their overriding goal, and self-help their guiding principle. Under these conditions, differences in power are usually sufficient to explain important events. Realists concentrate on interactions among major powers and on matters of war and peace. Other issues — even related issues like war crimes — are secondary.

Realists do not conclude that international cooperation and international law are unlikely or unimportant: states will naturally cooperate when it advances their interests. They do assert, however, that political realities constrain the commitments states will accept, and that the interests of more powerful states set the terms of cooperation. As a corollary, realists believe that international rules and institutions have little, if any, independent effect on state behavior: they are mere (“epiphenomenal”) artifacts of the underlying interest and power relationships, and will be changed or disregarded (at least on important issues) if those relationships change.

In analyzing legal doctrine (which they rarely do), realists would hew closely to the actual practice and unambiguous expressions of consent of major states. They would be deeply suspicious of efforts to establish customary law through mere ver-

bal formulations, pronouncements of international institutions or scholarly writings. Since even treaties frequently obligate states to do only what they would have done anyway, or reflect political pressures rather than serious commitments, these scholars should be narrowly interpreted.

Many *institutionalist* scholars start from a similar model of decentralized state interaction. Some share with realists a conviction that states are “real” actors with clearly specified national interests. Most, however, view states as legal fictions that aggregate the interests and preferences of their citizens; these scholars rely on state-centric analysis rather than true “methodological individualism” because it allows for more parsimonious explanation. In either case, these theorists acknowledge a broad spectrum of interests, from wealth to a cleaner environment, that depend on cooperation. Drawing on game theory, economics and other disciplines, institutionalists identify conditions that prevent states from realizing potential gains from cooperation — “market failures,” in economic terms — and analyze how rules and other institutions can overcome those obstacles. Regime theory, a more expansive vein of institutionalist scholarship, incorporates information and ideas as well as power and interests, and acknowledges significant roles for private and supranational actors and domestic politics.

In these accounts, institutions — broadly defined to include both norms or rules and organizations — *may* have independent effects on behavior: by changing the context of interaction, they facilitate the negotiation and implementation of agreements as well as other substantive interactions. For example, institutions can reduce the transaction costs of negotiation, provide unbiased information, create cognitive focal points to coordinate decentralized activities, insert neutral actors into situations of conflict, fill gaps in incomplete contracts, and facilitate the pooling of resources. Of course, the obstacles that create a need for institutions also hamper their formation; how are institutions created in the first place? Institutionalists have made less progress in answering these “supply side” questions.

On matters of legal doctrine, institutionalists would accept the traditional sources of international law, especially those revealing voluntary agreement among states; they would also be comfortable looking to national judicial decisions and norms promulgated by international courts and organizations. Some might even search more broadly for relevant normative expressions. In practice, though, institutionalist scholarship focuses on treaties. These are often seen as reciprocal bargains or contracts emerging from market-style interactions, a view that supports a narrow, textual mode of interpretation. But treaties are also viewed as purposive acts akin to legislation; this vision suggests the appropriateness of the kinds of teleological interpretation supported by legal process scholars.

Various forms of *liberal* IR theory have been influential for many years, but this approach has recently been given new vitality. Liberals insist on methodological individualism, viewing individuals and private groups as the fundamental actors in international (and domestic) politics. States are not insignificant, but their preferences are determined by domestic politics rather than assumed interests or material factors like relative power. This approach implies that interstate politics are more complex and fluid than realists and institutionalists assume: national preferences can vary widely and change unpredictably. It calls for careful attention to the domestic politics and constitutional structures of individual states — a daunting prospect for analysts of international relations.

Liberals, on the other hand, are developing their own theoretical generaliza-

tions, using variations in domestic governance to explain differences in international behavior. For example, scholars are exploring whether liberal democratic states—with representative institutions and a commitment to the rule of law—are more amenable to legal relationships and arguments and more prone to comply with legal rules than states with different domestic regimes. Research in this vein . . . is also helping to identify the domestic mechanisms through which international institutions affect behavior, and thus how they can be strengthened.

Transnational liberals go further, highlighting the activities of private individuals and groups across national polities and within international institutions. Traditional interest groups like business and labor, scientific communities, advocacy groups and networks concerned with issues like the rights of women or indigenous peoples, and other private organizations all play significant roles, independently of states, in creating international rules and institutions. Such institutions may in turn function most effectively by changing the terms of domestic politics. Some liberals emphasize the role of particular organs of government—national ministries, courts, legislators—which increasingly forge their own transnational relationships.

In analyzing legal doctrine, liberals would accept traditional sources of law, but would question lawyers' easy claims of universality. . . . [L]iberals might rather emphasize differences in adherence and implementation across domestic regime types. Transnational liberals, moreover, would reject doctrines that limit law creation to states. Asserting that the domestic-international distinction has broken down, they would urge the significance of transnational norms created by private actors and governmental units, as well as domestic norms.

Constructivist theory differs fundamentally from these rationalist accounts. Constructivists reject the notion that states or other actors have objectively determined interests that they can pursue by selecting appropriate strategies and designing effective institutions. Rather, international actors operate within a social context of shared subjective understandings and norms, which constitute their identities and roles and define appropriate forms of conduct. Even fundamental notions like the state, sovereignty and national interests are socially constructed. They are not objectively true, but subjective; their meaning is not fixed, but contingent. . . .

In terms of legal doctrine, for constructivists all is subjective and perpetually "in play." Constructivists would look to a variety of normative expressions, including practice, to define the subjective element of custom or the meaning of treaty commitments. In addition, normative understandings vary with historical and political context. Much as liberals see categories of states differentially amenable to law, some international society theorists see "concentric circles of commitment," with a Western core embedded in dense webs of norms and institutions, a Southern ring that participates selectively, and an outer ring on the fringes of society.

3. *Economic Analysis of International Law*

Jeffery L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*

24 *Yale J. Intl. L.* 1 (1999)

Economics is the study of rational choice. As such, it plays a leading role in evaluating the effects of rational maximizing behavior under conditions of scarcity. Eco-

D. International Law Theory and Methodology

53

nomics enjoys an advantage over other disciplines in rationality-based analysis, simply because this analysis is central to economics, and economics has developed this analysis extensively. The development has largely been in the mathematical realm, the so-called “blackboard economics.” However, at this point in the development of economics — and of international law — the more mathematical models do not yet seem to engage the core issues of international law. Economics as practiced by lawyer-economists often involves complex cost-benefit analyses. This approach is often useful, but has important limitations due to problems of administrability, commensurability, and interpersonal comparison of utility.

However, the more promising economic methodologies, in terms of their capacity to generate a progressive research program that might usefully address persistent international law problems, may not be those that teach us to balance the costs and benefits of any particular policy, but rather those that focus on the balancers: international institutions (including the general international legal system). Indeed, the threshold issue in many, if not all, international legal problems is that of institutional choice. What institution — market, domestic legislature, adjudicatory body, or international rule-making body — ought to decide, for example, if one state’s intellectual property standards are too low, or another’s environmental standards are too high? The answers to questions like these ought to be informed by an understanding of the relative institutional competencies and capacities of the various alternatives, as well as by an appreciation of the strategic interactions among the various institutions. . . .

[T]ransactions in international relations are analogous to transactions in private markets. . . .

At its core, the relevant similarity is that international society, like any society, is a place where individual actors or groups of actors encounter one another and sometimes have occasion to cooperate, to engage in what may broadly be termed “transactions.” . . . In [law and economics] literature, markets are understood to arise out of the activities of individual persons or firms. . . .

So, too, for the international system. Like economic markets, the international system is formed by the interactions of self-regarding units — largely, but not exclusively, states. . . . Actors in each system are willing — to some extent — to relinquish autonomy in order to obtain certain benefits. Both the international and the domestic systems, then, are individualist in origin, spontaneously-generated and unintended products of self-interested behavior.

The assets traded in this international “market” are not goods or services per se, but assets peculiar to states: components of power. In a legal context, power is jurisdiction, including jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce. In international society, the equivalent of the market is simply the place where states interact to cooperate on particular issues — to trade in power — in order to maximize their baskets of preferences. To be sure, states may also trade in money or physical assets; however, the unique feature of states is their possession of governmental regulatory authority in the broad sense. International law is concerned with the definition, exchange, and pooling of this authority.

States enter the market of international relations in order to obtain gains from exchange. For present purposes, we can understand the structure of this market as follows: Beginning from the state of nature, the first level of “trade” is that which establishes constitutional rules — rules about how subsequent and subordinate rules

will be made. The next level of trade is that which allows departure from the state of nature: establishment of market-organizing rules of non-coercion, property rights, and contract. These rules facilitate additional transactions among states. Finally, institutions can be established to constrain (positively or negatively) transaction choices in the future. Of course, in contexts where there are no gains from trade, there should be no trade; that is, depending on the context, no cooperation, no treaty, and/or no integration may result. . . .

A. EXTERNALITIES AND EXCHANGE

Actions or inactions of states may have positive or negative “effects” on other states. Thus, for example, the environmental law (or deficiencies therein) in one state may be associated with adverse or beneficial effects (negative or positive externalities) in other states, because (for example) the first state’s law permits pollution that flows to other states. Domestic environmental laws may also “cause” adverse effects in other states by being too strict regarding the entry of foreign goods into the national market, or too lax with respect to domestic industries, resulting in competitiveness effects (pecuniary externalities). Externalization through regulation that fails to protect foreign interests, pecuniary externalization through strict regulation that has protectionist effects or through lax regulation that may be viewed as a subsidy, and subsidization itself may all be viewed as questions of prescriptive jurisdiction: which state — or international body — will have power to regulate which actions?

These external effects may cause other states to wish to alter some of these activities, through their own regulation or through changes in the first state’s regulation. There are two main ways to do so: the first is bilateral persuasion; the second is through institutionalization. Bilateral persuasion may involve force, exchange, or implicit reciprocities (either specific or diffuse); it occurs in the “spot market.” Institutionalization involves the transfer of power over time through a treaty or an international organization. . . .

B. ECONOMIES OF SCALE AND SCOPE

Related potential sources of gains from trade are economies of scale and economies of scope. Given the increasingly global nature of society, and of problems such as environmental degradation and trade, it seems likely that there would be economies of scale, under some circumstances, in the international or regional regulation of these matters.

Economies of scale have a number of components. First, states may enjoy economies of scale in contexts where they regulate transnational actors. For example, there may be efficiencies gained through coordinated rule-making, surveillance, and enforcement activities. In the absence of these transactions, states face heightened risks of evasion, detrimental regulatory competition (which can be driven by externalization), and unjustified regulatory disharmony, all resulting in inefficiencies. Second, there may be technological economies of scale, relating to equipment, acquisition of specialized skills, or organization. Economies of scale may provide a motivation for integration in order to capture these economies.

D. International Law Theory and Methodology

55

Economies of scope are reductions in cost resulting from centralized production of a group of products, especially where the products share a common component. Once several areas of international regulation are established, economies of scope may be realized by regulating other areas. . . .

Finally, economies of scale and scope may arise from increased frequency of transactions or from longer duration of transactions. Given greater numbers of transactions in international relations, one would expect greater economies of scale. In addition, learning curve effects may, over time, give rise to economies of experience, which are economies of scale and scope that arise from repeated activity over time.

C. TRANSACTIONS AND INSTITUTIONS

States may enter into one-off unilateral transfers of power or jurisdiction, for example, when one state's courts determine that the doctrine of *forum non conveniens* or another doctrine of abstention calls on them to decline adjudicative jurisdiction in favor of another forum. Alternatively, states may enter into treaties to exchange jurisdiction over time with respect to a particular subject matter. For instance, states may enter into extradition treaties whereby they agree on the circumstances under which they will transfer jurisdiction to adjudicate claims against particular individuals. In addition, states may enter into institutional arrangements — constituted by treaties — that provide for legislative capacity to agree on further exchanges of jurisdiction over time. . . .

The new institutional economics assumes a dichotomy between transactions and institutions. But between the spot market transaction and the formal organization there exist many types of formal contracts and informal arrangements, and even the formal organization is a nexus of contracts. Thus, the supposed dichotomy is, in fact, a continuum: the boundary between the transaction and the institution is blurred. The metric of this continuum is the relative scope of retained individual discretion: where the individual retains greater discretion, she is closer to the pole of the market; where the individual retains less discretion — and assigns more discretion through contract or organization — she is closer to the pole of the firm. This continuum is translated in international economic relations to the continuum running from intergovernmentalism to integration, where integration denotes a pooling of authority. . . .

These analytical perspectives allow us to understand the choices that states make in deciding how to relate to one another. There may be circumstances where it is easier (in transaction cost and strategic terms) to engage in transactions through a market-type mechanism. Alternatively, in some circumstances it may be easier to engage in transactions — to deal in power or jurisdiction — through organizational mechanisms. The recognition that these mechanisms are related and comparable allows states to compare them and to match their characteristics to particular circumstances more accurately.

