

Toward Understanding Global Governance

The International Law and
International Relations Toolbox

Edited by Charlotte Ku and Thomas G. Weiss

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List of Acronyms

ACUNS	Academic Council on the United Nations System
ASIL	American Society of International Law
ECOSOC	Economic and Social Council
EU	European Union
GDR	German Democratic Republic
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IGO	Intergovernmental organization
IMF	International Monetary Fund
INGO	International nongovernmental organization
NATO	North Atlantic Treaty Organization
NGO	Nongovernmental organization
OSCE	Organization for Security and Cooperation in Europe
UN	United Nations



Preface

Since 1991, the Academic Council on the United Nations System (ACUNS) and the American Society of International Law (ASIL) have annually co-sponsored a two-week summer workshop on international organizations for scholars and practitioners. Participants are selected from varied academic backgrounds—international relations, international law, and other social sciences. The three purposes of the workshop have been to:

- enhance the professional development of younger teachers and scholars in international organization studies;
- renew the links between international lawyers and international relations experts; and
- build working relations between university-based scholars, members of the secretariats of international organizations, and staff of nongovernmental organizations (NGOs).

ACUNS and the ASIL have been fortunate to have had the support of the Ford Foundation for this project from the outset, from The Pew Charitable Trusts in 1994 and 1995, and from the John D. and Catherine T. MacArthur Foundation since 1997.

The workshops have contributed toward the first and third objectives—in fact, our own institutions have been rejuvenated with the infusion of almost 200 members of a new generation of participants (see Annex 1 for a complete listing). But the second objective has been more elusive. Although renewing links between those working in international law and international relations remains a major work-

shop focus, providing concrete means to forge these links has proved more challenging.

Each workshop has been made up of some twenty-five to thirty participants drawn from the target groups listed above; and each workshop has been led by directors drawn from international law and international relations. This core is supplemented by invited participants from these disciplines who serve as resource staff and lecturers (see Annex 2 for a complete listing). Each workshop has devoted a portion of its schedule to discussing methods and opportunities for cross-disciplinary work or collaboration. Yet consistently, participants have assessed this part of the workshop experience as troubling despite the close individual professional ties developed.

In retrospect, it seems clear why this is so. In two weeks, it is not possible for participants and resource staff to undertake a comprehensive review of the array of methods and approaches in either international law or international relations. By focusing on only two disciplines, a false dichotomy is set-up between the two while excluding other disciplines with relevance to an understanding of contemporary international issues and politics. Two weeks does not provide enough time to introduce those trained in a particular discipline to work in another. Instead, by emphasizing intellectual differences among participants, the opportunity to identify where and how different disciplinary approaches can work in a common area of inquiry is missed. We hope that the essays in this volume will move toward illustrating how different disciplines will approach a common research area to inform one another—in this instance, to understanding global governance.

These essays also grew out of an acknowledgment that our deductive approach of examining common materials and working together for two weeks had not led participants to embrace cross-disciplinary collaboration or even

necessarily to enhance their understanding of another field. We decided to commission essays to review the differences in the research approaches used by international lawyers and social scientists. The writings would also identify the different objectives in the two modes of inquiry and describe some of the factors influencing the evolution of methods in the two fields. Experiences from previous workshops had informed us that the differences in training and in use of terminology made any spontaneous coming together difficult, if not totally improbable.

At the same time, we were mindful that such difficulties in cross-disciplinary efforts are not uncommon, and that efforts to bring international relations and international law more closely together can be traced back to the nineteenth century.¹ However, the adoption of a more “scientific” method in the social sciences in the middle of the twentieth century created a gap between the two as many students of international relations moved away from normative and toward quantitative approaches. This divergence in approach limited potential interactions, although scholars of international law and international affairs continued to share a common interest in understanding relations between and among states. Changing perceptions of research methods in recent years, nevertheless, have reversed this trend. In international relations, qualitative research and detailed case studies are again acknowledged as legitimate approaches to social science inquiry. A similar broadening of methodological approaches to include the importance of processes and of institutional frameworks has also taken place in the study of international law, creating new areas of overlap between the two fields.² The convergence between the two fields has also been strengthened by the revitalization of the practice and study of intergovernmental organizations at the end of the Cold War. Convergence between international legal scholarship and the study of inter-

national relations has become apparent in recent years in a number of textbooks.³

Where research is conducted independently, a failure to recognize the differences between the two fields may be less critical than when it is designed to be integrated. But for scholars to traverse disciplinary boundaries in the search for additional evidence and deeper understanding for their hypotheses, it is imperative that they be in a position to evaluate the reliability of the findings and the underlying assumptions and objectives of the respective research projects. Moreover, on the basis of such a foundation, collaboration and other forms of interdisciplinary work stand a greater chance of producing better informed scholarship. It is our hope that these materials, produced initially to facilitate the work at the 1997 ACUNS/ASIL Summer Workshop, will at the same time be of assistance in the interaction between these two fields more broadly.

The papers present and demonstrate the tools, techniques, and purposes of the two fields of inquiry. Following a general introduction providing an overview of methodological developments in the two fields, the principal authors of this manuscript, Don Hubert (at the time a Post-Doctoral Fellow, Brown University, Watson Institute and now in the Canadian Department of Foreign Affairs and International Trade) and Brad Roth (Assistant Professor, Wayne State University Law School) have written two original essays on contemporary research topics to illustrate methodological controversies within each field. Both authors were participants in the 1996 ACUNS/ASIL Summer Workshop and are trained in international relations and international law, respectively, although both have also been exposed substantially to the other's discipline. These two illustrative studies are each preceded by a general essay on the purpose and development of broadly accepted methods of inquiry in international relations and international law.

Although grouped together, the essays within each of the two main parts are neither meant to endorse a particular approach nor to provide conclusions to a specific question. Rather, they provide a general reader with some background on the intellectual projects that fall within the two fields. The two illustrative studies then demonstrate how these methods might be applied by individual scholars.

We begin with Harold K. Jacobson's essay on "Studying Global Governance: A Behavioral Approach," which provides an explanatory background for the dominant approach in the social scientific study of international relations. Don Hubert then applies the social science method in an essay on nongovernmental organizations. In "Inferring Influence: Gauging the Impact of NGOs," he reviews recent debates over the design of social science research, particularly as they relate to the study of international relations, and draws out the implications for the study of the significance of nongovernmental organizations. Although NGOs have been the subject of considerable recent attention from both scholars and practitioners, Hubert touches on the methodological weaknesses in conclusions about and definitive influence of NGOs in changing state behavior and policy. Reflecting his training and perspectives in the discipline, Hubert spends two-thirds of his paper reviewing options for his investigation and the reasons for his choice.

Jonathan Charney opens the international law part by introducing the sources of international law as the principal tools in an international lawyer's approach to a subject. His essay focuses on emerging changes in this area. Brad Roth reflects on the questions that efforts to understand shifts in sources create in his, "What Ever Happened to Sovereignty? Reflections on International Law Methodology." Roth considers the methods used by international legal scholars to test normativity through an examination of

the current status of the legal concept of sovereignty and its implications for human rights law. Controversies revolve around how significant sovereignty is regarded for international law-making. Roth concludes that recent scholarship has perhaps gone too far in dismissing sovereignty as a factor in law-making processes, thereby undermining the significance of international law. Demonstrating his training and perspective, Roth moves almost immediately into defining his terms with less time spent on explaining his approach.

These contributions suggest that the reason for bringing together individuals from the different disciplines is not flawed, but efforts to infuse deep understanding and appreciation within the workshop framework was more than could be expected. What the workshop has provided is an opportunity for scholars and practitioners to explore a common subject—in this case, global governance—and related sub-topics—effectiveness and compliance of international law and institutions. The exercise as it has emerged has become less one of cross-disciplinary activity than of identifying and understanding a common ground for investigation using different strands and approaches.

Exploring Global Governance

The post-Cold War era was one heralded, somewhat prematurely as it turns out, by expectations for what President George Bush called a “new world order” relying on multilateralism, international institutions, and international law. Yet, the institutions and understandings of multilateralism as they existed at the end of the Cold War have proven inadequate to address and understand the issues and challenges of the post-Cold War. This has triggered a search for new institutions—the Organization for Security and Cooperation in Europe (OSCE), an expanded North Atlantic Treaty Organization (NATO), and acknowl-

edgment of greater participation and contributions by non-governmental actors are examples among others. It has also forced a reexamination of the concepts that seemed inadequate to explain contemporary international issues. This is the case because of the complexity and intensity of issues today. Issues no longer divide easily into security or economic and environmental issues, domestic or international issues, public or private sector issues; rather they are, in both theory and practice, multifaceted including elements of areas once thought to be independent of each other. A new language has now emerged to address today's issues and interactions with terms like "globalization," "global governance," and "global civil society."

The language has emerged because of the perceived limits of existing conceptual frameworks of international law and international organization to provide insight into contemporary international phenomena. New tools and exploratory strategies are needed. Yet, in an academic world where specialization and training have created communities that are ill-equipped to communicate widely outside their own areas, development of new approaches is neither straightforward nor easy.

The focus for creating such new approaches should not be negative—that is, identifying how one discipline is deficient—but rather positive—that is, actively seeking what a discipline may bring to an exploration. A new language, which may draw from existing disciplines and modes of thinking, is developing to assist in the analysis and monitoring of the post-Cold War world. Equipped with a wider variety of methodological tools, we can return to the expectations of the end of the Cold War, but we will do so with a fuller understanding and more robust conceptual framework upon which to build. This is the common endeavor that we hope the ACUNS/ASIL Summer Workshop program will continue to foster.

Over the last five years, these Summer Workshops have been ably and professionally administered by Melissa Phillips. For these workshops and for the timely and attractive presentation of this volume, we are deeply indebted.

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Endnotes

¹ See, for example, James Stephen, *International Law and International Relations* (London: Macmillan, 1884).

² See, for example, the work of one former participant, Anne-Marie L. Herbert, "Cooperation in International Relations: Comparison of Keohane, Haas, and Franck," *Berkeley Journal of International Law* 14, no. 22 (Winter 1996), which compares the approaches of international law as represented by Thomas Franck with two international relations scholars represented by Robert Keohane and Ernst B. Haas.

³ See, for example, Christopher L. Joyner, ed., *The United Nations and International Law* (Cambridge: Cambridge University Press, 1997) and Thomas G. Weiss, David P. Forsythe, and Roger A. Coate, *The United Nations and Changing World Politics* (Boulder: Westview Press, 1997), second edition.



Introduction

The Nature and Methodology of the Fields

Charlotte Ku and Thomas G. Weiss

The institutions and practices analyzed by students of international relations and international law frequently overlap. Analyzing the interactions between states, in both bilateral relationships and within intergovernmental organizations (IGOs), is a common purpose. The questions that underlie the respective research agendas and the research methods employed, however, differ. International relations (and even more specifically, the sub-field of international organization) is commonly situated within the social sciences, usually as a subset of political science. While there is substantial methodological disagreement within the social sciences generally, the central objective is to provide explanations for human behavior. In the case of international relations, the corresponding objective is to explain why states act the way that they do. The basic method adopted involves testing theories and hypotheses against empirical evidence.

International law is part of the broader field of legal studies, but focuses on the law among rather than within states. The basic objective of international legal scholars is not to explain the behavior of states, but rather to assess the status of legal norms. This is not to say that international lawyers are not interested in the behavior of states, for state behavior is a crucial determinant of the existence of a legal norm. The primary objective, however, is to determine which rules or standards have acquired the status of law. Once again the methodological approaches within the field range widely, but most international legal scholars would accept that a central task is to measure the norm in question

against the accepted “sources of international law”—including customs, treaties, and general principles.

A more detailed sketch of the principal objectives and methodological approaches for each would be helpful. Early work in international relations tended to be either political philosophy outlining normative claims about how things “ought” to be, or diplomatic history involving detailed descriptions and analysis of specific events. Theories, when they existed, were rarely subjected to rigorous empirical testing. A new approach to the study of the social world, usually referred to as “positivism,” emerged first in Europe during the inter-war period and later in North America; and by the 1960s, it dominated the field.

The positivist approach to hypothesis testing and processing knowledge in the social sciences is modeled on the natural sciences. The goal is to establish empirical facts, uncover causal relationships, and identify valid generalizations (or patterns) about human action. In the natural sciences, the most common research method is repeated experiments. In fields such as international relations, however, experimentation is seldom possible; we simply cannot rerun history under the conditions of our choosing. Complex statistical methods exist to provide reliable findings in situations where we are limited to using existing data, but these approaches depend on a large number of cases and numerical data. While particularly appropriate for the analysis of survey or election data, the nature of the evidence available to scholars of international relations often makes the use of statistical methods impossible. Where the number of comparable cases are few and the data cannot be collected in numerical form, qualitative rather than quantitative methods must be employed. Whether qualitative studies focus on a single instance of a particular phenomenon, or consider several cases in comparison, they continue to share the same basic method:

hypotheses are derived from theories and then tested against available empirical data.

The logic of social science research can perhaps best be illustrated through a discussion of the components of a basic research project. The research proposal involves not only stating and justifying the goals of the project, but also outlining a detailed plan for how those goals will be achieved. Justification for a proposed research topic should be provided at two levels. First, the significance of the topic must be defended in practical terms. For some topics, such as the outbreak of interstate war, this may be a rather simple task; in other cases such as the sources of intrastate violence, it may require a more elaborate defense. Second, the topic should also be situated within the literature to avoid duplication of research already completed, and to illustrate how the study will contribute to knowledge.

The research topic is usually revised into a question calling for an explanation. It is important to note that the question should relate to empirical facts rather than normative claims. At the same time, it cannot be limited simply to matters of fact and should also involve patterns and relationships. Identifying the research question is one of the most critical tasks before a researcher in the social sciences. It may be possible to resolve shortcomings in other components of the research project. But without a clear question, it is unlikely that the research will produce useful results.

A theoretical perspective is the second essential component of a research project. Theories are simply a preliminary answer to the research question. Put another way, they are our “best guesses,” reflecting what we expect to find in the empirical evidence when it is available and analyzed correctly. While the two theories commonly associated with international relations—realism and liberal institutionalism—are very wide ranging, the theoretical perspective

adopted for a particular research project may be much more narrowly focused. What is essential is that it is possible to derive hypotheses from the theoretical position that can be tested against empirical evidence. Although great attention is commonly given to the theoretical framework, the definitions of key concepts are usually a most problematic aspect of social science research. Most terms lack precise shared meanings, and will seldom correspond directly with the data accessible to the researcher.

The final step in a research project involves the collection and analysis of data. Although the term “data” tends to bring to mind large surveys and statistical tables, evidence can take a variety of forms including the written record, interviews, and observations. Analysis involves the testing of the original hypothesis against the data collected. If the evidence supports the initial expectations, our confidence in the hypothesis increases. To pursue further the topic, we might begin a research project again by either refining the hypothesis based on what has been learned, or attempting to apply the original hypothesis to other cases. Alternatively, if the evidence collected is inconsistent with the initial expectations, then confidence in the hypothesis would be reduced.

International law scholarship, in its classic form, seeks to measure actions—principally actions undertaken or proposed to be undertaken by states or intergovernmental organizations—against standards that can be said to have attained international acceptance as legally binding norms. Legal inquiry presupposes the existence of an international system that, albeit decentralized, generates standards of conduct relevant to (even if not always determinative of) the decisions of state actors.

Controversies among scholars of international law frequently reflect differences over the most fundamental question of jurisprudence: What is law? The most basic

difference is between the “natural law” and “positivist” approaches to legality.

Naturalism teaches that, to be worthy of the name “law,” a body of norms must be based on a set of universal, immutable principles of justice accessible to human reason. Natural law jurisprudence thus converges with normative political theory. Early naturalist approaches to international law, in particular that of the father of the discipline, Hugo Grotius (1583-1645), proposed principles of justice that could be rationally deduced from the premise of independent units—that is, states—interacting in the absence of a commonly-recognized sovereign. More recent naturalist approaches depart from the emphasis on the state as the elemental unit of the international system, stressing instead the dignity of the human person and the artificiality of the “state” as a legal construct. Contemporary naturalist scholarship thus tends both to exalt human rights and to base those rights more on deduction from first principles than on the actual practice or manifest intent of states.

Legal positivism, however, seeks to reduce law to a matter of fact. Positivists insist on a strict separation between “law as it is” and “law as it ought to be.” They conceive of law as an observable social phenomenon, manifest empirically in patterns of obedience to norms. Positivist approaches to international law, originated by such early scholars as Emerich de Vattel (1714-1767), ground legal norms in the voluntary undertakings of states, manifest in custom and treaty, as well as (by more recent accounts) in principles found in common among all major legal systems.

Over the last two centuries, the positivist orientation has dominated the study of international law, at least in the sense that positivistic criteria serve as indispensable reference points for assertions about international legality and normativity. Yet naturalism has never been fully banished.

One reason is that empirical findings can have legal significance only within a pre-established conceptual framework. Certain basic precepts, such as the juridical equality of states and the duty to fulfill treaties (*pacta sunt servanda*), are necessarily deduced from first principles rather than inferred from practice. Another reason, perhaps, is that the very notion of law presupposes—and the use of the term trades upon—certain broadly-shared ends (for example, predictability and accountability) that animate any project of legal interpretation. While it is certainly possible to conceive of law that is unjust, and an entire legal system that is unjust, it is not possible to regard as law what appears as arbitrary conduct.

In ascertaining whether a standard rises to the level of a legal norm, virtually all international law scholars make reference to an accepted set of “sources” of law—principally custom, treaty, and “general principles of law recognized by civilized nations.” Controversies nonetheless persist over the methods used to ascertain whether a given norm “exists” in international law, especially where state practice frequently contradicts apparent treaty commitments and ostensibly-solemn pronouncements, as in the vital areas of peace and security, human rights, and humanitarian law.

The methods by which international jurists “find” international law depend on the particular “source of law” at issue. With respect to custom, the goal is to find a consistent pattern of state practice, accompanied by a manifest sense of legal obligation (*opinio juris*). In other words, the customary law is that which states treat as binding upon themselves; an articulation of standards does not suffice to establish law without conduct conforming to those standards, nor does conduct alone establish the existence of a legal norm in the absence of at least a tacit renunciation of the right to behave otherwise.

When confronted with a controversy, international jurists search the historical record for instances of state conduct in situations similar to the one at issue, as well as for pronouncements by state officials explaining, justifying, endorsing, denouncing, or acquiescing in relevant conduct. In collected accounts of practices and pronouncements, jurists seek to find patterns that indicate the existence of a legal norm. Instances that seem to contradict that indication may be either dismissed as isolated outliers or “distinguished”—that is, found to have resulted from special circumstances extraneous to the specific issue with which the inquiry is concerned. Although custom is theoretically the product of the consent of each state, consent may be imputed to states that, on notice of the custom’s emergence in the community of states, fail to “persistently object,” and to states that begin to participate in the relevant international activity subsequent to the hardening of the practice into custom.