Thus, states choose among varying types and locations of transactions in power. Law and economics would predict that their choice depends on factors such as transaction costs and strategic considerations.

4. *Critical Legal Studies*

David Kennedy, A New Stream of International Law Scholarship

7 Wis. Intl. L.J. 1 (1988)

Let me begin with ideas about the relationship between public international law on the one hand, and something called “society” or “political economy” or “state behavior” on the other. Images of such a relationship have preoccupied public international law scholarship. Everyone has seemed convinced that these two things were, or should be, or purported to be, or struggled to be, different from one another. Indeed, they seemed to feel public international law could only *be* law if it were independent and “normative,” a word which, somewhat oddly, has been read to mean “against the state.” At the same time, and equally fervently, everyone has seemed convinced that the goal, or achievement, or aspiration or project of public international law is to link law with international “society.” This could be done descriptively, or theoretically, or by enacting resolutions, or signing treaties or allocating rights — but it had to be done. Otherwise public international law would seem hopelessly irrelevant to what really mattered, out of touch with the sovereign, in danger of losing touch with the source of power, glory and employment.

This conviction — that international law was not politics but struggled to be politics — has accounted for much of the discipline’s eclectic insecurity. It explains the pressure to regularize international law institutionally, and to analogize international law to more familiar domestic constitutional configurations. It explains the historic preoccupation with the relationship between norm and deed, and the mountain of theory — be it naturalist or positivist — explaining how law might both emanate from and control the state. It undergirds the oscillation between Republican formalism and democratic enthusiasm and explains the doctrinal preoccupation with rights — be they rights to food, to self-determination or to asylum — which could link legislative determination to political enactment and ensure respect for public law.

Displacing — and I mean “displacing,” setting aside, neither proving nor disproving but simply avoiding — such an entrenched constellation of imagery has been difficult. Doing so has meant borrowing from recent linguistic and literary theory and from the work of contemporary critical legal scholarship — which has itself drawn on the European philosophical traditions of structuralism and post-structuralism — in order to reformulate the relationship between law and politics in *rhetorical* terms.

Rather than concentrating on the relationship between a law and a society which actually *are* separate, joined or related only through the prism of the state or sovereign, I have tried to extend what has been the single most telling and controversial insight of much recent critical legal scholarship in the United States: namely, that law is nothing but a repetition of the relationship it posits between law and society. Rather than a stable domain which *relates* in some complicated way *to* society or political economy or class structure, law is simply the practice and argument about the relationship between something posited as law and something posited as society.

Mine is a relational and rhetorical image of a “law” and a “society” — invoked by a language which establishes them by positing their originality, their priority,

D. International Law Theory and Methodology

57

their presence. My sense is that this rhetorical project — in many ways *the* rhetorical project of public international law scholarship — accounts for the doctrinal structures of “public” and “private” or “objective” and “subjective” which we find recurring throughout international public law doctrine and for the recurrent scholarly contrasts we find between theory and practice.

In this alternative picture, law is nothing but an attempt to project a stable relationship between spheres it creates to divide. As a result, the relationship between these zones is much looser than we usually think. . . .

International legal scholars have produced a large body of work about the conditions under which treaties, custom or general principles of law bind actors and the hierarchy among the various doctrinal forms which might apply in a given instance. This body of doctrine provides a good introduction to the rhetorical patterns of public international law as a whole. Contemporary analyses generally work from the sources enumerated in Article 38 of the Statute of the International Court of Justice, proceeding to examine the conditions under which norms of these types will be binding, the hierarchical relationships among them, and the extent to which potential sources not included in the list (such as U.N. resolutions) might be assimilated to one of these classic forms.

Several aspects of this literature might seem odd to a man from the moon. For one thing, the literature proceeds quite abstractly, attempting to delimit boundary conditions for each category independent of the particular content of the norms whose source is being considered. There seems a shared sense that the abstract categories will control the content of the norms, rather than merely register them. Argument about sources doctrine is similarly abstracted from the content of the norm under consideration.

Much of this argument, moreover, seems to repeat a rather simple and familiar debate between the authoritative power of sovereign consent on the one hand, and some extraconsensual norm on the other. Argument about the relative authority of various sources, about their boundaries and effects, seems to be carried out as a debate about sovereign consent. It is an odd debate. At one level, it seems that the choice between a preference for consensual and non-consensual norms will answer all questions. Either a consensual treaty beats a non-consensual custom or it does not. But somehow this question is never squarely faced in doctrinal argument — somebody always seems to muddy the waters.

The bindingness of treaties, after all, seems more than consent, prior to consent, the very condition for a consensual system. And custom might also be the product of consent. Although arguments about the authority of international norms appeal either to consent or to some norm beyond consent as if these were exclusive and definitive possibilities, in the end, each always seems to invoke the other somehow — in a subordinate interpretation, or secondary doctrine.

The basic debate about consent suggests that the discourse of sources will address a basic theoretical dilemma for international law: how can it be simultaneously independent of and enmeshed with sovereign will? The autonomy of sovereigns ensures the attractiveness of consensual sources, while their participation in a preexisting normative order encourages a non-consensual rhetorical line. In order to fulfill the desire for an autonomous system of normative law, argument about the sources of international law simply included strands associated with both visions. Sources rhetoric is interesting not because it resolves the issue, but because it transforms it

into a debate between abstract legal forms — a debate which can manage the conflict between them interminably.

For all its abstraction, sources rhetoric is a distinctly doctrinal affair, neither theoretical nor political. Norms are legally binding which fit within one of a series of doctrinally elaborated categories, not when a persuasive argument about political interest or theoretical coherence can be made for their observance. The distinction between consensual and non-consensual sources — used to distinguish treaties from custom, to contrast various schools of thought about the nature of custom, to divide arguments for and against the application of specific norms in various situations, and in dozens of other ways throughout the materials on sources — opposes themes whose fluidity encourages a proliferation of rhetorical possibilities and strategies more than decisive identifications and differentiations.

The play between these themes gives sources discourse a doctrinal feel without ever presenting the clash between two norms — or two sovereigns — in substantive or political terms. A source discourse which operated completely within the rhetoric of either consent or systemic considerations would seem doctrinal, but it would not be able to avoid a more substantive face. A consensual rhetoric could certainly differentiate and prioritize norms in an abstract way, but in choosing among two norms, one would need to choose between the claims of two sovereigns about their autonomous consents. A purely extra-consensual rhetoric, while it would obviously avoid this problem, would have a difficult time avoiding a more substantive choice among various systemically grounded norms. By combining these two rhetorics, sources discourse can defend its independence from sovereign autonomy and from substantive legal regulation.

The question, obviously, is how do they do it? My own examination of various sources doctrines and cases suggested a number of rather obvious rhetorical strategies. The most obvious is simply repetition: differentiating various doctrines from one another as consensual and non-consensual and then repeating the distinction in distinguishing each doctrine from its exception or interpreting doctrinal strands which have once been characterized and perhaps adopted as consensual in non-consensual terms. Thus, custom might seem non-consensual when contrasted with treaty, but be measured in consensual terms, or subjected to a consent based exception — say, for persistent opposers. . . .

For additional discussion of critical legal studies as applied to international law, see Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 3 *Eur. J. Intl. L.* 66 (1992); Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 *Harv. Intl. L.J.* 81 (1991); and Phillip Trimble, *International Law, World Order and Critical Legal Studies*, 42 *Stan. L. Rev.* 811 (1990).

5. *Feminist Jurisprudence*

Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*

85 *Am. J. Intl. L.* 613 (1991)

The development of feminist jurisprudence in recent years has made a rich and fruitful contribution to legal theory. Few areas of domestic law have avoided the

D. International Law Theory and Methodology

59

scrutiny of feminist writers, who have exposed the gender bias of apparently neutral systems of rules. A central feature of many western theories about law is that the law is an autonomous entity, distinct from the society it regulates. A legal system is regarded as different from a political or economic system, for example, because it operates on the basis of abstract rationality, and is thus universally applicable and capable of achieving neutrality and objectivity. These attributes are held to give the law its special authority. More radical theories have challenged this abstract rationalism, arguing that legal analysis cannot be separated from the political, economic, historical and cultural context in which people live. Some theorists argue that the law functions as a system of beliefs that make social, political and economic inequalities appear natural. Feminist jurisprudence builds on certain aspects of this critical strain in legal thought. It is much more focused and concrete, however, and derives its theoretical force from immediate experience of the role of the legal system in creating and perpetuating the unequal position of women. . . .

International law has thus far largely resisted feminist analysis. The concerns of public international law do not, at first sight, have any particular impact on women: issues of sovereignty, territory, use of force and state responsibility, for example, appear gender free in their application to the abstract entities of states. Only where international law is considered directly relevant to individuals, as with human rights law, have some specifically feminist perspectives on international law begun to be developed. . . .

Our approach requires looking behind the abstract entities of states to the actual impact of rules on women within states. We argue that both the structures of international lawmaking and the content of the rules of international law privilege men; if women's interests are acknowledged at all, they are marginalized. International law is a thoroughly gendered system. . . .

The structure of the international legal order reflects a male perspective and ensures its continued dominance. The primary subjects of international law are states and, increasingly, international organizations. In both states and international organizations the invisibility of women is striking. Power structures within governments are overwhelmingly masculine: women have significant positions of power in very few states, and in those where they do, their numbers are minuscule. Women are either unrepresented or underrepresented in the national and global decision-making processes.

States are patriarchal structures not only because they exclude women from elite positions and decision-making roles, but also because they are based on the concentration of power in, and control by, an elite and the domestic legitimation of a monopoly over the use of force to maintain that control. This foundation is reinforced by international legal principles of sovereign equality, political independence and territorial integrity and the legitimation of force to defend those attributes.

International organizations are functional extensions of states that allow them to act collectively to achieve their objectives. Not surprisingly, their structures replicate those of states, restricting women to insignificant and subordinate roles. Thus, in the United Nations itself, where the achievement of nearly universal membership is regarded as a major success of the international community, this universality does not apply to women. . . .

At a deeper level one finds a public/private dichotomy based on gender. One explanation feminist scholars offer for the dominance of men and the male voice in

all areas of power and authority in the western liberal tradition is that a dichotomy is drawn between the public sphere and the private or domestic one. The public realm of the work place, the law, economics, politics and intellectual and cultural life, where power and authority are exercised, is regarded as the natural province of men; while the private world of the home, the hearth and children is seen as the appropriate domain of women. The public/private distinction has a normative, as well as a descriptive, dimension. Traditionally, the two spheres are accorded asymmetrical value: greater significance is attached to the public, male world than to the private, female one. The distinction drawn between the public and the private thus vindicates and makes natural the division of labor and allocation of rewards between the sexes. Its reproduction and acceptance in all areas of knowledge have conferred primacy on the male world and supported the dominance of men. . . .

What force does the feminist critique of the public/private dichotomy in the foundation of domestic legal systems have for the international legal order? Traditionally, of course, international law was regarded as operating only in the most public of public spheres: the relations between nation-states. We argue, however, that the definition of certain principles of international law rests on and reproduces the public/private distinction. It thus privileges the male world view and supports male dominance in the international legal order.

The grip that the public/private distinction has on international law, and the consequent banishment of women's voices and concerns from the discipline, can be seen in the international prohibition on torture. The right to freedom from torture and other forms of cruel, inhuman or degrading treatment is generally accepted as a paradigmatic civil and political right. It is included in all international catalogs of civil and political rights and is the focus of specialized United Nations and regional treaties. The right to be free from torture is also regarded as a norm of customary international law — indeed, like the prohibition on slavery, as a norm of *jus cogens*.

The basis for the right is traced to “the inherent dignity of the human person.” Behavior constituting torture is defined in the Convention against Torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

This definition has been considered broad because it covers mental suffering and behavior “at the instigation of” a public official. However, despite the use of the term “human person” in the Preamble, the use of the masculine pronoun alone in the definition of the proscribed behavior immediately gives the definition a male, rather than a truly human, context. More importantly, the description of the prohibited conduct relies on a distinction between public and private actions that obscures injuries to their dignity typically sustained by women. The traditional canon of human rights law does not deal in categories that fit the experiences of women. It is cast in terms of discrete violations of rights and offers little redress in cases where there is a pervasive, structural denial of rights.

D. International Law Theory and Methodology

61

The international definition of torture requires not only the intention to inflict suffering, but also the secondary intention that the infliction of suffering will fulfill a purpose. Recent evidence suggests that women and children, in particular, are victims of widespread and apparently random terror campaigns by both governmental and guerrilla groups in times of civil unrest or armed conflict. Such suffering is not clearly included in the international definition of torture.

A crucial aspect of torture and cruel, inhuman or degrading conduct, as defined, is that they take place in the public realm: a public official or a person acting officially must be implicated in the pain and suffering. The rationale for this limitation is that “private acts (of brutality) would usually be ordinary criminal offenses which national law enforcement is expected to repress. International concern with torture arises only when the State itself abandons its function of protecting its citizenry by sanctioning criminal action by law enforcement personnel.” Many women suffer from torture in this limited sense. The international jurisprudence on the notion of torture arguably extends to sexual violence and psychological coercion if the perpetrator has official standing. However, severe pain and suffering that is inflicted outside the most public context of the state — for example, within the home or by private persons, which is the most pervasive and significant violence sustained by women — does not qualify as torture despite its impact on the inherent dignity of the human person. Indeed, some forms of violence are attributed to cultural tradition. The message of violence against women, argues Charlotte Bunch, is domination:

[S]tay in your place or be afraid. Contrary to the argument that such violence is only personal or cultural, it is profoundly political. It results from the structural relationships of power, domination, and privilege between men and women in society. Violence against women is central to maintaining those political relations at home, at work, and in all public spheres.

States are held responsible for torture only when their designated agents have direct responsibility for such acts and that responsibility is imputed to the state. States are not considered responsible if they have maintained a legal and social system in which violations of physical and mental integrity are endemic. . . .

Another example of the failure of the normative structure of international law to accommodate the realities of women’s lives can be seen in its response to trafficking in women. Trafficking in women through prostitution, pornography and mail-order-bride networks is a pervasive and serious problem in both the developed and the developing worlds. These practices do not simply fall under national jurisdiction, as the ramifications of the trafficking and exploitative relationships cross international boundaries. They involve the subordination and exploitation of women, not on the simple basis of inequality or differences among individuals, but as a result of deeply engrained constructs of power and dominance based on gender. Catharine MacKinnon’s observation that women’s “material desperation” is connected to violence against women is even more powerful in the international context. To a large extent, the increase in trafficking in women in the Third World stems from growing economic disparities on the national and international levels. Once caught up in the trafficking networks, penniless women in foreign countries are at the mercy of those who arrange and profit from the trade.

Existing norms of international law could be invoked to prohibit at least some

of the international exploitation of women and children. The international law on this issue, however, is incomplete and limited in scope. Just as the prohibition of the slave trade, and subsequently of slavery itself, did not occur until economic considerations supported its abolition, so a real commitment to the prevention of sexual trafficking in women is unlikely to be made unless it does not adversely affect other economic interests. . . .

Another example of internationally recognized rights that might affect women and men differently are those relating to the protection of the family. The major human rights instruments all have provisions applicable to the family. Thus, the Universal Declaration proclaims that the family is the "natural and fundamental group unit of society and is entitled to protection by society and the State." These provisions ignore that to many women the family is a unit for abuse and violence; hence, protection of the family also preserves the power structure within the family, which can lead to subjugation and dominance by men over women and children.

The development of rights may be particularly problematic for women in the Third World, where women's rights to equality with men and traditional values may clash. . . .

For additional discussion of feminist perspectives on international law, see Hilary Charlesworth & Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000); Barbara Stark, *Women and Globalization: The Failure and Postmodern Possibilities of International Law*, 33 *Vand. J. Transnat'l L.* 503 (2000); and Fernando R. Teson, *Feminism and International Law: A Reply*, 33 *Va. J. Intl. L.* 647 (1993).

Bibliography

Standard texts on international law include Ian Brownlie, *Principles of Public International Law* (5th ed. 1998); Robert Jennings & Arthur Watts, eds., *Oppenheim's International Law* (9th ed. 1992); Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th rev. ed. 1997); I.A. Shearer, *Starke's International Law* (11th ed. 1994); and Malcom N. Shaw, *International Law* (4th ed. 1997). More summary treatments can be found in David J. Bederman, *International Law Frameworks* (2001); Thomas Buergenthal & Sean D. Murphy, *Public International Law* (2002); and Mark W. Janis, *An Introduction to International Law* (3d ed. 1999). For additional discussion of the reasons that nations comply with international law, see Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995).

E. INTERNATIONAL LAW IN ACTION: THE U.S. AND INTERNATIONAL RESPONSE TO THE ATTACKS OF SEPTEMBER 11, 2001

In this section we recount the events surrounding the terrorist attacks of September 11, and the U.S. and international response to them. These events have

fundamentally altered the existing relations among many states and other entities, and have had a major impact on international law. This case study, designed to stimulate your thinking about the role of international law, includes many accompanying questions, questions that you will be able to answer much more knowledgeably later in the course. In subsequent chapters we also use the collective reaction to the attacks for occasional questions.

1. Introduction

September 11, 2001, started as a relatively peaceful day in the world. However, as people began arriving at work on the U.S. East Coast, the calm of a crisp, clear day was shattered. American Airlines Flight 11, out of Boston and destined for San Francisco, was hijacked in mid-air by Mohammed Atta and four accomplices. Atta then diverted the large Boeing 767 and crashed it at high speed and full of fuel into the North Tower of New York City's World Trade Center at 8:46 A.M.

As fire and police forces converged on the building and sketchy initial media reports were widely circulated, a second large passenger jet, United Airlines Flight 175, slammed into the South Tower at 9:03 A.M., making clear that the events were no accident. About 30 minutes later, American Airlines Flight 77, originating at Dulles Airport near Washington, D.C., and destined for Los Angeles, flew low along the Potomac River and initially appeared headed toward the White House. Possibly because the hijacker pilot had trouble picking out the White House, the plane veered and found a target about two miles away, hitting the highly visible Pentagon at ground level. A fourth hijacked plane, United Airlines Flight 93, crashed in western Pennsylvania about 20 minutes later. Some of its passengers, who had learned of the first attacks from family and friends over cellular phones, valiantly decided to rush the cockpit and to try to retake control of the plane, rather than let it serve as another flying bomb. In the ensuing struggle between the four trained hijackers, who were armed with box cutters (that contain razor blades), and the passengers, who apparently commandeered the food cart and tableware, the plane crashed, far from its apparent target of the U.S. Capitol or the White House.

About 3,000 innocent people were killed at the World Trade Center site, the Pentagon, and aboard the four aircraft, in addition to the 19 hijackers. The victims included 343 firefighters and 72 police officers who had rushed without hesitation to the aid of people at the World Trade Center. More Americans died in the attacks on September 11 than on any other single day in U.S. history, except during the Battles of Antietam and Gettysburg during the Civil War. The Japanese attack on Pearl Harbor, another highly destructive sneak attack, killed about 2,400 people, mostly sailors and other military personnel. But Pearl Harbor was an attack on a military target for a military purpose — to weaken or cripple the ability of the United States to fight a naval war in the Pacific — and Gettysburg and Antietam were full-fledged military battles. By contrast, the terrorists on September 11 intentionally targeted civilians as part of their attempt to inflict much symbolic and physical damage. The World Trade Center had earlier been the target of a terrorist bombing in February 1993 and stood as a visible symbol of the United States and its economic power, and the Pentagon was a symbol of the U.S. government and its military. Nationals of 83 other countries besides the United States were murdered in the attacks,

including many Muslims. Great Britain alone lost at least 67 citizens, making September 11 the most deadly terrorist attack in its history as well.

2. *Historical Background*

The attacks were deliberate and carefully planned. The United States quickly established that Osama bin Laden and his Al Qaeda organization were behind them. It helps to understand the historical background.

Bin Laden and Al Qaeda

Osama bin Laden's *jihadi* career began in the 1980s, fighting the Soviets in Afghanistan.

Peter L. Bergen, Jr., *Holy War, Inc.: Inside the Secret World of Osama bin Laden*

53-54, 62, 80-81, 88, 98-99 (2002)

Within weeks of the Soviet invasion [in December 1979, Osama] bin Laden, then twenty-two, voted with his feet and his wallet, heading to Pakistan to meet with Afghan [opposition] leaders. . . . He then returned to Saudi Arabia and started lobbying his family and friends to provide money to support the Afghan guerrillas and continued making short trips to Pakistan for his fund-raising work.

In the early 1980s bin Laden, already an expert in demolition from time spent working in his family's construction business, made his first trips into Afghanistan, bringing with him hundreds of tons of construction machinery, bulldozers, loaders, dump trucks, and equipment for building trenches, which he put at the disposal of the *mujahideen*. The machinery would be used to build rough roads, dig tunnels into the mountains for shelter, and construct rudimentary hospitals. Bin Laden's followers also set up mine-sweeping operations in the Afghan countryside.

Despite the fact that the United States was also supporting the mujahideen, bin Laden was already voicing anti-American sentiments during the early eighties. . . .

In 1984 bin Laden set up a guesthouse in Peshawar[, Pakistan] for Muslims drawn to the jihad. It was called *Beit al-Ansar*, or House of the Supporters, an allusion to the Prophet Muhammad's followers who helped him when he had to flee his native Mecca for Medina. Initially the house was simply a way station for those who would be sent for training with one of the Afghan factions. Later, bin Laden would form his own military operation. . . .

The Afghan war did not only move men like bin Laden spiritually; it also enabled them to meet key figures in terrorist organizations in the Arab world. In 1987 bin Laden was introduced to members of Egypt's Jihad group, the organization behind the 1981 assassination of Egyptian President Anwar Sadat. A leader of the group, Ayman al-Zawahiri, had settled in Peshawar and was putting his skills as a physician to work at a hospital for Afghan refugees. In 1989, bin Laden founded

E. International Law in Action**65**

al-Qaeda, the “base” in Arabic, an organization that would eventually merge with al-Zawahiri’s Jihad group. . . .

[When the Soviets finally withdrew from Afghanistan in 1989, bin Laden left as well, returning to his native Saudi Arabia at the age of 32. Bin Laden’s anti-Americanism received a target in 1990, when the Persian Gulf War brought hundreds of thousands of U.S. troops to Saudi Arabia, in violation of what bin Laden saw as the prophet’s command to “let there be no two religions in Arabia.”]

. . . [B]in Laden had been denouncing Americans well before he was forced to put up with them in the flesh. On his return from the Afghan war . . . , he was quickly in demand as a speaker in mosques and homes, and one of his principal themes was a call for a boycott of American goods because of that country’s support for Israel. Hundreds of thousands of recordings of his speeches circulated in the Saudi kingdom.

Ironically, bin Laden was sympathetic to the underlying cause of the U.S. presences in Saudi Arabia: the war against Saddam Hussein. . . .

After Hussein’s forces did invade the small, oil-rich state on August 1, 1990, and threaten the security of Saudi Arabia, bin Laden immediately volunteered his services and those of his holy warriors. The Saudi army and his own men would be enough to defend the Kingdom, he reasoned; after all, hadn’t his own troops been instrumental in driving the Russians from Afghanistan?

The Saudis did not take the offer seriously. Despite the tens of billions of dollars they had spent on their own army, they turned instead for help to the U.S. government and then-President Bush. . . .

Bin Laden’s opposition to the presence of American troops was echoed by two prominent religious scholars, Sarar al-Hawali and Salman al-’Auda, who were subsequently jailed by the Saudis. Bin Laden, whose credentials as a religious scholar are nonexistent, often cites al-Hawali and al-’Auda to justify his own pronouncements against the United States. . . .

[By 1991 the Saudi regime was fed up with bin Laden’s anti-government critiques and effectively put him under house arrest. But bin Laden was able to use his family connections to leave the kingdom, and he moved his base of operations to Sudan, then under the de facto rule of an Islamist cleric.

[From his base in Sudan, bin Laden simultaneously ran both a legitimate business operation and a terrorist organization. He plausibly claims responsibility for the deaths of 18 American soldiers in Mogadishu in 1993, which helped lead the United States to withdraw from Somalia. The 1993 bombing of the World Trade Center was carried out by a group of terrorists closely connected to the Al Qaeda network. The bomber was himself apparently trained in explosives by Al Qaeda instructors in Afghanistan.]

In 1995 the de facto ruler of Sudan . . . organized an Islamic People’s Congress, during which bin Laden was able to meet with leaders of militant groups from Pakistan, Algeria, and Tunisia as well as the Palestinian Islamic Jihad and Hamas. At the same time, al-Qaeda sought to forge alliances with the Iranian-backed Hezbollah, based in southern Lebanon. Despite their disputes over religious doctrine — Hezbollah is Shia, while bin Laden espouses a conservative Sunni Islam — the two groups buried their differences to make war against their common enemy, the United States. Al-Qaeda members traveled to Lebanon, where the group maintained a guesthouse, and, with Hezbollah, learned how to bomb large buildings.