There are no clear specifications as to the quantum of evidence required to demonstrate the existence of a customary norm. Since, in a system based on the principle of sovereign equality, states are generally presumed free to behave as they choose, the burden of persuasion ordinarily falls on the proponent of a legal restriction on conduct.

Where the legal issue involves not custom but treaty, a different set of methods comes into play. These methods are themselves dictated by the customary law of treaties, which governs such questions as what constitutes a binding treaty, how a treaty should be interpreted, and when treaty obligations may be suspended or terminated. This customary law of treaties was codified and further developed in the 1969 Vienna Convention on the Law of Treaties. Articles 31 and 32 of the convention establish an “objective approach” to treaty interpretation that emphasizes the “ordinary meaning” of the treaty language, permitting

recourse to the records of the negotiations (the *travaux préparatoires*) only in cases where the language is ambiguous, obscure, or conducive to a “manifestly absurd or unreasonable” result.

In reality, however, “ordinary meaning” is frequently elusive and the emergence of new circumstances may render uncertain the application of once clear terms. Efforts to specify meanings originally intended or subsequently adopted by the parties often produce controversy. To fill gaps in treaty language, jurists are obliged to employ methods similar to those used to derive customary norms.

In addition to custom and treaty, international law encompasses “general principles” common to the major legal systems of the world. International jurists must thus employ yet another method, canvassing the domestic law of states representing a fair cross-section of legal traditions for evidence that certain principles are broadly shared. There is considerable disagreement as to whether “general” principles include substantive legal norms—such as particular human rights—or whether the category is limited to more abstract norms (for example, one should not be permitted to benefit from one’s own wrong); rules of textual interpretation (for example, a specific provision takes precedence over a general provision); and procedural principles (for example, a party should not be allowed to relitigate issues that were previously the subject of a final judgment against it).

In the last few decades, international law has seen the emergence of a new category of norms not predicated on the consent (even “tacit” or imputed) of individual states. These “peremptory” norms (*jus cogens*) may not be derogated, and treaty provisions that contravene such norms are deemed invalid. No list of such norms has been authoritatively agreed upon, although the illegality of genocide, slavery, and torture are most frequently mentioned. Propo-

nents are divided on how peremptory norms are to be derived; *jus cogens* may be predicated on *opinio juris* of an extraordinary character, on “general principles,” or directly on natural law.

We began by asserting that analyzing the interactions between states is a common interest of international relations and international law. Where the fields differ, however, is in the purpose for their undertaking a project. Put in generalized terms, in the case of social science, the purpose is principally to understand behavior. In the case of law, the purpose is largely to direct behavior. Recognizing this fundamental difference of purpose should aid in understanding the various strategies pursued and the work produced within either one or the other of the two fields. Where collaboration may be fruitful, therefore, is not for one field to adopt the method of the other, but rather to understand the results of work produced in concurrent efforts to explain issues of global governance.





Part One

International Relations Tools and Methods



Studying Global Governance: A Behavioral Approach

Harold K. Jacobson

To argue that there ought to be more collaboration between social scientists and international legal scholars in studying issues of global governance could seem to be so patently obvious that it would not even need to be stated. Both social scientists and international legal scholars study phenomena that are at the core of global governance—institutions, principles, norms, and rules—and with approaches that are in principle complementary. Moreover, as the twenty-first century dawns, there is a desperate need for useful knowledge about global governance. To establish and operate the world order that we have had in the second half of the twentieth century, an order that has provided such rich benefits, humankind has drawn deeply from the intellectual capital that was created from the thirteenth century through the 1930s about how to achieve international peace, prosperity, and respect for human rights. This intellectual capital is just about exhausted. In addition, the emerging problems that will require attention in the twenty-first century seem likely to be different from those that have dominated the international agenda since the seventeenth century. New ideas are required to address new issues. Unfortunately, despite the similarity of their concerns, the complementarity of their approaches, and the crying need for the knowledge that they could create, social scientists and international legal scholars do not work together very often. The summer workshops that have been sponsored by the Academic Council on the United Nations System and the American Society of International Law

were designed to change this. Perhaps this publication, which grows from the seventh such workshop in 1997, can also contribute.

Effective collaboration must be grounded on a clear understanding of the two approaches. This is more complicated than it sounds. Perhaps because social scientists and international legal scholars find many of the same or related questions interesting, the subtle but real differences between them in substantive concerns, terminology, and methodology are often ignored to the detriment of collaboration. This chapter attempts to describe the dominant approach to the social scientific study of international relations and, within that broad area, global governance. It will draw most heavily on political science, but it should apply to other social sciences as well. The purpose of the chapter is to build a foundation of understanding on which collaboration can be based.

The chapter will describe the behavioral approach to the study of global governance. There are, of course, several other approaches, and all have their merits. The reason for focusing on the behavioral approach is that, since the 1950s, it has been the dominant approach in the United States and, despite the growing appeal of some other approaches, it continues to be the one most prevalently used.

The Development of the Study of International Relations

International relations—issues of war and peace, commerce and investment, and the promotion and protection of human dignity—have been the subject of theorizing from time immemorial. Classic texts by such authors as Kautilya, Machiavelli, Mencius, Sun Tzu, and Thucydides contain wisdom of continued relevance, but the modern systematic study of international relations is primarily a product of developments since the First World War. The terrible carnage of World War I provided an impetus to determine if

scholarship could find some way of avoiding a repetition of that disaster.

The Woodrow Wilson Chair of International Relations was created at Aberystwyth in 1919, and international relations programs and departments were established in many other institutions in the following years. In keeping with social science generally at the time, the study of international relations had a strong reformist bias. The primary aim of early international relations studies was to find means to prevent war. Most of the early professors of international relations had been trained in either international law or history and their scholarship reflected their training. Given the reformist bias of international relations scholarship and the strong connection with international law, much of the writing consisted of prescriptions of legal modalities for achieving peace.

As international relations deteriorated during the 1930s these writings appeared to be increasingly irrelevant to the burning issues of the day. International relations writing made virtually no contribution to preventing World War II, the Great Depression, and the Holocaust. As the Second World War broke out and progressed, there was a broad determination that international relations should indeed be studied systematically, as the pioneers in the field had sought to do, and its ultimate purpose should continue to be to show how to make the world better; but the study must be radically revised.

The Revised Approach

Three books that were published during or shortly after the Second World War defined the new approach to the systematic study of international relations: E. H. Carr's *The Twenty-Years Crisis; 1919-1939*;¹ Quincy Wright's *A Study of War*;² and Hans Morgenthau's *Politics Among Nations*.³ Carr made the point that, in examining interna-

tional issues, scholars had to put aside their moral predispositions and examine the facts, however unpalatable they might be. He also stressed that scholars had to pay attention to power. Quincy Wright demonstrated the rich benefits that could be gained by examining international phenomena inductively and quantitatively. Hans Morgenthau showed how international relations theory could be built as economics had been built by deriving deductions from simple propositions. In this sense, his work foretold the application of rational choice theory to international issues. Graduate training in international relations in the aftermath of World War II was strongly shaped by these three seminal works.

It was also based on the assumption that it would be possible to develop a “science” of international relations and that this should be the goal of scholarship. Science took on a particular meaning. The goal of scholarship in this sense was to develop empirically-based generalizations about human behavior. Scholarship could have other goals. It could, for instance, seek to develop sensitivity to the many factors at play in international relations. Or it could seek to develop prescriptions for improving human behavior. In the aftermath of the Second World War, the first of these alternatives was deemed too modest and the second too ambitious. It was felt that scholarship in the 1920s and 1930s made such a minor contribution to improving international relations because it had been characterized by these two goals. To make a more important contribution, it was thought that scholarship had to yield verifiable generalizations on which policy could be based.

The epistemology that was adopted for developing generalizations was derived from the philosophical school of logical positivism.⁴ An important tenet of logical positivism is the distinction between factual and value statements, and this became the first tenet of the new

approach to the study of international relations. Factual statements are in principle capable of being empirically proved. Value statements are statements of preference. The statement that there were fewer conventional intergovernmental organizations (IGOs) in 1990 than there were in 1980 is a factual statement. The statement that the world is better off as a consequence is initially a value statement, but there could be sub-statements relating to this statement that could be factual. For instance, the statement that having fewer IGOs makes those that exist more effective because governments focus their attention more clearly on them is a factual statement. It may or may not be true, but it is in principle capable of being proved.

Logical positivism requires that scholars concentrate on factual statements. Such statements are where we should have expertise. We have no special claim for the value or our preferences. Moreover, democratic theory requires that those preferences pursued by governments should be determined by political processes and not by the pronouncements of an individual or some elite group.

The insistence that scholarship should concentrate on factual statements did not mean that the field abandoned its reformist origins. On the contrary, most international relations scholars have continued to have the normative biases that animated the creation of the field. Values enter into scholarship in a variety of ways, but most importantly in the choice of topics to be studied. A crucial criterion for judging the importance of international relations scholarship is whether or not the topic contributes fundamentally to understanding how to achieve peace, prosperity, and respect for human dignity and rights. The insistence that scholarship concentrate on factual statements was really an effort to follow Carr's advice, to look at the world as it is, not as we might like it to be, and to keep our own values separate from our observations of the world.

Some modern schools of scholarship have questioned whether or not concentration on factual statements is possible. Certainly keeping one's biases out of one's scholarship is difficult, and one must recognize this. Yet acknowledging this frailty is not equivalent to giving license to abandoning the quest for objectivity.

The reformist bias of the founders of international relations can enter importantly into the design of research in another way beyond the definition of the topic. This is in the insistence that one should search for variables that are subject to human manipulation. The purpose of scholarship, according to this tenet, is not to show that IGOs inevitably can do little to prevent war or economic depression, but rather to show how their contribution to preventing such disasters might be made more effective.

A second basic tenet of the new approach to the study of international relations was that, whenever possible, phenomena should be measured quantitatively. This tenet is derived from the belief that almost all important generalizations about international relations are quantitative. Examples of such generalizations include the generalizations that democracy is more likely to lead to peace and that freer trade is more likely to lead to prosperity. The word "more" in both statements is a quantitative concept. Quincy Wright's *A Study of War* pointed the way toward the emphasis on quantification by showing how useful careful attention to measurement could be.

There are several reasons for the insistence on quantification. One is a simple desire to be as precise as possible. The necessity for precision is easy to illustrate. When one thinks about moving toward freer trade, one wants some estimate of the relative benefits and costs of such a move. Another reason is that the more quantification is used, the more easily statements can be checked and analyses replicated, and results confirmed or disconfirmed.

To advocate being as quantitative as possible, however, is not to argue for attempts to assign numbers in overly simplistic ways. There are different forms of measuring the phenomena that interest us. Categorical or nominal measurement merely requires establishing categories, for instance, war or peace. Ordinal quantification requires only an ability to say that one condition is greater or less than another, for example, to say that Canada is more democratic than China. Such a statement is meaningful but it does not require precise measurement. Only cardinal or interval measurement requires that intervals between measures be precisely equal. Many phenomena in international relations cannot be measured on an interval scale, but they can be measured nominally or ordinally, and to do so is useful.

The distinction between factual and value statements and the dictum to measure phenomena as precisely as possible are foundations for the project to study international relations scientifically. The project was to proceed by following the course of natural science. Generalizations were to be developed by framing hypotheses and then by testing them with empirical evidence. Whenever possible, one would utilize techniques of statistical inference to confirm or disconfirm hypotheses. The hypotheses to be tested were to be derived from theoretical assumptions. Hans Morgenthau's *Politics Among Nations* was the first book in international relations to explore a simple assumption and its ramifications. The assumption was that which was stated in the opening sentence of the first chapter, "[i]nternational politics like all politics is a struggle for power."⁵

In practice, the scholarly project to study international relations scientifically proved much harder to execute than any of those who embarked on it imagined that it would be. Almost half a century after the project started, there are

very few generalizations in which international relations scholars have great confidence. The generalization that democracy contributes to peace is one of these, and there are others, but they are limited in number.

Nonetheless, the epistemology and approach of the scholarly project as it was defined in the years after the Second World War remain useful. The search for generalizations about human behavior must be the core of the enterprise. Careful attention to the definition and the use of terms is essential to rigorous thinking. Accurate measurement is essential. Experience using the basic tool of statistical analysis in the social sciences, multiple regression, should make us deeply suspicious of deterministic and single factor explanations. Most developments are brought about by multiple causes that contribute in differing proportions. Developing middle range generalizations is a reasonable and realistic goal for international relations scholarship.

Substantive Questions

This approach, of course, was designed to explore all issues of international relations, not just those that related to global governance. Indeed, global governance was not a term that was used until the late 1980s. In the original research program, the issues focused on international organization. The answers that emerged from exploring these questions contributed to redefining the issues under the rubric of “global governance.”

The issues that were to be explored concerning international organization were four in number. The term “international organization” was used advisedly because it was always intended to cover both international governmental and international nongovernmental organizations (INGOs). In the 1970s and 1980s the term “international organizations” was often superseded by the term “international regimes.” Sometimes they have been used as if they were

interchangeable, but the term “regimes” is broader. It included the principles and rules that IGOs espouse and promote as well as the formal institutions. Whether one focuses on IGOs or regimes, the broad issues that need to be investigated are similar if not identical.

The first of these issues concerns the creation of international organizations and regimes. Why and how have they been created? What trends can be discerned? Are IGOs established to take advantage of opportunities created by technological developments and in response to popular pressures, as functionalists argue?⁶ Is the support of a hegemonic state essential for the creation of effectively functioning international regime?⁷

The second issue involves decision-making in international organizations. How are decisions made? Which actors have influence? Do decisions in international organizations simply reflect the distribution of power in world politics generally, as one might infer from some scholars’ writings,⁸ or does taking decisions within the framework of international institutions alter power and influence relationships?

The third issue concerns the consequences of the actions of international organizations. What has happened as a consequence of actions taken by international organizations? Has the deployment of military force by international organizations upheld norms and international law, and brought peace? Does economic aid contribute to economic growth and development? Following the maxim that important occurrences have multiple causes, the latter two questions should be preceded by the query, “under what conditions?” At a deeper level, do the actions of international organizations and regimes reinforce or alter the existing distribution of values? Do they tend to make the rich richer and the poor poorer as Marxists have alleged, or do they promote and facilitate redistribution?

The fourth issue concerns the effects of international organization and regimes on the system of allocating political authority and power that has provided the framework for international relations since the seventeenth century. Sovereignty—the notion that the government of a state recognizes no higher external authority and its rule is supreme within the territorial boundaries for which it has jurisdiction—is the organizing principle of this system.

It is in response to inquiries relating to this last issue that the concept of global governance has attained the salience that it now has. Early scholarship on international organizations, in retrospect, seems to have been implicitly guided by a teleology that is represented in a series of tapestries that hang in the Palais des Nations, the home of the League of Nations and now the site of the Geneva office of the United Nations. The tapestries depict the social and political organization of humankind advancing from the family group, through the tribe, to the nation state, and finally to world government. International organizations were seen, implicitly at least, as ultimately a centralized form of political authority above nation states.

Indeed, many early efforts of international organizations appeared to have sought to realize this vision. The centralized efforts of the League Council to plan and manage global disarmament and arms control, and of the International Monetary Fund (IMF) to manage exchange rates are examples. Thus far, this vision have proved to be a chimera. Even in Europe, where the most powerful institutions exist, it is far from clear that the European Union (EU) will ultimately resemble a United States of Europe.

Instead, the growth of intergovernmental and nongovernmental organizations (NGOs), and other forms of international collaboration have contributed to the development of a much more complicated situation, a situation in

which sovereign states remain powerful, but there are many other actors that have influence.

As the Commission on Global Governance put it:

Governance is the sum of the many ways individual and institutions, public and private, manage their common affairs. It is a continuing process through which conflict or diverse interests may be accommodated and cooperative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.

. . . At the global level, governance has been viewed primarily as intergovernmental relationships, but it must now be understood as also involving non-governmental organizations (NGOs), citizens' movements, multinational corporations and the global capital market. Interacting with these are global mass media of dramatically enlarged influence.⁹

The system that is evolving is a much less hierarchical one than that that is pictured in the images on the tapestries in the Palais des Nations. As James Rosenau pointed out in his article in the first issue of the journal, *Global Governance*, “. . . practices and institutions of governance can and do evolve in such a way as to be minimally dependent on hierarchical, command-based arrangements.”¹⁰

The emerging vision of global governance does not, however, make the behavioral approach nor the questions on which behavioral studies focused irrelevant. To the contrary, they are even more relevant as we look forward to more complicated allocations of authority in the international system. To realize the neat hierarchical vision would have involved only a few choices with respect to the design of institutions and norms; the much more complex situation that appears to be the emerging reality will involve many, many more such choices.

Collaboration Among the Social Sciences and International Law

The likelihood that so many choices about institutions and norms will have to be faced should be a powerful stimulus to collaboration among social scientists who study international organizations and regimes, and international lawyers. Social scientists could contribute knowledge about behavior, about the goals that humans seek, the ways in which they pursue them, and the ways in which they respond to stimuli including institutions, norms, and regulations. International lawyers could contribute knowledge about the vast variety of legal arrangements that have been tried and are possible, and their effects. This should be a rewarding collaboration.

Social scientists studying international relations may be ready for such a collaboration. In the early years after the Second World War while pursuing our, in retrospect, imperfect understanding of Carr and Morgenthau, we tended to denigrate the importance of international law and institutions. Starting in the 1980s, social scientists developed a renewed appreciation of institutions and of legal arrangements.¹¹ Moreover, because so much of the parentage of contemporary international relations scholarship came from international law, which we have ignored for a while, we may be past the stage of insisting on demonstrating that we social scientists are different from international legal scholars. Finally, and perhaps most importantly, we now have something of our own to bring to the collaboration.

The need for collaboration is strong. The potential participants are ready. It should occur. The intellectual rewards could be rich.

Endnotes

¹ E. H. Carr, *The Twenty-Years Crisis, 1919-1939: An Introduction to the Study of International Relations* (London: Macmillan Press, 1939).

² Quincy Wright, *A Study of War* (Chicago: University of Chicago Press, 1942).

³ Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Alfred A. Knopf, 1948).

⁴ See Carl Gustav Hempel, *Fundamentals of Concept Formation in Empirical Science* (Chicago: University of Chicago Press, 1952) and Carl Gustav Hempel, *Aspects of Scientific Explanation, and Other Essays in the Philosophy of Science* (New York: Free Press, 1970).

⁵ Morgenthau, *Politics Among Nations*, p. 13.

⁶ See David Mitrany, *A Working Peace System* (Chicago: Quadrangle Books, 1966).

⁷ See Charles P. Kindleberger, *The World in Depression, 1929-1939* (Berkeley: University of California Press, 1973).

⁸ See Kenneth N. Waltz, *Theory of International Politics* (Reading, MA: Addison Wesley, 1979).

⁹ Commission on Global Governance, *Our Global Neighbourhood: The Report of the Commission on Global Governance* (London: Oxford University Press, 1995).

¹⁰ James N. Rosenau, "Governance in the Twenty-first Century," *Global Governance*, 1, no. 1 (Winter 1995), pp. 13-43; p. 14.

¹¹ See James G. March and Johan N Olsen, *Rediscovering Institutions: the Organizational Basis of Politics* (New York: Free Press, 1989).



Inferring Influence: Gauging the Impact of NGOs

Don Hubert

Attention to research methods in the study of international relations occurs primarily at opposing ends of the field: either philosophical treatment of the prospects for reliable enquiry into the human sciences, or scientific consideration of quantitative methods utilizing statistical analysis.¹ Yet the data available to students of international relations is often unsuited to statistical manipulation, and the number of potential cases or occurrences of important phenomenon is frequently small. These problems are even more acute in the study of intergovernmental organizations (IGOs) and other non-state actors. Studies of international organizations, therefore, have been dominated by qualitative methods, detailed case studies, and rich contextual analysis.

Numerous case studies have claimed that intergovernmental and nongovernmental organizations have important effects on the behavior of states. However, as Keohane notes in his review of the literature on multilateralism, “to argue that international institutions are significant ... is only to claim that it is worthwhile to study them, not to specify how strong they are or what should be studied.”² A similar argument could be made for the literature on nongovernmental organizations (NGOs). The importance of these non-state actors has been established sufficiently to warrant further inquiry. The task ahead is to measure their influence and assess the conditions under which they are more and less effective. Although this paper will focus specifi-

cally on the influence of NGOs on state policy, the problems encountered in the study of IGOs are similar.

It is often assumed that the methodological principles for establishing causal relationships apply only in quantitative studies. An overwhelming majority of the literature on research methods focuses on the use of numerical data derived from many cases. For quantitative scholars, detailed case studies are merely a preliminary step in a larger research project intended to familiarize the researcher with the area of study and produce tentative hypotheses. As a result, the case study approach has an unimpressive reputation among quantitative scholars. Although the opinions of these scholars appear to be changing, a bias against studies with a small number of cases and a qualitative methodology no doubt remains. And this bias is reinforced by the number of qualitative research projects that make no attempt to produce reliable inferences, yet claim to have demonstrated causal relationships. The dominance of quantitative approaches, on the other hand, has allowed methodological concerns to drive the research agenda. Projects are undertaken not because the questions are particularly urgent, but rather because data that fits neatly into research designs is readily available.

If we accept that the importance of the question should drive the research agenda, we are often faced with the situation of explaining highly complex outcomes with relatively weak data. This predicament is common when studying IGOs and NGOs: pressing questions but only a small number of cases and fragmentary evidence. Consider, for example, a research project designed to study the influence of the United Nations secretariat on decisions by the Security Council to intervene in internal conflicts without the consent of the warring parties. Although the frequency of Chapter VII interventions has increased significantly since the end of the Cold War, the number of

actual cases remains small. Furthermore, no systematic surveys of the key participants were conducted during the decision-making processes, and voting records from the Security Council record only the decisions of states, not why they were taken. A study of the effectiveness of NGOs in lobbying for international environmental treaties would face similar difficulties. One might conclude that research methods become much less important when working under these conditions; yet it can be argued that these limitations place even greater demands on our methodology. Making causal claims where the number of cases is small and the data weak is not impossible, but reliable findings do depend on careful attention to research design and data analysis.

The remainder of this paper will discuss the logic and rules that underlie the basic method of establishing causal relationships in the social sciences. For the moment, it is enough to point out that there are two central tasks associated with explaining outcomes: testing individual hypotheses and expanding particular conclusions into generalizable findings. Developing explanations begins with the proposition of a hypothesis or “best guess,” from which a precise set of expectations are generated. These expectations are then tested against empirical evidence that, in qualitative research, usually takes the form of interviews, written records, and observation. The closer the correspondence between the derived expectations and the empirical evidence, the greater the confidence in the original hypothesis. Whether we are studying a unique event or a much larger class of events, the logic remains the same.

The second objective of research in the social sciences is to produce generalizable conclusions. Where a large number of cases and numerical data are not available, the comparative method is used to generate findings with a broader applicability. Although sometimes equated with a sub-field of political science that examines the differences

and similarities between and among political systems, techniques of comparison are applicable to a much wider range of subject matter.³ Some events or phenomenon are genuinely unique, but in most instances the inclusion of at least a few comparable cases increases significantly the utility of the research project. Applying hypothesis testing to comparative studies offers an effective approach for assessing influence with either quantitative or qualitative data.

It is important to note at the outset that assessing influence is only one of many important tasks facing those who study nongovernmental organizations. The development of theories and conceptual approaches are an essential component of the research agenda; recent contributions such as “issue area networks” and “global civil society,” and efforts to clarify definitions and provide taxonomies are essential if the field is to advance.⁴ There is little, however, that a discussion of methodological principles can offer with respect to the formulation of new theories and concepts. Furthermore, due to the range of perspectives that currently coexists within the field of international relations, including critical and feminist theory, interpretivism and post-modernism, it should not be surprising that a range of distinct methodological approaches also exists.⁵ Providing explanations for the behavior of states or other international actors is clearly not the primary research objective of many international relations scholars. My purpose in this paper, therefore, is not to suggest that a single methodological approach should be adopted by all researchers, but rather to argue that if one is attempting to identify causal relationships, methodological principles exist to establish such claims. The common term used to identify this particular set of principles is positivism.

The positivist position can be understood to rest on four basic assumptions.⁶ The first is the belief that the natural

and social sciences are engaged in essentially the same enterprise. While some positivists would argue that the social sciences remain qualitatively different, they would nevertheless accept that the methodological and epistemological foundations are similar. Second is the claim that an objective view of the world is possible through the rigid distinction between fact and value. The third assumption is that regularities exist in both the natural and social worlds. Finally, positivists believe that reliable knowledge must be based ultimately on empirical validation. Powerful challenges have been leveled against each of these assumptions. Yet even if positivism is acknowledged as a troubled enterprise, there remain more and less reliable approaches to establishing claims about cause and effect. Judging from the frequency with which NGOs are said to have influenced particular outcomes, and the scarcity of systematic studies designed specifically to gauge that influence, there is little doubt that these approaches are worthy of greater attention.

The remainder of this paper is comprised of two sections. Drawing on a recent debate on methodological practices within the social sciences, I review the basic principles underlying research designs seeking to produce reliable inferences. This is followed by a critique of recent research on the significance of nongovernmental organizations. I argue that the evidence offered in many of these studies is insufficient to support the claim that NGOs were in large measure responsible for particular policy outcomes, and make some suggestions as to how these claims could be more dependably interrogated.

Inference in Qualitative Research

A valuable point of departure in thinking about research methodology is the recent work by Gary King, Robert Keohane, and Sidney Verba, entitled *Designing Social Inquiry: Scientific Inference in Qualitative Research*. The

central claim of the volume is that a common logic of inference underlies all attempts to establish facts about the world. The authors accept that the rules for positing inference are developed more systematically in quantitative research, but claim that the reasoning is equally applicable to qualitative research. The common objective, inference, “is the process of using facts we know to learn about facts that we don’t know. The facts that we don’t know are the subject of our research questions, theories and hypotheses. The facts we do know form our (quantitative or qualitative) data or observations.”⁷

In addition to an emphasis on inference, three themes relating to the empirical testing of theories recur throughout the volume. First, research projects should be designed to maximize leverage—to explain as much as possible with as little as possible. Pursuing greater leverage, however, does not mean that simple theories are necessarily better. The complexity of our explanations is partly a function of the quality of our theory, but it is also dictated by the complexity of the subject matter. The principal route to maximizing leverage is the second main theme: increase observable implications. These implications, the authors contend, are the link between theory and data. A critical task, therefore, is to increase the number of sites where hypotheses can be tested by expanding the number of observable implications. A third recurring theme is the importance of estimating uncertainty when drawing conclusions. Although most researchers recognize that their findings are provisional, a tendency exists to obscure rather than highlight sources of uncertainty and to downplay their consequences. This admonition should not discourage researchers from offering bold conclusions. It should, however, encourage systematic consideration and reporting on the reliability of the findings.

In many respects, *Designing Social Inquiry* does not break new ground. Much of the content is simply a review of basic methodological principles in the social sciences. The emphasis on moving beyond particular findings to uncover the systemic variables could be found in any work on methods. Similarly, their advice that research questions should be important in their own right, linked to an existing literature, and testable are well known if not always followed. The volume also has a distinctly quantitative bias. The explicit objective of the authors may be to bridge the ever-widening gap between quantitative and qualitative research, but it is clear from the language adopted and the concepts highlighted that it is a one-way bridge bringing the insights of quantitative social science to qualitative researchers. What sets this book apart, however, is the lucid discussion of the logic and practice of generating descriptive and causal inferences.

Descriptive Inference

The authors are particularly interested in providing explanations for social phenomenon, but they do not “claim that all social scientists must, in all of their work, seek to devise causal explanations of the phenomenon they study.” In many situations, they concede, “descriptive inference is the ultimate goal of the research endeavor.”⁸ For example, the authors suggest that one might study international organizations since 1945, seeking “to understand the size distribution of international organization activity (by issue area or by organization) in 1990; changes in aggregate size of international organization activity since 1945; or changes in size distribution of international organizations since 1945.”⁹ None of these studies involve causal claims; their objectives are purely descriptive. As the authors point out, however, in studies where identifying causal relationships is the principal objective, the claims also depend on

reliable description. In contrast to commonly held views, however, description is neither simple nor mechanical. It still requires inferring unobserved facts from those facts that have been observed, and distinguishing between factors that are systemic and those that are random.

Descriptive inference begins with clear historical summaries focused on the subject one wishes to understand. In furnishing descriptions, however, one is quickly confronted with the endless detail that could potentially be included. How, then, to decide what to exclude? Theories or hypotheses provide the criteria for discriminating between relevant and irrelevant information. Facts are relevant to the degree that they relate to observable implications of the theory. And we can attempt to increase the number of observable implications by asking: what else would we expect to observe if our hypothesis was correct?

Historical summaries emphasize the particulars of a specific case or event, but social scientists are also interested in the generalizations that can be drawn from those particulars. In the words of King, Keohane, and Verba, “social science research should be both general and specific: it should tell us something about a class of events as well as specific events at particular places.”¹⁰ Summaries simplify the information that needs to be considered, therefore, but they do not alone constitute descriptive inference. This additional step requires one to “distinguish the systemic component from the non-systemic component of the phenomenon we are studying.”¹¹ The question that we must ask is whether our observations reflect recurring phenomena or exceptions? For example, in the case of the UN intervention in the Korean War, analysis would suggest that without the Soviet boycott of the Security Council—a non-systemic event—UN involvement would have taken a very different form. In cases where the significance of random events is less obvious, one begins with the assump-

tion that all observations result from non-systemic forces, and then searches for evidence that particular events or processes are actually the result of systemic forces. Since non-systemic events will not yield consistent patterns or outcomes, systemic forces can be isolated through repeated tests in different contexts.

The authors offer two criteria to increase confidence in the evaluation of systemic and non-systemic factors: unbiasedness and efficiency. Bias is a measure of whether conclusions are, on average, correct. Recognizing that our estimations will not always be accurate, we must nevertheless be cautious to avoid systematic overestimation or underestimation. For example, government officials may systematically overestimate the effectiveness of a policy that they initiated or supported. Biased evidence, accepted uncritically, will skew the findings of a research project. Efficiency is related to bias, but measures the range of potential estimates rather than their average accuracy. Interviewing a wider range of participants or engaging in more detailed interviews increases one's confidence that individual estimations are close to the correct value. Although it is clearly impossible to derive precise estimates for either bias or efficiency in qualitative research, it is nevertheless important to be aware of their potential to undermine the reliability of descriptive inference.

Causal Inference

The pursuit of causal inference requires the adoption of more stringent principles than is the case with descriptive inference. On the basis of careful description, it should be possible to isolate the systemic factors that relate to particular outcomes. But descriptive inference does not offer the grounds to be confident that there is a cause and effect relationship between the correlated variables, nor does it indicate the direction of the potential causal relationship.

Causation can be understood as the difference between the outcome under one set of conditions and the outcome under another set of conditions. Rather than talking about effects and conditions, however, social scientists speak of the dependent variable, the outcome for which an explanation is sought, and the explanatory or independent variables, the factors that are believed to influence, affect, or cause the outcome. Causal effects are defined by King, Keohane, and Verba as “the difference between the systematic component of observations made when the explanatory variable takes one value and the systematic component of a comparable observation when the explanatory variable takes on another value.”¹²

It is worth noting that asserting causation is not simply a matter of identifying a chain that leads from cause to effect. Consider the effects of media coverage on the decision to provide humanitarian assistance in complex emergencies. A causal chain could potentially be identified from a lone reporter covering the crisis, through the resulting media coverage in newspapers and on television, to a senior government official proposing a change in government policy, and ultimately leading to a decision to provide assistance. While identifying such a mechanism is an excellent way to clarify hypotheses and create additional opportunities for testing hypotheses, the process through which causality operates is not the same as the causal effect. Although the identification of a causal chain may appear convincing, how confident can one be that the newscast was the only reason why the government official proposed a policy change, and can one be sure that this intervention was the only reason why government policy was changed? To be confident in the causal connection, each link in the chain would need to be investigated individually. In other words, “to demonstrate the causal status of each potential linkage in such a posited mechanism, the

investigator would have to define and then estimate the causal effects underlying it.”¹³

More helpful in understanding the meaning of causation is the recognition of the role of counterfactual claims in causal analysis.¹⁴ For example, to argue that international regimes are a partial cause of cooperation between states is also to claim that in the absence of international regimes there would be less cooperation between states. To understand how regimes promote cooperation is an important task, but the counterfactual remains the essence of the causal argument. Counterfactual claims are necessary when asserting causal inference because the experimental method—where differing values for the explanatory variables can be assigned—is unavailable. Put another way, “key events occur only once, whereas for purposes of valid causal inference we would like to rerun history many times and to examine the resulting distribution of outcomes.”¹⁵ To speculate on the likely outcome if events had been different than they were undoubtedly adds uncertainty to our causal claims, but these uncertainties are unavoidable and must be acknowledged.

For unique events, asserting causal inference depends on a three step process: clarifying a hypothesis, determining observable implications of that hypothesis, and conducting tests against empirical evidence. Where the phenomenon in question is part of a larger class of events, however, one can also compare different cases. In addition to offering a greater number of observations against which the theory can be tested, comparative studies also allow for the generalization of findings through the separation of systemic and random forces. When examining a single case, it is impossible to determine whether the specific explanatory variables are likely to recur or not. The techniques for separating the systemic and non-systemic factors when making causal inferences are the same as those

outlined above. Over multiple cases the systemic causes will recur and random causes will disappear. And, as with descriptive inference, the same two measures of reliability, bias and efficiency, can be employed.

An additional assumption, the uniformity of causal effects, is necessary in order to draw causal inferences from comparative studies. Consider, for example, a research project examining the influence of NGOs on environmental treaties. If it were possible to rerun the negotiations in the absence of NGO lobbying, it would be simple to isolate the effectiveness of these organizations. Our nearest approximation, however, is to examine negotiations where NGOs are active, and negotiations where they are not. Yet this move only works if we assume that the two cases are comparable in all relevant respects. According to the authors, in comparative studies, “we believe that the differences we observe in the values of the dependent variables are the result of differences in the values of the explanatory variables that apply to the observations.”¹⁶

A related assumption necessary for causal inference is the independence of explanatory and causal variables. At issue here is simply the direction of causality. The difficulty is that “the values our explanatory values take on are sometimes a consequence of, rather than a cause, of our dependent variable.”¹⁷ The role of ideas in explaining outcomes is a good example of this problem. Can we claim that ideas espoused by a political leader were the cause of particular policy outcomes, or were the ideas merely rationalizations for a policy chosen on other grounds. Directionality is not a concern in scientific experimentation. Where the researcher controls the values of the explanatory variables, the “direction of causality is unambiguous” since assigning values to the explanatory variables is entirely independent of the dependent variable.¹⁸ Studies with a large number of cases can avoid this difficulty through the

use of random selection which also ensures the independence of the dependent variable. But in studies with small numbers of cases the values of the explanatory variables may not be independent of the dependent variables.

Case Selection

Qualitative research is invariably pursued through case studies, but the definition of what exactly a “case” represents is frequently far from clear. For example, does an examination of human rights NGOs constitute a “case study?” The answer can only be determined with reference to the dependent variable of the research project. If the effectiveness of human rights NGOs are being compared to environmental and disarmament NGOs, then they constitute a single case. If, however, the focus of the research project is the roles of six different human rights NGOs in lobbying for a High Commissioner for Human Rights, then they are not a single case and merely define the boundaries of the analysis. According to Lijphart, a noted authority on comparative research, “a case is an entity in which only one basic observation is made and in which the independent and dependent variables do not change during the period of the observation.”¹⁹ This definition points to an important distinction between a “case” in its common usage, and an “observation.” For the authors of *Designing Social Inquiry*, the word observation refers to “measures of one or more variables on exactly one unit.”²⁰ In the second of the examples above, the number of observations would equal six, the number of human rights NGOs examined. While in qualitative studies the number of cases is usually small, the number of observations, even in studies of unique events, is almost always very large. And it is the number of observations, not the number of cases, that is relevant for testing theories and hypotheses.

The selection of cases for a comparative study is a crucial decision in qualitative research. Random selection, common in quantitative studies and effective at avoiding bias, is neither viable nor desirable where relatively few instances of a phenomenon exist. By selecting certain cases and ignoring others, however, the causal effects can be systematically underestimated or overestimated. Selection in studies with a small number of cases will invariably be intentional, and there are important rules to follow to reduce the likelihood of encountering selection bias. Most important here is that there must be variation in the dependent variable. To study the causes of wars, revolutions, or international cooperation, it is necessary to study both cases where these outcomes occurred, and cases where they did not. For example, if one is interested in examining the circumstances under which nations cooperate (our dependent variable), yet cases are selected only where nations did in fact cooperate (that is, where the values of the dependent variables are constant), how can one be confident in the significance of the explanatory variables? Perhaps similar values for the explanatory variables also existed in cases where international cooperation did not occur. This is not to say that every study on international cooperation must include cases where international cooperation did not occur. One can certainly study a narrower range of variation in outcomes by changing the dependent variable. One could, for example, examine not simply international cooperation but its various institutional manifestations. What is important is that the dependent variable should vary through the full range of possible values.