Bin Laden, meanwhile, met with Imad Mughniyeh, the secretive, Iran-based head of Hezbollah's security service. This was an important meeting. It was Mughniyeh who masterminded the suicide truck bombing of the Marine barracks in Beirut in 1983, which killed 241 American servicemen and precipitated a U.S. pullout from Lebanon within a few months.

. . . [T]he Beirut model was one bin Laden hoped to follow. . . .

[Finally, under intense U.S. pressure, Sudan expelled bin Laden in 1996. Sudan offered to send him to Saudi Arabia or the United States for detention. However, the Saudis, who had taken the unusually severe step of stripping bin Laden of his citizenship in 1994, refused to accept him. The United States determined it could not make a case against him. He went instead to Afghanistan.

[The Taliban regime treated bin Laden as an honored guest. In return, he provided money and warriors to the cash-strapped Taliban to help them in the civil war.]

On February 22, 1998, bin Laden upped the ante considerably when he announced the formation of the World Islamic Front for Jihad against the Jews and the Crusaders. Cosignatories of the agreement included Ayman al-Zawahiri of Egypt's Jihad Group, bin Laden's most trusted lieutenant; Rifa Ahmed Taha of Egypt's Islamic Group; and the leaders of Pakistani and Bangladeshi militant organizations. All were brought together under one umbrella for the first time.

Because the announcement inaugurating the World Islamic Front is the key text that set the stage for al-Qaeda's terrorist attacks, it is worth quoting at some length.

Since Allah spread out the Arabian Peninsula, created its desert, and drew its seas, no such disaster has ever struck as when those Christian legions spread like pest, crowded its land, ate its resources, eradicated its nature, and humiliated its leaders. . . . No one argues today over three facts repeated by witnesses and agreed upon by those who are fair. . . . They are: Since about seven years ago, America has been occupying the most sacred lands of Islam: the Arabian Peninsula. It has been stealing its resources, dictating to its leaders, humiliating its people, and frightening its neighbors. It is using its rule in the Peninsula as a weapon to fight the neighboring peoples of Islam. . . . The most evident proof is when the Americans went too far in their aggression against the people of Iraq. . . . Despite major destruction to the Iraqi people at the hand of the Christian alliance and the great number of victims exceeding one million, Americans are trying once again to repeat these horrifying massacres as if they are not satisfied with the long blockade or the destruction. Here they come today to eradicate the rest of these people and to humiliate its Muslim neighbors. Although the Americans' objectives of these wars are religious and economic, they are also to serve the Jewish state and distract from its occupation of the Holy Land and its killing of Muslims therein. The most evident proof thereof is their persistence to destroy Iraq, the most powerful neighboring Arab state. . . . All those crimes and calamities are an explicit declaration by the Americans of war on Allah, His Prophet, and Muslims. . . . Based upon this and in order to obey the Almighty, we hereby give all Muslims the following judgment: The judgment to kill and fight Americans and their allies, whether civilians or military, is an obligation for every Muslim who is able to do so in any country. . . . In the name of Allah, we call upon every Muslim, who believes in Allah and asks for forgiveness, to abide by Allah's order by killing Americans and stealing their money anywhere, anytime, and whenever possible. We also call upon Muslim scholars, their faithful leaders, young believers, and soldiers to launch a raid on the American soldiers of Satan and their allies of the Devil.

A CIA analysis point out: “These *fatwas* are the first from these groups that explicitly justify attacks on American civilians anywhere in the world.” . . .

On August 7, 1998, Al Qaeda operatives bombed the U.S. embassies in Nairobi, Kenya, and Dar-es-Salaam, Tanzania, killing 224 people, mostly Africans. For much of the West, this was the first time the name Osama bin Laden made headlines. The United States responded with cruise missile attacks against Al Qaeda training installations in Afghanistan, and an attack against a chemical plant in Sudan that it later appears was not connected with Al Qaeda. A U.S. grand jury subsequently indicted bin Laden in absentia for the bombing of the U.S. embassies.

On October 12, 2000, two suicide bombers exploded a bomb aboard a small boat alongside the U.S.S. Cole, which was refueling in a Yemenese port, severely damaging the destroyer and killing 17 people. This attack, which was apparently planned by Al Qaeda, drew virtually no retaliatory response from the United States. It was Al Qaeda’s last attack before September 11 and might well have encouraged bin Laden to believe that the United States would not respond in any significant military way to an attack.

Bin Laden’s Beliefs

Bin Laden professes a sect of Sunni Islam called Wahhabi. Professor Karen Armstrong describes the origins of this sect.

Karen Armstrong, The Battle for God

44 (2000)

On the margins of the [Ottoman] empire, where Ottoman decline was most acutely felt, people responded to the change and unrest as they had always done — in religious terms. In the Arabian Peninsula, Muhammad ibn Abd al-Wahhab (1703-92) managed to break away from Istanbul and create a state of his own in central Arabia and the Persian Gulf region. Abd al-Wahhab was a typical Islamic reformer. He met the current crisis by returning to the Koran and the Sunnah, and by vehemently rejecting medieval jurisprudence, mysticism, and philosophy. Because they diverged from this pristine Islam, as he envisaged it, Abd al-Wahhab declared the Ottoman sultans to be apostates, unworthy of the obedience of the faithful and deserving of death. Their Shariah state was inauthentic. Instead, Abd al-Wahhab tried to create an enclave of pure faith, based on the practice of the first Muslim community in the seventh century. It was an aggressive movement, which imposed itself on the people by force.

Wahhabi remains the official religion of the house of Saud today, and it remains very conservative. Reinterpretation of issues decided by the Qu’ran, *hadith*, or early jurists is forbidden, although some flexibility is permitted when new issues arise. Strict conformity with its precepts is enforced by the *mutawwiin*, who are authorized

to supervise dress, public behavior, and public prayer. In recent years, the Saudi regime has taken to discouraging and even banning non-Muslim worship in the kingdom.

For bin Laden, however, his particular sect takes second place to his agenda. Not only was he closely allied with the Taliban, whose own reactionary, puritanical breed of Islam, known as Deobandi, differs in a number of ways from Wahhabi, but he has made alliances with Islamist groups from Yemen, Egypt, and various other African and Middle Eastern countries. In these countries, and especially in Egypt, the homeland of many of the top Al Qaeda leaders, Wahhabi had little influence. Bin Laden's alliance with the *shī'ite* Hezbollah organization is even more telling. Bin Laden was willing to bury a millennium of religious difference for the knowledge to make Al Qaeda more effective.

Bin Laden's ultimate goal is far grander than the mere expulsion of the infidel from Saudi Arabia. As Peter Bergen explains:

In all the tens of thousands of words that bin Laden has uttered on the public record there are some significant omissions: he does not rail against the pernicious effects of Hollywood movies, or against Madonna's midriff, or against the pornography protected by the U.S. Constitution. Nor does he inveigh against the drug and alcohol culture of the West, or its tolerance for homosexuality. . . .

Judging by his silence, bin Laden cares little about such cultural issues. What he condemns the United States for is simple: its policies in the Middle East. Those are, to recap briefly: the continued American military presence in Arabia, U.S. support for Israel, its continued campaign against Iraq, and its support for regimes such as Egypt and Saudi Arabia that bin Laden regards as apostates from Islam.

Bin Laden is at war with the United States, but his is a political war, justified by his own understanding of Islam, and directed at the symbols and institutions of American power. . . .

Bin Laden envisaged his own counterpoint to the mark of globalization — the restoration of the *Khalifa*, or caliphate, which would begin from Afghanistan. Not since the final demise of the Ottoman Empire after the end of World War I had there been a Muslim entity that more or less united the *umma*, the community of Muslim believers, under the green flag of Islam. In this view, the treaties that followed World War I had carved up the Ottoman Empire, "the Sick Man of Europe," into ersatz entities like Iraq and Syria. Bin Laden aimed to create the conditions for the rebirth of the *Khalifa*, where the *umma* would live under the rule of the Prophet Muhammad in a continuous swath of green from Tunisia to Indonesia, much as the red of the British empire colored maps from Egypt to Burma before World War II. As a practical matter, the restoration of the *Khalifa* had about as much chance as the Holy Roman Empire suddenly reappearing in Europe, but as a rhetorical device the call for its return exercised a powerful grip on bin Laden and his followers. (Bergen, 226-227, 20-21.)

The Taliban

It is also helpful to understand the Taliban, who provided bin Laden and Al Qaeda an important sanctuary in Afghanistan.

After the Soviet withdrawal from Afghanistan in 1989, various Afghan factions and warlords embroiled the country in a fierce power struggle. In reaction to the prevalent anarchy and warlordism, a new movement of former *mujahideen* (freedom

fighters) began. This new movement, called the Taliban, took its name from the word *talib*, which means pupil. With substantial support from Pakistan, the Taliban successfully dedicated itself to removing warlords, sustaining order, and imposing an extreme interpretation of Islam on Afghanistan.

By 1994, the Taliban had captured the southern city of Kandahar, and by the fall of 1996, the regime extended its control over the capital city of Kabul and other strategic regions.

The ultra-purist version of Islam espoused by the Taliban was based in part on the rural Pashtun tradition. However, in the process of imposing this extreme interpretation of Islam, the Taliban committed grave human rights violations against the Afghan people, generating an international backlash against the rogue regime.

Some of the Taliban's most shocking policies were directed against Afghan women. Women were forced to wear a traditional body garment called a burqa, and they could not leave home without an accompanying male relative. The Taliban forbade girls from obtaining an education and prohibited women from working outside the home. Moreover, women's access to health care was restricted and women did not have the right to vote.

The Taliban also systematically opposed religious freedom. In early 2001, Mullah Omar ordered the destruction of all Buddhist statues in Afghanistan on the grounds that religious representations were un-Islamic. As a result, thousands of Buddhist statues were demolished, including some dating back to the third and fifth centuries. In particular, the Taliban blew up two giant, ancient Buddha statues outside the city of Bamiyan.

The Taliban's massive human rights violations also extended to ethnic minorities. The Taliban killed noncombatants on several documented occasions. These atrocities particularly targeted the Shi'a Hazara ethnic group, a population that was a minority in the northern and western regions of Afghanistan.

Not only were the Taliban's social and religious policies objectionable, but their economic activities stirred international concern. After the disintegration of central authority following the Soviet withdrawal, opium became the sole cash crop for many Afghans. Opium-derived revenues soon became a major source of funding for the Taliban, including nearly \$40 million per year in opium taxes alone.

In part because of its human rights violations and reliance on opium exports, the Taliban were not accepted by the international community. Even though the Taliban controlled roughly 90 percent of Afghanistan from about 1998 onward, only three countries (Pakistan, Saudi Arabia, and United Arab Emirates) had formally recognized the Taliban as Afghanistan's legitimate government by September 2001. Afghanistan's seat in the U.N. General Assembly continued to be held by the Taliban's opposition, known as the Northern Alliance, even though its control over Afghan territory had dwindled.

3. *Initial Reactions to the September 11 Attacks*

United States

Despite the tremendous shock, confusion, and mourning on September 11 and the days immediately after, the United States responded rapidly. First to react

were the brave firefighters, police officers, and other emergency personnel who rushed to the scene at the World Trade Center and the Pentagon. U.S. Air National Guard interceptors were soon scrambled, though minutes too late to prevent the attack on the Pentagon. The actions of the heroic passengers on the flight over Pennsylvania meant that a U.S. interceptor dispatched there did not have to undertake the possible mission of shooting down one of the country's own airliners. At 9:50 A.M. on September 11, the Federal Aviation Administration suspended flight takeoffs across the country and ordered all civilian planes to land at the nearest airport. Military forces were alerted and mobilized. By early afternoon, the Navy dispatched two aircraft carriers to New York harbor and scrambled five warships along the Eastern seaboard, and fighter planes were ordered to patrol over major cities.

The investigation of the attacks was underway almost immediately. Within a few days, the 19 hijackers had been identified, and attention focused on Osama bin Laden.

President George W. Bush addressed the nation the night of September 11 and ordered a number of measures that day and in the days following. Among them, on September 14, President Bush declared a national emergency under the National Emergencies Act (50 U.S.C. §1621) and called up 50,000 reservists for the purpose of "homeland defense." At the same time, both houses of Congress passed by large margins a Joint Resolution that provided in pertinent part:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. (P.L. 107-40)¹

On September 23, President Bush invoked the International Emergency Economic Powers Act (IEEPA). IEEPA provides the President with sweeping emergency powers in the international arena. It is designed to deal "with any unusual or extraordinary threat, which has its source in whole or substantial part outside the United States, to the [U.S.] national security, foreign policy, or economy." If the President determines that such a threat exists, he can declare a national emergency as Bush did on September 14 under the National Emergencies Act (NEA). IEEPA then authorizes him to employ a wide range of economic powers, such as cutting off exports or imports with a particular country, or (especially relevant here) restricting public and private financial transactions with a particular country or particular foreign individuals or entities. (IEEPA is discussed further in Chapter 3.) The following is an excerpt of President Bush's Executive Order freezing the assets of terrorist groups.