In addition to avoiding selection bias, it is also important to consider the number of observations analyzed. If there are more explanatory variables than observations, the results of the research will, by definition, be indeterminate. Consider a research project examining four factors (or explana-

tory variables) that appear to account for a particular outcome. With less than four separate observations, it is simply impossible to distinguish those factors that are actually relevant. In practice, furthermore, the ratio of observations to explanatory variables must be much higher in qualitative research. The common response when faced with too many explanatory variables is to delve more deeply into the existing cases looking for additional factors that might account for the outcomes being examined. Yet the logic of inference would suggest the opposite. The solution to this type of indeterminate research design is to seek out additional observations in order to select among the explanatory variables already under consideration.²¹ This demand for more observations does not mean that single case studies cannot support a number of explanatory variables. As noted above, virtually all individual cases have a host of discernible observations.

Aside from the recommendation that “researchers routinely list all possible observable implications of their hypothesis that might be observed in their data or in other data,” King, Keohane, and Verba offer three techniques for increasing the number of observable implications.²² First, it is possible to observe more units by simply broadening the study to include additional cases. While this might be the simplest option, the extra demands on time and resources may make it unattractive. A second option is to retain the explanatory variables and the collected data, but to change the dependent variable by shifting the level of analysis. Thus, a study on the effectiveness of human rights NGOs could be reconceived to examine the relative effectiveness of specific NGOs. Although the objective of the study would change, the existing data might be sufficient to see the research project through to completion. The third and most drastic technique for increasing observations is to derive a

new hypothesis from the indeterminate research project and to test the hypothesis on newly compiled data.

Assessing the Influence of NGOs

One of the first issues to address when considering the influence of NGOs is identifying the potential target of that influence. Two recent collections of essays on focus on NGOs at the United Nations.²³ One, *'The Conscience of the World': The Influence of Non-Governmental Organizations in the UN System*, takes as its aim "to demonstrate that UN politics cannot be understood without assessing the impact of NGOs on each issue," and concludes "that NGOs have achieved more than would seem possible for relatively small organizations working with limited resources on complex problems."²⁴ There is no doubt that the United Nations is a crucial forum in the emergence of new forms of global governance and, as the second volume suggests, provides a "central and reasonably transparent point of observation that has legal and historical underpinnings."²⁵ But focusing on NGO influence at the UN also begs the question: how effective are intergovernmental organizations at influencing the policies of states?

A far broader approach is adopted in a recent work on environmental NGOs, where Princen and Finger argue that the growth of environmental NGOs is "indicative of a more profound political transformation," and that "international environmental NGOs, although not alone in these efforts, appear to be the key actors in this regard."²⁶ The emphasis by these authors on social learning and social change is much more diffuse than simply the capacity of NGOs to influence states. There is no doubt that NGOs have many important influences on a wide range of different actors and outcomes, and this line of theoretical inquiry seems promising. But changes in the actions of states are also important. Many of the clearest attempts to gauge the effectiveness of

NGOs, such as Sikkink's work on human rights issue networks in Latin America, focus specifically on their capacity to change state policy.²⁷ A focus on NGO effectiveness vis-à-vis states is crucial since global governance or social change, regardless of the specific definitions, will depend to some extent on the agreement of states.

An alternative approach to the study of the influence of non-state actors revolves around the role of norms in international relations.²⁸ Klotz, in her study of the anti-apartheid movement, argues that norms should not be understood simply as a constraint on state practice, they are also "a fundamental component of both the international system and actors' definitions of their interests."²⁹ To demonstrate that NGOs are influential in the emergence and consolidation of new norms would be to make a very strong case for their importance in world politics. Although Klotz's attempt to offer explanatory claims appears to be consistent with the positivist position outlined above, she argues that positivist methodologies are "inherently incapable of capturing the crucial intersubjective aspect of norms."³⁰ Whether this is indeed the case, or whether this definition of positivism focusing only on observable behavior is excessively narrow, is open to debate. In any case, a research agenda examining NGOs and international norms would complement, not replace, the question I highlight of NGO effectiveness in influencing governments.

Before considering additional approaches for assessing the influence of NGOs, it is worth separating analytically the different objectives pursued by these organizations. An important distinction can be drawn between operational and advocacy roles.³¹ While operational roles have considerable influence on state policy, consider for example the evolution of overseas development or humanitarian assistance policy, where the analysis of advocacy represents a more difficult methodological challenge. The significance

of NGOs acting in operational roles can often be assessed independent of changes in the policies of other actors. It is possible, for example, to isolate the impact of NGOs in the monitoring of international agreements or in the provision of clean drinking water. The relationship between cause and effect, while complicated in practice, is relatively simple conceptually. In the case of advocacy work, however, the principal objective is to secure a change in the policies of another party. Effectiveness in these circumstances is much more difficult to assess given the lack of transparency in the policymaking process. The discussion below will focus therefore on advocacy rather than operational roles.

The most common, and least useful, measures of the influence of international nongovernmental organizations are numerical. It is undeniable that the number of NGOs has grown dramatically over recent decades, as have the number with Economic and Social Council (ECOSOC) accreditation, and those participating in UN-sponsored conferences. Explaining this rapid proliferation is an important research project in its own right, and descriptive accounts already exist charting the growth of international nongovernmental organizations.³² By setting the growth of NGOs as the dependent variable, fruitful studies could be conducted to provide explanations for this expansion. But it is important to note that the number of NGOs is not directly relevant in assessing influence. It is at least plausible that this rapid expansion, especially of weaker organizations, dissipates NGO influence rather than strengthens it.

A more promising approach seeks to assess the effectiveness of NGOs on the basis of policy outcomes. If NGOs lobby for the adoption of a particular treaty, and such a treaty is ultimately signed, it is plausible that the actions of those organizations were, in part, responsible.

But how can one be sure that governments did not pursue this new policy for reasons unrelated to the pressure exerted by NGOs? Furthermore, how does one interpret the effectiveness of NGOs when they are unsuccessful in their lobbying efforts? Should a lack of success in securing objectives be equated with ineffectiveness? One increasingly common route adopted to provide a more nuanced account of the influence of NGOs is to undertake detailed case studies that trace the specific actions of organization and individuals, and identify the connections between these actions and specific policy outcomes. These detailed studies can be thought of as attempts to trace the causal chain or mechanism. As was pointed out above, however, the identification of a causal chain may be helpful in formulating more precise hypotheses, but it cannot by itself support claims of causal inference. The crucial claim is the counterfactual. It is possible, of course, to argue that NGOs facilitated or expedited negotiations leading to a particular outcome. But to argue that the NGOs were the cause of a particular outcome is to argue that the outcome would not have occurred in the absence of the actions of those nongovernmental organizations.

Case Selection and Causal Inference

Of the methodological principles outlined above, the most significant for studies of the influence of NGOs relates to case selection. First, although important research can be conducted through the examination of single-case research projects, comparative studies are almost always more fruitful. In addition to offering more observable implications against which hypotheses can be tested, multiple case studies also allow for the separation of systemic and random variables leading to generalized findings. This does not necessarily mean that all individual researchers must examine multiple cases. Collaboration between

researchers studying individual cases, if based on common definitions and variables, can achieve comparable results.

Second, an overriding objective of case selection should be to avoid bias—defined above as the systematic underestimation or overestimation of the effects of explanatory variables. Bias is one of the central weaknesses in much of the literature on the significance of nongovernmental organizations. Case studies are often selected precisely because these organizations are believed to have been influential. In the earliest stages of research on nongovernmental organizations, selecting cases on the basis of the dependent variable—the influence of NGOs—was useful in highlighting new actors on the stage of world politics. As this point has already been acknowledged, continued selection on the basis of the dependent variable is simply pre-selecting cases that are likely to support the hypothesis and ignoring counter-examples.

Variation in the dependent variable is also absolutely essential. If we wish to understand the scope and nature of NGO influence, we must examine cases representing the full range of outcomes, including cases where NGO objectives were not realized and where their influence appears limited. If NGOs are effective in securing changes to state policy in some instances, as much of the literature suggests, why is it that they are not successful in other cases? As noted above, the most effective way to avoid bias in selection is to choose cases on the basis of the explanatory variable, without regard for the value of the dependent variable. Consider, for example, a hypothesis positing that NGOs were effective in influencing government policy due to their expertise in a particular field. Selecting on the explanatory variable in this case would lead us to select cases where NGOs had clear expertise, whether or not they appeared successful or influential.

Two additional strategies in case selection are worth noting. First, a technique to isolate further NGO influence is to examine cases where a government's opposition to policies advocated by NGOs is unambiguous. Given the initial opposition of government, we can be more confident that external factors of some kind were involved in the change of position. Second, the argument that NGOs are becoming increasingly important actors in world politics suggests that it is the organizational form of these entities, rather than their political objectives, that is important. Yet most studies on NGOs have focused on what might be considered "progressive" causes: women's issues, human rights, the environment, and peace groups. If one hypothesizes that this particular form of organization is becoming increasingly effective, then a growing influence from all NGOs should be observed—even those pursuing causes that are diametrically opposed to the objectives mentioned above. For example, how could the class of entities known as "NGOs" be a significant cause of the outcome at the International Conference on Population and Development when such organizations were working on both sides of the central cleavage—women's sexual and reproductive rights. On the other hand, if the objective is to explain only "progressive" outcomes, then it seems unlikely that the actions of the class of organizations known as NGOs can function as explanatory variables.

Conclusion

The discussion to this point has focused on methodological principles that offer a more reliable assessment of the influence that nongovernmental organizations bring to bear on states. There are other related tasks, however, that have not been covered, two of which are worth considering. Although for the sake of clarity I have considered NGO influence as a homogeneous phenomenon throughout this

paper, it should be obvious that most of the important research will not occur at this level of abstraction, but will focus instead on particular types of NGOs and specific kinds of influence. Are NGOs more effective when they have massive grassroots support, or when they have strong elite connections? Do NGOs tend to secure their aims more consistently when they adopt cooperative or confrontational tactics? These more specific questions about NGOs will also be raised in a range of differing contexts. Are loosely-aligned international systems more conducive to effective NGO lobbying than rigid bloc systems? How do different rules and procedures regarding NGO accreditation and access to negotiations affect their influence? While these types of questions may appear to require more complex research designs, the basic logic of research remains the same.

Another point worth considering is the manner in which NGO activities are conceptualized. There is a tendency within the literature to conceive of NGOs as existing in opposition to the state. The central aim of this paper, to understand the degree to which state policy is affected by NGOs, could be understood in this light. But this sort of binary opposition cannot stand up to even the most basic scrutiny. How can these organizations be considered diametrically opposed to states when it is not uncommon for national delegations to international conferences to be led by members of the NGO community, when specific countries and coalitions of NGOs work together for common objectives, and when individuals with backgrounds in the NGO sector use their positions inside government bureaucracies to lobby for the causes advanced by NGOs. Searching for more accurate measures of NGO influence cannot be accomplished effectively in isolation from the broader issues surrounding what are often referred to as transnational relations. Accounting for policy outcomes

will always require complex explanations, and only a portion of those explanations will focus on the nongovernmental sector. The purpose of the research agenda discussed in this paper is simply to measure and understand the NGO portion more accurately.

By challenging the reliability of assertions relating to the influence of NGOs on state policy, it might appear that I am skeptical of the importance of these actors. It seems clear that some of the more celebratory research on the growing influence of NGOs, particularly in support of “noble” causes, overstates their significance. Furthermore, the novelty commonly attached to these organizations suggests that, in addition to greater methodological precision, further historical research would also help produce more balanced accounts. Nevertheless, the continued expansion of advocacy NGOs does seem to represent an important transformation in the conduct of world politics. If this is indeed the case, then it is all the more important that our research is well-designed in order that our findings are reliable.

Endnotes

¹For examples of the first, see Martin Hollis and Steve Smith, *Explaining and Understanding International Relations* (Oxford: Clarendon Press, 1991); for the second, see virtually any political science textbook on research methods.

²Robert Keohane, "Multilateralism: An agenda for research," *International Journal* 45 (1990), p. 735.

³See David Collier, "The Comparative Method: Two Decades of Change," in *Comparative Political Dynamics*, Dankwart Rustow and Kenneth Erickson, eds., (New York: Harper Collins, 1991), pp. 7-31.

⁴See Kathryn Sikkink, "Human rights, principled issue-networks, and sovereignty in Latin America," *International Organization* 47, no. 3 (1993), pp. 411-441; Paul Wapner, *Environmental Activism and World Civic Politics* (Albany, NY: SUNY Press, 1996); Leon Gordenker and Thomas G. Weiss, "Pluralizing Global Governance: Analytic Approaches and Dimensions" and "NGO Participation in the International Policy Process," in Thomas G. Weiss and Leon Gordenker, eds., *NGOs, the UN, and Global Governance*, (Boulder: Lynne Rienner Publishers, 1996), pp. 17-47; 209-221; and Peter Willetts, ed., *'The Conscience of the World': The Influence of Non-Governmental Organizations in the UN System* (London: Hurst and Company, 1996).

⁵For a discussion of these methodological positions see Steve Smith, "Positivism and Beyond," in Steve Smith, Ken Booth, and Marysia Zalewski, eds., *International Theory: Positivism and Beyond* (Cambridge: Cambridge University Press, 1996), pp. 11-44.

⁶For a more detailed discussion see, *Ibid.*, pp. 14-18.

⁷Gary King, Robert Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton: Princeton University Press, 1994), p. 46.

⁸*Ibid.*, p. 75.

⁹*Ibid.*, pp. 51-52.

¹⁰*Ibid.*, p. 43.

¹¹*Ibid.*, p. 56.

¹²*Ibid.*, pp. 81-82.

¹³*Ibid.*, p. 86.

¹⁴For a discussion of the centrality of counterfactuals, see Phillip Tetlock and Aaron Belkin, eds., *Counterfactual Thought Experiments in World Politics: Logical, Methodological and Psychological Perspectives* (Princeton: Princeton University Press, 1996), pp. 9-10; and Thomas J. Biersteker, "Counterfactuals and regime consequences," in Volker Rittberger, ed., *Regime Theory and International Relations* (Oxford, Clarendon Press, 1993), pp. 317-322.

¹⁵Tetlock and Belkin, *Counterfactual Thought Experiments*, p. 9.

¹⁶King, Keohane, and Verba, *Designing Social Inquiry*, p. 93.

¹⁷*Ibid.*, p. 185.

¹⁸*Ibid.*

¹⁹Arend Lijphart, "The comparable-cases strategy in comparative research," *Comparative Political Studies* 8, no. 2 (1975), p. 160.

²⁰King, Keohane, and Verba, *Designing Social Inquiry*, p. 53.

²¹*Ibid.*, p. 120.

²²*Ibid.*, p. 30.

²³Willetts, *The Conscience of the World*, and Weiss and Gordenker, eds., *NGOs, the UN, and Global Governance*.

²⁴Willetts, *The Conscience of the World*, pp. 11-12.

²⁵Gordenker and Weiss, "Pluralizing Global Governance: Analytical Approaches and Dimensions," p. 17.

²⁶Thomas Princen and Matthias Finger, *Environmental NGOs in World Politics* (London: Routledge, 1994), p. 11.

²⁷Sikkink, "Human rights, principled issue-networks, and sovereignty in Latin America," pp. 411-441.

²⁸ For a general discussion of norms see, Peter Katzenstein, *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996).

²⁹ Audie Klotz, *Norms in International Relations: The Struggle Against Apartheid* (Ithaca: Cornell University Press, 1995), pp. 15; 25-27.

³⁰ *Ibid.*, p. 15.

³¹This distinction has been proposed by a number of scholars. See for example, Gordenker and Weiss, "Pluralizing global governance: Analytic approaches and dimensions," pp. 36-40.

³²See, for example, John Boli and George Thomas, "World culture in the world polity: A century of international non-governmental organizations," *American Sociological Review*, 62, no. 2 (1997), pp. 171-190.



Part Two

International Law Tools and Methods



The Role of IGOs in Global Governance

Jonathan I. Charney

Introduction

The purpose of this paper is to discuss the role of international law in global governance. It will also examine how the sources of public international law have developed in recent years to take greater account of the role of intergovernmental organizations (IGOs) and nongovernmental organizations (NGOs). My approach to international law may not be as orthodox as some, but I believe that it rather accurately represents the role that international law and international lawyers play in the international legal and political system.

International Law and International Relations

I would like to make clear that the primary role of lawyers in domestic and international societies is not to litigate cases before courts. More than ninety percent of lawyers' work is not to litigate but to solve problems and avoid litigation. They clearly need to know the law but, more importantly, they must also know how their clients and other parties will act in the relevant societal or business context in order to help solve the problem they are asked to address. Law is not the trump card that solves all. Rather, we believe that it is a good basis for predicting how the subjects of the law will act in a given situation. If it is not a relatively good predictor, law would have no value and lawyers would be unemployed.

International law practice is no different in most respects than domestic law practice. It is built upon the theory that a society controlled by human persons desires a

system of predetermined generalized rules of behavior upon which its subjects can rely in their every day affairs. This might include the definition of a state's territory, the rights states hold in that territory, the binding effect of agreements, or the human rights held by individuals. Lawyers are trained to determine what behavior is consistent with law and what is not. While the primary legal persons in public international law are states, other non-state entities enjoy rights and hold obligations under that system. Some contemporary examples of the role public international law plays in regard to individuals concern the criminal tribunals established to punish persons for war crimes, and crimes against humanity.

Enforcement is a perennial question posed to international lawyers. How can you have law without a standing police force and mandatory courts? The international lawyer will respond that a legal system does not require such centralized authorities or even certain enforcement against violators. How many persons have exceeded the speed limit and not been ticketed? How many have used illegal substances and not been caught? Why do virtually all Americans pay their federal income taxes when, if they massively refused to pay, the law could not be enforced? Nevertheless, we believe that in all three cases law exists. There must be something more to a rule of law than enforcement.

In my opinion, law exists because the society as a whole considers its rules to be legitimate and to embody binding legal obligations. To quote Professor Louis Henkin, "[A]most all nations observe almost all principles of international law and almost all of their obligations almost all of the time."¹ We international lawyers have built our entire discipline on that belief. But for international lawyers it is only a strongly held belief. We are not trained to test its validity. That is one area, among many,

where international relations could play a role that would be important to international law and international relations. Specialists in international relations have the tools to test whether a rule of international law has a strong correlation to compliance. They may also be able to determine how a rule of international law could be designed to promote better compliance.

For experts in public international law and international relations this is an important collaborative research area. They might identify norms to test for compliance in order to draw some conclusions on the efficacy of the law and how those rules and systems could be improved. Such research would have value to both disciplines. For the lawyers the legitimacy of their entire enterprise can be examined, as well as the generation of information on how their activities could be improved. For the specialists in international relations they could better understand the role public international law plays in influencing the behavior of the subjects of international law.

I would select for such studies rather clear rules of international law. Unfortunately, neither Don Hubert's nor Brad Roth's essays in this volume, on the roles of NGOs and state sovereignty respectively, are sufficiently narrow and normative for this purpose, but a well-defined collaborative agenda on an appropriate subject could be worthwhile.

The Roles of IGOs and NGOs in International Law-Making

The system of international law serves the practical interests of states and other international legal persons. As is true of all societies, the international community has a need for rules to impart a degree of order, predictability, and stability to relations among its members. The rules of the system also permit members to avoid conflict and

injury, and promote uniform beneficial reciprocal and cooperative relations. They may even promote values of justice and morality. Fear of sanctions, the desire to be viewed by others as law-abiding, and domestic institutional inclinations to conform to rules denominated as law further impel members of the international legal community to comply with international law. The close linkage between the law-making system and its subjects minimizes the likelihood that its subjects will be motivated to violate the law. Their participation in the law-making process makes it likely that the law will reflect their collective interests, giving the law legitimacy and a strong pull toward compliance.

While the obligation to abide by rules of international law may be strong, it does not directly relate to how rules of international law may be established. The secondary rules of recognition, the doctrine of sources, govern the process by which rules of international law are established. No public international law rule is immutable. It changes over time—even the doctrine of sources. In my opinion, the doctrine of sources has evolved substantially in recent years, primarily as a result of changes in the international community itself. The doctrine of sources gives international lawyers the information they must use to determine whether a particular rule is part of international law and, thus, binding on states and other entities subject to international law.

We list treaties, customary international law, and general principles as the primary sources of this law. Treaties are contracts among states that set out rules they specifically agree to follow in relations among themselves. That source has not changed much and I will not focus on it.

General principles of law are somewhat controversial today. Some argue for increasing their role as a source of public international law. I will not focus on them either, except to define them and to mention the controversy.

General principles of law, to some, are rules found in all of the main domestic legal systems. Due to this fact, they are part of public international law either because the domestic practice represents universal acceptance of a norm or because the universal domestic use proves that a norm is inherent to all systems of law. Thus, they are necessarily included in the system of public international law.

Some argue that general principles include natural law and they extrapolate from this that norms they consider to be fundamental principles of justice, especially human rights, are part of international law. Natural law had its heyday in the 16th century at the origins of public international law when religion and law were closely intertwined. It was brought back into vogue subsequent to the horrors of the Second World War. With the rise of international human rights law, groups sought to expand that law rapidly, especially in the face of frustrations with state actions in this area. As natural law, these principles could be included in international law without waiting for treaties or customary international law to develop. This aspect of general principles remains controversial.

In reviewing the decisions of international law courts and other international tribunals, one finds very limited use made of general principles. They are relied upon predominantly in the area of litigation rules that are necessary to conduct third party adjudication. These rules could not be created by the third source of international law, customary international law, because the only venue for practice would be the courts themselves. Thus, the international courts seem to be compelled to use general principles to bring in basic litigation rules. Other than this role, general principles have been relegated to a bit part in international law.

While the role of treaties is substantial in international law, treaties do not and cannot deal with the broad need to

have general international law applicable to the entire international community. Traditionally, that need was filled by customary international law. The international community of the late 20th century faces an expanding need to develop new norms to address global concerns.

Customary international law is the product of state practice and *opinio juris*. A norm of international law is established if states act in conformity with it and the international community accepts that norm as obligatory under law. Some maintain that individual states must choose to accept the norm as law. But clearly acceptance is required only by the international community and not by every individual state and other international legal persons. Furthermore, acceptance may be established by acquiescence. The acquiescence is often not tantamount to knowing and voluntary consent. For acquiescence to acquire that status, the entity must be aware of the subject of the consent and must know that failure to object will be taken as acceptance. Thus, acquiescence, if it obliges, must be tantamount to actual consent, but consent expressed by non-action rather than by action.

Most of the time it is difficult to establish that failure to object to a developing norm of customary international law constitutes consent to its incorporation into international law. Furthermore, when authorities examine the evidence necessary to establish customary law, they consider actions of a limited number of states, often only the largest, most prominent, or most interested among them. The awareness and opinions of other states that take no overt position are rarely considered, much less other international legal persons. Rather, when the evidence is amassed, decision-makers presume that the lack of opposition constitutes acquiescence. This presumption masks the reality that many do not know that the law is being made and, thus, they have not formed an opinion.

The credibility, if not the legitimacy, of the argument that states may be bound by rules of international law to which they have not consented (or even to which they have objected) may be further supported by the radical changes in the international system that were made in response to the tragedies of the Second World War. Recognition of the United Nations Charter system as prevailing over all states and other members of the international legal community became central to the contemporary international legal system. It clearly places restrictions on the theoretical autonomy of states under international law.

While customary law still is created in the traditional way, that process has evolved in recent years to a more structured method, especially in the case of important normative developments. Today, rather than practice and *opinio juris*, multilateral forums often play a central role in creating and shaping contemporary international law. Those forums include the United Nations General Assembly and Security Council, regional organizations, and standing and *ad hoc* multilateral diplomatic conferences; as well as other IGOs devoted to specialized subjects, and nongovernmental organizations. Today, developments in international law often get their start or substantial support from proposals, reports, resolutions, treaties, or protocols debated in such forums. That process draws attention to rules and helps to shape and crystallize them.

Often these ideas move into international law through the activities of intergovernmental forums. The authoritative nature of the debates at multilateral intergovernmental forums varies, depending upon many factors. Among the first is how clearly it is communicated to the participants that the rule under consideration reflects a refinement, codification, crystallization, or progressive development of international law. Of crucial importance is the amount of support given to a rule under consideration. The activities

of NGOs at this stage often are important. The forum's adoption of a rule in accordance with its decision-making procedures may not be necessary or even sufficient. At the same time, unanimous support is not required. Consensus, defined as the lack of expressed objections to a rule by any participant, would certainly be sufficient. The absence of objections amounts to tacit consent by participants that do not explicitly support a norm. Even opposition by a small number of participants may not stop the movement of the proposed rule toward law. The effect of the discussion depends upon a number of factors: the number of objections; the nature of the objections; the importance of the interests that they seek to protect; and the geopolitical standing of the objectors relative to the other participants that support the proposed rule. Also relevant is whether the support for the norm is widespread and encompasses all interest groups.

Discussions at such forums are necessarily communicated to all interested parties. According to some customary law analysts, the work and products of those forums may be characterized as state practice or *opinio juris*. Certainly, the forums may move solutions substantially toward acquiring the status of international law. Those solutions that also are received positively by the international community through practice or other indications of support will be absorbed rapidly into international law. This may occur notwithstanding the technical legal status of the form in which they emerge from a multilateral forum. The clearer the norm debated, the clearer the intention to promote a norm of generally applicable international law; and the stronger the consensus in favor of the norm, the less need there will be for evidence from outside the forum.

Similar attention over a period of time by the same or other forums may further strengthen the case for a norm.

When these signals are weak, confirmation of the normative status of a rule may be sought in declarations outside a particular forum, the other evidence of *opinio juris*, and practice before or after the meeting of a forum. In theory, however, one clearly phrased and strongly endorsed declaration at a near-universal diplomatic forum could be sufficient to establish new international law. Furthermore, any norm that attracts such definite and widespread support would necessarily be echoed in pronouncements and/or actions extrinsic to the forum. When that happens, precious little such evidence should be needed, if any at all. The law-making process is advanced substantially by the activities of these multilateral forums. In addition, it is a deliberative process that often approximates the legislative process found in domestic legal systems.

I am not suggesting that multilateral forums have independent legislative authority. They do not. Nor do I intend to suggest that all generally applicable treaty texts become *ipso facto* and *ab initio* customary international law upon adoption or entry into force. Rather, the products of multilateral forums, as influenced by the international community as a whole, advance substantially and formalize the international law-making process. They make possible the rapid and unquestionable entry into force of normative rules if the support expressed in a forum is confirmed. Decisions taken at such a forum, support for the generally applicable rule, publication of the proposed rule in written form, and notice to the international legal community call for an early response. If the response is affirmative (even if tacit) the rule may enter into law. It permits broader and more effective participation by all states and other interested groups and allows a tacit consent system to operate legitimately. While it is possible that the process may be abused, it is less open to abuse and miscommunication than classical customary law-making. All members of the

international legal community are increasingly aware that the work of multilateral forums contributes to the development of general international law. As a result, discussions at those forums are taken more seriously.

There are many examples of this process in action. In the Law of the Sea, two developments immediately come to mind: the rapid acceptance of both the 200 nautical-mile exclusive economic zone and the twelve nautical-mile territorial sea shortly after consensus was reached at the Third United Nations Conference on the Law of the Sea. Principles adopted by the Stockholm Conference on the Human Environment in 1972 emerged as international law in the subsequent period. Human rights norms found in the Universal Declaration and the Human Rights Covenants moved quickly into international law. Modern developments in the law of treaties are tied clearly to the Vienna Convention on the Law of Treaties.

Two relatively recent judgments of the International Court of Justice (ICJ) illustrate this important development. In the *Nicaragua* case of 1986, the Court found various rules relating to the use of force and humanitarian law by examining resolutions of intergovernmental organizations and treaties.² It never studied classical state practice in the real world although it said it would in *dicta*.

In the ICJ's opinion of 1996 in response to a request for an advisory opinion by the United Nations General Assembly on the legality of nuclear weapons, the court explored the law by reviewing resolutions and actions of intergovernmental and nongovernmental international organizations, votes by states, and relevant treaties with nary a look at so-called state practice or other evidence of *opinio juris*.³ When the question of state practice was raised, the court found that it could reach two completely incompatible conclusions. Thus, the fact that the nuclear weapons states had these weapons since the Second World War and never

used them could stand for the proposition: (1) that by having nuclear weapons those states took the view that they had a right to use them; or (2) by never using them since the war their abstention stood for the view that the use of nuclear weapons was illegal. The court declined to impose its subjective interpretation on this alleged state practice. By doing so, the court demonstrated the unreliability of state practice in the proof of customary international law and the reliability of decisions by intergovernmental and nongovernmental organizations. The products of such forums may enable the participants to understand the meanings of the decisions taken. Such decisions may produce evidence of the views of international community members.

The systemic developments described above directly affect the potential universality of international law norms. They heighten the ability of every member of the international legal community to participate in the legislative process. They also assure all that members will be given reasonable notice of the development of new law and information about its details. In addition, the argument that failure to act communicates voluntary and knowing consent may be made persuasively. The law that emerges from this process will be endowed with substantial legitimacy, creating a strong pull toward compliance. This law-making process extends greatly the international community's ability to clarify the intended scope and applicability of the norm under consideration.

Much of the demand for international law has been filled by treaties accepted as binding by the parties. Treaties, however, are unable to serve all the international legal requirements of the contemporary world. Treaties often require considerable time to be negotiated, adopted, and brought into force. It is also impractical to have treaties on all subjects of international law. Most importantly, adher-

ence to treaties rarely approaches universal participation. In contrast, general international law may be established on the basis of less formal indications of consent or acquiescence. This makes worldwide law possible.

The augmented role of multilateral forums in devising, launching, refining, and promoting general international law has provided the international community with a more formal law-making process. The increased clarity and the more transparent process encourages widespread participation and endows the resulting law with greater legitimacy than generally is possible through the traditional customary law-making processes.⁴

Conclusion

International law and international relations both address actions on the international stage. While they may approach the subject from different perspectives, they have common goals and objectives. Contemporary developments demonstrate that their linkages are close. International law is not a set of abstract doctrinal rules without a foundation in the society that they address. Rather, it must be linked to the real world behavior of international actors that may be best understood through international relations. International relations seeks to understand the behavior of international actors. An important component in that behavior is the existence of predetermined generalized rules denominated as law. Only by understanding the influence that law has on international behavior can one fully understand the international system.

Endnotes

¹ Louis Henkin, *How Nations Behave* (New York: Columbia University Press, 1968), p. 47.

² *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. the United States*), ICJ Rep. 14 (27 June 1986).

³ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), ICJ Rep. 103 (8 July 1996).

⁴ For a more elaborate treatment of the subject discussed in this section, see Jonathan I. Charney, "Universal International Law," *American Journal of International Law* 87, no. 529 (1993).



What Ever Happened to Sovereignty? Reflections on International Law Methodology

Brad R. Roth

For those not already steeped in its intricacies, the study of international law frequently appears a mysterious, if not dubious, enterprise. It is neither a strictly empirical study, seeking to ascertain the causes or to describe the salient features of a particular historical event, nor purely an exercise in normative political theory, applying abstract principles of justice to the international arena. Rather, it seeks to find, interpret, and apply norms that are discernible in international practices.

The results of international legal inquiry may be applied in domestic courts or in international judicial or quasi-judicial proceedings. Just as frequently, however, they are addressed to the “political” branches of governments. International law specifies what individual governments ought to do, insofar as those governments are concerned to avoid censure for violating internationally accepted standards of behavior.

The efficacy of international law depends substantially on support from “international public opinion” (somehow defined), yet ascertaining international law must not be confused with gauging international public opinion. Nor is international law properly understood as “positive morality” (i.e., the aggregate of moral views held by a particular community): unlike morality, law frequently concerns matters of coordination rather than high principle, can be created and changed from time to time through mere exercises of the will of relevant actors, and can be accessed

through technical arguments rather than appeals to conscience.¹

International law derives from the application of accepted methods for identifying international standards of a legal character. Exactly what those methods are—and upon exactly whose “acceptance” their validity rests—remain topics of fierce debate within the discipline.

The peculiar nature of the international system entails methods of norm recognition that differ fundamentally from methods characteristic of domestic systems, and especially from familiar Anglo-American, common law methods. There is no global government vested with sovereign powers. No international “legislature” has the formal power to pass binding laws, and no international court has the formal power to render “precedents” that control future decisions and thereby constitute interstitial lawmaking.

In theory, each unit of the international system—the “state”²—is understood to be a sovereign entity, which only by a voluntary undertaking can become subject to a legal obligation. (This generalization is frequently defeated in practice, but deviations from it face a substantial burden of justification.) The traditional approach to international law identifies three primary “sources of law,” or modes by which sovereign entities may become bound: treaties, custom, and “general principles of law.” Each source of law requires a separate method for establishing the existence of a legal obligation, and each is subject to substantial controversy. Such controversy centers, not so much on the means by which a given empirical proposition can be reliably established (method as understood by social scientists), but more on which empirical propositions are legally material. Any discussion of method immediately returns to the substantive question of what “counts” as international law.

Illustrative is the matter of international custom. The existence of a customary norm turns on the presence of two components: (1) a consistent pattern of state practice that conforms to the putative norm; and (2) a manifest sense of legal obligation (known as *opinio juris*) on the part of state actors to conform to the putative norm. Behavior conforming to a particular pattern does not alone establish that pattern as law, as that behavior may stem from courtesy or convenience or even inadvertence; there may have been no intent to yield the right to act differently on the next occasion. By the same token, pious pronouncements about how states ought to behave, without a supporting pattern of conforming practice, can be dismissed as diplomatic posturing, especially where the pronouncements pertain to the behavior of *other* states; talk is cheap. There is little agreement, however, about how much of either component is needed to establish the existence of a legal norm. Traditionalists emphasizing the need for enduring patterns of practice clash with the champions of “instant custom,” who emphasize unanimous or near-unanimous resolutions of intergovernmental organizations (IGOs). (Human rights activists, in particular, tend to emphasize *opinio juris* over practice, since states’ actual performance tends to fall far short of the standards suggested by their pronouncements.)

The primary methodological problem here is not one of “research design,” but of jurisprudential principle. To establish the existence of a legal norm is ordinarily to overcome the presumption that states remain free to act as they choose.³ Disputes that purport to turn on the strength of the adduced evidence are most frequently, in reality, disputes about the nature and strength of the presumption.

The paper that follows is intended to provoke discussion and debate on this fundamental question underlying methodological disputation in international law. It does not attempt to specify a grand theory of how international

jurists should decide cases, nor does it delve into the intricacies of specific disputes currently raging among competing schools of legal scholarship. Rather, it seeks to illuminate methodological problems in the discipline by developing a conceptual theme—exploring the legal meaning and jurisprudential significance of sovereignty. It argues controversially, not for rigid adherence to orthodoxies, but for a restoration of regard for traditional limitations, both on what counts as international law and on what infringements on sovereign prerogative international human rights law licenses.

Introduction

In this last decade of the millennium, international law scholarship has had few kind words for sovereignty. The trend has been to celebrate interdependence and global markets, the widespread rejection of statist solutions (right and left) to social problems, the enhanced status of the individual, and the imperatives of human rights and transboundary humanitarian assistance, all at the expense of traditional notions of sovereign prerogative. Many leading scholars have written disparagingly of “Westphalian” sovereignty—the historical reference being intended to connote “outmoded” rather than “venerable”—and have suggested that principles associated with it be dismissed as “anachronistic.”⁴

Of course, insofar as one characterizes sovereignty as a reserve of lawlessness that contracts as international law expands, it is only natural for an international lawyer to regard disparagement of sovereignty as an imperative of the trade. Yet sovereignty, as a distinctively legal concept, is much more profound than such a characterization allows, and the current attacks on sovereignty go far beyond asserting the applicability of legal norms to all realms of state conduct.

Sovereignty functions in international law as a limit both on the recognition and on the implementation of norms. With respect to norm recognition, sovereignty demands that any claim of legal obligation be predicated, in an essentially positivistic manner, on an accepted “source of law” (e.g., treaty, custom, and “the general principles of law recognized by civilized nations”), since sovereign states can be bound only by undertakings (that can be said to be) of their own making. With respect to implementation, sovereignty suggests a “dualist conception” of the relationship between international and internal legal norms—leading to such phenomena as non-self-executing treaties—and further demands that there be no outside interference in the internal affairs of states, arguably even where that interference seeks to vindicate international legal obligations.

Notwithstanding recent criticisms, the limits that the concept of sovereignty imposes on both norm recognition and norm implementation continue to serve valuable purposes. This paper will argue that currently-fashionable attempts to escape the bounds of sovereign consent in norm creation and recognition, framed as attacks on a narrow-minded positivism are, in reality, assaults on all methodological rigor, and are self-defeating. It will further argue that dualism remains the appropriate conceptualization of the relationship between the international and domestic legal systems, and that the doctrine of nonintervention, properly understood, serves important human interests that its opponents systematically ignore.

Sovereignty and the Sources of International Law

In the area of norm recognition and creation, the attack on sovereignty takes aim at an allegedly narrow-minded and formalistic “positivism” that refuses to acknowledge norms absent concrete manifestations of the factual (albeit,

perhaps, tacit) consent of sovereign states. Close examination reveals, however, that it is respect for the juridical principles associated with sovereignty, and not specifically positivism, that preoccupies the critics.