1. The Joint Resolution also specifically indicated that it was intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution of 1973. (The War Powers Resolution is discussed in Chapter 11.)

President Bush, Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism

Exec. Order 13,224 (Sept. 23, 2001), 66 Fed. Reg. 49,079

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.), section 5 of the United Nations Participation Act of 1945, as amended (22 U.S.C. 287c) (UNPA) . . . and in view of United Nations Security Council Resolution[s] . . .

I, GEORGE W. BUSH, President of the United States of America, find that grave acts of terrorism . . . by foreign terrorists, including the terrorist attacks in New York, Pennsylvania, and the Pentagon committed on September 11, 2001, acts recognized and condemned in UNSCR [U.N. Security Council Resolution] 1368 of September 12, 2001, and UNSCR 1269 of October 19, 1999, and the continuing and immediate threat of further attacks on United States nationals or the United States constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and . . . hereby declare a national emergency to deal with that threat. I also find that because of the pervasiveness and expansiveness of the financial foundation of foreign terrorists, financial sanctions may be appropriate for those foreign persons that support or otherwise associate with these foreign terrorists. . . .

I hereby order:

Section 1. Except to the extent required by section 203(b) of IEEPA (50 U.S.C. 1702(b)), or provided in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order, all property and interests in property of the following persons that are in the United States or that hereafter come within the United States, or that hereafter come within the possession or control of United States persons are blocked:

- (a) foreign persons listed in the Annex to this order;
- (b) foreign persons determined by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States;
- (c) persons determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to be owned or controlled by, or to act for or on behalf of those persons listed in the Annex to this order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of this order; . . .

Sec. 2. Except to the extent required by section 203(b) of IEEPA (50 U.S.C. 1702(b)), or provided in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date:

- (a) any transaction or dealing by United States persons or within the United States in property or interests in property blocked pursuant to this order is

prohibited, including but not limited to the making or receiving of any contribution of funds, goods, or services to or for the benefit of those persons listed in the Annex to this order or determined to be subject to this order;

(b) any transaction by any United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this order is prohibited. . . .

Sec. 3. For purposes of this order: . . .

(c) the term "United States person" means any United States citizen, permanent resident alien, entity organized under the laws of the United States (including foreign branches), or any person in the United States; and

(d) the term "terrorism" means an activity that —

(i) involves a violent act or an act dangerous to human life, property, or infrastructure; and

(ii) appears to be intended —

(A) to intimidate or coerce a civilian population;

(B) to influence the policy of a government by intimidation or coercion; or

(C) to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking. . . .

Sec. 6. The Secretary of State, the Secretary of the Treasury, and other appropriate agencies shall make all relevant efforts to cooperate and coordinate with other countries . . . to achieve the objectives of this order, including the prevention and suppression of acts of terrorism, the denial of financing and financial services to terrorists and terrorist organizations, and the sharing of intelligence about funding activities in support of terrorism. . . .

GEORGE W. BUSH, THE WHITE HOUSE, September 23, 2001.

This order froze all the assets in the United States or in possession of U.S. entities of 27 terrorists, terrorist organizations, and charitable organizations believed to fund terrorist organizations. Included in the annex to the order were bin Laden, Al Qaeda, and several allied terrorist groups and individual members of Al Qaeda. The assets of the Taliban, amounting to \$265 million within the United States, had been frozen in 1999 as part of the response to the embassy bombings in Kenya and Tanzania. The Administration added an additional 39 individuals and entities to its list on October 12, and has continued to add to it since then, as new information has arisen. As of November 2002, there were over 200 individuals and entities on Bush's freeze list, including terrorist groups as wide-ranging as Palestinian Hamas, Kashmiri Lashkar-e-Tayyiba, and Basque ETA.

Most of Al Qaeda's funds are located outside the United States, so international support for the freezing of terrorist assets has been important to the effectiveness of the program. To help this process, the U.N. Security Council had decided in Resolution 1373 of September 28, 2001, that all Member States should "[f]reeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts."

As of December 2002, the U.S. government reported that 161 other countries had issued their own blocking statutes. Overall, \$123 million in terrorist assets had

been frozen worldwide, \$36 million of that had been blocked domestically in the United States, and the remaining \$87 million had been blocked by other countries.

NATO

On September 12, the North Atlantic Treaty Organization (NATO) expressed its willingness to invoke Article 5 of its founding treaty for the first time in its history if it were determined that the Sept. 11 attacks were indeed directed from abroad. Article 5 states:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

On October 2, the NATO Secretary General stated that NATO had determined that Al Qaeda was involved in the Sept. 11 attacks. Accordingly, "it has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5." Despite this rapid and heartening show of support, the role of the NATO Alliance in the ensuing military response was limited. Although some NATO members provided forces to the U.S.-led campaign (namely, Britain, Canada, and France), most members limited themselves to opening their airspace to American military flights and providing some logistical support. In part, this was because the United States did not ask some of these countries to do more. Possibly the most important role played by the Alliance as an entity was to authorize the dispatch of NATO early-warning aircraft to patrol U.S. airspace, freeing American aircraft for an offensive role in Afghanistan.

The United Nations

The United Nations has been much involved in the struggle against terrorism and quickly reacted to the attacks of September 11. Essentially all the countries of the world are members of the United Nations, with 191 member states as of January 2003.² The basic documents for the United Nations are its Charter (which is a

2. Because of its historically neutral position, Switzerland had long declined to join the United Nations, but it did so in 2002. The State of Vatican City, discussed in Chapter 5, is not a member state, but an observer represented by the Holy See. As noted earlier, Afghanistan was a U.N. member, but in September 2001 the Northern Alliance was the recognized government, not the Taliban regime. The government of Hamid Karzai gained the seat in December 2001.

treaty), and a fundamental provision of the Charter is Article 2(4). It provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. . . ." The only explicit exception in the Charter for a country to use force is found in Article 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

In response to a breach of peace or threat of aggression, the Security Council has the power under Chapter VII of the U.N. Charter, especially Articles 39-42, to decide on a wide range of economic and military measures and to call on all U.N. Member States to apply these measures. (The U.N. Charter is in the Documentary Supplement.)

The Security Council has 15 members, with five permanent, veto-wielding members (China, France, Russia, the United Kingdom, and the United States). During the Cold War, the Security Council was often hamstrung by the veto, or the threat of veto, by one or more of the five permanent members. However, with the thawing of the Cold War, the Security Council has begun cooperating in an unprecedented way. The Security Council reacted quickly and strongly to the Iraqi invasion of Kuwait in 1990, and it played a major role in the conflict in the former Yugoslavia during the late 1990s, though it was NATO that finally took the lead in using military force against Serbia over Kosovo.

Before September 11

Prior to the terrorist attacks, the U.N. Security Council passed several resolutions condemning the Taliban for harboring terrorists and protecting terrorist training camps. After the bombings of the U.S. embassies in Kenya and Tanzania in 1999, the Security Council passed Resolution 1267, which demanded that the Taliban turn over Osama bin Laden to appropriate authorities in a country where he would be arrested. Additionally, Resolution 1267 called upon all states to prevent any Taliban-operated aircraft from taking off or landing in their territory. The resolution further required states to freeze all assets derived from property owned or controlled by the Taliban.

In December 2000, the Security Council passed Resolution 1333 condemning the Taliban for its support of terrorist activity. The resolution demanded the Taliban's compliance with Resolution 1267. It also mandated additional actions against the Taliban by Member States, such as preventing the supply of arms, military equipment, and certain chemicals to the Taliban. At the same time, the resolution contained provisions designed to maintain some humanitarian aid to the Afghan people.

It was clear even before September 11 that the Taliban failed to comply with the anti-terrorism provisions of these and other resolutions.

After September 11

The day after the Sept. 11 attacks, the Security Council, operating from U.N. headquarters that are only a few miles from the World Trade Center, swiftly and unanimously passed Resolution 1368. The resolution both condemned the terrorist attacks and offered broad support for retaliation by the United States and its allies.

U.N. Security Council Resolution 1368*(Sept. 12, 2001)**The Security Council,*

Reaffirming the principles and purposes of the Charter of the United Nations,
Determined to combat by all means threats to international peace and security caused by terrorist acts,

Recognizing the inherent right of individual or collective self-defence in accordance with the Charter,

1. *Unequivocally condemns* in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 . . . and *regards* such acts, like any act of international terrorism, as a threat to international peace and security;

2. *Expresses* its deepest sympathy and condolences to the victims and their families and to the people and Government of the United States of America;

3. *Calls* on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable;

4. *Calls also* on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions, in particular resolution 1269 (1999) of 19 October 1999;

5. *Expresses* its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations;

6. *Decides* to remain seized of the matter.

Although Resolution 1368 was a quickly drafted response to the attacks on September 11, its language had important legal consequences. First, Resolution 1368 described the terrorist attacks as a “threat to international peace and security,” thus bringing them within the scope of Chapter VII of the U.N. Charter, which raised the possibility of U.N. enforcement actions. Second, Resolution 1368 recognized the legal right of individual or collective self-defense in accordance with the Charter. In other words, the Security Council implicitly recognized that a state could respond militarily against those responsible for the attacks, even though the terrorists were not state actors. Legally, this was an unprecedented move for the United Nations. Prior to September 11, the Security Council had failed to reach a unanimous position on unilateral retaliation for terrorist attacks. Moreover, when the General Assembly spoke on the issue, it often condemned such unilateral military responses.

Although the Council's resolution suggests that a nation has a right of self-defense in response to international terrorism, according to Article 51 of the Charter, the right to individual or collective self-defense is only an interim right — "until the Security Council has taken measures necessary to maintain international peace and security." Hence, the Security Council may in future cases try to take charge, though a permanent member might use its veto power to block the Security Council.

On September 28, the Security Council followed up Resolution 1368 with an even stronger anti-terrorism declaration in Resolution 1373. Specifically, it stated that member states should implement domestic legislation that would fight the "international threat to peace and security" that terrorism had become and that all states shall take a number of other steps.

U.N. Security Council Resolution 1373

(Sept. 28, 2001)

The Security Council . . .

2. *Decides also* that all States shall:

(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

(g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

3. *Calls* upon all States to:

(a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups; . . .

E. International Law in Action

77

(c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;

(d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;

(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);

(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;

(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.

The U.N. General Assembly also addressed the issue of international terrorism after the Sept. 11 attacks. Each country's U.N. permanent representative spoke in a week-long debate on the question of terrorism. Perhaps the most controversial aspect of the discussions centered on whether the U.N. should set a specific definition as to what constitutes terrorism. Both the need for such a definition and the content of such a definition produced considerable debate and disagreement. Despite the General Assembly's efforts, a general consensus on the definition of terrorism was not reached.

Notes and Questions

1. As noted above, Congress passed a resolution on September 14, 2001, authorizing the President to "use all necessary and appropriate force" against countries that had "aided the terrorist attacks that occurred on September 11, 2001." This resolution became effective on September 18 when it was signed by President Bush. Do you think that President Bush could have proceeded to conduct the major U.S. operations against the Taliban in Afghanistan that began in October 2001, even if Congress had not passed this or any similar resolution? What about Article I, Section 8, clause 11 of the U.S. Constitution, which gives Congress the power "[t]o declare War." Given this broadly phrased resolution, did Congress cede all responsibilities and authority for conducting military operations in Afghanistan? If Congress later thought that the Bush Administration and the military might be failing to take sufficient precautions to protect innocent Afghan civilians, what steps were available to Congress?

2. Did the September 14 resolution also give the President the authority to launch a major military attack on Iraq or Iran if the President determined that there was sufficient evidence to demonstrate that one of those countries had provided material support to the hijackers?

3. As noted above, President Bush's actions included issuing an Executive Order on September 23, 2001, that invoked a broad U.S. law, IEEPA, to block (or freeze) the assets of Al Qaeda and other terrorist groups and individuals when the assets are in the United States or under the control of "U.S. persons." This phrase was defined to include, among others, U.S. individual citizens and U.S. corporations even if they were abroad. What authority does a U.S. President have to regulate assets in other countries, such as Saudi Arabia, even if they are held by a "U.S. person"? Does it matter that most other countries agreed to cooperate with the U.S. order? What if Saudi Arabia disagreed with some of the Executive Order's designations of terrorist groups and individuals, and directed that a U.S. company in Saudi Arabia should not freeze the assets of those disputed entities? Whose law controls?