Positivism and Sources

Legal positivism, in the words of its premier 20th century exponent, H. L. A. Hart, entails:

the contention that there is no necessary connection between law and morals, or law as it is and ought to be, [and]

the contention that the analysis (or the study of the meaning) of legal concepts is (a) worth pursuing and (b) to be distinguished from historical inquiries into the causes or origins of laws, from sociological inquiries into the relation of law and other social phenomena, and from the criticism or appraisal of law whether in terms of morals, social aims, “functions,” or otherwise.⁵

Positivism does not entail other contentions frequently associated with it, such as that law is essentially a command backed by a threat (a view famously held by 19th century positivists such as John Austin), nor

the contention that a legal system is a “closed logical system” in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, [or] moral standards.⁶

Positivism does, however, assert that a legal system is a set of rules, as distinct from principles or policies.⁷ According to Hart, controversies falling within the “core” of these rules have determinate legal outcomes, whereas issues falling outside the core—in shadowy or “penumbral” areas—require supplemental (i.e., moral and political) considerations for their resolution.⁸

Hart's positivism teaches that a developed legal system is based on a union of two types of rules: primary rules, specifying obligatory conduct; and secondary rules, specifying the methods by which primary rules are authoritatively recognized, adjudicated and, from time to time, changed.⁹ A set of secondary rules that achieves general acceptance in a society is constitutive of that society's governing authority. The legal validity of a putative primary rule is determined according to whether that rule is derived in accordance with the secondary rules.

As applied to international law, positivism entails a focus on acknowledged sources of law in the international community. The traditional starting point for discussion of sources of international law is the 1945 Statute of the International Court of Justice (an amended version of the 1920 Statute of the Permanent Court of International Justice), Article 38(1) of which specifies the following sources to be applied by that Court:

- (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) subject to the provisions of Article 59 [providing that an ICJ decision has no binding force except between the parties and in respect of that particular case], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.¹⁰

Gennady Danilenko, a leading voice of unreconstructed positivism in international law, characterizes this Article as

the constitution of the international community, “the rule according to which [international] law is created and developed.”¹¹

Article 38(1) has spawned innumerable controversies, many of which rage within the bounds of positivism. It is hardly clear that this list of sources is generally accepted as exhaustive today, nor that states originally intended the Article (which is obviously constitutive of the competence of a particular judicial institution) as anything more than declaratory of the progress, to that point, of a still-developing consensus on sources. Moreover, the provisions themselves—most notably, those regarding custom and general principles—are subject to widely varying interpretations. Yet it is hard to imagine a legal argument in the international system that does not at least make implicit reference to this list, and that does not appeal in some fashion to the notion of state consent (express, implied-in-fact, or imputed) that pervades the listed categories.

The weaknesses of positivism are well-known among scholars of both domestic and international law. The core/penumbra distinction, separating the realm of “juridical science” from the realm of political or moral judgment, is unpersuasive. Even matters apparently within the “core” of one rule (and thus subject to purely legalistic adjudication) can often be shown to be equally within the “core” of another rule suggesting the opposite outcome. In these cases, no third rule can be found to determine mechanically which of the two applicable rules ought to be the basis of adjudication. Moreover, purportedly authoritative rules at times seem infinitely malleable, so as to make available a plausible *post hoc* rationalization of any desired outcome.

On the other hand, juridical opinion typically manifests an ethic of constraint. The availability of a legal rationalization does not, as the more extreme “legal realists” would predict, suffice to guarantee a legal judgment favoring the

outcome desired on political or moral grounds. It is hardly plausible that such constraint reveals sheer lack of creativity on the part of the jurist. It is rather more plausible, as legal philosophers such as Ronald Dworkin suggest, that principles and policies are embedded within legal systems, and that in taking on the role of interpreter of a system's norms, a jurist takes on an obligation to temper her quest for substantive justice with concern for perpetuating the system's "integrity." And this means that legal decisions, though not mechanically derivable from the legal system's putative sources of authority, cannot simply be unhinged from them.

Critics of positivism are correct to point out that law is not reducible to rules that can be "found" as a matter of fact. Legal interpretation is a purposive project. The real debate centers on which purposes—and especially, whose purposes—properly animate the project.

The Juridical Role

Those who urge that international legal obligations be found to have a wider scope often assail opponents for their "formalism," their "mechanical" approach to the recognition of emergent norms of international law. One does well to recall in this regard Hart's observation that

frequently what is stigmatized as "mechanical" ... is a determined choice made indeed in light of a social aim but of a conservative social aim. Certainly many of the [United States] Supreme Court decisions at the turn of the century which have been so stigmatized represent clear choices in the penumbral area to give effect to a policy of a conservative type.¹²

What are being "conserved" by analogous conservative jurisprudence in the international system are, of course, principles and policies associated with sovereignty. Adherence to traditional doctrines of sources reflects not an

abject formalism, but a respect for aims that underpin state acceptance of and participation in the international legal system. One disregards these aims at the cost of losing what authority inheres in the role of interpreter of norms that states themselves acknowledge as binding.

It is this very role that Martti Koskenniemi disparages in his critique of Theodor Meron's work on customary human rights norms.¹³ According to Koskenniemi, Meron's search for "irreproachable legal methods" to demonstrate the existence of humanitarian norms in customary law is misbegotten. The traditional test for the existence of custom—conforming practice, combined with a manifest sense of legal obligation (*opinio juris*)—is, we are told, "relatively useless."

The first ground that Koskenniemi offers for this contention is the familiar observation that "the interpretation of 'state behavior' or 'state will' is not an automatic operation but involves the choice and use of conceptual matrices that are controversial and that usually allow one to argue either way."¹⁴ This is a fatal objection only if "the choice and use of conceptual matrices" is something that, because not "automatically" determined by a legal rule, is entirely exogenous to a distinctively legal analysis. But the very rejection of positivism opens the door to a broader conception of the juridical enterprise, one that sees the current state of the law as a complex of principles and policies that can, as a whole, be furthered well or poorly.¹⁵

Koskenniemi's second, and "more fundamental," ground for asserting the uselessness of source doctrine is that "it is really our certainty that genocide or torture is illegal that allows us to understand state behavior and to accept or reject its legal message, not state behavior itself that allows us to understand that these practices are prohibited by law." Indeed, to submit evidence of state practice and *opinio juris* not only "adds little or nothing to our

reasons for adopting” the legal conclusion, but further “contains the harmful implication that it is *only* because this evidence is available that we can justifiably reach our conclusion.”¹⁶

This is an astounding assertion. To be sure, our certainty that genocide or torture ought to be illegal prompts us to read state behavior in a way that favors a finding that states have, by their conduct, acknowledged the existence of a legal prohibition. We are disposed, for example, to impose coherence on source material that can well be characterized as chaotic, in the process dismissing as “outliers” instances of conduct that contradict our thesis while enhancing the prominence of instances of conduct that support it. But insofar as we are committed to upholding standards of juridical inquiry, we must be prepared to reach the conclusion, however regretfully, that our hopes for the law are thus far frustrated by the reality.

This would be by no means to say that atrocities are somehow less morally wrong than we had thought, or that political pressure should not be mobilized to induce states to restrain their conduct. It would merely be to say that the additional source of pressure that we had hoped to bring to bear—respect for international legal obligation—cannot properly be employed in this particular instance, and that any attempt to do so here promises to impair the usefulness of that source of pressure in other instances where its prospects are more promising.

Koskenniemi has elsewhere argued at length that source doctrines are failed efforts to surmount the contradiction inherent in invoking the will of states to bind states against their will, the contradiction between a positivistic “concreteness” that threatens to validate whatever states actually do and a naturalistic “normativity” that presumes to subject states to the jurist’s abstract sense of justice.¹⁷ He has concluded that, in seeking to ground states’ obligations in

their actual conduct, international legal argumentation can only amount either to apologism or utopianism.

Even assuming that the contradiction between concreteness and normativity is, at the level of high theory, insurmountable, Koskenniemi's thesis at best accounts for the extent to which international law fails to have any real effect on international politics. Yet international law is not the crashing failure that, by Koskenniemi's lights, it ought to be: state actors do not consistently dismiss non-apologetic juridical opinions as utopian. Whether putative "sources of law" can be theoretically justified is, in the final analysis, less important than whether significant actors act as though they matter; the same can be said of any constitutional doctrine that restrains the exercise of power domestically.

Koskenniemi would cast international law (indeed, all law) as mere politics in disguise. But this is an elemental error ascribable to all variants of legal realism. To say that law is inseparable from politics is not to say that it is reducible to ordinary political activity. Legal discourse, as opposed to moral and ordinary political discourse, plays a distinctive role in politics; stripped of the defining characteristics of that role, it performs no political function at all, neither apologetic nor utopian, neither legitimating nor constraining. And legal discourse is not capable of legitimating unless it simultaneously constrains. The very reach for the legitimacy that compliance with public law confers (whether in the international or domestic context) brings with it the cost of accepting constraint, and the violation of broadly-accepted interpretations of legal constraint has the cost (albeit frequently a bearable cost) of undermining that legitimacy.

The Nature of Public Law

The term "public law" refers to law that regulates the exercise of public power. Although in many crucial respects

domestic public law is not a model for international public law, the two share some essential characteristics. Most obviously, domestic public law does not fit the Austinian paradigm of command backed by threat, so dearly missed by those who question international law's status as "real law." Indeed, the very existence of domestic public law presupposes a system that recognizes no Austinian "uncommanded commander," but that regards public authority itself as constituted by a body of law. The task of public law is to bring to heel precisely those who most directly control the means of coercion; its perceived legitimacy is its only weapon. It is, therefore, worth a short digression to examine how domestic public law operates.

Where it is efficacious, public law embodies a broadly acknowledged framework for the legitimate exercise of power, from which can be deduced procedural and substantive limitations on power's legitimate exercise.¹⁸ That framework consists of an agreement, express or tacit, among politically potent elements of the society on what shall constitute a valid collective decision. Exercises of public power that usurp the agreement (whether by piecemeal violation or by outright *coup d'état*) are understood to justify resistance in appropriate measure.

A constitutionalist order—an order predicated on public law—is achieved and maintained where a society's politically relevant actors share a commitment to established principles and institutions of government. Those in power recognize that they may exercise their power only within the established competences of their offices. Those out of power recognize that they must obey the final decision of those officeholders duly authorized to render it. All understand their interests to favor sacrificing short-term objectives for the sake of maintaining long-term agreement on matters including, but not limited to, the rules of political contestation. A change in perceptions of long-term inter-

ests, however, can undermine this mutual disposition to forsake immediate ends, thereby bringing on a constitutional crisis.

The constitutional arrangement is structured in each case on the basis of the views and interests of those factions strong enough to have leverage in the political bargaining. The constitutional arrangement need not encompass every element of the political community, nor need its content have a liberal or democratic character. Some factions may reject the legitimacy of the constitutional order and thereby regard themselves as being in unmediated conflict with it; from their perspective, there is little to distinguish constitutionalism from absolutism and, indeed, their rejection of the constitution may subject them to emergency powers with absolutist characteristics.

In addressing disputes that arise under the constitutional framework, those who undertake a juridical role take on an obligation of “neutrality” in the following senses. First, they are obligated to be neutral with respect to the persons and political factions occupying the offices, the competences of which are at issue; Republican justices appointed by President Nixon, for example, were obligated to doom the Nixon Presidency by ruling against Nixon’s exorbitant claim of executive authority to withhold evidence from the courts.¹⁹ Second, in their interpretation of enabling statutes or constitutional provisions, jurists must not adopt a strictly partisan reading of legal norms established or tacitly preserved by agreement among factions, but must take seriously the elements of consensus and compromise underlying those norms. To simply flout those elements for the sake of a partisan cause—even a just cause—is illegitimate in the juridical role, and threatens the undoing of the framework that forestalls unmediated conflict in the society.

None of this supposes neutrality in any grand sense, and where jurists make exaggerated claims of neutrality, critical

theorists like Koskenniemi are correct to accuse them of obfuscating ideological preferences and power relations. Legal reasoning is a purposive enterprise. But the jurist's purposes must include fidelity to a conception of the authoritative framework that is consistent with continuing broad (though not necessarily universal) acceptance of that framework's legitimacy. To eschew that purpose in the quest for a more perfect justice is a violation of juridical responsibility unless the matter is so grave as to justify hazarding a constitutional crisis, with all of its potentially severe costs to all concerned.

Although the structure of the international legal system is very different from domestic constitutional structures, it is similarly the product of a combination of consensus and compromise among actors with differing values and interests. State actors, although concerned to maintain control over the scope of their obligations, concede that they are bound to abide by norms traceable, through source doctrines, to their own consent; a significant (though frequently not decisive) consideration in their policymaking is preservation of their reputation for abiding by such norms. The international system calls on states to restrain their pursuit of short-term unilateral objectives in the name of a long-term regime that confers mutual benefit. The system's efficacy depends on maintenance of its legitimacy in the eyes of diverse actors.

The role of international jurist carries with it responsibilities analogous to that of the domestic constitutional jurist. Those responsibilities are essentially political in nature; they reflect an ethical division of labor dictated by political imperatives. To violate these responsibilities in the name of the greater good of humanity is to risk debasing the discourse of international legal obligation, damaging its legitimacy and, hence, impairing its efficacy.

Sources and Sovereignty Considerations

The attack on sovereignty in the area of norm recognition and creation is manifest not only in radical efforts to dismiss source doctrines, but in less openly provocative efforts to relax the requisites associated with each of the established sources. Many of these efforts, though well-intended, do violence to the juridical role discussed above, and thereby do more harm than good to the very ends they seek to further.

One illustrative problem is the “teleological” approach to treaty interpretation. The orthodox method of treaty interpretation, spelled out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties,²⁰ emphasizes the “ordinary meaning” of treaty terms in light of the instrument’s “object and purpose,” with recourse in cases of ambiguity to the preparatory work and the circumstances of conclusion. It further invites attention to:

- (a) any subsequent agreement between the parties regarding interpretation of the treaty or application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in relations between the parties.²¹

Without question, these rules leave substantial room for interpretive creativity. The touchstone of interpretation, however, remains that which states can be said plausibly to have agreed to as part of the treaty obligation, whether at the time of treaty conclusion or at some subsequent time. Teleological interpretation is legitimate, provided that the *telos* can be shown to have been adopted by the parties.

Recent trends in human rights treaty interpretation, however, appear to move beyond this stricture. The Euro-

pean Court of Human Rights has suggested that the European Convention on Human Rights be construed “in light of modern-day conditions obtaining in the democratic societies of the Contracting States and not solely according to what might be presumed to have been in the minds of the drafters of the Convention.”²² The precise implications of this are unclear; no one can quarrel with the application of accepted principles to new circumstances, but updating of the principles themselves, without specific evidence of state practice indicating acceptance, presumes to bind states to norms they never accepted.

The Human Rights Committee set up under the International Covenant on Civil and Political Rights (ICCPR) seems to have moved in this latter direction, most stunningly in its conclusion that the “reference to ‘sex’ in articles 2, paragraph 1, and article 26 [of the Covenant] is to be taken as including sexual orientation,”²³ and more profoundly in its emerging liberal-democratic interpretation of the vague political participation rights provided for in Article 25.²⁴ The Committee typically sets forth no methodological basis for its views, but a supporter of an “updated” Article 25 interpretation appears to suggest that historical developments can add new specifications to the “ordinary meaning” of terms such as “genuine elections.”²⁵ The effect is to impute to states obligations they never had reason to contemplate in concluding the treaty.

It is generally accepted that treaties should be interpreted “so as to have the *fullest* value and effect consistent with their wording (so long as the meaning not be strained) and with other parts of the text.”²⁶ But this should not be taken as license to interpret a human rights instrument in accordance with the most expansive (let alone, most liberal-democratic) conception of human rights. For within the “object and purpose” of a human rights treaty—as embodied in the ratified instrument, not the drafters’ vi-

sion—must be included the *limitation* of obligation, the unwillingness of (all, many, or some) states to accept a limitlessly expansive international oversight of internal affairs.

The problem here is not the human rights activists' abandonment of formalism, but their adoption of an unbalanced teleological approach that excludes a whole set of considerations that activist jurists find inconvenient. If these sovereignty-oriented considerations are not given their due, the legitimacy of the enterprise suffers.

This basic problem is reproduced in the ever more permissive conceptions of what count as custom and general principles, and in the newer area of peremptory norms (*jus cogens*) (defined by the Vienna Convention as norms "accepted and recognized by the international community of States as a whole as [norms] from which no derogation is permitted").²⁷ As Bruno Simma and Philip Alston note,

Given the fundamental importance of the human rights component of a just world order, the temptation to adapt or reinterpret the concept of customary law in such a way as to ensure that it provides the "right" answers is strong, and at least to some, irresistible. It is thus unsurprising that some of the recent literature in this field, especially but not exclusively that coming out of the United States, is moving with increasing enthusiasm in that direction.²⁸

The irony of their observation is that their attempt "to achieve the same objective while maintaining the integrity of the concept of custom relatively intact" merely relocates the distortion, as they proceed to expand just as inappropriately the category of "general principles" to encompass what will not fit as custom. (The orthodox view limits "general principles" to precepts of judicial administration (e.g., *res judicata*), maxims of legal interpretation (e.g., *lex specialis derogat generalis*), highly abstract principles of

liability (e.g., estoppel), and other uncontroversial concepts necessary to the operation of a legal system but unlikely to be embodied in treaty or custom.)²⁹

This is not to say that there is no room for non-consensual norms in the international system. As international law has grown into a more comprehensive system, extending from matters at the periphery of state interests to matters at the very core (above all, peace and security), sovereignty has become less an empirical condition and more a norm of the international system. The fundamental principle of sovereign equality, enshrined in Article 2(1) of the United Nations Charter, is not an observation about the state of the world but a legal entitlement; the international system operates to preserve sovereignty (against forcible and other coercive intervention in internal affairs) and even to create it (in the processes of decolonization and recognition of new states).

Sovereignty is thus necessarily transformed and qualified. Much as the individual in Rousseau's social contract trades his "natural liberty, which is bounded only by the strength of the individual," for "civil liberty, which is limited by the general will,"³⁰ the terms of sovereignty are altered by the state's incorporation into the international community. States can no longer claim, in the name of sovereignty, a freedom to behave in ways that contradict the very purposes for which the international community respects and protects sovereignty. Since normative sovereignty has become inextricably linked to the self-determination of peoples, non-derogable limitations on states' freedom of action logically extend to certain matters of internal governance, genocide being the most obvious.

Nonetheless, non-consensual norms can be properly predicated only on a legal consciousness that is broadly shared in the international community. The problem is the tendency is to exaggerate the shared values of a community

that is, as Oscar Schachter likes to say, “incurrigibly pluralist.”³¹

Sovereignty and the Limits to Implementation

Even after international human rights norms are conclusively established, sovereignty continues to frustrate activists by erecting obstacles to implementation. These obstacles are often thought to be purely practical ones, a result of the continued deficiencies of a system that has yet to develop enforcement mechanisms capable, in ordinary circumstances, of reaching individuals directly or of imposing compliance on recalcitrant states. Sovereignty is thus frequently regarded in this context as a condition to be overcome, rather than a principle of international legality to be respected. This is an error.