4. Assume that the scope of the Executive Order, issued pursuant to IEEPA, was extended to include, besides U.S. individual citizens and U.S. corporations, "any corporation, wherever organized or doing business, that is owned or controlled by a U.S. corporation"—that is, foreign subsidiaries of a U.S. corporation. Does the U.S. President have the power to order an Italian subsidiary of a U.S. corporation to freeze assets that it might have in its possession in Italy from Al Qaeda or the Taliban (e.g., a bank deposit, or advances for goods that have yet to be delivered)? Should the President have this power? What are the rights of the government of Italy?

5. NATO was created in 1949 to provide a counterweight to the Soviet Union and its satellite states in Eastern Europe. Its primary purpose was to discourage a Soviet attack on Western European democracies. With the end of the Cold War, its mission has been redefined. It has expanded in recent years to include some of its former adversaries in Eastern Europe, and has even created a system by which Russia can have a nearly equal say in its deliberations. NATO forces fought the war against Milosevic in the former Yugoslavia and then provided peacekeepers in Kosovo afterwards.

When NATO invoked Article 5 against Al Qaeda on October 2, 2001, what were the obligations of the 19 countries then in NATO? Does Article 5 require each country to assist the United States?

After invoking Article 5 for the first time in its history, NATO's most important action was to contribute five early warning aircraft to the defense of United States skies. Why did the United States and just a few allies, and not NATO, take the lead in operations against Al Qaeda and the Taliban?

6. As noted earlier, from 1998 to 2001, the Taliban controlled about 90 percent of Afghanistan, but only three countries recognized the Taliban as the legitimate government of Afghanistan, with most of the remaining countries (including those in Europe and the United States) recognizing the rival Northern Alliance. Moreover, while Afghanistan is a member state of the United Nations and has signed the U.N. Charter, the United Nations continued to recognize the Northern Alliance as that state's government. What does recognition mean when a group (such as the Northern Alliance) cannot exercise effective control over its own territory? What effect does non-recognition have on a regime that is the de facto government of a state? (We return to these questions in Chapter 5.)

7. Security Council Resolution 1368 declared terrorism a threat to international peace and security. This finding is a precondition to any use by the Security Council of Chapter VII powers under the U.N. Charter, that is to say, the power to direct member states to take certain actions. Resolution 1373 exercised these powers for the first time after September 11, obligating member states to deny terrorists safe

haven in their territories, to refrain from supporting terrorists, and to bring terrorists and their supporters to justice. Was the Taliban bound by Resolution 1373?

Of course, the Taliban did not abide by Resolution 1373. Were states other than Afghanistan obligated to use force to ensure compliance by the Taliban? Were they authorized to do so? Could the Security Council have authorized or required the use of force against the Taliban?

8. Resolution 1368 recognized the inherent right of individual and collective self-defense, and called on member states to ensure that the perpetrators of the Sept. 11 attacks are held accountable. Does this authorize the use of force by the United States? By Great Britain? Whatever your answer about Resolution 1368, does international law require that the United States obtain U.N. Security Council authorization to use force against those who supported the Sept. 11 terrorists? Did Great Britain need authorization? Does "collective self-defense" include only recognized regional groups, such as NATO, or can informal coalitions be developed? See also U.N. Charter Article 52.

4. *Building a Coalition*

In his September 20, 2001, address to a joint session of Congress, President Bush issued an ultimatum to the Taliban:

Deliver to United States authorities all the leaders of Al Qaida who hide in your land. Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats, and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist and every person in their support structure to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating. These demands are not open to negotiation or discussion. The Taliban must act and act immediately. They will hand over the terrorists, or they will share in their fate.

The Taliban attempted to negotiate turning over bin Laden in the days after September 20, but the Taliban sought to impose conditions that President Bush had already said were unacceptable. In the meantime, the Taliban was losing what little international support it might have had. Both Saudi Arabia and the United Arab Emirates severed their diplomatic ties with the Taliban, leaving Pakistan as the only country that recognized the Taliban, and this was primarily to keep open a channel for negotiations.

Even before President Bush's September 20 speech, the United States had initiated far-ranging diplomatic negotiations with many countries to seek their understanding and possible cooperation for the military steps that the Pentagon began planning shortly after the Sept. 11 attacks. General Pervez Musharraf of Pakistan was crucial to this emerging coalition. Although Pakistan's intelligence services had supported the Taliban in its rise to power, Musharraf promptly condemned the attacks and the Taliban for harboring bin Laden, and agreed to allow the United States and its coalition to use Pakistani airspace and eventually airbases. Despite early violent protests by Islamic groups against cooperation, Musharraf reversed what had been an increasingly chilled U.S.-Pakistani relationship.

Also important was the agreement of the former Soviet republics of Uzbekistan, Kyrgyzstan, and Tajikistan, which faced internal threats from Al Qaeda-linked Islamist movements, to permit U.S. forces to operate from bases in their territory in exchange for increased U.S. aid and closer political and security ties. Similarly, Kuwait and Qatar, Muslim countries in the Middle East, allowed the use of existing airbases for U.S. air strikes in Afghanistan.

Although several European countries offered military support as well, the United States chose to use primarily its own forces and those of the Northern Alliance and other indigenous Afghan forces, with limited military assistance from British troops (as well as Australian and Canadian forces). Other European countries were asked to provide humanitarian aid and sometimes overflight permission for U.S. military aircraft. Turkey allowed the use of important airbases there.

President Vladimir Putin of Russia agreed to provide more Soviet-era arms and munitions to the Northern Alliance, with whom it already had existing ties. Russia also let the U.S. military operate freely in the former Soviet republics that Russia still considered to be in the Russian sphere of influence. Putin's price for this cooperation was not completely clear to observers, but aside from closer ties generally with the West, one benefit has been a freer hand in dealing with the separatist Chechens, some of whom have links to Al Qaeda.

China's support publicly and in the United Nations had considerable political value for the United States, though China also used the rhetoric of the "war on terrorism" to justify its crackdown on its own Islamic separatist minority, the Uighurs in Xinjiang province. Finally, while most of the Muslim states of the Middle East were not forthcoming with material support, several provided intelligence and law enforcement assistance in disrupting Al Qaeda networks outside of Afghanistan.

5. *The Military Campaign*

With the coalition assembled and with U.S. air, ground, and naval units moved thousands of miles into forward positions, President Bush gave the order on October 7, 2001, to begin the campaign against Afghanistan, code-named Operation Enduring Freedom. Nighttime airstrikes began on October 7 and continued for three nights, after which the United States declared that it had established air supremacy and could now bomb in daylight and, when appropriate, send in ground forces. The strikes were carried out with ship-launched cruise missiles and aircraft launched from carriers in the Arabian Sea, as well as bases in Pakistan and Uzbekistan, by B-52 and B-2 bombers flying from Diego Garcia, an island in the Indian Ocean, and by B-2 bombers flying day-long missions from bases in the United States itself. Airstrikes continued around the clock after October 9, targeting Taliban tanks, artillery, weapons and fuel depots, and command centers, as well as Al Qaeda training camps. Meanwhile, the allies dropped food rations, trying to minimize the bombing campaign's impact on civilians. By October 19, American Special Forces were able to land and to carry out raids and other missions near Taliban strongholds.

The ground war began in earnest in the closing days of October. Instead of continuing to bomb strategic targets, most of which had already been destroyed, the U.S. air campaign shifted its emphasis to supporting the ground forces of the Northern Alliance, a group of mostly Tajik and Uzbek warlords who were at that time the

only effective anti-Taliban rebels. Their charismatic leader, Ahmad Shah Massood, had been assassinated just two days before the Sept. 11 attacks, almost certainly by Al Qaeda. However, his faction still controlled significant amounts of territory when Operation Enduring Freedom began. The United States began targeting Taliban troop concentrations in the north and, in particular, those forces opposing Northern Alliance fighters.

The first major successes of this coordinated campaign came in mid-November. On November 9, the northern stronghold of Mazar-e-Sharif fell to the Northern Alliance, operating in coordination with U.S. forces. After that initial victory, the rest of the country fell relatively quickly. Northern Alliance forces took the capital, Kabul, from retreating Taliban forces on November 12, and the cities of Herat, Jalalabad, and Konduz fell within weeks. U.S. forces were able to occupy Bagram Air Force Base, about 27 miles north of Kabul, and use it as a staging area for other operations. The success of the Northern Alliance and the promise of American air support encouraged rebel groups in other parts of Afghanistan to rise up against the Taliban. One of these groups, under the leadership of Hamid Karzai, accepted the surrender of the Taliban capital of Kandahar on December 6. (As discussed below, Karzai had been chosen to lead an interim post-Taliban government days earlier.) Although many top Taliban officials, including Mullah Mohammed Omar, escaped Kandahar, the fall of the city finished them as a power in Afghanistan.

Remnants of the Taliban and Al Qaeda retreated to tunnel complexes built to house *mujahideen* fighting against the Soviets, such as Tora Bora, near the Pakistani border. Tora Bora fell on December 16 to a combination of American precision bombs and local forces the Americans called the "Eastern Alliance." However, the Eastern Alliance failed to follow up its victory, and there were insufficient U.S. forces on the ground to prevent hundreds of Al Qaeda, apparently including bin Laden, from escaping into the relatively lawless tribal regions of Pakistan. Another attack on an Al Qaeda cave complex in February and March 2002 was more successful. Over 1,000 U.S. infantrymen led the attack, called Operation Anaconda, against regrouping Al Qaeda in the Shah-i-kot valley, and they were able to prevent most of the fighters from escaping.

After Operation Anaconda, the remnants of Al Qaeda mostly scattered to tribal areas of Pakistan and Afghanistan. Cooperative operations between U.S. and allied forces and some local warlords against pockets of fighters continued, but nothing on the scale of Anaconda or Tora Bora.

Notes and Questions

1. Mostly through Pakistani intermediaries, the United States apparently communicated with Taliban representatives in an attempt to capture bin Laden and his accomplices without war. How could the United States negotiate with the Taliban without recognizing them?

2. On August 2, 1990, an Iraqi army invaded and occupied Kuwait. The reaction around the world was all but instantaneous and, with very few exceptions, entirely negative. The United Nations and the governments of most nation-states condemned the invasion as a violation of international law. Yet the U.S. attack on the Taliban was criticized only by a small minority of Muslim states, most of which

dropped their objections when the invasion succeeded beyond expectations. Why did the world community condemn the Iraqi invasion, but not the U.S. attacks? Were the U.S. attacks consistent with international law? If so, what principles provided the justification for them? Besides the fact that the United States was responding to the Sept. 11 attacks on its territory that were organized by Al Qaeda, does it help that the United States was also operating in conjunction with the Northern Alliance?

3. Given that most countries and the U.N. recognized the Northern Alliance as the government of Afghanistan, were the U.S. attacks in Afghanistan an "invasion" of Afghanistan? Did the United States "declare war" or "go to war" against Afghanistan? How would you characterize the U.S. operations against the Taliban and Al Qaeda? Was the United States intervening in a civil war?

4. (Review Note 8 in the last set of Notes and Questions.) If you think that the United States might have been justified in attacking the Taliban and Al Qaeda under Article 51 of the U.N. Charter and/or pursuant to U.N. Security Council Resolutions 1368 and 1373, did the attack have to be proportional? The United States made the overthrow of the Taliban one of its explicit objectives when the U.S. offensive began. If it could have uprooted Al Qaeda without bringing down the Taliban, should it have had to?

5. One notable aspect of the conflict in Afghanistan was the increased use of high technology warfare. Perhaps the most important innovation was the widespread use of "smart bombs," guided by Global Positioning System (GPS) satellites. These GPS-guided smart bombs are significantly more accurate and dependable than the laser-guided munitions used in the Persian Gulf War in 1991, and potentially cheaper as well. As many as 70 percent of the bombs used in Afghanistan were smart bombs (versus about 9 percent in Iraq). Most were actually ordinary bombs equipped with a JDAM (for Joint Direct Attack Munitions), a kit that cost about one-fifth a Gulf War smart bomb and that allows a bomb to guide itself to within three feet of a target. Other high-tech American advances that transformed this war include infantry equipment such as night-vision goggles, as well as the "Predator" unmanned aircraft, which were used to take images and, later in the campaign, to shoot missiles.

This high technology was often combined with old-fashioned low-tech warfare. There were situations when an American soldier, traveling on horseback and accompanied by Afghan forces using World War I-era rifles, would enter target coordinates into a state-of-the-art laptop computer. Within minutes, the command center in Saudi Arabia would relay the coordinates to a 1970s-era bomber, which would drop a GPS-guided bomb on Taliban or Al Qaeda troop concentrations or installations.

The use by American forces of high-tech weaponry kept both U.S. and civilian casualties relatively low. One result was that far fewer civilian targets were hit by stray bombs, although some mistakes still occurred, largely as a result of human error and equipment failure.

Despite a low ratio of civilian casualties compared to past military actions, even ones as recent as the Kosovo air campaign, the U.S. military was criticized for some operations that resulted in civilian casualties. Is the United States or its soldiers responsible when a bomb goes astray in an area of conflict? What if human error is the cause and the bomb is mistakenly programmed with the coordinates of a hospital, or a U.S. gunship fires on a wedding party? In at least one such case, the United

Nations faced pressure to perform an independent investigation. What limits should international law place on warfare? With the recent creation of an International Criminal Court, do U.S. soldiers have to worry about being criminally charged for decisions made under fire? (These questions are discussed more fully in the section on Individual Responsibility in Chapter 11.)

6. *Nation Building*

The Bonn Compromise

As the United States and Britain launched their military operations in Afghanistan, President Bush called on the United Nations to help rebuild a post-war Afghanistan. However, after the very troubled experience of peacekeeping operations in Somalia, U.N. officials were wary of taking on the nation-building role in Afghanistan. Nevertheless, U.N. Secretary-General Kofi Annan appointed a former Algerian foreign minister, Lakhdar Brahimi, as U.N. envoy for the Afghan peace settlement. As discussed below, backed by the United States and other countries, Brahimi was able to successfully negotiate an agreement in Bonn, Germany, that set up an interim Afghan administration. In addition, Brahimi and a number of countries shaped the U.N. aid programs that sustained much of Afghanistan's population.

The Bonn conference brought together the leaders of the four primary Afghan factions: the Northern Alliance, representing the Uzbek and Tajik minorities, and the Rome, Peshawar, and Cyprus Groups, representing Pashtuns connected to former King Mohammed Zahir Shah, to Pakistan, and to Iran, respectively. The conference met from November 27 through December 5, 2001, and created an interim government under the leadership of Hamid Karzai, who was absent from the meeting because he was commanding the assault on Kandahar. The meeting also provided for a *loya jirga*, or "grand council," to establish a transitional government that would lead for up to two years. Elections are to be held in 2004 and a new constitution ratified. The Karzai government was sworn in on December 21, 2001.

United Nations Peacekeeping

In December 2001, after the negotiation of the Bonn agreement, the U.N. Security Council passed Resolution 1386, which authorized the establishment of an International Security Assistance Force (ISAF) to aid the Afghan Interim Authority in maintaining peace and security in Kabul. Resolution 1386 established the ISAF to take "all necessary measures" to fulfill the peacekeeping mission. Everyone recognized that this might include the use of force.

U.N. Security Council Resolution 1386

(Dec. 20, 2001)

The Security Council . . .

1. *Authorizes*, as envisaged in Annex 1 to the Bonn Agreement, the establishment for 6 months of an International Security Assistance Force to assist the Afghan

Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment;

2. *Calls upon* Member States to contribute personnel, equipment and other resources to the International Security Assistance Force, and invites those Member States to inform the leadership of the Force and the Secretary-General;

3. *Authorizes* the Member States participating in the International Security Assistance Force to take all necessary measures to fulfil its mandate;

4. *Calls upon* the International Security Assistance Force to work in close consultation with the Afghan Interim Authority in the implementation of the force mandate, as well as with the Special Representative of the Secretary-General;

5. *Calls upon* all Afghans to cooperate with the International Security Assistance Force and relevant international governmental and non-governmental organizations, and welcomes the commitment of the parties to the Bonn Agreement to do all within their means and influence to ensure security . . . ;

6. *Takes note* of the pledge made by the Afghan parties to the Bonn Agreement in Annex 1 to that Agreement to withdraw all military units from Kabul . . . ;

7. *Encourages* neighbouring States and other Member States to provide to the International Security Assistance Force such necessary assistance as may be requested, including the provision of overflight clearances and transit;

8. *Stresses* that the expenses of the International Security Assistance Force will be borne by the participating Member States concerned, *requests* the Secretary-General to establish a trust fund through which contributions could be channelled to the Member States or operations concerned, and encourages Member States to contribute to such a fund; . . .

10. *Calls on* Member States participating in the International Security Assistance Force to provide assistance to help the Afghan Interim Authority in the establishment and training of new Afghan security and armed forces;

11. *Decides* to remain actively seized of the matter.

In November 2002, the Security Council extended the mandate of the ISAF to run through December 2003. Participation in the ISAF totaled roughly 4,600 troops from 122 different countries. Originally, the force was led for six months by the United Kingdom and then by Turkey. In December 2002, Germany and the Netherlands took the lead. Primarily, the ISAF aims to develop Afghan national security structures, assist the nation's reconstruction, and aid the training of future Afghan military forces.

Unlike many of its Western allies, the United States did not contribute troops to the peacekeeping force in Kabul, though U.S. forces remained in Afghanistan trying to track down the remnants of Taliban and Al Qaeda forces. The United States helped coordinate the peacekeeping operations and provided intelligence assistance to the peacekeeping troops. In addition, the United States supplied equipment and training to Afghans who were to become part of the new Afghan national army.

Despite the vital importance of the peacekeeping forces, U.N. officials still had many concerns about the future of the peacekeeping project. A primary concern was the cost of the mission. Resolution 1386 stressed that the expenses would be borne by the nations involved; however, it also requested the Secretary-General to

create a trust fund through which the U.N. funds could be channeled to the countries supplying troops. In any case, the costs of maintaining the peacekeeping force would be in addition to the estimated \$10 billion needed to rebuild Afghanistan over the next five years.

Another major concern was the safety of the peacekeeping personnel. U.N. officials worried that the peacekeeping forces might find themselves caught in a battle between rival post-war factions or the peacekeepers might be attacked by Taliban hold-outs. Moreover, the ISAF has only been authorized to operate in the capital city of Kabul, yet there is need for relief and recovery operations throughout Afghanistan. Concerns for safety and expense continued to prevent the spread of peacekeeping forces into other areas of the country.

In addition to establishing the ISAF, the U.N. Security Council passed Resolution 1401 in March 2002, which approved the establishment of the United Nations Assistance Mission in Afghanistan (UNAMA). Headed by Lakhdar Brahimi, the Algerian diplomat who negotiated the Bonn Agreement, the UNAMA is a small-scale peacekeeping project initially comprised of roughly 100 international representatives. The UNAMA coordinates relief and reconstruction efforts, narcotics control, and other U.N. activities in Afghanistan.

Transitional Government

The *loya jirga* called for in the Bonn Agreement met practically on schedule in June 2002, and elected Hamid Karzai as the President of the transitional government. Many participants were disappointed with the outcome, however, because decisions appeared to have been made before the council met. Karzai was elected with 80 percent of the vote, but only after Burhanuddin Rabbani, the Tajik former president and a leader of the Northern Alliance, and the popular ex-king Mohammed Zahir Shah declared that they would not stand for election. These withdrawals were perceived by many Afghans to have been engineered by the U.S. government, which supported Karzai. Zahir Shah was given the formal title "Father of the Nation" and a series of ceremonial responsibilities, but no political role. The *loya jirga* disbanded without an agreement on the makeup or powers of a national parliament. On June 24, Karzai and his cabinet were sworn into office.

The transitional government's cabinet was more balanced between Tajik and Pashtun ministers than its predecessor, which had been dominated by members of the Northern Alliance. However, as of January 2003, it still faced serious opposition to its effective governance over Afghanistan. First, some members of the Northern Alliance felt that, having defeated the Taliban, they are being shut out of the new government in favor of Pashtuns who have only recently returned from exile. Second, the significant Uzbek and Hazara minorities were still underrepresented in the Karzai government, as were women. Third, two of Afghanistan's most powerful warlords, Ismail Khan and Abdul Rashid Dostum, refused vice presidential posts in the new regime, preferring virtually unfettered local power to a role in the central government. Drug lords who can make enormous opium profits from Afghan poppies have incentive to oppose any strong central government. And finally, pockets of Taliban and Al Qaeda fighters with an interest in overthrowing the new government remained at large in the country, still capable of destabilizing terrorist acts and assassinations.

Evidence of these difficulties was not hard to find. On July 5, 2002, the most important Pashtun in Karzai's government, vice president Abdul Qadir, was murdered in Kabul. It was not clear who was responsible for his death — Qadir was pro-Western and anti-drugs, as well as a powerful Pashtun leader — but his was the second assassination of a government minister in six months. Nor did the new government have a monopoly on the use of force, one of the essential elements of stability. An Afghan army will take time to build. In the meantime, President Karzai, who had no troops loyal to him personally, was dependent on foreigners and on the various warlords and commanders who joined the central government. In many areas outside of Kabul, the armed forces were in the hands of warlords with questionable loyalty to the central government. Karzai himself found it necessary to have American bodyguards, because Afghan soldiers, who are mostly former *mujahideen*, did not have sufficient training to protect him against possible threats.

Notes and Questions

1. As outrageous as the Taliban were and as justified as the U.S. invasion might have been, did the United States and its allies have the right or responsibility to influence the regime change that they helped initiate by toppling the Taliban? Should international law have anything to say about the concept of nation building?

2. U.N. peacekeeping forces were sent to Kabul at the request of the Bonn meeting to prevent anarchy or warlordism from filling the void left by the Taliban's totalitarian rule. The U.N. authorized peacekeeping missions dozens of times in the 1990s, and there have been both notable successes and failures. (See Chapter 11.) In Afghanistan, the *mujahideen* greatly outnumber peacekeepers, who have no presence at all outside Kabul. As U.S. forces withdraw, will peacekeepers be able to prevent Afghanistan from disintegrating until a national army can be formed? What is the obligation of the U.N. to maintain order in a country like Afghanistan, which has not known peace since 1979? What is the obligation of the United States to see through, until there is stability, a regime change that it helped initiate by defeating the Taliban?

7. Rights of Detainees

In the course of the armed conflict in Afghanistan, the U.S. forces captured and detained, or had handed over to them by its allies, hundreds of persons associated with either the former Taliban regime or Al Qaeda. These persons were initially detained in Afghanistan and on U.S. naval vessels in the region. Beginning in January 2002, many detainees were transported to the U.S. naval base at Guantanamo Bay, Cuba. By January 2003, over 600 persons of over 30 different nationalities were being held at the base.

The U.S. detention of the Taliban and Al Qaeda led to questions about their status under the Geneva Conventions of 1949. These are four treaties concluded at the end of World War II that were intended to reduce the human suffering caused by war. The treaties provide for the amelioration of the conditions of the wounded and sick in armed forces in the field (First Geneva Convention); amelioration of the

conditions of the wounded, sick, and shipwrecked members of armed forces at sea (Second Geneva Convention); humane treatment of prisoners of war (Third Geneva Convention); and the protection of the civilian persons in time of war (Fourth Geneva Convention). As of January 2003, 190 states were parties to the Geneva Conventions, including the United States, Afghanistan, Egypt, and Saudi Arabia.

Initially, “U.S. officials referred to the detainees as ‘unlawful combatants,’ whom the United States regarded as falling outside the protections of the Third Geneva Convention, but who would nevertheless be treated humanely. . . . [Thus,] on January 18 [, 2002,] President Bush initially decided (without making any public announcement) that the Third Geneva Convention did not apply to any of the detainees.” Sean D. Murphy, *Decision Not to Regard Persons Detained in Afghanistan as POWs*, 96 *Am. J. Intl. L.* 475, 476-477 (2002).

The U.S. government’s position quickly changed, however, in part because of considerable criticism from other Western countries and legal scholars. Hence, on February 7, 2002, the Bush Administration announced the U.S. government’s new stance. In an official fact sheet on the status of detainees at Guantanamo, the White House outlined that the U.S. policy was “to treat all of the individuals detained at Guantanamo humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with principles of the Third Geneva Convention of 1949.” However, “the President has determined that the Geneva Convention applies to the Taliban detainees, but *not* to the al-Qaida detainees.” Al Qaeda members were not given the POW status because they were not “a state party to the Geneva Convention” but rather “a foreign terrorist group.” As for the Taliban detainees, the President determined that, although the terms of the Geneva Convention do not grant them POW status, many POW privileges would nevertheless be provided them as a matter of policy. White House Press Secretary Ari Fleisher explained further that “under Article 4 of the Geneva Convention . . . Taliban detainees are not entitled to POW status. To qualify as POWs under Article 4, Al Qaeda and Taliban detainees would have to have satisfied four conditions: they would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war.” Because “the Taliban have not effectively distinguished themselves from the civilian population of Afghanistan [and] have not conducted their operations in accordance with the laws and customs of war,” they are not POWs under the Geneva Convention.