The root of this error is reliance on a model of legality drawn from the domestic legal context. First, there is a natural supposition that “the law,” and thus the legal status of any given act, is unitary: if a public act is unlawful, it is null and void; if an individual commits an unlawful act, he or she is subject to civil or criminal liability. This supposition fails to account, however, for the complexity of the interaction of two legal systems, the international and the domestic. The obligation of states to comply with international law does not necessarily entail, even in principle, the direct effect of international law within the legal processes of the sovereign state.

Second, there is a tendency to understand legal obligation and legal authority to compel compliance—that is, the existence of a right and the availability of an effective remedy—as two sides of the same coin. Conceptually, however, the two are distinct. In the international system states, while undertaking all manner of obligations, have not given any general authorization for collective enforcement (although they have authorized the Security Council

to take and enforce decisions relating to threats to international peace, whether or not a breach of an international legal obligation has occurred). Nor does international law license individual states or alliances of states to engage in however much self-help is needed to vindicate a breached obligation, for this would open the door to limitless rationalization of presumptively illegal acts as “reprisals.” Rather, in order not to destroy legality in the name of saving it, international law strictly limits “countermeasures” to those calculated not to escalate conflict³² or to open the door to usurpation of a state’s “inalienable right to choose its own political, economic, social or cultural system.”³³

Thus, notwithstanding the exponentially increased volume of international legal obligations, states remain sovereign, not merely (or even primarily) as a matter of their empirical capacity to do as they choose, but in principle.³⁴ To understand the persistence of sovereignty as a normative principle in the international system, one must come to grips with: (1) the concept of dualism, which understands international and domestic legal systems as operating on separate planes and which denies the automatic operation of international norms as domestic law, and (2) the familiar and often-derided principle of nonintervention in “matters essentially within the domestic jurisdiction.”

Dualism

Although the United States Supreme Court has famously stated that “[i]nternational law is part of our law,”³⁵ the truth, as American law students quickly learn to their disillusionment, is much more complicated. Only on the rarest occasion is international law effective in U.S. courts against governmental institutions that themselves have the capacity to make law. The customary law of

nations operates in the U.S. courts at the level of “federal common law,” invocable only in the absence of a “controlling executive or legislative act.”³⁶ Treaties at best may be overruled for domestic legal purposes by subsequent statutes, and frequently do not achieve the status of domestic law at all because, as in the case of the human rights instruments to which the U.S. is a party, they are judged to be “non-self-executing.” The official view of the U.S. is that the human rights treaties obligate the nation to take whatever steps prove necessary to comply with their terms, but that the particular steps remain undictated by the treaties. The U.S. recognizes no obligation to have courts enforce treaty terms directly or to enact specific implementing legislation enforceable in the courts.³⁷

All states are responsible on the international plane for abiding by international legal obligations; contrary domestic law cannot be pleaded as a defense. Yet international obligations do not directly alter domestic legal obligations, nor are they necessarily invocable in the domestic courts. Each state’s law specifies the extent to which international law is incorporated into the domestic legal regime. Some states, especially in Western Europe, accord international law a direct effect that takes precedence over executive orders, statutes, and even the constitution. Most do not.

This diversity is predictably unpopular among international lawyers, who typically prefer to articulate a “monist” vision of legality as a seamless web. Insofar as the monist argument is directed toward effecting changes in domestic law to reflect this vision, it has whatever merit one’s ideology assigns it. It may be that we should allow our courts, acting pursuant to international law, to overrule Presidential and Congressional war powers during a time of national emergency, or to nullify provisions of the Bill of Rights that are found to offend international standards.³⁸ Suffice it to say that few Americans would agree with so sweeping a

rejection of dualism, and that a grant of domestic legal supremacy to international law would substantially chill adoption of international obligations.

A more important and frequently overlooked point to be made about dualism is that it has implications within international law itself. To be sure, states cannot be said to have the right to violate international law. They nonetheless have the sovereign power to do so. States are liable for violations of international law, but it does not follow that the violation invalidates the offending “act of state.”³⁹

This difference is significant, since individuals are often in the position of acting under a legal regime that violates international law. Assertions of international law that seek to pierce the veil of sovereignty, holding these individuals legally responsible to international standards as though those standards were directly applicable, come into conflict with fundamental principles of legality. The most weighty such principle is that of *nullum crimen et nulla poena sine lege*, the illegitimacy of prosecuting individuals for acts that were not contrary to applicable law when committed.

A case in point is the prosecution of East German border guards and their superiors following the demise of the German Democratic Republic (GDR). The theory of some of the prosecutions appears to have been that any use of force (not just excessive force) to prevent emigration could be deemed criminal, since GDR laws banning emigration violated international law and therefore provided no defense. Article 12 of the ICCPR, to which the GDR was a party, does provide for the freedom to leave one’s country, subject to national security and public order exceptions that the GDR construed exorbitantly. (In fact, the GDR’s economic survival demonstrably depended on preventing the best and the brightest from being lured to a neighboring state that offered automatic citizenship and far greater economic opportunity.) Conceding that the GDR’s anti-

emigration policies violated any fair reading of Article 12, one must note that Article 12 cannot be understood to have been part of the internal law of the GDR. To the extent that any of the prosecutions hinged on a legal obligation of the defendants to disobey domestic law restricting emigration, they pierced the veil of sovereignty in a manner that raises serious questions.

Once again, my objection to the attack on sovereignty is not a mechanistic one. There are some norms that clearly do pierce the veil; war crimes and crimes against humanity are among those that can be fairly characterized as transcendent crimes—crimes (and torts) not immunized by the contrary law or superior orders of sovereign authorities. But if human rights violations were to have this character generally, vast numbers of public officials (and private citizens who cooperate with them) would be vulnerable to criminal prosecution, and even more to tort claims, once subject to the jurisdiction of an unfriendly regime. One need only imagine the fate of ordinary Americans who participate in their government’s policies pertaining to the death penalty, imprisonment, immigration, or homelessness—all subject to international condemnation—to value the immunities that sovereignty ordinarily confers.

There is little reason to believe that states have consented to an international order that, as a general matter, invalidates sovereign acts violative of international obligations and imposes legal obligations on public officials and citizens to disregard such acts. Moreover, individuals deserve to be respected in their obedience and service to the only effective instrument of coordination that their political community possesses. Sovereignty in this context is far from a formalistic obstacle; it serves fundamental human aims.⁴⁰

Nonintervention

No aspect of sovereignty has drawn more fire from those seeking aggressive implementation of human rights norms than has the doctrine of nonintervention in internal affairs. Critics question the significance of Article 2(7) of the United Nations Charter, which provides that nothing contained in the Charter, with the singular exception of Security Council procedures for addressing threats to international peace under Chapter VII, “shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.” The expansion of human rights norms to cover all aspects of internal governance, combined with recent dramatic instances of Security Council intervention in clearly internal conflicts on humanitarian grounds, has led many to conclude that “matters essentially within the domestic jurisdiction” now constitute a null set, that all matters are now of international concern and therefore susceptible to international action.

Despite efforts to dismiss it as a dead letter, the doctrine of nonintervention persists. It is frequently reiterated, with ever more extravagant wordings, by overwhelming majorities of the United Nations General Assembly. The most authoritative statement is contained in the 1970 Friendly Relations Declaration, which asserts that “[n]o State or group of States has the right to intervene, directly or indirectly, *for any reason whatever*, in the internal or external affairs of any other State,” and that “[e]very State has an inalienable right to choose its political, economic, social and cultural systems, *without interference in any form by another State*.”⁴¹ Even resolutions that cite and applaud international efforts to further human rights and humanitarian concerns add a sovereignty proviso, stating, for example, that

the efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections should not call into question each State's sovereign right freely to choose and develop its political, social, economic and cultural systems, *whether or not they conform to the preferences of other States ...*.⁴²

The question is not whether human rights or nonintervention now prevails in international law, but how international law reconciles human rights with nonintervention.

Although no aspect of state conduct toward its own nationals may now be considered outside the scope of international obligation and scrutiny, implementation of human rights obligations is still subject to the control of sovereign states. Human rights instruments have not included intrusive implementation mechanisms, and no such mechanisms can be inferred from general international law. This means that, other than in extraordinary cases, activities within the state, undertaken by foreigners to secure the state's compliance with human rights norms, remain subject to state consent. It also means that foreign states and intergovernmental organizations may lawfully employ only limited measures to exert pressure on human rights violators.

The most straightforward stricture is the prohibition on the use of force against the territorial integrity or political independence of states, contained in Article 2(4) of the Charter. As the International Court of Justice (ICJ) made clear in the *Nicaragua* case, allegations of human rights abuse cannot be invoked to justify armed efforts, direct or by proxy, to destabilize a government.⁴³ Embedded in the international system is the insight that unilateral armed interventions are most frequently predatory, and the humanitarian justifications most frequently pretextual. This wisdom justifies a strong rule that excludes such measures even where no other remedy is available. W. Michael

Reisman complains that “[b]ecause rights without remedies are not rights at all, prohibiting the unilateral vindication of clear violations of rights when multilateral possibilities do not obtain is virtually to terminate those rights.”⁴⁴

Reisman’s proposed solution, however, would destroy the underpinnings of the system that makes those rights possible.

Economic coercion (e.g., secondary boycotts) and political interference (e.g., covert funding of opposition political groups) also consistently receive a frosty reception in resolutions of the United Nations General Assembly and other intergovernmental groups, although the rules pertaining to these measures are far less clear.⁴⁵ It is possible that such actions could be justified as countermeasures—proportionate reprisals against the legal rights of states that are in violation of human rights obligations owed the international community; opinion appears to be divided.⁴⁶ Given the lack of any effort to erect a collective apparatus for determining when such measures would be appropriate and for policing proportionality, there is reason to question both whether such measures have achieved acceptance and whether licensing such measures would invite mischief.

It is thus likely that international law limits unilateral state efforts to vindicate human rights to the category of “retorsion”—measures within the normal scope of discretionary external policy, such as suspension of diplomatic relations or cancellation of trading privileges. Stronger measures are ordinarily thought to be reserved to the Security Council,⁴⁷ which has recently shown a disposition to interpret the “threat to the peace” trigger to apply to internal matters where humanitarian catastrophe looms. Yet even the Security Council evinces a spirit of autolimitation in these matters, emphasizing the “exceptional” nature of each such case.⁴⁸

All of this makes human rights activists impatient. They are tempted to expand the implications of every episode

where sovereignty considerations have not prevailed, and to ignore those episodes where they have. They are also tempted to ignore their burden of proof; sovereignty, after all, is naturally favored by a system built on the consent of states, and that system's "default position" favors an outcome that respects sovereign prerogative.

These activists would do well to consider that sovereignty is not a "Westphalian" relic, but a dynamic principle that owes more to the United Nations Charter than to previous history, and that has developed through the series of declarations, resolutions, and concrete acts associated with decolonization and the enhanced participation of the less powerful in world affairs. The image of princes carving up territory in 1648 fails to capture sovereignty's contemporary significance. The early identification of sovereign prerogative with dynastic claims has long been a dead letter. In the contemporary period, sovereignty norms have been predicated entirely on the principle of self-determination of peoples.

This development has been frequently obscured by the strong legal presumption that a sovereign "people," through habitual obedience to the ruling apparatus in effective control of the national territory, has authorized that apparatus to act in the name of that people's sovereignty internationally, asserting rights, incurring obligations, and conferring immunities.⁴⁹ To be sure, this presumption at times produces untoward results, with tyrants and usurpers exploiting the principle of nonintervention as a shield against outsiders who might vindicate the true will and interests of the citizenry. Yet it should be remembered that, however badly motivated at times, claims for sovereign prerogative in the UN era have been asserted principally in the name of the weak against the strong.

To frame the issue as sovereignty *versus* human rights is to ignore that sovereignty can itself be characterized as a

human right, and indeed—given common Article 1 of the two main human rights covenants—as the first human right:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.⁵⁰

Self-determination in this context has meant statehood for dependent peoples, and free pursuit of economic, social, and cultural development has meant nonintervention in the internal affairs of less developed countries. The inviolability of the collectivity can be, and has been, understood not as the negation of the rights of individuals, but as a prerequisite to the realization of the values that all other rights seek to further.

Indeed, particularly in the 1960s and 1970s, it was the conventional wisdom among advocates for the less developed countries that a strong state apparatus, immune from external interferences, was essential to the critical tasks of political, economic, social, and cultural development, among them: protection against chaos, ethnic strife, and national disintegration; mobilization of economic resources, which might otherwise be squandered on consumer goods or invested outside of the country, for use in essential development projects; resistance to economic penetration and domination by neocolonialist states and transnational corporations; improved distributive justice at the expense of (and through the disenfranchisement of) entrenched social elites; and establishment of a sense of national identity, overcoming both tribalism and imperialism, through defense of a distinctive set of cultural values and practices. This view of self-determination, while not emphasizing the rights of individuals to participate autonomously in governance, was not self-consciously undemo-

cratic; to the contrary, the view was that, absent an authoritative state apparatus to overcome obstacles to (and enemies of) the accomplishment of these tasks, there would be nothing left to be democratic about. Nor was the idea to disparage the dignity or the rights of the individual human person; it was rather that negative rights—rights against incursions by the state into the sphere of autonomous activity—would be rendered hollow formalities if the affirmative requisites to autonomous activity could not be secured for the bulk of the populace.

In the past decade, such thinking has fallen into some disrepute. The failures of Communism and Third World nationalism and the retreat of social democracy have given rise to a caricature of the state—and above all the Third World state—as a drag on the economy and a threat to individual freedom. Beyond this, the term “failed state” has come into rather liberal usage (albeit without any very specific definition) to describe political communities beset by turmoil. Foreign “humanitarian” intervention by the great powers and their allies, once assumed to be transparently predatory or, at best, misguided, has gained a measure of acceptance as a plausible means of rescuing populaces that have suffered catastrophe upon catastrophe. And concededly, some of the historical developments properly justify reconsideration of the norm against intervention, at least as applied to the more extreme circumstances.

The wholesale deprecation of sovereignty, predictable in a period where government as a social institution is held in low regard, is nonetheless unjustified. Whatever its failings, the state apparatus remains the only institution capable of resolving collective action problems and of defending popular interests against a variety of potential predations, among them the designs of great powers professing human rights concerns. Even if one dismisses as outmoded dogmatism the notion that the interests of the

most developed and less developed countries (the likely agents and targets, respectively, of intervention) are diametrically opposed, it is a great leap to assume that those interests are in stable harmony, and that guarantees against impositions of the former countries upon the latter have become irrelevant. The benevolence (not to mention wisdom) of would-be intervenors can scarcely be assumed on the mere basis that powerful states now announce as their end the furtherance of human rights and democracy. (Indeed, the wisdom of regarding purportedly “humanitarian” intervention as presumptively predatory is borne out, to an extent, by the fact that where powerful states have nothing to gain by it, they are difficult to recruit for the task.)

The prohibition against coercive intervention in the internal affairs of states, however truncated in recent years, maintains both its vitality as a norm of international system and its moral relevance. This is not to say that sovereign prerogatives should be rigidly defended. It is to say that sovereignty considerations are human considerations, too.

Conclusion

The disparagement of sovereignty that has become fashionable in recent international law literature fails to take into account a set of interests and values at the core of the international system. To ignore the limits that sovereignty imposes on norm recognition and implementation deprives international legal discourse of its distinctive value in constraining state behavior, and neglects the interest in self-determination of peoples whose sole means of coordination and resistance to external forces of domination remains, like it or not, the institution of the state.

If the state were truly of radically diminished practical significance in the current period, something would indeed seem amiss in the idea that the content of human rights and

humanitarian law should turn on the demonstrated consent of the very state structures that are to be controlled. Since the life of the international community—once dominated by the decisions of individual governments—is increasingly influenced by supranational forces and nongovernmental organizations (including groups of human rights activists, humanitarian aid workers, and institution-building experts), it might well appear retrograde to remain attached to a state-centered conception of sources of law. But in the final analysis, the role of the state is irreplaceable, and it remains primarily the behavior of states that international legal discourse seeks to affect. To disregard considerations that underlie the state system undermines the goals of that discourse.

Endnotes

¹ See H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), pp. 222-225.

² Notwithstanding doctrinal bromides that appear to indicate otherwise, the “state” is best understood as an abstract entity, a political community to which the international system has attributed sovereign right. An existing state is not automatically extinguished by a loss of its classic empirical attributes (a population and territory under the effective control of an independent government), nor does the presence of such empirical attributes automatically bring a state into existence. (In the late 1970s, Lebanon was a state, while Rhodesia was not.) The concrete representation of the state in the international system is the “government,” a ruling apparatus that acts on behalf of the “state” in international affairs, asserting rights, incurring obligations, conferring immunities, and so on. The relationship of government to state is that of agent to principal. It is the state, not the government, that is “sovereign.” Traditionally, however, the ruling apparatus that exercises effective control of a recognized state is acknowledged to have authority to act on that state’s behalf for the purposes of international law. Obligations undertaken by a government continue to be binding upon states even should the government be overthrown.

³ The presumption is not always permissive. Where the conduct at issue interferes in areas ordinarily attributed to the exclusive jurisdiction of another state (such as conduct that impinges on a state’s monopoly on the legitimate use of force in its territory), the burden falls on those who argue that the conduct is licensed by international law. In some cases, it may be unclear where the presumption lies. In the famous 1927 case of the *S.S. Lotus*, the Permanent Court of International Justice (predecessor of today’s International Court of Justice) split, seven votes to six, on the question of whether Turkey could prosecute the pilot of a French-flagged ship for negligence on the high seas that had caused damage and loss of life aboard a Turkish vessel. The Court majority held that there was insufficient evidence of a customary norm barring Turkey from exercising jurisdiction. The dissent, taking the opposite view of the presumption, concluded that there was insufficient evidence of a customary norm *permitting* such exercise of jurisdiction. See L. Henkin, R.C. Pugh, O. Schachter, & H. Smit, *International Law: Cases and Materials*, third edition (St. Paul, Minn.: West Publishing Co., 1993), pp. 63-72.

⁴ W. Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law," *American Journal of International Law* 84 (1990), p. 866.

⁵ H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958), pp. 593; 601-602, n. 25.

⁶ *Ibid.* See Jose Alvarez, "Positivism Regained, Nihilism Postponed," *Michigan Journal of International Law* 15 (1994), p. 747 n. 2 (quoting five contentions cited by Hart as being associated with positivism—three of which, however, Hart dismisses).

⁷ By way of contrast, see, for example, Ronald A. Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986); Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977); Lon Fuller, *The Morality of Law*, revised edition (New Haven, Conn.: Yale University Press, 1969); Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," *Harvard Law Review* 71 (1958), p. 630.

⁸ Hart, *supra*, *Harvard Law Review* 71 (1958), p. 607; 614.

⁹ H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), pp. 77-96.