Several groups in the United States have tried to litigate the issue of detention of alien in U.S. courts. Their efforts, however, have been unsuccessful as of November 2002. U.S. federal courts have held that they lacked jurisdiction because the detainees were not within the territorial jurisdiction of the courts. See *Odah v. United States*, 321 F.3d 1134 (D.C. Cir 2003); *Coalition of Clergy v. Bush*, 310 F.3d 1153 (9th Cir. 2002).³

3. There is also burgeoning litigation in U.S. courts about the rights of detained U.S. citizens. E.g., *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) and *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003). Given space considerations, this case study on September 11 focuses, however, on alien detainees. See the more extensive discussion of individual responsibility in Chapter 11.

Notes and Questions

1. U.N. Security Council Resolution 1368 calls on member states to “bring to justice” those involved in terrorist activity. Does the resolution authorize whatever methods and procedures a member state may deem necessary to bring a terrorist “to justice”? Does it impose any restrictions on states? Should the U.N. step in and outline the judicial machinery that should be used to “bring to justice” those suspected of terrorist activity? Does the U.N. resolution permit Saudi Arabia to torture suspected terrorists?

2. The U.S. position on the status of the Guantanamo Bay detainees poses several questions under international law. Assuming the detainees are foreign citizens, what international norms might bind the United States on how these people are treated? One of the biggest issues is who should determine the status of the detainees. Should it be the United States? The United Nations? An independent international tribunal? A domestic court? According to Article 5 of the Third Geneva Convention to which the United States is a party, “should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to [the category of prisoners of war], such persons shall enjoy the protections of the present Convention until such time as their status has been determined by a competent tribunal.” In the official White House fact sheet outlining the U.S. position on the status of the detainees, President Bush mentioned that the treatment of detainees is “consistent with the principles of the Third Geneva Convention of 1949.” Given that the decision to deny POW privileges to Al Qaeda was made by President Bush, is the U.S. treatment of detainees really consistent with the Geneva Convention? If not, does the United States stand in violation of the treaty? What are the repercussions of such violation? Who would decide that a violation occurred? Who would enforce that decision?

3. Under Article 118 of the Third Geneva Convention, “prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.” For a captured Afghan Taliban, when do the hostilities end? When the armed conflict in Afghanistan ended? Or does “cessation of active hostilities” have a broader meaning implying the cessation of the war on terrorism? Who determines that and how?

4. Assume that an Al Qaeda member who is a citizen of Egypt is captured in Afghanistan and is now detained in Guantanamo Bay, Cuba. The United States explicitly stated that such persons are not covered by the Geneva Conventions because they are part of a foreign terrorist group and are thus neither POWs under the Third Geneva Convention nor “nationals” that are covered under the Fourth Geneva Convention.⁴ However, Article 75 of the Protocol Additional to the Geneva Conventions of 12 August 1949 (known as the Geneva Protocol), and relating to the Protection of Victims of International Armed Conflicts, guarantees certain protections to all “persons who are in the power of a Party to the conflict,” including humane treatment as well as some procedural and due process rights. The United States has

4. According to Article 4 of the Fourth Geneva Convention, the Convention applies only to persons “who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or occupying power of which they are not nationals. . . . Nationals of a neutral State [such as Egypt] who find themselves in the territory of a belligerent State . . . shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”

neither signed nor ratified this Protocol. However, a vast majority of countries are now a party to it.⁵ Should the Protocol be recognized as establishing norms of customary international law that might create any legal obligations for the United States? Who can decide this issue?

5. The United States has begun releasing some people who were detained at Guantanamo Bay. In October 2002, the first small group of detainees was returned to Pakistan under a reported policy that detainees can be returned to their home country if they no longer pose a threat or have no intelligence value.

6. For a category of persons who are captured outside of Afghanistan and have no direct relationship with the armed conflict, the Geneva Conventions definitely do not apply. An example of such person is a Saudi citizen captured in Spain due to links to Al Qaeda and shipped to Guantanamo Bay naval base. Because the Geneva Conventions do not apply, the “cessation of active hostilities” cannot be used as a limit to that person’s detention. What should be the limit? Can the Saudi citizen be detained at Guantanamo Bay for a prolonged period of time, without any review by a judge or other person authorized to exercise judicial power? For example, for one year? Ten years? For his or her lifetime?

The International Covenant on Civil and Political Rights states in Article 9 that “[n]o one shall be subjected to arbitrary arrest or detention” and that “[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.” The United States is a party to this Convention, as are over 145 other countries, though the U.S. ratification includes the reservation that Article 9 and other operative parts of the Convention are not self-executing in the United States. The United States, however, is bound on the international level to the treaty. By its detention of the illustrative Saudi citizen mentioned above, is the United States obeying the Covenant that it signed? Can the detention be justified under Article 4 of the Covenant, which permits derogation from Article 9 and certain other articles “[i]n time of public emergency which threatens the life of the nation”?

One might look for further guidance to the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which over 40 European nations are parties. It states in Article 5 that everyone detained “shall be brought promptly before a judge or other officer . . . and shall be entitled to trial within a reasonable time or to release pending trial.” Has this been done? Should the United States even pay attention to the European Convention, to which it is not a party?

7. On November 13, 2001, President George W. Bush issued a broad Order titled “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism” which called for creation of military tribunals with exclusive jurisdiction, targeted at trying members of al Qaeda, persons involved in acts of international terrorism against the United States, and those who knowingly harbored such terrorists. At a later interview, President Bush commented that the United States will “be using the tribunals if in the course of bringing someone to justice it may jeopardize or

5. As of January 2003, there are 161 states that are parties to the Additional Protocol I, leaving 29 states (including the United States and Afghanistan) that are parties to the Geneva Conventions but not parties to the Protocol. Canada, France, Germany, Spain, and the United Kingdom are all parties to the Protocol, as well as Egypt and Saudi Arabia.

compromise the national security interests.” The President’s order called for the Secretary of Defense, Donald Rumsfeld, to issue other orders and regulations required for the operation of military tribunals.

The Nov. 13 Order was criticized by U.S. allies and has been very controversial among international and constitutional law scholars. Among the criticisms was that it violated the International Covenant on Civil and Political Rights and the Geneva Conventions. Some of the important op-ed pieces on the commissions include: Harold Hongju Koh, *We Have the Rights Courts for Bin Laden*, N.Y. Times, Nov. 23, 2001, at A39; Anne-Marie Slaughter, *Al Qaeda Should Be Tried Before the World*, N.Y. Times, Nov. 17, 2001, at A23; and Ruth Wedgwood, *The Case for Military Tribunals*, Wall St. J., Dec. 3, 2001, at A18. Moreover, the commissions may be lawful under U.S. constitutional law only if the United States is in a “war,” and this issue may turn on the international law of armed conflict. See Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 Green Bag 2d 249 (2002).

On March 21, 2002, the Department of Defense (DoD) issued “Military Commission Order No. 1” that outlined “procedures for trials by military commission of certain non-United States citizens in the war against terrorism.” By specifying various procedural protections, the DoD regulations alleviated some of the concerns about what the President’s Order might entail when the military tribunals are convened.

8. *The Widening War*

Even as sporadic fighting continued in Afghanistan and the post-war nation building was just beginning, President Bush reemphasized the global nature of the war on terrorism. In his State of the Union speech on January 29, 2002, he listed U.S. military activities (including training) in the Philippines, Bosnia, and off the coast of Africa.

The speech then wove together the war on terrorism with efforts to combat the proliferation of weapons of mass destruction. President Bush set out as a goal the prevention of “regimes that sponsor terror from threatening American or our friends and allies with weapons of mass destruction.” He specifically listed Iraq, Iran, and North Korea and said that they “and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world.” He went on to explain:

By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States. In any of these cases, the price of indifference would be catastrophic.

We will work closely with our coalition to deny terrorists and their state sponsors the materials, technology, and expertise to make and deliver weapons of mass destruction. . . . And all nations should know: American will do what is necessary to ensure our nation’s security.

We’ll be deliberate, yet time is not on our side. I will not wait on events, while dangers gather. I will not stand by, as peril draws closer and closer. The United States of America will not permit the world’s most dangerous regimes to threaten us with the world’s most destructive weapons.

President Bush's speech was generally well received in the United States. However, questions were raised, especially abroad, about his lumping Iraq, Iran, and North Korea together under the umbrella of "axis of evil," especially Iran where reformist groups were struggling to change the clerics' policies. Moreover, his promise "not to wait on events" raised questions about whether the United States would engage in preemptive military strikes against these or other foreign states.

In the ensuing months, particularly accelerating in August 2002, the Bush Administration's focus seemed to shift emphasis from rooting out Al Qaeda and catching bin Laden, toward changing the regime of Saddam Hussein in Iraq. In a powerful speech to the U.N. General Assembly on September 12, President Bush focused on Iraq and its failure to comply with numerous past Security Council resolutions. He squarely challenged the U.N.: "Are Security Council resolutions to be honored and enforced, or cast aside without consequence? Will the United Nations serve the purpose of its founding, or will it be irrelevant?" He then committed the United States to work with the U.N. Security Council, though he also warned that the U.N. resolutions needed to be enforced or "action will be unavoidable."

Shortly after his speech, President Bush released his National Security Strategy for the United States, which he had foreshadowed in earlier statements. The new strategy included a proactive stance against potential threats to the United States. The strategy announced that:

We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends. . . .

[T]he greater the threat, the greater the risk of inaction — and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively. . . .

The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends. The reasons for our actions will be clear, the force measured, and the cause just.

(See the discussion of this new strategy in Chapter 11.A.)

As the world awaited U.N. action on Iraq, President Bush sought and obtained a strong Joint Resolution from the U.S. Congress on October 16 that authorized the President to "use the Armed Forces of the United States as he determines to be necessary and appropriate in order to defend the national security of the United States against the continuing threat posed by Iraq. . . ." Then, on November 9, the U.N. Security Council unanimously passed on Resolution 1441, which provided Iraq a "final opportunity" to comply with its disarmament obligations previously imposed by the Security Council, established a rigorous inspection regime, and required Iraq to provide a full and accurate accounting of its efforts to "develop chemical, biological, and nuclear weapons, ballistic missiles, and other delivery systems. . . ." (Both resolutions are in the Documentary Supplement.)

U.N. weapons inspectors arrived in Iraq in mid-November and, pursuant to U.N. Resolution 1441, Iraq submitted a voluminous report on December 7. U.S. officials were highly critical of the report, while the chief U.N. weapons inspector, Hans Blix, and the head of the International Atomic Energy Agency (IAEA), Mohamed ElBaradei, were more mixed in their assessment.

Inspections continued at an accelerating pace into March 2003. Also accelerating were major deployments of military forces from the United States and Britain, along with some support from Australia and other countries. This was accompanied by continued harsh criticism of Saddam Hussein by President Bush and Prime Minister Blair, and the reports of mixed progress from the U.N. inspectors.

By March 2003, the debate had sharpened, with the United States, Britain, Spain and a number of other countries favoring a new U.N. resolution saying that the Saddam Hussein regime had once again not complied with the U.N. resolutions and that the use of force was appropriate. On the other side, France, Germany, Russia, and many other countries thought the inspectors needed more time. When it became clear to the United States and Britain that they did not have the requisite nine votes in the Security Council to pass a second resolution and probably faced, in any event, a French veto there, efforts for a new resolution were dropped. Instead, President Bush issued an ultimatum to Saddam Hussein and his sons that they had to leave Iraq within 48 hours or “[t]heir refusal to do so will result in military conflict, commenced at a time of our choosing.”

Early on March 20 in Iraq, less than two hours after the end of the ultimatum, a major coalition attack began, first with missile and aircraft strike against a location in Baghdad where Saddam Hussein and his senior aides were thought to be meeting. What followed with a swift campaign by coalition forces that left them in control of Iraq in less than a month. The coalition’s highly mobile forces possessed overwhelming firepower and employed twenty-first-century weapons and tactics, including precision-guided missiles and bombs, new surveillance methods such as low-flying drones, and rapid communications.

As of April 2003, however, the coalition was encountering problems in establishing stability in Iraq, reconstructing the economy, and moving toward the transition to a democratic Iraqi government. (A more detailed discussion of the U.S. and world’s actions toward Iraq, from its invasion of Kuwait in 1990 through the 2003 war in Iraq, is found in Chapter 11.B.)

Bibliography

There is extensive literature on the September 11 attacks and the U.S. and world response. A few examples are: Bob Woodward, *Bush at War* (2002); Report, Joint Committee on Intelligence Activities, *Report on September 11* (2002); David Cole, *Enemy Aliens*, 54 *Stan. L. Rev.* 953 (2002).

Up-to-date information on all U.N. activities regarding the attacks and Afghanistan can be found on the excellent U.N. Web site at <<http://www.un.org>>.