¹⁰ Statute of the International Court of Justice, 59 Stat. 1055, UNTS 993 (1945). All member states of the United Nations are parties to the Statute by operation of Article 93 of the United Nations Charter. In addition, Switzerland, Lichtenstein, and San Marino are parties to the Statute. L. Henkin, R. C. Pugh, O. Schachter, and H. Smit, *International Law: Cases and Materials: Basic Documents Supplement*, second edition (St. Paul, Minn.: West Publishing Co., 1987), p. 83n.

¹¹ G. M. Danilenko, *Law-Making in the International Community* (Norwell, Mass.: Kluwer Academic Publishers, 1993), pp. 14-15, borrowing from H. Moser, *The International Society as a Legal Community* (1980), pp. 15-16.

¹² Hart, "Positivism and the Separation of Law and Morals," *supra*, *Harvard Law Review*, 71 (1958), p. 611.

¹³ Martti Koskenniemi, "The Pull of the Mainstream," *Michigan Law Review* 88 (1990), p. 946, reviewing Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989).

¹⁴ Koskenniemi, *supra*, *Michigan Law Review* 88 (1990), p. 952.

¹⁵ See, for example, Ronald A. Dworkin, “‘Natural’ Law Revisited,” *University of Florida Law Review* 34 (1982), p. 165.

¹⁶ Koskenniemi, *supra*, *Michigan Law Review* 88 (1990), pp. 1952-1953.

¹⁷ Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Lakimiesliiton Kustannus, 1989), pp. 264-341.

¹⁸ I previously gave this as the definition of constitutionalism in “Evaluating Democratic Progress: A Normative Theoretical Approach,” *Ethics & International Affairs* 9 (1995), pp. 55; 73.

¹⁹ *United States v. Nixon*, 418 U.S. 683 (1974).

²⁰ Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27 (1969), *American Journal of International Law* 63 (1969), p. 875 and *International Legal Materials* 8 (1969), p. 679. The Convention entered into force in 1980, and so technically does not govern interpretation of the International Covenant on Civil and Political Rights (ICCPR), but it is persuasive as to the applicable customary rules of interpretation.

²¹ *Id.*, Article 31(3).

²² *Deumeland Case*, *International Legal Review* 86 (1986), pp. 376; 408, quoted in L. Henkin, R. C. Pugh, O. Schachter, and H. Smit, *International Law: Cases and Materials*, third edition (St. Paul, Minn.: West Publishing Co., 1993), p. 479.

²³ *Toonen v. Australia*, CCPR/C/50/D/488/1992 (31 March 1994), para. 8.7.

²⁴ See *Bwalya v. Zambia*, Commun. No. 314/1988, reprinted in *Human Rights Law Journal* 14 (1993), pp. 408; 410, “restrictions on political activity outside the only recognized political party amount to an unreasonable restriction of the right to participate in the conduct of public affairs;” Human Rights Committee, General Comment 25 (57), UN Doc. CCPR/C/21/Rev.1/Add.7 (1996); but see Statement of Mr. Ban, UN Doc. CCPR/C/SR.1399 (28 March 1995) para. 25 at p. 5, “the absence of democratic institutions need not necessarily result in any failure to comply with Article 25;” Statement of Mr. Lallah, UN Doc. CCPR/C/SR.1422, (13 July 1995), para. 87 at p. 12, “[t]he article made no mention of democracy or accountability and was quite neutral regarding the power structure within which the rights it proclaimed were exercised.”

²⁵ See Gregory H. Fox, “The Right to Political Participation in International Law,” *Yale Journal of International Law* 17 (1992), pp. 539; 588-590. It is not entirely clear whether Fox rests his argument on a change in “ordinary meaning” or on the presence of “subsequent practice,” but the latter device’s requirements that the practice be “in the application of the treaty” and that such practice “establish agreement of the parties” render the former device more convenient for his purposes.

²⁶ Fitzmaurice, “The Law and Procedure of the International Court of Justice,” *British Yearbook of International Law* 28, p. 1 at p. 8; quoted in Henkin, et. al., *supra*, p. 480.

²⁷ Vienna Convention, *supra*, Article 53.

²⁸ Bruno Simma and Philip Alston, “The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles,” *Australian Yearbook of International Law* 12 (1992), pp. 82-83.

²⁹ Oscar Schachter, *International Law in Theory and Practice* (Boston: Martinus Nijhoff Publishers, 1991), pp. 50-55, excerpted in Henkin, et. al., *supra*, pp. 105-106.

³⁰ Jean-Jacques Rousseau, “The Social Contract,” in Rousseau, *The Social Contract and Discourses*, trans. G. D. H. Cole (Toronto: J. M. Dent & Sons Ltd., 1973), 163 at p. 178 (bk. I, ch. 8).

³¹ It has been suggested that individual state consent should no longer be seen as the touchstone of international lawmaking, as the international community—acting through such intergovernmental bodies as the UN General Assembly—possesses the authority to legislate non-derogable norms even in the face of the “persistent objection” of some states. See Jonathan I. Charney, “Universal International Law,” *American Journal of International Law* 87 (1993), p. 529. There is much truth in this suggestion, especially where it includes the proviso that “[t]he international legal system ... will invoke this authority sparingly.” *Id.* at p. 551. In my view, however, it is disorienting and ultimately misleading to cease speaking of individual state consent as the presumptive requisite to a binding obligation.

³² See, for example, *Case Concerning Air Services Agreement Between France and the United States*, Arbitral Award of December 9, 1978, 18 UNRIAA pp. 417; 443-446, excerpted in Henkin, et. al., *supra*, 572 at 574; “Counter-measures ... should be a wager on the wisdom, not on the weakness of the other Party.”

³³ See *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res. 2625 (XXV) (unanimous); see also Article 14, International Law Commission Draft Articles on State Responsibility, I. L. C. Rep., (1980) II (Pt. 2) *Yearbook of the International Law Commission* 34; “States shall not resort, by way of countermeasure, to ... the threat or use of force ... [or] any extreme measures of political or economic coercion jeopardizing the territorial integrity or political independence of the State against which they are taken.”

³⁴ It is worthwhile to recall that the great theorist of sovereignty, Jean Bodin, conceived of sovereignty not as the absence of obligation, but as the absence of any higher authority to impose compliance. See Jean Bodin, *Six Books of the Commonwealth* [1576], trans. M.J. Tooley (Oxford: Basil Blackwell, 1955), pp. 29-31 (bk. I, ch. 8). The fact that states nowadays undertake wide ranging obligations regarding internal practices in no way dilutes sovereignty, so conceived.

³⁵ *The Paquete Habana*, 175 U.S. (1900), pp. 677, 700.

³⁶ See *Id.*, p. 700.

³⁷ For a helpful summary of the reasons for the relative impotence of international law in domestic courts where the U.S. government is involved, see *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F. 2d 929 (D.C. Cir. 1988).

³⁸ Note the dualist “Helms Proviso” to the Senate ratification of the International Covenant of Civil and Political Rights:

Nothing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

“U.S. Reservations, Understandings, and Declarations to the ICCPR,” *Congressional Record* 138 (April 2, 1992), S4781, S4783, reprinted in Henkin, et. al., *supra*, pp. 628, 630.

³⁹ One instance of a dubious effort to use international law as a justification for declaring sovereign acts invalid is Title III of the *Helms-Burton Cuban Liberty and Democratic Solidarity Act*, Pub. L. No. 104-114, 110 Stat. 785 (1996), which authorizes suits against foreign corporations liable for “trafficking” in property that Cuba nationalized without compensation. The justification offered for the

extraterritorial assertion of jurisdiction is that foreign corporations buying or leasing such property in Cuba are dealing in stolen property, the title to which continues to be held by U.S. nationals. Cuba's exercise of eminent domain—a prerogative at the core of sovereignty—is deemed not only to constitute an actionable international legal wrong, but also to be ineffective. See Brice M. Clagett, "Title III of the Helms-Burton Act is Consistent with International Law," *American Journal of International Law* 90 (1996), pp. 434, 438; but see, for example, *Charter of Economic Rights and Duties of States*, GA Res. 3281 (XXIX) (1974) (approved 120-6-10, over the objection of some capital-exporting states), Article 2, strongly suggesting the opposite conclusion.

⁴⁰ Indeed, the principle of *nulla poena sine lege* is itself embodied in the ICCPR, Article 15.

⁴¹ GA Res. 2625 (XXV) (1970) (unanimous), emphasis added. As the International Court of Justice has noted, "the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question." *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ 14 (1986), para. 191.

⁴² GA Res. 45/150 (1990), para. 4 (adopted over the opposition of a few non-liberal states, 129 to 8 with 9 abstentions), emphasis added.

⁴³ *Nicaragua v. United States*, *supra*, paras. 267-268.

⁴⁴ Reisman, *supra*, *American Journal of International Law* 84 (1990), p. 875.

⁴⁵ See, for example, GA Res. 49/9 (1994) (adopted 101-2-48), repudiating the U.S. secondary boycott against Cuba; GA Res. 46/210 (1991), calling "upon developed countries to refrain from making use of their predominant position in the international economy to exercise political or economic coercion through the application of economic instruments with the purpose of inducing changes in the economic, political, commercial or social policies of other countries;" GA Res. 45/151 (1990) (111-29-11), para. 5, appealing to all states "to abstain from financing or providing ... overt or covert support for political parties or groups;" *Latin American Economic System (SELA) Decision No. 271 on Economic Coercive Sanctions Against Panama* (March 29, 1988), repudiating U.S. economic sanctions imposed following the removal of President Eric Arturo Delvalle, quoted in Michael Krinsky and David Golove, eds., *United States Economic Measures Against Cuba* (Northampton, Mass.: Aletheia Press, 1993), pp. 286-287; *Declara-*

tion on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, GA Res. 36/103 (1981) (passed 120-22-6, over the dissenting votes of liberal states), Annex, Article 2(o), asserting a duty “to refrain from any economic, political or military activity in the territory of another State without its consent.”

⁴⁶ See *Report of the Secretary-General on Economic Measures as a Means of Political or Economic Coercion against Developing Countries*, UN Doc. A/44/510 (1989), para. 23, indicating division of opinion on a “human rights exception.” See also International Law Commission, *Draft Articles on State Responsibility*, Article 14(2), quoted in Henkin, et. al., *supra*, p. 571, barring generally as counter-measures “extreme measures of political or economic coercion.”

⁴⁷ It is frequently argued that Chapter VIII of the United Nations Charter contemplates actions by regional organizations that are authorized neither by Security Council resolution nor by the collective self-defense provision of Article 51. This argument seems at odds with both the letter of Chapter VIII and the Charter scheme as a whole, but is nonetheless supported to a considerable extent by UN acquiescence in the practices of regional intergovernmental organizations, such as the recent actions of the Economic Community of West African States (ECOWAS) in Liberia and Sierra Leone. But see GA Res. 38/7 (1983) (108-9-27), “deeply deploring” armed intervention in Grenada authorized by the Organization of Eastern Caribbean States.

⁴⁸ See SC Res. 841 (1993) (unanimous), ordering economic sanctions against the Haitian military junta; SC Res. 940 (1994) (12-0-2), authorizing the use of force against the junta.

⁴⁹ I have written a doctoral dissertation on the theoretical underpinnings and legal consequences of this presumption, and on the increasing extent to which the presumption is rebuttable. Brad R. Roth, *Governmental Illegitimacy in International Law: An Emerging Norm in Theoretical Perspective* (Ann Arbor, MI: UMI Microforms, 1996).

⁵⁰ *International Covenant on Civil and Political Rights*, 999 UNTS 171, *International Legal Materials* 6 (1967), p. 368, Article 1; *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3, *International Legal Materials* 6 (1967), p. 360, Article 1.



❖ Annex 1 ❖

**ACUNS/ASIL Summer Workshop Participants
1991-1997**

Francis Abiew '96 *University of Alberta*
Clement Adibe '94 *DePaul University*
Pita Agbese '93 *University of Northern Iowa*
Yusaf Akbar '97 *Univ. of Sussex/European Business School*
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S. James Anaya '91 *University of Iowa*
Donald Anton '97 *Environmental Defender's Office, Sydney*
Kwadwo Appiagyei-Atua '96 *McGill University*
Karin Arts '96 *Institute of Social Studies, The Hague*
Zehra Aydin '93 *United Nations Commission on
Sustainable Development*
Betsy Baker '92 *University of Minnesota Law School*
J. Samuel Barkin '95 *Williams College*
Horace Bartilow '96 *University of Kentucky*
Robert J. Beck '92 *University of Virginia*
Marianne Beisheim '97 *University of Bremen/InIIS*
Steven Bernstein '96 *University of Toronto*
David J. Biggs '95 *United Nations*
Linda S. Bishai '95 *London School of Economics*
Thomas Boudreau '91
Marjolein Brouwer '93 *UN Human Rights Centre, Geneva*
M. Leann Brown '95 *University of Florida*
Donald Buckingham '92 *University of Western Ontario*
Gian Luca Burci '94 *United Nations Office of Legal Affairs*
Sherri L. Burr '91 *University of New Mexico*
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Maxwell O. Chibundu '92 *University of Maryland
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Jarat Chopra '91 *Brown University*

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Ann Marie Clark '96 *Purdue University*
Alexander Costy '97 *University of Toronto*
Tad Daley '92 *Campaign for a New UN Charter*
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School of Law
Paul D'Anieri '92 *University of Kansas*
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Tobias Debiel '97 *University of Duisburg*
William DeMars '94 *The American University in Cairo*
Mark E. Denham '92 *University of Toledo*
Kalowatie Deonandan '95 *University of Saskatchewan*
Andrew Deutz '96 *The Woods Hole Research Center*
Douglas Lee Donoho '91 *Nova Southeastern University*
Walter Dorn '95 *University of Toronto*
Mary Durfee '97 *Michigan Technological University*
Helen A. Durham '95 *The University of Melbourne*
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Kenza S. Elmandjra '93 *United Nations*
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Silvia Ferazzi '96 *United Nations*
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Michel Frédérick '93
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Ruth Gordon '91 *Villanova University*
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Nergis Canefe Günlük '94 *York University*
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Sohail Hashmi '94 *Harvard University*
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Mita Hosali '95 *United Nations*
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sion*
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Kathryn Lavelle '97 *Cleveland State University*

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Roula Majdalani '97 *Economic and Social Commission
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Victoria Smith '96

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Joaquin Tacsan '93 *Arias Foundation for Peace and
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Robin Leigh Teske '92 *James Madison University*
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❖ Annex 2 ❖

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Leon Gordenker '91 *Princeton University*

Hurst Hannum '94 *The Fletcher School of Law and Diplomacy, Tufts University*

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Nico J. Schrijver '94, '95 *Institute of Social Studies, The Hague*

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Lecturers

Chadwick Alger '91 *Mershon Center, The Ohio State University (ret'd.)*

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Helmut K. Anheier '97 *The Johns Hopkins University*
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Anne Marie Slaughter-Burley '93
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Jonathan I. Charney '97 *Vanderbilt University School
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Robert W. Cox '91 *York University*
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Thomas Franck '91 *New York University School of Law*
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Alan James '95 *Keele University*
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Peter Kooijmans '95 *Ministry of Foreign Affairs,
The Netherlands*
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Karen A. Mingst '96 *University of Kentucky*

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M. J. Peterson '92 *University of Massachusetts, Amherst*
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B. G. Ramcharan '92 *United Nations*
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Robert Russell '91 *International Monetary Fund*
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Thomas G. Weiss '91, '94 *Brown University*
Robert White '94 *Center for International Policy*
Abiodun Williams '93 *United Nations Preventive
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About the Contributors

Jonathan I. Charney is professor of law at Vanderbilt University School of Law. His professional affiliations include the American Society of International Law (vice-president 1994-1996), the Board of Editors of the *American Journal of International Law*, the Board of Editors of the *Journal Ocean Development and International Law*, the Council on Foreign Relations, and the American Law Institute. He has published widely on a variety of subjects in the field of public international law. His research focuses on the jurisprudence of international law, third party dispute settlement processes, the law of the sea, environmental law, and Antarctica.

Don Hubert serves in the Human Security Division (AGM) of the Canadian Department of Foreign Affairs and International Trade. As a recipient of a Social Science Research Council grant and Killam Post-Doctoral Fellowship, he conducted research at Brown University and Dalhousie University, respectively. He has also served as research officer at the Canadian Immigration and Refugee Board and assistant to the editor of the *International Journal of Refugee Law*. His research focuses on the politics and sociology of security and risk, arms control and disarmament, and international humanitarianism. He has written on the emerging regime to ban land mines, and is co-editor of *Understanding Modern Societies: An Introduction*.

Harold K. Jacobson is Jesse Siddal Reeves Professor of Political Science and senior research scientist in the Center for Political Studies of the Institute for Social Research at the University of Michigan. He is a specialist in international institutions and politics. At the University of Michi-

gan, he has held a variety of positions, including director of the Center for Political Studies. He has served as president of the International Studies Association and vice president of the International Political Science Association. He played a leading role in creation of the International Human Dimensions of Global Environmental Change Program and received the 1995 American Association for the Advancement of Science Award for International Scientific Cooperation for his efforts. He is the author, editor, or co-editor of eleven books and numerous articles and monographs dealing with international institutions and politics.

Charlotte Ku is executive vice president and executive director of the American Society of International Law and chair-elect of ACUNS. She has also served as visiting professor at the Johns Hopkins University SAIS Nanjing Center in China and assistant professor of government and foreign affairs at the University of Virginia. Her research interests encompass foreign policy applications of international law and the development of international institutions. Her recent publications include a review of *International Law and World Order, Basic Documents* in the *American Journal of International Law* and a chapter entitled "Catholicism, the Process of Westphalia, and the Origins of Modern International Law," which appeared in *The European Legacy*.

Brad R. Roth is assistant professor of political science and legal studies at Wayne State University. He holds a J.D. from Harvard University, an LL.M. in international and foreign law from Columbia University, and a Ph.D. in jurisprudence and social policy from the University of California at Berkeley. His research focuses on the application of legal and normative political theory to problems in international and comparative public law. His other re-

search, regarding questions of democracy, constitutionalism, and foreign intervention, has appeared in such journals as *Ethics and International Affairs* and the *Harvard International Law Journal*.

Thomas G. Weiss is research professor and director of the Research Program on Global Security at Brown University's Watson Institute for International Studies, and also executive director of ACUNS. He was formerly with UNCTAD, the UN Commission for Namibia, UNITAR, and ILO and also served as executive director of the International Peace Academy. He has written extensively about international organizations and politics, and his most recent books include *Beyond UN Subcontracting: Task-Sharing with Regional Security Arrangements and Service-Providing NGOs* (1998, editor); *The United Nations and Changing World Politics* (1997, with D.P. Forsythe and R.A. Coate); *Political Gain and Civilian Pain* (1997, edited with D. Cortright, G.A. Lopez, and L. Minear); and *NGOs, the UN, and Global Governance* (1997, edited with L. Gordenker).

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